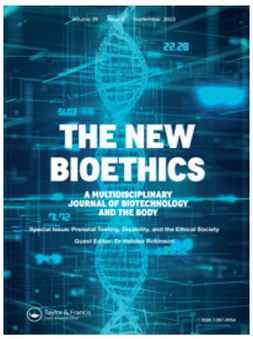

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Between Rocks and Hard Places: Good Governance in Ethically Divided Communities

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This article, prompted by Heidi Crowter's campaign to eliminate the discriminatory aspects of current abortion law, outlines the challenges to good governance in a context of bioethical plurality. First, the nature of the plurality is sketched. Secondly, some reflections are presented on how those who have governance responsibilities might ease the tensions engendered by the plurality; and, at the same time, how the discontented governed might reasonably press their views. Thirdly, a model of good governance (demanding integrity by those who govern and respect for the global commons) is introduced. The conclusion is that good faith governance merits our respect, but it does not guarantee particular outcomes or positions that will meet with the approval of all bioethical constituencies or individuals. Accordingly, we have to learn not only to live with rocks and hard places but also to find civilized ways of debating our differences.

KEYWORDS Good governance, bioethical plurality, human rights, human dignity, abortion, global commons

1. Introduction

This article is prompted by Heidi Crowter's campaign[1] to change English abortion law and, in particular, by the judicial review that has been pursued on her behalf claiming that the law is incompatible with the UK's commitment to human rights.[2] However, the primary concern of the article is not so much with the details of the Crowter campaign as with the context of bioethical division in which it is being undertaken. Once we focus on that context, we find a general question that is neither new nor at all easy to answer. As Lord Justice Ward remarked in the well-known case of the conjoined twins, Jodie and Mary:[3]

[1] See, https://www.crowdjustice.com/case/downrightdiscrimination/.
[2] *R (on the application of Heidi Crowter and others) v Secretary of State for Health and Social Care* [2021] EWHC 2536 (Admin).
[3] *Re A (Children)* [2000] 4 All ER 961.

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> The problems we have faced have gripped the public interest and the case has received intense coverage in the media. Everyone seems to have a view of the proper outcome. *I am very well aware of the inevitability that our answer will be applauded by some but that as many will be offended by it* … . (968, emphasis supplied)

In cases of this kind – and, there are many of them in our jurisprudence – the judges find themselves caught between a rock and a hard place. Moreover, it is not only the judges who find themselves faced with difficult choices. For legislators, too, where their constituencies are morally divided, it will be challenging to find a legal position that is acceptable to all views.

Our general question, therefore, is this: how are we to achieve 'good governance' and maintain respect for the law when the questions to be resolved engage a backcloth of ethical plurality such that the position taken by the law will inevitably provoke discontent in some quarters?

Arguably, the emergence of social media as a platform for sharing views and attracting support for campaigns has made the plurality even less tractable. For present purposes, we do not need to treat this view as correct or blame the Internet for all our governance problems (Sunstein 2001; Benkler *et al*. 2018). The fact of the matter is that, with or without online connectivity and complications, those with governance responsibilities are already in trouble when they are confronted by ethical plurality (Brownsword 2021a) – damned if they do, and damned if they don't.

At the same time, our ethical differences are a challenge for those – such as Heidi Crowter and her supporters – who argue from a position that is resisted within the plurality. Those who so argue might be convinced that they are 'right', but the plurality does not recognize right answers as such. How are those who are discontent with governing positions to proceed?

This article has three principal parts. In Part 2, the nature of the plurality, comprising a three-sided confrontation between the ethics of collective utility, the ethics of individual rights, and the 'dignitiarian' ethics of duty, is sketched. Where the plurality is resistant to change, this will invite discontent amongst revisionists; and, where the plurality is receptive to change, this will invite discontent and resistance amongst those whose ethics are more conservative. This leads, in Part 3, to a two-sided discussion. On the one side, there are some reflections about how those who have governance responsibilities might mitigate discontent occasioned by the plurality; and, on the other side, how those who are discontent might reasonably press their views. Finally, in Part 4, we draw on a model of good governance as another approach to engaging with contested bioethical questions. This model demands integrity on the part of those who govern as well as governance in the interests of those who are governed. In particular, the latter demands that legislative positions and judicial decisions should be: (i) socially acceptable; (ii) faithful to the fundamental values of the particular community; and, (iii) compatible with respect for the preconditions for viable human communities. However, the burden of good governance is not to be borne entirely by those who govern; for those who are governed, the model implies that they, too, have responsibilities.

Our conclusions are that there is no easy escape from the plurality and that we have to learn not only to live with rocks and hard places but also to find civilized ways of debating our differences (compare Sumption 2021). Good faith governance in the interest of those who are governed merits our respect. However, it does not guarantee particular outcomes or positions that will meet with the approval of all ethical constituencies. In the case of our abortion law, it probably is time for a reset. It is a law that can, and should, speak to the kind of community that we aspire to be – in short, a law that can command the respect of the whole community.

2. The nature of the plurality: the bioethical triangle

For those, like Heidi Crowter, who campaign against our abortion law or for those who contest our law on assisted dying, the context might seem to be a straightforward duality: on one side, there are pro-choice views and, on the other, there are pro-life views; on one side, the emphasis is on individual autonomy, consent, and rights and, on the other, the emphasis is on the community, on solidarity and on responsibility and duty. However, the plurality, even in the simplified form of the 'bioethical triangle' that I will present, is more complex.

Broadly speaking, the ethical plurality that is the backcloth for the *Crowter* case is dominated by three rival approaches, each approach being an umbrella for a number of more particular views. These approaches can be conceived of as forming the points of a (bioethical) triangle (Brownsword 2003, 2008). In response to the general question, 'What is the right thing to do?' these views respond that the right thing to do is, respectively: (i) to act in a way that will promote some specified 'good'; (ii) to respect the rights of others; and (iii) to act in accordance with one's duties. Of course, the practical significance of these views only becomes clear when we fill in what constitutes the relevant 'good' (such as utility, the satisfaction of preferences, equality, the interests of women, or whatever), the substance of the 'rights' that are to be respected (including whether these rights are both negative and positive), and the substance of one's 'duties' (including to whom or what these duties are owed).

The triangulation of these approaches varies from topic to topic, from time to time, and from one place to another. Occasionally, these three viewpoints converge to invite lawmakers to act on a consensus—as was the case, for example, with the agreed prohibitions on human reproductive cloning that followed on the successful cloning of Dolly the sheep. As one commentator remarked at the time, we find a 'degree of unanimity in opposition to cloning [that is] astounding, often uniting liberal and conservative, pro-life and pro-choice, and secular and religious people of various persuasions' (Kunich 2002-2003, p. 3). Typically, though, there is not convergence and in Anglo-American bioethics and biolaw, there has been a drift away from utilitarian consequentialist thinking and paternalistic duty-based ethics to an ethic that highlights the rights of patients and research participants.

If there were any doubt about this reconfiguration of the bioethical triangle, the importance of patient rights was very clearly illustrated in the landmark case of *Montgomery v Lanarkshire Health Board*.[4] There, Lady Hale emphasized that:

[4] [2015] UKSC 11.

> A patient is entitled to take into account her own values, her own assessment of the comparative merits of giving birth in the 'natural' and traditional way and of giving birth by caesarean section, whatever medical opinion may say, alongside the medical evaluation of the risks to herself and her baby … Gone are the days when it was thought that, on becoming pregnant, a woman lost, not only her capacity, but also her right to act as a genuinely autonomous human being. (paras 115–116)

Moreover, in addition to noting the growing culture of consumer rights, the court remarked on the increasing influence in judicial thinking of the importance of respecting human rights: 'Under the stimulus of the Human Rights Act 1998, the courts have become increasingly conscious of the extent to which the common law reflects fundamental values.' (para 80)

Looking more broadly at biolaw and bioethics, though, we should not think that (human) rights and individual autonomy have had it all their own way. Far from it, in some communities there has been a strong push-back against both rights and utilitarian ethics, usually in the name of a conservative dignitarian ethic – and, indeed, this ethic is sometimes found deep in ostensibly human rights instruments, such as the Council of Europe's Convention on Human Rights and Biomedicine[5] (see Brownsword 2014). Where a technology impacts on the human body, as is particularly the case with the human genetics applications of biotechnology, this is widely seen as raising concerns about human dignity (Beyleveld and Brownsword 1998, 2001). The dignitarian perspective condemns any practice, process or product—human reproductive cloning, therapeutic cloning, and stem cell research using human embryos being prime examples—which it judges to compromise human dignity (Caulfield and Brownsword 2006). The emergence of duty-based dignitarianism creates a genuinely triangular contest, the dignitarians disagreeing as much with the utilitarians as they do with the human rights constituency—with the former because they do not think that consequences, even entirely 'beneficial' consequences (that is, 'beneficial' relative to a utilitarian standard), are determinative; and with the latter because they do not think that informed consent cures the compromising of human dignity (Beyleveld and Brownsword, 2001, 2007).

What should we make of this picture of a three-way debate with different viewpoints prevailing at different times and in different places? Where the debate goes our way, and where our preferred position is translated into our community's biolaw, we will have no reason to be discontent with the law. However, as in any such debate, those who hold views which do not prevail will take less comfort from the outcome; and, the deeper those non-prevailing views are held, the deeper will be the discontent with the law (Brownsword, 2006).

3. Engaging with the plurality

How should those who govern and those who are governed engage with bioethical plurality? For the former, are there strategies to manage the stress potentially occasioned by the plurality? For the latter, are there ways of pressing one's viewpoint

[5] Available at https://rm.coe.int/168007cf98.

without losing respect for the law? We can start with the former and then consider the options for the latter.

3.1. Those with governance responsibilities

Depending upon the nature of the governance responsibilities in question (for example, whether they are legislative, judicial, or advisory, and so on), there are several ways in which those with such responsibilities and who are committed to good governance might engage with the plurality.

Anticipating limited consensus and a degree of discontent, good governance implies that rule-makers and position-takers should signal a willingness to review and reconsider; to this extent, governance should be provisional (Brownsword and Earnshaw, 2010). Arguably, in particularly controversial cases, reconsideration and review should be guaranteed by the use of sunset clauses (Kouroutakis, 2016); in other cases, governance should be responsive to new evidence or new arguments. However, there is no guarantee that review and reconsideration will lead to consensus. More likely, it will continue to be adversarial. If such review results in 'no change', then those who feel that they are banging their heads against a brick wall will continue to be discontent; if it results in a reversal, those whose position is now reversed will be newly discontent; and, if it results in a 'compromise', this might provoke discontent all round. It follows that, beyond a willingness to review and reconsider, good governance implies that steps are taken to mitigate and minimize discontent. However, we should not underestimate the challenges involved here: it is one thing to agree that reasonable steps should be taken to reduce discontent but quite another thing to reach agreement on whether particular steps that have been taken are reasonable.

For example, in the UK, prosecutors have been reluctant to charge those who assist a member of their family to end their lives. Where the acts of assistance clearly amount to the commission of an offence, this approach to governance, although well-intentioned, raises awkward questions about the non-enforcement of the law. In this context, it is arguable that the policy of non-prosecution serves the public interest but, generally, how far would we accept the principle that we should avoid prosecution for the commission of crimes where this would aggravate existing discontent with the law (compare Brownsword 2019, pp. 48–49)?

In what follows, four responses to ethical plurality are introduced – these are 'localisation', making use of conscience clauses, relying on process and reasonable accommodation, and (for courts) excluding moral argument – each of which invites its own particular debate about the reasonableness of the strategy and its application.

3.1.1. Localization

When, in June 2022, the US Supreme Court in *Dobbs v Jackson Women's Health Organization*[6] overruled the Court's landmark decision in *Roe v Wade*,[7] there

[6] https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.
[7] 410 US 113 (1973).

was a worldwide outcry that the reproductive freedom of women had been compromised, and that the cause of pro-choice and women's rights had suffered a grievous setback. *Roe v Wade* was not just a major US decision on the governance of terminations, it was a rallying point for liberal politics and women's rights. On the other side, of course, *Dobbs* was greeted with acclaim by the pro-life groups who, for years, had been trying to overturn *Roe v Wade*.

In this way, it is tempting to present *Dobbs* as a decision that restores pro-life ethics against pro-choice ethics, as a decision that sides with one part of the moral plurality against the other. However, in the present context, this is not the right way to view *Dobbs*. Rather, we should see this decision as suggesting a 'localising' strategy for mitigating moral plurality. In this light, we should note the closing remarks in Alito J's judgment for the majority:

> We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives. (78–79)

Reconstructing this, what we have is the Supreme Court denying that the principles of *Roe v Wade* reflect the fundamental commitments of the US people; to the contrary, it is a decision that divides rather than unites the community. Accordingly, there is no reason to privilege those principles. Instead, the strategy in *Dobbs* is not to unite the community but to try to ensure that what will be a patchwork of governance maps as closely as possible on the patchwork of moral views in local communities. It is an old saying that all law is local and, in this instance, the Supreme Court tries to return the law to the local level.

Is this a reasonable strategy? Is it compatible with the ideals of good governance? Arguably, this is a strategy that chimes in with Mark Leonard's suggestion that world order 'could be built like a Russian doll' (Leonard 2022, p. 177). Thus:

> The outer layer – with a very small number of rules designed to prevent the destruction of the planet through war or the climate crisis – would apply to all countries. Within that global container, smaller dolls could develop more extensive rules … .The goal should be to develop laws as closely aligned as possible to the citizens who have to live with them. (177–178)

Following this line of thinking, we will judge that smaller pools of governance that are closely aligned to the views of those who are subject to governance are better than larger pools of governance that are not so aligned. That said, *Dobbs* has provoked a torrent of critical comment and we might think that it is not simply the decision and its constitutional consequences but the strategy that is a matter of concern. For example, one concern might be that localization (or alignment) will lead to a governance patchwork that will look rather like a 'chequerboard' solution that lacks integrity (Dworkin 1986). However, the strategy is not arbitrary; it is not like holding that, in those states that start with a letter in the range A-M, terminations will be permitted while, by contrast, in states that start with a letter in the range N-Z, abortion will be prohibited. That would be arbitrary; it would be

incoherent. Another concern might be that localization is all very well in a federal nation state but how would it work in, say, the UK? When the UK was a member of the EU, it was subject to a similar principle of 'subsidiarity' where the local units were the member states. After Brexit, the question is whether, within the UK, we can identify plausible local units. Given the substantial devolution of governance to Scotland, Wales and Northern Ireland, this seems the obvious starting point. Indeed, we might even want to take localization further, allowing smaller units (counties and towns) to self-govern (as was once the case in Wales when the counties had their own rules about the opening of pubs on Sundays).[8] To be sure, localization means that governance of the plurality will be fragmented but, other things being equal, each fragment of formal law should better reflect the views of those who are most proximately subject to its governance.

There is (at least) one other point that we might wish to take against *Dobbs*, namely, that it has a particularly negative impact on one group, on those who have been lawfully obtaining or providing terminations but who are now prohibited from doing so. For doctors and nurses who might want to continue with this kind of employment, they will need to travel or move for work; and, for those who seek abortions that are now unlawful, they too will need to travel. Whether or not there should be assistance for such persons so that these options are practically available and, if so, what precisely would be reasonable in the circumstances are matters for debate and potential discontent. However, whatever its merits, this point is actually about measures to mitigate the impact of the decision rather than about localization as a mitigating strategy. Reversing a legal permission will have negative effects irrespective of whether it is central or local law that specifies the new rule.

3.1.2. Conscience clauses

Where it is moral plurality that is at issue, there is a case for being generous in allowing for conscientious objection. No community with moral aspirations will want to compel its members to act (or omit to act) against their conscience.

That said, formally recognizing that conscientious objection has its place – as is the case in the UK where section 4 of the Abortion Act 1967 provides that no person shall be under a duty 'to participate in any treatment … to which he has a conscientious objection' – is not enough: the question is how much scope and strength is accorded to conscientious objection. The jurisprudence in the UK is markedly restrictive. In the leading case, *Greater Glasgow Health Board v Doogan*,[9] the concern of the petitioner midwives was that, following the closure of one of the three hospitals in Glasgow that provided maternity services, and the consequent reorganization of such services, they might find themselves being expected to perform functions to which they had a conscientious objection. The question narrowed to whether 'delegating, supervising and/or supporting staff to participate in and provide care to patients throughout the termination process' would qualify as activities from which the midwives might exempt themselves on the

[8] See, https://www.ucat.ac.uk/uploads/ukcat-tour/pages/page_10.html.
[9] [2014] UKSC 68.

grounds of conscience. The midwives' application was unsuccessful at first instance but then succeeded on appeal. On final appeal, the Supreme Court ruled against the applicants.

In *Doogan*, Lady Hale declared that the restrictive reading was more likely to accord with Parliament's intention. The conscience clause, it was noted, related to acts made lawful by the legislation, from which it followed that it was unlikely that Parliament was contemplating an exemption from 'the host of ancillary, administrative and managerial tasks that might be associated with those [now lawful] acts' (para 38). However, at the best of times, reliance on 'legislative intention' is highly problematic (MacCallum, 1966); and, in the context of the 1967 Act, where a legal (and, for many persons a moral) prohibition was being changed to a conditional permission, this might seem like a more than usually problematic reason for marginalizing conscientious objection (which, unlike an objection that is based on prudential considerations, rests on an independent moral judgment).

Of course, if the context is such that the exercise of conscientious objection by midwives impedes the availability of health services or is treated as being incompatible with the rights of patients or employers, then a further layer of complexity is added. At the European Court of Human Rights, in the case of *Grimmark v Sweden* (2020),[10] the Court eased the complexity by observing that Sweden, by committing to provision of nationwide abortion services, 'has a positive obligation to organize its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context does not prevent the provision of such services'; and, thus, the 'requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified' (para 26). However, those who conscientiously oppose abortion are likely to remain discontent, judging that the reasoning in *Grimmark*, like that in *Doogan*, is too quick in prioritizing convenience or competing rights over duty-based conscience.

3.1.3. Process and reasonable accommodation

In the face of ethical plurality, a pragmatic approach is to undertake a public consultation, to hear all viewpoints, and then to seek an accommodation or a balance of interests that is 'reasonable' or broadly 'acceptable' (compare Franklin 2019).

Following an approach of this kind, in its report on the ethics of non-invasive prenatal testing (NIPT), the Nuffield Council on Bioethics identifies a range of legitimate interests that call for regulatory accommodation (Nuffield Council on Bioethics 2017). On the one side, there is the interest of pregnant women and their partners in making informed reproductive choices. On the other side, there are interests (particularly of the disability community and of future children) in equality, fairness and inclusion. The question is: how are regulators to 'align the responsibilities that [they have] to support women to make informed reproductive choices about their pregnancies, with the responsibilities that [they have] … to promote equality, inclusion and fair treatment for all' (Nuffield Council on Bioethics 2017: para 5.20)? In response to which, the Council, being particularly

[10] Decision of the Third Section, reported at https://hudoc.echr.coe.int/fre?i=001-201915.

mindful of the interests of future children (in an open future) and the interest in a wider societal environment that is fair and inclusive, recommends that a relatively restrictive approach should be taken to the use of NIPT.

In support of the Council's approach and its recommendation, there is a good deal that can be said. For example, the Council consulted widely before drawing up the inventory of interests to be considered; it engaged with the arguments rationally and in good faith; where appropriate, its thinking was evidence-based; and its recommendation is not manifestly unreasonable. If we were to imagine a judicial review of the Council's recommendation, it would surely survive the challenge.

However, if the Council had given greater weight to the interest in reproductive autonomy together with the argument that women have 'a right to know' (Brownsword 2016) and that health care practitioners have an interest in doing the best that they can for their patients (compare Wald *et al*. 2018) leading to a much less restrictive recommendation, we could say exactly the same things in its support.

In other words, so long as the Council (and, similarly, any such body that is laying out a scheme of governance) consults widely and deliberates rationally, and so long as its recommendations are not manifestly unreasonable, we can treat its preferred accommodation of interests as acceptable. Yet, in such balancing deliberations, it is not clear where the onus of justification lies or what the burden of justification is; and, in the final analysis, we cannot say why the particular restrictive position that the Council takes is more or less acceptable than a less restrictive position.

At the same time, the UK National Screening Committee (NSC) recommended that government should pilot the incorporation of NIPT into the existing pathway for fetal screening. This cautious recommendation attracted criticism from both wings: on one side, from utilitarian-minded practitioners (for being too conservative) and, on the other, from the disability community and others who viewed this as presaging a step away from duty-based solidarity and inclusiveness. Like many others, the NSC finds itself caught between rocks and hard places.

In a democracy, it would be unreasonable not to consult before reaching a position on a matter about which the community is morally divided. Governance that commits to public engagement is well-intended. However, unless members of the community believe that it is the process that really matters and not the outcomes, the approach that we have sketched above can only go so far. Discontent is still to be expected.

3.1.4. Excluding ethical considerations

Turning specifically to the courts, an attempt might be made to hold the ethical plurality at arm's length by emphasizing that judicial decisions are applications of law not morals. This is precisely what we find in the *Crowter* case when Singh LJ and Lieven J state:

> The issues which have given rise to this claim are highly sensitive and sometimes controversial. They generate strong feelings, on all sides of the debate, including sincere differences of view about ethical and religious matters. This Court cannot enter into those controversies; it must decide the case only in accordance with the law. (para 5)

This is by no means exceptional. For example, in the above-mentioned case of the conjoined twins, Lord Justice Ward also stresses that the court 'is a court of law, not of morals … .' (969). On the other hand, we have a different view from Lord Justice Hoffmann (as he then was) in the tragic case of Tony Bland, who was one of the victims of the disastrous crush at the Hillsborough football stadium in April 1989. The question for the court was whether it would be lawful to remove feeding and hydration support from a person diagnosed as being in a persistent vegetative state. According to Lord Hoffmann, in relation to such a matter, no

> difference can be allowed to exist between what is legal and what is morally right. The decision of the court should be able to carry conviction with the ordinary person as being based not merely on legal precedent but also upon acceptable ethical values.[11]

Where questions of biolaw are being debated in Parliament, as with debates about assisted suicide and abortion, it is quite clear (and uncontroversial to accept) that the making of the law might be, indeed should be, influenced by the community's moral judgments. However, once the law has been made and the courts are being asked to apply the law, the role of the judges, as Ward LJ emphasizes, is to be guided by the legal precedents and principles. On this view, it is not the task of the courts to sit in judgment on the moral debate that is being conducted by philosophers or by members of the community, or by the media. Nevertheless, where we are dealing with high-profile biolaw cases, there will be concurrent debates, in courts and out of courts, both off-line and online. In courts, the recognized reference points are in the established principles and precedents; out of court, the reference points are not so constrained and they might include not only a plurality of ethical viewpoints but also the more formal ethical guidance that we find in professional codes. While judges might be able to distance themselves from out-of-court ethical debates, if they want to carry the public with them on particularly contentious issues, then as Lord Hoffmann says, it is advisable to base judgments not only on the law but also on acceptable ethical values.

Once again, we find rocks and hard places. If a judge sticks to the law, this will be criticized as being too narrow and disconnected; but, if a judge engages with the plurality, this will be criticized as exceeding the judicial role.

3.2. Those who are subject to governance

Turning to those who are subject to the law's governance and who are discontent with either the permissive or the restrictive nature of the legal position on the matter in question, how might they reasonably advance their case? One approach is to appeal to the fundamental value commitments of the law (in the case of the UK, human rights); another is to focus on the gap between the original intentions of the lawmakers and current practice; and, a third approach is simply to build public support for a particular position.

[11] *Airedale NHS Trust v Bland* [1993] 1 All ER 821, 851.

3.2.1. Judicial review (human rights)

Given that English law is explicitly committed to respect for human rights, one strategy is to invite the courts to rule on the human rights compatibility of a contested legal position. This is a strategy employed by Heidi Crowter's legal team and it is also a strategy that has been employed in support of a relaxation of the law on assisted suicide. In this latter case, the pro-choice ethic seeks support from human rights in order to force a relaxation of duty-based restrictions. Not surprisingly, this has had some success, albeit not to the point where the law is actually changed. However, the strategy in a case such as *Crowter*, where the appeal is to human rights for less choice or more restriction, looks unpromising. And, sure enough, the court's response offers little encouragement.

In *Crowter*, the essence of the claim was put in the following terms, namely that 'it is impermissible to differentiate, as the 1967 Act does, between pregnancies where there is a substantial risk that, if born, a child would be 'seriously handicapped' … and those where it would not.' (para 2) An attempt was made to hang this argument on a number of particular human rights pegs. However, the claims based on Articles 2 and 3 were rejected largely because the jurisprudence does not recognize that a fetus is yet a rights-holder; and the claim based on Article 8 was also met with a jurisprudence that reflects a rights ethic of individual choice rather than a restrictive duty-based ethic. Without support from one of these rights, the argument that there was unlawful discrimination under Article 14 was also doomed to fail.

Putting this in other words, the argument was that the Act does not fairly balance the interests of pregnant women against the interests of the fetus, disabled persons, and the community as a whole (para 122). However, in the absence of any consensus (either at Strasbourg or domestically in the UK) as to what a fair balance might look like, a wide margin needs to be given to lawmakers (para 123). Then, crucially, we have the counter-argument that.

> it is important to bear in mind that Parliament gives a choice to women; it does not impose its will upon them. The evidence before the Court powerfully shows that there will be some families who positively wish to have a child, even knowing that it will be born with severe disabilities. But the evidence is also clear that not every family will react in that way. (para 125)

Quite simply, the arguments advanced in *Crowter* go against the grain of human rights law. To be sure, there are instances in the Strasbourg jurisprudence where there does seem to be some support for dignitarian views (compare Scott 2018) but, in general, liberal values and human rights law do not reflect or represent duty-based ethical viewpoints (compare Reinders 2000).

Even in the case of assisted suicide, where the revisionist arguments are much more with the grain of human rights law, success is not assured. While liberal revisionists have little chance of persuading duty-based conservatives that they should switch to a more permissive position, they have good reason to try to address the concerns of those who argue that, in practice, we simply cannot guarantee that assisters always will be good Samaritans or that no one will try to take advantage of those who are vulnerable (Brownsword *et al.* 2012). Famously, this was the

central objection expressed by Chief Justice Rehnquist in the leading US case of *Washington v Glucksburg*;[12] it is found, too, in the jurisprudence of the European Court of Human Rights, where national prohibitions against acts of assistance with suicide are protected by a margin of appreciation that gives particular weight to the potential vulnerability of the unwilling;[13] and, in 2014, the judgments in the UK Supreme Court hearing of the joint appeals of Nicklinson, Lamb, and Martin, are full of references to this critical concern.[14]

It was in this context that Lord Falconer's Assisted Dying Bill (2014) presented a procedure that was designed to give precisely the assurance that those who are vulnerable will not be tricked or coerced or otherwise pressurized into seeking assistance that they do not actually wish to have. At the core of the Bill was the requirement that an independent doctor (together with the person's attending physician) should countersign the person's statutory form declaration but should do so only if satisfied that the person 'has a clear and settled intention to end their own life which has been reached voluntarily, on an informed basis and without coercion or duress.'[15] Given the strong signal from the Supreme Court in *Nicklinson* that a declaration of incompatibility was hanging over the legislative prohibition on assisted suicide unless Parliament took a hard look at the issues,[16] the wind looked set fair for change. However, when asked the question, the Commons overwhelmingly rejected the Bill.

With Parliament having so firmly rejected the proposed relaxation of the law, there might be a reversion to judicial review and appeal to human rights. However, as things currently stand, this option is not particularly promising. Famously, Dianne Pretty failed to persuade the Strasbourg court that UK law was incompatible with its human rights commitments,[17] and more recent challenges suggest that it will be extremely difficult to persuade the Court to declare that the UK, having had an extensive Parliamentary debate on the matter, is in breach of its human rights obligations. Moreover, in the domestic courts, as the *Conway* case[18] highlights, there is no encouragement at all for even putting such questions to a judicial panel. Nevertheless, there surely will be more test cases, renewed initiatives in Parliament (such as Baroness Meacher's Assisted Dying Bill which was formally introduced in May 2021[19]), and continuing debates about the rights and wrongs of assisted suicide (Rozenberg 2020: Ch 5).

[12] (1997) 521 US 702, esp at 731–732.
[13] See *Pretty v United Kingdom* (2002) 35 EHRR 1, [74].
[14] *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v The DPP* [2014] UKSC 38, [2014] 3 WLR 200. See, for just a few of the many examples, [85]–[89], [172], [228]–[229], and [349]–[351].
[15] ADB 2014, s 3(3)(c).
[16] For some of the relevant remarks in the Nicklinson appeal, see [2014] UKSC 38, [113]–[118], [190], and [293].
[17] *Pretty* (n 13).
[18] *R (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431. Leave to appeal was refused by the Supreme Court, see https://www.supremecourt.uk/docs/r-on-the-application-of-conway-secretary-of-state-for-justice-court-order.pdf.
[19] This Bill is modelled on the earlier Falconer Bill, see, https://www.dignityindying.org.uk/news/assisted-dying-lords-private-members-bill-second-reading-due-22-october-2021/ (last accessed October 17, 2021).

3.2.2. Original intent and current practice

On the face of it, the terms of the legislative compromise on abortion have not been adhered to. At the time of enactment in 1967, terminations were viewed as special case exceptions – on paper, the tilt of the law was distinctly restrictive; yet, by 2022, in all but name, the law as administered licenses abortion on demand. Surely this was not the intention of the politicians who brokered the compromise. What should we make of this?

If, taking our inspiration from the Scalian jurisprudence of the US Supreme Court (Scalia 1989), we take an 'originalist' approach to the interpretation of legislation, the argument will be that practice in relation to terminations is now way beyond the original intent of the 1967 Act. Thus, it is unlawful. However, there are at least two problems with this. One is that we cannot be at all confident that British judges will accept the invitation to espouse originalism; and, the other is that reliance on historic legislative intent, especially in relation to such a divisive issue as abortion, is problematic (compare MacCallum 1966; and 3.1.2 on *Doogan*). That said, we might try to fortify an originalist reading by recalling the context in which the legislative compromise was struck in 1967. The point is that, if 'compromise medicalisation' – that is, a political compromise of the kind exemplified by the 1967 Act where we have a qualified permission for terminations, with gatekeeping entrusted to the medical profession – is to work as a strategy for dealing with persistent ethical conflict, then it is imperative that both the courts and the medical profession hold the line; it is not their job to make running adjustments to the compromise as the community's views evolve (Brownsword and Wale 2015). But, unless we can be confident about how much discretion was implicitly delegated to doctors by the Act, we do not know precisely which line it was that was to be held.

Whatever the attractions of an originalist approach to the interpretation of statutes, British judges are more likely to treat legislative intent as dynamic, such that Victorian statutes should be treated as 'always speaking'.[20] Viewing matters from this perspective, judges will note not only that community opinion has apparently changed to the point that termination at will is now accepted by many as a woman's right, but also that the relevant techniques for termination have also changed, reducing the need for harrowing and invasive surgical procedures. So, if the 1967 legislative compromise is read as authorizing doctors 'to move with the times', it is arguable that, actually, the terms of the legislative deal have been respected. In other words, it is arguable that current practice is authorized by the law.

While we cannot be confident that a strategy that focuses on the gap between the law in 1967 (even as amended) and practice today will persuade judges to read the legislation in an originalist manner, it might be a more promising approach than an appeal to human rights. Moreover, even if judges do not accept the argument, it might be taken up by parliamentarians who, whatever their stance on the abortion issue, are concerned that the Rule of Law is violated when practice seems to be so seriously detached from the covering law (Fuller 1969).

[20] *Reg. v. Ireland* [1998] A.C. 147, at 158 D-G.

3.2.3. Pressure in Parliament and in the public square

The importance of the public square is highlighted by the case of Diane and Stephen Blood.[21] The couple were keen to start a family but, tragically, their hopes were frustrated when Stephen contracted meningitis and died. The question was whether it would be lawful for medical staff at the Sheffield hospital where Stephen was being treated to take samples of his sperm immediately prior to his death; and, then, there was a further question of whether it would be lawful for a clinic to assist Diane in using those samples with a view to becoming pregnant and having Stephen's child.

Initially, these were questions for the Human Fertilisation and Embryology Authority (HFEA) which took the view that this proposed plan of action would not be lawful because it did not satisfy either the usual consent requirements for couples who wish to access assisted conception or the particular requirement for explicit consent where sperm or eggs are to be used posthumously. The HFEA's determination was not well-received and, with mounting public support for Diane Blood, a judicial review was commenced. This now looked like a textbook hard case: the popular merits on one side, the clear provisions of the law on the other. In the High Court, the law prevailed. With an insistent and intensifying chorus of support, the case was sent to the Court of Appeal where, in a quite extraordinary judgment, the appeal was allowed, the Court holding that the HFEA had failed to give serious consideration to the fundamental freedoms of European Community law (concerning the free movement of goods [sperm] and access to services [IVF clinics]) (for critique, see Morgan and Lee 1997). Although, technically, this meant only that the matter was being remitted to the HFEA for its reconsideration, the Blood team were not premature in celebrating their victory at the front entrance to the Royal Courts of Justice in London. The legal outcome was now a foregone conclusion; the HFEA, having duly re-considered, announced that it would be lawful to proceed. Whether or not this episode, in which the law bent to public pressure, exemplifies good governance is a matter about which members of a community might reasonably disagree.

3.2.4. Taking stock

For those who have governance responsibilities, there are some ways of mitigating the plurality but, essentially, some hard choices will remain and, in a vibrant plurality, they are unavoidable. For those who are subject to governance, there are various avenues for pressing one's arguments. Again, though, there is no guarantee of success and, like those who govern, those who are governed will not be entirely content. Plurality, whatever the particular configuration of the bioethical triangle, is a challenge for those who govern and a recipe for discontent amongst those who are governed.

4. Good governance

Is there another way of engaging with contested bioethical questions? In this part of the article, we draw on a model of good governance that is based on the integrity of

[21] *R v Human Fertilisation and Embryology Authority, Ex parte Blood* [1997] 2 All ER 687.

those who govern together with a mission to govern in the interests of those who are governed. Immediately, the question becomes: by reference to which criteria do we determine whether particular acts of governance are in the interests of those who are governed?

For any member of a human community, we can certainly say that it is in everyone's interest that the preconditions for humans to exist and to live in viable communities are protected. These are the conditions of the global commons; and, it follows that, above all, governance should respect these conditions (Brownsword 2020, 2021b, 2021c). We can also say that, *within a particular community*, it is in the interests of members that governance is compatible with the fundamental values of their particular community; and, that governance takes up positions that are socially acceptable. So, governance should be responsive to both community-specific and cosmopolitan considerations.

4.1. Community-specific considerations

There is an assumption that, in the absence of conspicuous discontent with a particular legal position, we can infer that it is broadly acceptable to members of the community (that it is supported by a social licence). Conversely, where there is conspicuous discontent with a particular legal position, then we cannot assume that it is supported by a social licence. In both cases, the principle is that good governance will attempt to identify and adopt positions that are socially acceptable.

In effect, it is this principle that aligns with an inclusive processual approach and that puts a justificatory gloss on building public support for a campaign such as that of Heidi Crowter (or, before her, Diane Blood). The more support that the campaign attracts, the more convincing it is to argue that governance is not in line with the social licence and that revisions (or, one-off, ad hoc decisions) need to be made. There is no guarantee, however, that the public can be persuaded to get behind such a campaign in a way that highlights some unacceptable features of abortion law.

Where a community has committed to fundamental values, they should take priority over social considerations of what is and is not acceptable. However, as *Dobbs* remind us, there are communities and communities (compare, too, Brownsword 2021b); and the larger and more populated the unit, the more problematic it might be to identify the group with clear fundamental values. In the UK, there is a public commitment to human rights but also a large background of pragmatic utilitarian thinking. So, if the Crowter campaign looks for assistance at this level of the community's defining values, it might not find that the relevant parts of the plurality are prioritized. Indeed, as I have said, a strategy that pleads human rights, while tapping into the UK's fundamental values, is unlikely to assist a duty-based campaign.

So long as the members of the community generally prefer to make their own reproductive choices and so long as this is endorsed by human rights' commitments, these kinds of community-specific arguments simply will not wash.

4.2. Cosmopolitan considerations

Beyond the UK community, or any other community, there are conditions that make it possible for humans to exist and which create a context for their self-interested

and other-regarding agency. These conditions are neutral between individual humans and their preferences and favoured projects as well as between particular ethical views; they are the reference points for Mark Leonard's idea of the outer layer of law (Leonard 2022). Importantly, while the outer or cosmopolitan layer of law should assure that the conditions for the development of moral reason (or ethics) will be respected, they should not assure that any particular ethical viewpoint will prevail.

Without doubt, these cosmopolitan conditions – for example, relating to climate, global health and security, freedom, and so on – are the right reference point for a categorical critique of the law; right answers are available here. But, the ethically neutral pre-conditions for viable human communities do not assist in supporting partisan ethical views. In Heidi Crowter's case, the cosmopolitan question is whether the terms of the Abortion Act militate against the preservation of the global commons. Terminations certainly prevent some humans from being born; but can we say that this compromises the very possibility of humans existing on planet Earth? I think not. Similarly, permitting the termination of pregnancies where the fetus is seriously handicapped might speak to the kind of community that we are but does it militate against the viability of human community? Again, I think not. On the other hand, not making sufficient allowance for conscientious objection might be an issue at this level.

In short, those who are discontent with the legal position in their community might find some support in its fundamental values but this is entirely contingent. It might be that duty-based campaigns draw a blank because the communities in question are strongly orientated towards utilitarian or rights-based reasons. On the other hand, the strongest basis for ethical judgments is to be found in the cosmopolitan conditions. However, they are strictly neutral as between rival ethical views. These conditions do not align with any particular point in the bioethical triangle. So, this kind of argument, albeit speaking to the preconditions for the formation of ethical constituencies, will not reach through to endorse any particular ethical constituency.

5. Conclusion

According to Henk Addink (2019), the ideal of good governance is represented by the general principles of properness, transparency, participation, effectiveness, accountability, and human rights. This is a reasonable starting point but it is clear that good governance is challenged where the social and economic order is disrupted by new technologies and where the community is morally divided.

The take-home message of this article is that, so long as the members of our societies have their own ethical views, and so long as those views compete and conflict with another, governance is going to be challenging. On the one side, those with governance responsibilities should try in good faith to do the right thing, governing in the interest of their community; on the other side, those who are governed should have every opportunity to express their ethical views but should respect the best efforts of those who govern; and, for all parties, it should be remembered that

we need to find civilized ways of settling and living with our ethical differences lest we encourage actions that threaten the global commons (Brownsword 2023).

With particular reference to Heidi Crowter's campaign, it is arguable that our abortion law needs a fundamental reset, not just some tinkering or minor amendments. It is a law that can, and should, speak to the kind of community that we aspire to be, a law that is fully connected to today's technologies and genetic techniques (such as NIPT), and a law that can command the respect – if not the approbation and endorsement – of the whole community (Brownsword and Wale 2018). If we do not know quite what that law might look like, then all the more reason surely for there to be urgent public engagement and review.

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