Who should define what constitutes ethical and lawful medical practice? Judges? Doctors? Scientists? Or someone else entirely? This volume analyses how effectively criminal law operates as a forum for resolving ethical conflict in the delivery of health care. It addresses key questions, such as: How does criminal law regulate controversial bioethical areas? What effect, positive or negative, does the use of criminal law have when regulating bioethical conflict? And can the law accommodate moral controversy? By exploring criminal law in theory and in practice and examining the broad field of bioethics as opposed to the narrower terrain of medical ethics, it offers balanced arguments that will help readers form reasoned views on the ethical legitimacy of the invocation and use of criminal law to regulate medical and scientific practice and bioethical issues.

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This series of books was founded by Cambridge University Press with Alexander McCall Smith as its first editor in 2003. It focuses on the law’s complex and troubled relationship with medicine across both the developed and the developing world. Since the early 1990s, we have seen in many countries increasing resort to the courts by dissatisfied patients and a growing use of the courts to attempt to resolve intractable ethical dilemmas. At the same time, legislatures across the world have struggled to address the questions posed by both the successes and the failures of modern medicine, while international organisations such as WHO and UNESCO now regularly address issues of medical law.

It follows that we would expect ethical and policy questions to be integral to the analysis of the legal issues discussed in this series. The series responds to the high profile of medical law in universities, in legal and medical practice, as well as in public and political affairs. We seek to reflect the evidence that many major health-related policy debates in the UK, Europe and the international community involve a strong medical law dimension. With that in mind, we seek to address how legal analysis might have a trans-jurisdictional and international relevance. Organ retention, embryonic stem cell research, physician-assisted suicide and the allocation of resources to fund health care are but a few examples among many. The emphasis of this series is thus on matters of public concern and/or practical significance. We look for books that could make a difference to the development of medical law and enhance the role of medico-legal debate in policy circles. That is not to say that we lack interest in the important theoretical dimensions of the subject, but we aim to ensure that theoretical debate is grounded in the realities of how the law does and should interact with medicine and health care.

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Bioethics, Medicine and the Criminal Law Volume I: The Criminal Law and Bioethical Conflict: Walking the Tightrope
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
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Foreword

Mark Hedley
Justice of the High Court (Family Division)

Every democratic society depends for its integrity on some concept of the Rule of Law. Every democratic society learns (if only by experience) that, for the Rule of Law to be effective, two conditions must be fulfilled: first, that the substantive law must be broadly acceptable to its members; and second, that the law must be capable of enforcement. The second condition requires (at least as a last resort) the availability and implementation of criminal sanctions.

Since it is generally accepted in principle that the state has a regulatory role in the implementation and oversight of scientific (and specifically medical) research and practice, some engagement between medical ethics and the criminal law is inevitable. The real question today is not so much whether the criminal law has a role in medical research and practice or in bioethics, but rather what that role is, or should be.

There are two basic approaches to the enactment and use of the criminal law. On the one hand, legislators debate and decide on the moral criteria to be applied and in so doing define the limits of research, practice or bioethics and then enforce them by criminal penalties. Alternatively, legislators seek to permit maximum freedom within these areas (with or without a civil regulatory framework) and seek to enforce through the criminal law only evasion of that framework or the minimum standards acceptable to that society. This difference of approach may lie at the heart of many a modern controversy in this area. Whilst our society tends to follow the latter approach, it is not wholly consistent in doing so. Indeed there are many raised voices favouring the former approach, especially where debate focuses (as inevitably it must) on specific issues.

The criminal law must be recognised as something of a blunt instrument. Its substance is for Parliament, its implementation for the prosecuting authorities and its application for judges. Yet whilst appellate courts can review the law after conviction and trial judges can instruct juries in accordance with the law, the final decision in any contested case of weight lies with the jury who give no reasons for it and whose decision
to acquit is effectively beyond review. Clearly this can make for real uncertainty, which itself can be compounded by the uncertainties inherent in the scientific process then under consideration.

This volume of essays correctly captures the issue in its subtitle *Walking the Tightrope*. It is a particularly difficult tightrope since, on the one hand, our society has inherent sympathy and support for medical research and practice, but, on the other hand, is likely to have firm, if often diverse, views on where the line should be drawn on specific issues. Further difficulties can be introduced in the use of justificatory concepts like ‘public health’ or ‘human dignity’, whose definitions are uncertain (or at least unagreed) and whose very provenance may sometimes be controversial. If (as I think to be so) hard cases make bad law, these are areas in which hard cases abound and therefore bad laws are an ever-present danger.

I am particularly grateful, as a judge who is not infrequently required to engage with these issues, to have been invited to write the foreword to this book, which I would wish to commend to careful study. There is no common agenda in these essays beyond a real attempt to recognise that medical research and bioethics are uneasy but probably inevitable bedfellows with the criminal law. They seek to deepen an understanding of how these bedfellows should relate in our society, making clear that this is an essential (and multidisciplinary) task that is both problematic and controversial. I found particularly helpful discussion about the place and problems of compromise in these questions, since compromise, whilst uncomfortable to the purist, is a concept innately attractive to both legislators and practising lawyers. I venture to suggest that the authors’ responses to these pressing issues will put legislators, lawyers, regulators, professional leaders and all serious practitioners very much in their debt.
Acknowledgements

This edited volume is one of the major outputs of the AHRC-funded project, The Impact of the Criminal Process on Health Care Ethics and Practice, and we are extremely grateful for the Council’s support.

There are a number of people who we owe a debt of gratitude to. We would especially like to thank Margot Brazier for her expert leadership as Principal Investigator on the aforementioned project, for her support and assistance regarding this edited volume, and for being such a source of knowledge, strength and friendship to us all. We would also like to thank Charles Erin for the foundational work he contributed to the volume – together with Amel, it was he who conceived of the original idea and wrote the proposal for this book. Our families and friends deserve particular thanks for allowing us the time needed to work on this project. Amel is thankful first and foremost for her son, Abrahim, who came along whilst this collection was in progress and allowed her to appreciate the finer things in life, and to her family and friends for their support. Becki would like to acknowledge the love and support given to her by Isabella, who makes everything worth it, and to thank LB for making her smile even when she thinks she can’t. Suzanne is thankful for all Nick’s support, and for Lily and Matthew’s unwavering ability to remind her that there is much more to (and more important things in) life than her laptop. She would also like to express her gratitude to Sara Fovargue, who has been immensely supportive (both as a friend and colleague) during the duration of this project.

Finally, we are very grateful indeed to each of the contributors to this volume. It seems trite to say that without them this book would not exist. But it is true and we hope and anticipate that readers of their essays will find their contributions as engaging and thought-provoking as we have as editors.

This book is dedicated to the memory of Dr Mary Lobjoit and Professor David Price, who contributed so much to the development of medical ethics and law.

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