

What help is a steward? Stewardship, political theory and public health law and ethics

JOHN COGGON*

University of Manchester

1 Introduction

Public health law, on almost any estimation, represents an enormously broad field. Some commentators would seek to limit its scope, for example by claiming that it refers solely to the competence of the government's public health department,¹ or even by declaring only a narrow competence of all of government to deal with health issues.² However, it is hard to find non-arbitrary means of avoiding the much wider definitions that account for all socio-political responsibility for health; not simply health *care* or the policy of departments of health, but all practical manifestations of responsibility for health held by “the state, in collaboration with its partners”.³ It is therefore becoming a received wisdom that the concerns of scholars in (public) health law and ethics cannot be addressed simply

* Institute for Science, Ethics and Innovation, School of Law, University of Manchester: email john.coggon@manchester.ac.uk. I am grateful for feedback from audiences who heard earlier drafts of this paper at the following conferences: A Symposium with Professor Roger Brownsword: Super-stewardship in the Context of Public Health, School of Law, University of Sheffield, 14 November, 2009; The David C.Thomasma International Bioethics Retreat, Institut d'Études Politiques de Paris, 21–25 June 2010; Medical law section at the annual conference of the Society of Legal Scholars, University of Southampton, 13–16 September 2010. For feedback on earlier drafts, I am grateful to Soren Holm and Sheelagh McGuinness. Responsibility for any errors is my own. Finally, thanks to the British Academy postdoctoral fellowship scheme and the Wellcome Strategic Programme in the *Human Body, its Scope, Limits and Future* for their support during the development of this paper.

- 1 M Rothstein, “Rethinking the meaning of public health” (2002) 30 *Journal of Law, Medicine and Ethics* 144–9. For further discussion, see also D Goldberg, “In support of a broad model of public health: disparities, social epidemiology and public health causation” (2009) 2(1) *Public Health Ethics* 70–83, and M Rothstein, “The limits of public health: a response” (2009) 2(1) *Public Health Ethics* 84–8.
- 2 R Epstein, “In defense of the ‘old’ public health” (2004) 69(4) *Brooklyn Law Review* 1421–70; R Epstein, “Let the shoemaker stick to his last: a defense of the ‘old’ public health” (2003) 46(3) *Perspectives in Biology and Medicine* S138–59. See also L Gostin and M Gregg Bloche, “The politics of public health: a response to Epstein” (2003) 46(3) *Perspectives in Biology and Medicine* S160–75.
- 3 The phrase is taken from Larry Gostin's celebrated definition of public health law: “Public health law is the study of the legal powers and duties of the state, in collaboration with its partners . . . to ensure the conditions for people to be healthy . . . and of the limitations on the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals.” See L O Gostin, *Public Health Law: Power, duty, restraint* 2nd edn (Berkeley: University of California Press 2008), p. 4.

by reference to, or analysis of, medicine and health care.⁴ A natural upshot of this is that theorists are forced (of course, some may already anyway choose to do this)⁵ to consider wholesale political theories when grounding their analyses: it is impossible to identify or evaluate a “public health problem” without having an idea of the role of the state and the reasons how and why a given health-related issue is a public one and properly subject to policy.⁶ It is for this reason that we increasingly find in the literature distinct evaluative measures for analysis of public health matters. Included in the wide array of proposed models are accounts based in feminism,⁷ contractarianism,⁸ luck egalitarianism,⁹ communitarian civic virtue,¹⁰ capabilities or functionings,¹¹ small state libertarianism,¹² and Millian political liberalism.¹³ As part of this journal’s special issue on “super-stewardship” and the related work of Roger Brownsword, my purpose in the current paper is to provide a critical examination of the stewardship model as applied in regard to public health. I evaluate it both as a concept to assist analyses of public health issues, and as something designed to help guide political decision-makers in issues concerning health.

The essay begins with two foundational sections: the first briefly gives the analytic context, exploring the contention that political theory is the relevant start point in the public health studies to which stewardship is directed; the second explores the idea of stewardship itself as it has been employed in relation to public health. This groundwork allows me then to build a substantive critique of stewardship, which demonstrates strong reasons to doubt it as a useful or robust theory. Although I do not address super-stewardship explicitly, it should be clear that the claims that I make in what follows apply to it too.¹⁴ I consider arguments about the relationship between stewardship and political theory more widely, and question quite what it adds to understandings of political obligation. This permits examination of the crucial question: what do we gain by appealing to stewardship in debates on public health? I focus particularly on the World Health Organisation’s (WHO) *World Health Report 2000*¹⁵ and the Nuffield Council on Bioethics’ report *Public Health: Ethical issues*,¹⁶ which give great prominence to stewardship, and the recent work of

4 This is perhaps most starkly represented in the shift in focus from Norman Daniels’ seminal work *Just Health Care* (Cambridge: CUP 1985) to his *Just Health: Meeting health needs fairly* (Cambridge: CUP 2008). See, especially, the introduction to the latter.

5 Including Roger Brownsword, whose work is considered in the current essay.

6 See the discussion in J Coggon, “Commentary – Public health, responsibility and English law: are there such things as no smoke without ire or needless clean needles?” (2009) 17(1) *Medical Law Review* 127–39.

7 F Baylis, N Kenny and S Sherwin, “A relational account of public health ethics” (2008) 1(3) *Public Health Ethics* 196–209.

8 Daniels, *Just Health*, n. 4 above.

9 S Segall, *Health, Luck, and Justice* (Princeton and Oxford: Princeton UP 2010).

10 B Jennings, “Public health and civic republicanism” in A Dawson and M Verweij (eds), *Ethics, Prevention, and Public Health* (Oxford: OUP 2007).

11 M Powers and R Faden, *Social Justice: The moral foundations of public health and health policy* (Oxford: OUP 2006); J Wolff and A de-Shalit, *Disadvantage* (Oxford: OUP 2007).

12 Epstein, “In defense of the ‘old’ public health”, n. 2 above.

13 J Coggon, *What Makes Health Public? A critical evaluation of moral, legal, and political claims in public health* (Cambridge: CUP 2012).

14 See also the criticisms in S Holm, “From steward to Stuart: some problems in deciding for others”, in the current issue of this journal.

15 WHO, *World Health Report 2000* (Geneva: WHO 2000).

16 Nuffield Council on Bioethics, *Public Health: Ethical issues* (London: Nuffield Council on Bioethics 2007). The Nuffield Council describes itself as “an independent body that examines and reports on ethical issues in biology and medicine”, www.nuffieldbioethics.org/about (last accessed 5 January 2011).

Roger Brownsword, which also claims a role for stewardship.¹⁷ Finally, I consider the relationship between stewardship and paternalism. This last part comes against a backdrop of concerns about “nanny-statism” and positions of cynicism and scepticism towards state regulation of health issues.¹⁸

The conclusion to the analysis is that stewardship offers little in the development of robust analysis in public health law and ethics. It either provides a label for normative conclusions that are unsubstantiated, in which case we need to see a theory rather than a politically attractive term, or it speaks to issues of good governance that are anyway entailed in a theory, in which case little or nothing is gained by an added reference to stewardship. Whilst I acknowledge stewardship’s possible benefits for public ethical discourse, I urge caution against its adoption in analysis, particularly where it obscures rather than exposes important normative argument, and I suggest that it is not a sound reference point as the basis of policy or critical scholarship.

2 Public health and politics

Public health law and ethics are developing as subjects of increasing prominence and importance.¹⁹ Roger Brownsword’s work stands amongst the most significant contributions, offering a rich marriage of concern for coherent moral theory and a deep understanding of law and regulation.²⁰ A large part of that work has been directed to questions in bioethics; at issues relating to rights, liberties and responsibility in regard to health and health decision-making. It is useful, therefore, to introduce the current essay with some brief general reflections on the nature of normative analysis of law and policy in relation to public health.²¹

-
- 17 In particular, see D Beylvel and R Brownsword, “Principle, proceduralism, and precaution in a community of rights” (2006) 19(2) *Ratio Juris* 141–68; R Brownsword, “So what does the world need now? Reflections on regulating technologies,” in R Brownsword and K Yeung (eds), *Regulating Technologies: Legal futures, regulatory frames and technological fixes* (Oxford: Hart 2008); R Brownsword, “Rights, responsibility and stewardship: beyond consent” in H Widdows and C Mullen (eds), *The Governance of Genetic Information: Who decides?* (Cambridge: CUP 2009).
- 18 See e.g. the reception of the Nuffield report in *The Times*: D Rose, “No to the nanny state, but yes to telling us all what to do through ‘stewardship’”, *The Times* (London), 13 November 2007; D Rose, “Higher alcohol tax and no smoking at home – beware of the new nanny state”, *The Times* (London), 13 November 2007.
- 19 See especially D E Beauchamp and B Steinbock (eds), *New Ethics for the Public’s Health* (New York: OUP 1999); N Kass, “An ethics framework for public health” (2001) 91(11) *American Journal of Public Health* 1776–82; A Thompson, A Robertson and R Upshur, “Public health ethics: towards a research agenda” (2003) 9(2) *Acta Bioethica* 157–63; B Jennings, “Frameworks for ethics in public health” (2003) 9(2) *Acta Bioethica* 165–76; S Anand, F Peter and A Sen (eds), *Public Health, Ethics, and Equity* (Oxford: OUP 2004); M Boylan (ed.), *Public Health Policy and Ethics* (Dordrecht: Kluwer Academic Publishers 2004); R Bayer, L O Gostin, B Jennings and B Steinbock (eds), *Public Health Ethics: Theory, policy, and practice* (Oxford: OUP 2006); A Dawson and M Verweij (eds), *Ethics, Prevention, and Public Health* (Oxford: OUP 2007); Gostin, *Public Health Law*, n. 3 above; K Syrett and O Quick, “Pedagogical promise and problems: Teaching public health law” (2009) 123(3) *Public Health* 222–31; L O Gostin, *Public Health Law and Ethics: A reader* 2nd edn (Berkeley: University of California Press 2010); M Freeman, *The Ethics of Public Health*, vols I and II (Farnham: Ashgate 2010).
- 20 The key books explicating Brownsword’s jurisprudential position are D Beylvel and R Brownsword, *Law as a Moral Judgment* (London: Sweet & Maxwell 1986); D Beylvel and R Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: OUP 2001); D Beylvel and R Brownsword, *Consent in the Law* (Oxford and Portland OR: Hart 2007). The enormous body of work he has produced looks at health-related issues, and much else besides.
- 21 These ideas are explored in much greater depth in Coggon, *What Makes Health Public?*, n. 13 above. See also J Coggon, “Assisted dying and the context of debate: ‘medical law’ versus ‘end-of-life law’” (2010) 18(4) *Medical Law Review* 541–63; J Coggon, “Confrontations in ‘genetics’: rationalities, challenges, and methodological responses” (2011) 20(1) *Cambridge Quarterly of Healthcare Ethics* 46–55.

A hallmark of much medico-legal scholarship is the prominence given to moral theory.²² Yet, as the focus has moved beyond the doctor/patient relationship, and wider disciplines such as “healthcare law”, “health law”, and “public health law” have developed, it has become apparent that often the more pertinent school of normative inquiry is political rather than moral philosophy. Thus, whilst theorists may seek to derive normative conclusions, for example, from Kantian moral theory – or, as in Brownsword’s work, that of Alan Gewirth – they recognise the need for some “meta-theory”; a bridge between what morality “says” and the proper scope and manner of legal regulation, be it coercive or otherwise. Although a good deal of focus is directed to understanding the *moral* rights and wrongs of a given scenario, practical philosophical discussion often falls on the public policy implications of troublesome normative questions. Analysts want to know what freedoms and duties *citizens* should have; what responsibilities *the state* has to structure its institutions and its health-related policy; what the limits are to *professional obligations*; and so on. It is trite to note that there need be no direct correlation between moral and legal obligation: we may have legal rights that are morally uninteresting, or be legally free to do things that are in contravention of many accounts of morality.²³ And a commitment to morality does not demand a complete matching of moral and legal obligations. Brownsword, who is not a legal positivist, argues that when it comes to regulation it is better that people are not always forced to do right as this forestalls their potential to learn and choose to act as responsible moral agents.²⁴ So, whilst (indeed because) he is a committed and consistent advocate for Gewirthian moral theory,²⁵ his analyses of law and regulation assume a commitment to related but different concerns than just ensuring that moral right be done. Rather than simply direct arguments at moral agents to assist their moral deliberations, his position speaks to the state, and assists understandings of the proper scope, reach and ends of law and regulation. To be clear from the start, this is part of what he describes as the state’s stewardship role within a system of Gewirthian rights. And such analysis is an exercise in political philosophy.

Likewise, regardless of putatively “private” interactions, for example, between doctor and patient, whatever “public health” might mean, it necessarily gives rise to political ideas. Any normative analysis of a public, or of matters being public, presents questions in politics. It is for this reason that works in public health law and ethics position themselves (wittingly or otherwise) in the field of political philosophy.²⁶ This is true regardless of where a theorist happens to sit on the political spectrum. Concepts of the state and legal rights and responsibilities are always at least in the background, if not presented as central concepts. The Nuffield Council on Bioethics’ report on ethics and public health makes this point starkly. Under the heading “Ethical issues – *The context of the debate?*” it says:

Public health measures raise complex questions about the relationship between the state and individuals and organisations that are affected by its policies. They also raise questions about the duties that individuals have towards each other. A substantial body of literature in political philosophy examines these relationships of duties and entitlements . . .²⁷

22 K Veitch, *The Jurisdiction of Medical Law* (Aldershot: Ashgate 2007).

23 Seminally, on the separation of law and morality see H L A Hart, *Law, Liberty, and Morality* (Stanford: Stanford UP 1963).

24 See e.g. R Brownsword, “So what does the world need now?”, n. 17 above, pp. 40–1, and the discussion in section 5, below.

25 A Gewirth, *Reason and Morality* (Chicago: University of Chicago Press 1978).

26 See Coggon, *What Makes Health Public?*, n. 13 above, chs 7 and 8.

27 Nuffield Council, *Public Health*, n. 16 above, p. xv.

The report explicitly contrasts political philosophy and the bioethics literature, and suggests that this latter body of scholarship is not equally pertinent to evaluations of public health. Instead it states that: “The central issue in public health is the extent to which it is acceptable for the state to establish policies that will influence population health.”²⁸ In order to understand this, the report takes for granted the existence of a state, and considers its possible manifestation from extremes of libertarianism to extremes of collectivism.²⁹ Along this spectrum are increasingly invasive roles for government, with the mandate of political institutions deriving from distinct political philosophical positions; for example, libertarian “natural rights”, social contract models, or systems directed to protect collective welfare. The authors of the report purport to position themselves some way along the spectrum, claiming that their position can be characterised by the concept of stewardship. They seek to distinguish this from the liberalism of John Stuart Mill,³⁰ and urge that it provides a happier balance between too much individualism at an indifferent extreme of minimal state responsibility, and too much meddling at an extreme of nanny-statism. The following section gives an account of stewardship as it has been developed in relation to public health.

3 Stewardship in public health

The concept of stewardship is establishing a place in academic public health law and ethics, and in public policy. It is important to note and distinguish the independent existence of robust theological concepts of stewardship, which assume significance in environmental ethics. In that context, stewardship represents the idea that humanity is steward over the earth; rather than meaning the world is ours to do with as we please, it gives expression to the principle that we must be responsible stewards of God’s creation. As Robert Lannan puts it, “human beings are given the dual responsibilities of serving as stewards over the environment, and as agents acting on God’s behalf in the ongoing process of creation and redemption”.³¹ In this sense, humankind is under an obligation to ensure the protection and perfection of itself and its environment. Beyond environmental ethics, it should be noted too that theological arguments about stewardship have been invoked in relation to medical ethics,³² and non-theological notions of stewardship have also been advanced in relation to medical ethics, medical resource allocation decisions and good medical practice.³³ In the current essay, I do not seek to address any of these uses of stewardship, and in particular would emphasise the irrelevance of what follows to theological concepts of stewardship and environmental ethics. My focus is on the new incarnations of stewardship, which may be attributed to the WHO, and which have since found champions within the Nuffield Council on Bioethics and the King’s Fund,³⁴ and in the academic work

28 Nuffield Council, *Public Health*, n. 16 above, p. xvi.

29 See *ibid.* ch. 2.

30 J S Mill, *On Liberty*, E Alexander (ed.) (Peterborough, Canada: Broadview 1999).

31 R W Lannan, “Catholic tradition, and the new Catholic theology and social teaching on the environment” (1999) 39(4) *Catholic Lawyer* 353–88, pp. 365–6. See also B Waters, “Christian theological resources for environmental ethics” (1995) 4(8) *Biodiversity and Conservation* 849–56.

32 See e.g. R L Sevensky, “The religious foundations of health care: a conceptual approach” (1983) 9(3) *Journal of Medical Ethics* 165–9.

33 See e.g. D C Thomasma, “Stewardship of the aged: meeting the ethical challenge of ageism” (1999) 8 *Cambridge Quarterly of Healthcare Ethics* 148–59.

34 The King’s Fund describes itself as a body that “seeks to understand how the health system in England can be improved” and “shape policy, transform services and bring about behaviour change”, www.kingsfund.org.uk/about_us/ (last accessed 5 January 2011).

of Roger Brownsword. As I will show, these accounts of stewardship present themselves with an incompleteness, superficiality, or superfluity that renders them problematic.

In the literature relating to public health, stewardship has been given as the basis of governmental responsibility for the health of the population. The principal source is the WHO's *World Health Report 2000*.³⁵ The WHO defines stewardship in, amongst others, the following ways:

The careful and responsible management of the well-being of the population – stewardship – is the very essence of good government. The health of people is always a national priority: government responsibility for it is continuous and permanent.³⁶

Stewardship is ultimately concerned with oversight of the entire system, avoiding myopia, tunnel vision and the turning of a blind eye to a system's failings.³⁷

[Drawing from the dictionary definition]: *the careful and responsible management of something entrusted to one's care*. People entrust both their bodies and their money to the health system, which has a responsibility to protect the former and use the latter wisely and well . . . A large part of stewardship consists of regulation, whether undertaken by the government or by private bodies which regulate their members, often under general rules determined by government. But the concept embraces more than just regulation, and when properly conducted has a pervasive influence on all the workings of the system.³⁸

Governments should be the “stewards” of their national resources, maintaining and improving them for the benefit of their populations. In health, this means being ultimately responsible for the careful management of their citizens' well-being. Stewardship in health is the very essence of good government. For every country it means establishing the best and fairest health system possible. The health of the people must always be a national priority: government responsibility for it is continuous and permanent. Ministries of health must take on a large part of the stewardship of health systems.

Health policy and strategies need to cover the private provision of services and private financing, as well as state funding and activities. Only in this way can health systems as a whole be oriented towards achieving goals that are in the public interest. Stewardship encompasses the tasks of defining the vision and direction of health policy, exerting influence through regulation and advocacy, and collecting and using information. At the international level, stewardship means influencing global research and production to meet health goals. It also means providing an evidence base to guide countries' efforts to improve the performance of their health systems.³⁹

In a King's Fund report, written by Karen Jochelson and entitled *Nanny or Steward? The role of government in public health*, stewardship is described as follows:

Legislation brings about changes that individuals on their own cannot, and sets new standards for the public good. Rather than condemning such activity as nanny statism, it might be more appropriate to view it as a form of “stewardship”. Stewardship implies that government has a responsibility for protecting national health, and to serve in the public interest and for the public good. It suggests a

35 WHO, *World Health Report 2000*, n 15 above.

36 *Ibid.* p. x.

37 *Ibid.* p. xi.

38 *Ibid.* p. 45.

39 *Ibid.* p. 118.

protective function, where individuals are protected from harm by others and sometimes from themselves. Stewardship implies that paternalistic government is acceptable under certain conditions, and the debate should focus both on defining these conditions and the likely benefits.⁴⁰

Finally, the Nuffield Council on Bioethics, in its report *Public Health: Ethical Issues*, presents stewardship in the following way:

The concept of “stewardship” is intended to convey that liberal states have a duty to look after important needs of people individually and collectively. It emphasises the obligation of states to provide conditions that allow people to be healthy and, in particular, to take measures to reduce health inequalities. The stewardship-guided state recognises that a primary asset of a nation is its health: higher levels of health are associated with greater overall well-being and productivity.⁴¹

The Nuffield Council report does not provide a clear explanation of stewardship’s normative foundations. It does, however, offer some claims about the concept as a political framework. Most notably, it gives an account of Millian liberalism, which echoes readings found in much of the bioethics literature more than it does some interpretations or developments of the ideas expressed in *On Liberty*.⁴² The report suggests that sometimes Mill’s liberalism is to be recommended and incorporated in the model it advances, but that, on occasion, Millian liberalism is to be set aside because it fails to address important concerns. These concerns are stated rather than clearly derived from an explicated political theory. Although there is no obvious means of mediating between the demands of its articulation of Millian liberalism and the alternative concerns, it does list “the core characteristics that public health programmes carried out by a stewardship-guided state should have”:⁴³

Concerning goals, public health programmes should:

- aim to reduce the risks of ill health that people might impose on each other;
- aim to reduce causes of ill health by regulations that ensure environmental conditions that sustain good health, such as the provision of clean air and water, safe food and decent housing;
- pay special attention to the health of children and other vulnerable people;
- promote health not only by providing information and advice, but also with programmes to help people to overcome addictions and other unhealthy behaviours;
- aim to ensure that it is easy for people to lead a healthy life, for example by providing convenient and safe opportunities for exercise;
- ensure that people have appropriate access to medical services; and
- aim to reduce unfair health inequalities.

In terms of constraints, such programmes should:

- not attempt to coerce adults to lead healthy lives;
- minimise interventions that are introduced without the individual consent of those affected, or without procedural justice arrangements (such as democratic decision-making procedures) which provide adequate mandate; and

40 K Jochelson, *Nanny or Steward? The role of government in public health* (London: King’s Fund 2005), p. 1 (reference omitted).

41 Nuffield Council, *Public Health*, n. 16 above, pp. xvi—xvii.

42 See J Coggon, “Harmful rights-doing? The perceived problem of liberal paradigms and public health” (2008) 34(11) *Journal of Medical Ethics* 798–801.

43 Nuffield Council, *Public Health*, n. 16 above, p. 26.

- seek to minimise interventions that are perceived as unduly intrusive and in conflict with important personal values.⁴⁴

It is not obvious from the Nuffield report's explanations quite why Millian liberalism cannot itself be read to accommodate these goals.⁴⁵ More problematically, the picture it presents of stewardship attaches to *conclusions* about the state's role rather than to reasons for accepting certain things to be the state's function. The report offers the following understanding of "the liberal", who apparently would accept the conclusions:

The liberal agrees with the libertarian that the protection of individual freedom constrains the state's authority. Nonetheless, the liberal rejects the libertarian thesis that legitimate state power is restricted to protection of these freedoms, and agrees with the social contract version of collectivism that the state's power may rightly be used to advance the welfare of its citizens.⁴⁶

There thus seems to be a sense in which the concept of stewardship will only appeal to those who already accept it: libertarians, for example, will not be convinced to change their minds simply because "the liberal" disagrees with them.⁴⁷ And there does not seem to be any argument provided to persuade them otherwise.

In its various presentations, then, stewardship is a concept whose normative basis is opaque, but whose implications have a degree of clarity. Some readers may not find it terribly illuminating. It tells us that the state (and probably in all three cases given above this should be read as the liberal-democratic state) exists for the good of citizens. Perhaps the most controversial aspect of the concept is the claim that health should be singled out as a particularly strong priority.

Having levelled these criticisms, it is important to acknowledge that an immediate response might be that they miss the point about the nature of the documents from which the definitions are drawn. Reports aimed at the public, governments, or other policymakers are necessarily *not* sources of philosophically robust normative theory. Jonathan Montgomery, who was a member of the working group on the Nuffield Council report, makes a forceful and convincing argument against critics (including me),⁴⁸ urging acceptance of the distinction between "public ethics" and scholarly works in ethics.⁴⁹ Montgomery stresses two particularly strong reasons why it would be unreasonable to expect in reports, such as those of the Nuffield Council, the nature and quality of argument that one would find in an academic work. First, there is the distinct collaborative nature of committees that "do" public ethics. Montgomery explains the necessary processes of compromise and the formal and political constraints that committees face. Regarding

44 Nuffield Council, *Public Health*, n. 16 above, p. 26.

45 See Coggon, "Harmful rights-doing?", n. 42 above.

46 Nuffield Council, *Public Health*, n. 16 above, p. 14.

47 Thus, an account such as Robert Nozick's would remain unaffected by the claims made in the Nuffield report because they do not answer for the breach of the rights whose existence Nozick asserts: R Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell 1974). This criticism applies *mutatis mutandis* to any alternative political ideology.

48 In part Montgomery's paper is a response to a paper of mine that is critical of the report for not providing a stronger theoretical position. In my paper, I suggest the liberalism of Joseph Raz is an example of the type of political theory that the Nuffield Council might have adopted, instead of the unclear concept of stewardship: see Coggon, "Harmful rights-doing?", n. 42 above. Two other members of the working party are co-authors with the working party's secretary of another paper that responds to my argument: T Baldwin, R Brownsword and H Schmidt, "Stewardship, paternalism and public health: further thoughts" (2009) 2(1) *Public Health Ethics* 113–16. This article is considered below.

49 J Montgomery, "Reflections on the nature of 'public ethics'" (in progress). I am grateful to Professor Montgomery for sharing with me an early draft of this paper, and for discussions we have had on this issue.

compromise, he notes that final formulations may be agreed upon even if they are reached by different committee members for different reasons. Second, regarding audience, he notes the need to account for and respond to the prevalent policy climate, to express ideas in a way that tracks well the prevailing discourse, and to consider the different addressees the reports will have, including a non-expert public.

Montgomery offers sound reasons to accept the working party's wisdom in selecting a catchy label such as "stewardship", even where it might seem a simplistic substitute for substantive academic argument: "Such a summary is necessary to facilitate debate in a media context that favours dramatic images and soundbites over subtle and protracted arguments."⁵⁰ Rhetoric, in short, is crucial to public impact, and academic critics of concepts presented in public documents must remain sympathetic to the real politics of public discourse about ethics. Expectations must be set against the contexts of the process, form and purpose of reports, such as those considered directly above. To quote Montgomery once more:

It is entirely right for academic work to draw attention to the shortcomings of pronouncements in order to test and refine them. However, it is also appropriate to note that the context of public communication introduces different aspects to the challenge of doing ethics. "Public ethics" needs to pay more attention to the way in which its contribution will be understood than writing for academic colleagues because the audience does not share the same technical vocabulary or canons of interpretation that the community of scholars has developed.⁵¹

Accepting Montgomery's position, I remain committed to a critical wariness of stewardship and consider it important to express my views for two reasons. First is what may be called a "real world objection". Ideas taken to be subsumed within the label "stewardship" are geared to affecting people in real life. Ideological stances are being sold to governments on the back of supposedly sound intellectual argument. In the case of the Nuffield Council, for example, there is the tangible and reasonable sense that the report is academically rigorous, given that its authors are highly noted academic figures.⁵² This quite properly gives a sheen to the claims made in the report, and allows other bodies – such as the National Institute for Health and Clinical Excellence (NICE)⁵³ – to cite it as an authoritative statement, and introduce it directly as a defensible normative basis for the policy recommendations that NICE makes, and which are acted upon by government. Given this, it is crucial to expose weaknesses in, and problems with, the concept.

My second concern relates to scholarship. The concept of stewardship is taking hold in some academic circles,⁵⁴ and this heightens the demand for careful scrutiny. Politicians may find appeal in attractive names without too much concern about substance. In the usage of Jochelson, considered above, "steward" over "nanny" seems to be better packaging. But scholars, in contrast, need to know what they are dealing with before they go and embrace a supposedly new concept. If regulatory theorists and other academics take for granted the

50 Montgomery, "Reflections", n. 49 above.

51 Ibid.

52 The working group, listed at p. ix of the report, includes, amongst others, esteemed professors of philosophy, law, health economics and primary care.

53 See A Killoran and P White, "NICE public health guidance" (2010) 32(1) *Journal of Public Health* 136–7. NICE works independently of government, basing its decisions on the best available expert evidence, to give guidance and recommendations to the National Health Service on new and existing medicines, treatments and procedures, and the treatment and care of people with specific diseases and conditions: see further www.nice.org.uk/aboutnice/ (last accessed 19 January 2011).

54 Note, for example, its employment in other papers at the conference where the current paper was first presented: "A Symposium with Professor Brownsword", n* above.

soundness of stewardship, and carry it into their analyses, they risk producing scholarship whose normative foundations are to be doubted. I will therefore continue in this section by exploring in greater detail stewardship in public health.

Readers unfamiliar with dominant theories in medical ethics might be interested to learn that part of the reason that a “repackaging” exercise for political liberalism was considered necessary lies in the current state of the field of bioethical scholarship. Conceptions of autonomy and liberty are often grossly impoverished, ill-conceived, or ill-equipped to deal satisfactorily with the sorts of social problems they are supposed to resolve.⁵⁵ Conceptual caricatures, for example, of Mill’s treatise *On Liberty*, dominate the literature, and doubt is cast on the original’s capacity to serve as a sound piece of political theory. In the face of a near hegemony of unrefined concepts of “individual autonomy”, theorists and policy-advisers sense a need for a conceptual sea-change.⁵⁶ Whilst in some cases the suggested reforms are excellent, it is important to accept the need for rigour in response to problems of hyper-atomisation or hyper-individualism. I have elsewhere explored the difficulties with responses to this individualism that rest heavily on normative constructs of “public health”.⁵⁷ My concerns about stewardship are similar. It is not satisfactory to be told simply that public health demands that society be structured in such-and-such a manner, as if public health has the “authority” or “jurisdiction” straightforwardly to do that. Equally, there is no value or strength in being told that the steward state, as described in the passages above, straightforwardly and compellingly “means” that society ought to be regulated in a particular way. It cannot do this, especially when it is a concept that is presented as an incompletely articulated theory.

To find more substantial meaning, therefore, and to try to discern the reasons for embracing stewardship, I turn to Richard Saltman and Odile Ferroussier-Davis, who have provided perhaps the most useful exploration of the concept in the light of the WHO report. Saltman and Ferroussier-Davis allude, in essence, to a governmental *need* to be freed from various constraints, which may be categorised as follows:

1. what the authors label “traditional theories”, which focus “on inherent limitations of state organization and behaviour”;
2. economic theories that posit that “civil servants never serve the state, but instead pursue only their own rational self-interest”;
3. disagreements over the role and function of civil servants;
4. and, in their words “[m]ost significantly”, the constraint (one imagines that it is a constraint) of the need to make populations healthier.⁵⁸

Effectively, Saltman and Ferroussier-Davis suggest that there is a certain end point that states should aim towards, and they consider stewardship to be the best means to reach it. This attitude is reflected in the other literature on stewardship in health policy. It seems to be based on something approximating the following reasoning:

55 See M Brazier, “Do no harm: do patients have responsibilities too?” (2006) 65(2) *Cambridge Law Journal* 397–422.

56 See W Gaylin and B Jennings, *The Perversion of Autonomy: Coercion and constraints in a liberal society* 2nd edn (Washington DC: Georgetown UP 2003); B Jennings, “Public health and liberty: beyond the Millian paradigm” (2009) 2(2) *Public Health Ethics* 123–34.

57 J Coggon, “Does public health have a personality (and if so, does it matter if you don’t like it)?” (2010) 19(2) *Cambridge Quarterly of Healthcare Ethics* 235–48.

58 R B Saltman and O Ferroussier-Davis, “The concept of stewardship in health policy” (2000) 78(6) *Bulletin of the World Health Organization* 732–9, p. 732.

1. we know what are attractive ends: people generally are in better health, social determinants of health inequalities are reduced, etc;
2. we know that we fail in reaching these ends as a logical upshot of prevalent norms in political philosophy; so
3. we need a new theory that tells us that the attractive ends are good and lets us reach them – and it is best labelled “stewardship”.

Saltman and Ferroussier-Davis describe the history of stewardship as a normative concept, drawn first from theological perspectives, and latterly from environmental ethics. This has led to discussions in political theory where we move:

[B]eyond solely process-based notions of the state as an efficient agent to substantive-based ones in which the state is an ethically motivated representative of the popular will and the common interest.⁵⁹

They also say that stewardship is to be distinguished from the technocratic nature of the European welfare state, which is unable to be “simultaneously ethical and efficient”.⁶⁰ In short:

The positive dimensions of stewardship are predominantly tied to its potential for improving policy outcomes. The core contention is that while focusing the policy process on traditional principal–agent relationships can create an efficient state, it is possible to create a state that is not only efficient but good by emphasizing normative, ethically oriented expectations of stewardship. Stewardship, at its best, could provide an organizing principle for power in society transcending economics to base itself on the common interest.⁶¹

Stewardship is seen as a communitarian, pluralist, contractarian, democratic theory of the state. Yet little theorising has been done on the back of stewardship: *it* tells us nothing new. I would note that the final sentence in the quoted passage could as well have read “Politics, at its best . . .”. We might also be wary of observations such as the following:

A stewardship approach based in developing the collective health commons fits well with the sense of mission that has traditionally been the central motivation of health care providers. For physicians, this mission-oriented framework lies at the core of the Hippocratic oath. The notion of stewardship, if properly developed, is also consistent with an evidence-based health policy framework.

Surely the authors are correct, but the dice are doubly loaded here. First, it is less a happy coincidence and more a pre-ordained certainty that stewardship will present the same drivers as the so-called “mission” in public health if we hold that it is *based* on that same mission. Second, we are told that the “notion” of stewardship is yet to be developed, but that we already know that it is consistent with these worthy things. In other words, if in practice it fails to provide an efficient and good state, it is only because it has been wrongly developed.

To conclude this section, it is evident that within the public health literature stewardship is best seen as a means of packaging a set of conclusions rather than as a means of coming to them. This is a profound weakness, and leaves us in need of a defensible theory. The potential influence of documents that endorse stewardship is considerable. Its advocates seek to distinguish it, prescriptively guide, and yet the concept awaits substantive conceptual content. In the following section, I will develop this point by examining the employment of stewardship in the Nuffield report and in the scholarly work of Roger Brownsword.

59 Saltman and Ferroussier-Davis, “The concept of stewardship”, n. 58 above, *ibid.* p. 734.

60 *Ibid.* pp. 734–5.

61 *Ibid.* p. 735.

4 What does stewardship add to public health law and ethics?

We have seen how stewardship is defined in public health documents, and noted its popularity amongst policy bodies: on the international stage, WHO; nationally, NICE. It has also been embraced by bodies that offer ethical advice to policymakers, such as the Nuffield Council and the King's Fund. And within academe, it has been brought into works discussing public health questions, most influentially in the recent scholarship of figures including Roger Brownsword. Having considered the concept as it features in various public sources, my focus in the remainder of this paper is on the concept as presented in the Nuffield Council's report on public health ethics, and in Brownsword's academic work. It is interesting to begin by distinguishing the problems each has. In the case of the Nuffield report, stewardship is problematic because of the superficiality with which it is presented. In Brownsword's independent work, the problem by contrast is not superficiality, but superfluity. Where he discusses stewardship, he is referring to functions of the state that are already comprised in his wider theoretical position. Whilst there is no intrinsic problem with his description of the stewardship role of regulators, stewardship itself is not a basis of regulatory justification. Rather, state responsibilities are a logical upshot of his already clearly articulated theory.

In a defence of the Nuffield report, Tom Baldwin, Roger Brownsword and Harald Schmidt say that stewardship:

[I]n its shortest form can be understood as stating that governments have a responsibility to promote, protect and preserve the infrastructural conditions that are essential to community life.⁶²

This iteration is interesting for two reasons. First, because it betrays the issue at the core of my concern: stewardship is a statement, not a theory. Indeed, in concession to this line of criticism, they also say that:

[T]he stewardship model does not claim to be the heart of a comprehensive moral theory, nor does it attempt to be the last word on the question of "what is a robust normative theory for public health ethics?"⁶³

Their iteration is interesting, second, because what stewardship states is pretty much the central point of philosophical inquiry into normativity and liberal political obligation.⁶⁴ It does not seem peculiar to advocates of stewardship, unless they are identified so blandly and widely that their title becomes redundant, that they should be concerned with governments having to sustain community life.⁶⁵ As explained here, stewardship is at most an aspect of a wider political philosophy, but there can be no doubting that all manner of inquiry on the political spectrum described in the report relates to the morally defensible

62 Baldwin et al., "Stewardship", n. 48 above, p. 116.

63 Ibid. p. 116.

64 Thomas McPherson, for example, says: "Politics is concerned with the State and with our relations to the State and its to us – in the liberal tradition with how to achieve peace and security and our interests, and with how to achieve 'more commodious living.'" T McPherson, *Political Obligation* (London: Routledge & Kegan Paul 1967), p. 76. Regardless of whether a reader is convinced by McPherson's analytic separation of moral and political obligation, this categorisation must be widely acceptable.

65 It should be noted that some may object to my characterisation here. Tristram Engelhardt, for example, argues that community and society are separate concepts. His point seems to be directed at communitarian theories that treat political society and moral community as the same thing: H T Engelhardt, "Health care reform: a study in moral malfeasance" (1994) 19(5) *Journal of Medicine and Philosophy* 501–16, pp. 509–10. My use of community does not entail a commitment to such a view (i.e. a conflation of moral and political community), and relates rather to the community that is associated through a shared political authority. In this sense, even narrow libertarian models that would only protect people's "basic rights" concern themselves with sustaining community.

maintenance of community life. As far as the Nuffield Council report goes, the overarching philosophy is not clearly articulated, and this makes it very hard to assess either its coherence, or the role of stewardship within it. As seen in the previous section, it provides little more than a list of putatively important things, with no means of gaining substantial insight into how important each is, what ought to be done to prioritise them, or how to mediate conflicts between them and *other* important things.

I am therefore sceptical of the supposed force in the language found in the report. For example, at para. 2.41:

The concept of stewardship means that liberal states have responsibilities to look after important needs of people both individually and collectively. Therefore, they are stewards both to individual people, taking account of different needs arising from factors such as age, gender, ethnic background or socio-economic status, and to the population as [a] whole, including both citizens of the state, and those that do not have citizen status, but fall under its jurisdiction. In our view, the notion of stewardship gives expression to the obligation on states to seek to provide conditions that allow people to be healthy, especially in relation to reducing health inequalities.

It is not unsympathetic academic rigour to note that stewardship does not, and cannot, *mean* anything that tells states what to do, especially as it is presented here. If, as the report says, it gives expression to an obligation of states, it is that obligation and not the expression of it that means that states must do x or refrain from doing y. Unfortunately, I do not find in the Nuffield report sufficient presentation of the basis of this political obligation. Rather, there is a nice word that we are told summarises some apparently appealing conclusions. It is easy to see why this might be attractive to governments and policymakers, but it is not enough to support arguments in favour of general or special obligations.

By interesting contrast, in the case of Brownsword's work this criticism is not applicable. Drawing faithfully from the moral philosophy of Alan Gewirth, Brownsword describes in careful detail the normative foundations of legal rights and responsibilities, their relation to concepts such as dignity and human rights, and the attendant role of the state. But here again we find the problem with stewardship doing no work. Brownsword takes it as analytically true that the state should do good. But this analytic truth undermines any need to appeal to stewardship. To gain content to the theory we need only look to Gewirth (or Brownsword's interpretation of Gewirth). Put another way, the state learns of its obligations from a proper interpretation of Gewirthian theory, not from stewardship. The force of reasons for seeking to draw from stewardship is nullified entirely if we accept the view that is taken *ex ante* by Brownsword. He considers and dismisses the concern that:

[L]icens[ing] the state to intervene on the grounds that the act in question might be damaging to rights-holders or *might* be damaging to the community is to put a considerable trust in both the sound judgment and the good faith of the state.⁶⁶

His dismissal comes because:

In a *community of rights* . . . it is an analytical truth that . . . the state simply will not act in bad faith or in a way that is clearly incompatible with the community's rights or commitments.⁶⁷

66 Brownsword, "Rights, responsibility and stewardship", n. 17 above, p. 119.

67 *Ibid.*

The upshot is that the state is already a steward rather than in a position where it has to *assume* the stewardship role. It is naturally benevolent, and thus stewardship tells it nothing that it does not already know.

As noted above, there is nothing intrinsically objectionable with Brownsword's using the stewardship metaphor: the important thing – providing a normative theory – is clear and present in his work. His appeals to a state having stewardship functions are well captured in Christopher McMahon's observation that "political society is a peculiarly human phenomenon".⁶⁸ In moral communities, or in "aspirant moral communities",⁶⁹ state regulation is needed to overcome "co-ordination problems", to provide needed certainty, and to maintain the community's commitment to morality.⁷⁰ Again to quote McMahon, the "*raison d'être* of political society is to overcome the mutual frustration of moral purposes which ensues when autonomous moral agents follow their own conceptions of the public good".⁷¹ Thus, I do not doubt the importance of the stewardship function presented by Brownsword, but describe it as superfluous in the sense that it offers nothing foundational to a normative political theory, and would be entailed within Brownsword's theory (and other normative political theories), regardless of the use of the stewardship label. Brownsword is right that states must take seriously their stewardship responsibilities. Equally, it is important that the content of these be explored by academics, policy advisers and policymakers. However, whilst there is general agreement that a "state stewardship role" exists, there is radical disagreement about its basis and the means of understanding its content. This latter is achieved through normative analysis. The specifics of having a normative position should not be sidestepped by reference to general agreement about states having a stewardship function. The important aspects of Brownsword's analysis are found in the Gewirthian theory, and it is to that and not the label "stewardship" that theorists should trace political obligation if they agree with Brownsword. In other words, people could agree that stewardship roles are needed whilst fully rejecting Gewirthian morality and thus, potentially, the sorts of substantive roles that Brownsword describes. This is not to claim that political decision-making requires everyone to agree on the same conclusion for the same reasons.⁷² But it is to say that reasons are needed, and those are not found in stewardship. At most, it presents a general term for a generally accepted view of part of the state's role. So, describing the state as having a "stewardship responsibility"⁷³ is not problematic, but talking about "the stewardship version of liberalism" is.⁷⁴ It is widely accepted that states have stewardship roles, but this wide agreement is not reducible to a single understanding of liberalism.

In summary, there is good reason to believe that stewardship as it is employed in the public health law and ethics literature offers nothing, and possibly obscures a great deal. The Nuffield report provides an example of stewardship being used in a superficial manner. Rather than provide reasons in support of an ethical foundation for public health policy, stewardship is simply given as a title to encapsulate a commitment to conclusions whose support is not articulated. Readers are invited to accept stewardship because they (should) agree with the list of priorities articulated in the report. But stewardship offers nothing new

68 C McMahon, "Autonomy and authority" (1987) 16(4) *Philosophy and Public Affairs* 303–28, p. 325.

69 Brownsword, "Rights, responsibility and stewardship", n. 17 above, p. 122.

70 Beyleveld and Brownsword, "Principle, proceduralism, and precaution", n. 17 above; Brownsword, "Rights, responsibility and stewardship", n. 17 above, p. 120.

71 McMahon, "Autonomy and authority," n. 68 above, p. 325.

72 See C Sunstein, *Legal Reasoning and Political Conflict* (Oxford: OUP 1998).

73 E.g. Brownsword, "Rights, responsibility and stewardship", n. 17 above, p. 124.

74 *Ibid.* p. 118. This description is given in reference to stewardship as presented in the Nuffield report.

and, of course, if readers already agree about the state's obligations then they are not afforded further insight by the label. Instead, they are given a label that they can further employ in their own analyses, and possibly in claim of greater "jurisdiction".⁷⁵ In contrast with this, Brownsword's use of stewardship provides an example of its being used superfluously. Brownsword's prior normative commitments and analytic givens already spell out the foundation, nature and scope of political obligation. In this case, it is just not clear what is gained by reference to stewardship. At most, reference to stewardship serves as a reminder that the state has certain paternalist and co-ordination roles. Whilst it is not objectionable for these to be labelled "stewardship", the interesting and important normative work comes from the prior theory. In Brownsword's work, that theory is the principle of generic consistency, and his understanding of the state's roles and obligations is derived from that, not from stewardship. Having reached these conclusions, I will consider one more issue: whether stewardship can meaningfully be said to present a distinct understanding to state paternalism.

5 Stewardship and paternalism

We have seen that part of the attraction of the term stewardship is its rhetorical appeal. It allows the repackaging of ideas that might otherwise be labelled nanny statist or imply undue paternalism. The Nuffield report, however, seeks to distinguish stewardship and paternalism, probably because the latter is something of a dirty word in much of the bioethical literature. Although there are overlaps, there is an important conceptual distinction between paternalism and stewardship. Unlike paternalism, stewardship presents itself as (part of) a political theory, even where its advocates hold that it is not a complete normative theory. Stewardship permits (demands even) paternalism. Paternalism by contrast does not permit paternalism, or anything else. Rather, it is an instance of something that may be permissible given a background theory (such as stewardship would purport to be). Although a definition of paternalism may contain normative criteria – such as person A, or state A, acts to further the interests of person B – *ex ante* we know nothing of the instances in which it is valid; we just know what it is. Stewardship, by contrast, is supposed to help assessments of the instances when paternalism may be justified. Stewardship requires a normative defence, whereas paternalism in the abstract just offers something whose application in any instance would warrant normative justification. This point has been made by Angus Dawson and Marcel Verweij,⁷⁶ who say:

First, paternalism is a concept, not a normative position. Usually . . . the term paternalism is used to describe specific types of action, performed for specific reasons. It is not a model, theory or view in any sense . . . Second, whilst, paternalistic actions may involve coercion, it seems a category mistake to claim [as the Nuffield report does] that paternalism supports coercion . . .⁷⁷

Baldwin, Brownsword and Schmidt respond that Dawson and Verweij's criticism is invalid because it works from a different understanding of paternalism to that employed in the Nuffield report, which follows Gerald Dworkin, saying:

[P]aternalism is: "interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm".⁷⁸

75 See e.g. the perspectives in L Marks, S Cave and D J Hunter, "Public health governance: views of key stakeholders" (2010) 124 *Public Health* 55–9.

76 A Dawson and M Verweij, "The steward of the Millian state" (2008) 1(3) *Public Health Ethics* 193–5.

77 *Ibid.* p. 194.

78 Baldwin et al., "Stewardship", n. 48 above, p. 115.

In this sense, it might seem that paternalism is itself both the concept and the background theory, i.e. it contains its own justificatory criteria. However, we may not be convinced that this provides a defence against Dawson and Verweij's point. This becomes clearer if we consider more of Baldwin, Brownsword and Schmidt's argument. They say:

[I]t is correct that actions that fall under the concept provided by Dworkin may be motivated by the *intention* of "wanting to do good for another person". But it would be a mistake to reduce paternalism to this one sense. It is not uncommon that what is perceived to be good for another person by one party is enforced against that person's will, and it is precisely this overriding of 'individuals' wills that makes acts of paternalism problematic – irrespective of whether or not they are supported by a comprehensive normative theory.⁷⁹

This reasoning is troublesome because in being asked to accept stewardship we are invited to agree that at times – i.e. when there is a comprehensive normative theory that supports it – paternalist measures are acceptable. Acts of paternalism are of necessity non-problematic if they are supported by a comprehensive normative theory. For an analyst such as Robert Paul Wolff, paternalism – indeed any political obligation – is necessarily unjustifiable.⁸⁰ But for an analyst who supports a comprehensive theory that "deproblematises" paternalism, there is no concern. And stewardship is intended to represent a view that paternalism is not always problematic. Nevertheless, Baldwin, Brownsword and Schmidt go on to say:

The Council hence stands by the view that Dworkin's characterisation is an appropriate one. Equally it stands by the view that what is needed is an approach that endorses qualified paternalism that goes beyond both libertarian paternalism and the restrictive liberalism that is based on simple Millian accounts. This is what has been set out as the stewardship model.⁸¹

Despite this claim, it seems more accurate to say that the Nuffield Council is not endorsing a "qualified paternalism"; rather, it is attempting to articulate the instances when paternalism is justified. That requires a sound normative model, and, as shown above, it is not provided by stewardship.

As these problems combine, there is little left to recommend stewardship. To understand when, why, and how political obligation is legitimate, we need a substantial theory. Even so, the idea has gained appeal for regulators and those working in regulatory theory and, before concluding, I would like to explore a point made by Brownsword. In this there is reference, albeit tacit, to a problem that is noted in various ways in different works that consider paternalism: the sometimes absent rational self within each of us that can be replaced by the irrational, perhaps compulsive or selfish self. In discussion of regulators considering the employment of new technologies that would make people behave better, Brownsword discusses the issue as follows:

In a community of rights, agents will face more than one kind of moral dilemma. One kind of dilemma will be that in which the agent is striving to do the right thing but it is not clear what action is required; for example, this is the dilemma of an agent who is not sure whether the right thing to do is to tell the truth or to tell a white lie, whether to respect a confidence or to inform another of a risk, and so on. However, it is another kind of dilemma that is relevant to our thinking about the impact and import of design-based regulation. This is the dilemma of an agent who believes that the morally required action is x (say,

79 Baldwin et al., "Stewardship", n. 48 above, p. 115.

80 R P Wolff, *In Defense of Anarchism* (with a new preface) (Berkeley: University of California Press 1998).

81 Baldwin et al., "Stewardship", n. 48 above, p. 115, reference omitted.

keeping a promise) but who is inclined, for reasons of non-moral self-interest, to do not-x (say, breaking the promise in order to make financial gain). As Kantians would put it, this is the case of an agent whose will is in conflict, the autonomous moral will being contested by the heteronomous will of inclination and desire. More prosaically, we can identify the following four key elements in this conflicted situation:

- (a) the agent is aware that doing x is the morally required action;
- (b) however, the agent is inclined, or desires, to do not-x;
- (c) this conflict arises in circumstances where a choice between doing x and doing not-x presents itself to the agent as a real practical issue; and
- (d) the circumstances also allow, in practice, for the doing of not-x

In principle, regulators might target any one of these elements in order to design around or design out the difficulty. The question is whether, in a community of rights, anything rides on which element of the situation regulators target.

Assuming that the agent is aware that doing x is morally required, then when an agent might be tempted to defect, regulators might seek to reinforce the agent's moral resolve against defection.⁸²

So, here we see an expression of the apparent attraction to regulators of overriding people's ostensible choices when they are wrongful. However, and notwithstanding the foreseeable breaches of morality, Brownsword does not consider this to be a good idea. He goes on to argue:

To be sure, if the regulatory intervention makes it so easy for agents to do the right thing that they experience no resistance to doing that thing, then there is no element of overcoming and there is a risk that agents lose the sense that they face a choice (between right and wrong).⁸³

I agree with Brownsword here. But we might note that the reason for being reluctant to interfere with people's freedom to make mistakes – to harm their own or others' interests – is based entirely on a paternalistic rationale; it is good for them to be able to choose to be good. In other words, in a political system the “steward” is *always* looking over our shoulder, whether it is being coercive for our good or permissive for our good. Where the reluctance to interfere is justified by paternalistic concerns, we are still witnessing paternalism, albeit “passive paternalism”. Contemplated decision-making at a state level leads to policy whether that policy manifests itself positively or negatively. In the words of the Nuffield Council: “Any policy, including a policy to ‘do nothing’, implies value judgements about what is or is not good for people, and requires justification.”⁸⁴ This seems to me to support a claim that even in a libertarian system the state is still to be characterised as a steward – i.e. it assumes a “stewardship role” – and it supports a view that paternalism is inevitable within the political schemes advanced by stewardship's advocates. The background paternalism that may take a passive form, and the fact that a good state will concern itself with the interests of its citizens, drives evaluations of measures, systems and policies. The question is, does talking about stewardship add anything to those evaluations? I have argued that it does not.

82 R Brownsword, “So what does the world need now?”, n. 17 above, p. 40.

83 Ibid. p. 41.

84 Nuffield Council, *Public Health*, n. 16 above, p. xvi. Recall also the statement from the WHO report, quoted above, that “Stewardship is ultimately concerned with oversight of the entire system, avoiding myopia, tunnel vision and the turning of a blind eye to a system's failings.” WHO, *World Health Report 2000*, n. 15 above, p. xi.

6 Conclusions

In considering stewardship in public health law and ethics, we are often confronted with a point that theorists seek to draw from public health as a science: namely, that we should take a “population perspective” in our analysis.⁸⁵ As I have stated elsewhere,⁸⁶ the simultaneous banality and profundity of this message is interesting. When we are dealing with political communities, we necessarily take a “population approach”; we are addressing the regulation of populations by definition! More profoundly though, we see that if a normative theory fails to allow for a population perspective, it will fail as a theory applicable in public health analysis, and in legal and political theory more generally. This point applies as strongly to the most minimal state libertarianism as it does to the most stringent forms of communitarianism: in all cases our perspective is on populations. The dispute then is about how populations are best served; by minimal intervention and sharing of concerns, or by greater state interference and wider sharing of responsibilities.

Analysts and regulators have good reasons for looking at alternative conceptions of the state, but the way it is presented in the context of stewardship either begs the question (“we know this is good; let’s find out what it means”) or else it adds nothing to an already complete social theory (e.g. Brownsword’s preferred jurisprudential model). Of course, people come up with theories and concepts, and these need names. My point is not that no concept of stewardship could be useful in political philosophy. But it is hard to see – especially in the public health literature – how stewardship distinguishes itself from many well understood brands of political liberalism or concepts entailed therein, either in its grounds, or in the claims it makes. The use of stewardship at most is as a means of packaging ideas nicely. I am sceptical of its potential to provide salient reasons for rethinking political philosophy, and am wary of its potential to have its claims overstated in pursuit of ends whose justifications remain to be argued. The insight that a normatively defensible liberal state will assume a stewardship role in some of its regulatory activity is important, and worth stating *if* the point will otherwise be missed. But stewardship as a political theory or framework is not an important basic reference point for regulatory theorists or public policy-makers. It is a cause of great concern if a neat label becomes accepted as a substitute for clear and robust arguments about political obligation.

85 See G Rose, “Sick individuals and sick populations” (1985) 14 *International Journal of Epidemiology* 32–8; M Verweij and A Dawson, “The meaning of ‘public’ in ‘public health’” in Dawson and Verweij, *Ethics, Prevention, and Public Health*, n. 10 above; W Parmet, *Populations, Public Health, and the Law* (Washington DC: Georgetown UP 2009).

86 See Coggon, *What Makes Health Public?*, n. 13 above, pp. 146–7.