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### Righting Health Policy: Bioethics, Political Philosophy, and the Normative Justification of Health Law and Policy

D. Robert MacDougall

*CUNY New York City College of Technology*

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# Righting Health Policy

## Bioethics, Political Philosophy, and the Normative Justification of Health Law and Policy

D. Robert MacDougall

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# Introduction

## THE TASKS AND TOOLS OF BIOETHICS

There is an old saying that when you have a hammer, everything looks like a nail. It could mean that when you have a certain tool handy, it seems like the best tool for every task. Or, it could mean that when you have a tool, everything looks like a problem that needs to be fixed. Whatever else it means, though, it surely means that the tools we have at our disposal influence the way in which we solve problems. Sometimes we use a hammer when a pry bar, a mallet, or a nail puller would be better.

This is a book about tools, the tools that we use to judge the moral acceptability of laws and policies regulating health and the various practices of health care. What makes a law a good one? What makes a behavior deserving of regulation, incentivization, or prohibition? What should laws aim at? When do laws go too far? Answering these questions requires tools, or methods. It is crucially important that we use the right tool for the job when answering questions like these. I will argue that bioethics has not been using the right tools when answering questions such as these. It has tended to use the tools it has available rather than the best ones for the job.

The tools that I am primarily concerned with in this book are philosophical ones. The discussion about methods in bioethics is a relatively big and multifaceted one: bioethics is inherently interdisciplinary, and so there is no single set of tools applicable to all, or perhaps even *any*, bioethics problems or issues. Even the questions I listed above are not solely philosophical questions. When we ask whether a behavior should be regulated or prohibited, for example, sociology and the medical sciences might be relevant. In fact, it might be harder to list disciplines *not* relevant to these questions than it would be to make a list of those that are. Everything affects everything; how can any tool be the “wrong one” for the job, if we need so many tools to get a grasp on the moral problems we face in real life?

It would be foolish to bring only the tool you thought *most important* for a job to the task; you should bring a whole tool bag because for any problem, you may need more than one tool. Even so, there is often one or a small set of tools that are most important for the job at hand. My argument is, roughly, this: despite the large number of tools bioethics has brought to problems of health law and policy, it has generally failed to bring the most important one: political philosophy. The argument is about philosophical tools because I understand moral problems to be, at base, best answered by philosophical tools. These philosophical tools are commonly employed in the bioethics literature, where a significant percentage of the field is made up of professional philosophers. But the problem is that bioethicists have typically brought (to use another hackneyed saying) knives to a gunfight. They have used the principles, theories, and methods characteristic of moral philosophy when they should have been using political philosophy. This has had a detrimental effect on the quality of the substantive answers bioethicists have given to normative questions surrounding health law and policy; and in many cases it has also caused debate to revolve around issues that are, I shall argue, not the most relevant to the problems for which they are thought foundational.

Defending these sweeping claims raises methodological problems of its own. Even if it were true, that bioethics has tended to use moral philosophy when political philosophy would be more appropriate, what sort of method could be used to demonstrate this? The claim is clearly an empirical one—bioethics only has a “problem” if we look at the bioethics literature and find that political philosophy is indeed missing. How could such a thing be accomplished in any kind of rigorous way?<sup>2</sup> But these sweeping claims also raise serious normative and philosophical issues. Who decides what the most important discipline is for addressing any particular question? Isn’t the idea that political philosophy is the “best” tool for some job itself a normative claim? How would we even know if political philosophy were used *enough*? Wouldn’t the answer to such a question depend, in part, on answering questions about which moral and political theory is the right one?

The book is in fact designed around these questions. To give a spoiler: there is no rigorous way to make the claim I am making. That is why I will have to combine broad characterization of the literature with specific, pointed examples, that I think are strong but are still, ultimately, only suggestive. Readers will have to judge for themselves whether the examples are compelling enough to demonstrate a problem with the field. Furthermore, there is no definitive way to explain the role that political philosophy *should* play in the bioethics literature without assuming a normative standpoint. That is why—after some broad observations of the field in chapters 1 and 2—I will stick to evaluating the bioethics literature from a specific normative standpoint, namely, a Kantian one. But the reasons for bringing Kant into this debate

are, ultimately, related to showing the broader problem with the bioethics literature. Using moral instead of political theories for answering normative questions about health law and policy is a problem from many standpoints, although it is particularly problematic from a Kantian standpoint, as Kant himself made a great effort to demonstrate, I shall argue. But Kantian bioethicists have not generally considered the theoretical problems with trying to enforce Kantian morality; nor have they paid any attention to Kant's political philosophy, or any competing political philosophy; and what is more, they haven't been challenged to do so by their critics. This overall state of affairs is among the most damning evidence possible, I will argue—that there is a problem with the field. If anyone should be employing political philosophy, and specifically a theory of government legitimacy, for practical problems it should be Kantian bioethicists. But instead of paying close attention to the conceptual issues with enforcing Kantian morality, or trying to apply the principles specifically developed by Kant for issues of law and policy, Kantian bioethicists have taken the same approach toward matters of law and policy that other bioethicists have: they justify laws and policies by appealing to principles and duties characteristic of moral philosophy, rather than by giving an account of the role and legitimate function of the government.

## THE BOOK

The book will proceed in two very unequal parts. In the first and shorter part of the book (essentially chapters 1 and 2), I will make the case that political philosophy has been underrepresented in bioethics. In this part of the book the argument I make is mostly empirical and can be summarized by three major points. The first two occur in chapter 1. First, I argue that bioethics is, and always has been, oriented toward questions of law and policy—arguably the larger part of the discipline has been aimed at questions relating to law and policy, and has not been content with mere discussion of what behaviors are “moral” or “immoral.” Even the principles most closely associated with bioethics were originally adopted in the context of pressing problems in health law and policy. My claim then is that bioethics has always been in practice a kind of applied political theorizing, since the questions bioethicists sought to answer were so often legal or regulatory ones. Even clinical bioethics depends in a very significant way on conclusions about the normative justifiability of laws and policies. Then I will discuss in a very abstract way the methods that would seem to be most appropriate to answering questions about the normative justification of laws and policies. What kinds of premises would be necessary to decide, for example, whether some action should be legally mandated, incentivized, or prohibited? This leads us to the

second major point: premises about government are necessary for justifying any normative claim about health law or policy. Treating issues of law and policy as mere questions about the morality of the behaviors they regulate is problematic, because such an approach necessarily relies on premises about government that are rarely even articulated, let alone defended as part of a broader theoretical perspective.

The third major point in this first part of the book appears in chapter 2. Despite the field's aspiration to give arguments justifying health law and policy; and, despite the formal importance of normative theories about government to this project; political theory plays only a very small role in bioethics. The reasons for the absence of political philosophy in bioethics can be understood by studying the context in which the field emerged. Understanding that context sheds some light on why the major approaches present in the bioethics literature today have systematically marginalized theories of government and exposes some common but problematic assumptions these major approaches make about how law and policy should be justified. Political philosophy is nearly absent from major works on bioethics methodology, and the methods that these works have established has meant that it is also missing in most other areas of the field. We can see this by examining a variety of introductions to bioethics and general works on bioethics and law, for example. The argument is not that political philosophy is entirely absent from bioethics, but that it is severely underrepresented when considered in light of the political goals of the field and the wide (although by no means universal) enthusiasm the field shows for using philosophy as a method for justifying normative claims.

The second part of the book (chapters 3–8) will make a more sustained case for the inclusion of political philosophy in bioethics by using Kantian moral and political philosophy to give a detailed account of the problems with the dominant approach to normative justification of health law and policy, and the ways in which a political philosophy can solve them. This part of the book, with the exception of chapter 3, is mostly normative. In chapter 3, I survey a variety of ways that bioethicists have approached the question about whether markets in organs should be legally prohibited. I focus specifically on Kantian approaches to this question. This makes a comprehensive survey of the literature more feasible, but it also offers important insight about the way bioethicists approach questions of health law and policy. In that chapter I show how, despite a rich theoretical literature exploring multiple aspects of Kantian philosophy and applying it in diverse ways to the question of the legalization of organ markets, almost no attention has been given in that literature to basic questions about political philosophy, such as the conditions for legitimate laws, or the moral justification for the exercise of political power. This is perplexing because Kant himself devoted much attention to

these issues in his political philosophy, developed in several of his works not often utilized in the bioethics literature. Instead, bioethicists have almost universally preferred to utilize Kant's moral philosophy to answer questions about the basic justifiability of laws prohibiting the sale of organs. In this way, they reflect the "moral philosophy approach" dominant in the bioethics literature, by which I mean that they determine the justifiability of laws and policies by using moral philosophy to determine whether the actions regulated are moral or immoral.

In chapter 4, I give a detailed account of the theoretical problems with this moral philosophy approach to issues of health law and policy. To do this, I give an account of the main problem associated with justifying specific health laws or policies (the problem of political legitimacy). I show why there is no easy way to solve the problem of legitimacy if we are limited to familiar moral principles described in Kantian moral philosophy. Although bioethicists in the literature on Kant and organ markets have thought that Kantian moral principles can explain either why we should or should not have legal prohibitions on organ sales, a careful study of Kant's moral philosophy shows that such uses categorically misunderstand Kantian moral philosophy. The various versions of Kant's Categorical Imperative cannot easily justify any uses of political power, because for Kant moral duty is primarily about acting on the right reasons, and laws and policies have no way of causing us to do this. In fact, far from solving the problem of political legitimacy, Kant's Categorical Imperative actually presents three serious challenges for justifying political legitimacy, and so threatens to show that law and policy cannot be justified *at all*. The challenges presented by a careful reading of Kant's moral philosophy leave us in need of a dedicated account of the moral justification of exercise of political power—in other words, a normative political philosophy.

Fortunately, Kant provides such an account in his *Doctrine of Right*. In chapters 5 and 6 I develop an account of political legitimacy and authority along the lines of Kant's account in the *Doctrine of Right*, and argue that it solves the challenges that his familiar moral principles, taken by themselves, cannot. In chapter 5 I argue that Kant shows how the exercise of coercion is morally justified by the possibility of it being exercised in a manner consistent with the external freedom of everyone under universal law. Kant's account of the basic case of justified coercion helps solve some of the problems set up in chapter 4 but leaves others outstanding. In chapter 6, I argue that Kant provides the resources for answering these remaining challenges in his accounts of private and public right and I show how he does so. Notably, I also argue here that Kant's political philosophy is actually necessary for plausibly applying his moral philosophy to many *moral*, rather than political, questions. A theory of political rights of the kind Kant provides turns out to

be a necessary precursor to answering basic questions about whether actions use persons as a mere means, on my account.

In chapters 7 and 8, I explore some ways in which political philosophy—in this case, the Kantian one I developed in chapters 5 and 6—might change the bioethics debate surrounding two significant legal issues in bioethics. These chapters illustrate some ways that significant issues and questions have been overlooked in the bioethics literature because it has utilized methods of moral philosophy, rather than more appropriate methods characteristic of political philosophy. These chapters are important for understanding the fundamental rethinking of various bioethics issues that normative political philosophy can offer us.

In chapter 7, I rethink the contribution Kant makes to questions about the legal permissibility of markets in organs. While chapter 3 shows how Kant is usually interpreted as supporting laws prohibiting the sale of kidneys, his basic political principles suggest that governments actually lack the authority to legally prohibit such sales. This is true even though such sales are deeply immoral, on his view. However, Kant's theory also provides reasons for thinking that the state cannot legitimately enforce contracts for kidney sales. I argue, then, that the considered Kantian position on such markets is that they must be legally permitted, although contracts for kidneys are unenforceable. The stark contrast between "Kantian" accounts based on his moral views, and the most defensible position based on his political ones, illustrates the importance of political philosophy for justifying law and policy. Laws that seem easily justified by their role in enforcing "morality" may turn out to be deeply unjustifiable when considered more carefully in light of the principles defining and limiting the legitimate exercise of political power.

In chapter 8 I rethink the basis of informed consent laws. Bioethicists have typically utilized the moral philosophy approach here as they have elsewhere, thinking that laws requiring informed consent must be justified on the basis of our general moral rights. But they have failed to justify informed consent laws, I argue, because they have not been able to explain why general pre-political rights to consent entail that physicians (alone among parties seeking to obtain consent) have special duties to inform patients about the risks and benefits of treatment. The Kantian political approach is different, because it starts with the presupposition that our prepolitical moral rights are indeterminate. So although patients have a basic moral right to consent, nothing specific follows from this about how much information physicians must give patients in order to obtain a valid consent. Physicians consequently have no specific prepolitical duties to inform patients prior to treating them. However, Kant understands this condition of indeterminate prepolitical rights and duties as deeply morally problematic, and it forms the basis of his account of government authority. The government exists in part to solve the problem

of indeterminacy and give content to our prepolitical moral rights, as part of its general mandate to make us equal under law. Because the government has authority to determine the specific contours of, for example, the physician's duties when obtaining consent, it can endow physicians with both a moral and legal duty to inform patients about the benefits and risks of treatment as a condition for obtaining a valid consent. In this case, political philosophy is not only necessary for determining the nature of our political rights and obligations, but also for giving shape and content to our moral duties.

### THEORY AND BIOETHICS: A FEW CONCERNS

As I've said, the primary purpose of this book is to argue for reconsidering the importance of political philosophy or political theory to bioethics. I argue that bioethics should use principles explaining the legitimacy of governmental actions when justifying laws or policies. However, some readers may be skeptical about the importance of theory *in general* (moral or political) for bioethics. If theory in general is not a legitimate or important way of treating bioethics issues, then it may seem misguided to suggest that political philosophy has an important role to play in the justification of law and policy. Other readers may think theory is important, but question the relevance of specific kinds of theories, such as the kind of Kantian theory I've indicated will be employed in this book.

Critics have had a variety of motivations and have questioned the use of theory in bioethics in different ways. Some writers—such as casuists—have been skeptical about the use of theory in moral reasoning altogether.<sup>3</sup> Obviously, if theory should not play a significant role in moral reasoning, then arguments about “what kind” of theory we should employ in bioethics will lose much of their interest. In this book, I make the modest assumption that moral and political theorizing is sometimes valuable for bioethical reasoning.

Even granting this modest claim, some may object that theory is nevertheless a liability in certain contexts. For example, Will Kymlicka argues against the use of theory on governmental commissions, in part because there is limited time in this context to engage in extensive theorizing.<sup>4</sup> John Arras, similarly, argues against the use of theory in the public policy context, because the more “theoretical” the work is, the less likely that it can be understood by the general population, and so the less likely that it can be endorsed in a meaningful way by the electorate from which laws get their authority in a democratic society.<sup>5</sup>

The argument in this book, however, is not for the use of theory in any particular context. The argument is instead a qualitative one: it is about the kind

of theory that should be employed when we engage in theory, not an account about when we should engage in it. If there are certain contexts where overt theory is not appropriate—as there likely are—then political philosophy should not be used in those contexts, but neither should moral theory. The argument here is best understood in a hypothetical sense: if theory is ever justified in bioethics reasoning about law and policy, then it is political rather than moral theorizing that deserves pride of place. The argument in chapter 1, that normative claims about laws and policies presumably must rely on some account about what governments should generally do, should be taken in this way. It may not always be appropriate for bioethicists to explain the more general premises about morality or political legitimacy that lead to their conclusions about law and policy; but if they do, it is indefensible to explain only the relevant moral premises, and not the (even more) relevant political ones.

### KANTIAN THEORY

A different set of concerns has been leveled not at the context of theoretical work, but instead at the kinds of theories employed. Specifically, some have argued against the use of “high moral theory,” particularly theories of the kind traditionally studied in normative ethics, such as Kantian or utilitarian theories.<sup>6</sup> Various concerns about these theories are raised, including their “architectonic” nature (meaning that they usually depend on one or a few foundational principles—which, if wrong, would seem to invalidate the whole theory), and the background pluralism that makes appeal to such theories controversial, or even morally objectionable. In some ways, it is possible to read the whole field of bioethics as a response to the problem of pluralism about morality and the necessity of finding commonly acceptable solutions to moral problems. I explore this reading of the field in chapter 2.

From this perspective, it may seem like appeals to Kantian moral or political philosophy rest on a very significant misunderstanding of bioethics and its tasks in the real world. On this view, bioethics exists to present commonly acceptable answers to our public problems, not to further divide us by appealing to controversial or outdated theories.

However, part of the argument of this book is that we have lost something in the move away from the use of “high” moral and political theory. Specifically, I argue in chapter 2 that bioethics moved toward mid-level principles—such as, for example, Beauchamp and Childress’s four principles of biomedical ethics—as a practical way of avoiding some of the controversy that threatened to undermine bioethics deliberation in the pluralistic context of health care. However, the move to mid-level principles unwittingly focused attention on what I call “primary moral duties,” that is, moral duties

ordinary persons have toward one another. Because of the focus on these primary moral duties, bioethicists have predominantly considered issues of law and policy through that lens: not as questions about the duties and rights of governments, but instead as questions about the duties of professionals (or in some cases, citizens or patients). Conclusions about these are then translated directly into law or policy.

The problems with this approach are best seen by taking a step back and considering, abstractly, whether an account of these primary moral duties is sufficient for justifying either law or policy. I argue that it is not, but the argument is necessarily theoretical. For example, in order to consider whether showing that something is immoral is enough to show that it should also be illegal, we have to consider what it means for something to be “immoral” in the first place. Kantian theory is employed in part because it makes a commitment about major concepts explored here, such as “morality,” “coercion,” “legitimacy,” and more.

I caution readers against what would, in my view, be a serious misreading of this book. Some readers may be tempted to read this as merely a “Kantian political account” of bioethics. This book does provide the outlines of such an approach, but I will spend relatively little time defending Kant’s particular political philosophy against competing political approaches (although, I do provide an extensive argument about why Kant’s political philosophy is preferable to his moral philosophy when addressing issues of law and policy). The main argument of the book is that bioethics should use political philosophy when justifying health law and policy, and I employ Kant’s moral and political theory as a way of showing what is at stake and why it is important. Kant is particularly helpful for this project because he provides a detailed and thorough account about the principled distinctions between moral obligation and political legitimacy. Much of the potential audience for this book does, I suspect, self-consciously reject Kantian moral theory for one reason or other. As we will discuss in some detail (especially in chapter 5), the main principles of Kantian political theory are not directly dependent on his moral principles, even though they are compatible with them. So I encourage readers to approach Kant’s political theory with an open mind, even if they reject Kant’s moral theory. But even if readers have reasons for rejecting both his moral and political theory, I think this book still has something to offer them: it is a book about the importance of normative political philosophy, and not just a Kantian political bioethics.

Because the main purpose of the book is to reflect on the relationship between morality and law, and to consider the reasons why political theory is more suited to addressing health law and policy problems than moral theory, it is important to regard the normative policy conclusions of chapters 7 and 8 somewhat tentatively. In both chapters, I draw normative conclusions

about policy on the basis of Kantian arguments about the source and nature of government legitimacy and authority. I believe that these conclusions are relatively better justified than other positions on these issues in the extant literature. However, part of the reason why Kant's theory is relatively successful here compared to the existing bioethics literature is that few authors in bioethics are even addressing the relevant questions in these applied cases—namely, questions about the source, nature, and limitations of the state's legitimacy and authority. If we had a more robust literature beginning with these questions rather than questions about our moral duties, then Kantian political philosophy could be put into fruitful exchange with other views about government legitimacy and authority, and we might find (methodologically appropriate) reasons for thinking that the Kantian positions I develop are wrong. If there ever comes a day when the bioethics literature engages more extensively with these issues from competing views about the legitimacy and authority of the government, then perhaps there will be occasion to revisit the normative conclusions of these chapters.

## NOTES

1. By “moral philosophy” from here forward, I mean the branch of philosophy that develops theories that are meant to assess our most basic duties toward each other. By “political philosophy,” I understand theories specifically designed to address questions about what makes government “just or legitimate or good” (see the discussion in chapter 1). On some accounts—including perhaps the Kantian one, as I discuss in chapter 5—political philosophy should be understood as a branch of moral philosophy. Even so, in this book I argue that the problems raised in attempting to justify governments and their laws go well beyond the more basic ones about our duties to each other that are the bread and butter of moral philosophy. As such they require additional explanation about concepts such as legitimacy and authority, even if political philosophy is ultimately best understood as a branch of moral philosophy broadly construed. This distinction between moral and political philosophy also underlies Kant's approach. In some works, such as the *Groundwork*, the *Critique of Practical Reason*, and the *Doctrine of Virtue*, Kant is most concerned with explaining our basic duties to one another. In others—most significantly, the *Doctrine of Right*, but also in his occasional works, such as “Theory and Practice,” and “Towards Perpetual Peace”—Kant discusses issues related to government legitimacy and authority.

2. For a discussion of the value but also limitations of this kind of work, see Rosalind McDougall, “Systematic Reviews in Bioethics: Types, Challenges, and Value,” *The Journal of Medicine and Philosophy* 39, no. 1 (2014).

3. Albert R. Jonsen, *The Birth of Bioethics* (New York: Oxford University Press, 1998), 333.

4. Will Kymlicka, "Moral Philosophy and Public Policy: The Case of New Reproductive Technologies," in *Philosophical Perspectives on Bioethics*, ed. L W Sumner and Joseph M Boyle (Toronto: University of Toronto Press, 1996).

5. John Arras, "Theory and Bioethics," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2020). <https://plato.stanford.edu/archives/fall2020/entries/theory-bioethics/>.

6. John Arras, "Theory and Bioethics," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2020).

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