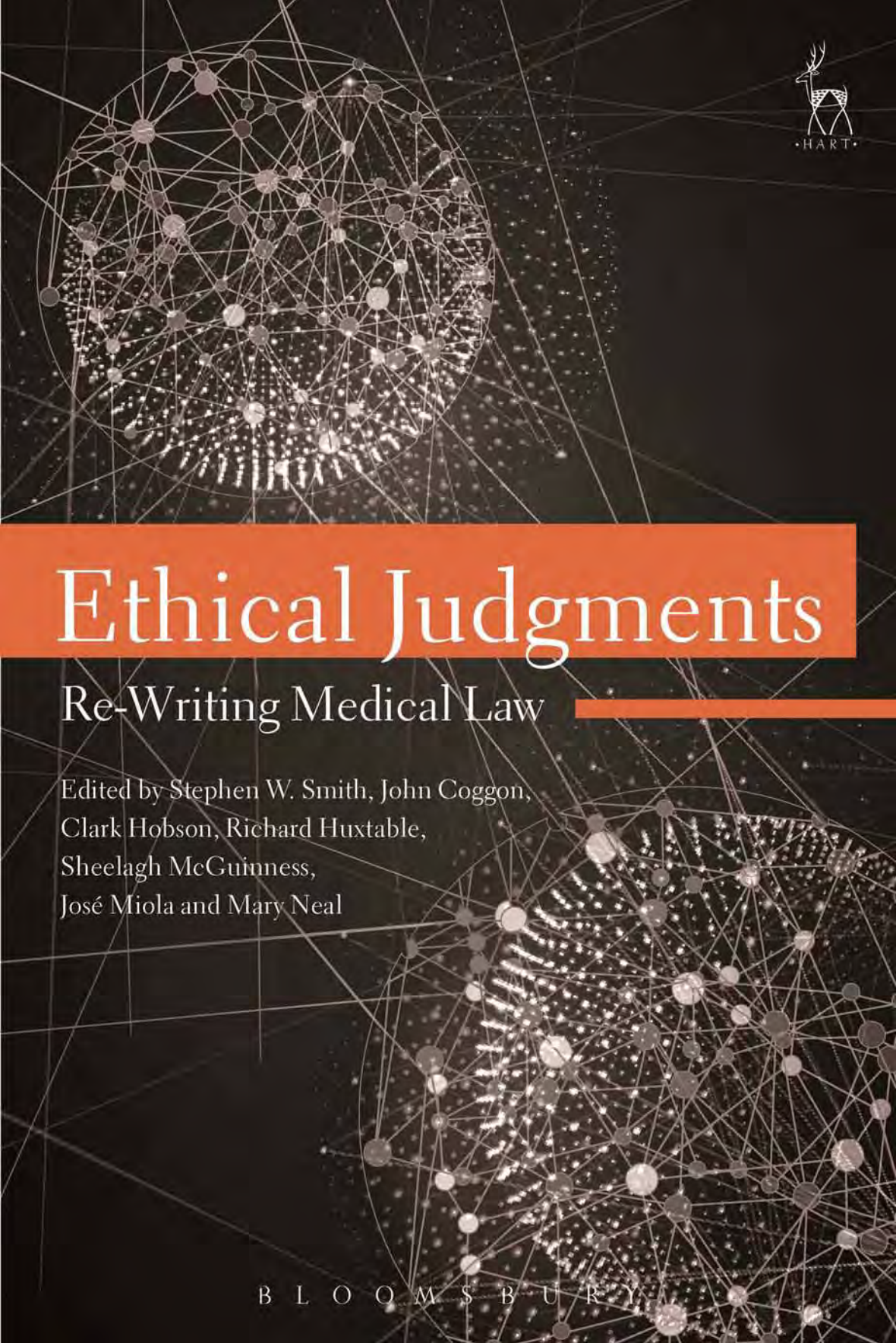

Ethical Judgments

Re-Writing Medical Law

Edited by Stephen W. Smith, John Coggon,
Clark Hobson, Richard Huxtable,
Sheelagh McGuinness,
José Miola and Mary Neal

BLOOMSBURY

ETHICAL JUDGMENTS

This edited collection is designed to explore the ethical nature of judicial decision-making, particularly relating to cases in the health/medical sphere, where judges are often called upon to issue rulings on questions containing an explicit ethical component. However, judges do not receive any specific training in ethical decision-making, and often disown any place for ethics in their decision-making. Consequently, decisions made by judges do not present consistent or robust ethical theory, even when cases appear to rely on moral claims.

The project explores this dichotomy by imagining a world in which decisions by judges have to be ethically as well as legally valid. Nine specific cases are reinterpreted in light of that requirement by leading academics in the fields of medical law and bioethics. Two judgments are written in each case, allowing for different views to be presented. Two commentaries—one ethical and one legal—then explore the ramifications of the ethical judgments and provide an opportunity to explore the two judgments from additional ethical and legal perspectives. These four different approaches to each judgment allow for a rich and varied critique of the decisions and ethical theories and issues at play in each case.

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Dedication

To the judges, healthcare professionals, patients and their families
who have to deal with these issues in practice.

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This project involved a great deal of consensus between the editors. However, as with any collaborative undertaking, not every view expressed is entirely shared by every member of the editorial team.

TABLE OF CONTENTS

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NOTICE ON THE ORDER OF JUDGMENTS

In this collection, each case is taken in alphabetical according to legal convention, as opposed to chronological, order. There are two judgments for each case, followed first by a legal commentary and then by an ethical commentary. In legal cases, the first judgment is often considered more important and the 'majority' opinion, whereas subsequent judgments are seen as concurring or dissenting judgments. In this collection, neither judgment should be seen as stating a majority or minority view. Instead, we have simply used reverse alphabetical surname order for the judgments.

TABLE OF CASES

TABLE OF LEGISLATION

Stautory Instruments

European

Introduction—Medicine in the Courtroom: Judges, Ethics and the Law

'[T]his is a court of law, not of morals'[1]

I. Judicial Determinations: Legal, Not Ethical?

In the 'conjoined twins' case, *Re A*, the Court of Appeal had to issue a judgment under the sharp glare of the global media spotlight, on a question both divisive and morally significant: could English law sanction the separation of two legally distinct but physically united babies, knowing that one would be killed and one saved by the operation, and in the face of a refusal to consent by the parents but with medical opinion that favoured the surgery? In the much-cited *dictum* that heads this introduction, Ward LJ denies the relevance of the moral or ethical dimensions of the case as a component of his *legal* determination,[2] despite their obvious and urgent nature.[3] His judicial reasoning, he suggests, draws purely from law. In conceptual legal jargon, he commits to a formalist position: judges should not bring extra-legal considerations to their decision-making, and by implication, can find all of the necessary answers to the question *within* the law itself.

Re A presented a true moral dilemma: whichever decision was reached, one of the children would die earlier than she had to in order that the other might live longer. But even in less dramatic health care cases, the ethical elements will be apparent, and will invite critical examination from within and beyond legal scholarship. In recognition of the weighty ethical components of health care law, and the fact that so much medico-legal doctrine has been developed in the court-room, this book calls for an examination of three related, overarching questions that are respectively doctrinal, methodological, and substantive in nature. First, have judges, in making key medico-legal decisions, drawn a clear and compelling conclusion based on what the *law* requires, or (*pace* Ward LJ) have they in reality drawn upon extra-legal factors, suggesting that more than one outcome could have

[1] *Re A (Children) (Conjoined Twins: Medical Treatment)* [2000] 4 All ER 961, 969, *per* Ward LJ.
[2] We will use 'morals' and 'ethics' interchangeably here.
[3] J Montgomery, 'Law and the Demoralisation of Medicine' (2006) 26 *Legal Studies* 185.

been achieved? Second, in reaching a judgment, should judges embrace extra-legal modes of reasoning where the 'right' legal answer is either unclear or unacceptable? In particular, we wonder, how would judicial decision-making work if judges openly explained the *ethical* reasoning underpinning their decisions? And third, would a more overt engagement with ethical reasoning produce an improved or diminished medical law: should medical law be a field that is formally detached from medical ethics, or should the two, in practice and in form, be combined?

Despite Ward LJ's assertion, judges presiding over health care cases do sometimes dip their toes into ethical waters.[4] We can wonder, however, whether they do so sufficiently deeply, or with sufficient skill.[5] Understandings of concepts such as 'welfare', 'autonomy' and 'dignity' might be advanced without rigour or consistency, but might nevertheless help drive the eventual outcome.[6] Grand ethical theories, such as deontology and utilitarianism, might be borrowed from in order to achieve a preferred outcome, without due regard for the nuances of these theories or how they might become incoherent if used in this way.[7] Judges might also struggle to prioritise certain principles over others, or to identify ways of resolving apparent clashes between principles.[8] It might even be said that judges are not necessarily any better at 'doing ethics' than the average person on the Clapham omnibus.

These are not necessarily criticisms. As Ward LJ reminds us, courts are for law, not—or, perhaps, not necessarily—for morals, and judges are not appointed for their ability to engage in ethical reasoning. They are, first and foremost, lawyers, trained in the art of legal reasoning and interpretation. With luck, judges will have what Karl Llewellyn referred to as 'horse-sense' ('common sense' to the rest of us),[9] but even that is not *strictly* a requirement. Since judges are not necessarily trained in ethical reasoning, it may be unfair (indeed, perhaps unethical) to expect them to be so skilled.

Lack of engagement with ethical questions would be unproblematic except that, in relation to health care particularly, many of the cases that judges hear have

[4] Eg In *Airedale NHS Trust v Bland* [1993] AC 789 (CA) 826A, Hoffmann LJ cites R Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London, Harper Collins, 1993), as does Lord Steyn in the House of Lords in *Chester v Afshar* [2004] UKHL 41; and in *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All ER 449, [81]–[83], [94], Butler-Sloss P cites K Atkins, 'Autonomy and the Subjective Character of Experience' (2000) 17 *Journal of Applied Philosophy* 71.

[5] Eg J Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Oxford, Hart Publishing, 2007).

[6] A Bainham, 'Handicapped Girls and Judicial Parents' (1987) 103 *Law Quarterly Review* 334; J Coggon 'Varied and Principled Understandings of Autonomy in English law: Justifiable Inconsistency or Blinkered Moralism?' (2007) 15 *Health Care Analysis* 235; C Foster, *Human Dignity in Bioethics and Law* (Oxford, Hart Publishing, 2011).

[7] Eg R Huxtable, 'The Court of Appeal and Conjoined Twins: Condemning the Unworthy Life?' (2000)162 *Bulletin of Medical Ethics* 13.

[8] J Finnis, '*Bland*: Crossing the Rubicon (1993) 109 *Law Quarterly Review* 329; J Keown, 'Restoring Moral and Intellectual Shape to the Law after *Bland* (1997) 113 *Law Quarterly Review* 482.

[9] K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago, University of Chicago Press, 1962) 249.

undeniable ethical import. Sometimes, in such cases, the law is relatively clear (if nevertheless sometimes unsatisfactory). What may be unclear are the ethical issues associated with a particular problem. Failing to provide the necessities for life might amount to murder, but should this mean that life-supporting measures should, so far as possible, continue to be provided to an individual who is confirmed to be in a permanent vegetative state?[10] Such questions, difficult as they are, are not—or, at least, are not solely—legal in nature. Rather, they invite us to consider what characteristics that we should aspire to possess individually and collectively, what obligations we should honour, and what should be the outcomes of the decisions we make. In short, insofar as we recognise that health care law raises ethical questions, we need to understand whether and how such questions should be answered in a process of legal determination.

We have proceeded in this project with a healthy, inquiring scepticism that judges can avoid taking ethical positions when discharging their functions in cases such as those considered herein, whatever they might say to the contrary. Commentators have spilled much ink attributing one ethical standpoint or another to a particular judge or judgment. With occasional exceptions, however,[11] judges themselves are rarely explicit about, or thoroughly reflective upon, their ethical orientations. As an extended thought experiment, this collection seeks to make the ethical questions, and the efforts to furnish them with answers, more explicit in the judging process. The collection therefore starts with a simple enough premise: what if the decisions in these sorts of cases require the decision of the judge to be ethically aware, as well as legally valid? In other words, in addition to whatever legal constraints that might exist in a particular case, what if the judges were required to acknowledge and work through their ethical positions? How might such an exercise impact upon the final decision?

We ask these questions not only because we seek more explicit and defensible accounts of what judges might mean when they refer to ethically-laden notions such as 'autonomy', 'dignity' or 'the sanctity of human life', but also because such concepts and their deployment have real-world implications. To work in the world, judgments need at least to be capable of guiding people's behaviour—they need, therefore, to be clear, consistent and predictable.[12] Arguably, however, something more is also needed: a robust approach to the ethical questions which will fall within judges' purview. If judges are called upon to decide legal questions with an inherently ethical dimension, and yet fail to address the ethical elements conscientiously and coherently, questions can then be asked about whether those entrusted with special roles in the (political) community have discharged their role legitimately.

[10] *Bland* (n 4).
[11] See, eg, the references in n 4.
[12] Eg LL Fuller, *The Morality of Law* (New Haven, Yale University Press, 1969).

This collection, then, involves an ethical re-writing of health care law. What has resulted is somewhat akin to a work in counter-factual history;[13] a sort of 'alternate world' opened up by asking 'what if…?'

II. Our Ethical (Re-)Writers and (Re-)Readers

In planning the project, we sought to assemble a broad spectrum of ethical views, representative of robust but contradictory bioethical positions. Stephen Smith convened the core project team of editors, which comprises a group of medical lawyers who have, in their work, examined and disagreed forcefully on the doctrinal, methodological, and substantive questions this project raises, and how they should be answered. If asked, we would all place ourselves at different points on the spectrum from medical lawyer to medical ethicist, but all of us are primarily trained as lawyers. In honing our plan, we were mindful of the *Feminist Judgments Project*, also published by Hart.[14] While we did not entirely follow its lead, that project (and before it the Women's Court of Canada)[15] broke new ground in emphasising the importance of judging as a collective and critical endeavour and asking 'what if…?'[16] In our own engagement with that question, we were clear that we did not want to elicit the views only of medical lawyers imitating judges. We also sought a varied range of ethical voices from which we could hear a diverse presentation of views about the cases that we selected for re-examination.

To achieve the aims of the project, therefore, we have gathered together a group of over 30 academics: some lawyers, some ethicists, some social scientists, some overlapping two or more of these categories. Our contributors also come from different common law jurisdictions: England and Wales (the jurisdiction that forms the focus of this collection), Scotland, Northern Ireland, Canada and the United States, and represent different religious, theoretical, and moral traditions.

It ought to be noted that although many of the writers in this volume have viewed the project as an opportunity to write the decision that they believe the original judge(s) ought to have reached, some of the new judgments do not necessarily represent the authors' personal moral views, but simply ethical conclusions that the authors regard as theoretically plausible in light of the facts of the case and the law at the time. The end result is a collage of perspectives covering the

[13] Eg N Ferguson (ed), *Virtual History: Alternatives and Counterfactuals* (New York, Basic Books, 1999); R Cowley (ed), *What If?* (New York, Berkley Books, 2000).

[14] R Hunter, C McGlynn, E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford, Hart Publishing, 2010).

[15] Decisions of the Women's Court of Canada http://www.law.utoronto.ca/scholarship-publications/conferences/archives/rewriting-equality-08 (accessed 10 June 2016).

[16] Indeed, this point was made by one of the editors of the Feminist Judgments Project; see E Rackley, 'Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales' (2012) 24(2) *Canadian Journal of Women and Law* 389.

spectrum from ethically and legally conservative to radical, but united by the fact that they all strive to be ethically grounded and to embody an ethical coherence.

III. (Re-)Writing the Judgments

This volume is structured around nine cases that we have selected as broadly reflective of the wide range of ethical issues that are visible in the medical law context. The cases include issues relating to the beginning and end(ing) of life, to patients young and old, and to a range of professional obligations. They convey the complexity of the legal and ethical reflection required. *Bourne* concerns the question of whether or when a doctor can terminate a pregnancy,[17] and *Blood* whether a woman might take her dead husband's sperm and use it to conceive a child.[18] The issue in *Chester* was how the law should respond to the failure of a surgeon to explain to the patient the risks inherent in an operation,[19] while in *Axon* the Court had to consider in what circumstances patients younger than 16 could consent to abortions without the knowledge or consent of their parents.[20] *St George's* asked whether a pregnant woman should be able to refuse consent to a caesarean section, even if this meant that she and her foetus might die.[21] *Bolitho* explored how the courts should treat medical expertise when contemplating clinical negligence, and the extent to which they should therefore involve themselves in clinical decision-making.[22] In *Bland*, the Court was asked to determine whether life support could be removed from a patient in a persistent vegetative state.[23] In *Re A*, judges had to decide whether it would be lawful to separate conjoined twins when it was certain that one of them would die if the procedure took place.[24] Finally, in *Nicklinson*, the Court confronted a challenge to the law prohibiting assisted suicide.[25]

The cases have been approached via a two-stage process. First, two contributors (the 'judges') have written decisions, doing so with an eye to achieving ethical groundedness, rather than (merely) applying legal rules. This means that they were less formally encumbered by the law, although they were asked to follow a limited set of rules imposed by us as editors. To begin with, the decisions had to be written as judgments. As such, they had to have numbered paragraphs (for ease of presentation, we extended this requirement even to older cases), follow the referencing style of judgments (in-text citations) and the other accoutrements of

[17] *R v Bourne* [1938] 3 All ER 615.
[18] *R Human Fertilisation and Embryology Authority, ex parte Blood* [1999] Fam 151.
[19] *Chester v Afshar* [2005] 1 AC 134.
[20] *R (on the application of Axon), v Ministry of Health* [2006] EWHC 37 (Admin).
[21] *St George's Healthcare NHS Trust v S* [1999] Fam 26.
[22] *Bolitho v Hackney Health Authority* [1998] AC 232.
[23] *Bland* (n 4).
[24] *Re A (conjoined twins: surgical separation)* [2001] Fam 147.
[25] *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38.

an actual legal judgment. Also, our judges were limited to 3,000 words. This was a considerable limitation, considering that some of the original judgments run far longer, and many of the contributors found this a particular challenge. Third, we required our judges to write their judgments as if they were a member of the highest court that decided the case. For some, that was a trial court. For others, it was the House of Lords or (nowadays) the Supreme Court. As a reward for their efforts, those participants who acted as judges had the privilege of picking their own titles.

Finally, and most importantly, the decisions had to be made on the basis of the established facts of the case and the state of the law at the time. Thus, our judges in *Bourne* did not have recourse to the Abortion Act 1967, and those involved in older end-of-life decisions did not have the benefits or constraints of the Mental Capacity Act 2005. Mindful of the advanced age of some of these cases and that our judges would inevitably be influenced by developments (in the law or the surrounding literature) which post-dated the case, we allowed limited scope to include 'editorial footnotes' to reference material that judges felt bound to mention, but which was not available when their case was decided. We have endeavoured to keep such additional references to a minimum.

Once written, the second stage of the process provided that the judgments were considered by two commentators; of whom one was asked to engage from a predominantly legal perspective and the other from a more overtly ethical point of view. Effectively, therefore, there are four different opinions on each case, with the contributions of the judgment-writers having been subjected to scrutiny in much the same way that they themselves had scrutinised the efforts of the original judges. We consider one of the most interesting aspects of this project to be its demonstration of how a single case can elicit such different responses from different people, all of whom share an overarching commitment to good quality care that respects both (health care) professionals and patients. Evidently, this shared commitment leaves ample room for discussion, disagreement and differences in general approach, as well as in matters of emphasis. The result is a varied set of opinions from contributors who all bring fresh perspectives to bear on these classic cases.

IV. Approaching Ethical Coherence

As noted already, we have chosen cases in which significant ethical questions arise. The task for judges in such cases is to consider how the law should be brought to bear on these complex questions. Many of the seven editors have written on the relationship between medical law and medical ethics.[26] All of us have thought about it.

[26] J Coggon, 'Assisted Dying and the Context of Debate: "Medical law" versus "end-of-life law"' (2010) 18 *Medical Law Review* 541; SW Smith, *End-of-Life Decisions in Medical Care: Principles and*

A couple of terminological clarifications are in order before embarking on the judgments and commentaries. 'Ethics', as understood in philosophy, can be seen as comprising four areas of inquiry: *normative ethics*, in which we see the creation and critique of normative theories of what we should do or who we should be; *applied ethics*, in which such theories are related to specific fields; *meta-ethics*, in which there is concentration upon the concepts in issue; and *descriptive ethics*, in which actual moral beliefs and practices are analysed.[27] This collection is primarily an exercise in normative ethics, insofar as our judges are seeking to stipulate what *should* be the ethical judgment passed down in the case at hand. The exercise is, however, also one in applied ethics, insofar as we see particular normative positions being applied to health care, professional-patient interactions and, of course, to law. And, in issuing their judgments, our judges will occasionally have recourse to knowledge gleaned from descriptive ethics and meta-ethics. In passing their judgments, then, our judges are cognisant of the 'real world', but also of more abstract (albeit perhaps no less real) ethical theories, concepts and approaches.

We also wanted our judges to strive for orderly ethical thinking: to *aim* for something approaching ethical coherence. In other words, we hoped that our judges would aspire to reason through their decisions clearly, in an informed and considered manner, and in a way that was informed by the rich history of ethical deliberation; we anticipated the influence of particular theories and approaches working their way down into the content of the judgments delivered.

As such, the reader will sometimes observe particular theories or approaches influencing the judgments: perhaps a duty-based deontological approach, perhaps an outcome-oriented consequentialism, perhaps feminist ethics, narrative ethics, casuistry or principlism.[28] We have not asked that judges tether their judgments too obviously to particular ethical traditions: as such, readers should not expect to see densely referenced judgments (or, for that matter, commentaries) wherein contributors explicitly advance their preferred ethical theory or theories. Rather, we have left it to our commentators (and to you, the reader) to draw out, commend or critique the ethical underpinnings that inform the judgments, or their application in the judicial decision. In short, our judges have been encouraged to reflect how moral theory might bear on how their case ought to have been decided; this is in line with our shared view that the practice of ethics is partly the result of internal reflection.

Policies for Regulating the Dying Process (Cambridge, Cambridge University Press, 2012); R Huxtable, 'Friends, Foes, Flatmates: On the Relationship between Law and Bioethics' in J Ives, M Dunn and A Cribb (eds), *Empirical Bioethics: Practical and Theoretical Perspectives* (Cambridge, Cambridge University Press, 2016, forthcoming); Miola, *Medical Ethics and Medical Law* (n 5).

[27] W van der Burg, 'Law and Ethics: The Twin Disciplines', *Erasmus Working Paper Series on Jurisprudence and Socio-Legal Studies No 10-02* (2010). Available at: http://ssrn.com/abstract (no = 1631720), 5.

[28] Definitions of these terms, and many others, can be found in the Glossary.

What readers should expect to see, then, are judgments that are not entirely encumbered by professional or legal rules, but which will be informed by (and which may in turn inform) ethical discourse. In effect, the contributors—including the commentators—have been 'let loose' on the cases; left as free as possible, in other words, to disagree, discuss, and debate the issues in a way which draws upon their various perspectives, backgrounds, and experiences. We hope you will agree that this has given rise to some illuminating differences of opinion, and equally, in some instances, shows contributors reaching the same conclusion by different theoretical routes.

V. Aims and Aspirations

Our hope is that the judgments and commentaries in this volume provide an insight into some possible alternative interpretations of, and resolutions to, the cases that we have selected. We do not mean to claim that the judges who delivered the 'real' judgments were mistaken; apart from anything else, we recognise that they had to abide by the legal rules of the time (such as they may have been). Indeed, many of those who have contributed judgments and commentaries have a new-found respect and admiration for the judges who really did have to decide these difficult cases, and for the task of judging in general. That said, there are some cases in which the courts have seemed willing to twist the law in order to achieve their preferred result: *Bland* and *Re A* arguably do so through an expansive reading of existing rules; others, such as *Chester*, show the Court being more explicit about its willingness to modify the law. Nevertheless, the law is inevitably a constraining influence on judges, and it may well be that, were they able to contribute to this collection, the original judges too would have come to approach things differently.

Ultimately, we hope that this collection will be useful to students and academics who want to think critically about the cases considered below, and the nature and processes of judicial decision-making more generally. Not only do the contributions provide alternative visions of what the outcomes might have been, they also help to shed some light onto what *was* actually decided. In other words, by providing alternative judgments, which are critiqued in their turn by the commentators, the thinking of the judges in the 'real' cases is brought doubly into focus. Instead of considering the original judgments in isolation, therefore, this volume invites readers to consider them as some possibilities among others. The ethical judgments are often markedly different to the real decisions, but they do not ignore the legal landscape of the time; they describe alternative outcomes which were realistically possible in the sense of being available to the original judges in the cases. We leave it to the reader to decide whether they find the original judgments or the alternative judgments more persuasive. Above all, we hope the perspectives presented here will inspire the reader to consider how *they* might have decided these cases, on what basis, and so to engage in ethico-legal reflection themselves.

Re A (Conjoined Twins: Surgical Separation) [2001] Fam 147

Facts

The applicants in this case were the parents of M and J, two twins conjoined at the pelvis. Of the two twins, J was the stronger, sustaining M's life by delivering to her the oxygenated blood that M's own heart and lungs were too weak to supply. Medical evidence suggested that should the twins remain conjoined, J's heart would eventually fail under the strain of supporting them both and thus both twins would die. However, medical evidence also suggested that should the twins be separated, although M would die, J would survive to live a near normal life. The twins' parents, being devout Roman Catholics, refused to consent to the separation. The hospital applied for a declaration that the surgery would be lawful. Granting the declaration, Johnson J found that, while regard ought to be had for the parents' wishes, the separation should take place and could do so lawfully as the proposed operation was not a positive act, but rather was analogous to those situations in which a court authorises the withholding of nutrition and hydration.

Outcome (Court of Appeal): Appeal Dismissed

The Court held that the proposed separation would constitute a positive act and therefore was not analogous to those cases in which a court authorises the withdrawal of life-support. Looking to the family law, the Court acknowledged that the parents' wishes were entitled to great respect, but emphasised that the children's welfare was the Court's paramount consideration. Here, however, the Court recognised that it was dealing with two children, each of whose best interests had to be considered. In light of this, the Court sought to strike a balance between the interests of each child, taking into account the worthwhileness of the treatment, the condition of each child and the advantages and disadvantages that would flow from both the performance, and non-performance, of the separation. Here the Court concluded that the least detrimental choice was to permit the separation of the twins. Turning to the criminal law, the Court decided that separation would amount to murdering M, but that this was justified. The majority (Brooke and Walker LJJ) pointed to a (narrowly drawn) defence of necessity; Ward LJ additionally suggested there might be a defence of 'quasi self defence' of J.

Judicial Makeup Ward LJ, Brooke LJ, Walker LJ.

Appellate History Family Division; 25 August 2000
Re A (Conjoined Twins: Medical Treatment) (No 1) [2001] Fam Law 16.

Keywords *surgical procedure, children's welfare, conjoined, intention, murder, parental rights, necessity, right to life*.

Judgment 1—*Re A (Conjoined Twins: Surgical Separation)* [2001] Fam 147

OST LJ (SUZANNE OST)

I. Introduction

[1] We are asked to rule whether surgery to separate Jodie and Mary, conjoined twins joined at the pelvis, is lawful. The surgery is deemed necessary by the medical team caring for the twins in order to save the stronger twin, Jodie's, life. Indeed, without surgical separation, both twins will die. However, an inevitable consequence of the operation is that Mary, the weaker twin, who depends for her survival on Jodie's heart to circulate the blood around her body, will die within minutes of separation. Their parents refuse their consent to the surgery.

[2] There is no getting away from the fact that this case is a tragedy. It is our responsibility to reach a judgment which reflects the reality of the case. It might be tempting to try and avoid coming to a decision that leads to the stark result of Mary's death. However, it cannot be right to downplay the reality, to give ourselves false reassurance that letting things continue as they are could lead to a positive outcome for the twins. My learned friend Huxtable LJ questions the certainty of the expert opinion that the consequences of leaving the twins conjoined will be dire. But, with respect, the expert opinion is unanimous. Even if the undisputed prediction that the twins are most likely to die within six months (or, less likely, a few years) is wrong, Mary's condition is not a prediction; it is a fact, here and now. In terms of the future, not only will she be unable to live a normal life because of her seriously impaired brain, heart and lungs, she will face the awful prospect of being dragged around by her twin as Jodie continues to develop normally. According to the medical evidence, because she will receive insufficient oxygen, this will progressively cause cellular damage and brain damage. As for Jodie, the surgeon has presented us with the reality of her future life if the twins are not separated: 'she is not going to be able to walk or to stand, she is going to need to lie or to be carried wherever, and that will therefore limit her ability to develop as a normal child'. Jodie's heart, effectively having to do the work of two hearts, will eventually fail. Whilst we may hope for a miracle, we cannot escape from this reality.