Public Health Interventions as Regulatory Governance: The Place of Political Theory

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This is a reply to Steve Latham's Article for the Republicanism special issue.

Steve Latham poses the question—how should a person who is concerned with the public's health engage with political theory? His quest is to identify a methodological approach that is both useful and politically legitimate. Given that 'pristine theory' must in practice ultimately give way to pragmatism, Latham eschews theory, preferring to proceed directly from arguments about value priorities.

As a public health neophyte, Latham's quest resonated with what I perceive as an uncomfortable bifurcation in methodological approaches to public health scholarship. While some of this literature is highly abstract and theoretical, another strand is firmly grounded in specific public health practices, typically involving empirical studies seeking to understand their effects and how they are experienced in real-world contexts. Hence, I have also pondered whether there is a 'third way' (and where I might find it), and Latham's methodological approach does just that: it offers a 'middle level' approach that engages directly with the normative values at stake in public health yet firmly anchored in the messy realities of public policy practice.

For me, Latham's approach also appealed because it resembles my own methodological approach as a scholar of 'regulatory governance' or 'regulatory studies'. This is a multidisciplinary field of scholarship that is broadly concerned with understanding regulatory governance, employing a wide range of methodological approaches and analytical perspectives, including law, political studies, political theory, economics, management studies, sociology, criminology and applied ethics. Regulation, or regulatory governance, has been defined as 'the organised attempt to manage risks or behaviour in order to achieve a publicly stated objective or set of objectives' (Black, 2014: 2).

In seeking to understand, develop and offer a critique of various facets of the regulatory governance enterprise,

this scholarship straddles the space between political theory and public policy and much of it is pitched at the level of middle level theorizing (see Morgan and Yeung, 2007: 223–228). Hence Latham's reflections indicate that public health scholarship and practice might be understood as a *form of regulatory governance* applied to the realm of public health. Indeed, Latham explicitly recognizes that public health interventions are a species of public policy interventions by acknowledging that we must legitimize all our public policies and activities, such as police and intelligence activities, our public school curricula, our highway design and so forth, and not just our public health interventions. So, I urge those interested in public health to engage with regulatory governance scholarship, for they may discover, perhaps surprisingly, that it has much to offer them.

Public health scholars might, for example, find a methodological bridge between pristine theory and public policy pragmatism in the concept of 'regulatory legitimacy'. Although this concept is protean and multidimensional, my approach to regulatory legitimacy springs from my understanding of the regulatory enterprise as fundamentally purposive in orientation, directed towards the achievement of identified collective goals in attempting to manage risk and/or shape social behaviour. Thus, I evaluate the legitimacy of regulatory governance interventions primarily in terms of their effectiveness in achieving the designated regulatory goal (Yeung, 2004, chapter 3). Yet, because these interventions often involve the exercise of public power and affect multiple individuals and groups, they are necessarily tempered and constrained, at least in liberal democratic societies, by a series of normative values (Yeung, 2004, chapter 3).

While Julia Black adopts a more empirically oriented conception of regulatory legitimacy, focusing on whether a regulatory organization is *perceived* as having a 'right to govern' by both those it seeks to govern, and those on behalf of whom it purports to govern (Black, 2008: 144), she provides a useful taxonomy of the kinds of normative values or 'claims' that are typically invoked when seeking to evaluate the legitimacy of a regulatory organization or intervention (Black, 2008: 145), broadly classifying them into four groups:

- (1) *constitutional claims*, which emphasize conformance with written norms (thus embracing law and so-called 'soft law' or non-legal, generalized written norms) and conformity with legal values of procedural justice and other broadly based constitutional values such as consistency, proportionality and so on;
- (2) *justice claims*, which emphasize the values or ends which the organization is pursuing, including the conception of justice (republican, Rawlsian, utilitarian, for example, or various religious conceptions of 'truth' or 'right');
- (3) *functional or performance-based legitimacy claims*, which focus on the outcomes and consequences of the organization (e.g. efficiency, expertise and effectiveness) and the extent to which it operates in conformance with professional or scientific norms, for example; and
- (4) *democratic claims*, which are concerned with the extent to which the organization or regime is congruent with a particular model of democratic governance, e.g. representative, participatory or deliberative (Black, 2008: 145–146).

Hence, Latham's methodological approach could be understood through the lens of regulatory legitimacy applied to the domain of public health: his discussion of various concerns implicated in mandatory childhood vaccination schemes encompasses effectiveness and performance (including adverse effects), constitutional and justice-based concerns arising from the need to respect the liberty of parents with regard to their child rearing practices, the need to accommodate to religious and 'private' but strongly held objections to vaccination and the need to develop institutional procedures that can justly evaluate applications for exemption, concluding that our response to such a proposed intervention will require some kind of democratic yet pragmatic accommodation between potentially competing values. As Latham puts it, the resulting picture of political legitimacy will be so sufficiently complex and grounded in legal

and factual contingencies that it will no longer merit the title 'theory'.

But I would caution against throwing the baby out with the bathwater. For Latham, the value of 'pristine theory' lies in providing us with 'rhetoric' to support the interventions we favour. But for me, the value of pristine theory is more than merely rhetorical. As a set of broadly coherent ideals that seek to encapsulate a series of related political commitments and constellations of value, theories are simplified 'ideal type' models. Hence, they are useful heuristics, providing analytical clarity in various ways, helping us to: understand commonality and divergence between opposing views; identify inconsistencies in particular positions from the viewpoint of theoretical coherence; and to identify the extent to which our differences spring from fundamentally different starting points and political commitments thereby enabling us to assess the prospects of finding an acceptable compromise between them.

For example, Latham rejects civic republican theories of health because they expect citizens to invest too much political energy and vigilance to health matters, leaving them 'without enough evenings' to devote to the pursuit of higher callings. Latham's view springs from a belief that democracy should not place undue demands on individuals' participation in political life. Unlike civic republic theories, which envisage active political participation by citizens in democratic governance, liberal democratic theories regard citizens as entitled, rather than obliged, to participate actively in political life. Accordingly, it seems unlikely that Latham (whose viewpoint resonates strongly with liberal democratic theory) would regard it as normatively desirable to expect vigorous participation in matters of health from its citizens, other than in exceptional circumstances.

References

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