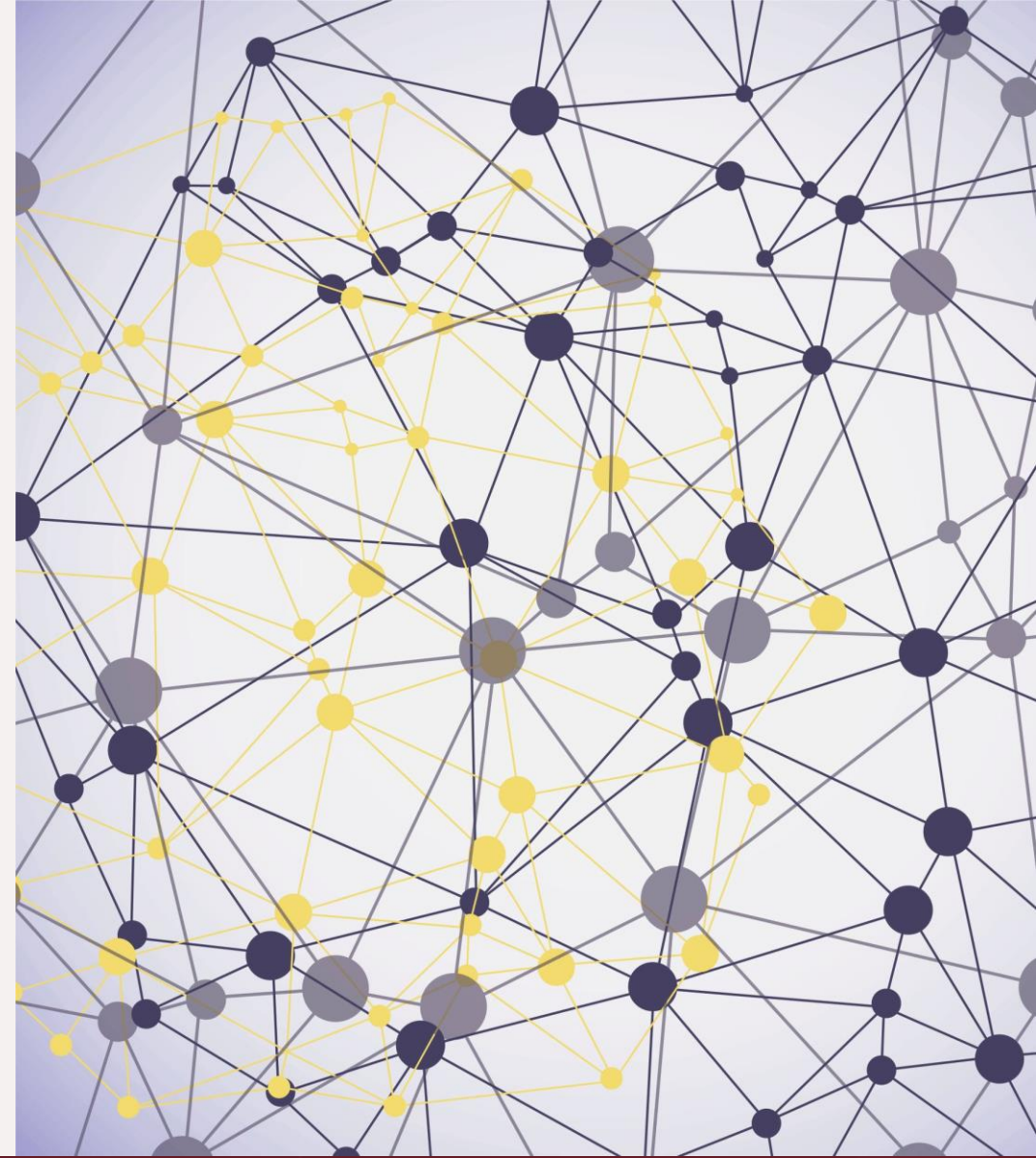


The Governance of Assisted Dying: Foreground Debate and Background Challenge

Roger Brownsword



Foreground Debate and Background Challenge

- Foreground debate: should the legal position in relation to assisted suicide be set for prohibition or permission?
- Background challenge: where more than one position is advocated in the foreground debate, and where the position that is adopted continues to be contested, how is law to manage discontent with its governance? In the face of reservations about the legal position, is it reasonable for those who govern to insist on respect for the law?

Overview

- Foreground debate: should the legal position in relation to assisted suicide be set for prohibition or permission?
- Law's imperfect governance and discontent
- Background challenge: where more than one position is advocated in the foreground debate, and where the position that is adopted continues to be contested, how is law to manage discontent with its governance? In the face of reservations about the legal position, is it reasonable for those who govern to insist on respect for the law?

Foreground Debate

- Full disclosure
- Is the legal position coherent?
- Is the legal practice coherent?
- False positives and Bad Samaritans
- Effective and legitimate safeguarding

Full Disclosure

- Funding by Dignity in Dying
- Roger Brownsword, Penney Lewis, and Genevra Richardson, 'Prospective Legal Immunity and Assistance With Dying' (2012) 23 *King's Law Journal* 181-193

Legal coherence



- Doctrinal coherence (integrity of doctrinal body) (characteristic of Law 1.0 reasoning)
- Regulatory coherence (laws serve some specified policy) (characteristic of Law 2.0 reasoning)



Is the legal position 'coherent'?

- If P1 does x, then no criminal offence is committed by P1
- But, if P2 assists P1 to do x, then a criminal offence is committed by P2
- Is this coherent where x = having a drink of water, or shopping on a Sunday, or suicide?

Is the legal practice 'coherent'?

- If P1 does x, then no criminal offence is committed by P1
- But, if P2 assists P1 to do x, then a criminal offence is committed by P2
- In practice, though, P2 will not be prosecuted

False positives and bad samaritans

- If P1 should be permitted to do x, then P2 should be permitted to assist P1 to do x
- But, P2's act of assistance must be freely willed by P1
- P1 must be safeguarded against P2s who are bad samaritans

Effective and legitimate safeguarding of P1

- By making all acts of assistance unlawful. Is this effective in practice? Is it legitimate if it prevents P1 being able to do x? Do we treat a false positive P1 as equivalent to a true positive P1?
- Current practice judges whether P1 freely wished for P2's assistance after x. Why not assess this before x?

Law's Imperfect Governance and Discontent

- Discontent with promise, positions, performance, and people
- Roots of discontent
- Reasonableness of discontent

Law's Governance and its Discontents

- Discontent with the position taken by law
- Discontent with practice
- Exacerbated by emerging technologies; but in relation to assisted dying, we have good old-fashioned discontent

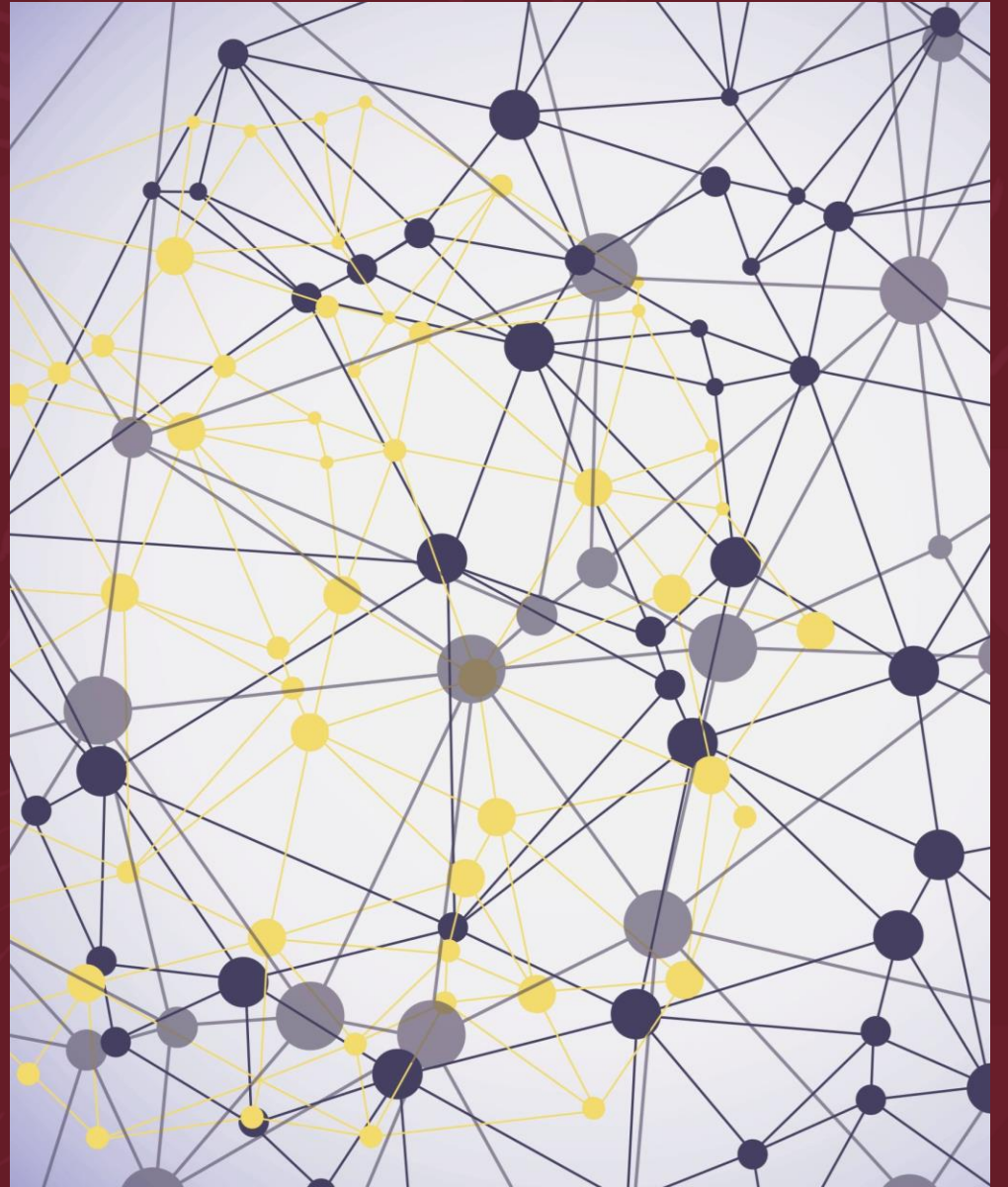
The reasons for our discontent

Law is a *human* enterprise

Rules and their many affordances
normative (open texture of rules)
practical

Plurality (both prudential and moral)

Transitions

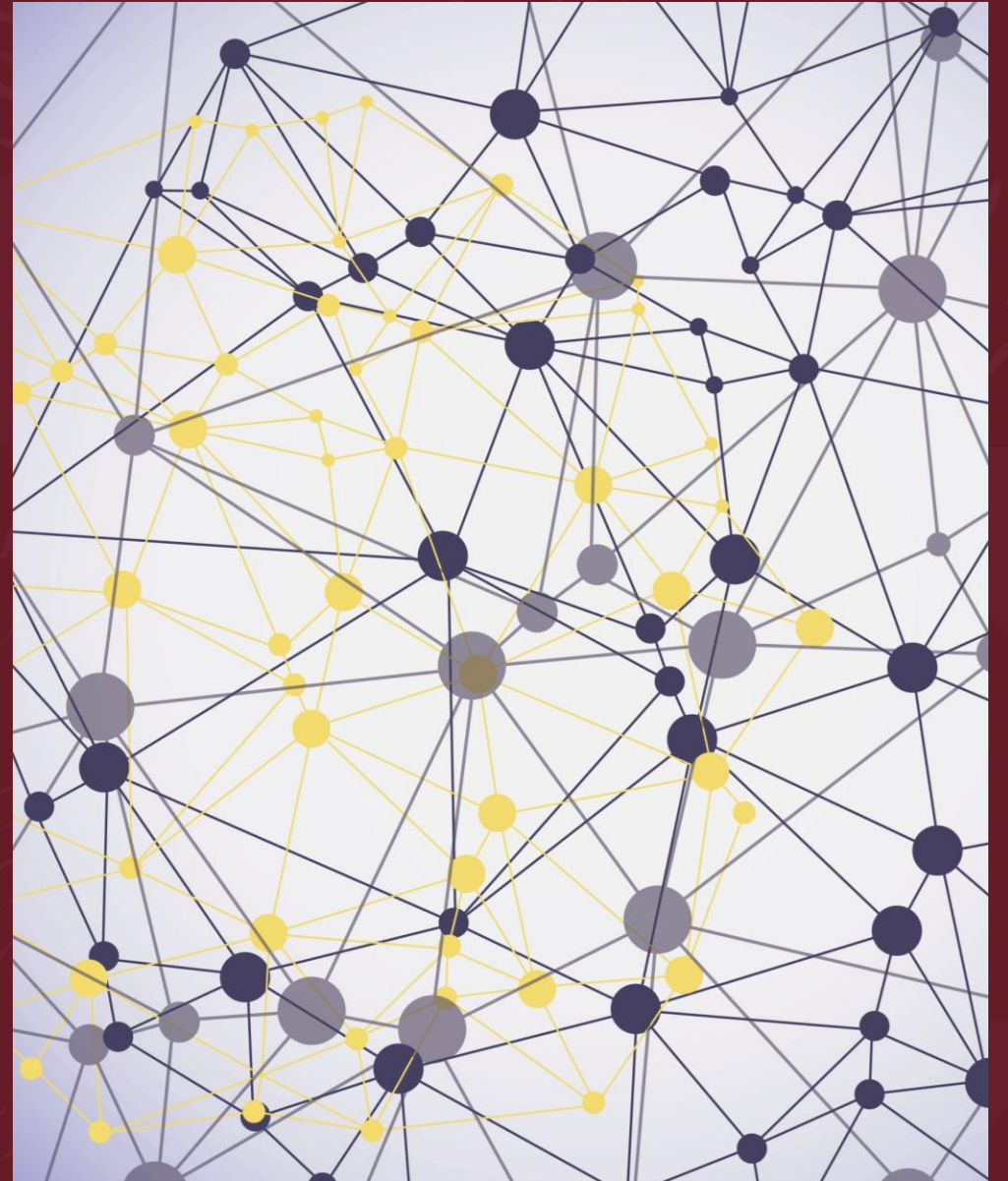


The reasonableness of our discontent

In pluralistic communities, a spectrum of reasonable views

Views that, by the community's own lights are wholly unreasonable

Is there an Archimedean vantage point beyond individuals and their communities?



The Background Challenge

- The demand for respect for law
- Sumption and social solidarity
- Weak reservations
- Stronger reservations
- Overriding reservations



Demand for respect for law

- Respect for law simply because it is the law
- Respect for law reservations notwithstanding
- Denning on precedent
- Reservations and reservations

Jonathan Sumption, *Law in a Time of Crisis* (London: Profile Books, 2021)



- The only thing that ever has or ever will unite us is a common loyalty to a way of conducting our affairs that we can respect even if we disagree about the outcome. This means a process of decision-making that accommodates dissent, debate and a diversity of values. (204)
- '[W]hat holds us together as a society is precisely the means by which we do things. It is a common respect for a way of making collective decisions, even if we disagree with the decisions themselves' (237).



Weak reservations

- Culture of 'like' and 'dislike', thumbs-up and thumbs-down
- Mere preference
- Self-interest
- 'Detached' judgment of what is in the collective interest (public interest)?

Stronger reservations

- Matter of principle (moral judgment---nb question of threshold conditions) and conscientious objections
- Community values (fundamental values)

Overriding reservations

- Reservations based on the generic conditions (the conditions of possibility) for viable human communities: three imperatives
- (i) Respect for the planetary boundaries and the possibility of human existence
- (ii) Respect for legitimate difference and the need for peaceful co-existence
- (iii) Respect for humans as prospective purposive agents

And finally.....Challenges facing law's governance

- Threats to the generic conditions, sustaining the conditions of possibility for viable human communities
- Giving proper consideration to 'existential' concerns (question of 'justiciability')
- Adopting a more technological (but still 'human-centric') approach to governance
- Dealing with discontent both intra-community and inter-community