Book Review

Gerald Gaus: The Order of Public Reason—A Theory of Freedom and Morality in a Diverse and Bounded World

by Rudolf Schüssler

Gerald Gaus' book *The Order of Public Reason* is one of the most interesting manifestations of a recent trend in moral and political philosophy. Following Rawls it blends Kantian and non-Kantian approaches supplying at least some prominent schools of moral and political philosophy with a much needed patch of overlapping consensus. In particular, Humean and Kantian considerations are merged in a theory of rights-constrained social evolution. Gaus' work stands out among others for asking the right questions and for providing good answers. He claims to outline a viable social ethic, i.e., a duty- and right-based ethic for the interaction between persons. Such an ethic tells us "what we owe to each other", in Thomas Scanlon's influential phraseology. However, the pervasiveness of reasonable disagreement concerning most issues of justice and duty even between good-willed moral evaluators is taken much more seriously by Gaus than by Scanlon and most other philosophers. This is a step in the right direction, because it underlines that a social ethic ought to be mainly concerned with second-order considerations, considerations of what we owe to others who do not agree with our moral beliefs. Moreover, Gaus offers a further boon to the readers of this journal. He amply employs concepts of rational choice and game-theory thus documenting that they can be valuable instruments of philosophical analysis even beyond the narrower confines of neo-Hobbesian social contract theories.

The Order of the Book

The Order of Public Reason is a massive work, which carefully scouts the surroundings and prepares the ground before advancing its central thesis. (Hence, we can cover only some of Gaus' claims.) *Chapter 1* introduces the fundamental problem of the book. Free and equal persons are in need of a social ethic, a morality that tells them what they are entitled to demand from others (note the inversion of Scanlon's search for "what we owe to each other"). Legitimate demands presuppose authority on the part of those who make demands, but

there are two puzzles which all who claim such authority have to face. The puzzle of authority over an equal asks how anybody can attain authority for her moral opinions over an equal who may hold different opinions. The puzzle of mutual authority wonders how a person can claim authority over another person who has equal authority over the claimant. Kantian considerations suggest that these problems can be solved if the agents converge on a set of shared moral demands, but this solution runs afoul of the pervasiveness of moral disagreement. Gaus assures us that there is simply no way to achieve a convergence of moral demands on the basis of ideal theories alone without unjustly arrogating authority over others.

Part One of the book clears the ground for a solution to these problems. *Chapter 2* shows that Hobbesian social contract theories must fail because they rely on mere instrumental rationality. *Chapter 3* investigates the sphere of rules. Social life requires moral rules, and it has to be explained why rule following can be rational for moral agents. *Chapter 4* discusses the motivation to be moral and the role of emotions and reasons in this respect.

Part Two grafts Gaus' theory on these preparative investigations. *Chapter 5* is crucial for specifying the demands of justification which idealized members of the public must satisfy in their deliberations concerning a social ethic. The task of finding a social ethic is akin to Kantian self-legislation for Gaus, and there are conditions to which self-legislation has to comply in a public of reasonable equals. In earlier writings (*Value and Justification*), Gaus relied on bargaining theoretical solutions, agreeing with David Gauthier on a minimax relative concession model. By now, Gaus acknowledges that this solution is just one from a larger set of eligible bargaining solutions, in which the problems of authority reappear as problems of choice between different formal solutions. We are thus still lacking a viable solution to the problem of legislation among disagreeing equals. However, Gaus assumes that we have found at least a set of mutually undominated, fair solutions from which reasonable agents will choose. The set in question can be further narrowed by requiring that its elements should safeguard basic human rights. This theme is developed in *chapter 6* in Benjamin Constant's framework of rights of the ancients and of the moderns. Gaus predictably opts for the rights of the moderns, presenting his view of fundamental rights to property, basic welfare, freedom of thought, privacy, etc. His justifications and interpretations of fundamental rights differ from others' but the differences are not central for the argument of the book. What matters most is that fundamental rights as they are granted in modern democracies are valid constraints for the set of eligible solutions. *Chapter 7* delivers the capstone of Gaus' theory by providing a Humean answer to the problem of solution selection. Gaus underlines the need for a social ethic, and therefore coordination on a solution attains utmost importance. Since no uniquely justifiable procedure for selecting a solution exists in Gaus' eyes, we should focus on the fact that coordination problems allow for an evolutionary solution. Social evolution will usually break the symmetry between eligible solutions, and as long as an emerging or established solution is in the optimal set, i.e., satisfies all legitimate conditions

of rationality and equal concern, nobody has good reason to reject it. For Gaus, social evolution plus Kantian constraints thus solve the selection problem of social ethics. *Chapter 8* draws conclusions from this argument for a political order that complements the outlined social order.

Discussion

Altogether, Gaus' project is impressively well-conceived. He wants to find out how "the authority of social morality [can] be reconciled with our status as free and equal moral persons in a world characterized by deep and pervasive yet reasonable disagreements about the standards by which to evaluate the justifiability of claims to moral authority" (xv).[1] Only if this project succeeds do we know how "a cooperative social order on terms of moral freedom and equality" is possible—an order of public reason, as Gaus calls it.[2] A main difficulty for conceiving such an order arises from a lack of authority between disagreeing equals. It is indeed hard to see on what grounds an individual with a reasonably defensible moral point of view can be mandated by another individual to act according to her different moral point of view. One of the strengths of Gaus' book is that it tries to overcome this problem without reverting to facile escape routes such as denying disagreement or relying on the hope that one day we will all agree in ethics. In a world with pervasive moral disagreement, Scanlon's claim (which Gaus dubs the "Expansive View") that only those principles can be legitimate which cannot be reasonably rejected by anyone seems much too narrow. There may be no principle that cannot be reasonably rejected from at least one defensible point of view, and hence it may turn out that nobody owes nothing to anybody. Gaus therefore favors a "Restricted View" which rests on two assumptions. The first, Kantian assumption conceives of moral personhood as capacity to care for moral principles even at the expense of one's own preference satisfaction. The second assumption is that one should desist from moral claims on others in cases of reasonable moral disagreement, although we may act in such cases according to our own moral convictions. This Restricted View seems quite plausible, except that it overstates the difference to what I take to be Scanlon's position. Scanlon's criterion of reasonable rejection circumscribes the domain of "what we owe to each other", but Scanlon is not assuming that this domain is extensionally identical with the realm of ethics, so that Gaus' solution of acting on one's own moral lights can be easily endorsed by Scanlonians. The problem is that moral combat and conflict *omnia contra omnes* might ensue if all rely on their particular moralities. Such conflict is familiar from Hobbes, and our first reaction could therefore be: if we do not agree, then we must fight it out, and everybody may fight for himself. Social cooperation is then only possible as

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[1] Numbers in brackets generally refer to page numbers in Gaus 2011.

[2] Gaus alludes with his book-title to Kurt Baier's concept of an "order of reason" (Baier 1995) and develops his approach in line with ideas of Baier and P. F. Strawson. I will not further comment on this connection.

outlined by modern contractarians, who base morality on rational egoism. Gaus recognizes that no morality that honors our everyday moral convictions, which we hold dear, can be reconstructed on these lines. Even worse, social cooperation would suffer if it were based on rational egoism alone. Hence, we may rejoice that human beings simply are no purely rational egoists. Most of us are willing to sacrifice at least some self-interest to morality. Yet this concerns our moral motivation and does not clarify how agents can find the moral common ground required by a social ethic.

In this respect, procedural solutions for picking an action plan or a point of view from a plurality of reasonably tenable plans or views seem to provide the best escape route. This strategy is familiar from politics and one might be tempted to transfer it to morality. Gaus (392) counters such expectations with the *Procedural Justification Requirement* (PJR):

> "That process O selects option x from the optimal eligible set cannot show that x is uniquely publicly justified unless O itself is uniquely publicly justified."

PJR appears plausible and at the same time hard to satisfy, because procedural solutions are no less subject to the action-blocking effects of reasonable moral disagreement than the first-order positions which they are deemed to select. In other words, moral agents can no less reasonably disagree about second-order procedures than about first-order positions. It is a great boon of Gaus' approach that it pays full attention to this problem. Gaus claims that there is no abstract procedure (such as a bargaining or fair division solution—or even Kant's Categorical Imperative) which satisfies PJR. I think Gaus is mistaken, but I will not engage him on this complicated issue here.[3] His analysis is in any case valuable in showing that a social ethic is possible even without a uniquely optimal abstract procedure.

Gaus correctly points out that PJR is misleading. Sometimes a solution is already suggested by existing moralities. In Scanlonian terms it may suffice in such cases that nobody can reasonably reject the established moral norms. Of course, not all evolutionary social outcomes are acceptable. Only those are eligible which satisfy the rationality, fairness and humanity conditions outlined in *chapters 5 and 6*. Gaus is circumspect enough not to saddle the process of social evolution with consequentialist optimization. The claim that social evolution favors optimal or even just good social norms rests on very shaky foundations (and seems euphemistic). Nevertheless, a norm that satisfies agreed criteria of moral appropriateness and has in fact become established breaks the symmetry between the elements of the eligible set, and we have reason to endorse it if moral coordination is clearly better than moral chaos.[4] Gaus rightly emphasizes the significance of social and moral coordination here, but he also ventures a bit

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[3] For a defense of the view that optimal procedures can be found for certain contexts and for one such procedure, see Schüssler 2002.

[4] The term 'moral chaos' is already pejorative. Generally, social coordination is only required where uncoordinated action on one's individual (or subgroup) moral convictions ought not to be condoned.

too far. Sticking to a norm, which one regards as somehow acceptable but not as best, usually collides with the agent's well considered moral opinion—or to use traditional language, constitutes an act against the agent's conscience. There have been demands to act against one's prima facie judgment of conscience and to tune one's conscience to a social ethic (and social epistemology) ever since the concept of conscience became central to Western ethics in the Middle Ages. Hence, Gaus' demand to prioritize coordination is backed by a strong tradition in Western ethics. It should be clear, however, that this holds only for matters momentous enough to justify a subordination of the agent's considered moral judgment, because the overriding need for coordination does not materially impugn the moral judgment it overrides. This insight grounds the well-known phenomenon that agents who agree to participate in a group action x often nevertheless insist that it would have been better to do y, claiming that they only gave in for the sake of the group whose coordinated action they take to be more important than their personal moral view.

Such phenomena of double moral accounting are problematic for Gaus' theory because he fails to represent them in his simplified model of coordination. Gaus develops a stylized Kantian coordination game in order to show that it becomes individually rational to comply with a norm once the symmetry between competing norms has been broken by historical or random variation. There is just one betterness relation for each agent in the Kantian coordination game, and thus reasons to comply with a norm are also reasons to internalize and believe the norm at the expense of one's most preferred norm. Moreover, after the symmetry of norms has been broken, the norm with more adherents is clearly morally best for all agents in the Kantian coordination game. In real moral contexts, however, a requirement of coordination is merely a reason to act according to a communal norm, whereas another norm can still be personally believed to be best. This constrained power of coordination marks the difference between a moral coordination of equals and totalitarian policies which try to usurp even our personal points of view. Decent requirements of coordination therefore fail to generate sufficient reasons for internalizing and fully accepting norms. Yet Gaus emphasizes the importance of internalization and thus offers a dangerously open flank to attitudes he otherwise wants to oppose.

Apart from that, the Kantian coordination game is designed as an iterated game, but Gaus employs a one-shot logic of decision. After the symmetry between norms has been broken by the random action of the one indifferent agent in the game, all agents realize that they do better in the next round by adhering to the norm that has been followed by more agents in the last round. However, the agents might reason differently with their cumulated payoffs in view. For half of them an implementation of norm y would be better in the long run than norm x. It might therefore be better to ignore a one-time fluctuation in norm compliance towards x and wait until their preferred norm y comes on top in another fluctuation, hoping that the x-lovers will then give in. Of course, those others can reason in precisely the same way for x. The picture of rational choice in the iterated Kantian coordination game is thus far more complicated than

Gaus assumes. (It takes on features of a war-of-attrition game, but I will not follow up on this observation here.)

Note that these criticisms are not meant to convey that Gaus' basic strategy is flawed. To my best knowledge he is right in considering social evolution or historical processes as in principle apt symmetry breakers for the norm or procedure selection problem. However, the matter is more complicated than Gaus envisages in his *chapter 7* or in the simplified strategic representation of the Kantian coordination game. It would probably be preposterous to demand a full account of the problems of historical symmetry breaking from an already very long and otherwise well-argued book. The complications in question may be put aside for further inquiry. Nevertheless, it should be clear that Gaus' symmetry breaking mechanism has only limited moral standing until its complications are well understood—and the biggest problems seem not to lurk in the Kantian coordination game. Serious problems with Gaus' internalization requirement have already been indicated. Moreover, the class of eligible norms may prove to be empty because fairness constraints and evolutionary considerations are not disjunct. In many real-life cases small groups of trendsetters or even notable parts of a moral community will contest established norms.[5] They may claim that an established norm (such as until recently the discrimination of homosexuals) is not morally eligible and that it always has been an error to regard it as eligible. In most of these cases the dissidents will also claim that the norm has been established in an unjust way. Given Gaus' laudable sensitivity to problems of authority between equals, a moral majority can hardly ever *bona fide* respond that historical processes of norm diffusion have been equal respecting and fair. Gaus claims that there are no uniquely fair decision procedures that could have guided the choice of norms. Symmetry breaking must therefore have come about if not by force or fraud then at best by public deliberation in which the most resourceful communicators and best rhetoricians won the day. Had public deliberation been a Habermasian better-argument-takes-all discourse, we would still be without norm today, because the concept of an optimal set entails that no norm from the set tops another in purely argumentative combat. Hence, we can deduce the far from immaculate conception of our established morality from the assumed impossibility of a fair abstract meta-solution for norm choice. The upshot is that Gaus needs to assume a healing of initial unfairness with time or otherwise an agreement among all members of the public that all now profit from a formerly unjust norm. Yet it is not unreasonable to deny the univer-

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[5]   Gaus (442) addresses the problem of moral trendsetters. He clearly sees that "trendsetting behavior may involve punishment and criticism of noncompliers that, at the early stages of the evolution of the new norm, is not justified". Note that this is a different problem from the one discussed here. Nevertheless, it is a serious problem, and Gaus responds somewhat lamely on theoretical grounds that "under some conditions group beneficial norms can spread quickly throughout a population without the use of punishment". Moreover, "what Baier identifies as the sphere of moral questions requires just the type of moral rule that can spread without trendsetter authoritarianism" (443). To my knowledge, this would be a very rare case. Most cases of moral innovation involve moral combat between the innovators and the defenders of the moral ancien regime and thus give rise to the allegation of trendsetter authoritarianism.

sal beneficiality of norms, in particular if the norms have formerly been unfair and the accounts of historical justice have not been settled. Gaus owes us a more elaborate answer to such qualms than he offers in his book, because the view that initial injustices do not heal with time can be upheld by reasonable observers.

Moreover, does the rights-based framework for the choice of norms really insure against the inherent conservatism of the evolutionary approach? It might seem so because the rights which Gaus assumes are constitutive for modern open democracies. However, rights and their interpretation change, and usually the changes are contentious. The members of open societies (or the citizens of open democracies) have to pick various options of new rights and interpretations. Following the logic of Gaus' approach it would be best to retain the established set of rights and interpretations, because thus the problem of choice is solved. Yet this implies a problematic conservatism for the set of constraints which help define the optimal set of norms. Such conservatism implicitly assumes that our present state of normative evolution does suffice at least with respect to the deontic constraints of norm selection. However, this is a stark claim given that world history has consistently refuted similar aspirations in the past.

References

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