

CAMBRIDGE

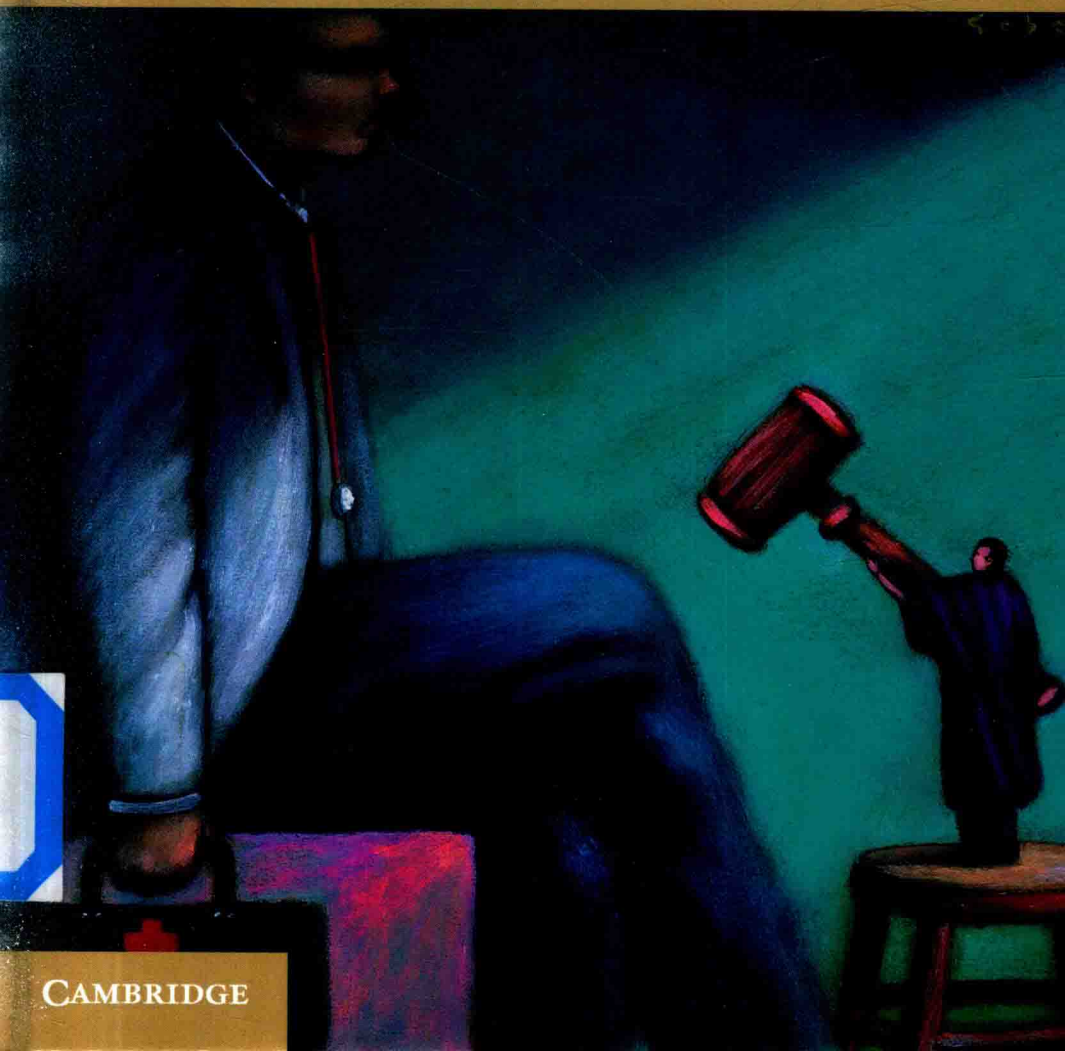
Bioethics and Law

Bioethics, Medicine and the Criminal Law

VOLUME 3

Medicine and Bioethics in the Theatre
of the Criminal Process

Margaret Brazier and Suzanne Ost



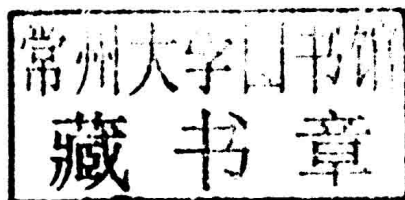
CAMBRIDGE

Bioethics, Medicine and the Criminal Law

Volume III

*Medicine and Bioethics in the Theatre
of the Criminal Process*

Margaret Brazier and Suzanne Ost



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press,
New York

www.cambridge.org

Information on this title: www.cambridge.org/9781107018259

© Margaret Brazier and Suzanne Ost 2013

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2013

Printed and bound in the United Kingdom by the MPG Books Group

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Brazier, Margaret.

Bioethics, medicine and the criminal law. Volume III. Medicine and bioethics
in the theatre of the criminal process / Margaret Brazier and Suzanne Ost.

p. cm. – (Cambridge bioethics and law)

Includes bibliographical references and index.

ISBN 978-1-107-01825-9 (hardback)

1. Physicians – Malpractice – Criminal provisions. 2. Bioethics. 3. Criminal
law – Philosophy. 4. Medical errors – Moral and ethical aspects. 5. Medical
care – Law and legislation – Criminal provisions. I. Ost, Suzanne. II. Title.

K4366.B73 2013

345'.02 – dc23 2012046427

ISBN 978-1-107-01825-9 Hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to
in this publication, and does not guarantee that any content on such
websites is, or will remain, accurate or appropriate.

Bioethics, Medicine and the Criminal Law

Volume III

To date, little analysis exists of the criminal process' roles as a regulator of medical practice and as an arbiter of bioethics, nor of whether criminal law is an appropriate forum for judging medical ethical dilemmas. The conscription of criminal law into moral controversy and the (perceived) rise in criminal investigations of medical errors sets the backdrop for this innovative, contemporary, historical and theoretical analysis of the relationship between medicine, bioethics and the criminal process. Case studies on abortion, end of life and the separation of conjoined twins reveal how judges grapple with bioethics in criminal cases and the impact of 'theatre' on the criminal law's response to ethically controversial medical cases. A central argument is that bioethics and criminal law are not necessarily incompatible; rather, it is the theatre surrounding interactions between bioethics and criminal law that often distorts both and creates tension.

MARGARET BRAZIER is Professor of Law at the University of Manchester.

SUZANNE OST is Professor of Law at Lancaster University.

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 in 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 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, whereas international organisations such as the 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, and in public and political affairs. We seek to reflect the evidence that many major health-related policy debates in the United Kingdom, 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 transjurisdictional 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 that 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.

Series Editors

Professor Margaret Brazier *University of Manchester*

Professor Graeme Laurie *University of Edinburgh*

Professor Richard Ashcroft *Queen Mary, University of London*

Professor Eric M. Meslin *Indiana University*

Books in the series

Marcus Radetzki, Marian Radetzki, Niklas Juth

Genes and Insurance: Ethical, Legal and Economic Issues

Ruth Macklin

Double Standards in Medical Research in Developing Countries

Donna Dickenson

Property in the Body: Feminist Perspectives

Matti Häyry, Ruth Chadwick, Vilhjálmur Árnason, Gardar Árnason

The Ethics and Governance of Human Genetic Databases: European Perspectives

Ken Mason

The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

- Daniel Sperling
Posthumous Interests: Legal and Ethical Perspectives
- Keith Syrett
Law, Legitimacy and the Rationing of Health Care
- Alastair Maclean
Autonomy, Informed Consent and the Law: A Relational Change
- Heather Widdows, Caroline Mullen
The Governance of Genetic Information: Who Decides?
- David Price
Human Tissue in Transplantation and Research
- Matti Häyry
Rationality and the Genetic Challenge: Making People Better?
- Mary Donnelly
Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism
- Anne-Maree Farrell, David Price and Muireann Quigley
Organ Shortage: Ethics, Law and Pragmatism
- Sara Fovargue
Xenotransplantation and Risk: Regulating a Developing Biotechnology
- John Coggon
What Makes Health Public? A Critical Evaluation of Moral, Legal, and Political Claims in Public Health
- Mark Taylor
Genetic Data and the Law: A Critical Perspective on Privacy Protection
- Anne-Maree Farrell
The Politics of Blood: Ethics, Innovation and the Regulation of Risk
- Stephen Smith
End-of-Life Decisions in Medical Care: Principles and Policies for Regulating the Dying Process
- Michael Parker
Ethical Problems and Genetics Practice
- William W. Lowrance
Privacy, Confidentiality, and Health Research
- Kerry Lynn Macintosh
Human Cloning: Four Fallacies and Their Legal Consequence
- Heather Widdows
The Connected Self: The Ethics and Governance of the Genetic Individual
- Amel Alghrani, Rebecca Bennett and Suzanne Ost
Bioethics, Medicine and the Criminal Law Volume I: The Criminal Law and Bioethical Conflict: Walking the Tightrope
- Danielle Griffiths and Andrew Sanders
Bioethics, Medicine and the Criminal Law Volume II: Medicine, Crime and Society
- Margaret Brazier and Suzanne Ost
Bioethics, Medicine and the Criminal Law Volume III: Medicine and Bioethics in the Theatre of the Criminal Process

In memory of Mary Jacobs and Hilda Ost –
Y.C.L.M.A.M. T.I.L. Y.

[The connection between bioethics and criminal law] resembles the lighthouse in its working, which sends one ray and then no more for a time; save that [the connection] is much more capricious in its manifestations and may flash six or seven beams in quick succession . . . and then lapse into darkness . . .

– V. Woolf, *Orlando* (with modification) (1928)

You cannot have art that does not in some way distort. . . . Therefore, you do not see the whole, you only see a part through this distorted view, this particularization.

– D. Heathcote, *Collected Writings on Education and Drama* (1984)

Acknowledgements

This book 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. We would also like to thank the Universities of Manchester and Lancaster for granting us study leave to help facilitate the completion of this book.

Certain colleagues, in particular, deserve special thanks. Dave Archard, Emma Cave, Sara Fovargue, Sheelagh McGuinness and Alex Mullock offered valued comments on either the proposal for this book or drafts of chapters. Participants at seminars in Manchester and Lancaster, including Sarah Beresford, Bela Chatterjee and Sarah Devaney, helped us refine our ideas. We are especially grateful to John Coggon for drawing our attention to the relevance of political liberalism. Our colleagues in the AHRC project (Amel Alghrani, Becki Bennett, Charles Erin, Anne-Maree Farrell, the late Peter Gooderham, Danielle Griffiths, Mélinée Kazarian, Alex Mullock and Andrew Sanders) listened to our ramblings and offered generous support. Many of our students were subjected to early drafts of our ideas. We are grateful to the copy-editor, William H Stoddard, for his thorough and efficient work and to Ekta Vishnoi for her management of the production process. We could not have completed this book without the patient support of our families, Rodney and Victoria Brazier and Nick, Lily and Matthew Green.

The desire to write a book involving the concept of theatre has proven irresistible to SO. I have much to thank Joan Fitz-Gibbon for that – for encouraging my love of theatre and English literature and for setting me on the path to where I am today. I have so much to thank my co-author and dear friend Margot for, for all her help and sound guidance throughout the time I have known her and for being such a wonderful godmother to Lily. I owe a huge debt of gratitude to Sara Fovargue, who is both a true friend and an incredibly supportive colleague. Thanks also to Hazel Biggs for her continued help and support. I have benefitted greatly from the support that Peter Skegg, Margaret Otlowski, Andrew Ashworth, Alisdair Gillespie and Sigrun Skogly have provided and I am

sincerely grateful to each of them. Thanks to John and Yvonne Ost and Bob and Jenifer Green for all their support. Bob, thank you for always expressing an interest in my work. Finally, as ever, I am most indebted to my wonderful husband Nick, and to Lily Jorja and Matthew Luke, my treasured little mischief-makers.

Table of cases

- A, B and C v. Ireland* [2010] ECHR 2032
AB v. Leeds Teaching Hospital NHS Trust [2004] EWHC 644 (QB)
Airedale NHS Trust v. Bland [1993] AC 789
Airedale NHS Trust v. Bland [1993] 1 All ER 821
Appleton v. Garrett [1996] PIQR P1
Attorney General v. David English and another (1982) *The Times*, 16 July
Attorney General's Reference (No 6 of 1980) [1981] QB 715 (CA)
Attorney General's Reference (No 3 of 1994) [1996] 2 All ER 10 (CA)
Attorney General's Reference (No 3 of 1994) [1997] 3 All ER 936 (HL)
Avsar v. Turkey [2001] EHRR 1014
B v. An NHS Hospital Trust [2002] EWHC 429 (Fam)
Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118
Bolitho v. City and Hackney Health Authority [1997] 4 All ER 771
Bravery v. Bravery [1954] 3 All ER 59
British Pregnancy Advisory Service v. Secretary of State for Health [2011] EWHC Admin 235
C v. S [1987] 1 All ER 1230 (CA)
Chatterton v. Gerson [1981] 1 All ER 257
Chester v. Afshar [2004] UKHL 41
The Creutzfeldt-Jakob Disease Litigation [1995] 54 BMLR 1 (QBD)
Devi v. West Midlands Health Authority [1980] 7 CL 44
Dr Groenvelt's Case (1697) 9 Will Bl
Dr Handyside's Case (1604)
H (A Healthcare Worker) v. Associated Newspapers; H v. N [2002] EWCA 195
Hashman and Harrup v. UK (2000) 30 EHRR 241
In re Guardianship of Schiavo 789 so 2d 348 (Fla, 2001)
In the Matter of Karen Quinlan, an Alleged Incompetent 70 N.J. 10 (1976)
Jepson v. The Chief Constable of West Mercia Police Constabulary [2003] EWHC 3318
Kokkinakis v. Greece (1994) 17 EHRR 397
Leigh v. Gladstone (1909) 26 TLR 139

- A Local Authority v. E* (by her litigation friend, the Official Solicitor) and others [2012] EWHC 1639 (COP)
- Master v. Miller* (1791) 4 TR 320
- Morgentaler v. New Brunswick* [1994] 117 DLR (4th) 793 (Canada)
- Paton v. BPAS* [1978] 2 All ER 987
- R v. Adams* [1957] Crim LR 365
- R v. Adomako* [1995] 1 AC 171 (HL)
- R v. Arthur* (1981) 12 BMLR 1
- R v. Bourne* [1938] 3 All ER 615
- R v. Bourne* [1939] 1 KB 687
- R v. Brown* [1994] 1 AC 212 (HL)
- R v. Cato* (1976) 62 Cr App R 41
- R v. Collins and Ashworth Special Hospital Authority ex p Brady* [2000] Lloyd's Rep Med 355
- R v. Cox* (1992) 12 BMLR 38
- R v. Dudley and Stephens* (1884) 14 QBD 273
- R v. Dica* [2004] EWCA Crim 1103
- R v. Dica* [2004] 3 All ER 593 (CA)
- R v. Ethical Committee of St Mary's Hospital (Manchester), ex p Harriott* [1988] 1 FLR 512
- R v. Handley* (1874) 13 Cox CC 79
- R v. Howe* [1987] AC 417
- R v. Inglis* [2010] EWCA Crim 2637, [2011] 1 WLR 1110
- R v. Ireland, R v. Burstow* [1998] AC 147 (HL)
- R v. Martin* [1989] 1 All ER 652
- R v. Miller* [1983] 2 AC 161
- R v. Misra and Srivastava* [2004] EWCA Crim 2375
- R v. Moor* [2000] Crim LR 31
- R v. Morgentaler* [1988] SCR 30 (Canada)
- R v. Morgentaler* [1993] 3 SCR 463 (Canada)
- R v. Newington* (1990) Crim LR 593
- R v. Prentice, R v. Adomako, R v. Holloway* [1993] 4 All ER 935 (CA)
- R v. Prentice* [1994] QB 302
- R v. Richardson (Diana)* [1999] QB 444 (CA)
- R v. Russell* (1832) 1 Moo CC 356
- R v. Stone, R v. Dobinson* [1977] QB 354
- R v. Tabassum* [2000] Lloyd's Rep Med 404 (CA)
- R v. Woollin* [1999] 1 AC 82
- R (on the application of AM) v. DPP* [2012] EWHC 2381 (Admin)
- R (on the application of Burke) v. General Medical Council* [2005] EWCA Civ 1003

- R (on the application of Nicklinson) v. Ministry of Justice* [2012] EWHC 2381 (Admin)
- R (on the application of Purdy) v. DPP* [2009] UKHL 45
- R (on the application of Smeaton) v. Secretary of State for Health* [2002] 2 FLR 146
- Rance v. Mid-Downs Health Authority* [1991] 1 QB 587
- Re A (children) (conjoined twins: surgical separation)* [2001] Fam. 147 (CA)
- Re C (a minor) (medical treatment)* [1998] 1 FLR 384
- Re F (in utero)* [1989] 2 All ER 193 (CA)
- Re J* [1991] Fam 33
- Re J (child's religious upbringing and circumcision)* [2000] 1 FCR 307
- Re MB (an adult: medical treatment)* [1997] 2 FCR 541 (CA)
- Re S (adult patient: sterilisation)* [2000] 3 WLR 1288
- Re T (adult: refusal of medical treatment)* [1992] 4 All ER 649 (CA)
- Re Wyatt (a child) (medical treatment: parents' consent)* [2004] EWHC 2247 (Fam)
- Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52
- Reibl v. Hughes* (1980) 114 DLR (3d) 1
- Roe v. Wade* 410 US 113, (1973)
- Rowley v. DPP* (2003) EWHC Admin 693
- Savage v. South Essex Partnership NHS Foundation Trust* [2008] UKHL 74
- Schindler v. Schiavo* 780 So 2d 176, 177 (Fla Dist Ct App, 2001)
- Scott v. Shepherd* (1773) 2 W.B1 892
- Sidaway v. Governors of Bethlem Royal Hospital* [1985] AC 671
- Smith v. Littlewoods Organisation Ltd.* [1987] 1 All ER 710 (HL)
- St George's HC NHS Trust v. S* [1998] 3 WLR 936
- Stafford v. UK* (2002) 35 EHRR 32
- Vo v. France* (2005) 10 EHRR 12
- W v. Egdell* [1990] Ch 359
- Wason v. Walter* (1868), L.R 4 QB 73
- William Rose (in error) v. College of Physicians, London* [1703] English Reports 857
- Winnipeg Child and Family Services (Northwest Area) v. G(DF)* [1997] 3 SCR 925 (Canada)
- X v. Y* [1988] 2 All ER 648

Table of statutes

Abortion Act 1967

s.1

Anatomy Act 1832

Births and Deaths Registration Act 1953

s.41

Children and Young Persons Act 1933

s.1(i)

Coroners and Justice Act 2009

s.52

s.62

Criminal Justice Act 2003

s.269

Schedule 21

Female Genital Mutilation Act 2003

s.1(1)

s.6

Homicide Act 1957

s.2(1)

Human Fertilisation and Embryology Act 1990

s.3(1)

s.12(e)

s.42

Human Fertilisation and Embryology Act 2008

Human Organ Transplants Act 1989

Human Tissue Act 1961

Human Tissue Act 2004

ss.1–3

s.5

s.32

s.33

s.53

Schedule 1 Parts 1 and 23

Infant Life (Preservation) Act 1929

Medical Act 1983

Mental Capacity Act 2005

s.4(5)

s.44

Mental Health Act 1983

s.127

Offences against the Person Act 1861

s.20

s.47

s.58

s.59

Prohibition of Female Circumcision Act 1985

Sexual Offences Act 1967

Sexual Offences Act 2003

ss.38–41

Suicide Act 1961

Surrogacy Arrangements Act 1985

Theft Act 1968

s.1

Contents

<i>Acknowledgements</i>	page xii
<i>Table of cases</i>	xiv
<i>Table of statutes</i>	xvii

Introduction: beginning the story	1
The pervasive influence of the criminal process	4
The relevance of 'theatre'	7
A story and some themes	9
Tensions and transient connections: the lighthouse's beam	10
Theatrical distortion	10
(Political) liberalism	11
Moral sentiment and medical politics	11

Part I Setting the scene

1 Courtrooms, 'physic' and drama	15
The 'criminal process' and the regulation of medicine before 1858	16
The gruesome history of dissection	20
No peaceful burial place	22
Body snatching	23
<i>Causes célèbres</i> in the twentieth century: faulty connections?	25
Bourne: a reluctant 'rebel'?	26
Bodkin Adams: 'deserved to hang 20 times over'	30
<i>R v. Arthur</i> : framing bioethical debate	33
2 Crime, doctors and the body (politic)	38
Medical 'assaults'	40
Rhetoric not reality	41
Bodily integrity, autonomy, self-determination	42
The tort of battery and criminal assault – one and the same?	43
'Proper medical treatment or care'	45
Not wholly or solely ours	52
Is my body mine?	52
Kidneys for sale	53
Organ retention	55

Appropriate consent	57
Organ trafficking	61
3 From 'theatre' to the dock – via the mortuary	66
Serious wrongs	71
What makes wrongs 'serious'?	72
'Medical manslaughter'	73
Responsibility for medial error	75
Gross negligence, recklessness and manslaughter	77
Moral luck and a game of chance	79
Harm short of death	80
Serious but not 'wrong'	82
Escaping from sanctity of life?	83

Part II Judges on the stage: case studies

4 Protecting life before birth?	95
Not a unique dilemma?	96
'Proper medical treatment'	99
Protecting women: the power of the profession	101
Protection of morals and society	105
Protecting future children	106
Decriminalising abortion: a case study from Canada	109
Muddling through in England	114
Abortion and sanctity of life	118
5 Medical (and non-medical) ending of life	124
Criminal responsibility and the (ir)relevance of motivation	125
Killing with compassion: motive's role in attenuating the strict legal response to assisted dying cases	126
Intention, causation, the doctrine of double effect and the murky waters of the 'doctor's defence'	133
Intention	133
Causation	135
Double effect and its application in the medical setting	135
The slipperiness of the central premise(s) of the 'doctor's defence': does the DDE have a place in the criminal law?	137
Does the DDE reflect medical practice at the end of life?	145
Implications for the criminal law and bioethics	145
The criminal law's differentiation between doctors and relatives: a 'benign conspiracy'?	148
(Evading) the criminal law's role in cases of withdrawing life-sustaining treatment	152
Charades and prosceniums: it's all an act, but to what end?	159
6 Which twin lives?	163
Jodie and Mary (Gracie and Rosie)	164
The heart of the matter: the criminal process	165
Necessity and 'self-defence': a utilitarian calculus disguised	166