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978-1-107-02512-7 - Bioethics, Medicine and the Criminal Law Volume I: The Criminal Law and Bioethical Conflict: Walking the Tightrope

Edited by Amel Alghrani, Rebecca Bennett and Suzanne Ost

Excerpt

[More information](#)

1 Introduction: When criminal law encounters bioethics: a case of tensions and incompatibilities or an apt forum for resolving ethical conflict?

Amel Alghrani, Rebecca Bennett and Suzanne Ost

Whilst health care professionals and scientists have been subject to civil law and professional regulation for some time, in England and Wales at least, questions of medical and scientific malpractice and cases involving bioethical dilemmas are increasingly coming before the *criminal* courts. This growing trend seems to have proceeded in the absence of very much by way of legal scrutiny or jurisprudential analysis.¹ Of course, some may consider the use of the criminal law as a forum to resolve bioethical dilemmas as both inevitable and wholly appropriate. Medical practice, biotechnologies and scientific research all have a major impact on our lives, and whilst they can bring and have brought us great benefits, we do not have to look too far back into the past to recall atrocities that were committed in the name of medical and scientific advancement.

The criminal law enforces moral standards and, in so doing, exemplifies the wrongs society considers especially grievous. Medical practice, biotechnologies and scientific research can involve public wrongs – that is, wrongs that should be the concern of the criminal law because they contravene defining values that the state endeavours to safeguard to ensure the good of its citizens.² Values that might be violated by medical practice and the development of biotechnologies include the sanctity of life and the protection of the vulnerable. Thus, arguably, the intervention

We would like to express our gratitude to Charles Erin for the part he played in laying down the foundational work for this introduction. We also thank Margot Brazier for all her valued help and support whilst putting this collection together.

¹ The way in which the criminal law regulates health care practice has been explored in C. A. Erin and S. Ost (eds.), *The Criminal Justice System and Health Care* (Oxford University Press, 2007), a volume that focuses more on health care in general, as opposed to bioethics.

² See S. E. Marshall and R. A. Duff, 'Criminalization and Shared Wrongs' (1998) XI(1) *Canadian Journal of Law and Jurisprudence*, 7, 20.

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Excerpt

[More information](#)2 *Amel Alghrani, Rebecca Bennett and Suzanne Ost*

of the criminal law is not only apposite, it is *required* and there is an inevitability about its intervention in any society that utilises the criminal law to reflect its basic values and punish those who culpably cause others harm or a risk of harm.

Others might contend that resort to the criminal process in these areas constitutes morally supportable redress to what they see as a prior conspiracy of professions, whereby the law almost ‘naturally’ deferred to the perceived authority of those who practise in the rarefied environment of medicine.³ And whilst some might not wish to make medical professionals who commit an error accountable to the criminal law,⁴ as Oliver Quick has recently observed: ‘Not even the staunchest sympathiser of the medical profession would call for a blanket ban on criminalisation. Some events will always be beyond the pale and warrant a criminal response.’⁵

A further, more sceptical view may be that the criminal law is being employed as part of the state’s exercise of biopower,⁶ to regulate and subjugate our bodies by placing clear limits on what can and cannot be done, regardless of our consent. Whether or not such a Foucauldian argument convinces, it seems only right that the growing tendency to involve the criminal law should be questioned, and this collection of essays by leading legal and philosophical thinkers sets out to do exactly that.

Given the rich philosophical underpinnings of some criminal law and bioethical theories, and the common appearance of utilitarian and deontological approaches and liberalist ideals in both, it would seem that, at least on the face of it, parallels can be found between the two.⁷ Moreover, bioethical⁸ and criminal law theory both offer fertile grounds for analysis of the law’s social role. For example, criminal law theorists have explored the matters of whether the criminal law deters and

³ I. Kennedy, *The Unmasking of Medicine* (London: Allen and Unwin, 1981).

⁴ See J. K. Mason and G. T. Laurie, *Mason and McCall Smith’s Law and Medical Ethics* (8th edn) (Oxford University Press, 2010), p. 167. See also Archard in this volume.

⁵ O. Quick, ‘Medicine, Mistakes and Manslaughter: A Criminal Combination?’ (2010) 69(1) *Cambridge Law Quarterly*, 186.

⁶ M. Foucault, *The History of Sexuality Vol. 1: The Will to Knowledge* (New York: Pantheon, 1978).

⁷ M. Brazier and S. Ost, *Medicine and Bioethics in the ‘Theatre’ of the Criminal Process* (Cambridge University Press, in press). See especially Part 3.

⁸ When we talk about ‘bioethical theory’ or ‘bioethicists’ in this introductory chapter, we are referring to what might be termed ‘philosophical bioethical theory’ and ‘philosophical bioethicists’. Philosophical bioethics uses the methodology of moral philosophy to analyse ethical issues that arise in the biosciences, including medicine and health care. There is, of course, a more interdisciplinary use of the word ‘bioethical’ or ‘bioethicist’ that does not necessarily hold the methodology of moral philosophy as its primary focus.

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whether its purpose should be to deal out retribution and to punish, or to achieve restorative justice.⁹ Bioethicists have considered the law's role in resolving difficult cases involving ethical conflict.¹⁰ And there is much to be found in criminal law theory that is of direct relevance to the kind of debates present in bioethics (for example, the sanctity of life¹¹) and vice versa (autonomy,¹² for instance). But debate in each usually remains confined within the boundaries of the discipline, aimed at an audience either of criminal lawyers *or* of bioethicists. In order to offer a richer assessment of the appropriateness of the criminal law's regulation of medical practice and bioethical issues, there is a need for the two disciplines to talk to each other.

This volume offers balanced arguments that will help the reader form a reasoned view on the ethical legitimacy of the invocation and use of the criminal law to regulate medical practice and issues of bioethics. It aims to shed light on the question of who *should* define what constitutes ethical, and thus lawful, medical practice – judges, the legislature, doctors, scientists or someone else? To this end, it analyses how effectively the criminal justice system can and does operate as a forum for resolving ethical conflict in the delivery of health care. Key questions that are addressed include: How does the criminal law regulate controversial bioethical areas? Is the use of the criminal law in these areas appropriate or desirable? What effect, positive or negative, does the use of the criminal law have when regulating bioethical conflict? Can the law accommodate moral controversy? Does compromise offer a way forward? The volume explores criminal law in theory and in practice, and the broad field of bioethics rather than the narrower terrain of medical ethics. All the essays are interrelated by their analysis of the criminal law's regulation of bioethical areas; however, whilst numerous essays focus on criminal law within the specific context of health care, others address scientific research and biotechnologies. The book is divided into the following four parts, framed around what we conceive to be some of the most dominant issues involved when criminal law and bioethics encounter each other.

⁹ See, e.g., A. von Hirsch, A. E. Bottoms, E. Burney and P.-O. Wikström, *Criminal Deterrence and Sentence Severity* (Oxford: Hart, 2000); D. Wood, 'Retribution, Crime Reduction and the Justification of Punishment' (2002) 22 *Oxford Journal of Legal Studies*, 301; M. Munn, 'Restorative Justice: An Alternative to Vengeance' (1993) 20 *American Journal of Criminal Law*, 99.

¹⁰ See M. Powers, 'Bioethics as Politics' (2005) 15 *Kennedy Institute of Ethics Journal*, 305, 306.

¹¹ See, e.g., G. Williams, *The Sanctity of Life and the Criminal Law* (London: Faber and Faber, 1958).

¹² See, e.g., O. O'Neill, *Autonomy and Trust in Bioethics* (Cambridge University Press, 2002).

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Excerpt

[More information](#)4 *Amel Alghrani, Rebecca Bennett and Suzanne Ost***Part I: Death, dying and the criminal law**

Medically assisted dying is perhaps one of the most obvious examples of a phenomenon that causes the fields of bioethics and criminal law to intersect. It is thus, ironically, the ending of life that marks our starting point. For all the protracted, intense dispute engendered by the involvement of the medical profession in the premeditated ending of a person's life, about the only area of agreement between those ranged on all sides seems to lie in the acceptance that this is a very sensitive area of social and legal policy, and we need safeguards in law to protect the vulnerable. Although the debate is far from static, the basic lines of argument have not changed much in decades: principles of personal autonomy and of sanctity of life still dominate. Is the current legal position truly reflective of current attitudes of the general public, the medical profession or the judiciary? By whom should our lawmakers be guided? Does criminal liability of doctors in this area make for 'good medicine'? How successfully does the criminal law accommodate the moral controversy that surrounds medically assisted dying? Whilst it may seem that the only way to deal with this is to go one way or the other – that is, to criminalise or decriminalise – there is also a subtler middle-ground approach. Each of these approaches is advocated by the three contributors in this part. The decriminalisation and legalisation of euthanasia are John Griffiths' recommendations. Utilising the Netherlands as a case study, Griffiths contends that the criminal law's involvement in doctors' death-causing behaviour is dangerous. Furthermore, because some types of this behaviour are lawful and there are no moral, legal or public policy differences between these and euthanasia, legalisation of the latter should be the way forward. What he highlights as the most difficult matter to decide is ascertaining what should constitute 'appropriate' cases in which euthanasia is justifiable.

In marked contrast to Griffiths, John Keown sees the intervention of the criminal law as wholly appropriate and necessary. For him, the only advisable way to go is to ensure the continued criminalisation of euthanasia, a position he explains through challenging five commonly raised arguments in favour of decriminalisation. Keown sees the prohibition on intentional killing as core to law and society, and argues that its reflection in the criminal law's response to euthanasia is both right and proper and means that no conflict exists with bioethics.

Aiming to move the assisted dying debate forward, Richard Huxtable paves a middle way between the polarised approaches reflected in the essays by Griffiths and Keown. Whilst the idea of compromising is likely to face hostility from those who stand on both sides of the assisted dying debate, given their strongly held convictions, Huxtable defends his view

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Excerpt

[More information](#)

that compromise is the way forward in the face of conflicting opinion in the bioethical literature. The compromise he proposes involves basing a new offence of mercy killing on excuse as opposed to justification, since he contends that the notion of excuse offers a means to embrace the ambivalence that lies at the heart of the debate and the criminal law's response to assisted dying. Huxtable's ship of compromise traverses the rough waters between prohibition and permission, demanding concessions from both opponents and supporters of assisted dying, in order to achieve a new, 'morally sensitive' approach to this phenomenon in criminal law and bioethics.

Part II: Freedom and autonomy: when consent is not enough

The principle of respect for individual autonomy is a core ethical principle of modern medical ethics and bioethics more generally, and this is reflected clearly in medical law. We no longer live in a world where either the doctor or the state is thought to know best when it comes to our individual choices about our lives. Thus, it is normally assumed (both in law and ethics) that if an individual has sufficient mental capacity to understand his decision and its consequences, is not unduly influenced, has sufficient information to make a considered choice and is unlikely to cause serious harm to others, he should be allowed the freedom to make such a choice about his life, however foolish or risky we may think that choice is. This freedom to make such decisions and retain control over our lives is, in general, viewed as more important than protection from the possible risky consequences of these choices. Thus, in the medical arena, the law supports a competent patient's decision regarding whether to accept or reject medical treatment, regardless of any possible difficult or dangerous consequences of such a choice.¹³

Part II considers whether criminal law's often more paternalistic approach to acts that constitute occasioning actual and grievous bodily harm can be reconciled with the trend in both the bioethical literature and medical law to view respect for individual autonomy as the paramount consideration. It asks whether we should accept that, in such situations, medical and legal paternalism is justified, that personal autonomy and informed consent are not conceptually peremptory.

In the first essay in this part, Surgeon Robert Smith considers the ethical and legal aspects of his involvement with patients with Body

¹³ See cases such as *B v. An NHS Hospital Trust* [2002] EWHC 429 (Fam).

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Excerpt

[More information](#)6 *Amel Alghrani, Rebecca Bennett and Suzanne Ost*

Integrity Identity Disorder (BIID), the desire for amputation of a healthy limb. He argues that a society that holds respect for individual autonomy as a core ethical and legal principle should allow individuals with BIID to undergo amputation, however foolish this decision may seem to others. Smith contends that patients with BIID are generally well-informed, appear to have the required mental capacity to make medical decisions and are fully aware of the consequences of their wish to amputate a limb. Further, he claims that whilst limb amputation may seem to others to be a great harm, to patients with BIID, limb amputation can be a great personal benefit and will not necessarily cost society in terms of resources, resulting in happier, more productive members of society. Currently, although unprecedented, criminal sanctions could be taken against a surgeon providing this kind of amputation. Smith argues that such a use of the criminal law is not an appropriate response to BIID and its treatment. He suggests that BIID should be recognised as a disorder treatable by surgery in a similar way that Gender Identity Disorder is, rather than a cause for the involvement of the criminal law.

Cases of sexual transmission of diseases such as HIV raise interesting and difficult issues when it comes to respect for individual autonomy. Whilst we normally assume that individuals' decisions should be respected, where these decisions put others at risk of serious harm there may well be some justification for legal and even criminal sanctions. In 'Risky sex and "manly diversions": contours of consent in HIV transmission and rough horseplay cases', David Gurnham notes how inconsistent the legal approaches taken by the criminal courts are in deciding whether or not consent is enough when dealing with the infliction of grievous bodily harm during sexual encounters. He highlights how, depending on the types of behaviour and the context, the courts often deem bodily harm inflicted unintentionally through 'rough and undisciplined horseplay' lawful, even when bodily harm is foreseen and consent wrongly presumed; yet unsafe sexual activity where one party is aware s/he is infected with HIV and recklessly transmits it to the other party is deemed unlawful, unless 'informed consent' was given to the risk. In this context, it is clear that legal paternalism will prevail over individual autonomy, and even in the context of private sexual encounters, the criminal common law holds that there are indeed certain harms where consent simply is not enough.

Whilst it is clear that the criminal law's involvement deems what sexual conduct is lawful or unlawful when grievous bodily harm is inflicted, should the role of the criminal law be extended to determine whether other sorts of sexual conduct ought to be unlawful? Take, for instance, sexual activity between individuals where there is an imbalance

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Excerpt

[More information](#)

Introduction: When criminal law encounters bioethics

7

of power that might be regarded as exploitative and could negate consent – one example being the relationship between doctor and patient. Considering whether criminal law should be extended further, Suzanne Ost and Hazel Biggs explore the doctor–patient relationship and the controversial issue of maintaining sexual boundaries. The ethical and regulatory guidance on maintaining sexual boundaries between health care professionals and their patients takes the position that *any* engagement in sexual activity with a patient by a doctor is inappropriate and damaging. They explore why this might be the case and whether consent can ever really freely be given in the context of this relationship. Should a doctor who enters into a consensual sexual relationship with a patient incur the wrath of the criminal law due to the inherent imbalance of power between the two? Their conclusion is that the criminal law’s intervention is warranted in such cases when the doctor obtains the patient’s consent through deception, inducement or coercion, and they highlight the possible limitations of the criminal law in England and Wales in this regard.

Part III: Criminalising biomedical science

Law and bioethics clearly come together in the context of scientific endeavour, and controversial applications of science continue to raise challenging questions for both legislators and philosophers. Advances in the life sciences proceed apace in the early twenty-first century, and it is hard to ignore current and potential contributions to medical practice. Yet the relationship between science and society is at times an uneasy one. Concerns and controversy over scientific research and new technologies and advances often lead to calls for stronger regulation. Part III of the volume considers the foundations for the regulation of scientific research, and the suitability of the criminal courts for this role. As Alghrani and Chan note in their essay, “Scientists in the dock”: regulating science’, negotiating the legitimate bounds of scientific activity requires a precarious balancing act, for whilst on the one hand there is the desire to encourage innovative research, on the other there is the need to minimise harms that research might cause, and ensure accountability so as to allay public concerns. In their exploration of the regulation of science, they focus on research in the controversial areas of human reproduction and human tissue, examining the use of criminal law to regulate these areas and whether it is an appropriate or effective regulatory mechanism for science. In these areas, they argue the criminal law is used less as a direct regulatory mechanism and more as a means of gaining public trust and

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Excerpt

[More information](#)

8 *Amel Alghrani, Rebecca Bennett and Suzanne Ost*

legitimising science that would, if not subjected to the powerful symbolic force of criminal regulation, arouse even greater public concern.

The matter of balancing risk and benefit is also tackled by Sara Fovargue. Her essay presents xenotransplantation as a site of bioethical conflict because, whilst successful xenotransplants would benefit recipients and society, there are real risks. Given this, whilst recognising the dangers of overcriminalisation, she conceives criminal law regulation as imperative to protect public health. Indeed, Fovargue goes so far as to contend that without the force of the criminal law to safeguard against the threat to public health, genetically engineered solid organ clinical xenotransplants should not be permitted to occur.

Whilst the bioethical conflict generated by xenotransplantation relates to the development of biotechnologies that might save lives but also threaten health, there are of course other scientific developments that may not pose such a significant danger to health, but still raise controversy, such as the emerging use of drugs that can enhance individual performance/cognitive ability. Such developments are not considered by some to be in any way the business of the criminal law. Nishat Hyder and John Harris certainly advocate such a view in their essay, 'The criminal law and enhancement: none of the law's business?' They argue that chemical cognitive enhancement is none of the law's business for two main reasons: the first is that it is both a right and a duty of the individual to enhance oneself in a wide variety of ways; second, they argue that the availability of chemical cognitive enhancements promotes the societal interest in a more productive and efficient workforce, less affected by stress and ill health. Thus, they argue that enhancements are in both the personal and the public interest and should be the prudential concern of individuals as well as governments. The criminal law can only thwart the public interest in personal aspiration by interference.

On a different tack, Stephen Smith examines the use of the concept of dignity by the criminal law to regulate scientific research. Smith argues that interference with dignity may constitute a harm, and thus the concept of human dignity may be invoked as an 'ethical brake' to provide some protection to embryos, those in persistent vegetative states, infants and individuals with advanced dementia – that is, where respect for individual autonomy cannot be used. However, whilst this concept of dignity may be seen as a useful one, it is notoriously difficult to pin down. The purpose of Smith's chapter is to clarify the concept of dignity, particularly exploring what entities have human dignity and why, so that we can then use this concept of dignity in a meaningful way. Smith concludes that as there is nothing that humans inherently share that would provide the grounding for a concept of human dignity, we

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Excerpt

[More information](#)

Introduction: When criminal law encounters bioethics

9

should base the concept on a socially constructed value, so that the harm that may be avoided by the concept of dignity is the harm of being unjustifiably treated as outside of the human community.

Part IV: Bioethics and criminal law in the dock

The final part of the volume examines the suitability of the criminal law to regulate ethical matters and medical practice in terms of moral and jurisprudential bases. Contributors examine how the attitudes of the judiciary have changed over time on the role of the criminal law in matters of bioethical conflict, their understanding of contemporary bioethics and the difficulties judges face in grappling with moral controversy. They consider the suitability of the criminal courts for the role of adjudicating bioethical conflict and whether the criminal law's approach to regulation of bioethical controversy is potentially damaging to society.

Medical law raises many ethical issues that often raise moral questions that are difficult for judges to grapple with. As Mason and Laurie say, 'Medical law is catalysed by moral issues'.¹⁴ Whilst moral issues are present in many of the non-bioethical disputes judges are asked to determine, Margaret Brazier examines why it may be that the moral questions that medicine and science provoke are especially tricky. She examines whether the common law can accommodate such moral controversy principally through the prism of abortion laws, which explicitly cast abortion as criminal by way of the Offences Against the Person Act 1861, whilst offering defences to doctors under the Abortion Act 1967 (as amended). She notes the limitations of the law, and indeed science, in providing answers to some of society's most challenging questions, such as on the sanctity of life, and argues that when dealing with issues to which there are no 'right' answers, the challenge for the law is to pay equal consideration to diverging views and, in so doing, resolve moral controversy in a way that best fits the society in which it exists.

Across the water in Northern Ireland, the Abortion Act 1967 and defences therein do not apply – in that jurisdiction there are thus no statutory grounds for abortion, and termination of pregnancy is a criminal offence subject only to minor exceptions carved out by the common law. Use of the criminal law to govern this issue continues to create enormous injustices for women residing there. Engaging with the politics of abortion reform in this jurisdiction, Marie Fox argues that feminist arguments should focus on the inappropriateness of deploying the criminal law to

¹⁴ Mason and Laurie, *Mason and McCall Smith's Law*, p. 2.

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Excerpt

[More information](#)10 *Amel Alghrani, Rebecca Bennett and Suzanne Ost*

regulate decisions about pregnancy, by highlighting the material realities of criminalising abortion. Second, she cautions that reforms that bypass the moral dimensions of the debate and are couched in consumerist rhetoric about choice and services may prove counterproductive in the Northern Irish context. Rather, she contends that legal reforms must be framed with historical and cultural contexts in mind, and suggests that framing pro-abortion arguments as a matter of discrimination and injustice – discourses that have a particular resonance and appeal in Northern Ireland – may be more likely to command support.

Individual doctors working at the frontiers of medical ethics and practice may also incur the wrath of the criminal law. A doctor who commits a fatal error that is judged to be grossly negligent may find himself in the dock charged with gross negligence manslaughter. When this occurs, are doctors ‘special’, or, indeed, should they be regarded as so for the purposes of the criminal law because of the nature of the work undertaken? In ‘The impact of the loss of deference towards the medical profession’, José Miola considers the courts’ deference towards the medical profession in general terms. He argues that in a shift from the deferential approach in the past, the civil courts have deliberately sought to wrestle control back from medical practitioners and this has also filtered through to the criminal sphere, as evidenced by the rise in number of gross negligence cases. Nevertheless, doctors are still treated no worse (and arguably better) than other professionals. Whilst he contends that in this regard the law is moving in the right direction, he notes that this does not mean that criminal law is the correct forum for addressing medical errors – particularly those involving negligence rather than intentional harm.

Offering a philosopher’s analysis of the issue of whether grossly negligent doctors who cause their patients’ deaths merit special treatment, David Archard places emphasis on the characteristics of such behaviour, alongside the particular context of the medical professional’s role and the value of this role. In his view, whilst ‘malicious doctoring’ should rightly be prosecuted by the criminal law, we should think carefully about whether the prosecution of negligent doctors leads to the fair distribution of burdens and benefits in the criminal justice system.

Public health is the particular focus for John Coggon in ‘All to the good? Criminality, politics, and public health’. He explores the jurisdiction of the law and the state over health, and considers whether public health measures should include the utilisation of the criminal law in a political liberal state. Whilst recognising a logical and defensible role for the criminal law, Coggon’s argument echoes the liberal paradigm; criminal law should not be used lightly, especially in the case of offences