

## What Justifies a Law or Policy? Two Views

A talk by D. Robert MacDougall for Works in the Works, September 24, 2024.

The book *Righting Health Policy: Bioethics, Political Philosophy, and the Normative Justification of Health Law and Policy* (2022) is described by author D. Robert MacDougall as critique of bioethics. However, since health law is legitimated in the same way that other laws are, the book could even more ambitiously extend to law in general.

First, the speaker spoke about how health law and policy is typically justified. Take some bioethics topic (for example, physician assisted suicide). Legality is usually justified by appeal to some moral duty. For example, for Beauchamp and Childress (2019) “adequate reasons” can morally justify it. Since it is moral, so too should it be legal.

Appeals to moral duty can also go in the other direction. On this point, Rob cites Velleman (1999) who argues, after Kant, that suicide under any circumstances violates the inherent dignity of human life. Trading one’s own bodily existence for pain relief reduces human life to a cost/benefits calculus, devaluing the currency of personhood.

Rob notes something’s missing there. The problem with deriving legality from a moral maxim is that extra justification is required which isn’t being supplied. He shows onscreen a syllogism missing a major premise, which he identifies as the unstated assumption that *morality should be grounds for legislation*.

Plenty of examples to show this is a bad idea, since morality is subject to revision, and sometimes cringeworthy in retrospect. For example, there exist outdated moral mandates justifying slavery, and prohibiting same-sex coupling, eating shellfish, and wearing synthetic fabric! (my example, not Rob’s).

In other words, is moral duty a sufficient condition of legality? How far away are we from the Nuremberg defense, of just following orders? Rob notes that this hidden premise (if it’s moral, it should be legal, and vice versa) is not widely believed today. For one, there are plenty of things widely regarded as moral which aren’t enshrined in law. Further, under tyranny, violating unjust laws is an arguably moral thing to do.

To Rob, the exercise of political power is only legit when it enforces, not duties, but *rights*. He offers a Kantian rationale, based on *The Metaphysics of Morals*. He calls *The Metaphysics* a valuable but neglected work, which can correct the misapplication of Kant’s earlier work, *The Groundwork*....

In MacDougall’s view, rights are a stricter criterion than duty, and rights-based conceptions of legitimacy have advantages over duty-based ones. Both can arrive at the same policies, but rights-based arguments hold up better under scrutiny. In the discussion, clarification was sought over how, if morality is fallible, Kant is able to determine what is moral? Rob explained the idea of the categorical imperative, that actions are moral if and only if everybody else could act that same way.

Review by David Lee