
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>

1 A TENSION IN THE IDEA OF A PUBLICLY 2 JUSTIFIED DISCOVERY SYSTEM

3
4 This paper attempts to bridge some insights in Jerry Gaus's
5 two most recent books, *The Order of Public Reason* and *The*
6 *Tyranny of the Ideal* (Gaus 2011, 2016: hereafter *OPR* and
7 *TI*). In *OPR*, Gaus argues that the "social-moral" rules that
8 comprise our shared moral order must be *publicly justifi-*
9 *fied* to each person in order to sustain the moral practices
10 ~~the~~ bind society together and make social life possible and
11 beneficial (2011, p. 2). A rule is publicly justified when each
12 moral person has sufficient reason to internalize the rule as
13 requiring her to engage in certain lines of conduct in the
14 relevant circumstances. If we ensure that the social, moral
15 rules to which we are subject are publicly justified, Gaus ar-
16 gues that we can sustain a shared social life and enjoy its
17 benefits (2011, p. 263). ~~For~~ publicly justified rules sustain our
18 moral practice of *holding others responsible* for wrongdoing
19 ~~because~~, when we hold others to rules publicly justified for
20 them, they acknowledge that they are culpable and blame-
21 worthy for rule violations, which motivates conformity
22 ~~and so the sustained application of~~ the rule. ~~Furthermore,~~
23 publicly justified rules render our moral practice consistent
24 with our jointly recognized freedom and equality (2011, p.
25 14) and help us to avoid relating to one another in an au-
26 thoritarian fashion (2011, pp. 32-4).

27 A critical feature of publicly justified social-moral rules
28 is that they are in some sense *self-stabilizing*. These rules do
29 not persist as social practices merely because they are co-
30 ercively enforced; instead, persons generally comply with
31 publicly justified social-moral rules because they each see
32 sufficient reason of their own to comply with the rule so
33 long as others do likewise. The flip side of this is that no
34 one can do better from her own perspective and simulta-
35 neously sustain cooperation with others by unilaterally de-

36 viating from such a rule; accordingly, her deviation from
37 the rule will bring more costs than benefits.¹ Under these
38 conditions, we can therefore say that a publicly justified
39 social-moral rule is a social *equilibrium* (2011, p. 390). As
40 such, the idea of public justification is a kind of *equilibrium*
41 *concept* because it elaborates the condition under which a
42 social-moral rule can remain in equilibrium under moral
43 conditions.

44 In *TI*, Gaus is focused on showing how a diverse "open
45 society" can generate important social benefits (2016, pp.
46 133-8), in particular the benefits of social discovery (2016,
47 p. 96). But capturing these benefits requires having a sys-
48 tem of rules that can *escape* equilibrium. As Gaus argues,
49 we want a system of rules that will tend to return to *some*
50 equilibrium, but not necessarily the *same* equilibrium when
51 disrupted; this is the difference between a system being *ro-*
52 *bust* and a system being *stable* (2016, p. 231). While we still
53 want a ~~measure~~ of stability for our shared social rules in an
54 open society, we also want to allow for discovery through
55 social change, that is, through a change in the rules that
56 govern our common lives. For there may exist rules that
57 would be better than the rules in equilibrium as judged
58 from each person's evaluative perspective. So while we want
59 our shared moral rules to be self-stabilizing, we also want
60 to be able to move to other rules. This means that social-
61 moral rules in equilibrium ~~now~~ have a greater social cost.
62 They can be too hard to change in an open society of citi-
63 zens who recognize the possibility of improved their shared
64 social rule.

65 We now confront an apparent tension between *TI* and
66 *OPR*, since *OPR* stresses public justification as an equilib-
67 rium concept, and *TI* stresses the costs of keeping social
68 rules in equilibrium. I argue that the apparent tension can
69 be resolved. Gaus stresses that an open society is composed
70 of local "republican" communities (2016, p. 145), within

71 which experiments can take place. The idea, I take it, is that
 72 ~~the~~ social-moral rules should be able to vary *within* these
 73 communities, whereas the social-moral rules that govern
 74 all communities should be harder to change. This means
 75 that we may want some social-moral rules to be *stable* for
 76 the open society as a whole, but local republican commu-
 77 nities should focus more on robustness. The difficulty with
 78 this solution, however, is that Gaus argues that all moral
 79 violations are “everyone’s business” (2011, p. 188), such that
 80 moral innovators within local republican communities may
 81 be subject to ostracism and punishment from members of
 82 the open society that are not members of her local repub-
 83 lican community. ~~But~~ the threat of such interference may
 84 discourage social discovery within local republican com-
 85 munities, which will push those communities away from
 86 robustness and back to an excessively conservative notion
 87 of stability.

88 Even with the threat of interference, a great deal of moral
 89 innovation can take place. In *TI*, Gaus allows moral innova-
 90 tion when a moral innovator wishes to move her society to
 91 another rule within its “optimal eligible set” (2016, p. 214),
 92 or among rules that no member of the open society has suf-
 93 ficient reason to reject. Moreover, if social-moral rules do
 94 not prohibit an activity, then by a principle of natural lib-
 95 erty, persons may experiment with a new “act-type” (2016,
 96 p. 187).

97 However, there is an important type of moral experimen-
 98 tation that *OPR*’s model of public justification appears to
 99 forbid. In some cases of moral innovation, we *don’t know*
 100 whether a rule favored by the moral innovator can be pub-
 101 licly justified, in part because many members of local re-
 102 publican communities cannot evaluate the rule until they
 103 can see how the rule works in practice. It appears that *OPR*’s
 104 model of public justification thereby renders the moral
 105 innovator’s action impermissible, since it is not obvious
 106 whether the rule can sustain our shared moral life. So by re-
 107 quiring that a society stick with an obviously justified rule
 108 when a new rule *might* be better, as judged from the per-
 109 spective of all, we are forbidden from finding out whether
 110 that rule is better in practice. In this way, *OPR*’s model of
 111 public justification may forbid innovation that an open so-
 112 ciety could otherwise accommodate.

113 I believe that *OPR*’s model of public justification can ac-
 114 commodate this form of moral innovation. To demonstrate,
 115 I develop the idea of a *jurisdictional rule* based on Gaus’s
 116 idea of a jurisdictional right (2011, p. 370); a jurisdictional
 117 rule establishes *who is permitted to enforce* publicly justifi-
 118 ed social-moral rules. If jurisdictional rules are publicly

119 justified for all members of an open society, they may pro-
 120 tect moral innovators within local republican communities
 121 from ostracism and punishment by non-members, and so
 122 no one outside the moral innovator’s community will pun-
 123 ish or ostracize her for experimentation. With publicly jus-
 124 tified jurisdictional rules, therefore, moral innovators can
 125 attempt to move their local republican community to a new
 126 rule without fear of reprisal or ostracism by the open soci-
 127 ety as a whole. She need only face resistance from members
 128 of her local republican community.

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

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

156 I proceed in four parts. In section II, I bring out the ten-
 157 sion between *OPR* and *TI* as one concerned with the costs
 158 and benefits of understanding public justification as an
 159 equilibrium concept. Section III explores the resolution of
 160 the tension that I think Gaus has in mind in *TI*. Section IV
 161 introduces the idea of a jurisdictional rule, which is some-
 162 what at variance with Gaus’s conception of a moral rule. I
 163 conclude in section V by using the idea of a jurisdictional
 164 rule to show that *OPR*’s model of public justification can
 165 capture the benefits of moral innovation better than one
 166 might think. Note throughout that I argue that all the tools

167 required to resolve the tension between *OPR* and *TI* can be
168 found in different parts of Gaus's work.

169

170 PUBLIC REASON AS AN EQUILIBRIUM 171 CONCEPT

172

173 On my reading of *OPR* and *TI*, Gaus's social theory is fo-
174 cused on how *moral relations* can be established and main-
175 tained between persons (2011, p. 13).² Moral relations can be
176 understood as a series of relationships between people that
177 are mediated by a *practice of moral responsibility* (2016, p.
178 182), understood as the practice of holding persons respon-
179 sible for culpable errors in public behavior and judgment
180 and providing the conditions under which the reactive atti-
181 tudes of guilt, resentment, and indignation can be rational-
182 ly sustained (2011, p. 205). The idea of public justification in
183 Gaus's work is a specification of the conditions under which
184 holding others responsible, blaming them, and holding the
185 reactive attitudes against them is appropriate (2011, p. 254).

— 186 We normally expect persons to follow a wide array of what
40 187 Gaus calls social-moral rules (2011, p. 2), rules that are so-
188 cially recognized, that are generally internalized as morally
189 binding on community members, and that meet certain
190 formal conditions for moral requirements like reversibility,
191 generality, and a modest common good requirement (2011,
192 pp. 172-3). Violations are normally met with the reactive at-
193 titudes and punishment.

194 But our practice of insisting that others comply with
195 social-moral rules is determined in part by the condi-
196 tions of culpability at work in a violation, that is, when we
197 think that persons are morally responsible for violations of
198 social-moral rules. In many cases, we excuse persons from
199 violating rules because we think certain appropriateness
200 conditions for holding others responsible have not been
201 met. Excusing others is appropriate when we see that they
202 could not have known better than to act as they did. To put
203 it another way, persons are judged accountable or excused
204 based on our model of their commitments and their cogni-
205 tive capacities. If Reba breaks a promise to John, we hold
206 her responsible because we think she knows that she made
207 the promise, that she recognizes promise-keeping rules as
208 applying to her, and that no exculpatory conditions have
209 been met. Under these conditions, then, we can appropri-
210 ately blame Reba for breaking her promise and be indignant
211 with her as a result.

212 One of the exculpatory conditions that Gaus identifies is
213 engaging in a "respectable amount" of reasoning (2011, p.
214 254), where the person violating the rule does so because

215 she concludes, after careful consideration, that she lacks
216 sufficient reason to comply with the rule. Our normal prac-
217 tice is to only hold persons to moral rules that we think that
218 another person, after considering it, should have recognized
219 herself as bound by. We cannot justifiably hold persons ac-
220 countable to rules whose rationale is beyond the ordinary
221 exercise of her cognitive capacities.³ It is true that we often
222 hold a person responsible for breaking moral rules in cases
223 where she was unaware of the violation. However, we only
224 do so when we think the person *should have known better*.
225 Gaus interprets what the agent should have known as what
226 an agent *would have seen* after a respectable amount of rea-
227 soning.

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

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

243 To remain in force, and to sustain the rational reactive at-
244 titudes, a social rule must also achieve a measure of stability
245 among members of the public. This does not mean that there
246 must be some enforcer agent who coerces others to follow
247 a moral rule (though enforcement is sometimes required),
248 but rather that the rule is sustained as a social norm by
249 the actions of members of the public, by ~~a~~-compliance and
250 holding violators accountable.⁴ This means that a publicly
251 justified norm is stable based on the *moral* reasons of citi-
252 zens. They do not stabilize the rule as in force merely out of
253 fear of reprisal or violent threats; rather, they comply with
254 the rule based on their own evaluative attitudes and psy-
255 chological drives.

256 In *OPR*, then, the object of public justification is a social-
257 moral rule that exists as a kind of *social equilibrium*: com-
258 pliance with a publicly justified social-moral rule is each
259 agent's best response to the actions of others (2011, p. 390),
260 where the "best response" is understood as the balance each
261 agent engages in between the satisfaction of her own evalu-
262 ative standards and what she takes to be the social good of

263 ensuring cooperative relations with others. That is, each
 264 person in a real sense consents to a publicly justified moral
 265 rule because she can regard it as normatively compelling so
 266 long as others comply with it. For the rule both comports
 267 with her own moral point of view and sustains cooperative
 268 relationships with others (2011, pp. 398-9).

269 The advantage of treating publicly justified moral rules
 270 as equilibria is that the rules form an ongoing basis for so-
 271 cial life on moral terms. ~~That is, rules in equilibrium create~~
 272 moral relations between persons by sustaining our practice
 273 of moral responsibility and mediating our otherwise strate-
 274 gic relationships with each other. We should understand
 275 public reason as an equilibrium concept, therefore, because
 276 the problem we wish to solve is how to establish stable moral
 277 relations with each other despite our differences.

278 *TI* identifies a problem with conceiving of our practice
 279 of moral responsibility in terms of equilibrating on social
 280 rules. In many cases, our evaluative standards contain a
 281 certain kind of social *ideal*, a social configuration towards
 282 which we would like to push our social order (2016, pp.
 283 39-40). Many people simply are not satisfied with a shared
 284 social morality that establishes moral relations between
 285 persons; they wish to pursue a more perfect union. Gaus
 286 thinks there are some ways of pursuing our ideal that are
 287 compatible with our practice of moral responsibility, but
 288 our practice depends upon *sustaining* rules in equilibrium,
 289 while our ideals lead us to *change* rules in equilibrium.

290 Importantly, however, some ways of pursuing one's ideal
 291 are problematic. First, if we impose rules on others that
 292 cannot sustain our practice of moral responsibility, we lose
 293 the great good of moral relations with ~~those to whom our~~
 294 ~~preferred rules cannot be publicly justified.~~ There is also the
 295 problem that we might impose "The Choice" on other peo-
 296 ple (2016, pp. 140-2), where we decide to make others worse
 297 off in the short-term in the hopes of making them better
 298 off in the long-term. Imposing the Choice on others raises a
 299 number of moral problems, not least among them that it is
 300 in an important sense tyrannical.

301 But the central reason *TI* identifies for opposing the im-
 302 position of our ideals on the unwilling is that we are likely
 303 to lose out on the best social mechanism for arriving at our
 304 own ideal; for by making our society more uniform, we lose
 305 out on the prospect of using diverse ideals and agents to
 306 explore the social space required to discover how to realize
 307 *our own* ideal in practice or how to formulate our ideals in
 308 the first place (2016, p. 130). Thus, if we impose our pres-
 309 ent ideal on others, we are at risk of ending up in a worse
 310 place *even as judged by our own evaluative standards*. Gaus

311 defends this point by arguing that we know quite a bit less
 312 than we think we do about how to institutionalize our so-
 313 cial and political ideals. Consequently, we must discover
 314 how to understand and realize our ideals through social
 315 experimentation (2016, pp. 89, 133). If we want a more just
 316 society, then given how little we know, we should embrace
 317 a diversity of views and opinions in order to better map the
 318 territory of how societies might be better organized. This is
 319 a reason we wish to avoid social change, since we should not
 320 try to make our society more homogenous.

321 But just as there are some problems with social change,
 322 there are also critical benefits. Thus, we want *OPR's* model
 323 of public justification to allow for persons to change the so-
 324 cial-moral rules that apply to them if people discover better
 325 rules and superior forms of social organization. Now, allow-
 326 ing for change is by no means problematic in *OPR*. Social
 327 change is actually *required* when a social-moral rule is not
 328 publicly justified; a social-moral rule should be discarded,
 329 no longer regarded as normatively binding, or replaced, if
 330 some members of the public have sufficient reason to reject
 331 the rule. Further, there is no particular problem with mov-
 332 ing from a mutually acceptable rule to a second rule that is
 333 broadly acceptable but is considered superior to the pres-
 334 ent rule by some members of the public.⁵ In Gaussian terms,
 335 there may be multiple social-moral rules in a society's "op-
 336 timal eligible set" of moral rules that can govern some is-
 337 sue (2011, p. 323). Moves within the optimal eligible set are
 338 morally permitted, even if we move from one rule that some
 339 members of the public rank as best to another rule that
 340 those members (though not all members) rank as inferior.

341 *OPR's* model of public justification instead opposes two
 342 other types of social change. First, it condemns persons
 343 who try to push their society from a publicly justified so-
 344 cial-moral rule to a defeated rule, one outside of the optimal
 345 eligible set. Holding others responsible for violating the new
 346 rule makes one a small-scale authoritarian (2011, p. xvi). I
 347 think that much is clear, and the model is right to condemn
 348 social change of this variety. But I also think *OPR's* model is
 349 uncomfortable with a second kind of social change—when
 350 persons try to push their society from a publicly justified
 351 social-moral rule to a rule whose justificatory status is *un-*
 352 *known*. Moral innovators insist that the new rule will prove
 353 superior to the present, eligible rule. However, given that
 354 many members of the public are unaware of how the rule
 355 will function or have yet to acquire the ability to assess the
 356 rule, they might turn out to have defeaters for the rule once
 357 they've experienced the rule. Thus, members of the public
 358 are likely to want to stick to the extant rule. But in *TI*, we

359 may want to allow for moral innovators to push for rules
360 outside of the optimal eligible set in order to discover the
361 effects of new rules. In comparison to *TI*'s model, then, *OPR*
362 seems wedded to a certain kind of conservatism that is in
363 tension with *TI*'s stress on discovery.

364 Perhaps the main source of *OPR*'s conservatism is that
365 there are shared returns to current moral requirements
366 (2011, p. 398). Rules that already exist have a normative ad-
367 vantage over rules that do not: extant rules coordinate our
368 interactions. As a result, we have additional reason to sign
369 on to extant rules than we do for rules that are at present
370 mere proposals, for they already establish moral relations
371 between persons. We should also stick to extant eligible
372 rules because they have already reduced uncertainty about
373 how to live together (2016, p. 171).

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

380 A GAUSSIAN RESOLUTION

381
382 I believe Gaus is aware of the problem I raised in the pre-
383 vious section. In this section, I characterize what I take to
384 be Gaus's solution and explain why I think it needs further
385 development.

386 In *TI*, Gaus argues that an open society with a diversity-
387 accommodating moral constitution can be liberal overall
388 but nonetheless "contain numerous republican commu-
389 nities" that can "reap the benefits of diverse (but not too
390 diverse) searches" (2016, p. 146). So we can have a moral
391 constitution of social-moral rules that bind all members
392 of a diverse society together but that expressly assign lo-
393 cal communities the liberty to carry out their own experi-
394 ments. As Gaus notes,

395
396 ... often the same society will be characterized by a
397 variety of sets of rules, regulating different areas of so-
398 cial life, different types of problems, over different ar-
399 eas. And often the same society will be characterized
400 by competing sets of rules, followed by different parts
401 of the population (2016, p. 184).

402
403 So we can allow local variation in our social-moral rules
404 in order to capture the benefits of diversity and experimen-
405 tation. Now, to do this, the system needs "relatively stable
406 social and moral rules" (2016, p. 171). We need these sta-

407 ble rules because we cannot otherwise reduce uncertainty
408 about how to interact and so how to live together on moral
409 terms. But we can have relatively more stable moral rules at
410 the highest levels of social organization and allow for rela-
411 tively more social change in moral rules at the local level,
412 along with a variety of rules across different local areas.

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

430
431 Moral experimenters—those who are exploring a new
432 perspective on justice—need not first convince them-
433 selves that a new action type falls under a previous
434 permission; they proceed as long as they do not con-
435 clude that the new type falls under a current prohibi-
436 tion (ibid).

437
438 So insofar as moral experimenters are experimenting
439 with *new act types*, Gaus has an answer for the tension I've
440 outlined.

441 By defending a moral constitution that allows for local
442 variation and arguing that we implicitly endorse a prin-
443 ciple of natural liberty in exploring new act-types, we may
444 be able to resolve the tension between *OPR* and *TI*. We can
445 argue that a moral innovator who wants to venture outside
446 of her society's optimal eligible set should confine her ex-
447 periments to her local moral communities.⁷ She should not
448 attempt to drag other communities along until they have
449 more information about how the innovator's moral propos-
450 als work out in practice. So long as these moral communi-
451 ties adopt a principle of natural liberty, anyone pursuing
452 new act types should be morally permitted to do so.

453 Neither of these solutions adequately addresses the case
454 of moral innovation I discussed in the previous section,

455 however, where a moral innovator tries to establish a new
 456 social-moral rule whose justificatory valence is unknown.⁸
 457 A social morality of natural liberty only permits the moral
 458 innovator to engage in act-types not already regulated by
 459 rules, but the moral innovator often proposes a new form
 460 of social regulation for *recognized* act-types. The moral in-
 461 novator, then, is vulnerable to ostracism and social punish-
 462 ment for trying to move her society to a rule that may, for
 463 all we know, be outside of the optimal eligible set, even if
 464 she sticks to moral innovation in her local moral commu-
 465 nity. This means that she will be discouraged from engaging
 466 in social innovation.

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

485 Nonetheless, confining moral experimentation in this
 486 way prohibits a large class of experiments. Given Gaus's
 487 stress on the limits of our knowledge, it will often be dif-
 488 ficult to determine which rules are publicly justified, espe-
 489 cially new rules that have been proposed. Since such rules
 490 might be publicly justified, we may do better even from
 491 *everyone's* perspective by allowing this form of moral ex-
 492 perimentation. Once we acknowledge our considerable fal-
 493 libility about the justificatory status of rules that may be
 494 outside of the open society's optimal eligible set, we can see
 495 that barring action to move us to rules whose justificatory
 496 valence is unknown might be quite restrictive.

497 It is not enough to allow experiments with rules in the
 498 optimal eligible set of her local republican community that
 499 are not also in the optimal eligible set of the open society
 500 as a whole. This is because the level of interaction and co-
 501 operation between different republican moral communi-
 502 ties in an open society is sufficiently rich that violations of

503 social-moral rules are still the business of all community
 504 members, such that all members of the open society will
 505 hold local experimenters responsible for violations. As of
 506 yet, we have not grappled with the tension between Gaus's
 507 insistence that moral violations are everyone's business and
 508 the liberty of republican communities to experiment.

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

514 JURISDICTIONAL RULES

515 Resolving the *OPR-TI* tension requires appealing to the
 516 idea of a *jurisdictional rule*. A jurisdictional rule is a so-
 517 cial-moral rule that *constricts the community of those sub-*
 518 *ject to a social-moral rule*. An ordinary social-moral rule,
 519 according to Gaus, is a social rule that both permits per-
 520 sons to authoritatively direct the actions of others in accord
 521 with an act-type and meets the minimal standards for a
 522 rule to count as a genuine moral requirement. A jurisdic-
 523 tional rule is a social-moral rule that specifies that *another*
 524 social-moral rule only applies to a local community within
 525 an open society. The jurisdictional rule prohibits members
 526 of the open society from demanding that members of the
 527 local republican community act in accord with the social-
 528 moral rule, since the rule is not the rule of the open society.
 529 Conversely, a jurisdictional rule can make it the case that a
 530 social-moral rule that would otherwise apply to all mem-
 531 bers of an open society does *not* apply to a local republican
 532 community, such that members of the republican commu-
 533 nity are exempt from appropriate moral punishment on the
 534 part of members of the open society as a whole for violating
 535 the rule. So jurisdictional rules are a kind of *second-order*
 536 moral rule that makes reference to another social-moral
 537 rule and fixes its scope of application.

538 In both *OPR* and *TI*, Gaus stresses the importance of
 539 what he terms "jurisdictional rights" or rights that give in-
 540 dividuals or groups the right to control the expression of
 541 their evaluative standards within a restricted domain of so-
 542 cial space (2011, pp. 370-4; 2016, p. 200). Within a moral ju-
 543 risdiction, persons are permitted to act in accord with their
 544 evaluative standards without the interference or permis-
 545 sion of others. Similarly, a jurisdictional rule requires that
 546 a social-moral rule only applies to a sub-group or that the
 547 sub-group is exempt from an open society's social-moral
 548 rules on some issues. So a jurisdictional rule creates a kind
 549 of jurisdictional freedom, though it differs somewhat from
 550

551 the sort of freedom secured by a jurisdictional right, since it
552 is focused not so much on the expression of local evaluative
553 standards, but on the scope of social-moral rules.

554 To illustrate the idea of restricted scope, let us return to
555 the case of Mormon polygamy. If a *marital* jurisdictional
556 rule is publicly justified to an open society, this may allow
557 that, within the Utah territory, polygamy is morally permit-
558 ted and polygamous marriages impose moral and legal du-
559 ties on spouses. Assuming the polygamy-permitting rules
560 do not apply to American society broadly, the jurisdictional
561 rule in this case prohibits the United States public from
562 punishing and ostracizing the Mormon community for en-
563 gaging in polygamy. Now, in practice, such a jurisdictional
564 rule may not have been publicly justified to American soci-
565 ety. However, the 19th century emphasis on federalism, even
566 following the Civil War and the 14th amendment, which
567 limited the extent of federalism, suggests that federalism
568 was enough of a part of their social morality that confin-
569 ing polygamy to the Utah territory may have been publicly
570 justified. But *had* the jurisdictional rule been publicly justi-
571 fied, then the Mormon community would have had moral
572 freedom from American society as a whole to experiment
573 with polygamy.

574 Importantly, Gaus's work suggests that the idea of a ju-
575 risdictional moral rule is incoherent because violations
576 of all social-moral rules are necessarily the business of all
577 community members. For Gaus, our moral practice as-
578 sumes that we "hold ourselves to have standing to insist
579 on actions on [another person's] part" (Gaus 2011, pp. 190-
580 191). Following Kurt Baier, Gaus argues that moral viola-
581 tions where reactive attitudes are relevant are ones where
582 we think it is "[our] business" because we "have standing
583 to insist on performance and standing to hold the violator
584 responsible for what she has done" (Gaus 2011, p. 224). Baier
585 argued that moral violations cannot be *entirely* the business
586 of the person who engaged in the moral violation: "whether
587 a person conforms to the mores and laws of the group is
588 not entirely his own business." (Baier 1958, pp. xviii-xix).
589 But both Gaus and Baier have cause for concern about the
590 suggestion that moral violations can be *entirely* the private
591 business of some individual or group. The concern is that
592 social-moral rules are public entities that are created, en-
593 forced, and maintained by the community, such that moral
594 violations license indignation among those who observe an
595 infraction of the rule, and license resentment by those who
596 were harmed or insulted by the infraction. So jurisdictional
597 rules, by establishing that violations of some social-moral
598 rules are *not* everyone's business, contradict the Gaussian

599 understanding of one of the central features of social-moral
600 rules.

601 And yet, it seems obvious that there are many jurisdic-
602 tional rules in effect. In the Catholic Church, for instance,
603 there are social-moral rules that require Catholics to con-
604 fess their sins or obey the directives of the church hierarchy.
605 If an atheist insists that her Catholic friend go to confes-
606 sion, even when the Catholic friend herself acknowledges
607 that she should go to confession, the atheist lacks standing
608 to insist on compliance with the Catholic moral rule of con-
609 fessing sin. In this case, the Catholic friend is liable to think
610 that *the atheist* has violated a social-moral rule of minding
611 her own business because she is not a member of the group
612 to whom the social-moral rule applies.

613 To show that the idea of a jurisdictional rule is coher-
614 ent, we need not entirely reject Gaus and Baier's claim that
615 moral violations are everyone's business. Instead, we can
616 begin with the default assumption that moral violations are
617 everyone's business, but that social-moral rules can apply
618 to sub-communities within an open society so long as a ju-
619 risdictional rule is publicly justified. Otherwise, members
620 of the open society may think that a community's having
621 a unique social-moral rule or rejecting a broadly accepted
622 social-moral rule is cause for indignation, ostracism, and
623 punishment. We therefore arrive at the possibility of a so-
624 cial-moral rule whose violation *is not* everyone's business
625 because the scope of those whose business it is to care about
626 the violations of that rule is restricted by a social-moral rule
627 whose violation *is* everyone's business.

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

636 In reply, I argue that we need the idea of a jurisdictional
637 rule because the degree of social unity and social coopera-
638 tion within an open society suggests that all social-moral
639 rules should apply to all persons within that system of social
640 cooperation. In *OPR*, Gaus discusses the incompleteness of
641 moral relations between citizens of different nation-states
642 (2011, p. 474), and so he allows that social-moral rules can
643 vary across *them*, such that moral relations are incomplete
644 between members of these states. He also notes, however,
645 that moral relations can extend across the boundaries of
646 states in virtue of the market interactions between persons

647 across states (2011, pp. 471-74). This condition suggests that
 648 social morality extends across groups of people who regu-
 649 larly interact with one another, just as we can expect mem-
 650 bers of different local republican communities to interact
 651 with one another. So the presumption is that persons who
 652 interact on a regular basis share a social morality, and we
 653 need jurisdictional rules to explain how their justified so-
 654 cial moralities can differ.

656 A GAUSSIAN RESOLUTION VIA 657 JURISDICTIONAL RULES

658
 659 The tension between *OPR* and *TI* is that *OPR* treats public
 660 reason as an equilibrium concept in a way that seems to
 661 prohibit some kinds of valuable moral experimentation, in
 662 particular moral experimentation where a moral innovator
 663 wishes to push her republican community to a rule whose
 664 justificatory valence is unclear. I believe the model of public
 665 justification in *OPR* can allow for this sort of moral experi-
 666 mentation.

667 Jurisdictional rights play a prominent role in both *OPR*
 668 and *TI*. In solving the problem of diverse evaluative stan-
 669 dards, Gaus argues, “jurisdictional rights reduce com-
 670 plexity by decoupling the public moral constitution from
 671 changes in perspectives, allowing high levels of change
 672 in some perspectives without affecting the shared public
 673 world” (2016, p. 200). So jurisdictional rights, like the right
 674 to privacy and freedom of association, are ways of permit-
 675 ting persons to engage in moral experiments. The idea of a
 676 jurisdictional rule plays a similar role, since it allows per-
 677 sons to attempt to move their local community or asso-
 678 ciation to a new rule without fear of reprisal by the larger
 679 community of the open society. This is because the juris-
 680 dictional rules specify that not all social-moral rules apply
 681 equally to all members of the open society. Some rules apply
 682 only to local communities, and some local communities are
 683 morally exempt from rules that apply to everyone else. In
 684 this way, a publicly justified jurisdictional rule can allow for
 685 moral innovators to try to move the open society outside of
 686 its eligible set by first engaging in a moral experiment in her
 687 local republican community that is protected from moral
 688 control by members of the open society as a whole.

689 One problem remains, however, and this is the question
 690 of whether the moral innovator is permitted to try to move
 691 her local republican community outside of *its* optimal eli-
 692 gible set. Returning to the case of Mormon polygamy, we
 693 might imagine that prior to the establishment of polygamy,
 694 polygamy was not clearly in the Mormon community’s op-

695 timal eligible set, but it would in fact turn out to be. Thus, in
 696 moving the Mormons to polygamy, Joseph Smith was mov-
 697 ing his society to a new marital rule outside of its optimal
 698 eligible set. So what is the moral status of Smith’s innova-
 699 tion? Remember that jurisdictional rules play no role in this
 700 case, since we are only focused on the optimal eligible set
 701 of the moral community protected by a jurisdictional rule.
 702 This suggests that *OPR*’s model of public justification may
 703 prohibit Smith’s experimentation within his own commu-
 704 nity, since the new rule undermines moral relations be-
 705 tween Mormons.

706 In this case, I submit that protection from the open so-
 707 ciety’s indignation and punishment should be enough to
 708 capture the benefits of experimentation. When a moral
 709 innovator tries to disrupt extant publicly justified moral
 710 rules in her community in favor of a rule whose justifica-
 711 tory valence is unknown, she is unjustifiably subversive.
 712 Fortunately, however, members of local republican com-
 713 munities can have social-moral rules that are at great vari-
 714 ance with the rest of the open society, such that moral
 715 innovators in different communities will be able to engage
 716 in quite different forms of life. Moreover, the discovery of
 717 new act-types is also permitted within these communities
 718 by the morality of natural liberty. So *OPR*’s model of pub-
 719 lic justification is still somewhat conservative when applied
 720 within local republican communities, but it is more liberal
 721 and open when applied to the open society as a whole. That
 722 seems to me to strike the right balance. And all we need to
 723 achieve this balance is to introduce the idea of a jurisdic-
 724 tional rule.

727 NOTES

- 729 1 Where “costs” and “benefits” are understood ~~as costs~~
 730 ~~not based solely on economic costs and benefits, but~~
 731 ~~costs and benefits from her evaluative perspective,~~
- 732 2 Gaus discusses the idea of moral relations many times
 733 in *OPR*. See Gaus 2011, pp. 8, 13, 174, 183-4, 193, 199-
 734 200, 282, 426, 431, 463, 475.
- 735 3 Though we can justifiably hold her accountable to rules
 736 whose validity she may not see given her present rea-
 737 soning, but would see if she reasoned a fair or respect-
 738 able amount. This is where *idealization* enters into the
 739 idea of public justification.
- 740 4 And, in some cases, holding persons who refuse to en-
 741 force the rule accountable as well.

743 5 Though if the current rule is in equilibrium, then the
744 process of moving to the new rule will come with costs.
745 Deviators may still be blamed and resented on the ba-
746 sis of the existing rule. So even moves within the op-
747 timal eligible set can be resisted in *OPR*. I thank Paul
748 Billingham for this point. Since movement can often
749 be justified, I set aside this case of experimentation as
750 compatible with the experimental emphasis of *TI*.

751 6 And, again, *OPR*'s model gives us reason to prefer ex-
752 tant rules in the optimal eligible set to *other* rules in the
753 optimal eligible set, so it may be even more conserva-
754 tive than I have argued.

755 7 Here I am focused on the open society's optimal eligi-
756 ble set, not the optimal eligible set of the local commu-
757 nity, which might be different.

758 8 The justificatory valence for the open society as a
759 whole, that is.

760
761

— 762 REFERENCES

- 46 763
- 764 Baier, K. (1958). *The Moral Point of View: A Rational Basis of Ethics*.
765 Ithaca: Cornell University Press.
- 766 Gaus, G. (2011). *The Order of Public Reason*. New York: Cambridge
767 University Press.
- 768 — (2016). *The Tyranny of the Ideal*. Princeton: Princeton University
769 Press.