Voices Carry? The Voice of Bioethics in the Courtroom and Voice of Law in Bioethics

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Abstract
This paper explores the interaction between bioethics and law in the theatre of the courtroom, with particular reference to English law. No matter what some judges say, the courtroom has long been a location in which law and bioethics interact, not least in seminal health care law cases such as *Re A (Minors) (Conjoined Twins: Separation* [2000] and *R v Arthur* [1981]. Judge-made law has made some positive contributions to the shaping of bioethics as a discipline, providing a real-world testing ground for moral arguments, issuing the judicial 'products' with which bioethics engages, and emphasising the importance of observing due process. At the same time, the courtroom is an adversarial arena, not always ideally suited to the resolution of ethical conflict, and its concern with actions that satisfy attainable standards can fall short of the aspirations set in philosophical ethics. Indeed, sometimes the judges misinterpret or wholly neglect the ethical dimensions of the case at hand. So much of what judges do involves orchestrated framing, the manipulation of legal concepts, interpretation (of the facts of the case, the story of legal precedent and of the particular ethical dilemma) and translation (of ethical issues into law's discourse). Whether they like it or not, the judges are interpreting and responding to the voice of bioethics alongside the voice of the law in their attempts to reach the 'right' judgment and in the face of the theatre surrounding cases involving bioethical controversy. The end result may be distorting because bioethical theory is misinterpreted or the voice of bioethics becomes obscured because of the drama of the case. But this is not to claim that bioethics has some access to the 'right' or 'true' response to the case at hand. Indeed, neither bioethics nor law can necessarily claim superiority or access to the 'truth' of the matter. We nevertheless argue that each will be likely to gain greater insight by opening a dialogue with the other, telling and re-telling the story, so that the voices of one forum can carry over into the other.

Introduction
Both bioethics and law have valid (and invalid) ways of telling stories. They can sometimes tell these stories with one another, thereby enriching the worldview of each. Judge-made law has made some positive contributions to the shaping of bioethics as a discipline, providing a real-world testing ground for moral arguments, issuing the judicial 'products' with which bioethics engages, and emphasising the importance of observing due process. And bioethics can have a positive impact on law when law engages with, for example, the principle of respect for autonomy. But, importantly, bioethics and law each has its own domain (and associated language and 'voice') and, on occasion, this can lead to obscuration and disharmony. The courtroom is an adversarial arena, not always ideally suited to the resolution of ethical conflict, and its concern with actions that satisfy attainable standards can fall

short of the aspirations set in philosophical ethics. Indeed, sometimes the ethical dimensions of the case at hand are misinterpreted or wholly neglected in the courtroom. So much of what judges do involves interpretation (of the facts of the case, the story of legal precedent and of the particular ethical dilemma) and translation (of ethical issues into law's discourse). Likewise, bioethics involves its own narrative discourse; real life situations are interpreted into substantive ethical controversies. Consequently, whilst both bioethics and law can reveal more of the story than one alone, the presence of narrative construction in both means that there is no one 'truth' but, rather, numerous interpretations of the critical scenario.

This paper explores the interaction between bioethics and law in the specific theatre of the courtroom. No matter what some judges say, the courtroom has long been a location in which law and bioethics interact, not least in seminal health care law cases such as *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 and *R v Arthur* (1981) 12 BMLR 1. By way of a case study, the paper first argues that the voice of bioethics in the courtroom can be obscured because of the drama of the case. Secondly, however, it acknowledges that the voice of bioethics will sometimes transfer through to the courtroom and law, both covertly and overtly. Moreover, thirdly, we will suggest that a reciprocal transfer can also be detected, when we hear echoes of law's products, processes and practices in bioethics. Finally, through an exploration of narrative construction and interpretation in law and bioethics, we argue that there is no one truth but, rather, that the voices of law and bioethics offer multiple narratives of cases involving bioethical conflict – and that, accordingly, each field can benefit by ensuring that it is ready to receive the insights the other has to offer.

Drama and the doctor in the dock

In 1981, highly respected paediatrician Dr Leonard Arthur faced trial for the murder of John Pearson, a baby with Down's syndrome. The charge was subsequently reduced to attempted murder and, at the end of the trial, he was acquitted. According to newspaper reports (Osman Ferriman and Timmins, 1981: 1), there were cries of 'Thank God' from the public gallery as the verdict was announced. The Down's Children's Association expressed fears that the case would cause more parents to reject children with Down's and be 'sufficient reason to let them die' (Ferriman, 1981: 3). The subject matter of the case, a doctor dedicated to caring for children charged with a baby's murder, is certainly dramatic. It is thus unsurprising that Dr Arthur's case attracted much media attention. It gave rise to a series of challenging moral problems, numerous bioethical papers and a whole book, Raanan Gillon's *Philosophical Medical Ethics*, in 1986. But, as we will see, the responses of the medical profession and the judge's directions to the jury suggest that, in such high profile criminal law cases, fundamental ethical issues are evaded and hidden under the cloak of professional definitions of proper medical treatment. Thus, the voice of the medical profession joins with the voice of law to mask the voice of bioethics.

The charge against Dr Arthur arose from his management of the baby, who died 69 hours after he was born. The post mortem revealed that he had died of bronchopneumonia and a toxic level of a powerful painkiller was found in his blood (Osman, 1981: 2). During a police interview, Dr Arthur stated: 'I am fully responsible, no one else. I do not want to be a martyr and I do not want the nurses brought into it' (ibid). That initial reaction helped shape the image of a conscientious doctor caught

in the wheels of the criminal law. There was no suggestion that Dr Arthur had any venal motive. Although he may have been wrong (at least legally) in the care he provided, he did not have the appearance of a 'bad' man.

In a contemporary newspaper report, it is stated that the baby's mother 'rejected the child because it was mentally retarded' (ibid). Following discussion with both parents, Dr Arthur wrote on the nursing notes 'Parents do not wish to survive. Nursing care only'. He prescribed 5 milligrams of dihydrocodeine to be administered every four hours. The prosecution alleged that this drug would have suppressed the baby's appetite and repressed his ability to breathe independently. In prescribing an unnecessary drug and withholding food, the Crown argued, Dr Arthur sought to bring about the baby's death at the parents' request. The defence contended that Dr Arthur's prescription of dihydrocodeine and the alleged withholding of food and treatment amounted to acceptable medical practice. They were too remote from the death to amount to the actus reus of attempted murder and Dr Arthur had no intention to bring about John Pearson's death. Rather, these measures were a 'holding' tactic, so that the baby's condition could be reviewed and in case the mother changed her mind.

Whilst it was the Crown's case that John Pearson had been a healthy baby, save for Down's Syndrome, the defence produced slides which showed that the baby had serious brain and lung damage. And cross-examination of witnesses revealed that the baby had lost no weight during his brief life. Therefore, he had not been starved to death. There was thus a lack of reliable evidence that Dr Arthur's management was a significant contributory factor in causing the baby's death, so the murder charge was withdrawn and the prosecution then pursued a charge of attempted murder ((1981) 12 BMLR 1, 9-10). The prosecution's flawed telling of the story must have impacted on the jury, especially since the case against Dr Arthur for attempted murder fared no better. There was no apparent evidence that Dr Arthur knew that the baby had numerous abnormalities when he prescribed dihydrocodeine and instructed that only nursing care be given. On the evidence available, at most all that could be suggested was that he might have considered the possibility that because the baby had Down's syndrome, he could have had further impairments. Notwithstanding the destruction of the prosecution's case, the ethical issues remained exactly the same. Although expressed too simply, the central question of principle remained: did John Pearson have the same rights to life-sustaining care as a baby born without Down's?

In directing the jury, Farquharson J stated: 'I imagine you will think long and hard before deciding that doctors, of the eminence that we have heard, representing to you what medical ethics are, and apparently have been over a period of time in that great profession, have evolved standards which amount to committing crime' (ibid, 17). It may seem that the judge comes close to suggesting that doctors define ethics and the boundaries of crime are set by these ethics, as long as the defendant doctor has no apparent venal motive. But just before this sentence, he reminded the jury that the medical profession's ethics cannot, alone, ensure the non-criminality of an act or omission. Earlier in the directions, he said that doctors are not given 'extra protection' from the criminal law (ibid, 4). Yet, given the weight of the expert evidence, did the jury hear this message?

Four eminent experts gave evidence for the defence to the effect that Dr Arthur's management of John Pearson fell within the bounds of acceptable medical conduct. According to his peers' testimonies, Dr Arthur had done no wrong. That said, the evidence reveals uncertainty as to whether all medical professionals would have considered Dr Arthur's management appropriate. One of the expert witnesses said: '[i]f a doctor puts such a child on a regime which will inevitably end with its death that could be described as taking steps. I would not do it myself, but in this extremely grey area doctors may arrive at inconsistent decisions' (ibid, 15). Another considered what D Arthur did fell 'within acceptable paediatric policy' (ibid, 16). Although the professional evidence was not overwhelmingly supportive, neither was it condemnatory.

Alongside the possible seeds of doubt this evidence may have sowed in the jury's minds, prominence was attached throughout to Dr Arthur's good character. In the concluding paragraph of his directions, the judge noted that 'seldom in a court could one have heard so many testaments to a man's good character' (ibid, 18). He went on to say that this did not make the doctor incapable of committing a crime, but he ended with the following statement: 'in a case of this kind, when we are talking about medical attitudes and treatment, his own career must stand him in good stead, as to whether he is a man who would do what the prosecution submit he has done' (ibid, 16).

Essentially, the jury were asked: was Leonard Arthur a bad man? It was the man and not the (other) ethical issues that shaped the trial. Further, it might seem that, in a sense, the child was on trial too. The judge described the baby as a 'mongol' and 'it', and accepted the bleakest of prognoses for the life of a child with Down's (ibid, 3; Huxtable, 2007: 110-2). Mason and Laurie dismiss *Arthur* as being poor precedent and telling us nothing ultimately about the law relating to the treatment of severely disabled infants (Mason and McCall, 2011: 479-80). They are right (cf. Huxtable, 2007: 125-6). Later cases heard in the Family Division, such as *Re J (a minor) (medical treatment)* [1993] Fam 15, give much more coherence to the law relating to the care of very sick neonates than Dr Arthur's trial (Mason and Laurie, 2011: 481-8). The trial – and no doubt others (e.g. *R* v. *Bourne* [1939] 1 KB 687; *R* v. *Adams* [1957] Crim LR 365) – reveals that when the criminal law intervenes, drama can obscure the voice of bioethics in the courtroom.

The voice of bioethics in the law?

Even beyond the criminal law, there is reason to doubt that the voice of bioethics is heard sufficiently when bioethical conflict transfers from the clinic to the courtroom. The courts will sometimes hear from *amici curiae*, intervening parties and others who seek to advance distinctive principled positions: for example, the Pro-Life Alliance, Care Not Killing, Dignity and Choice in Dying and the British Humanist Association have all been involved in recent proceedings (e.g. *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147; *R (on the application of Purdy) v DPP* [2009] EWCA 92 (CA); *R (on the Application of Tony Nicklinson and another) v Ministry of Justice* [2014]). Yet, bioethics' academic orators – 'bioethicists' – are seldom heard (James, 2008: 68). Even when exceptions are made, so too are errors. In 2000, in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, the Court of Appeal contemplated the surgical separation of conjoined twins: to do so would immediately mean the death of the weaker twin; but not to do so would apparently

mean the death of both girls within a matter of months. Favourable references were made to John Keown's (1997) work on the sanctity of life, which the court seemed inclined to apply. Yet, in the event, the judges' reasoning owed more to an ethic that is most concerned with judging the quality (rather than the inviolability) of life and is thus quite at odds with the one Keown espouses (Huxtable, 2002).

Of course, this is not to say that medical law is entirely divorced from medical ethics. Even leaving aside jurisprudential questions about whether law (in principle) involves a moral commitment, the ethical dimensions of law (in fact) are inescapable. Sometimes the judges are relatively open about (and to) this: Lord Coleridge CJ famously stated that 'It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation' (*R v. Instan* (1893) 1 QB 450, 453). Equally, the courts are not averse to receiving direct inputs on 'formal' and 'semi-formal' (Miola, 2004: 253) medical ethics from professional organisations like the General Medical Council (e.g. *W v. Egdell* [1990] Ch 359, 390-2, 412-4, 416, 420-3). Less commonly, judges may engage with critical medical ethics, as did Butler Sloss P (as she was then) in her endorsement of respect for the gravely disabled patient's subjective experience of her condition in *B* v. *NHS Trust* [2002] EWHC 429 (Fam), para 94 (cf. Atkins 2000). Note also Hoffmann LJ's more critical ethical approach in the Court of Appeal in *Bland*, in which the judges agreed that clinically assisted nutrition and hydration could be withdrawn from a patient in a persistent vegetative state (*Airedale NHS Trust v Bland* [1993] 1 AC 789, 824-34). But other times, as we see in *Re A*, the judges are less open: Ward LJ insisted that 'this is a court of law, not of morals' ([2000] 4 All ER 961, 969), albeit before then proceeding to analyse (but misapply) the sanctity of life position in considerable detail. It seems that, no matter what the judges say, medical law is replete with the 'stigmata cases' to which Lee and Morgan have referred i.e. cases that 'require courts to develop a social, even a moral vision with which to respond to the dilemmas created by the social and cultural revolution of contemporary medicine' (Lee and Morgan, 2001: 298).

The 'moral vision' will occasionally be clear to all, such as when direct appeals are made to the aforementioned sanctity of life or to the principle of respect for autonomy. Yet, even when the moral vision is clouded – and the ruling in question more technical and correspondingly 'de-moralised' – it can usually be detected (Montgomery, 2006). For example, in Dr Arthur's trial we see hints of the *Bolam* standard, borrowed from the civil law of clinical negligence, which holds that a defendant is not negligent if he or she has acted in accordance with a responsible body of medical opinion (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582). The standard has long had a strangle-hold on medical law. This might appear to be a descriptive paradigm, according to which an individual clinician's behaviour is compared or contrasted with that of his peers. But this inevitably involves an ethical judgment: it is, therefore, also an evaluative standard, premised on the idea that one ought to do what one's 'responsible' peers would do. The judges have recently sought to remind defendants that they (not the defendants) will be the ultimate arbiters of responsible practice (*Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771). But whoever does the judging, the standard unavoidably involves just this i.e. a judgment, with inescapable ethical undertones.

On this view, (bio)ethics does indeed enter law, both overtly and covertly. Indeed, like Miola, one might view ethics and law as united in a 'symbiotic' relationship (Miola, 2007). But does the reverse hold? In other words, how, if at all, does law enter bioethics?

The voice of law in bioethics?

There are three legal locations in particular from which law's voice has projected into bioethics: the products, processes and practices of law (Huxtable, 2015). First, the products of law, as they pertain to the biosciences, will undoubtedly make a considerable contribution to bioethics and its development. Law can, therefore, provide some of the raw materials with which bioethicists will work. There will be rulings, statutes and codes that have a direct and specific bearing on an issue of bioethical import, such as when a jurisdiction seeks to govern the uses of human tissue, practices in reproductive medicine, or physician assisted dying. There are, of course, many more examples that could be cited. Very often, as we suggested above, the legal materials in question will adopt a particular principled position. As Callahan has suggested, law is 'ready to take on ethics if that is what gets served up to it for the making of decisions' (Callahan, 1996: 34). Bioethicists will, understandably, seek to reflect critically on such developments. Sometimes the judges will even advance ethical practice, such as when a clinician's recommendation of the creation of clinical ethics committees was endorsed by the New Jersey Supreme Court adjudicating on the fate of Karen Ann Quinlan (*In re Quinlan* (1976) NJ 355 A 2d 647). As Spielman (2007: 41) observes, this 'endorsement provided a crucial boost to the fledgling ethics committee movement'. There will also be a plethora of other rules and regulations not directly aimed at the biosciences whose influence is nevertheless felt. Although medical (or, more broadly, health care) law is nowadays a recognised body of law in its own right, it continues to gain sustenance from its roots in criminal law, tort law, public law, human rights law and European Community law, amongst others. Sometimes, retracing (and even redrawing) these roots will help the parties to navigate their way out of bioethical difficulty (e.g. *R (on the application of Watts) v Secretary of State for Health* [2003] EWHC 2228/[2004] EWCA Civ 166, *Malette v Shulman* (1990) 67 DLR (4th) 321 (Ont CA), *Airedale NHS Trust v Bland* [1993] 2 WLR 316 and *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147).

Secondly, law makes a distinctive contribution to bioethics in its insistence on due process. Commenting on the United States, Jonsen (1998: 343) cites Annas' claim that:

> American bioethics has been driven by the law... The stress on autonomy and self determination comes from our Bill of Rights, our Declaration of Independence and the whole common law tradition. And law's primary contribution to bioethics is procedural. Lawyers are expert at procedure. The common law itself is based on deciding individual cases and using these cases as the basis of creating law. Bioethics has adopted this technique. In the United States, with its pluralism of beliefs and people, the law is what holds us together. There is no other ethos...

His comments chime with experiences elsewhere. Casuistry – case-based reasoning – is a method also adopted by bioethical practitioners outside the US (Ashcroft et al,

2005). Indeed, the influence of law here should not be surprising, as bioethics is a wide multi- and inter-disciplinary discipline, whose practitioners have long included lawyers (Schneider, 1994). We see this not only in the pages of specialist journals, but also in bioethics' more overtly practice-orientated and public-facing endeavours, such as the work of national organisations like the Nuffield Council on Bioethics (e.g. Nuffield Council on Bioethics, 2006). Despite such input, there are some who believe that the lessons of the law should be better heeded in bioethical practice. In the UK, for example, Sheila McLean has appealed to the due process associated with legal proceedings in her critique of clinical ethics services. In this jurisdiction, research ethics committees are formally constituted and regulated (a development which owes much to the European Union's European Clinical Trials Directive 2001/20/EC) but clinical ethics committees, from which advice may be issued on cases of ethical complexity, remain relatively ad hoc, despite their growing number (75 by 2007) (Larcher, Slowther and Watson, 2010). McLean (2008) perceives a 'due process wasteland', which she believes would be best re-developed by architects schooled in pertinent principles of law.

Thirdly, law's intrinsic connection to practice enables it to make a distinctive contribution to bioethics. In the words of Lon Fuller (1969: 96), law is 'the enterprise of subjecting human conduct to the governance of rules'. In its preoccupation with human conduct, law can therefore provide a real world testing ground for concepts and approaches in bioethics. 'Moral philosophers are not obliged day by day to solve the real problems of real people', notes Birks (2000: 2-3), 'nor are they called to daily account to justify to those same real people the substance of their tenets and the even handedness of their procedures'. Bioethics is, by its nature, also a practice-facing endeavour, such that it is not wholly beholden to the sometimes abstracting theorising of moral philosophy. However, for many, bioethics remains essentially tethered to this branch of philosophy, since it involves 'the systematic study of the moral dimensions – including moral vision, decisions, conduct, and policies – of the life sciences and health care, employing a variety of ethical methodologies in an interdisciplinary setting' (Reich 1995: xxi). Legal officials like the judges, meanwhile, must often do more than study, deliberate or theorise – they must decide. And, McLean (2007: 196) continues, 'irrespective of the ethical views of decision-makers – legal or medical – there are rules under which they must operate, like it or not. Whether or not they are based on moral obligations ... they nonetheless are superior (in practical terms) to the outcome predicted by adherents to one ethical school of thought or another'. What law thus offers to bioethics is the crucible of experience: a space in which action-directed theories and approaches can be tested.

Law's voice has therefore projected into bioethics, correspondingly influencing its theoretical and practical expressions. But that does not mean that each can fully hear the other's voice; to borrow Carl Schneider's (2004) terminology, we should be wary of those limits that 'crimp the usefulness of law's language as a vehicle for bioethical discourse'. Three particular limits – concerning angst, action and aspiration – suggest that we should be cautious.

First, when we mention angst, we mean to refer to the adversarial process that is central to law, at least as it is associated with court proceedings. Certainly bioethics will often engage with conflict, whether between principles, positions or parties. But bioethics need not resolve such conflicts in an all-or-nothing fashion; law courts,

however, tend to position parties as adversaries and ultimately to divide them into winner and loser (Meller and Barclay, 2011: 619). We see this quite vividly in the trial of Dr Arthur, in which he appears to emerge victorious, over both the prosecutors and, some might say, John Pearson. Even the judges have appreciated that this model is not wholly suited to addressing the dilemmas that can arise for patients and the professionals caring for them (e.g. *Portsmouth NHS Trust v Wyatt* [2005] EWCA Civ 1181, *per* Wall LJ, para. 86).

Secondly, in its preoccupation with action and with rules, law seems likely to miss other pieces of the moral jigsaw. The 'native language' of bioethics is much richer than law's, as one might expect, given its wider reach; as Schneider (1994) says, bioethics contemplates 'the most basic and intractable issues about human life and the most intricate and intimate issues about human relationships', with the result that 'a rich vocabulary of ethical considerations, styles, and approaches is necessary'. Although there will be areas of agreement, it is likely there is no *lingua franca* for bioethics, and this need not be a bad thing *per se* (Derse, 2000). Nor should we expect this, Pluralistic contemporary societies lack a common conception of the good; there is, for example, no shared moral consensus on the meaning of beneficence. Indeed, Engelhardt (1996) argues that the only *lingua franca* for modern bioethics is the language of consent.

Of course, some of the rich vocabulary of bioethics, including the language of consent, will be amenable to translation into the language of law: action-directed approaches, like consequentialism and deontology, appear so amenable, particularly the latter, given its concern with duties and rights. Yet, other words might be lost; for example, law will struggle to express the values associated with virtue, character and emotion. Some suggest that action and character can be related (e.g. Feldman 2000; van Zyl 2002; Solum 2003), but Slote (1995: 91) observes that, '[b]ecause virtue ethics is supposed to concentrate more on the inner life of the individual than either consequentialism or deontology, one can easily wonder whether the former is really capable of doing justice to law or to any sort of objective or real constraint upon human action'.

The constraints to which Slote refers give rise to the third area of concern, regarding the aspirations of bioethics, of which law will often fall short. In the words of Mark Twain, 'Laws control the lesser man... Right conduct controls the greater one'. Law, on this account, is more often concerned with minimal standards, rather than high level aspirations. The English case law pertaining to 'informed' consent was long a case in point, because the judges effectively signalled that doctors could disclose what other doctors in their position would disclose – not necessarily what the patient wanted to know (Fovargue and Miola, 2010). Here, as elsewhere, *Bolam* appeared to reign supreme. Although the jurisprudence in this area is now developing along more robustly pro-autonomy lines (e.g. *Chester v Afshar* [2004] UKHL 41), we might still doubt that the judges have given due critical attention to the model(s) of autonomy they seek to defend (Coggon, 2007). Indeed, it is not difficult to detect inconsistent approaches throughout medical law, with some such inconsistencies attributable to a failure to attend to the ethical dimensions of the given problem (e.g. Huxtable, 2007; Huxtable, 2012).

Perhaps law's failures are forgivable and explicable, given the aforementioned absence of a bioethical *lingua franca*. If only autonomy and non-interference command a consensus in bioethics, then it should not be surprising – and may even be commendable – that law seeks, at a minimum, to give effect to such liberal ideals. Of course, as we indicated previously, the ethical lexicon cannot be *reduced* to these concerns and neither is there bioethical consensus on *how* such ideas are to be understood. There are, therefore, ongoing challenges for bioethics, in ensuring its lexicon is appropriately rich and in generating the most robust ethical models. The challenge for law, meanwhile, involves setting the (ethical) bar at the appropriate height. Given the nature of law, coupled with the ethical dissensus to which we have referred, we suspect that law is likely to set the bar a few rungs lower than it might be set by some critical bioethicists.

Bioethics is, after all, 'a critical discipline', says Brownsword (2008): 'bioethics tries to sort out the moral wheat from the non-moral chaff'. As Dawson and Wilkinson (2009: 36) elaborate, philosophical practical ethics comprises: 'appraisal of ethical arguments using the techniques of analytic philosophy'; 'conceptual analysis, which seeks to clarify and explain the role of particular ethical concepts and terms'; and 'the formulation and critical assessment of ethical principles or normative theories about how we should behave'. Logical analysis – and thus clarity and consistency – seems to play an important role in this endeavour (e.g. Pollock, 1998). Similar analytical approaches might, of course, be adopted by legal scholars, such as those inquiring into the requirements associated with the 'internal morality of law' or the 'Rule of Law' (see Brazier and Ost, 2013: chapter 8).

Although there will be areas of overlap (including overlapping concerns with consistency and the like), the standards and requirements of law and bioethics will nevertheless continue to differ. We have suggested that, whilst each undoubtedly influences and enriches the other, bioethics and law have different voices and speak different languages. Implicit in some of what we have said here might appear to be the idea that the two must inevitably remain in competition, clamouring to be loudest. However, this need not be the case, as we will explore in the next section.

Different voices, different stories?

The voices of bioethics and law can sound different and sometimes dissonant because of the presence of interpretation in both fields. Often the cases involving bioethical conflict are ones in which we engage in narrative thinking in order to reach comprehension. According to Bruner (1996b: 39), '[t]here appear to be two broad ways in which human beings organize and manage their knowledge of the world... one seems more specialized for treating of physical "things," the other for treating of people and their plights. These are conventionally known as *logical scientific thinking* and *narrative thinking*...'. We suggested, above, that law and bioethics will sometimes tend towards logical approaches and appraisals. But these might not be entirely appropriate concerns; instead we might find it more fitting to rely on narrative discourse to make sense of cases involving people and their plights, such as the end of life, abortion and the selling of organs. In bioethics, this is the domain of narrative ethics, the exploration of meaning and interpretation of human events, of narrative knowledge, construction and storytelling in bioethics, which can involve embracing disciplines such as literary criticism, sociology and psychology (Charon, 1994: 260).

According to this view, the voices of bioethics and law are involved in the process of narrative discourse, offering meanings, solutions and challenges that are subject to interpretation throughout the story. The role of interpretation is important here, for interpretation is an essential element in the narratives that the voices of bioethics and law play a part in shaping.

As we noted earlier, some of the decisions taken by the courts may appear to be illogical and fail to harmonise the voices of bioethics and the law. But there is a reason for this. Charon (1994: 272) highlights the existence of differing interpretations in bioethics, noting that ethical issues regularly come to light because of a conflict between the interpretations of an issue and the available actions. When the law intervenes, a conflict in interpretations of the ethical issue often exists and the law attempts to resolve the case, although it can only do so in the specific legal context. So the application of law in *Re A* resolved the legal dilemma presented by the bioethical conflict that the precipitating event gave rise to – whether benefiting one twin or not harming the other should take priority.

When law is applied to bioethical dilemmas, the ethical issue must be interpreted and translated into legal discourse, principles and concepts in order to (legally) resolve the case. Thus, we observe Brooke LJ moulding the case before him into one in which the doctrine of necessity could apply, to justify operating on the conjoined twins and thereby kill Mary (*Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 219-240). And judges interpret the case law in light of the ethical dilemma before them: the defence of necessity had never before been available in response to a case involving the deliberate ending of life (*R* v. *Dudley and Stephens* (1884) 14 QBD 273; *R* v. *Howe* [1987] AC 417). Brooke LJ interpreted the criminal law jurisprudence surrounding necessity to involve policy considerations not present in *Re A*, which therefore made it an exceptional case. It was not a case where one person was being a judge in his own cause of the value of his life, nor one in which allowing necessity to justify the taking of an innocent life would cause the law to be absolutely divorced from morality (*Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 239). So interpreted, necessity could be an available defence, thereby differentiating the case before him from previous cases. Thus, Brooke LJ chose an interpretation that responded to the specific and unique elements in the case, a reflection of Dworkin's 'law as integrity' thesis (Dworkin, 1998: 238-9).

Through his interpretation and application of law-lore, Brooke LJ became a co-author of the story of criminal law; the case before him became a chapter of this story. His translation of ethical conflict into a legal story involving necessity offered a resolution. Thus, even in such hard cases, although the task of finding a resolution is especially taxing, it has still proven possible for judges to find, interpret and apply a legal principle such as necessity that apparently offers the least detrimental outcome.

Turning to bioethics, ethicists and health care lawyers interpret real life situations into substantive ethical controversies, interpreting a factual situation and framing the ethical theories and principles to tackle the situation. Thus, for example, a case involving the donation of a man's organs on the condition that they would go to a white recipient is presented as an ethical controversy of autonomy versus justice (Department of Health, 2000; Cronin and Price, 2008). Following a hospital's refusal

to provide in vitro fertilisation treatment to a woman (*R* v. *Ethical Committee of St Mary's Hospital (Manchester), ex p Harriott* [1988] 1 FLR 512), her former status as a prostitute is emphasised in the bioethical and health care law literature. The case can thereby be narrated as an ethical controversy involving reproductive autonomy versus discrimination (Freeman, 1988: 3; Brahams, 1990: 857). Whilst this may narrow the bioethical debate, such narrowing might be necessary to enable a legal decision to be reached. This suggests that some sort of compromise is necessary to enable law and bioethics to work in harmony. Interpretation is thus crucial in ensuring the evolvement of narratives that construct the reality, which the voices of bioethics and law help shape, and in facilitating congruence between the two disciplines. It is therefore highly unlikely that there will be one generic interpretation of an event and, consequently, there is no one 'truth': there are, instead, multiple stories.

Conclusion

Practitioners of bioethics and of law can speak in different voices and will sometimes tell very different stories. Occasionally, as one can detect in some depictions of widely-publicised and dramatic court proceedings, legal officials will be willing to hear what bioethic(ist)s have to say, citing some principle or other as a means of resolving the case at hand. Equally, one can also detect bioethics' reception of law's concerns, when the former field addresses what law has to say on a substantive matter of moral import, or problems of process. But any dialogue (such as it is) is unlikely to be entirely mutually enriching. Law courts are adversarial arenas, in which ethical nuance and laudable aspirations might lose out in the quest to determine a victor; legal answers tend also to be directed towards action, rather than concerns about character, virtue and the like that might be voiced in the bioethical forum. As such, when faced with questions associated with moral conflict, law and bioethics are capable of replying as one, but their answers can also be discordant and can speak past one another. Practitioners in each field need not despair, however. Rather, we suspect that there will be much to be gained from recognising that each has their own story to tell, guided by their own narrative norms. Neither can necessarily claim superiority or access to the 'truth' of the matter. However, each will be likely to gain greater insight by opening a dialogue with the other, telling and re-telling the story, so that the voices of one forum can carry over into the other.

References list

Annas, G.J., 'Ethics committees: From ethical comfort to ethical cover' (1991) 21 *Hastings Center Report*, 18-21.

Anon, 'Dr Leonard Arthur: His Trial and its Implications' (1981) 283 *BMJ*, 1340-1.

Ashcroft, R., Lucassen, A., Parker, M., Verkerk, M. and Widdershoven, G., *Case Analysis in Clinical Ethics* (2005, Cambridge University Press).

Atkins K., 'Autonomy and the subjective character of experience' (2000) 17(1) *Journal of Applied Philosophy*, 71-9.

Birks, P., 'Rights, wrongs, and remedies' (2000) 20(1) *Oxford Journal of Legal Studies*, 1-37.

Brahams, D., 'Ethics and the Law: The Law and Assisted Conception' (1990) 46(3) *British Medical Bulletin*, 850-9.

Brazier, M. and Ost, S. *Medicine and Bioethics in the 'Theatre' of the Criminal Process* (forthcoming, 2013, Cambridge University Press).

Brownsword, R., 'Towards a Rational Law of Contract', in Wilhelmsson, T. (ed.), *Perspectives of Critical Contract Law* (1993, Dartmouth), 241-272.

Brownsword, R., 'Bioethics: Bridging from Morality to Law?' in Freeman, M. (ed.), *Law and Bioethics: Current Legal Issues 2008, Volume 11*, 12-30, (2008, Oxford University Press).

Bruner, J, *Actual Minds, Possible Worlds* (1996a, Harvard University Press).

Callahan, D., 'Bioethics as a Discipline' (1973) 1(1) *The Hastings Center Studies*, 66-73.

Callahan, D. (1996) 'Escaping from Legalism: Is It Possible?' (1996) 26(6) *Hastings Center Report*, 34-5.

Charon, R. 'Narrative Contributions to Medical Ethics: Recognition, Formulation, Interpretation, and Validation in the Practice of the Ethicist' in E. Dubose, E., Hamel, R. and O'Connell, L. (eds.), *A Matter of Principles: Ferment in US Bioethics* (1994, Trinity Press International), 260-83.

Coggon J. Varied and principled understandings of autonomy in English law: Justifiable inconsistency or blinkered moralism? (2007) 15 *Health Care* Analysis, 235-55.

Cronin, A. and Price, D., 'Directed Organ Donation: is the Donor the Owner?' (2008) 3(3) *Clinical Ethics*, 127-31.

Department of Health*, An Investigation into Conditional Organ Donation, the Report of the Panel* (2000, Department of Health).

Derse, A.R., 'Is There a *Lingua Franca* for Bioethics at the End of Life? (2000) 28(3) *The Journal of Law, Medicine & Ethics*, 279-84.

Dworkin, R., *Law's Empire* (1998, Hart).

Engelhardt, H.T., *Foundations of Bioethics*, 2nd ed. (1996, Oxford University Press).

Feldman, H.L., 'Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law' (2000) 74 *Chi.-Kent L. Rev.*, 1431-66.

Ferriman, A. (1981) 'Down's group fear case will cause deaths', *The Times*, 7 November.

Fovargue, S., and Miola, J., 'One step forward, two steps back? The GMC, the common law and "informed" consent' (2010) 36 *Journal of Medical Ethics* 494-7.

Freeman, M., 'Introduction', in Freeman, M (ed.), *Medicine, Ethics and the Law* (1988, Stevens & Sons), 1-8.

Fuller, L.L. (1969) *The Morality of Law* (revised edn), (1969, Yale University Press).

Gillon, R., *Philosophical Medical Ethics* (1986, Wiley).

Hart, H.L.A., 'Review: Fuller, The Morality of Law' (1965) 78 *Harvard Law Review*, 1281-96.
Huxtable R., 'Separation of conjoined twins: Where next for English law?' (2002) *Criminal Law Review*, 459-70.
Huxtable R. *Euthanasia, Ethics and the Law: From Conflict to Compromise* (2007, Routledge-Cavendish).
Huxtable R. *Law, Ethics and Compromise at the Limits of Life: To Treat or not to Treat?* (2012, Routledge-Cavendish).
Huxtable R. 'Friends, Foes, Flatmates: On the Relationship between Law and Bioethics'. In A. Cribb, J. Ives and M. Dunn, eds., *Empirical Bioethics: Practical and Theoretical Perspectives* (2015, CUP, forthcoming)
Keown J., 'Restoring moral and intellectual shape to the law after *Bland*', (1997) 113 *The Law Quarterly Review*, 481-503.
Kramer, M., 'Scrupulousness without scruples: a critique of Lon Fuller and his defenders' (1998) 18 *Oxford Journal of Legal Studies*, 235-63.
Jonsen, A.R., *The Birth of Bioethics* (1998, Oxford University Press).
Larcher, V. Slowther, A. and Watson, A.R., 'Core competencies for clinical ethics committees' (2010) 10(1) *Clinical Medicine* 30-3.
Lee, R. and Morgan, D., 'Regulating risk society: Stigmata cases, scientific citizenship and biomedical diplomacy' (2001) 23(3) *Sydney Law Review*, 297-318.
Mason, K. and Laurie, G, *Mason and McCall Smith's Law and Medical Ethics*. 8th edn. (2011, Oxford University Press).
McLean, S.A.M. (2007) 'Law, ethics and health care', in R. Ashcroft, A. Dawson, H. Draper and J. McMillan (eds), *Principles of Health Care Ethics* (2nd edn) (2007, John Wiley and Sons), 193-8.
McLean, S.A.M. 'Clinical Ethics Committees: a due process wasteland?' (2008) 3 *Clinical Ethics* 99-104.
Meller, S., and Barclay, S., 'Mediation: An approach to intractable disputes between parents and paediatricians' (2011) 96 *Archives of Disease in Childhood*, 619-21.
Miola, J., 'Medical Law and Medical Ethics – Complementary or Corrosive?' (2004) 6 *Medical Law International*, 251-74.
Miola, J., *Medical Ethics and Medical Law: A Symbiotic Relationship* (2007, Hart).
Montgomery, J., 'Law and the demoralisation of medicine' (2006) 26(2) *Legal Studies*, 185-210.
Nuffield Council on Bioethics, *Critical care decisions in fetal and neonatal medicine: Ethical issues* (2006, Nuffield Council on Bioethics).
Osman, A., Ferriman, A. and Timmins, N. (1981) 'Women cry "Thank God" as Dr Arthur is cleared', *The Times*, 6 November.
Osman, A. (1981) '69-hour life of a mongoloid child', *The Times*, 14 October.
Pollock, L., 'Evaluating moral theories' (1988) 25(3) *American Philosophical Quarterly*, 229-40.
Reich, W.T., *Encyclopedia of Bioethics*. *Vol. I* (1995: Macmillan).
Schneider, C.E., 'Bioethics in the Language of the Law' (1994) 24(4) *Hastings Center Report*, 16-22.
Simmonds, N.E., *Law as a Moral Idea* (2007, Oxford University Press).
Slote, M., 'Law in Virtue Ethics' (1995) 14(1) *Law and Philosophy*, 91-113.
Solum, L.B., 'Virtue Jurisprudence: A Virtue-Centered Theory of Judging', (2003) 34(1/2) *Metaphilosophy*, 178-213.
Spielman, B., *Bioethics in Law* (2007, Humana Press).

Twining, W. and Miers, D.R., *How to do Things with Rules*, 3rd edn, (1991, Butterworths).
van Zyl, L. (2002) 'Euthanasia, Virtue Ethics and the Law' (2002) 3(1) *New Zealand Bioethics Journal*, 18-27.