
Public Reason in the Open Society

KEVIN VALLIER

Department of Philosophy
Bowling Green State University
305 Shatzel Hall
Bowling Green, OH 43403

Email: kevinvallier@gmail.com
Web: <http://www.kevinvallier.com>

A TENSION IN THE IDEA OF A PUBLICLY JUSTIFIED DISCOVERY SYSTEM

This paper attempts to bridge some insights in Jerry Gaus's two most recent books, *The Order of Public Reason* and *The Tyranny of the Ideal* (Gaus 2011, 2016: hereafter *OPR* and *TI*). In *OPR*, Gaus argues that the "social-moral" rules that comprise our shared moral order must be *publicly justified* to each person in order to sustain the moral practices that bind society together and make social life possible and beneficial (2011, p. 2). A rule is publicly justified when each moral person has sufficient reason to internalize the rule as requiring her to engage in certain lines of conduct in the relevant circumstances. If we ensure that the social, moral rules to which we are subject are publicly justified, Gaus argues that we can sustain a shared social life and enjoy its benefits (2011, p. 263) because publicly justified rules sustain our moral practice of *holding others responsible* for wrongdoing. When we hold others to rules that are publicly justified for them, they acknowledge that they are culpable and blameworthy for rule violations, which motivates conformity to the rule. Publicly justified rules render our moral practice consistent with our jointly recognized freedom and equality (2011, p. 14) and help us to avoid relating to one another in an authoritarian fashion (2011, pp. 32-4).

A critical feature of publicly justified social-moral rules is that they are in some sense *self-stabilizing*. These rules do not persist as social practices merely because they are coercively enforced; instead, persons generally comply with publicly justified social-moral rules because they each see sufficient reason of their own to comply with the rule so long as others do likewise. The flip side of this is that no one can do better from her own perspective and simultaneously sustain cooperation with others by unilaterally deviating from such a rule; accordingly, her deviation from the

rule will bring more costs than benefits.¹ Under these conditions, we can therefore say that a publicly justified social-moral rule is a social *equilibrium* (2011, p. 390). As such, the idea of public justification is a kind of *equilibrium concept* because it elaborates the conditions under which a social-moral rule can remain in equilibrium under moral conditions.

In *TI*, Gaus is focused on showing how a diverse "open society" can generate important social benefits (2016, pp. 133-8), in particular the benefits of social discovery (2016, p. 96). But capturing these benefits requires having a system of rules that can *escape* equilibrium. As Gaus argues, we want a system of rules that will tend to return to *some* equilibrium, but not necessarily the *same* equilibrium when disrupted; this is the difference between a system being *robust* and a system being *stable* (2016, p. 231). While we still want a degree of stability for our shared social rules in an open society, we also want to allow for discovery through social change, that is, through a change in the rules that govern our common lives. For there may exist rules that would be better than the rules in equilibrium as judged from each person's evaluative perspective. So while we want our shared moral rules to be self-stabilizing, we also want to be able to move to other rules. This means that social-moral rules in equilibrium have a greater social cost in *TI* than in *OPR*. They can be too hard to change in an open society of citizens who recognize the possibility of improving their shared social rules.

We now confront an apparent tension between *TI* and *OPR*, since *OPR* stresses public justification as an equilibrium concept, and *TI* stresses the costs of keeping social rules in equilibrium. I argue that the apparent tension can be resolved. Gaus stresses that an open society is composed of local "republican" communities (2016, p. 145), within which experiments can take place. The idea, I take it, is that

social-moral rules should be able to vary *within* these communities, whereas the social-moral rules that govern all communities should be harder to change. This means that we may want some social-moral rules to be *stable* for the open society as a whole, but local republican communities should focus more on robustness. The difficulty with this solution, however, is that Gaus argues that all moral violations are “everyone’s business” (2011, p. 188), such that moral innovators within local republican communities may be subject to ostracism and punishment from members of the open society that are not members of her local republican community. The threat of such interference may discourage social discovery within local republican communities, which will push those communities away from robustness and back to an excessively conservative notion of stability.

Even with the threat of interference, a great deal of moral innovation can take place. In *TI*, Gaus allows moral innovation when a moral innovator wishes to move her society to another rule within its “optimal eligible set” (2016, p. 214), or among rules that no member of the open society has sufficient reason to reject in comparison with no rule. Moreover, if social-moral rules do not prohibit an activity, then by a principle of natural liberty, persons may experiment with a new “act-type” (2016, p. 187).

However, there is an important type of moral experimentation that *OPR*’s model of public justification appears to forbid. In some cases of moral innovation, we *don’t know* whether a rule favored by the moral innovator can be publicly justified, in part because many members of local republican communities cannot evaluate the rule until they can see how the rule works in practice. It appears that *OPR*’s model of public justification thereby renders the moral innovator’s action impermissible, since it is not obvious whether the rule can sustain our shared moral life. So by requiring that a society stick with an obviously justified rule when a new rule *might* be better, as judged from the perspective of all, we are forbidden from finding out whether that rule is better in practice. In this way, *OPR*’s model of public justification may forbid innovation that an open society could otherwise accommodate.

I believe that *OPR*’s model of public justification can accommodate this form of moral innovation. To demonstrate, I develop the idea of a *jurisdictional rule* based on Gaus’s idea of a jurisdictional right (2011, p. 370); a jurisdictional rule establishes *who is permitted to enforce* publicly justified social-moral rules. If jurisdictional rules are publicly justified for all members of an open society, they may protect moral innovators within local republican communities

from ostracism and punishment by non-members, and so no one outside the moral innovator’s community will punish or ostracize her for experimentation. With publicly justified jurisdictional rules, therefore, moral innovators can attempt to move their local republican community to a new rule without fear of reprisal or ostracism by the open society as a whole. She need only face resistance from members of her local republican community.

To illustrate, consider the case of Mormon polygamy. Joseph Smith, the founder of Mormonism, believed that his new religious community had been granted divine authority to engage in “plural marriage” where a man may take multiple wives. This is, in many ways, the quintessential moral experiment. But given how long polygamy had been morally and legally prohibited in Western civilization, the polygamy rule may well have been unjustifiable for most members of American society. It was certainly treated as such. In 19th century American society, plural marriage was considered a moral abomination. Even with Mormon polygamy confined to the Utah Territory, other Americans saw it as their business to stop Mormon polygamy even through the use of military power.

In this case, Americans recognized no jurisdictional rule that protected Smith and his followers in experimenting with plural marriage. A publicly justified jurisdictional rule, however, would have protected Smith from punishment by American society broadly, even though members of his community would be free to push back. And had the experiment been allowed to proceed in the open, American society might have come to a better understanding of the justifiability of different marital norms, even if polygamy turned out to be unjustified. In this way, jurisdictional rules can allow *OPR*’s model to capture the benefits of this kind of moral experiment. That is the way in which the tension between *OPR* and *TI* can be resolved.

I proceed in four parts. In section II, I bring out the tension between *OPR* and *TI* as one concerned with the costs and benefits of understanding public justification as an equilibrium concept. Section III explores the resolution of the tension that I think Gaus has in mind in *TI*. Section IV introduces the idea of a jurisdictional rule, which is somewhat at variance with Gaus’s conception of a moral rule. I conclude in section V by using the idea of a jurisdictional rule to show that *OPR*’s model of public justification can capture the benefits of moral innovation better than one might think. Note throughout that I argue that all the tools required to resolve the tension between *OPR* and *TI* can be found in different parts of Gaus’s work.

PUBLIC REASON AS AN EQUILIBRIUM CONCEPT

On my reading of *OPR* and *TI*, Gaus's social theory is focused on how *moral relations* can be established and maintained between persons (2011, p. 13).² Moral relations can be understood as a series of relationships between people that are mediated by a *practice of moral responsibility* (2016, p. 182), understood as the practice of holding persons responsible for culpable errors in public behavior and judgment and providing the conditions under which the reactive attitudes of guilt, resentment, and indignation can be rationally sustained (2011, p. 205). The idea of public justification in Gaus's work is a specification of the conditions under which holding others responsible, blaming them, and holding the reactive attitudes against them is appropriate (2011, p. 254). We normally expect persons to follow a wide array of what Gaus calls social-moral rules (2011, p. 2), rules that are socially recognized, that are generally internalized as morally binding on community members, and that meet certain formal conditions for moral requirements like reversibility, generality, and a modest common good requirement (2011, pp. 172-3). Violations are normally met with the reactive attitudes and punishment.

But our practice of insisting that others comply with social-moral rules is determined in part by the conditions of culpability at work in a violation, that is, when we think that persons are morally responsible for violations of social-moral rules. In many cases, we excuse persons from violating rules because we think certain appropriateness conditions for holding others responsible have not been met. Excusing others is appropriate when we see that they could not have known better than to act as they did. To put it another way, persons are judged accountable or excused based on our model of their commitments and their cognitive capacities. If Reba breaks a promise to John, we hold her responsible because we think she knows that she made the promise, that she recognizes promise-keeping rules as applying to her, and that no exculpatory conditions have been met. Under these conditions, then, we can appropriately blame Reba for breaking her promise and be indignant with her as a result.

One of the exculpatory conditions that Gaus identifies is engaging in a "respectable amount" of reasoning (2011, p. 254), where the person violating the rule does so because she concludes, after careful consideration, that she lacks sufficient reason to comply with the rule. Our normal prac-

tice is to only hold persons to moral rules that we think that another person, after considering it, should have recognized herself as bound by. We cannot justifiably hold persons accountable to rules whose rationale is beyond the ordinary exercise of her cognitive capacities.³ It is true that we often hold a person responsible for breaking moral rules in cases where she was unaware of the violation. However, we only do so when we think the person *should have known better*. Gaus interprets what the agent should have known as what an agent *would have seen* after a respectable amount of reasoning.

The idea of public justification can be understood as a specification of the conditions under which someone does or should be able to recognize a rule as in effect and as binding on her moral agency. We say that a moral rule is publicly justified for an agent when she has sufficient reason, after a respectable amount of reasoning, to internalize the rule as binding on her in the relevant circumstances.

A rule is publicly justified for all community members (which Gaus terms "members of the public") when each community member recognizes the rule as in force in her community and sees herself as having sufficient reason to abide by and internalize the moral rule as applying in some particular set of circumstances. This gives meaning to the idea of *public* justification, such that a moral rule is justified to a public on that public's own terms.

To remain in force, and to sustain the rational reactive attitudes, a social rule must also achieve a measure of stability among members of the public. This does not mean that there must be some enforcer agent who coerces others to follow a moral rule (though enforcement is sometimes required), but rather that the rule is sustained as a social norm by the actions of members of the public, by compliance and holding violators accountable.⁴ This means that a publicly justified norm is stable based on the *moral* reasons of citizens. They do not stabilize the rule as in force merely out of fear of reprisal or violent threats; rather, they comply with the rule based on their own evaluative attitudes and psychological drives.

In *OPR*, then, the object of public justification is a social-moral rule that exists as a kind of *social equilibrium*: compliance with a publicly justified social-moral rule is each agent's best response to the actions of others (2011, p. 390), where the "best response" is understood as the balance each agent engages in between the satisfaction of her own evaluative standards and what she takes to be the social good of ensuring cooperative relations with others. That is, each person in a real sense consents to a publicly justified moral

rule because she can regard it as normatively compelling so long as others comply with it. For the rule both comports with her own moral point of view and sustains cooperative relationships with others (2011, pp. 398-9).

The advantage of treating publicly justified moral rules as equilibria is that the rules form an ongoing basis for social life on moral terms. Rules in equilibrium create moral relations between persons by sustaining our practice of moral responsibility and mediating our otherwise strategic relationships with each other. We should understand public reason as an equilibrium concept, therefore, because the problem we wish to solve is how to establish stable moral relations with each other despite our differences.

TI identifies a problem with conceiving of our practice of moral responsibility in terms of equilibrating on social rules. In many cases, our evaluative standards contain a certain kind of social *ideal*, a social configuration towards which we would like to push our social order (2016, pp. 39-40). Many people simply are not satisfied with a shared social morality that establishes moral relations between persons; they wish to pursue a more perfect union. Gaus thinks there are some ways of pursuing our ideal that are compatible with our practice of moral responsibility, but our practice depends upon *sustaining* rules in equilibrium, while our ideals lead us to *change* rules in equilibrium.

Importantly, however, some ways of pursuing one's ideal are problematic. First, if we impose rules on others that cannot sustain our practice of moral responsibility, we lose the great good of moral relations with them. There is also the problem that we might impose "The Choice" on other people (2016, pp. 140-2), where we decide to make others worse off in the short-term in the hopes of making them better off in the long-term. Imposing the Choice on others raises a number of moral problems, not least among them that it is in an important sense tyrannical.

But the central reason *TI* identifies for opposing the imposition of our ideals on the unwilling is that we are likely to lose out on the best social mechanism for arriving at our own ideal; for by making our society more uniform, we lose out on the prospect of using diverse ideals and agents to explore the social space required to discover how to realize *our own* ideal in practice or how to formulate our ideals in the first place (2016, p. 130). Thus, if we impose our present ideal on others, we are at risk of ending up in a worse place *even as judged by our own evaluative standards*. Gaus defends this point by arguing that we know quite a bit less than we think we do about how to institutionalize our social and political ideals. Consequently, we must discover

how to understand and realize our ideals through social experimentation (2016, pp. 89, 133). If we want a more just society, then given how little we know, we should embrace a diversity of views and opinions in order to better map the territory of how societies might be better organized. This is a reason we wish to avoid social change, since we should not try to make our society more homogenous.

But just as there are some problems with social change, there are also critical benefits. Thus, we want *OPR's* model of public justification to allow for persons to change the social-moral rules that apply to them if people discover better rules and superior forms of social organization. Now, allowing for change is by no means problematic in *OPR*. Social change is actually *required* when a social-moral rule is not publicly justified; a social-moral rule should be discarded, no longer regarded as normatively binding, or replaced, if some members of the public have sufficient reason to reject the rule. Further, there is no particular problem with moving from a mutually acceptable rule to a second rule that is broadly acceptable but is considered superior to the present rule by some members of the public.⁵ In Gaussian terms, there may be multiple social-moral rules in a society's "optimal eligible set" of moral rules that can govern some issue (2011, p. 323). Moves within the optimal eligible set are morally permitted, even if we move from one rule that some members of the public rank as best to another rule that those members (though not all members) rank as inferior.

OPR's model of public justification instead opposes two other types of social change. First, it condemns persons who try to push their society from a publicly justified social-moral rule to a defeated rule, one outside of the optimal eligible set. Holding others responsible for violating the new rule makes one a small-scale authoritarian (2011, p. xvi). I think that much is clear, and the model is right to condemn social change of this variety. But I also think *OPR's* model is uncomfortable with a second kind of social change—when persons try to push their society from a publicly justified social-moral rule to a rule whose justificatory status is *unknown*. Moral innovators insist that the new rule will prove superior to the present, eligible rule. However, given that many members of the public are unaware of how the rule will function or have yet to acquire the ability to assess the rule, they might turn out to have defeaters for the rule once they've experienced the rule. Thus, members of the public are likely to want to stick to the extant rule. But in *TI*, we may want to allow for moral innovators to push for rules outside of the optimal eligible set in order to discover the effects of new rules. In comparison to *TI's* model, then, *OPR*

seems wedded to a certain kind of conservatism that is in tension with *TI*'s stress on discovery.

Perhaps the main source of *OPR*'s conservatism is that there are shared returns to current moral requirements (2011, p. 398). Rules that already exist have a normative advantage over rules that do not: extant rules coordinate our interactions. As a result, we have additional reason to sign on to extant rules than we do for rules that are at present mere proposals, for they already establish moral relations between persons. We should also stick to extant eligible rules because they have already reduced uncertainty about how to live together (2016, p. 171).

So the reformer must give up on moving her society to a rule whose justificatory status is unknown. This is because *OPR* understands public justification as an equilibrium concept, leaving us with a kind of conservatism that resists the experimental orientation of *TI*.⁶

A GAUSSIAN RESOLUTION

I believe Gaus is aware of the problem I raised in the previous section. In this section, I characterize what I take to be Gaus's solution and explain why I think it needs further development.

In *TI*, Gaus argues that an open society with a diversity-accommodating moral constitution can be liberal overall but nonetheless "contain numerous republican communities" that can "reap the benefits of diverse (but not too diverse) searches" (2016, p. 146). So we can have a moral constitution of social-moral rules that bind all members of a diverse society together but that expressly assign local communities the liberty to carry out their own experiments. As Gaus notes,

... often the same society will be characterized by a variety of sets of rules, regulating different areas of social life, different types of problems, over different areas. And often the same society will be characterized by competing sets of rules, followed by different parts of the population (2016, p. 184).

So we can allow local variation in our social-moral rules in order to capture the benefits of diversity and experimentation. Now, to do this, the system needs "*relatively* stable social and moral rules" (2016, p. 171). We need these stable rules because we cannot otherwise reduce uncertainty about how to interact and so how to live together on moral terms. But we can have relatively more stable moral rules at

the highest levels of social organization and allow for relatively more social change in moral rules at the local level, along with a variety of rules across different local areas.

Gaus also defends a more experimental model of social life by establishing a morality of "natural liberty" where persons confront new "act-types as permissible" such that when someone proposes a new way of living together, she is "free to engage in a new type of action that is not covered by existing prohibitions" (2016, p. 195). Gaus thinks recent empirical work on moral reasoning suggests that people implicitly adopt a morality of natural liberty since moral learning proceeds by assuming permissions to act and then learning about prohibitions. We assume that liberty is the default; restrictions on liberty are learned and justified in order to override the appearance of a moral liberty. This accommodates the innovator insofar as she proposes a new rule that refers to new act-types. So if a moral innovator sees no analogy between the new act-type and prohibited act-types, "he will conclude that morality allows his innovative activity" (2016, p. 196). Thus,

Moral experimenters—those who are exploring a new perspective on justice—need not first convince themselves that a new action type falls under a previous permission; they proceed as long as they do not conclude that the new type falls under a current prohibition (*ibid*).

So insofar as moral experimenters are experimenting with *new act types*, Gaus has an answer for the tension I've outlined.

By defending a moral constitution that allows for local variation and arguing that we implicitly endorse a principle of natural liberty in exploring new act-types, we may be able to resolve the tension between *OPR* and *TI*. We can argue that a moral innovator who wants to venture outside of her society's optimal eligible set should confine her experiments to her local moral communities.⁷ She should not attempt to drag other communities along until they have more information about how the innovator's moral proposals work out in practice. So long as these moral communities adopt a principle of natural liberty, anyone pursuing new act types should be morally permitted to do so.

Neither of these solutions adequately addresses the case of moral innovation I discussed in the previous section, however, where a moral innovator tries to establish a new social-moral rule whose justificatory valence is unknown.⁸ A social morality of natural liberty only permits the moral

innovator to engage in act-types not already regulated by rules, but the moral innovator often proposes a new form of social regulation for *recognized* act-types. The moral innovator, then, is vulnerable to ostracism and social punishment for trying to move her society to a rule that may, for all we know, be outside of the optimal eligible set, even if she sticks to moral innovation in her local moral community. This means that she will be discouraged from engaging in social innovation.

Perhaps the case of moral innovation I examine is rightly prohibited by the moral constitution of an open society. Gaus could argue that the moral innovator should restrict herself to pursuing new act-types and moving around within the optimal eligible set of an open society. She must do this because the social-moral rule that exists at present is publicly justified and establishes moral relations between persons; the new rule is much less certain and clear. By pushing for a new rule in this case, we undermine the great goods provided by the extant rule. Gaus can then argue that an open society will not lose out on valuable innovation if we confine the moral innovator in this way. She already has plenty of avenues for experimentation. After all, she can pursue experimentation within the optimal eligible set, she can pursue new act-types, and if she has defeater reasons for the social-moral rule in question, then she is morally free to disobey it. Perhaps these forms of moral experimentation are sufficient to capture the benefits of innovation.

Nonetheless, confining moral experimentation in this way prohibits a large class of experiments. Given Gaus's stress on the limits of our knowledge, it will often be difficult to determine which rules are publicly justified, especially new rules that have been proposed. Since such rules might be publicly justified, we may do better even from *everyone's* perspective by allowing this form of moral experimentation. Once we acknowledge our considerable fallibility about the justificatory status of rules that may be outside of the open society's optimal eligible set, we can see that barring action to move us to rules whose justificatory valence is unknown might be quite restrictive.

It is not enough to allow experiments with rules in the optimal eligible set of her local republican community that are not also in the optimal eligible set of the open society as a whole. This is because the level of interaction and cooperation between different republican moral communities in an open society is sufficiently rich that violations of social-moral rules are still the business of all community members, such that all members of the open society will hold local experimenters responsible for violations. As of

yet, we have not grappled with the tension between Gaus's insistence that moral violations are everyone's business and the liberty of republican communities to experiment.

So my goal henceforth is to draw on other parts of Gaus's social theory in order to show that *OPR's* model of public justification can accommodate the social experimentation emphasized in *TI*.

JURISDICTIONAL RULES

Resolving the *OPR-TI* tension requires appealing to the idea of a *jurisdictional rule*. A jurisdictional rule is a social-moral rule that *constricts the community of those subject to a social-moral rule*. An ordinary social-moral rule, according to Gaus, is a social rule that both permits persons to authoritatively direct the actions of others in accord with an act-type and meets the minimal standards for a rule to count as a genuine moral requirement. A jurisdictional rule is a social-moral rule that specifies that *another* social-moral rule only applies to a local community within an open society. The jurisdictional rule prohibits members of the open society from demanding that members of the local republican community act in accord with the social-moral rule, since the rule is not the rule of the open society. Conversely, a jurisdictional rule can make it the case that a social-moral rule that would otherwise apply to all members of an open society does *not* apply to a local republican community, such that members of the republican community are exempt from appropriate moral punishment on the part of members of the open society as a whole for violating the rule. So jurisdictional rules are a kind of *second-order* moral rule that makes reference to another social-moral rule and fixes the scope of the group to whom the rule applies.

In both *OPR* and *TI*, Gaus stresses the importance of what he terms "jurisdictional rights" or rights that give individuals or groups the authority to control the expression of their evaluative standards within a restricted domain of social space (2011, pp. 370-4; 2016, p. 200). Within a moral jurisdiction, persons are permitted to act in accord with their evaluative standards without the interference or permission of others. Similarly, a jurisdictional rule requires that a social-moral rule only applies to a sub-group or that the sub-group is exempt from an open society's social-moral rules on some issues. So a jurisdictional rule creates a kind of jurisdictional freedom, though it differs somewhat from the sort of freedom secured by a jurisdictional right, since it is focused not so much on the expression of local evaluative standards, but on the scope of other social-moral rules.

To illustrate the idea of restricted scope, let us return to the case of Mormon polygamy. If a *marital* jurisdictional rule is publicly justified for an open society, this may allow that, within the Utah territory, polygamy is morally permitted and polygamous marriages impose moral and legal duties on spouses. Assuming the polygamy-permitting rules do not apply to American society broadly, the jurisdictional rule in this case prohibits the American public from punishing and ostracizing the Mormon community for engaging in polygamy. Now, in practice, such a jurisdictional rule may not have been publicly justified to American society. However, the 19th century emphasis on federalism, even following the Civil War and the 14th amendment, which limited the extent of federalism, suggests that federalism was enough of a part of their social morality that confining polygamy to the Utah territory may have been publicly justified. But *had* the jurisdictional rule been publicly justified, then the Mormon community would have had moral freedom from American society as a whole to experiment with polygamy.

Importantly, Gaus's work suggests that the idea of a jurisdictional moral rule is incoherent because violations of all social-moral rules are necessarily the business of all community members. For Gaus, our moral practice assumes that we "hold ourselves to have standing to insist on actions on [another person's] part" (Gaus 2011, pp. 190-191). Following Kurt Baier, Gaus argues that moral violations where reactive attitudes are relevant are ones where we think the violation is "[our] business" because we "have standing to insist on performance and standing to hold the violator responsible for what she has done" (Gaus 2011, p. 224). Baier argued that moral violations cannot be *entirely* the business of the person who engaged in the moral violation: "whether a person conforms to the mores and laws of the group is not entirely his own business." (Baier 1958, pp. xviii-xix). But both Gaus and Baier have cause for concern about the suggestion that moral violations can be *entirely* the private business of some individual or group. The concern is that social-moral rules are public entities that are created, enforced, and maintained by the community, such that moral violations license indignation among those who observe an infraction of the rule, and license resentment by those who were harmed or insulted by the infraction. So jurisdictional rules, by establishing that violations of some social-moral rules are *not* everyone's business, contradict the Gaussian understanding of one of the central features of social-moral rules.

And yet, it seems obvious that there are many jurisdictional rules in effect. In the Catholic Church, for instance, there are social-moral rules that require Catholics to confess their sins or obey the directives of the church hierarchy. If an atheist insists that her Catholic friend go to confession, even when the Catholic friend herself acknowledges that she should go to confession, the atheist lacks standing to insist on compliance with the Catholic moral rule of confessing sin. In this case, the Catholic friend is liable to think that *the atheist* has violated a social-moral rule of minding her own business because she is not a member of the group to whom the social-moral rule applies.

To show that the idea of a jurisdictional rule is coherent, we need not entirely reject Gaus and Baier's claim that moral violations are everyone's business. Instead, we can begin with the default assumption that moral violations are everyone's business, but that social-moral rules can apply to sub-communities within an open society so long as the jurisdictional rule is publicly justified. Otherwise, members of the open society may think that a community's having a unique social-moral rule or rejecting a broadly accepted social-moral rule is cause for indignation, ostracism, and punishment. We therefore arrive at the possibility of a social-moral rule whose violation *is not* everyone's business because the scope of those whose business it is to care about the violations of that rule is restricted by a social-moral rule whose violation *is* everyone's business.

One might wonder why Gaus can't simply acknowledge that some social-moral rules apply to the open society whereas other social-moral rules only apply to local republican communities. Can't the fact that some rules just happen to be part of a local community be enough to ensure that non-members have no standing to enforce the rule since the rule does not apply to them? If so, perhaps we can do without the idea of a jurisdictional rule.

In reply, I argue that we need the idea of a jurisdictional rule because the degree of social unity and social cooperation within an open society suggests that all social-moral rules should apply to all persons within that system of social cooperation. In *OPR*, Gaus discusses the incompleteness of moral relations between citizens of different nation-states (2011, p. 474), and so he allows that social-moral rules can vary across nation-states such that moral relations are incomplete between members of these states. He also notes, however, that moral relations can extend across the boundaries of states in virtue of the market interactions between persons across these states (2011, pp. 471-74). This condition suggests that social morality extends across groups of

people who regularly interact with one another, just as we can expect members of different local republican communities to interact with one another. So the presumption is that persons who interact on a regular basis share a social morality, and we need jurisdictional rules to explain how their justified social moralities can differ.

A GAUSSIAN RESOLUTION VIA JURISDICTIONAL RULES

The tension between *OPR* and *TI* is that *OPR* treats public reason as an equilibrium concept in a way that seems to prohibit some kinds of valuable moral experimentation, in particular moral experimentation where a moral innovator wishes to push her republican community to a rule whose justificatory valence is unclear. I believe the model of public justification in *OPR* can allow for this sort of moral experimentation.

Jurisdictional rights play a prominent role in both *OPR* and *TI*. In solving the problem of diverse evaluative standards, Gaus argues, “jurisdictional rights reduce complexity by decoupling the public moral constitution from changes in perspectives, allowing high levels of change in some perspectives without affecting the shared public world” (2016, p. 200). So jurisdictional rights, like the right to privacy and freedom of association, are ways of permitting persons to engage in moral experiments. The idea of a jurisdictional rule plays a similar role, since it allows persons to attempt to move their local community or association to a new rule without fear of reprisal by the larger community of the open society. This is because the jurisdictional rules specify that not all social-moral rules apply equally to all members of the open society. Some rules apply only to local communities, and some local communities are morally exempt from rules that apply to everyone else. In this way, a publicly justified jurisdictional rule can allow for moral innovators to try to move the open society outside of its eligible set by first engaging in a moral experiment in her local republican community that is protected from moral control by members of the open society as a whole.

One problem remains, however, and this is the question of whether the moral innovator is permitted to try to move her local republican community outside of *its* optimal eligible set. Returning to the case of Mormon polygamy, we might imagine that prior to the establishment of polygamy, polygamy was not clearly in the Mormon community’s optimal eligible set, but it would in fact turn out to be. Thus, in moving the Mormons to polygamy, Joseph Smith was mov-

ing his society to a new marital rule outside of its optimal eligible set. So what is the moral status of Smith’s innovation? Remember that jurisdictional rules play no role in this case, since we are only focused on the optimal eligible set of the moral community protected by a jurisdictional rule. This suggests that *OPR*’s model of public justification may prohibit Smith’s experimentation within his own community, since the new rule undermines moral relations between Mormons.

In this case, I submit that protection from the open society’s indignation and punishment should be enough to capture the benefits of experimentation. When a moral innovator tries to disrupt extant publicly justified moral rules in her community in favor of a rule whose justificatory valence is unknown, she is unjustifiably subversive. Fortunately, however, members of local republican communities can have social-moral rules that are at great variance with the rest of the open society, such that moral innovators in different communities will be able to engage in quite different forms of life. Moreover, the discovery of new act-types is also permitted within these communities by the morality of natural liberty. So *OPR*’s model of public justification is still somewhat conservative when applied within local republican communities, but it is more liberal and open when applied to the open society as a whole. That seems to me to strike the right balance. And all we need to achieve this balance is to introduce the idea of a jurisdictional rule.

NOTES

- 1 Where “costs” and “benefits” are understood expansively to account for whatever her evaluative perspective regards as a cost or benefit.
- 2 Gaus discusses the idea of moral relations many times in *OPR*. See Gaus 2011, pp. 8, 13, 174, 183-4, 193, 199-200, 282, 426, 431, 463, 475.
- 3 Though we can justifiably hold her accountable to rules whose validity she may not see given her present reasoning, but would see if she reasoned a fair or respectable amount. This is where *idealization* enters into the idea of public justification.
- 4 And, in some cases, holding persons who refuse to enforce the rule accountable as well.
- 5 Though if the current rule is in equilibrium, then the process of moving to the new rule will come with costs. Deviators may still be blamed and resented on the ba-

sis of the existing rule. So even moves within the optimal eligible set can be resisted in *OPR*. I thank Paul Billingham for this point. Since movement within the optimal eligible set can often be justified, I set aside this case of experimentation as compatible with the experimental emphasis of *TI*.

- 6 And, again, *OPR*'s model gives us reason to prefer extant rules in the optimal eligible set to *other* rules in the optimal eligible set, so it may be even more conservative than I have argued.
- 7 Here I am focused on the open society's optimal eligible set, not the optimal eligible set of the local community, which might be different.
- 8 The justificatory valence for the open society as a whole, that is.

REFERENCES

- Baier, K. (1958). *The Moral Point of View: A Rational Basis of Ethics*. Ithaca: Cornell University Press.
- Gaus, G. (2011). *The Order of Public Reason*. New York: Cambridge University Press.
- (2016). *The Tyranny of the Ideal*. Princeton: Princeton University Press.