

# From steward to Stuart: some problems in deciding for others

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The purpose of this paper is to explore the concepts of state stewardship and international super-stewardship in public health from a critical philosophical point of view. Stewardship has recently been presented as an alternative to paternalism and the “nanny state” in the field of public health. It is therefore of interest to explore whether the concepts and models of stewardship that are proposed 1) are internally coherent, 2) are based on a sound justification, 3) really differ from a reasonably sophisticated account of paternalism, and 4) can be action-guiding in practice. By the term “critical philosophical”, I mean that the analysis presented here is not a narrowly legal one and, in the few instances where legal material is used, it teases out the arguments in a non-jurisdiction specific way.

The paper falls into three sections. The first explores the origins of stewardship discourse in general and how the concept of stewardship entered discussions about public health. It examines why stewardship discourse has been successful, but does not provide an in-depth analysis of the social, legal and political conditions that allowed stewardship discourse to emerge and that are now facilitating its circulation. The second section outlines two particularly influential concepts of stewardship: one put forward by the Nuffield Council on Bioethics in its report on *Public Health: Ethical issues*;<sup>2</sup> and one put forward by Roger Brownsword who was a member of the group drafting the Nuffield report.<sup>3</sup> Based on the exposition of these two concepts a number of issues critical to the usefulness of stewardship as a tool in the formulation and justification of public health policy are then analysed and critically discussed. The first of these is whether stewardship can be differentiated from paternalism in public health. It is argued that the Nuffield Council concept of stewardship cannot be differentiated in this instance, if the paternalism we are envisaging is a sophisticated kind in a modern democracy. Secondly, the question is

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2 Nuffield Council on Bioethics, *Public Health: Ethical issues* (London: Nuffield Council on Bioethics 2007). As a member of the Nuffield Council on Bioethics when the report was published, I have signed up to the report, although as will become evident not necessarily to the minutiae of its argument.

3 And later defending it against critics, see T Baldwin, R Brownsword and H Schmidt, “Stewardship, paternalism and public health: further thoughts” (2009) 2 *Public Health Ethics* 113. Brownsword’s own conception of stewardship is laid out in most detail in R Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford: OUP 2008).

addressed of whether the state having a role as steward of public health can be justified. It is argued that, whereas Brownsword's concept of stewardship does contain such a justification, through the device of the "aspirant moral community", the Nuffield Council concept provides no clear justification for state stewardship. The third and final section of this paper extends this critical analysis of state stewardship to international super-stewardship in the public health arena. It is argued that the justification for super-stewardship in public health is even weaker than for state stewardship.

### Stewardship then and now

According to the *Oxford English Dictionary* the term "steward" has 13 distinct meanings,<sup>4</sup> the original but now obsolete one being: "An official who controls the domestic affairs of a household, supervising the service of his master's table, directing the domestics, and regulating household expenditure; a major-domo." Another and for our present purposes more relevant usage that entered the English language very soon after the first one is: "One who manages the affairs of an estate on behalf of his employer."

The historically most famous and successful stewards are probably the Stuart family who from the position of stewards of the royal house of Scotland in a few generations managed to elevate themselves to the position of kings of Scotland as "the Stewarts" and later of England and Scotland as "the Stuarts". They moved from being the trusted servants of the ruler to become rulers themselves and the later Stuarts attempted to transform the English–Scottish political system into an absolute monarchy, supported by political theorists such as Sir Robert Filmer.<sup>5</sup> The steward-to-Stuart transition thus exemplifies one of the risks inherent in stewardship, i.e. the shift from being steward of another's interests and affairs to being the master.

The concept of stewardship entered philosophy via moral theology and considerations of man's relationship to nature. In Genesis 1:28–30, God gives man dominion over the earth and all living things:

And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

And God said, Behold, I have given you every herb bearing seed, which is upon the face of all the earth, and every tree, in the which is the fruit of a tree yielding seed; to you it shall be for meat.

And to every beast of the earth, and to every fowl of the air, and to every thing that creepeth upon the earth, wherein there is life, I have given every green herb for meat: and it was so."<sup>6</sup>

The traditional interpretation of these verses is, understandably, that man is placed by God in a position of power over the earth and that the earth is there to be exploited by man for his own benefit. The nature and extent of this power was traditionally understood to be unlimited. But, in the latter half of the twentieth century, dissatisfaction with this traditional interpretation grew and one of the prominent re-interpretations reconceptualised man's role in terms of stewardship. Man is not the ruler and the owner of the earth, but he is God's steward and must treat the earth responsibly. This theological re-orientation

4 *Oxford English Dictionary Online* [www.oed.com](http://www.oed.com) (last accessed 11 January 2011).

5 R Filmer, *Patriarcha: Or the natural rights of kings* (originally published posthumously 1680). Available at [www.constitution.org/eng/patriarcha.htm](http://www.constitution.org/eng/patriarcha.htm) (last accessed 10 January 2011).

6 Genesis 1:28–30, King James' Bible.

happened as a response to increasing environmental concerns in society. It is not the case that theologians were the first to discover or develop an environmental ethics taking account of modern environmental concerns, but, prior to these theological developments, the environmental concerns and the proper response to them had not been conceptualised in terms of stewardship. This theological development of the environmental stewardship idea and its influence on environmental ethics in general is traced and discussed in detail in the contributions in a recent comprehensive assessment of environmental stewardship discourse.<sup>7</sup> The exact details of this theological conception of stewardship need not detain us here, but from moral theology it was adopted by some non-religious environmental philosophers and ethicists. And it is primarily from environmental ethics that stewardship has found its way into thinking about public health. Here, it has gained prominence partly because of its alleged potential to justify some coercive public health actions without resorting to paternalistic justifications and partly because the phrase “the stewardship state” is more pleasing to the ear and the populace than the nanny state.<sup>8</sup> Whether stewardship discourse will in time come to dominate public health discourse is a complicated question that is outside the scope of this paper. It is, however, important to note that if it does come to dominate it will not be as a direct result of any greater philosophical coherence or better justification than other competing concepts and ideas. If stewardship wins this contest it will be – with phrasing borrowed from Ashcroft’s insightful discussion of a possible convergence of human rights and bioethics – not due to intellectual necessity but due to concrete historical and political contingencies.<sup>9</sup>

In the reformulation of the stewardship concept as non-theological, two quite distinct versions emerged: one where stewardship is still seen as stewardship on behalf of someone who is absent or unable to express interests and desires (e.g. future generations or “Nature”) but who its final beneficiary; and another where stewardship is uncoupled from any particular beneficiary and is merely describing a certain mode of or attitude towards decision-making.<sup>10</sup> As will become apparent, these two concepts can easily be elided, but it is important to keep them apart.

Two other strands of stewardship discourse have also influenced the concepts of stewardship applied to public health.

In the business ethics and management theory literature, “stewardship theory” has been proposed as an alternative to “agent theory” or “agency theory”.<sup>11</sup> In agent theory, those who act on behalf of others are supposed to be exclusively self-interested. An agent’s only aim is to pursue his or her own interests and it is only if an agency relationship can be put in place that aligns the agent’s interests with the interests of those whom he or she is acting for (the principals) that the agent can be expected to act in their interests. Agent theory applies this description to both public and private agents and thus claims that it also applies to state bureaucrats, including presumably, those responsible for public health. In stewardship theory, the person acting is conceptualised quite differently:

7 R J Berry (ed.), *Environmental Stewardship* (London: T&T Clark 2006).

8 K Jochelson, “Nanny or steward? The role of government in public health” (2006) 120 *Public Health* 1149; K Calman, “Beyond the ‘nanny state’: stewardship and public health” (2008) 123 *Public Health* e6. For the view that stewardship rhetoric signifies a dangerous move from the “nanny” to the “bully”, state see P Basham, “From the nanny state to the bully state” (2010) 62 *IPA Review* 24.

9 R E Ashcroft, “Could human rights supersede bioethics?” (2010) 10 *Human Rights Law Review* 639.

10 Berry, *Environmental Stewardship*, n. 7 above.

11 P Block, *Stewardship: Choosing service over self-interest* (San Francisco: Berrett-Koehler 1993); J H Davis, F D Schoorman and L Donaldson, “Toward a stewardship theory of management” (1997) 22 *Academy of Management Review* 20.

In stewardship theory, the model of man is based on a steward whose behavior is ordered such that pro-organizational, collectivistic behaviors have higher utility than individualistic, self-serving behaviors. Given a choice between self-serving behaviour and pro-organizational behaviour, a steward's behavior will not depart from the interests of his or her organization. A steward will not substitute or trade self-serving behaviors for cooperative behaviors. Thus, even where the interests of the steward and the principal are not aligned, the steward places higher value on cooperation than defection (terms found in game theory). Because the steward perceives greater utility in cooperative behaviour and behaves accordingly, his or her behaviour can be considered rational.<sup>12</sup>

The steward is thus distinguished from the mere agent by identifying with the goals of the organisation in which he or she works. Whether a steward will act in an ethical manner therefore depends upon whether the goals of the organisation are ethical.

Finally, the World Health Organization (WHO) proposed in 2000 that stewardship should be the basis for the state's role in directing the health-care system and providing health care.<sup>13</sup> This proposal is explicitly based in stewardship theory as just described. According to the WHO, state stewardship in relation to the health system amounts to responsible management of the well-being of the population:

Ultimate responsibility for the performance of a country's health system lies with government. 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.<sup>14</sup>

And the stewardship function is primarily discharged by oversight:

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.<sup>15</sup>

A 2002 technical report provides further, more concrete, guidance concerning how the WHO thinks the stewardship function should be operationalised. This report makes it clear that the WHO sees stewardship as a high-level function of government:

WHO is attempting to identify a small number of core domains/sub-functions that collectively are thought to constitute effective health system stewardship that leads to better outcomes . . .

Who are stewards trying to influence, and how? They are aiming at influencing the behaviour of a wide range of players: those involved in provision, financing or generation of other resources; the behaviour of stewards themselves;<sup>16</sup> of users or consumers, and non-health system actors whose actions affect health . . .

Six domains/sub-functions of stewardship are presented here for discussion. They are constructed from prevailing notions of what together constitute the

12 Davis et al., "Toward a stewardship theory", n. 11 above, p. 24.

13 WHO, *The World Health Report 2000: Health systems: improving performance* (Geneva: WHO 2000). For an in-depth exploration of the conceptual background to the WHO use of the concept of "stewardship", see R B Saltman and O Ferroussier-Davis, "The concept of stewardship in health policy" (2000) 78 *Bulletin of the World Health Organization* 732. See also G Magill and L Prybil, "Stewardship and integrity in health care: a role for organizational ethics" (2004) 50 *Journal of Business Ethics* 225, for an attempt to better integrate the WHO concept and general stewardship theory.

14 WHO, *World Health Report*, n. 13 above, p. viii.

15 Ibid. (original emphasis).

16 This element is rather puzzling. Who are the stewards who should influence the "stewards themselves"? Or, *quis custodiet ipsos custodes?*

function of stewardship. Some are primarily concerned with dealing with market failures that are common to health systems, and others are more concerned with addressing potential public sector failure. There may be questions about both the categories and their content, and these domains/sub-functions are expected to further evolve following wide debate.

Their definition, their contribution to effective stewardship, the effectiveness of different instruments and approaches within these domains/sub-functions, and the links to intermediate goals and outcomes can all be investigated.

- Generation of intelligence
- Formulating strategic policy direction
- Ensuring tools for implementation: powers, incentives and sanctions
- Building coalitions/Building partnerships
- Ensuring a fit between policy objectives and organizational structure and culture
- Ensuring accountability<sup>17</sup>

As we shall see below, the concepts of state stewardship in public health incorporate both this idea of stewardship as a high-level function and a much more mundane idea of stewardship as concerned with very concrete policy decisions. Apart from brief references to the WHO *World Health Report 2000*, there is little evidence that the specific elements of the WHO concept of stewardship has in itself played any major role in current discussions about stewardship in public health. None of the specifics of the WHO concept are mentioned or discussed in the academic literature, and there are no signs that it has influenced recent public health policy in any European jurisdiction.<sup>18</sup>

### State stewardship in public health

There is one obvious way in which the modern nation state acts as a steward in the health care field (including public health) and that is as a distributor of common resources. The revenue that the state extracts from taxation (and other forms of income) is held and distributed on behalf of the citizens. This is in itself unproblematic, except for radical libertarians.<sup>19</sup>

But this role of economic stewardship of health care resources by the state is not the concept of stewardship that is central to the discussion of state stewardship in public health. Here, we are talking about a broader concept that potentially engages a much wider range of the state's coercive powers, not just its power to tax. The Nuffield Council lays out its concept of stewardship in public health in this way:

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 whole, including both citizens of the state, and

17 P Travis, D Egger, P Davies and A Mechbal, *Towards Better Stewardship: Concepts and critical issues* (WHO/EIP/DP/02.48) (Geneva: WHO 2002), p. 4.

18 That it has not influenced policy in Europe may reflect the fact that most European countries probably already consider themselves to have this high-level control of the function of the health-care system, without conceptualising it in stewardship terms.

19 The taxation is an infringement of liberty and thus anathema to libertarians, but the distribution of the resources obtained by taxation involves no infringement of liberty (in principle) and is therefore acceptable to liberals who usually accept fair taxation as morally justified.

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 . . .<sup>20</sup>

The difference between paternalism and our stewardship model is that the latter is less likely to support highly coercive universal measures. Instead, the stewardship model is more sensitive to the need to respect individuality, by seeking the least intrusive way of achieving policy goals, taking into account also the criteria of effectiveness and proportionality . . . The stewardship approach is also more sensitive than paternalism to the concept of mandate, and the need for policies to be adequately justified. It recognises the importance of open and transparent participatory processes as a necessary condition for public health policy making, but it is also clear that these are not sufficient by themselves. Stewardship is not exercised simply by following the public vote, especially where issues involve complex scientific evidence. Under the stewardship model, public health policy should be compatible with the views of the public, and the government should create conditions that allow the public to scrutinise and judge the appropriateness of proposed policies.<sup>21</sup>

Let us break down the Nuffield concept into its five constituent elements.

1. The state is a steward both in relation to individuals and to the population as a whole (and by extension to groups within the population).<sup>22</sup>
2. Stewardship gives expression to a more basic obligation on the state to provide conditions that allow people to be healthy.
3. This expression is particularly important in relation to reducing health inequalities (or alternatively there is a particular obligation in this regard).
4. The stewardship model differs from paternalism by:
  - a. being less likely to support highly coercive universal measures;
  - b. respecting individuality by seeking the least intrusive method to achieve goals (but taking into account effectiveness and proportionality);
  - c. being more democratic in taking mandate, justification, openness and transparency seriously.
5. Stewardship is not the same as following public opinion, especially where issues involve complex scientific evidence.

The first major philosophical issue that needs to be discussed is whether stewardship is really different from paternalism and in order to do so we need to be clear what paternalism is. There are many different kinds of paternalism but I take it that the core meaning of paternalism is that an agent A makes decisions on behalf of another agent B because A believes those decisions to be in B's best interest.<sup>23</sup> If B is unable to discern what is in his or her best interest, we have an instance of "genuine paternalism" as when a parent decides

20 Nuffield, *Public Health*, n. 2 above, p. 25 (footnotes removed).

21 Ibid. p. 26

22 It is unclear in what sense the state can be a steward in relation to individuals for which it is not already *in loco parentis*. Typical adult citizens have not given the state powers to run their households, neither are they absent from their own decision-making.

23 H Häyry. "Paternalism" in R Chadwick (ed.), *Encyclopedia of Applied Ethics* vol. 3 (San Diego: Academic Press 1998), p. 449.



for a child in a situation where the child genuinely does not know its own interests. This is morally unproblematic.<sup>24</sup>

If, however, B is able to discern what is in his or her best interest we have a morally problematic instance of paternalism, unless B wants A to make the decision.<sup>25</sup> Some argue that the only instances of paternalism that can be justified are instances of genuine paternalism, but this view is clearly not reflected in the policymaking of any modern welfare state.

Let us in the next couple of paragraphs, for the sake of argument<sup>26</sup> allow that paternalism is morally justifiable if 1) A has good reasons to believe that he or she is in a better position than B to discern B's interest, 2) the interests at stake are important interests, and 3) A acts with the sole motive of promoting B's interests.<sup>27</sup> What does this imply with regard to what actions A should do and how they should be done, if A is a justifiably paternalistic state agency? Well, it seems to imply that A should choose to act in the way that is most likely to achieve the goal of promoting B's interest (i.e. consider effectiveness) and that A should choose to act in the way that has the fewest negative side-effects (i.e. consider proportionality, seek the least intrusive method – in so far as intrusive methods are likely to have more negative side-effects than non-intrusive methods – and take issues of mandate and justification seriously in so far as this is likely to make A's actions more understandable and democratically palatable to citizens). But, if this is correct, a paternalistic state agency in a democracy has to take account of many of the same considerations as a stewardship agency. This would also seem to be the case if the paternalistic state agency simply applied the better governance and better regulation paradigm which is supposed to guide the actions of UK state agencies. And it is simply incorrect to state that stewardship inherently differs from paternalism in relation to the kind of interventions that can or will be chosen. When we compare the steward to the paternalist we should not compare the sophisticated, modern steward with the unreconstructed and traditional paternalist. The paternalist or paternalistic agency we should have in mind is the sophisticated one working within the structures and confines of a modern (semi-?)transparent and accountable democratic state. Such a paternalist would only choose overt paternalistic action when absolutely necessary and would try to minimise the number and effect of paternalistic actions.

The reason that paternalism has a bad name is that it infringes upon individual autonomy and liberty as famously encompassed in Mill's so-called "harm principle" as expressed in *On Liberty*:<sup>28</sup>

24 Parents may have obligations to help their children to develop decision-making abilities and, depending on the precise nature of these obligations, they may limit the range of cases in which even "genuine paternalism" is morally justifiable.

25 In relation to a state agency, the analysis of when paternalism is morally problematic becomes a little more complicated, because citizens may have agreed to give general powers to the state without realising the possible scope of their specific application. A citizen may thus at the same time want and not want the state to make certain decisions on his or her behalf.

26 It is important to keep in mind that the acceptance of paternalism in the next paragraphs is strictly *for the sake of argument*. I do believe that there are instances of justified paternalism, but giving a full account of what characterises those is beyond the scope of this paper.

27 This last criterion is important because there are many instances where decision makers override the decisions of others from motives other than promoting the interests of the others and such instances are not instances of paternalism. There are also many instances of mixed motives that should be classified along a spectrum of "impure paternalism".

28 J S Mill, *On Liberty*, E Rapaport (ed.) (Indiana: Hackett 1978), p. 9. I have chosen to provide a slightly longer quote than is usually presented to make it clear that Mill himself allows for remonstrance and other forms of attempts at persuasion of the person.

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

A dyed in the wool paternalist will, almost by definition, believe that Mill is wrong and that there are instances of purely self-regarding actions that can be overridden on the basis of the agent's own interests (cf. discussions about the ethics of suicide or euthanasia or discussions concerning recreational drug use).

A stewardship model can claim to adhere to the harm principle if the steward never interferes in purely self-regarding actions. But in principle, this difference between stewardship and paternalism may be far less important in practice in the public health arena than is generally realised. The practical irrelevance of the harm principle comes from two sources. The first is that almost any action that an individual performs that has health implications for him or her also has implications for public health and thereby for others.<sup>29</sup> Actions affecting individual health either presently or in the future have economic externalities.<sup>30</sup> Public actions have signalling effects as do many actions performed in the privacy of the home if anyone apart from the agent is present or can detect the effects. And there are numerous actions that, although primarily affecting the agent, also alter the risk that others will be affected by a particular disease or will take up or continue an unhealthy behaviour. It is not only infectious diseases that are communicable or transmissible: behaviours like smoking or conditions like overweight and obesity are also communicable in the sense that a person's risk of adopting the behaviour or getting the condition depends on the behaviours of others in his or her social network.<sup>31</sup>

The second source of irrelevance of the harm principle is that public health agencies most often intervene to affect the actions of groups. The goal of a specific intervention may be to reduce the incidence or prevalence of specific harmful behaviours and this is clearly only achieved if individuals change their behaviour, but the intervention is targeted at the group and is based on considerations at the group level. If the group is heterogeneous with regard to interests, level of reflection regarding the behaviour, level of personal

29 In so far as public health is a function of the individual health of members of the public, this is even an analytic truth, but arguably a fairly uninteresting one.

30 This is true for both publicly and privately funded health-care systems. What differs is only on whom the externalities fall.

31 See, for instance, N Christakis and J Fowler, "The spread of obesity in a large social network over 32 years" (2007) 357 *New England Journal of Medicine* 370.



commitment to the behaviour etc. – and most groups are – then the intervention may breach the harm principle in relation to some members of the group and not in relation to others. But if we allow that public health agencies can intervene at the group level, and it seems that we must allow this if we think that public health agencies have a role that is distinct from “individual health agencies” (i.e. health-care agencies), then we have to allow them to breach the harm principle in some circumstances, for instance, where most of the group cannot be said to have fully endorsed their own behaviour and where it is practically impossible to design an intervention that targets only that sub-group.

So, many public health interventions at the group level will technically breach the harm principle in relation to some members of the group who, upon reflection and with full understanding of the evidence, still endorse their own unhealthy behaviour.

From these considerations, it seems to follow that paternalism and stewardship are not nearly as distinct as claimed by the Nuffield Council.

Roger Brownsword's concept of stewardship looks superficially like the Nuffield one, but is in my view fundamentally different because he connects stewardship to the context of the state as an (aspirant) moral community striving to flourish and develop as a moral community.<sup>32</sup> By creating that link, he can give much more specific content to the ways in which the state ought to approach its stewardship than is possible if the context is just the state and its citizens.

As an (aspirant) moral community, a community is not just a group of people who identify as a such, it is a community with a certain moral shape and moral goals:

no community may present itself as a moral community unless it holds its commitments sincerely and in good faith, it treats its standards as categorically binding and universalizable, some such standards at least are of an other regarding nature, and there is an integrity, consistency, and coherence about its commitments as a whole. Relative to this standard, there is no difficulty in accepting that utilitarians, rights theorists, and dignitarians are moralists and that communities guided by such standards are moral communities.<sup>33</sup>

The (aspirant) moral community thus comes with a set of moral commitments and the stewardship role of the state is justified if the state's actions are guided by those commitments. This provides guidance in relation to what the state ought to do (i.e. promote the development of the aspirant moral community); and it provides limits concerning what the state cannot do.

In Brownsword's preferred “community of rights” he argues that:

there are three circumstances in which stewardship might be legitimately invoked. First, if we suppose (as I do) that the members of a community of rights do not regard themselves as morally omniscient, the state has some margin to cater for the fallibility of the community. Accordingly, if it is argued that an action should be prohibited because it might put at risk the interests of *possible* rights-holders or because it might *indirectly* be damaging to rights-holders, the state may intervene (if only temporarily) on stewardship grounds. Secondly, the state has a responsibility to protect and promote the conditions that are conducive to the flourishing of agency. Public health seems to be such a case. Stewardship certainly requires the state to keep citizens informed about risks to their health and a community of rights might well judge that it is legitimate for the state to

32 And given Brownsword's other commitments, the aspirant moral community ought to develop itself into a community of (Gewirthian) rights.

33 Brownsword, *Rights, Regulation and the Technological Revolution*, n. 3 above, p. at 115

exercise stewardship by requiring participation in programmes that are intended to improve the conditions of public health. Thirdly, to return to my basic point, the state has a stewardship responsibility to protect and promote the conditions that are constitutive of a meaningful moral community . . .<sup>34</sup>

Let us move on to look at other parts of the concepts of stewardship as put forward by the Nuffield Council and Roger Brownsword, respectively. According to the Nuffield Council, stewardship can especially be invoked in cases where “issues involve complex scientific judgement”. This may well be the case for stewardship outside public health as well and it coheres well with some elements of Brownsword’s concept of stewardship in the context of regulation of technology. Brownsword states in one of his explications of stewardship within a community of rights:<sup>35</sup>

that there are three circumstances in which stewardship might legitimately be invoked . . .

- (i) where state intervention is required in order to settle doubts (at least provisionally) about the application of the rights regime;
- (ii) where state intervention is required in order to maintain the conditions that are essential to a community’s survival; and
- (iii) where state intervention is required in order to maintain the conditions that are essential to the community’s self-perception as an aspirant moral community.

The two kinds of uncertainty or epistemic complexity alluded to by Brownsword’s first condition and by the Nuffield Council’s mention of “complex scientific judgments” are clearly different. One is a question of moral uncertainty/complexity and the other one of scientific uncertainty/complexity, but they are nevertheless worth considering together partly because they are sometimes difficult to disentangle, partly because there is a more general issue of whether uncertainty/complexity provides a specific justification for state stewardship.

If there is a policy question on which people in general could form a view if they had the time and opportunity to assess the question in all its complexity, but where a decision needs to be made urgently (e.g. where waiting to decide has significant opportunity costs), then there does seem to be a justification for the state to make the decision, taking into account all the considerations a democratic agency ought. That is clearly congruent with a stewardship model of decision-making, but also with many other models. But we might decide that there are advantages in separating and setting apart this kind of “epistemic” stewardship as a particular class of decision-making activity, if for no other reason than pointing out that the decision maker is here making decisions on behalf of principals who, due solely to epistemic complexity, are temporarily absent but will later become present.

Taking the lead from Brownsword, there is a need to consider whether such epistemic stewardship can be more than provisional or temporary. Here we need to distinguish between three different situations: 1) there is epistemic complexity, but there is sufficient evidence to make a secure final judgment; 2) there is epistemic complexity, and there is not yet sufficient evidence but it is likely that the issue can be resolved in the not too distant future; 3) there is epistemic complexity and it is unlikely that the issue can be resolved.

34 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* (London: Hart 2008), p. 23, at p. 47 (original emphasis, footnote removed).

35 R Brownsword. “Rights, responsibility and stewardship” in H Widdows and C Mullen (eds), *The Governance of Genetic Information: Who decides?* (Cambridge: CUP 2009), p. 99, at p. 120.

A state acting on stewardship grounds in situations 1 and 2 would seem to have an obligation to inform the public about the available evidence so that the community could form its own opinion (which, if the judgment is secure, as in situation 1, will by necessity be the same as the state's) and to try to produce the further evidence that will resolve the complexity in situation 2. So, in these two situations, the state's stewardship role could only be provisional and temporary until sufficient evidence has been assembled and communicated to reach a state where all persons of good will and reflective ability can form a judgment.

In situation 3, the decision made by the stewardship state will still be provisional, but might end up being permanent if the complexity turns out to be irreducible.

Above, I made the claim that the two different types of uncertainty/complexity can be handled as one, i.e. both as cases of epistemic stewardship issues. But there are also important dissimilarities and exploring these will display the fundamental differences between the Nuffield Council and the Brownsword concepts of state stewardship. Both Nuffield and Brownsword locate the justification for stewardship in the idea of community. In a response to critics, Baldwin et al. claim that Nuffield's stewardship model is:

based centrally on the value of the community, which is the value of belonging to a society in which each person's welfare, and that of the whole community, matters to everyone.<sup>36</sup>

But this is clearly a much thinner concept of community than Brownsword's aspirant moral community, which again is much less specific than his aspirant moral community of rights. As we have seen, Brownsword's concept entails that any aspirant moral community is aspiring towards the ideal state of being a moral community of a particular kind (a community of rights, dignity, virtue, etc.) and members of the society and all of its agencies share this aspiration. This justifies moral stewardship when this is necessary "in order to maintain the conditions that are essential to the community's self-perception as an aspirant moral community",<sup>37</sup> for instance, when there is disagreement about the right moral approach because the community is still only an aspirant moral community.

But this further resource is not available to the Nuffield Council and it is therefore unclear how its stewardship model can deal with moral uncertainty or complexity. In public health decisions, we often have to balance the interests of some individuals against the interests of other individuals, the interests of present individuals against future individuals and, sometimes, the interest of community members against the interests of outsiders. But just knowing that "each person's welfare and that of the whole community, matters to everyone" will not get us far,<sup>38</sup> unless we have a way of deciding how much your interests ought to matter to me!

36 Baldwin et al., "Stewardship", n. 3 above, p. 116. We might in passing note that this seems to be a kind of community that is not achieved in any major nation state today; and that the value commitment implied may not even be shared by the majority in many nation states.

37 Brownsword, *Rights, Responsibility and Stewardship*, n. 3 above, p. 120.

38 I do realise that prescriptivists such as Richard Hare can derive all of morality from the meaning of the word "ought" and that Hare's student Peter Singer believes that very far-reaching conclusions can be reached from the mere fact that we have some interest in the welfare of others: R M Hare, *The Language of Morals* (Oxford: OUP 1952); P Singer, *Practical Ethics* 2nd edn (New York: CUP 1993). Similarly, Alan Gewirth and Gewirthians derive very far-reaching conclusions from the principle of generic consistency and its application to any situation where an agent asserts any kind of right: A Gewirth, *Reason and Morality* (Chicago: Chicago UP 1978); D Beyleveld, *The Dialectical Necessity of Morality: An analysis and defense of Alan Gewirth's argument to the principle of generic consistency* (Chicago: Chicago UP 1984). I am rather sceptical towards these claims that it is possible to derive very substantial moral conclusions from very formal claims.

To successfully invoke stewardship in a certain area it is not sufficient to be able to claim truthfully that something is in B's interest and that that interest can be furthered by appropriate stewardship (even in cases where B is clearly incompetent either epistemically or in relation to decision-making). This is because to be able to claim that B (or his or her steward) ought to act on an interest, more is needed. The action has to be in B's interest, all other things, and particularly all other interests of B considered! That B has a specific interest only gives B a *pro tanto* or *prima facie* reason to act on that interest, and it might be a very weak reason. It is only by taking all of B's interests into account that B or an outsider can decide what B has decisive reason to do.<sup>39</sup> To claim that each of us has an interest in the welfare of others only provides a sound basis for stewardship if this is a strong interest, or if it is in certain cases not outweighed by any other significant interests.

This analysis does not imply that a stewardship state on the Nuffield Council model cannot deal with moral uncertainty or complexity, but it does imply that it can in most instances not deal with these issues as a matter of stewardship. It may well do so, because all states balance interests or choose between competing rights claims, but it does not do this through the device of stewardship or with a justification in stewardship.

### Can international super-stewardship be justified?

In addition to state stewardship of public health, it has been suggested that we need super-stewardship at the international level, either performed by international organisations or through international agreements.<sup>40</sup>

At this level, a number of the problems already identified for state stewardship recur, but in even more accentuated forms.

It is, to be polite, not obvious that any community-based justification for decision-making can succeed at the international level. Even in the thinnest possible sense of community there is no global community to which we all belong. And in so far as most international organisations are intergovernmental, their members are not citizens or individual persons but states. This has been pointed out by Saltman and Ferroussier-Davies in their discussion of WHO's concept of state stewardship:

The various concepts of stewardship discussed above imply it to be a function of governments responsible for the welfare of populations and concerned about the trust and legitimacy with which its activities are viewed by the general public. This raises a question concerning the suggestion in The World Health Report 2000 that stewardship can extend beyond duly constituted national governments to the role of international agencies. International organizations can be appropriately termed stewards only in relation to their role as good agents for national governments, whereby both normative and efficiency-oriented objectives are combined in the expenditure of public monies allocated to the organizations by sovereign states.<sup>41</sup>

It might be argued that the European Union (EU) is a special case because changes in the 1992 Maastricht treaty have made it a community of European citizens<sup>42</sup> and that the

39 And even then, what B has decisive reason to do prudentially (e.g. killing his arch-enemy) may be constrained by any side-constraints imposed by the rights held by others.

40 E.g. at the symposium on Super-stewardship in the Context of Public Health, University of Sheffield, 14 November 2009. And, in passing, in R Brownsword, "So what?", n. 34 above, p. 47.

41 Saltman and Ferroussier-Davies, "The concept of stewardship", n. 13 above, p. 735.

42 A similar, but more indirect argument can be made for the Council of Europe in relation to its human rights functions since citizens of nation states have access to a supra-national jurisdiction.

EU can therefore legitimately engage in super-stewardship.<sup>43</sup> I do not intend here to discuss the legal merits of this argument, i.e. whether the EU should legally be conceptualised as a community of citizens. Whatever the precise legal status of the EU is or can be argued to be, it seems to be an incontrovertible empirical fact that most people who are citizens of EU member states do not conceive of themselves primarily as members of some greater community of EU citizens.<sup>44</sup>

The most recent Eurobarometer (spring 2011) shows that, if asked to agree or disagree with the statement “You feel you are a citizen of the EU”, 62 per cent agree, with very large national differences ranging from 86 per cent agreement in Luxembourg to 41 per cent in the UK.<sup>45</sup> This might be taken as a strong indication of a feeling of EU citizenship, but this would be misleading. We don’t actually know how many EU citizens feel that they are citizens of their own nation state (a guess might be somewhere above 90 per cent in many states), and we don’t know what people’s primary identification is. If they had to choose, would they feel themselves to be, say, more Swedish citizens than EU citizens? That the meaning and importance of EU citizenship is still a project in development can be seen in the EU’s continuing efforts to promote EU citizenship and instil it in the young.<sup>46</sup> At the philosophical level, a community-based justification for a super-stewardship role for the EU is therefore not much stronger than for any other international organisation if we take a thin notion of community. Can we conceptualise the EU as an aspirant moral community, a community aspiring to “hand on to the next generation . . . an environment that is conducive to a moral way of life, to a way of life that hinges on agents trying to do the right thing, trying to respect the legitimate interests of fellow agents, and being held responsible for their actions.”<sup>47</sup> Perhaps. But without too much verbal contortion it is probably more realistic to conceive of the EU as an organisation aspiring to become an aspirant moral community at some point in the future. The EU clearly aspires to hand on to the next generation an environment that is conducive to a moral way of life, but there is still no clarity concerning exactly what kind of moral life and therefore no clarity concerning what kind of aspirant moral community the EU might be or might become in the future.

Could it then be argued that the “global public health” is itself a proper object of stewardship, just as “nature” might be conceived to be in relation to environmental ethics and policy? This could be made meaningful, but only if the object of stewardship is “the public health of future generations”. Present generations are not absent and not, in the main, ignorant of their own interests or their own health status. One way of making the claim meaningful is to say that global public health is a public good. The UNESCO *Universal Declaration on Bioethics and Human Rights* (adopted by acclamation on 19 October 2005), for instance, states in Article 14.2a that “health is essential to life itself and must be considered to be a social and human good”, but exactly what kind of good is health?

Many theories in political philosophy acknowledge health as a basic good, either on its own or because of the strong links between health and welfare and health and social participation. These arguments are not affected by the observation that there may be individuals who do not value health or for whom health is not important.

43 It is, however, worth noting, that if the argument holds, what the EU would be doing would not strictly be super-stewardship since it would just be the steward for its own citizens acting essentially with the same justification as any nation state exercising stewardship responsibility.

44 M Jolly, “A demos for the European Union” (2005) 25 *Politics* 12.

45 European Commission, *Eurobarometer 75: Public opinion in the European Union* (spring 2011).

46 See, for instance, European Commission, “Making citizenship work: fostering European culture and diversity through programmes for youth, culture, audiovisual and civic participation” COM (2004) 154 final.

47 Brownsword, *Rights, Regulation and the Technological Revolution*, n. 3 above, pp. 305–6.

There is also little doubt that having healthy citizens is a benefit to society and that health is a social or public good in that sense. The health of individuals contributes positively to general social conditions.

There is, however, another economic sense of “public good” in which it is more doubtful as to whether health or global health qualifies as a public good.<sup>48</sup> Economists distinguish between private goods that are characterised by being rival and excludable and public goods that are non-rivalrous and non-excludable. A non-rivalrous good is a good where my consumption does not affect your consumption of the same good and a non-excludable good is a good where it is impossible effectively to exclude some but not others from consumption (e.g. exclude non-payers but still allow payers to consume). Classic examples of economic public goods are clean air, effective national defence and street lighting. Economic theory predicts that there will be undersupply of public goods because their non-excludable nature means that it will be impossible to extract market value payment from all consumers of the goods. This entails that there is an economic argument for state intervention in the market and possible state provision of the good or taxation to make up for the market failure. If global health was an economic public good there would thus be a purely economic argument for providing health and engaging in super-stewardship (in reality, providing health promotion and care since health cannot be provided directly). This would reduce the need for appeal to moral or even prudential obligations to secure health care for those who cannot pay for it themselves.<sup>49</sup>

The “global health is a public good” argument does, however, face significant obstacles. It is clearly not the case that most forms of health care are non-rivalrous or non-excludable. Physical and manpower resources are finite, leading to rivalry between consumers, and it is very easy to exclude people from health care or the benefits of health care. Health care knowledge is non-rivalrous,<sup>50</sup> but it is not non-excludable and, therefore, still falls outside of the definition of an economic public good. The increasing tendency to patent university-based inventions in health care clearly indicates that exclusion is possible in the area of health-care knowledge, and that it is seen as economically desirable by some.

There are areas where it is more plausible to see global health as an economic public good, especially in relation to the prevention and treatment of infectious diseases which significantly reduces their spread. The fact that other people have immunisations benefits me and this general benefit of herd immunity is non-rivalrous and non-excludable. But similar arguments cannot be made for health care in general. My appendectomy does not in any appreciable way benefit you. In an economic sense, much of health (and most of health care) is a private good.

But acknowledging that health is a private good in an economic sense does not negate the fact that health is a public good in the much more straightforward sense outlined above, that a society with healthy citizens is a better society than one with much illness and a world with healthy people better than the one we have now. This can still be an excellent reason to promote health, but it is an open question as to whether we can establish a sufficiently robust sense of global health to justify super-stewardship of it.

Now, there are other possible justifications for seeking global public health regulations and the most obvious are the economic and other costs imposed by incompatible national

48 A J Culyer. *The Dictionary of Health Economics* (Cheltenham: Edward Elgar 2005).

49 L C Chen, T G Evans and R A Cash, “Health as a global public good” in *Global Public Goods* (Oxford: Oxford Scholarship Online Monographs 1999), p. 284.

50 In reality, even this is complicated because the exploitation of health-care knowledge may involve rivalry, for instance, between producers of the same pharmaceutical product.



regulations. It is, however, not obvious that the project of harmonising such regulations is best described as a project of stewardship. In discussion, Roger Brownsword has argued that a proper target for super-stewardship are those structures at the international level that are necessary to preserve a common arena for agency, i.e. those international structures that all (aspirant) moral communities rely on to survive and develop as communities.<sup>51</sup> Even if we accept this argument, such structures would, however, only constitute a limited subset of current global public health structures.

### Conclusion

In the discussion above, a number of critical issues have been identified in relation to stewardship and super-stewardship in the context of public health.

It has been argued that, whereas stewardship in public health is not identical to paternalism, the area of overlap between the two concepts is very large; and that it is still unclear whether stewardship adds much to our understanding of how a state ought to act in relation to public health. There is, thus, a risk that state actions that are clearly paternalistic and therefore need strong justification are re-badged as actions based on a presumably less controversial stewardship function of the state and therefore not subject to the same scrutiny as overtly paternalistic actions.

It has further been argued that the concept of stewardship put forward by the Nuffield Council on Bioethics lacks theoretical foundation and that, as a matter of theoretical justifiability, Roger Brownsword's concept of stewardship is preferable. Brownsword's concept also provides more specific action guidance to policymakers who conceive of themselves as making policy in an aspirant moral community. The Brownswordian steward has an obligation to steward according to the community's moral aspirations. This provides a clearer justification for some paternalistic actions, but this justification comes with added normative baggage.

Finally, it has been argued that it is difficult to find any cogent justification for international super-stewardship in the arena of public health. International public health policy still has to be formulated, but, given the status of the international bodies formulating this policy, it is preferable that they continue to see themselves as policymakers making policy in politically contentious areas, and not as stewards of the affairs of some partly fictional citizenship.

Will the public health steward then slowly change into the public health ruler? Insofar as stewardship is being invoked in circumstances where those who are subject to stewarding are not really absent, this has in one sense already happened. And it is a real risk whenever the stewards forget that some of their actions are also paternalistic.

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51 In his response to discussants at the symposium on Super-stewardship in the Context of Public Health, University of Sheffield, 14 November 2009.

