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Book Review

AMEL ALGHRANI, REBECCA BENNETT and SUZANNE OST, **Bioethics, Medicine and the Criminal Law Volume 1, The Criminal Law and Bioethical Conflict: Walking the Tightrope**. Cambridge University Press, 2013, £65.00

Advances in both medicine and science continue to raise difficult questions. Scientific advancement, emerging technologies, and the evolving nature of medicine have conferred many advantages on society. However, these advantages are not trouble-free. The price to pay for advancement is, of course, the creation of new risks. Many would argue that this is a small price to pay, particularly when viewed against the backdrop of the advances achieved in modern medicine and science over the years. Nonetheless, there is a tension which has caused a great deal of controversy, and attracted the attention of philosophers, ethicists, and lawyers alike. Whereas the bioethicist is primarily concerned with the controversial ethical questions born out of the relationship between science, technology, medicine, philosophy, politics, and the law, the specific challenge for the law *per se* is grounded in *how* it responds to the constant developments taking place within these various disciplines. As scientific and medical knowledge expands, and as new dangers are exposed as a result of this, what role should the law play? Indeed, to what extent can different types of law be used to meet the new challenges presented?

The civil law is one area of law that does have a part to play in responding to the new risks inherent in pioneering medicine and expanding technologies; it can be used to set prescriptive standards and also to provide compensatory redress to those who have been harmed by the careless conduct of others. Yet, as its focus is predominantly on the relationship between two parties, its potential impact in terms of the bigger picture is rather limited. It overlooks some of the greater societal considerations such as regulation, deterrence, punishment, and rehabilitation. These are all factors commonly associated with the criminal law and so when medicine and bioethics are viewed from a wider perspective, the significance of the criminal law begins to shine through. However, while the importance of the criminal law is not, of itself, in dispute, certain questions remain which are far less certain and which are worthy of in-depth discussion and analysis. If the criminal law is going to regulate certain ethically delicate and sensitive areas of medicine, science, and technology, what precise form should that regulation take? If the law adopts a heavy-handed approach to regulation, it may stifle creativity and ingenuity in disciplines where it is needed the most, thereby working to the detriment of society on the whole. There is even an argument that in certain areas there ought to be no external scrutiny at all from the criminal law, and that any supervision is best left to the profession itself and to the individual conscience of doctors and scientists. The debate also continues about the extent to which the criminal law provides any real deterrent effect. How, if at all, can the criminal law be utilised to deter doctors and scientists from participating in dangerous activities and bad practice that have the knock on effect of exacerbating existing dangers to the

public? Finally, if one of the main aims of the criminal law is to punish wrongdoers, what type and magnitude of sanction befits individuals who may have acted recklessly but with the best of motives?

With all these questions in mind, it is remarkable that there has been a dearth of literature that attempts to tie all these issues together and address some of the important points raised above. *The Criminal Law and Bioethical Conflict: Walking the Tightrope* seeks to redress this problem and a text such as this has been long overdue in academia. The book is one of many outputs of the AHRC-funded project, 'The Impact of the Criminal Process on Health Care Ethics and Practice', which is a collaborative venture between the Universities of Manchester, Birmingham, and Lancaster. This collection of essays brings together some of the preeminent names in medical law, ethics, and philosophy and explores, in detail, the role of the criminal law and some of the tensions which exist between that and the discipline of bioethics. Each individual author has selected a contemporary and original topic, and constructed a short chapter discussing the legal and bioethical issues which are apparent within. In a project such as this, the difficult task for any editor is keeping the authors on task and not allowing them to go off at a tangent. Moreover, the essays that make up the substantive content of the book must relate to an underlying set of themes which permeate the entire text so as not to give the reader the impression that this is just a group of disparate essays mixed together. When you are dealing with a number of different scholars, from a variety of disciplines and backgrounds, this is not an easy process to manage and the editors of this volume should be applauded for the excellent job they have done.

One of the strengths of the book is that it explains, from the outset, how the volume is organised and alerts the reader to the key underlying themes of the text.[1] Many books such as this purport to do exactly the same thing, but as the reader progresses into the substantive material there is a dawning realisation that the essays do not necessarily relate to the key themes and there is a propensity to feel lost, rendering it difficult to make connections between key ideas and arguments. This does not happen here and as you read on it is easy to make those all-important connections. It is worth identifying at this point what some of those key themes actually are in order to set the scene for this review. First, many of the authors explore *what* the appropriate limits of the criminal law should be. Second, some of the essays explore the *role and character of the actor* and whether this makes a difference to when it is considered appropriate to blame them, and, in some instances, hold them criminally liable. *Moral controversy* is also a recurrent idea that features in many of the essays, as is the *paternalism/autonomy* divide and the extent to which the state should act paternalistically to regulate certain types of behaviour and when it is, and is not, appropriate to override individual autonomy. Finally, the degree to which, and on what grounds, *certain scientific research and endeavours should be permissible* is analysed in considerable depth. In order to bring these interconnecting themes to fruition and to ensure the book has a coherent narrative running through it, the essays are organised into four

[1] A Alghrani, R Bennett, S Ost, 'Introduction—When Criminal Law Encounters Bioethics: A Case of Tensions and Incompatibilities or An Apt Forum for Resolving Ethical Conflict?' Ch 1.

distinct sections. Part I of the book is dedicated to death, dying, and the criminal law; Part II concerns freedom and autonomy; Part III covers criminalising biomedical science; and Part IV focuses on bioethics and criminal law in the dock. The essays themselves have all been placed under the appropriate heading and it is plain to see where they fit into the overall scheme of the project. There are far too many essays to do justice to each in this review. Thus, I will focus on what I consider to be the most interesting aspects of the book. This is not to do a disservice to those which do not specifically get a mention, my choices simply reflect those specific essays that captured my imagination and caused me to challenge my own assumptions about the topic under discussion.

The first section of the book concentrates on death, dying, and the law. It contains three chapters which focus on the challenging yet well traversed issue of euthanasia. In a text as original and innovative as this, it is perhaps a little disappointing that the first two substantive chapters do little more than reinvent many of the time-honoured arguments in favour of, and against, the decriminalisation of physician-assisted suicide and euthanasia. Two prominent scholars in the field, John Griffiths and John Keown, unsurprisingly approach the debate from opposite ends of the spectrum.[2] Griffiths argues in favour of decriminalisation of euthanasia as it is necessary for the safety of patients and because there are no relevant differences between euthanasia and the long-established legal and justified ways in which doctors intentionally cause the death of patients. Keown, on the other hand, analyses what he considers to be five flawed arguments in respect of decriminalising euthanasia, thereby reinforcing his well-known position that the law should continue to prohibit behaviour of this kind. Of course, the main problem with this is that the debate will never be resolved and for every argument that is presented on one side, there is an equally credible counter argument on the other. For me, as a reviewer, Griffiths constructs the more compelling case. That does not mean that Keown's thesis is completely unconvincing. In the build-up to this publication, I was fortunate enough to be present at the conference in Manchester where these notable opponents debated the issue in person and one thing struck me more than anything. However convinced I was by the strength of Griffiths' argument, Keown raised the bar on that day in terms of the style, manner, and confidence with which he presented his case. He is every bit as meticulous a scholar as he is accomplished a presenter, and no matter how much one disagrees with him, there is an enigmatic power of persuasion in his writing and public speaking that ought to serve as a warning shot to each of us on the other side of the debate that we, in turn, must raise our game if we are to take this forward and press for legal change.

A text such as this could never eschew a discussion of death and euthanasia, but the opening exchanges mean that the book is slow to get going and we do not see anything fresh until we come across Richard Huxtable's interesting and discrete perspective on euthanasia.[3] Huxtable approaches the question from a slightly different angle and his view is somewhat revitalising. Rather than focusing on the

[2] J Griffiths, 'Euthanasia and Assisted Suicide Should, When Properly Performed By A Doctor In An Appropriate Case, Be Decriminalised' Ch 2; J Keown, 'Five Flawed Arguments for Decriminalising Euthanasia' Ch 3.

[3] R Huxtable, 'Euthanasia Excused: Between Prohibition and Permission' Ch 4.

arguments for and against decriminalisation of euthanasia *per se*, he suggests that the law should adopt a compromise approach. His chapter discusses when to compromise, how to compromise in general, and then analyses how the law should compromise specifically in relation euthanasia. The emphasis for Huxtable is on the language of excuse rather than justification and he argues that we should mark out assisted dying as a particular and compassionate type of killing, chargeable as a distinct offence, and also available as a partial defence to certain homicide charges (p. 66). One problem with a specific offence such as this is that a lot would hinge on being able to identify a compassionate motive from the defendant. Many would argue that this is out of square with traditional criminal principles which repeatedly state that motive plays no part in the law of murder.[4] Huxtable deals with this criticism by acknowledging that whatever the correct theoretical legal position may be, the reality is that the law does consider motive, and does so in a number of different guises. Its appearance in the DDP's Prosecuting Policy for Cases of Assisted Suicide is a classic example of this, and one that is rightly acknowledged by the author (p. 66).[5] The finer details of the offence, by Huxtable's own admission, would need fleshing out in more depth (p. 67), and one notable concern that requires further thought is the impact that this would have on the wider physician-assisted suicide debate.

Huxtable's claim that qualifying cases should be prosecuted consistently, irrespective of the professional status of the defendant, will not be well received by the medical profession (p. 66). Increasing the possibility of prosecution for healthcare professionals who help patients to die may serve to alienate further medical support for any reform in the law. If the law is to change in any way, whether in the form of the compromise position or the legalisation of controlled physician-assisted suicide, support from the medical profession will be crucial in effecting any change. The threat of prosecution, no matter how much discretion is available to the courts in sentencing, may be enough to deter compassionate doctors from helping patients to die who need it the most. To some this will be a desirable result of a new law; to others it is not. Either way, the threat of prosecution would not exist to the same extent if the law were to change in a more radical way to legalise and regulate controlled physician-assisted suicide and so, for some, this may still represent the more sensible move. Nevertheless, the idea of compromise, in principle, is an attractive proposition in medico-legal discourse. More often than not, when the law is faced with polarised views shrouded in moral, philosophical, and ethical uncertainty, it does adopt what many would describe as the middle ground, and in sensitive fields such as abortion, embryo research, and advance decision making, the compromise position works for the majority of people. Thus, the idea itself is there and the discussion is lively and stimulating. For this reason, it is interesting to read how Huxtable develops this idea in his own recent book.[6]

[4] See recently *R v Inglis* [2010] EWCA 2637; *Airedale NHS Trust v Bland* [1993] AC 789, HL; *R v Cox* (1992) 12 BMLR 38.
[5] CPS, 'Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' issued by The Director of Public Prosecutions, February 2010.
[6] R Huxtable, *Law, Ethics and Compromise at the Limits of Life: To Treat or Not To Treat?* (Routledge-Cavendish 2012).

Part II of the book is where this collective work really starts to flourish and contains three thought-provoking chapters on freedom and autonomy which are all enjoyable to read. Robert Smith opens up with a chapter on Body Integrity Identity Disorder,[7] closely followed by an engaging discussion from David Gurnham on the contours of consent in HIV transmission and rough horseplay cases.[8] The most notable contribution in the section, however, is from Suzanne Ost and Hazel Biggs who explore the criminality of consensual sexual activity between doctors and patients.[9] Their short essay broaches a number of important issues, both from a theoretical legal standpoint and also from a real-world perspective. They raise the question as to whether sexual activity between doctor and patient can ever truly be consensual. My initial reaction to this question was: 'yes, it can', but the answer is not that simple. Where a doctor participates in sexual activity without a patient's consent, it is fairly clear that the criminal law ought to, and will be, engaged. The more difficult situation, though, is when there is some form of consent from the patient but where it is arguable that the consent has only been obtained *because* the doctor is in a more powerful position and has induced, enticed, or caused the patient to feel that they are unable to say no (p. 113). Certainly where consent is obtained through deception, coercion, or inducement, there is evidence of exploitation, which is enough in itself to question the validity of a patient's consent. Here, as Ost and Biggs correctly identify, there is a strong case that the criminal law should have a role to play (p. 116). Yet, as it stands, it does not adequately capture all instances of exploitation and perhaps the introduction of a new abuse of trust offence could act as a panacea in the future (p. 116).

The more curious part of this, however, revolves around the acknowledgement from the authors that not every relationship between a doctor and a patient will involve exploitation; there are some cases in which there will be a genuinely consensual relationship (p. 116). This is of particular interest, especially amid the hard-line approach that the GMC takes towards doctor patient relationships.[10] Consider the following hypothetical scenario. An adult male patient visits his female GP of a similar age with a recurring football injury for which he needs treatment in order to play in the amateur divisional cup final in two weeks' time. The doctor prescribes painkillers, anti-inflammatories, and demonstrates some exercises that she advises the patient to perform on a daily basis. The male patient then leaves, follows her advice, and is fit to play in the final. During the course of the game, the male patient notices that his doctor is watching because, unbeknown to him, she is an avid follower of amateur football and has watched the opposition in every game of the season. After the game in the clubhouse, the patient and doctor bump into each other at the bar; she asks how his knee is and he asks her opinion about the game. The conversation develops and eventually the doctor asks

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7 R Smith, 'Body Integrity Identity Disorder—A Problem of Perception?' Ch 5.

8 D Gurnham, 'Risky Sex and "Manly Diversions": The Contours of Consent in Criminal Law—Transmission and Rough Horseplay Cases' Ch 6.

9 S Ost and H Biggs, '"Consensual" Sexual Activity Between Doctors and Patients: A Matter for the Criminal Law?' Ch 7.

10 GMC, *Maintaining A Professional Boundary Between You and Your Patient* (GMC, 2013), paras 4, 6. For example, Oladapo Idowu had a sexual relationship with two of his patients. A Fitness to Practise Panel upheld the allegations made against him and his name was subsequently removed from the Medical Register in 2007.

if the patient would like to go out for a drink sometime. He agrees and as a result they eventually begin a relationship. Supposing this relationship is not platonic, would this be genuinely consensual sexual activity? I would argue it is. Has the patient been exploited by the doctor? Assuming that her motives in attending the game and initiating the conversation by asking about the knee injury were genuine, I would argue not. Irrespective of this, even if the female doctor had questionable motives, the exploitation has not caused any real harm to the patient, in fact the patient will most probably feel quite the opposite, so at what point do we say it is appropriate for the criminal law to step in? With this in mind, Ost and Biggs have to be correct in concluding that certain relationships between doctors and patients are genuinely consensual and not all based on exploitation, although the caveat that they place on it, that genuine cases will be rare, is accurate (p. 116).

Nevertheless, the jury is still out on whether the GMC's guidance recognises this to the extent that it should. At various points in the chapter, it is stressed that doctors will be called to account professionally for engaging in inappropriate relationships. In its most recent guidance, published after this volume in March 2013, the GMC states that 'you must not pursue a sexual or improper emotional relationship with a current patient'.[11] Admittedly, the guidance is a little more circumspect in respect of former patients as it does not expressly forbid all relationships between a doctor and former patient where the professional doctor/patient relationship has ended,[12] but notwithstanding this the GMC perhaps needs to tread carefully in respect of its guidance. For example, in the hypothetical scenario discussed above, the male patient may still be registered with the general practice at which the female doctor works after their relationship has begun and would, therefore, technically remain a patient of hers. If the GMC followed its guidance to the letter, adopted the intransigent stance that it sets out towards *that* particular relationship and sought to sanction the doctor, surely there ought to be a discussion about the lawfulness of such guidance. It is not difficult to envisage a legal challenge being brought by means of a judicial review by the doctor. The possibility of success would, in all likelihood, be remote, but an argument under Article 8 could undoubtedly also be made that a court would have to consider. This claim would probably centre on the invasion of the right to respect for private and family life, and the unyielding nature of any professional regulatory regime that sought to impinge on this disproportionately. What is clear is that interesting questions still remain; these focus not only on the degree of exploitation that ought to be required in order to invoke the criminal law, but also about the interface between the criminal law and professional regulation. Hopefully the planned future work alluded to by Ost and Biggs will develop some of these issues.

The third part of the book investigates criminalising biomedical science. This is perhaps the most exciting section, which is mainly due to the originality of the chapters and the exigent questions that many of the topics under investigation pose. Sara Fovargue's chapter on xenotransplantation raises awareness of some

[11] GMC, *Maintaining A Professional Boundary Between You and Your Patient* (GMC, 2013), paras 4, 6.
[12] Ibid, para 8.

of the difficulties created by this emerging biotechnology.[13] Amid statistics that show there is a real shortage of human organs available for transplantation,[14] the immediate reaction to a breakthrough such as xenotransplantation is that it can only be a good thing and, if the science and medicine which underpin it are perfected, would confer many benefits on society. On one level, this view is accurate, but it neglects to consider some important risks that run hand in hand with biomedical developments of this kind. Fovargue discusses these potentially serious risks and proceeds to consider how the law should respond to them. In doing so, she constructs a cogent argument for a new xenotransplantation statute which would provide an effective regime to regulate activity within this field. The idea of a xeno-surveillance scheme, supported by the criminal law to enforce compliance and, where appropriate, early anticipatory action, ought to be welcomed. Provided, of course, this new statute adopts a similar approach to that embraced by the Human Fertilisation and Embryology Acts, which are essentially permissive in nature, the creation of this law would be advantageous. This is because it would allow medicine and science to flourish with the necessary legal protections in place to appease those who are rightly concerned about the potentially far-reaching nature of the risks created by xenotransplants. In a comparable way to Huxtable's earlier chapter, Fovargue admits that the further particulars of any proposed statute would need to be considered very carefully and it is unfortunate that there is not enough room for this to be explored in further detail within the text (p. 154). However, Fovargue's existing work in this field is illuminating, and she has almost certainly paved the way for this discussion in the future.[15]

Following on from this, the reader is confronted by a particularly entertaining and uplifting chapter from Nishat Hyder and John Harris.[16] As a reviewer, this chapter wrong-footed me initially and did so for a number of reasons. First, the topic was incredibly specialised and stood out as being markedly different from the previous essays; this grabbed my attention immediately. Second, after reading the title of the essay, I had assumed that the authors would argue the opposite way than in fact they did and was pleasantly surprised to read their view on this current issue. The crux of their argument is that a more balanced and rational approach should be adopted in respect of access to chemical and cognitive enhancers (CCE's) and that it is inappropriate for the criminal law to interfere in an individual's quest for self-improvement (p. 174). Some may view this as a controversial position to adopt, but controversy provokes the reader to think. Likewise, the analysis is crisp and the argument well crafted. There will inevitably be

[13] S Fovargue, 'Bioethical Conflict and Developing Biotechnologies: Is Protecting Individual and Public Health from the Risks of Xenotransplantation A Matter for the (Criminal) Law?' Ch 9.

[14] According to the NHSBT website in 2011/12, the number of people on the Organ Donor Register rose to 18.7 million. The total number of organ transplants carried out in the period April 2011 to March 2012 was 3,953, an improvement on the 3,725 transplants recorded in 2010/11. Despite these achievements, over 10,000 people are in need of an organ in the UK. See NHSBT Annual Review 2011/2012: http://www.nhsbt.nhs.uk/annualreview/organ_donation_transplantation/.

[15] See, for example, S Fovargue, *Xenotransplantation and Risk: Regulating A Developing Biotechnology* (Cambridge University Press 2012).

[16] N Hyder and J Harris, 'The Criminal Law and Enhancement—None of the Law's Business?' Ch 10.

those who disagree and it will no doubt be fascinating to hear their riposte, but for the time being this chapter leaves some interesting questions hanging in the balance about the precise role and contours of the criminal law in a society where autonomy is becoming an increasingly important principle.

The final part of the book investigates bioethics and criminal law in the dock. Margaret Brazier starts the ball rolling in a typically well written and analytical chapter focusing on whether English law can accommodate moral controversy in medicine.[17] Abortion is used as the hook to frame the discussion, and Brazier develops her thesis by reference to the enduring debates on this subject which have existed for centuries. Her assertion that there is no 'right' answer to the sanctity of life conundrum is certainly a sensible way to view the problem (p. 202). There will inevitably be those who will oppose this by suggesting that it is entirely possible to separate the 'right' from the 'wrong' and that the criminal law is a mechanism by which this can be achieved, yet the law must be sensitive to diversity and cannot simply reflect this narrow perspective. Competing values, opinions, and beliefs may come to the fore, all of which may be equally as important as each other, but which will invariably affect the way in which a person thinks about a particular matter. The law must recognise this and, insofar as possible, have due regard to these divergent views. Brazier identifies one of the key themes of the text as the symbolic role of the criminal law (p. 202). This is quite true, but another key theme that we can draw out from this chapter is the notion of compromise, alluded to earlier in Huxtable's chapter. Instead of the criminal law supporting one particular side of the debate over the other, it is sometimes sensible for the law to find the middle ground, as it does in relation to abortion, in order to resolve moral controversy in a way that accommodates the majority of society. If the criminal law in England was to adopt this attitude in respect of other delicately poised areas, such as physician-assisted suicide, it would represent a significant step forward.

Further on in this section, there is an elegantly written chapter from José Miola, which addresses the question of deference towards the medical profession.[18] Miola effectively analyses deference in a civil context before making the transition to deference in the criminal sphere. His conclusion that the civil courts have sought to 'wrestle back control' in the post-*Bolitho* era is accurate, at least on a theoretical level (p. 234). Nonetheless, uncertainty remains about the true impact of *Bolitho*[19] and the extent to which the courts are willing to carry out the 'hard-look' approach to the medical evidence that was advocated in the case.[20] Carrying this over into the criminal law, once again a case can be made out for a general loss of deference towards the medical profession, evidenced by the increase in the number of gross negligence manslaughter cases. Yet, as is identified, conviction rates remain low and are certainly lower than in other forms of manslaughter (p. 229). All things being considered, then, a sensible caveat from Miola in

[17] M Brazier, 'Can English Law Accommodate Moral Controversy in Medicine? The Case of Abortion' Ch 12.
[18] J Miola, 'The Impact of the Loss of Deference Towards the Medical Profession' Ch 14.
[19] *Bolitho v City & Hackney Health Authority* [1998] AC 232, HL.
[20] See R Mulheron, 'Trumping *Bolam*: A Critical Legal Analysis of *Bolitho's* "Gloss"' (2010) 69 CLJ 609.

regard to the general loss of deference is that the problem should not be overstated and that doctors do not need to fear the general direction of the law (p. 234). They may, indeed, be subject to closer legal scrutiny, both civilly and criminally, but whether this has any practical bearing on the outcome in the majority of cases is much less clear. Medicine is still regarded as an esteemed profession and doctors are still well respected by judges. With this in mind, even though many would argue differently, can a case be made out that doctors are indeed a special case when it comes to the law? In the next chapter, which follows on neatly, David Archard makes a controversial yet convincing case for this.[21]

Turning now to the main criticisms of the book, two points are worth mentioning. The main complaint is that the chapters, while well written and exciting, often leave you wanting more. An idea is introduced which whets the appetite only for the authors to then repeatedly state that more thought will need to be given to the minutiae of the idea in order for it to bear fruit. In one sense, this is not necessarily a bad thing, especially given that this book is labelled volume 1 and so one has to assume that there will be a volume 2 further down the line. If this is the case, it will be interesting to see whether some of the ideas aired here are, in fact, developed more substantially later on, or whether a fresh set of authors covering new and entirely different topics will be incorporated into the next volume. One of the principal reasons for some of the chapters not being able to explore the issues in as much depth as both the authors and the readers may have liked is due to the tight word limit that was bound to have been imposed on each contributor in order to accommodate all of the chapters contained within. This feeds directly into the second main criticism. There are perhaps too many chapters in this book. It may have been worth considering cutting back on the number of contributors thereby freeing up more space for some of the more original arguments to be developed. This may have made the job of the editors even more difficult because selecting which chapters made the final cut would not have been easy. Even so it is perhaps something to reflect on in the development of the next volume.

Small criticisms aside, this book is a major success. It is original, thought provoking, and covers a wide range of contemporary issues which everyone interested in bioethics, medicine, and the law will take pleasure in reading. While this book is aimed largely at an academic audience, it will definitely garner interest from practitioners, both medical and legal, scientists and students on undergraduate and postgraduate courses across the country. The work is a striking example of the fabulous use that funding from UK Research Councils, such as the AHRC, can be put to when managed efficiently and effectively. The next published output from this project is certain to be eagerly anticipated by everyone with an interest in this vibrant and ever-changing field.

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[21] D Archard, 'Criminalising Medical Negligence' Ch 15.