Introduction

Beginning the story

'You are far from being bad men'.

Such were the words spoken in 1993 by a judge sentencing two doctors for gross negligence manslaughter.[1] A year earlier, Ognall J directed the jury in Dr Nigel Cox's trial for attempted murder. He stressed that Dr Cox was 'a man of unblemished reputation and character' who had acted with 'intense compassion' for his patient.[2] We address the content and context of both cases later. We begin with the question of how doctors who are not 'bad men', or who are acknowledged to have acted from the highest of motives, end up in the dock. How does medicine become entangled with the criminal process? This is one of two linked concerns of this work. First, we seek to evaluate the engagement of the criminal process with medical practice and bioethical debates. In so doing, we address the 'unquestioned assumption' that the (criminal) courts are the appropriate forum to resolve ethical conflict.[3] As Ashworth observes:

> The uncertainties posed by the ambivalence and flexibility of the judicial approach to [cases involving medicine and bioethical conflict] suggest that there are difficulties at various levels in the criminal law's response to medical problems – over the principles that should come into play, whether the conflicts between them can be resolved to the extent of stating some general rules, and whether it is desirable to state rules or preferable to conceal what the courts are doing.[4]

Secondly, we assess how far the dramatic context of both trials involving doctors and public debates about bioethical controversy involving medicine affects and even distorts any analysis of what role the criminal process should play in the regulation of medical practice and medical ethics.

The closing decades of the twentieth century witnessed the dramatic evolution of scholarly and public interest in the interaction between

[1] Merry and McCall Smith 2001: 18–19. [2] *R* v. *Cox* (1992) 12 BMLR 38.
[3] Veitch 2007: 141. [4] Ashworth 1996: 192.

medicine, law and ethics. A vibrant subdiscipline of 'medical law' emerged in the UK's universities. Not everyone applauded. Scholars questioned the integrity of the subject area.[5] Doctors faced with growing numbers of clinical negligence claims and a level of legal scrutiny of medical practice unknown for over a century were unsurprisingly uncomfortable with such developments.[6] The phenomenon of medicine itself and the study of the ethics of both clinical medicine and medical science (i.e., bioethics) became a major focus for the law that could not be ignored.

Under the umbrella of medical law, several areas of law engaged with medicine. At the forefront lay the law of tort in developing clinical negligence principles, the evolution of the law on consent, and the gradual assimilation of confidentiality as a quasi-tort. Family law was prominent in, to give just a few examples, disputes about children's medical care, controversy surrounding fertility treatment and the thorny issue of decision making on behalf of mentally incapacitated patients. On numerous occasions, case law proved inadequate and legislation was introduced to remedy defects in medical law and regulate emerging technologies.[7] Criminal law was present on the stage, sometimes in a leading role as in the prosecutions of Drs Prentice, Sullman[8] and Cox, more often in a less obvious role as in *Airedale NHS Trust* v. *Bland*[9] and in *Re A (Minors) (Conjoined Twins: Surgical Separation)*.[10] Relatively little was written about how and why criminal law permeates medical law. In 1957, Glanville Williams published one of the first modern books in England to fall within the genre of what was to become medical law, *The Sanctity of Life and the Criminal Law*. For Williams, criminal law stood at the centre of the law's relationship with medicine. Somehow, in succeeding decades, criminal law was often demoted to a bit part. In one notable exception, the criminal law's treatment of medical professionals was addressed in an important essay by Ashworth in the 1990s.[11] Other than this, the criminal law's role has been overlooked. We hope to restore it to centre stage.

We use the language of theatre unashamedly, for unlike many analogous professions, medicine has seen legal disputes about its practice and ethics played out in a dramatic fashion. Court cases that address questions of abortion or euthanasia attract the kind of attention often

[5] Veitch 2007. [6] Brazier and Cave 2011: 236–9.
[7] For example, the Human Fertilisation and Embryology Acts of 1990 and 2008 and the Mental Capacity Act 2005.
[8] *R* v. *Prentice, R* v. *Adomako, R* v. *Holloway* [1993] 4 All ER 935, CA.
[9] [1993] 1 All ER 821. [10] [2001] Fam. 147. [11] Ashworth 1996.

reserved for celebrity disputes or true theatrical productions. Note, in this country, the much publicised prosecution of Dr Aleck Bourne after he challenged abortion laws in 1938,[12] the trial of Dr Bodkin Adams in 1957,[13] and the hearings in 2000 seeking to determine if conjoined twins could lawfully be separated when one was doomed to die as soon as the scalpel cut her loose from her sister.[14] In the USA, the landmark decision in *Roe* v. *Wade*[15] and the history of repeated attempts to reverse that decision have acquired the same prominence as any soap opera. The years of litigation over the fate of Terri Schiavo[16] became an international drama. The public galleries in the Bourne and Adams trials were full; law became spectacle. Nor is medicine as spectacle unknown. In the fifteenth and sixteenth centuries, Europe's anatomy theatres were as much sources of entertainment as the 'real' theatres. In modern times, the exhibition of plastinated bodies by Dr Gunther Von Hagens continues that tradition. Medicine and bioethics touch on the very nature of health, life and death and so have innate dramatic qualities. It is thus unsurprising that they feature so heavily in real theatre, in literature and in popular culture. Medical soap opera and theatre dominate the airwaves and prime time television.[17] Speculations about ethical boundaries of medical science are the stuff of much science fiction.[18]

How does a study of the criminal process and its role in medical practice and bioethics fit with a study of portrayals of medicine in the real theatre and the theatre of the media, literature and popular culture? Are we overstretching ourselves in a vain attempt to build bridges between the well-established tradition of criminal law scholarship, legal history, the contested jurisdiction of medical law, the vast domain of bioethics and the emergent study of law and literature? We acknowledge that we embark on a perilous journey and lack reliable maps. One of our aims is to evaluate how far the development of criminal law principles that play a role in regulating medical practice and bioethics is influenced and

[12] *R* v. *Bourne* [1939] 1 KB 687. [13] *R* v. *Adams* [1957] Crim LR 365.
[14] See n.10 above. [15] 410 US 113, (1973).
[16] *Schindler* v. *Schiavo* 780 So 2d 176, 177 (Fla Dist Ct App), 2001); *In re Guardianship of Schiavo* 789 so 2d 348 (Fla, 2001).
[17] Illustrated in this recent opening narration from the lead character in the US drama *Grey's Anatomy*, Meredith Grey: 'There was a time when they used to call operating rooms an operating theatre. It still feels like one. Scores of people get ready for the show. The sets are arranged. There are costumes, masks, props. Everything has to be rehearsed, choreographed. All leading to the moment when the curtain goes up.' *Grey's Anatomy*, Series 8, Episode 11, 'This Magic Moment'. UK showing on Sky Living, 29 February 2012.
[18] Gurnham 2009.

distorted by the drama that often surrounds the making and application of law. The criminal process has intrinsic drama, an appeal to the lay public not shared by all cognate areas of law. Behaviour labelled criminal indicates to many a moral culpability, conduct outlawed by society. Criminal law's relationship with debates on morality, especially in the context of medicine, gives it an immediacy that tax law may lack. The interpretation of a tax statute may be of huge importance to those at risk of paying more tax. It is unlikely to spark the public imagination as does the question of whether a dreadful error in the Intensive Therapy Unit by a junior doctor should be punished as manslaughter, or whether doctors who terminated a pregnancy at a late stage of gestation when a fetus had a cleft palate should face gaol.[19] Moreover, portrayals of the criminal process and medicine may be far from accurate and public interest is on occasion prurient interest. This is important in its own right. For just as the criminal process attracts such theatrical attention, so we contend that portrayals and conceptions of medicine and medical behaviour may, in turn, affect the law's development.

The pervasive influence of the criminal process

The role of the criminal law in medicine and bioethics is self-evident in certain cases. When a doctor who made a fatal error is prosecuted for manslaughter or a doctor who is accused of easing the passing of a dying patient by hastening his death is charged with murder, these are overtly criminal law issues. But many other cases relating to the practice of medicine, although presenting as a matter of family law before a family court judge or in the Court of Protection, equally entail the application of criminal law principles to medicine.

An obvious example is *Airedale NHS Trust* v. *Bland*. Tony Bland had suffered massive brain damage when he suffered crushing injuries in the disaster at Hillsborough Football Stadium. He had lain in a persistent vegetative state (PVS) for more than two years, his life maintained by artificial nutrition and hydration. The form of the case involved an application for a declaration heard initially before the President of the Family Division. There was no Crown Court trial, no prosecution as such. But the trigger for the hearing to establish if it was lawful to withdraw life support was concern that although Tony Bland's doctors and family agreed that his feeding tube should be withdrawn and the young man allowed to die, any doctor who removed the tube might face a murder charge. The

[19] See n.8 above; *Jepson* v. *The Chief Constable of West Mercia Police Constabulary* [2003] EWHC 3318.

court was invited to rule if passive euthanasia was lawful and adjudicate on a major debate in bioethics, as well as regulating the medical care of the dying. The scope of the criminal law lay at the centre of judicial decision making.

As a further example, in the conjoined twins case, a crucial issue of family law arose: could the twins be separated against their parents' wishes? Again, criminal law took the starring role, albeit in the family courts. Separating the twins meant the immediate and inevitable death of the weaker twin. Were the surgery murder, the operation could not go ahead whatever the parents' views.

Criminal law touches on medicine and bioethics in different guises. Murder and manslaughter are general criminal offences, in no way special to medicine.[20] The challenge for law is to ensure that the particular needs of medical care can be accommodated within offences not designed to address the dilemmas doctors and patients face today. We are not directly concerned with doctors such as the notorious Harold Shipman, who killed at least 215 of his patients for unknown motives. Shipman was a serial killer who happened to be a doctor. We are concerned with how the criminal law engages with doctors who seek to practise compassionately at the end, or beginning, of life, who seek to honour their patients' wishes and find themselves at the centre of bioethical and popular debates on abortion and assisted dying – cases which involve a 'profound level of moral conflict'.[21] For the medical lawyer and the bioethicist, the consequence of a 'wrong' answer is, at most, stringent criticism. The doctor may find himself or herself in the dock. We are also concerned with the doctor who makes a fatal error and faces prosecution for gross negligence manslaughter. How well does the criminal process address the issue of accountability for medical errors? Until relatively recently, in England at least, the story might have been one of doctors being privileged by judicial deference.[22] In much of what passes for medical law, that deference has markedly declined. Judges have robustly supported competent patients' rights to make autonomous choices about treatments.[23] The best interests of mentally incapacitated patients are no longer the preserve of medical expert opinion.[24] In the context of the criminal law, although deference may no longer prevail, the practice of the profession and medical experts' opinions continue to weigh heavily

[20] Although the term 'medical manslaughter' is often utilised, there is no such specific offence at law.
[21] Veitch 2007: 132. [22] Miola 2012.
[23] *B* v. *An NHS Hospital Trust* [2002] EWHC 429 (Fam); *St George's HC Trust* v. *S* [1998] 3 WLR 936. *Chester* v. *Afshar* [2004] UKHL 41.
[24] See *Re S (Adult Patient: Sterilisation)* [2000] 3 WLR 1288.

in terms of determining the law. Some degree of privilege still protects the doctor.

Another factor renders the profession vulnerable. In theory at least, the criminal law allows little room to distinguish between individual cases. The question is: was the law broken or not, with no principled means, outside defences such as self-defence and necessity, to say, 'well it was, but for a good/legitimate cause'. The criminal law is, on its face, implacable. It may be contrasted to family law where the courts deciding on the fate of very sick neonates,[25] or wrestling with the awful results of applying the letter of the law to foreign surrogacy arrangements, can mould the law to the demands of justice and compassion in a particular case.[26]

But the criminal law's role in medicine today is far from limited to the need to fit medical (mis)conduct into the general offences punished by penal law. Increasingly in the UK, as emergent and/or controversial areas of medicine are subject to special regulation, breaches of the regulations imposed are made express and discrete criminal offences. To give just two examples, a doctor or a scientist who creates a human embryo in vitro or keeps such an embryo beyond the fourteen-day limit set by the Human Fertilisation and Embryology Act 1990 does not just risk losing his or her clinic their licence, but could face a ten-year jail sentence.[27] A pathologist who removes or retains human material *post mortem* without appropriate consent as required by the Human Tissue Act 2004 may be prosecuted and gaoled for up to three years.[28] The criminal law's encroachment on regulation in such instances prompts two questions. What should the criminal law's role be in regulating medical science?[29] And given that, for the most part, these specific crimes are created in areas of ethical controversy, how do criminal law and bioethics fit together? This second question is our focus. Return to the example of the pathologist. The Human Tissue Act makes him or her a criminal if he or she retains organs without consent. Yet there are those who argue that no wrong can be done to the dead and that any interest of a bereaved family in the body of their loved one must cede to the interests of the living in medical education and research.[30]

Untangling the substantive criminal law applying to medicine and bioethics is like untangling a ball of wool that the family cat has been playing with. Another factor complicates the task. In England and Wales, crucial decisions that shape how the criminal process affects medical

[25] See e.g. *Re Wyatt (a child) (medical treatment: parents' consent)* [2004] EWHC 2247 (Fam).
[26] See Brazier and Cave 2011: 382–3. [27] S.3(1) and s.42. [28] S.5.
[29] Alghrani and Chan 2012. [30] Harris 2002.

practice and bioethics are made not in the courts and accessible in reported judgments, but by the Crown Prosecution Service (CPS) and in some cases its head, the Director of Public Prosecutions (DPP). For this reason, we often refer to the criminal process rather than the criminal law. We address the role played by the CPS and the DPP in subsequent chapters. When a fatal error by a doctor is investigated by the police, any question of prosecution will be referred to a specialist unit of the CPS. In settling the criteria used to determine whether to prosecute a doctor, the law in books differs from the law in practice.[31] A better-known example is the DPP's guidance setting out the circumstances in which a person may or may not be likely to face prosecution for assisting suicide. It happens that doctors who help patients to die will apparently find little comfort in the guidelines.[32] The important issue is that, in effect, the DPP is making the law on assisted dying even more of a hotbed of bioethical controversy and that the highest court in the UK commanded him to do so.[33]

Nor is the DPP's role the only reason that our focus is on the criminal process and not simply the principles of criminal law. It seems sometimes that the criminal process is perceived as the only, or best, legal vehicle to obtain justice in the wake of medical error or scandal. Families who have lost a relative to medical error may press for prosecution and where an injury occurs short of death and no criminal offence has been committed, the victim may find civil redress and disciplinary action against the doctor inadequate. In the scandal that erupted in the UK when it became known that pathologists had routinely retained organs from the dead with no consent, angry families called for prosecution.[34] Justice becomes equated with a gaol sentence, and thus the criminal process is viewed as an essential means to right the wrong.

The relevance of 'theatre'

Legal debates about medicine and ethical controversy do not take place in a vacuum; once the criminal process is engaged, drama frames the proceedings. In that drama, the media play a large role. Does a 'theatrical' context enhance or inhibit the development of legal principles apt to meet the needs of the matter before the courts, or under consideration by the DPP, or when new proposals to amend the law are to be debated? The presentation of individuals and human dilemmas may cloud rational

[31] We allude to research carried out as part of the broader project from which this book arises. See Griffiths and Sanders 2013b.
[32] Crown Prosecution Service [CPS] 2010a: para 43.
[33] In *R (on the application of Purdy)* v. *DPP* [2009] UKHL 45.
[34] Retained Organs Commission 2004.

debate. Public sympathy for families who have accompanied relatives to die at the Swiss right-to-die 'clinic' run by *Dignitas* had, we argue, a significant effect on the guidelines demanded by the House of Lords and developed by the DPP.[35] The eloquence and courage of Debbie Purdy in her quest for clarity about the likely legal consequences for her husband if he helps her to die created strong popular support for her cause.

In the context of families helping relatives to reach Switzerland, real theatre played its part in the television drama about the case of Dr Anne Turner starring the popular actress Julie Walters.[36] Theatre and literature have long shaped debate about medicine and the criminal process. The perception of the physician in society is mirrored in its literature. And in centuries past, the low esteem in which the physician or surgeon or apothecary was held made him more vulnerable to legal attack. The influence of theatre and literature on ethical debate is by no means uniform, in the sense that one could judge that it favours (only) a liberal or conservative approach. Science fiction may be conservative in its effect, with frightening stories of unhappy child clones bred to be organ banks for more privileged 'naturals'.[37] Any effect on legal debate may be accidental. A good story, a compelling drama, will often not be even-handed. Imagine *Brave New World* where the fictional technology was used only responsibly to give all those who wanted it a chance to have the healthiest children. There were no Alphas and no Epsilons. The book would not have sold as it did. In contrast, the aforementioned television drama about Anne Turner's quest for an assisted death was liberal in orientation and effect, supporting the pro-assisted-dying argument. Literature influences debate by its ability to catch interest rather than any dispassionate service to the public interest.

The concept of theatre is also relevant because so much of what the judges do in the cases we address involves orchestrated framing, the manipulation of legal concepts, interpretation (of the facts of the case, the story of legal precedent and the particular ethical dilemma) and translation (of ethical issues into criminal law discourse). The concept of theatre we employ is a liberal one, encompassing drama both within and without the courtroom, legal and bioethical literature,[38] narrative construction, media coverage and the spectacle of medicine. The concept of theatre is notoriously difficult to define. However, according to definitions that fit with the broader ideas in this work, an audience is the essential requirement for something to be described as theatre:

[35] Above, nn.32 and 33.
[36] 'A Short Stay in Switzerland', BBC 1, 25 January 2009.
[37] Darnton 1999.
[38] Note Herring's notion of bioethics 'as entertainment'. Herring 2010: 19.

'[t]he only thing that all forms of theatre have in common is the need for an audience.'[39] Such an understanding is capable of capturing all the aspects we have mentioned previously. In addition, '[t]he core of the theatre is an encounter . . . The theatre is an act engendered by human reactions and impulses, by contacts between people'.[40] This contact can be by way of, for example, the judge engaging with those involved in the case before him or her; the bioethicist being involved in dialogue with readers; public reaction to a significant medical development, such as the first face transplant; the defendant's counsel's interpretation and application of judicial precedent. The essential components of the concept of theatre are an actor/player/author, an audience and narrative.

A story and some themes

Within this book we try to achieve a number of ends which sometimes conflict. The book tells a story of how the criminal law and process remain a significant part of the framework within which medicine and bioethics are regulated. Criminal law's range is so huge that in seeking to ensure that the story is more than a superficial canter over the multitude of 'crimes' that doctors risk committing, we had to make difficult choices about what to include. Part I sets the scene, identifying links and conflicts between bioethics, medicine, the criminal law and theatre. Part II presents the criminal courts and law as the theatre in which medical cases involving bioethical controversy are played out, and also considers the impact that other external theatrical forces have on criminal law. Case studies illustrate how judges have grappled with bioethics, suggesting tensions between bioethics and the criminal process. Part III adds the major theoretical component to our analysis. Can the criminal law be an appropriate forum for resolving bioethical medical conflict – do criminal law and bioethics connect? Can principles of bioethics and criminal law work together? Our narration of this story is shaped by the fact that we are more medical lawyers than criminal lawyers or bioethicists. Our construction of the story, our own theatre, is framed by the lens of medical law. A criminal law theorist or bioethicist might well offer a different theatre, narrative and conclusion.

Besides telling a story, we seek to discern what can be learned from the story. Is there, can there be or should there be coherent themes that tell us when and how medicine, bioethics and the criminal law should meet? We attempt to unearth some form of theory or theories, but should be clear from the outset that what we find is that although,

[39] Brook 1977: 154. [40] Grotowski 1968: 56 and 58.

for instance, respect for autonomy (and political liberalism) has strong connections to medicine, bioethics and criminal law, the connections are far from solid and tensions emerge. Medical politics may trump political liberalism. Human sentiment plays a role and rational answers are not always feasible. Principle and practice conflict. The ethicist can build a model of what ought to be. The lawyer struggles to apply principle to legal concepts never designed to address the complexity of modern medicine or bioethics. The following themes are core to our story.

Tensions and transient connections: the lighthouse's beam

The connections between criminal law, medicine and bioethics are analogous to the moving beam of light emanating from a lighthouse. Sometimes the connections are lucid and brightly lit; at other times they are cast in shadows. For example, as Chapters 7 and 8 illustrate, the concept of responsibility in some respects lights up a clear connection between criminal law, bioethics and the medical professional, but this connection then moves into the shadows cast by the differing functions of the criminal law and bioethics. By way of a further example, sometimes the connection between medicine, bioethics and the criminal law provided by political liberalism is transparent. At others, especially in Chapter 2's context of the body, the connection looks strong when we consider how the law endorses bodily integrity but, once we ask about freedom to choose what we do with our bodies, is sometimes lost or prevented because of moral sentiment, the limits of cultural acceptability and/or politics. Although the lighthouse's beam returns and criminal law, medicine and bioethics can work in harmony, there are periods of darkness in which there is more of a disconnect and a tension between the fields.

Theatrical distortion

Although the theatre involved in cases of bioethical controversy is captivating, one of the central themes of this work is that this theatre causes tension between the criminal law, medicine and bioethics. Just as Plato castigated poetry in *The Republic* as falsification, as 'presenting images that are at several removes from the truth',[41] we claim that theatre has a distorting effect, blurring the reality of the situation. Plato's ambiguous notion of the *pharmakon*[42] is also of some relevance here; partly because of the theatre surrounding the cases we explore, the criminal law appears

[41] Plato 1992: Book 3, section 389b and Book 2, section 382d; Tanner 2010: 130.
[42] See Derrida 1981; Plato 1992: loc. cit.