A Clash of Traditions?

An Investigation into Judicial Interpretations of Autonomy in Ethically-Contentious Medical Cases

by

Mark Bratton

Dissertation submitted in partial fulfilment of the requirements for the Degree of Doctor of Philosophy in Medical Education in the Department of Medical Education at the Warwick Medical School in the University of Warwick

April, 2012

Table of Contents

Table of Figures

Table of Cases

1. English cases

R (on the application of Debbie Purdy) [2010] 1 AC 345

R (on the application of Pretty) v Director of Public Prosecutions [2002] 1 AC 800

Re (on the application of Wilkinson) v. Broadmoor Hospital [2002] 1 WLR 419

Sidaway v. Board of Governors of the Bethlem Royal Hospital Governors [1985] AC 871

St George's Healthcare NHS Trust v. S; Collins [1999] Fam. 26

T (Adult: Refusal of Treatment), Re [1993] Fam 95

Thake v Maurice [1986] QB 644
W (A Minor)(Medical Treatment), Re [1993] Fam 64

Whitehouse v. Jordan [1981] 1 All ER 267

Yearworth v. North Bristol NHS Trust [2010] QB 1

2. Non-English cases

Auckland Area Health Board v Attorney-General [1993] 1 NZLR 235

Bensaid v. United Kingdom (2001) 33 EHRR 205.

Canterbury v. Spence., 464 F.2d 772 - 1972

Conroy, Re 486 A. 2d. 1209 (1985).

Cruzan v. Director, Mo. Dept. of Health, 497 US 261 - 1989

In re Jane Doe, 418 SE 2d 3 - 1992

In re Jobes, 510 A. 2d 133 - 1986

Johnston v. Wellesley Hospital (1970) 17 D.L.R. (3d) 13

Pretty v. United Kingdom (2002) 35EHRR 1

In re Quinlan, 355 A. 2d 647 – 1976

Reibl v. Hughes [1980] 2 S.C.R. 880.

Acknowledgements

This thesis would not have been completed but for the love and support of my wife, Emma, and the forbearance of my children, Katy (11) and Theo (10) who would far rather have had their father playing in the garden, than squirrelled away in his study. I am also very fortunate to have had the encouragement of a caring congregation, who warmly affirmed my ambition to complete the PhD in spite of the demands of a busy parish. To all of them I give my heartfelt thanks.

Amongst them I would like to thank in particular Stewart Ranson, David and Penny Stableforth, and Sarah Burke for their generous support, interest and willingness to talk through some of my developing ideas. They stand as testament to the way face-to-face intellectual exchange can open up new vistas of enquiry that might otherwise have been obscured from view. Dr David Stableforth was of invaluable help reading the script with unerring eye for the superfluous adjective, stylistic barbarity, and high-flown hyperbole. I am entirely responsible for any defects in these areas which remain.

To their number, I would add Neil and Cynthia Bratton, Siwan Bratton and Jonathan Tarr, and Jan Rushton. Patrick and Frances Hooper, Jonathan and Sarah Kirk who agreed to read through the text in its final stages. I thank Jan in particular for reminding me regularly that the thesis would one day be completed when the summit seemed impossibly far off. I would like to offer particular thanks to Jim and Nix Maybery who made light work of some complicated tables at short notice.

I have had the privilege throughout this process of working with my supervisors Dr Anne Slowther and Professor Andrew Parker. Professor Bill Fulford also was involved with this project from a very early stage of its gestation and made many valuable suggestions.

My appreciation and thanks are due to all three of them for their support and encouragement.

Declaration

I declare that this thesis is my own work and has not been submitted in any form for another degree or diploma at any university or other institution of tertiary education. Information derived from the published or unpublished work of others has been acknowledged in the text and a list of references given.

_____ _____

Signature Date

Abbreviations

ANH	-	Artificial Nutrition and Hydration
BMA	-	British Medical Association
DPP	-	Director of Public Prosecutions
ECHR	-	European Convention on Human Rights
ECtHR	-	European Court of Human Rights
GMC	-	General Medical Council
HRA	-	Human Rights Act 1998
MCA	-	Mental Capacity Act 2005
MND	-	Motor Neurone Disease
MS	-	Multiple Sclerosis
SOL	-	Sanctity of Life

Abstract

The concept of autonomy has acquired paramount status in English medical law, medical ethics and philosophy. Using the methodology of grounded theory, and three iterative cycles of enquiry of the medical law reports and the literature, this thesis investigates how and why judges use and interpret autonomy in ethically-contentious medical law cases. Each cycle of enquiry reveals its internal limitations, prompting further engagement with the data in order to overcome those limitations and deepen the level of understanding and explanation.

The first cycle of empirical enquiry describes variation in judicial usage of the autonomy concept in the law reports but gives way to a second cycle of hermeneutical enquiry in order to advance understanding of what judges mean in their use of it. Concurrent analysis of the literature on autonomy reveals a progressive development from a partial view of autonomy as body and mind towards an emerging holistic concept as the identity and capability of the person. The failure of hermeneutical enquiry to explain judicial variations in meaning and interpretation leads to a third cycle of enquiry based on critical realist analysis, examining the underlying social structures and traditions that may influence judicial variations in usage. Using MacIntyre's concept of tradition, and Brandom's tools of inferential analysis, the thesis explores whether the law reports reveal the influence on judicial usage of traditions of legal rationality – common law, statute law, and European human rights law – and whether these legal traditions are influenced by wider traditions of moral and political order.

The emergent theory of the research, developed through the iterative cycles of enquiry of the data is that judges have developed a community of practice which has over time elaborated a sophisticated ethical language of autonomy to mediate the influence of different legal traditions and, in so doing, has constituted a new practice of medical jurisprudence.

Prologue

The genesis of this research

The idea for this thesis initially emerged from a sense of unease which I began to experience as a practising barrister in the mid-80s, specialising in medical and personal injury law. It has continued throughout my academic career as a sessional teacher of medical ethics and law at a British university, and as an Anglican parish priest with responsibilities involving pastoral care of the sick and dying. In the 1980s, I had the sense that autonomy was being oversold as a principle in medical ethics and that its supremacy was being achieved at the expense of other important ethical principles, in particular the effect that an unqualified right to autonomy gave the individual to make decisions which might have profoundly negative consequences for others.

This impression was reinforced in the course of preparing a co-authored article for publication on the ethics of separation surgery on conjoined twins following the celebrated legal case of Maltese conjoined twins, known for legal purposes as 'Jodie' and 'Mary'(Bratton & Chetwynd, 2004). The suggestion of the third Court of Appeal judge, Lord Justice Robert Walker, that fatal surgery for the weaker of the twins, 'Mary', would be in her best interests because it would restore to her that bodily integrity and autonomy than nature had denied her was startling. It seemed to exemplify the insight of the philosopher and psychiatrist George Canguilhem that "the abnormal, while logically second, is existentially first" (Bratton & Chetwynd, 2004: 284). It seemed that in the face of the spectre of the entangled flesh of two would-be singletons, the medical profession and the courts were driven to define

autonomy as physical circumscription and bodily integrity as the norm all the more strongly.

Another stimulus was the sheer intellectual delight of trying to make explicit what judges implicitly mean when they use words like 'autonomy'. Because of the pressure under which they work, judges have neither the leisure, nor usually the inclination, to articulate the concepts they use with theoretical rigour, though they tend to be men and women of great practical intelligence in terms of their legal craft. Judicial decisions are therefore potentially a fertile source of 'implicit philosophy', of evidence from which the deeper meanings of the words they used might be inferred and structure of thought unearthed. This possibility is premised on the view that law and the legal system are a part of, rather than *apart* from, the society that brings them into being. The law is a social artefact, "a lens to reveal the dominant cultural values and interests of a society and observe how these are preserved, challenged and changed" (Laster, 200: 1).

A third motivation for this thesis is the desire to demystify the law. The language of law is not 'autonomous' in the sense that it operates according to its own standard norms apart from ordinary language. One of the distinctive features of judicial discourse, captured in the law reports, is its roots in the facts and circumstances of human experience. For that reason, perhaps, many of them, especially in the context of medical jurisprudence, are interesting and readable. Judges draft them partly with an eye to their public reception, analogous to the way that barristers draft their legal opinions, so that their non-lawyer clients can make sense of what they are advising.

It has been a startling discovery that qualitative methods of documentary analysis have hardly, if ever, been applied to the law reports, when they seem so eminently suitable to such methods of analysis. It is my conjecture that academic lawyers in English law schools are still so concerned with the requirements of legal practice, and the traditional doctrinal approaches to the law, that they are still unfamiliar with, or bewildered by, the techniques that social research methods of the kind employed in this thesis have to offer. Non-lawyers, too, still tend to regard legal material as the monopoly of the specialists, a province restricted to those who have been inducted into the allegedly esoteric practices of the law. Yet, as was said above, the common law has from time immemorial been rooted in the reality of people's everyday lives and the law reports have unusual intelligibility for those willing to familiarise themselves with their style of thinking. The law reports are, after all, meant to be matters of 'public record'.

The rationale for the structure of this thesis

This thesis has been, as all intellectual enterprises on this scale tend to be: personally and intellectually transformative. At journey's end, the thesis has settled on a structure which has departed from the shape of the conventional research template. Nevertheless it is proposed that there is a strong rationale for the shape it has ultimately taken. Instead of the usual pattern (introduction, literature review, methodology, findings (including analysis and discussion) and conclusion, the thesis is organised according it its three cycles of enquiry: empirical; hermeneutic and structural. This organisational decision was not made *a priori* but rather in response to the logic of the experience of the research process driven by the processual, iterative dynamic of grounded theory. The account of the methodology, the strategy

of investigation and analysis of the findings are not treated in discrete sections in the traditional fashion but in complementary fashion within the particular cycle of enquiry to which the particular processes of investigation and findings relate. It is suggested that this strategy of exhibiting the research through the different stages of enquiry, while following a chronological structure, is nevertheless analytical methodologically and as a result renders the thesis more intelligible.

The possibility of restructuring the thesis in this way began to suggest itself after a personal and fundamental watershed in the research process. Several years in, it became apparent that an exclusively empirical approach to the database of law reports and its intellectual hinterland in the literature would result in a thesis that was trivially descriptive. This impasse was largely self-inflicted, the outcome of the descriptive research questions which the thesis initially set out to address. The impasse was finally and timeously broken only when wider background reading and conversations with colleagues suggested that there were different, explanatory, research questions with which I needed to engage. As a result the nature of the enquiry was rethought and the initial focus on how judges were using and varying in their use of the concept of autonomy shifted to concern with the question of why the judiciary were using and interpreting autonomy as they were. This led to deepening of the cycles of research enquiry around the proximate and underlying influences affecting judicial meanings in practice of use of autonomy.

The third justification for adopting a structure based on layers of intellectual and methodological enquiry is that it has enabled the disclosure of the emerging findings and the theory of the study. It is contended that on this structure ‘the right notes are

played in the right order'. On the conventional structure, the rights notes seemed to be being played in the 'wrong' order' leaving it with an unsatisfactorily hybrid quality, rendering the research process less transparent. It is contended that the structure adopted for this thesis is truer to the practice and experience of the research.

Some preliminary matters

There are three preliminary matters which are best dealt with at this stage concerning the research sample of law reports; the question of jurisdiction; and some terminological matters.

1. The law reports

Case summaries of the research sample of law reports are set out at Appendix 1. These set out the facts and decisions of the cases as well as indicating their legal significance. Although the salient features of the cases are briefly indicated in the course of analysis in the main text of the thesis, they should be read cognisant of the fuller exposition in the Appendix.

2. Jurisdiction

The research sample is restricted to English law reports, although these cases are often deeply influenced by cases decided in other jurisdictions, e.g. decisions of the European Court of Human Rights. It should be noted that the UK has three legal systems: English law which applies to England and Wales; Northern Irish law which applies in Northern Ireland; and Scots law which applies in Scotland. For the purposes of this thesis, therefore, Northern Irish and Scots cases are regarded as 'non-domestic'.

3. Terminology

'Medical law' is sometimes distinguished from 'medical jurisprudence'. Medical jurisprudence refers to judicial decisions in (medical) law reports, whereas medical law is an umbrella term embracing jurisprudence, other sources of medical law, and academic medico-legal literature. 'Medical ethics' and 'bioethics' are used as synonyms. While there is no single definition of these terms, they are sometimes used interchangeably in the literature (Levinson & Reiss, 2003) and this thesis does not require terminological distinction. The difference between legal and bioethical literature is made by looking at content and the principal intellectual formation of the author. Distinguishing bioethical from philosophical literature is complicated by the fact that most bioethicists tend to have studied philosophy. I have chosen to take a pragmatic approach and refer to bioethics and philosophy conjointly.

CHAPTER 1

INTRODUCTION: THE TRANSFORMED FRAMEWORK AND CONTEXT OF MEDICAL LAW

1.1 BACKGROUND

Over the last thirty years, 'medical law' has emerged as a distinct legal topic interacting with healthcare in diverse ways (Grubb, 1987; Rothstein, 2004; Laurie, 2006a). Veitch (2007) has referred to "medical law's inexorable expansion" likening it to the painting of the Forth Bridge:

> …no sooner has the ink dried on the latest textbooks than the pace of events, and the arrival of new topics, compel their authors to embark anew on the next invariably longer editions (Veitch, 2007: 1).

Grubb and Kennedy (2000) have made similar observations. There are now a large number of textbooks specifically devoted to the subject which have not only grown in size but also in complexity (e.g. Herring, 2010; Jackson, 2010; Pattinson, 2011). Hope (1991) has explored medical law's parentage: "After an extensive and somewhat uncertain gestation period, a new subject has been born; its name is *Medical Law* and its birth weight is well above average" (1991: 247). However, while medical law's parentage is fairly easily traced, its legitimacy should not perhaps be too quickly assumed, as we shall explore later in this chapter.

Over recent decades, the courts have been increasingly called upon to respond to new moral and ethical dilemmas raised by advances in modern science, medicine, and technology. There has been a range of contentious cases arising out of healthcare practice which have provoked intense public debate about matters of human concern, including the nature of human mortality (Miola, 2007). Novel, ethically controversial, medico-legal cases have compelled reflection on the nature and goals of medicine. Lee & Morgan (2001) have designated some of these 'stigmata cases' because they enable "the marks of a deeper system of values to be seen on the surface of a specific dispute" (Montgomery 2006b: 190). They are "talismatic of broader debates in society" (Montgomery 2006a: 8) and have challenged the 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 & Morgan, 2001: 298).

In addition to this growing jurisprudence, complex legislation governing various aspects of clinical practice and research has brought the field of medical law within the province of democratic vote (Smith, 1997). This has partly taken form in recent statutes governing the storage and use of human tissue and organs (Human Tissue Act 2004); determinations of capacity in vulnerable adults (Mental Capacity Act 2005); and assisted reproduction and the storage, use and disposal of human gametes and embryos (Human Fertilization and Embryology Act 2008). The increasing variety of domestic medico-legal provisions has been matched by a range of international legal and quasi-legal measures, e.g. the European Convention on Human Rights (1950); the International Convention on Civil and Political Rights (1966); the United Nations Convention on the Rights of the Child (1989); and the

United Nations Convention on the Rights of Persons with Disabilities (2006). A central argument of this thesis is that the incorporation of the ECHR into UK jurisprudence through the Human Rights Act 1998 (HRA) is of special significance for the changing legal, moral and political ecology of English medical law.

To date, the moral and ethical implications of these advances have attracted the attention of a number of scholars (Dworkin, 1993; Fukuyama, 2002; O'Neill, 2002; Habermas, 2003; Sandel, 2007) who have singled out for specific consideration issues such as abortion, euthanasia, assisted reproduction and genetic engineering thus putting the nature and scope of ethics in issue. These advances are challenging the limits of established moral and ethical theories because they concern not simply how to make the world a better place, but what kind of world in the first place is to be brought into being: Heyd (1994) has distinguished 'world-creation' from 'world-amelioration'. These thinkers argue that such developments are not only having an impact on the way people live but also on the ethical self-understanding of the human race. Mason et al. (2006) state that:

> …the importance and intensity of the public moral conversation about bioethics and medical law are explained in part by the very nature of their subject matter. This is an area of concern that touches upon people's most intimate interests.

Law, morality and the 'public interest' are intertwined in the healthcare context; a scenario which was inconceivable until more recently. As this thesis will demonstrate, English medical jurisprudence reflects the centrality of autonomy as a

legal, moral and political principle and has a bearing on the origins of the research interest.

1.1.1 Autonomy and the origins of the research interest

Questions of autonomy have typically been at the centre of judging ethically contentious medical law cases. The concept of autonomy, and the principle of respect for personal autonomy, is a legal and ethical value of paramount importance in the West. McLean (2010) observes that:

> … the emergence of autonomy as the guiding concept in biomedical ethics has occurred relatively recently and co-exists with the growth in the importance of the language of human rights. Autonomy rules, then, but … its precise meaning is far from agreed and some commentary seems unclear about whether the mere existence of (legal) decision-making capacity – which is a pre-existing condition of autonomy, is sufficient to demand respect for a decision made by the competent person.

There is paucity of research investigating how judges use, and understand, the concept of autonomy and what factors have shaped it. Indeed, it is this very issue that forms the central thread of the present thesis, that is: to enquire into judicial interpretations of the concept of autonomy in ethically-contentious medical cases.

My early professional practice as a barrister, and general reading around the literature in medical law and ethics suggested that judges' understanding and use of autonomy was varied. In addition to the fact of usage, the initial stage of enquiry would need to examine the variety of usage and what factors influenced diversity of

legal judgments on autonomy. My initial conjecture, derived from background reading of the literature over 25 years (i.e. since 1985), proposed that law and ethics were closely related, that medical law as a distinct legal topic was bound to ethics; and that there had been a legalistic influence on medical ethics since its inception (cf. Rothstein, 2004). The rise of legalism, the assimilation of morality to law and the legalisation of morality in medical ethics has been well-documented from the inception of medical ethics (Ladd, 1979; Faden et al., 1986; Jonsen, 1998). The fact that medical law and ethics are in relationship is not universally commended. Miola (2007) has recently argued that medical law and ethics are in a symbiotic, but mutually detrimental, relationship.

Thus, it is my contention that the influence of academic developments on the judiciary needs to be more closely examined: are judges' conceptions of autonomy similar to uses in the literature? These, such as they are, will be explored in chapter 2. Moreover, enquiry into judicial uses of the concept of autonomy needs to develop a broader assessment of judges' decisions, and not just to analyse the scale and limits of influence. The significance of prominent cases needs to be examined, and, as does the implications of the changes taking place in public and European law for the traditions of English law.

This thesis uses, as its investigative basis, a set of medical law reports applying qualitative documentary analysis rather than conventional legal commentary. Traditional legal commentators analyse law reports to explain the doctrinal implications of judicial decisions and the ways they might be improved (Jacobson et al., 2001). In terms of its overall methodology, the research takes a grounded theory

approach with its emphasis on explanatory theories of a study emerging from the constant interaction of the researcher with the data that includes significant literature on changes in public and European law, as well as the discourses on autonomy. To this end, the thesis is an interdisciplinary study combining medical law, applied and political philosophy, and social science.

1.1.2 The chapter plan

The introductory chapter examines the background of change that has faced judges in their decision-making about autonomy. First, it considers the expansion of medical law. Second, it considers the relationship between this expansion and the rise of the assertive citizen. Third, it uncovers the changes that have taken place in the framework of law and their significance, especially the creation of the European Convention on Human Rights (ECHR), for the tradition of English common law. The chapter concludes by describing the problematic of the thesis: its purpose, focus and organisation.

1.2 THE EMERGENCE OF MEDICAL LAW AND THE PRIMACY OF ETHICAL QUESTIONS

The complex origins of medical law are widely agreed. As an outgrowth of different branches of traditional private law, e.g. contract, family, property, tort and public law, medical law has been referred to as "an academic version of the cuckoo" (Wicks, 2007: 1). Originally focussed on the doctor-patient relationship, medical law has acquired broader, "public law" dimensions, embracing the institutional context of healthcare, e.g. the legal and ethical complexities of assisted reproduction, the

structure and responsibilities of the National Health Service (NHS) and issues of resource allocation (Pattinson, 2009). Accordingly, for some medical lawyers, "healthcare law" is the preferred nomenclature (Montgomery, 2003). Some have wanted to expand the discipline beyond the structured healthcare provided within the healthcare system calling it "health law" (Hervey & McHale, 2005), and "public health law" (Gostin, 2012). Brazier & Glover (2000: 372) have distinguished 'medical' and 'health care' or 'health law' thus:

> Medical law which focusses on a relationship between doctors and patients remains in essence a creature of private law….Health care law is located more firmly in public law. Doctors are shifted to the margins of debate. The needs, and even rights, of individual patients must be viewed within a wider context of protecting health and promoting public goods.

There has been a blurring in the medical, or healthcare, or health, law context, of the formerly fundamental distinction between private law (which governs relationships between individuals) and public law (which concerns the regulation of State and its relationship between individuals). The function of public law is to protect the rights of citizens and to vindicate them against those in positions of power who threaten to infringe them (Poole, 2005).

1.2.1 The rise of the 'intervener' and courts as sites of civic debate

The 'intervener' is a conspicuous feature of recent cases and a sign that the ethical issues raised in them are attracting broader public interest. Pattinson (2009) has argued that this is partly the consequence of pressure groups being denied support by the major political parties in spite of lobbying which has, in turn, led them to look to

the judicial process instead. This is conspicuously evident in three cases which (as it turns out) form part of the research sample (see Appendix 1). In *Re A* (2001), the Court of Appeal, quite unusually, accepted written submissions from the Roman Catholic Archbishop of Westminster and the Pro-Life Alliance. The former specifically stated in his written submission that his views were "based on Roman Catholic faith and morality" (Skene, 2006). The Court of Appeal in *Burke* (2006) allowed seven interveners. The case of *Re F* (1990) is an early example of third-party intervention. Although such interventions are rare in the law, it is proposed that there is a link between their putative increase and the constitutively ethical-contentiousness of medical law. Pattinson identifies another trend – for such groups or individuals to bring cases themselves. For example, the applicant in *Gillick* (1986) did not have a direct personal interest in the lawfulness of a Department of Health circular on contraception policy. Whether or not these interveners succeed in their appeals to the judicial process, they invariably attract publicity for their points-of-view.

Although the status of 'public standing' to intervene is contentious where disputed ethical questions are involved (Pattinson, 2009; Wicks, 2009), medical law has nevertheless become a site for civic ethical debate. The case of *Re A* (2001) mentioned above, involving the lawfulness of separation surgery on infant conjoined twins, involved complex legal and ethical analysis. For Lee (2003), the decision not to appeal the case to the House of Lords was a lost opportunity to continue moral reflection on ethical issues of the profoundest importance and at the highest judicial level. James (2008), who also refers to the case, points to a growing expectation that

judges adjudicating ethically-contentious cases will 'do the right thing', as well as decide them in the technically correct way.

1.2.2 The 'legitimacy' of medical law and its relationship with ethics

The judiciary in a culture of moral pluralism are hard-pushed to appeal to any one moral position without questions arising regarding their legitimacy as arbiters of 'public morals' (Montgomery, 2006a). In controversial areas such as assisted suicide and euthanasia what legitimacy has the courtroom, or law-makers in Parliament, to dictate a restrictive moral and legal position? In ethically-contentious cases, the judiciary is caught on the horns of a dilemma. Judges' are required to resolve them in the absence of any universally-agreed moral vision. Veitch (2007) has argued that this pressure has led to a disjunction in judicial discourse between judges' stated reasons for their decisions and 'actual' reasons which can be discerned in the reports. Although judicial rhetoric has emphasised a view of autonomy consistent with an 'individualistic' model, judges are in fact taking into account factors which they do not make explicit and are more consistent with a model of 'principled autonomy' (cf. O'Neill, 2002).

While judges resort to the rhetoric of individualistic autonomy in their judicial reasoning in order to entrench their liberal credentials, the outcome of these cases is determined by their responses to the ethical and human dilemmas which the cases present, leading to a disconnection between judicial 'rhetoric' and judicial 'reality' (Munby, 1998). Montgomery contends that the:

> …key to the legitimacy problem in the modern context is to see medical law as a tool to ensure the recognition that its subject matter is morally charged and to protect the ability of individuals to grapple with the ethical issues that arise. It maintains the pre-conditions for moral agency (2006a: 14).

In the absence of a clear normative moral framework, the role of the courts is to keep the parties, and the public, attuned to the ethical dimensions of the case.

The uncertain relationship between law and ethics in medical jurisprudence can perhaps be accounted for within the recent history of legal philosophy. The tradition of positivism associated with Hart (1961) which dominated in the second half-of the twentieth-century, maintained a strict separation between law and morality. James (2008) states that the:

> …long-term impact of legal positivism, in the view of at least some scholars, has been gradually to remove substantive moral debate from the decision of controversial cases. Yet, 'medical treatment has become possibly the most fertile source of ethical conundrums (2008: 67).

This separatist tradition is perhaps reflected in judicial statements which attempt to restrict the courts' concerns in cases which raise profoundly difficult moral issues, to technical ones of identifying and applying the relevant legal principles to the facts of the case before the court. In the conjoined twins' case above-mentioned, the Court of Appeal insisted that it was a "court of law, not an arbiter of morals" (*Re A* (2001) at p. 155*D-E*). In other cases, the courts have recognised the fundamental intertwining of law and ethics. In a case involving the ethical and legal issue of whether it was

right to withdraw life-sustaining sustenance from a permanently insensate patient, the Court of Appeal stated (*Bland* (1993), p. 825*F-G*):

> This is not an area in which any difference can be allowed to exist between what is legal and what is morally right. The decision of the court should be able to carry conviction with the ordinary person as being based not merely on legal precedent but also upon acceptable ethical values.

A moral dimension of English law is assumed in Lord Coleridge's oft-cited statement that, while every moral obligation is not necessarily translated into a legal duty, "every legal duty has a moral foundation" (*R v Instan* [1893] 1 QB 450). The separatist approach to law is being challenged in the transformed social context where, as alluded to above, the judiciary are increasingly being expected to offer ethically satisfactory answers to complex medico-legal questions in a morally-diverse culture. This raises questions as to where the judiciary is to look for sources of law and ethical guidance.

The growth of medical law from its seedbed in a variety of traditional legal topics, its transition from private to public law, and the intimate interplay of medical law and ethics have led to debate about medical law's coherence as a distinct legal discipline (Grubb, 1987; Brazier et al., 2000; Grubb & Kennedy, 2000; Lee & Morgan, 2001; Montgomery, 2006a; Miola, 2007). This debate has focused on the role of patient autonomy in the healthcare context. The traditional approach, which ties medical law to its common law roots, views patient autonomy as a function of the law of consent. On the traditional version, the role of consent is to turn otherwise unlawful behaviour (non-consensual touching) into lawful, ethical and professionally responsible

behaviour. This contrasts with an approach tied to 'human rights'. Kennedy (1988) has long argued that the theoretic underpinnings of medical law should be located in human rights, rather than traditional common law reasoning, contending that it provides medical law with its rationale, and has, at its core, the principle of respect for patient autonomy.

Other medical lawyers have subsequently sought to reconfigure medical law around the concept of human rights (e.g. Wicks, 2007). On different lines, Morgan (2001) has argued that the crucial question is not what medical law is, but rather what medical law is *for*: "medical law indeed is not just a subject; it is also a responsibility." In attempting to delineate the boundaries of medical law academic medical lawyers have tended to overlook the unique way in which medical law attempts to address the intersection of medical ethics and law within the context of advancing technology, social change, and developments in philosophical medical ethics.

1.2.3 Autonomy, rights and the rise of the assertive citizen

The rise of medical law as a distinct discipline and constituted as such by its inherently ethical content is closely associated with the phenomenal rise of the assertive citizen in Western culture. This phenomenon began to emerge from the late 1960s onwards. In the early 1960s, Devlin (1962) commented:

> Is it not a pleasant tribute to the medical profession that by and large it has been able to manage its relations with its patients ... without the aid of lawyers and law makers? (Devlin, 1962: 103).

By the beginning of the 1970s, however, the shape of the relationship between the medical and legal professions had changed dramatically. Medical advances had begun to pose ethical dilemmas of unprecedented complexity (Dworkin, 1996a). This coincided with the rise of consumerism and consumer rights. Medical decisions which were once widely accepted as falling exclusively within the discretion of professionals had been brought firmly within the scope of legal redress.

The growth of the consumer-inspired doctrine of 'informed consent' represents an important stage in the recalibration of the relationship between doctor and patient away from medical paternalism (Kennedy, 1981; O'Neill, 2002). The growth of consumerism is closely related to the post-industrial emergence of individualism or 'individualization'. This is linked to the loosening of ties to tradition and the advance of individual autonomy. Beck & Beck-Gernsheim (2002) have charted the emergence of the assertive citizen from the constraints of "normal biography" into relative freedom of "the do-it -yourself biography". Beck has observed the rise of a new "institutionalised individualism" in which people are "invited to constitute themselves as individuals: to plan, understand, design themselves as individuals" (Giddens, 1998: 36).

Another linked development has been the growth of moral pluralism made possible by an important shift in cultural mood in the latter part of the 20th century, 'postmodernism'. The traditional presumption that people share a concrete morality, whether through religious observance or rational reflection, has given way to the felt importance of pursuing individually chosen goals and achieving personal freedom (Church of England Doctrine Commission, 1997). The lack of a shared moral

framework within which to make medical decisions has led to increasing emphasis on allowing people to live according to their personal values and to pursue their individual life-plans (Harris, 1985; Spriggs, 2005). Technological advance, the economics of consumerism, the rise of individualism, the growth of moral pluralism and the increasing importance of individual autonomy have all contributed to the emergence of the assertive citizen in the healthcare context.

The culture of moral pluralism and lack of shared ethical foundations has had implications for the role of law. If ethically-contentious cases arising in healthcare cannot be resolved by medical ethics because of the variety of ethical viewpoints which exist, then problems that arise in practice need another forum for their resolution. Miola (2007) argues that "the law cannot help but be involved in this area, as many of the medico-legal cases that come before the courts have inherently ethical content" (2007: 8). Medical law is a function of the demand by an assertive citizenry for a relevant effective outlet for the difficulties that arises for it in the medical context.

A central finding of this thesis is that the courts have responded to the demands of the assertive citizen by developing an ethical discourse to inform the difficult practice of judicial decision-making in medical law contexts. The courts have developed this language in stages and the concept of autonomy has been central to this development. It is proposed that the medical law reports chosen for analysis provide snapshots of this development and, in the process, this thesis makes a contribution to the "as-yet largely unexplored historical jurisprudence in various quarters of the medico-legal world" (Laurie, 2006b: 131). In short, this work goes at

least some way to demonstrating that medical law is a practice which has dynamically developed in response to social change.

1.2.4 From 'civil liberties' to 'human rights': the legal 'positivisation' of rights

Coincident with these developments has been the rise of 'rights talk' (Glendon, 1991). It is widely stated that rights discourse has become a *lingua franca* of modern politics and law and has led several to designate the current era as 'the age of rights' (Henkin 1990; Bobbio, 1996). Epp (1998) and Ignatieff (2000) have referred to 'a rights revolution' which has fundamentally altered the way in which the relation between citizen and state is understood. The nature of rights is highly contestable. The existence of rights has, amongst other things, been related to human need, responsibility or interests (Weinreb, 1994; Fukuyama, 2003). For some, the existence of rights can be affirmed notwithstanding the lack of establishment of firm normative foundations (Hart, 1979; Thomson, 1990).

Whatever rights consist in, Loughlin (2003) argues that rights discourse has changed over history and in the contemporary West has had expressed a transformed relationship between law and government, the citizen and the State. He has pointed to a 'blurring' in the post-Enlightenment period of the formerly clear distinction between 'positive law', expressed in the body of rules, and politics, the language in which concepts of the right and the good are engaged with. This elision of the discourses of law and politics has accompanied the transmutation of 'natural rights' into 'human rights' and fuelled "a tremendous expansion in the creativity of legal argument, as basic values of dignity, autonomy, and equality are explicated into ever more ingenious forms of rights claims" (Loughlin, 2003: 127).

Natural rights were, especially within the Hobbesian conception, regarded as political claims which, within the British political tradition, sought to protect the subject from the restrictive effects of law. These have, accordingly, "generally taken the form of negative liberties, serving mainly to define a zone of individual autonomy which government must not invade" (Loughlin, 2003: 127). However, rights (and human rights) discourse has shifted from an exclusive political domain and become a fundamental feature of the legal order. This has led to an expansion in 'law's empire' in which liberty "is no longer the sphere of individual autonomy beyond the constraints of the law [but] must now be defined by the operations of the law" (Loughlin, 2003: 128). "Law, once a form of coercive order, now presents itself as a means of maintaining freedom." (Loughlin, 2003: 128).

This development has had a number of potentially revolutionary implications for the relationship between law, morals and politics. Firstly, it has meant that rights have become institutionalised and 'positivised'. In other words, rights have become items of legal, rather than simply political, order. Secondly, it has made the judiciary the ultimate arbiters of competing rights claims, which might properly have been taken to be political matters to be determined by a democratic state's elected representatives. Thirdly, and relatedly, it has introduced ethical considerations into matters of judicial deliberation making it more difficult to separate law and morals in the tradition of legal positivism. Fourthly, the moralisation of the law has meant that political critique can no longer appeal to a non-judicial standard, but must come from within the law.

1.3 THE CHANGING LEGAL FRAMEWORK

In the previous section, I have argued that medical law is not a static discipline but one that has been characterised by dynamic change. Its existence as a discrete legal topic is inseparable from the development of an ethically-loaded medical jurisprudence. Since the 1980s these changes have occurred in the context of important institutional developments in the framework of the law, in particular the development of common law, the influence of statute, and the incorporation of the provisions of the ECHR. It is proposed that these legal regimes each represent specific forms of rationality, that is, particular methods of normative legal reasoning mediated through specific institutional operations, informed by distinctive traditions of moral and political order. It is further proposed that what distinguishes these specific rationalities can partly be captured in terms of the kinds of constraint on the otherwise whimsical judicial decision-making they represent, respectively, common law precedent, the democratic will expressed in statute, and fundamental ethical values embedded in human rights law. These legal regimes need to be discussed in turn.

1.3.1 Common law and the doctrine of precedent

The common law represents a distinct form of legal rationality characterised by its inductive commitment to the authority of precedent, its attention to facts and human experience, and its *remedial* character. It is a complex historical product of English parentage but whose offspring constitute a distinctive legal family throughout the world, e.g. Australia, Canada, India, Israel, New Zealand and the United States (Goff, 1987). It contrasts with the systems of law typical of the European continent

in its largely uncodified make-up and the centrality of judges, as opposed to jurists, or law professors, in the formulation of law. Within England's (UK) unwritten constitutional settlement, English judges have power to make law without statutory authority; the notion that the judiciary merely 'declares' the law is widely-regarded as an outmoded constitutional fiction (Dworkin, 1986).

The common law has emerged out of judicial resolutions of countless concrete cases. Accordingly, it can be argued that it has acquired an intelligible relationship to 'real-life' and thus public support. Unlike the appeal to abstract principles typical of codified systems on the continent, common law is steeped in the facts and circumstances of particular cases off the back of which legal propositions are enunciated (i.e. inductively). Common law is argued law, and therefore 'tough law', in which judicial ideas are formed through "the purifying ordeal of skilled argument on the specific facts of contested cases" (Lord Justice Megarry in *Cordell v Second Clanfield Properties Ltd* [1968] 3 WLR 864 at 872). Foster (2009) has contended that practising lawyers:

> …tend to think that if a solution has been shown for quite a long time to work, that is a fairly good reason to adopt it, unless a compelling case is made for an alternative (2009: 4)

Glenn (2007) has characterised the rationality of common law as 'interstitial', "rooted in a contextual tradition' moving 'within existing principles and categories without imposing conclusions broader than those already and explicitly authorised" (2007: 38).

At common law, judges' decisions are preserved as records (in law reports) and it is the established rule to work with these when the same points arise in litigation. This forms the basis of the distinctly English common law doctrine of *stare decisis* ('let the decision stand'). According to this, judges are 'bound' by previous decisions of a higher court if its rationale (*ratio decidendi*) is applicable in the instant cases (i.e. binding precedent). Where in the course of a decision a judge enunciates a proposition of law which is not directly relevant to the final outcome, it is considered ancillary. Such *obiter dicta* have 'persuasive' rather than 'binding' authority. Distinguishing the *ratio* from *obiter* statements is an interpretative rather than algorithmic process and raises profound questions relating to the nature of common law and the common law process.

There is a large literature attempting to conceptualise the process of common law and the nature of its authority (e.g. Holmes, 1881; Weinreb, 2005; Duxbury, 2008). Brandom has made a lucid philosopher's contribution. He has argued that an "essential feature of the common law model is the symmetry between retrospective and prospective perspectives" (Pritzlaff, 2008: 368; cf. Brandom, 2002). Rather, Brandom states that the judge must:

> retrospectively rationally reconstruct the tradition as progressive, so as to reveal within a trajectory that he can construe as the gradual revelation, the gradual unfolding into explicitness, of principles that can be seen retrospectively to have been implicit all along (Pritzlaff, 2008: 368).

Brandom identifies a "complex diachronic recognitive structure" in the common law model:

> …where a judge makes himself responsible to previous judges and to future judges, but also exercises a kind of authority over both the past judges whom he interprets and the future judges who are bound by the precedent that his decision establishes … (Pritzlaff, 2008: 369).

It is widely accepted amongst practising lawyers that the case law does not supply an algorithm which the judge applies mechanically to the cases before him but rather seeks a *post-hoc* legal and ethical justification for the decision he has made (cf. Foster, 2009).

Another distinguishing feature of the English common law system in contrast to civil law systems is its 'remedial character'. Citizen freedoms exist 'negatively' and only come to light when infringed and judicially remedied, or abridged by statute. They are residual, rather than 'positive' entitlements, which are allowed to exist unless prohibited. Klug (2000) has written that not:

> Even many lawyers tend to appreciate the crucial distinction between our [English] legal system characterized by unwritten liberties and others based on written rights. The terms 'human rights' and 'civil liberties' have been used interchangeably over the years. There has been little awareness of the increasing weight given to the values of dignity, community and equality in post-war human rights thinking, for example (2000: 6).

The common law judiciary have made a fundamental contribution to the common law constitutional tradition of negative civil liberties. The constitutional historian Dicey (1902) has argued that:

> …the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us as a result of judicial decisions determining the rights of private persons in particular cases brought before the courts (1985: 188).

Thus, the common law tradition of legal rationality is distinguished by its largely inductive, interstitial, and negative character. It is 'mosaic' rather than 'architectonic', focussing on particulars until patterns (i.e. legal rules and principles) emerge which give shape to the law.

1.3.2 Statute law and the sovereignty of Parliament

Apart from European Union law, legislation is the highest source of English law and overrides the authority of case law where it overlaps. Legislation (or statute law) derives from the legislature which in the UK is the Queen in Council in Parliament. Its legitimacy emanates from parliamentary sovereignty and popular mandate, arising out of the political process, as opposed to rules and principles mined from myriad 'real-life' cases. The Victorian constitutional historian Dicey (1902) observed that, with English lawyers, it was a fundamental principle that Parliament could do everything except change human nature. The quote is apt to convey the force of the traditional doctrine of parliamentary sovereignty, but sounds somewhat ironic with the benefit of hindsight. In the case of *Goodwin v. UK* ([2002] IRLR 664), the ECtHR held that in denying legal recognition to the applicant's transgender status the UK had breaching her rights under Articles 8 (right to privacy) and 12 (right to marry) of the ECHR. In response, the UK Parliament passed the Gender Recognition Act 2004 which enables transsexuals to apply to a Gender Recognition Panel for a certificate recognising their change of gender.

Under the doctrine of the separation of powers and legislative supremacy, Parliament has authority to infringe even the most basic of human rights (Slapper and Kelly, 2006). Van Caenegem (1987) has stated:

> The theory of parliamentary sovereignty, i.e. that Parliament is an absolutely sovereign legislature, is built on two pillars. The first is that no parliament can bind a future parliament or be bound by a previous one. There are no laws that parliament cannot make or unmake and no consideration of morality or natural law can prevail against a clear statute emanating from Westminster. The second is that no judge can condemn a law and refuse to apply it on the ground that it is incompatible with the constitution or the fundamental principles of the common law; that would be a usurpation of the legislative function by the judiciary (1987: 21-22).

Statutes have become the most prolific source of English law, with approximately seventy-five per cent of judicial business taken up with matters of statutory interpretation. Zander (2004) has observed that while the number of statutes enacted in any parliamentary session has not greatly increased in the last hundred years, their length has done so, e.g. in 1901, 40 statutes totalling 247 pages, in 1991, 69 statutes totalling 2,222 pages.

The role of the judge is to interpret statute in order to give expression to the will of Parliament. How the will of Parliament is discerned is a debatable point of constitutional significance. Over the last hundred years or so, the judiciary have developed principles of statutory interpretation. Broadly speaking, in interpreting statutes, English judges have either looked for the surface meaning of the words (the literal approach), or, if ambiguous, beyond the literal meaning for Parliament's true intent (the purposive approach). Barak (2008) has argued that the interpretation of

statutes is more than an exercise in textual analysis. He contends that when the judiciary interpret a statute they seek to balance what the authors of the statute intended with the fundamental values embedded in the legal system. In his view, the will of Parliament is a judicial-constitutional construct which requires of judges learned conjecture as to what a democratic parliament intended to achieve through the enactment of the statute.

Barak (2008) distinguishes between the 'letter' and the 'spirit' of a statute. The interpreter's aim is to give 'life' or 'spirit' to legislative provisions so as to achieve the statute's social objectives. Where a statute is new, narrow and domain-specific, (e.g. licensing statutes) greater weight is normally given to the original intentions of the legislators (the statute's subjective purposes). Where, however, a statute is older, wider and more comprehensive, greater emphasis is usually placed on giving the statute a 'reasonable' interpretation which takes into account the values of the legal system (its objective purpose). Accordingly, when judges interpret statutes, they are required to strike a balance between the statute's subjective and objective purposes. A useful (and relevant) example of this process is the MCA 2005.

1.3.2.1 Mental Capacity Act 2005 (MCA)

The Mental Capacity Act 2005 (MCA) is a good illustration of a statute which, in Barak's terms, calls for balance between subjective and objective interpretation. The MCA is one of the most important medical law statute enacted in recent times. As a statute, it is the product of parliamentary process and rationale. Although it is new, it is wide-ranging and has something of the character of a 'code'. The Act is the product of extensive research, reflection and public consultation, including a Law

Commission Report (Law Commission, 1995), a Government Policy Statement (Lord Chancellor's Department, 1999), and extensive pre-legislative scrutiny. It provides a framework of protection and support for those who are unable to make decisions for themselves for reasons of impaired capacity and a structure for those who are required to make and implement decisions in relation to them.

The 'spirit' of the Act is evident in a list of governing principles set out in section 1, inviting a broad purposive approach to its interpretation. In particular, section 1(3) stipulates that 'a person is not to be treated as unable to make a decision unless all practicable steps to help him have been taken without success' and section 1(6) that:

> Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

The principles of support and enablement have a practical impact on the determination of a person's capacity. In section 3 (2), the MCA provides that:

> …a person is not to be regarded as unable to understand the information relevant to the decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids, or any other means).

The practical spirit of support and enablement applies also to the assessment of a patient's best interests (section 4). Section 4 (3), (4) states:

> [The decision-maker] must consider …whether it is likely that the person will at some time have capacity in relation to the matter in question, and … if it

> appears likely that he will, when that is likely to be… [The decision-maker] must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

The Act invites a broad, purposive approach to its interpretation and a flexible judicial construction of parliamentary intent based on the fundamental values embedded in the legal system. What those fundamental values are is debatable, but it is noteworthy that the MCA, which, amongst other things, enshrines common law principles relating to mental capacity and best interests, albeit with important updates and modifications, is drafted to meet the UK's positive obligations under the European Convention on Human Rights. In particular, interference with the patient's Article 8 (right to privacy) rights in pursuit, of the principles under section 1, the incapacity criteria (section 2 and 3), and the best interests 'checklist' (section 4) is legitimate under that Act provided it is proportionate.

The distinctive form of legal rationality embodied in legislation is principally characterised by its commitment to the authority of Parliament and giving authoritative expression to the sovereign parliamentary will through processes of statutory interpretation. Tuori (2011) states that:

> …the legislator is guided by a specific rationality: instrumental rationality, which conceives of the law as a means to achieve the legislator's political goals. What constitutes the problem with such a view of legislative *voluntas* is not a lack of rationality but rather its truncated nature… Here, democracy alters the situation, at least potentially, by sensitising the lawmaking procedure to such discourses within civil

> society where even the ethical and moral aspects of legislative issues are addressed (2011: xii).

Thus, the Act is the confluence of three legal 'rationalities': the common law background of legal capacity; the European Convention and the fundamental ethical values of privacy, dignity and autonomy; and statute law, and the intentions of Parliament. The European Convention on Human Rights – the third legal regime – is where we now turn.

1.3.3 European Convention on Human Rights (ECHR)

The European Convention on Human Rights (ECHR) was signed in 1950, entered into force in 1953, and, by Article 1, enjoins that ratifying national governments "shall secure to everyone within their jurisdiction the rights and freedoms" described by the Convention (Tompkins, 1997). The ratification of the ECHR by the UK government did not have the effect of making it part of UK domestic law, even though it could be seen as indicating what the law of the country should be, or interpreted as being (Gearty, 1997). It came fully into force in English (UK) law in October 2000 through the Human Rights Act 1998 (HRA). Consequently, England's public law obligations under the Convention can now be directly considered by English judges in cases where the Articles of the Convention are engaged. It means that litigants can obtain remedies for breaches of their human rights in the English courts without the need for a lengthy journey to the European Court of Human Rights (ECtHR) in Strasbourg. It also signifies that English judges can now directly contribute to the growing jurisprudence of the ECtHR and thus its 'authority'.

By having ratified and incorporated the ECHR, England (UK) has, in addition to European Community Law and the European Court of Justice, opened up another avenue for civil law influence on the common law tradition. Burton & Carlen (1979) have drawn a distinction between the rational, theoretic traditions of the continental civil law tradition and the distinct customary origins and rationale of English common law. Civil law is based on codes, rather than cases, and the authority of jurists (i.e. law professors) rather than judges. It represents a different method of legal thinking based on the development of abstract principles which are applied to cases by a process of 'subsuming', i.e. the cases are incorporated under a more general principle. The approach is logical rather than historical. It seeks to anticipate and solve problems in advance rather than addressing them as and when they arise. According to Glenn (2007) law, on this model, is 'reason's instrument' in which deductive thought follows syllogistic logic. Doctrine, and its associated dogmatic conceptual constructs, has priority over jurisprudence, rather than the contrary as with common law.

A significant consequence of the incorporation of the Convention into English law is its impact on the doctrine of precedent. When considering the meaning of the Articles of the Convention, the English courts are not bound by previously binding authorities in the area of overlap. Instead, the courts have a duty to consider the decisions of the ECtHR (section 2 of the HRA), although, as with domestic case law, they are not bound by them. Moreover, it is unlawful for the courts which are 'public authorities' for the purposes of the Act (section 6) to act in way incompatible with the Convention. Previously binding domestic case law and the case law of the

ECtHR may, nevertheless, have ‘persuasive’ authority when the courts are interpreting the provisions of the Convention.

Another consequence of the development is its impact on the ‘negative’ character of the common law. The common law constitutional tradition of ‘negative’ liberty understands law in basically permissive terms: ‘liberties’ are expressed as ‘negative rights’, what is left over after all prohibitions are accounted for’ (Dicey, 1902). On this version, the function of the law was essentially remedial: to restore a person to the position he would have been in but for the unlawful infringement of his negative freedom. This largely unwritten constitutional tradition is, some argue, giving way to ‘a new British constitution’ (Bogdanor, 2009) in which citizens have positive entitlements, enshrined in writing in the European Convention, which are matters of direct judicial interpretation, regardless of parliamentary evaluation. The English legal system is now, on this view, subject to a ‘higher law’ (European human rights enshrined in the Convention), which affects all other laws by subjecting them to a set of basic values.

Another significant consequence of incorporation is its effect on the interpretations of legislation and, more broadly, its implications for the doctrine of parliamentary sovereignty and judicial review. The courts are now obliged “in so far as is possible” to interpret statutes in a manner compatible with the ECHR, regardless of the intention of Parliament (section 3 of the HRA). Where the provisions of the ECHR and statute cannot be reconciled, the courts are empowered to issue a “declaration of incompatibility” which Parliament has discretion to remedy (although it is not obliged to do so) through an expedited parliamentary procedure (section 4). The

English courts do not have (or have not yet arrogated to themselves) the powers of 'constitutional' courts (e.g. the American Supreme Court) with power to 'strike down' legislation deemed incompatible with the written tenets of the relevant Constitution.

Thus, the Human Rights Act 1998, through its incorporation of the Convention, has modified the traditional approach to common law precedent and legislation in significant ways, engendering change in the legal and, it is proposed (see below), moral and political ecology of the UK. The Act enjoins that case law and statute must be decided, enacted and interpreted in a manner consistent with individuals' human rights under the Convention.

1.4 TENSIONS BETWEEN BODIES OF LAW?

The incorporation of the Convention by virtue of the Human Rights Act 1998 (HRA) has extended to English judges authority to determine cases arising under the European Convention on Human Rights. English judges can now supposedly protect, promote and uphold fundamental human rights directly, rather than waiting for the Strasbourg court to make a decision under the Convention which the English Courts are then bound to follow. The impact that the ECHR is making, or should make, to traditional judicial reasoning is a matter of debate amongst the most senior members of the judiciary.

Sumption (2011) is sceptical about the notion of universal human values that can be applied uniformly throughout the forty-seven states that have ratified the European

Convention. Rights, he argues, find their grip in the context of the values of the particular communities in which they are claimed and "depend for their legitimacy on a measure of recognition by that community." He states that:

> …collective values are the product of their particular culture and history…The Strasbourg Court has treated the Convention not just as a safeguard against arbitrary and despotic exercises of state power but as a template for most aspects of human life. The problem about this is that the application of a common legal standard breaks down when it is sought to apply it to all collective activity or political and administrative decision-making. The consensus necessary to support it at this level of detail simply does not exist (2011: 13-14).

In the context of his 'communitarian' construction of human rights, Sumption is determined to uphold the sovereignty of Parliament and to restrict judicial review to proper scrutiny of executive action rather than contentious review of the merits of legislation or executive policy. He contends that in a number of cases "the presumption that Parliament cannot have intended to authorise the decision in question is distinctly artificial." Part of the problem, he argues:

> …has been that the judiciary and the executive are looking at the issue from different ends of the telescope. The judiciary's instincts are moulded by their experiences of individual cases, many of which have involved profound human tragedies to which no judge could be indifferent. By comparison, politicians, policy-makers and electors are primarily concerned by the problem viewed impersonally and en masse.

Sumption's conservative approach to the relationship between the courts, legislation and European Convention contrasts with the views of some of his colleagues on the

Supreme Court. Lord Hope contends that human rights have now become matters of judicial, rather than parliamentary evaluation, stating that it was:

> …now plain that the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary (*R v. DPP ex p. Kebeline* 3 WLR [1999] 972 at 988).

The advent of the ECHR has raised the prospect of a potential clash or tension within the highest ranks of the judiciary over the nature of the judicial role at the intersection of law, morality and politics.

The impact of the ECHR on English law is also a matter of debate amongst academic lawyers and political scientists. Loughlin (2003) has argued that the legal institutionalisation of (human) rights has led to a shift in the function of the law from defining negative constraints on liberty, beyond which the citizen is free to do as he pleases, into means of maintaining freedom, in which large tracts of the lives of rights-bearing citizens are brought within the bounds of 'law's empire': "Liberty is no longer the sphere of individual autonomy beyond the constraints of the law; liberty must now be defined by the operations of the law" (2003: 128).

Campbell (1999) contends that judicial interpretation of the HRA may well involve more than resolving ambiguities in the Articles of the Convention through traditional methods of statutory interpretation. Rather, it "may involve creative concretizations of vague statements in order to give justiciable meaning to those statements, a process with goes far beyond resolving ambiguities" (1999: 23). Indeed, the judiciary may need to determine whether there are ambiguities to be resolved in the

first place. They may be required to consider the intentions of those who sought to give meaning to the form of words contained in the Convention, and this may have an impact on how the judiciary read and interpret domestic statutes which might otherwise appear, on the face of them, quite clear. Judges may be constrained to interpret them in accordance with the ethical and democratic values lying at the heart of the Convention. This might in turn encourage judicial activism of a kind that would push the development of the common law into areas of public policy development that would formerly have been regarded as a matter for Parliament alone.

Bogdanor (2009) maintains that one consequence of the Human Rights Act is that individual rights will be derived from the "principles of the Constitution", rather than the decisions of the courts. He states that:

> Following the passage of the Human Rights Act, judges are now entrusted with interpreting legislation in the light of a higher law, the provisions enshrined in the European Convention of Human Rights (2009: 63).

This 'new Constitution' represents an important qualification of the principle of parliamentary sovereignty. This is so even though the British courts, unlike their American counterparts, lack constitutional authority to strike down legislation. Under section 4 of the Human Rights Act, they can only make declarations of incompatibility. The former Law Lord, Lord Steyn, speaking extra-judicially, has stated (Bogdanor, 2009: 64):

> In the development of our country towards becoming a true constitutional state, the coming into force of the

> Human Rights Act 1998 …was a landmark….By the Human Rights Act Parliament transformed our country into a rights-based democracy. By the 1998 Act Parliament made the judiciary the guardians of the ethical values of our bill of rights.

Loughlin (2003) has observed that the incorporation of the ECHR has given the English judiciary a direct means of turning basic ethical and political values into rights-claims. Klug (2000) contends that the ECHR has introduced "a set of ethical standards essential to creating a decent society, to providing people with the contours of a value system by which to lead their lives" (Klug, 2000: 6). Bogdanor (2009) argues that under the HRA, the judiciary are bound to become more political because it "now has responsibility of interpreting legislation to determine whether it is in accordance with the rights outlined in the Act" (2009: 65). The judicial, rather than the political, sphere has become the preferred context for the advancement of human rights claims.

This, according to Veitch (2007), is having a paradoxical result. While giving legal effect to Convention rights has supposedly politicised the law, it has, in reality, depoliticised it, because human rights no longer represent an external moral and political standard against which the law itself can be judged. Rather, the rights outlined in the HRA have been 'positivised' and 'institutionalised'; they encapsulate rules and principles which have become subject to "familiar methods of legal reasoning" (Veitch, 2007: 112). He contends that:

> Confronted with the task of assessing the compatibility of both statutes and common law with human rights provisions, the judiciary has overwhelmingly sought to delimit the 'political' nature of their new function by

> deploying traditional techniques of legal reasoning – for example a concern to respect legal precedent – to resolve cases, and by stressing the need for a restrained judicial role (2007: 114).

This, for Veitch, would not be a problem if the fundamental moral values enshrined in human rights were transparent to the judiciary, obviating the need for public discussion of those norms. However, the existence of shared epistemological foundations is too highly contested to justify the restriction of judgements about fundamental human values to the courts..

In the new legal ecology brought about by the direct introduction of human rights law into England, judges can move in one of two directions: either towards judicial activism, with a more pronounced ethical and political role; or judicial conservatism which favours traditional techniques of judicial reasoning and seeks to apply those to the European Convention

1.5 ORGANISATION OF THE THESIS

This investigation was initially led by the proposition that the judiciary was using, understanding and interpreting the concept of autonomy in various ways in complex medical law cases. This initial interest in the variations of judicial decision-making on autonomy led to the preliminary conjecture that these variations reflected the influence of the academy. Further examination of the concepts used in the jurisprudence and the academic literature disclosed regularities of particular usage leading to the provisional conclusion that the influence of the academy was the appropriate object of study.

However, as a result of wider reading in medical and public law, bioethics and political philosophy a level of uncertainty has emerged as to how interpretation of the initial object of enquiry was to be developed. The implication of legal transformations in the bodies of law has invited a reassessment of the principal influences on judicial decision-making on autonomy. The proposition that the incorporation of the European Convention on Human Rights into UK law has introduced fundamental tensions between bodies, or traditions, of law has suggested a broader canvas of study, encompassing the academy as well as traditions of law. This is illustrated in certain quarters of the judiciary through the promotion of, and resistance to, human rights-based constructions of autonomy.

An interactive relationship with the data bases of the study which this introduction implies led to recognition of the value of a grounded theory approach to the methodology of this thesis. The salient order in the presentation of this thesis is methodological, rather than conceptual. This research has been a study, in three stages, of the emerging formation of the ethical language of autonomy in judicial decision-making in ethically-contentious medical cases. The justification for this methodological account of the research process is the relative economy with which the main components of the thesis can be assembled and exhibited and the avoidance of untidy duplication of content and argument. Moreover, this organising principle allows for a thesis structure which incorporates analysis of the jurisprudence and the literature in a way that reflects the iterative character of the research. As the object of study changes, the use of the law reports changes from an internal unit of analysis (vocabulary) to an external contextualizing of a case in time in a legal context.

Chapter 1 has set out the contemporary context within which medical jurisprudence has been constituted and developed. It has drawn attention to the transformed legal, social context and political context within which medical law and jurisprudence has emerged. In particular, it has differentiated the roles and processes of three distinct bodies of law and highlighted the complexity of their interaction. These developments supply the indispensable framework within which questions of autonomy are being addressed by judges in the medical law context.

Stages of enquiry	**Research questions**	**Method and data bases**	**Mode of Analysis**
Object 1 **PROBLEMATIC MEANINGS** **Judges use and interpretation of autonomy**	(RQ1) Do judges use the concept of autonomy? (RQ2) Do judges express a variety of uses of autonomy? *[Judges are intuitive in their use]*	Content analysis of Law reports [*The unit of analysis is the vocabulary/language of the reports)*	*Semantic analysis* of (elemental) meanings in judges decisions
Object 2 **PROXIMATE INFLUENCES** **Dimensions of analysis**	(RQ4) Is there evidence of an influence of the Academy in judicial decision-making? *[The Academy is influential}* (RQ3) Analysing patterns of variation	Literature review Mapping cases in time	*Hermeneutic analysis* of continuity of meanings and interpretations of autonomy in legal and academic literature *Diachronic and synchronic analysis*
Object 3 **UNDERLYING INFLUENCES** **The role of traditions**	(RQ5) Are judges' decisions influenced by traditions (legal, and socio-political)? *[There is likely to be a clash of traditions]*	Literature review of background changes in jurisprudence; Literature review of autonomy Juxtaposing sample cases *The unit of analysis is the report as a case in time in legal context*	Examination of *inferential relations* between use of autonomy and (a) traditions of law, and (b) moral and political traditions *Critical realism*

Figure 1.1 Summary of the plan of research investigation

Chapter 2 grounds the research enquiry and design setting out the principles and practice of grounded theory in this research

In Chapter 3, the first stage of the enquiry (*Cycle 1*) is addressed to the initial problematic of the thesis, namely what uses of autonomy, and variety of use, judges express in the research sample medical law reports. In Chapter 3, a semantic content analysis of elemental uses is undertaken, setting out to establishing what concepts are used and what relations they have with usage in the academic literature. At this stage, the 'surface' vocabulary and language of the reports is the main unit of empirical analysis.

In Chapter 4, the second stage (*Cycle 2)* develops the initial object of enquiry through an investigation into the meanings and interpretations judges give to their uses of autonomy, which semantic analysis alone is unable to disclose. Through hermeneutical enquiry, the thesis sets out to analyse how the judiciary use the concept of autonomy and to trace the continuity of meanings and interpretations of autonomy in both the law reports and the literature.

In Chapters 5 and 6, the third stage of critical realist research enquiry sets out in search for an explanation why judges use the concept of autonomy as they do. Through inferential analysis, it examines the relationship between judicial uses of autonomy and underlying legal moral and political traditions. The existence of a structural relationship between the law reports and the role of traditions is pointed to by the literature reviews of background changes in jurisprudence (Chapter 1) and literature reviews of autonomy (Chapters 3 and 4).

In Chapter 7, the outcomes of the research are discussed and the emergent theory (to be tested in further research) is discussed. It is contended that the emergent theory which has developed through iterative cycles of enquiry of the data is that the judges have been developing a community of practice which over time has elaborated a sophisticated ethical language of autonomy. In this connection judges have been mediating the influence of different legal traditions, informed by wider traditions of moral and political order, and, in doing so, constituted a new practice of medical jurisprudence.

This thesis hopes to make a contribution to public philosophy, medical jurisprudence and social science.

PART 1

GROUNDING THE RESEARCH ENQUIRY AND DESIGN

CHAPTER 2

GROUNDING THE ENQUIRY

2.1 INTRODUCTION

In Chapter 1, the emergence of medical law from its heterogeneous origins in various branches of private law into the realm of public law was considered in the context of background changes in public law and jurisprudence, in particular the incorporation of the European Convention on Human Rights (ECHR) and its implications for English common law based on precedent. These developments provide the legal setting within which the investigation into judicial uses and interpretations of autonomy is to be undertaken. In this chapter, the principles on which the empirical enquiry into the law reports will be undertaken – the principles of grounded theory - are expounded – leading in Chapter 3 to the explication of the application of these principles to the law reports as part of a first cycle of empirical enquiry.

There has been a dearth of qualitative investigation of legal material and little has been written about the reasons for this. In spite of early advocacy of empirical legal

research by the Americans, Pound (1910) and Holmes (1920) there has been little of this undertaken on judicial decision-making and existing research generally consists of quantitative analyses involving the application of statistics to large bodies of law. A famous example is Landes & Posner's (1987) classic study of the economic structure of the law of tort. Hall & Wright (2008) identified only one example of a qualitative study (Fradella et al, 2002) based on case analysis. They suggest that the main reason for this lack of qualitative and quantitative research is the legal professions' often dilettante approach to inter-disciplinary enquiry and consequent failure to find its "own unique empirical method" (2008: 63). The only qualitative content analysis of English law reports of which I am aware is an unpublished PhD thesis by Nicole Westmarland (2005).[1]

Traditional legal analysis often employs comparatively unsystematic forms of case analysis. Academic lawyers tend to draw on cases that suit their academic purposes. Hall &Wright (2008) observe:

> Interpretive legal scholars present the cases that interest them, often with no discussion at all about where they found the cases or why they selected them over other candidates for discussion. The reader depends on the author's judgment about which cases are worth reading, which are the "leading cases" that best illustrate the historical moment in question. In contrast, a purposive selection of law reports, and the application of procedures of qualitative analysis, promises more systematic methods of ascertaining documentary themes (2008: 79).

[1] Dr Westmarland informed me privately that her research also revealed a dearth of empirical analysis of law reports.

This work seeks to contribute to the development of rigorous investigation of law reports by applying to them for the first time the methodology of grounded theory. The task of this chapter is to describe the principles of the methodology grounding the enquiry and the method that will guide the research investigation.

2.2 THE PRINCIPLES OF GROUNDED THEORY

The 'discovery' of grounded theory (GT) by Glaser & Strauss (1967) and its subsequent development (Strauss & Corbin, 1998), offers a powerful theory-generating qualitative research methodology, and method of collecting and analysing data (Corbin & Holt, 2005; Allan, 2003). GT was first formulated as a reaction against detached, positivist, approaches to the investigation of the social world, promoting fieldwork and viewing theory as a property of the data gathered. Perhaps GT's most distinctive feature is its rejection of pre-defined theoretical formulations in favour of methods of data comparison. This involves procedures of theoretical sampling with a view to generating and developing, as opposed to testing, theory. Accordingly, it falls within a broader family of theorising known as 'analytic induction' which is designed to be more reflective of practical situations than speculatively derived theory (Glaser & Strauss, 1967; Pole & Lampard, 2002; Corbin & Holt, 2005). The constant interaction between data and ideas works to develop two layers of theory: first, as explanation and interpretation of the data field and second, as clarifying any underlying presuppositions about the objects of enquiry (ontology) and how they are to be known (epistemology). These will be discussed in turn.

2.2.1 Grounding theory, interpretation and explanation

Bryman (1988) develops a processual account of the practice of grounding theoretical analysis and explanation. The practice works in two cycles: *Cycle 1* deals with posing preliminary research questions and *Cycle 2* with their further development. *Cycle 1* involves acquiring knowledge of the context of the question, through theoretical sampling; getting to know the data through collection; and grounding concepts in the data. This entails interaction between ideas and data, using coding procedures, developing concepts and categories, submitting them to constant comparison, and exploring relationships between categories. These procedures reflect the distinctively iterative approach of GT in which data collection and data analysis occur in tandem constantly referring to each other (Bryman, 2004). This feature, along with data-derived theory, distinguishes GT from other research methods.

Cycle 1 begins with a basic orientation towards the field of investigation in the form of a general question (See Figure 2.1). This preliminary orientation provides the impetus for collecting data that will help to develop understanding of how the research question is to be interpreted and explained, that is theorised. Glaser and Strauss (1967), cited by Bryman (2004), defines this practice as theoretical sampling:

> …the process of data collection for generating theory whereby the analyst jointly collects, codes, and analyzes his data and decides what data to collect next and where to find them, in order to develop his theory as it emerges. The process of data collection is controlled by the emerging theory, whether substantive or formal. (Bryman, 2004: 305).

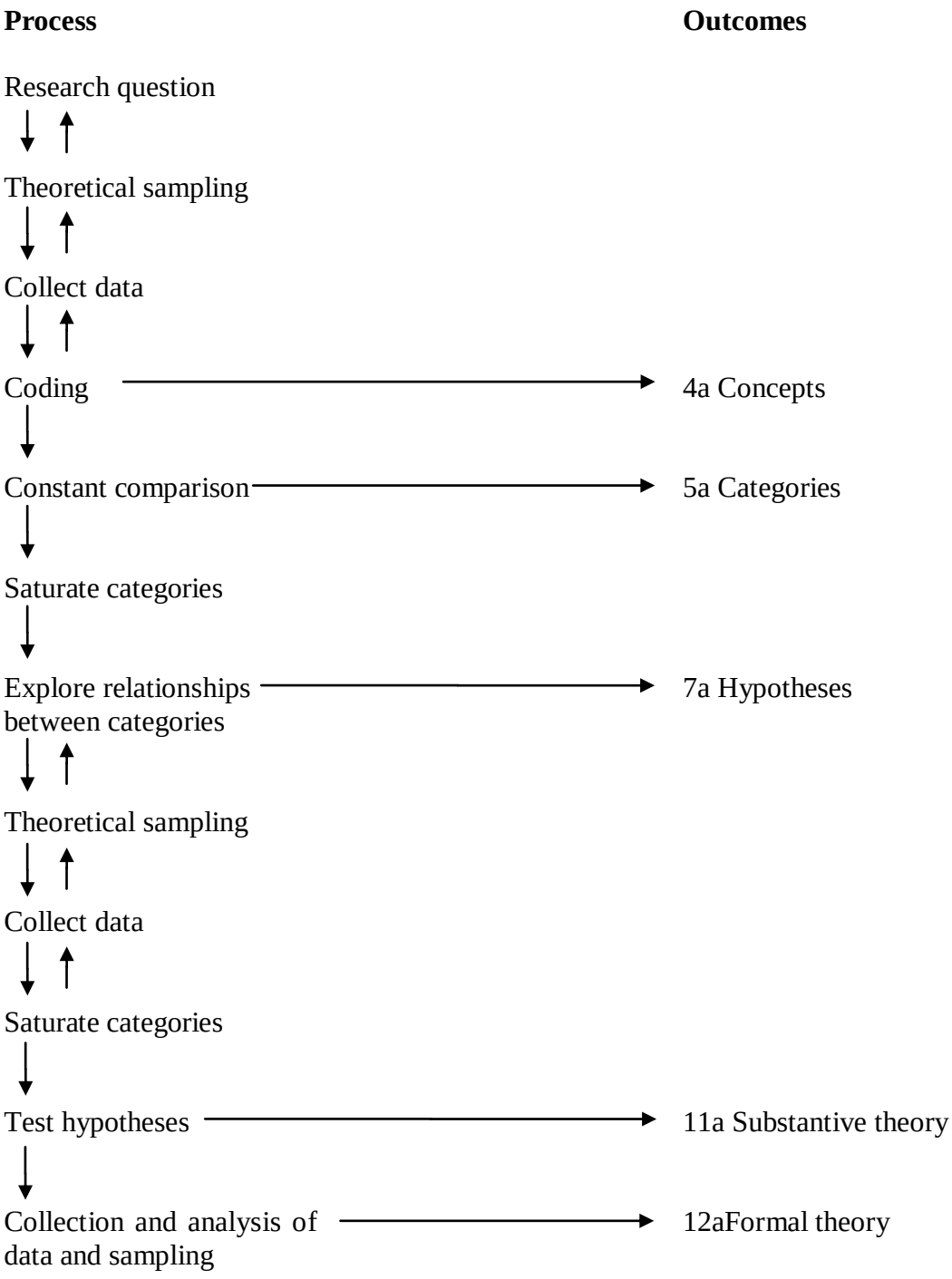

Figure 2.1 Processes and outcomes in grounded theory (taken from Bryman, 2004: 404 (Figure 19.2))

The aim of this stage is to identify the concepts, and to hypothesise relationships between them, in order to generate theory. This should be understood not as a theoretical formulation to be applied to an investigation, but the interrelated set of ideas and propositions which emerge from the investigation to provide a unique explanation of the object of enquiry.

Knowing the context of the research is the first stage of *Cycle 1*. The next stage, according to Bryman, is to obtain knowledge of data, which can only emerge through its analysis as part of an iterative process. GT offers a number of practical strategies enabling the researcher to become familiar with his otherwise intractable data. These initial ideas can be drawn from a multiplicity of sources, e.g. data bases, literature, media, public discourses, reflection on public cases, preliminary interviews and discussions.

The concurrent processes of data collection, analysis and coding are designed to obviate the contentious and unrealistic procedures of, on the one hand, merely displaying the data, devoid of intellectual engagement, and, on the other, identifying a hypothesis at the outset of the research, testing it through the collection of data, and then transmuting the hypothesis into theory if the data confirms it. Rather, the processes of GT (coding, conceptualisation, categorisation etc.) are designed, through engagement with the data, to initiate reasoned movement through levels of abstraction in the direction of theory-development.

This recursive relationship between the research question, and the processes of data collection, coding and conceptualisation, provides the dynamic for the process of

constant comparison, a key feature of GT method (e.g. Strauss and Corbin, 1998; Bowling and Ebrahim, 2005; Corbin and Holt 2005). According to Glaser and Strauss (1967) this feature of the research process is the principal means of maintaining intimacy between researcher, data, and the process of conceptualisation. Bryman describes this part of the process as:

> …constant movement backwards and forwards between [the research question, theoretical sampling, data collection and coding] so that early coding suggests the need for new data, which results in the need to theoretically sample, and so on. (Bryman, 2004: 404)

It is this idea of honing by constant comparison, continuing until the level of 'data saturation' is reached, i.e. repetitions of theoretical relationships already discovered, leading to intensified 'theoretical sensitivity' of researcher to data, which distinguishes GT (Glaser, 1978; Bowling and Ebrahim, 2005).

Coding plays a crucial role in the process of data analysis. According to Bryman (2004) coding in qualitative research is a method of breaking up data into components which are then given names. Strauss and Corbin (1990) identify three different kinds of codes that can be used in the early stages of data analysis: respectively, open, axial, and selective coding. These three steps in the coding process broadly correspond to Pole and Lampard's (2002) descriptive, interpretative and explanatory coding stages. Open coding is the initial stage in data acquisition, so-called because it aspires to be an 'open-minded' procedure for developing categories of information. Strauss and Corbin 1990 describe it as "the process of breaking down, examining, comparing, conceptualizing and categorizing data"

(1990: 61). Axial coding is the next stage and is a means of interconnecting the codes and the categories obtained, "a set of procedures whereby data are put back together in new ways after open coding, by making connections between categories" (1990: 96). Selective coding is the final stage in the sequential series and is a procedure for selecting the particular codes and categories, including the core category or categories, as a way of identifying what is central to the explanatory framework being developed.

Bryman (2004) similarly uses 'categories' to represent the more general and selective way of understanding the phenomenon of interest. Categories are elaborated concepts, or subsumptions of two or more concepts, which constitute representations of real-world phenomena. Categories represent a third level of abstraction, higher than concepts. A category may become a core category, around which other categories can gather, and to which they are related. A core category has been called the 'storyline' that frames the research (Strauss and Corbin, 1990; Bryman, 2005). The identification of a core category is the result of an exploration of relationships between categories, leading to a hypothesis, a hunch about relationships between concepts.

The completion of this stage leads to *Cycle 2* in which the processes of *Cycle 1* are repeated, leading to the testing of hypotheses, and the generation, or development of theory. This may involve further research, e.g. re-reading documentary material, to refine categories. Bryman distinguishes substantive from formal theories; the former applying to substantive areas or empirical instances; the latter applying at a higher level of abstraction embracing a range of substantive areas.

Thus, GT's distinction as a research methodology, and set of procedures, is its capacity to distil the object of research and to generate, iteratively, the specific theoretical propositions with their higher and lower levels of conceptual abstraction, which serve to provide the necessary interpretation and explanation.

2.2.2 Principles of reliability, replicability and validity

It is important for consumers of research to have confidence that a study has been undertaken with rigour and that the finding that can withstand public scrutiny. Yet researchers differ about which procedures are appropriate for studies of the social world. Bryman (2004) sets out three criteria for assessing the quality of research: reliability; replicability; and validity. Reliability is concerned with whether the results of a study are repeatable, stable and consistent. Two forms are identified: internal reliability and external reliability. Internal reliability refers to inter-observer agreement about what is seen and heard; external reliability refers to the degree to which others can repeat these observations. Replicability refers to the reproducibility of the results of research. Validity is concerned with the integrity of the conclusions. Two forms of validity are identified. Internal validity inquires whether conclusions follow from the research, independent variables explain variation, and the theoretical ideas developed follow from the researchers' observations.

2.2.2.1 Alternative criteria for evaluating qualitative research

Some researchers (e.g. Silverman, 2000) argue that it is not possible to follow the procedures used in the natural sciences and call for criteria that are appropriate for qualitative studies of the social world. These have been developed by Lincoln &

Guba (1985) and Guba & Lincoln (1994) who propose two principle criteria of trustworthiness and authenticity. Trustworthiness includes:

2.2.2.1.1 Credibility (parallels internal validity): Where multiple accounts lead to the same account, research is credible (inter-observer consistency), where those who have contributed to research (respondents) receive a report and validate the findings (respondent validation, or member validation). Another technique is triangulation: using more than one method, or source of data in the study of a social phenomenon to check the data and the findings.

2.2.2.1.2 Transferability (parallels external validity): Researchers are encouraged to produce what Geertz (1973) , cited in Bryman and Bell (2007) terms "thick description": that is "rich accounts of the details of a culture' or practice which provide others with a data base for making judgments about the possible transferability of findings to other milieux" (2007: 413).

2.2.2.1.3 Dependability (parallels reliability): Guba & Lincoln (1994) encourage researchers to adopt an 'auditing' approach. "This entails ensuring that complete records are kept of all phases of the research process – problem formulation, selection of research participants, fieldwork notes, interview transcripts, data analysis decisions etc. in an accessible manner" (Bryman & Bell, 2007: 414).

2.2.2.1.4 Confirmability (parallels objectivity): A researcher should have acted in good faith in not allowing personal values or theoretical inclinations to sway the conduct of the research. This should be one of the objectives of the auditors of a

research project. Authenticity is the second criterion developed by Guba and Lincoln and is used to assess the wider political impact of research. This criterion includes: Fairness: does the research fairly represent different viewpoints among members of a social setting? Ontological authenticity: Does the research help members to arrive at a better understanding of their social milieu? Educative authenticity: does the research help members to appreciate better the perspective of other members of their social setting? Catalytic authenticity: has the research acted as an impetus to engage in action to change their circumstances? Tactical authenticity: has the research empowered members to take the steps necessary for engaging in action?

2.2.2.2 An intermediary position

Hammersley (1992), cited by Bryman (2004), presents a third, intermediary position, lying between the quantitatively oriented validity and reliability perspective and the qualitatively oriented trustworthiness and authenticity perspective. For Hammersley, validity means that an empirical account must be plausible and credible and should take into account the amount and kind of evidence used in relation to it. In this, Hammersley shares with realists the notion that there is an external reality independent of the researcher. Yet he also shares with critics of the empirical realist position that the researcher is a direct and neutral mirror of the social world, and the researcher is always engaged in representations and constructions of that world.

The intermediary position is the one preferred for its suitability for the investigation of law reports. The differences between the three positions, Bryman argues, reflect divergences in the degree to which a realist position is broadly accepted or rejected: "Most qualitative researchers operate at the mid-point of the realist-constructivist

axis" (2004: 277). The framework of critical realism, adopted in this thesis, construct the structures that underlie social reality and the practices of empirical enquiry that allow them to be investigated. This study believes that it is reasonable to apply the tests of reliability and validity but with practices that are appropriate to the study of the social world. Thus the investigation will seek to introduce the tests of (1) Inter-observer reliability; and (2) Testing the thesis against the work of leading academics in the field.

2.2.2.2.1 Inter-observer reliability: A qualitative assessment using three researchers (two colleagues and my supervisor) was used to ensure the reliability of my coding manual. The early version of my manual was the product of my initial iterative investigation of the law reports and the academic literature. This had resulted in a list of descriptors of autonomy each of which I had elaborated with a brief paraphrase and exemplar quotation drawn from the academic literature. Each researcher was given clear and concise instructions about how to use the coding grid and then given two law reports (*Re T* (1993) and *Re B* (2002)) for examination and asked to pull out concepts of autonomy from them.

There was a much greater degree of consistency between my and my supervisor's results than those of my colleagues (a lawyer and philosopher). While the latter tended to treat the various descriptors of autonomy as synonyms, my supervisor was more prepared to distinguish them. Upon further reflection (including with my supervisor), a number of conceptual distinctions were sharpened and the coding grid accordingly revised.

There now seemed to be four possible relationships between conceptions: (1) clearly distinct conceptions, e.g. 'subjective character of experience'; (2) distinct conceptions which nevertheless presuppose others, e.g. 'self-determination' presupposes 'freedom of choice'; (3) narrower conceptions which specify broader conceptions with greater concreteness, e.g. 'bodily inviolability' is a bodily form of privacy (which can include *psychological* privacy), and freedom from unwanted interference (which can include both psychological and *political*) interference;[2] and (4) conceptions which are synonymous with others. , e.g.' self-possession' can mean the same thing as 'self-ownership' (although it is noted could mean something very different e.g. 'composure').

Although my two colleagues and supervisor were given the same instructions, the inconsistency between them, and between my friends and me, can plausibly be accounted for. My supervisor had initially coded the two cases before she had discussed the coding framework with me. The principal reason why her results were more consistent than my colleagues was because she was more familiar with the theoretical framework of the conceptions of autonomy, and their nuances, that I had developed from the literature. Thus, when coding the empirical data, she would have had a better understanding of the coding framework. In future, it would help inter-observer reliability to provide researchers with a more careful and thorough introduction to the theoretical framework within which the coding manual had been drawn up.

[2] In this thesis, 'bodily integrity' is taken to embrace both 'bodily inviolability' and 'physical sovereignty'

2.2.2.2.2 Wider background reading: The investigation of the medical law reports was carried out in tandem with a rich account of academic data which both influenced the course of research and provided a basis for a description of the process. For example, the process of abstraction, prompted by the need to explain the role of the literature as an explanatory factor in the judicial interpretation of autonomy in ethically-contentious medical law cases, led to the discovery of 'tradition' as a theme of central importance. The work of the medical lawyer Veitch (2007), public lawyer Loughlin (2003), and political scientist Bogdanor (2009) were important contributors to my awareness that different bodies of law existed informed by traditions of moral and political order. The well-documented, serial, character of the research, enabled by the use GT has provided a rich data base allowing researchers to check and explore validity, maintaining a tight connection between the findings and the process of investigation, and providing a clear and accessible audit trail.

2.3 THE PRACTICE OF GROUNDED THEORY IN THIS RESEARCH

As stated in the Prologue, the idea for this thesis emerged from a sense of unease which I began to experience as a practising barrister in mid-80s specialising in medical and personal injury law and which has continued throughout my academic career as a teacher of medical ethics and law at a University, and as an Anglican clergyman with pastoral responsibilities. This unease was related to my perception that the principle of respect for personal autonomy was receiving apparently uncritical acclaim as a cultural value of first-order amongst colleagues at the Bar, in the academy and in society-at-large. This feeling of personal, and philosophical,

discomfort has been exacerbated as a result of an accompanying perception of the way the language of autonomy, individual rights and choice, has dominated the public moral conversation. Substantively moral issues, whether in the context of abortion, assisted reproduction and assisted-suicide, seem to have been reduced to the utilitarian proportions of 'best interests' and 'harm to others', rather than forming part a more robust moral conversation about whether these are the 'right-thing-to-do'.

The thesis has developed through a number of cycles of interaction between researcher and data that have clarified and developed the objects, purposes and questions of study. This cyclical approach has helped to elicit and elucidate the object(s) of study through the various stages of field work investigation, and engagement with the data field (law reports, bodies of law, academic and public discourse). The interaction of background reading and scrutiny of the law reports has revealed the multiple layers of the object of inquiry. For Bourdieu & Wacquant (1992), this stage - the construction of the object – is the most crucial operation.

To develop and deepen investigation of the objects of investigation three cycles of enquiry unfolded. These were:

(i) Empirical enquiry (cycle one): to study the judges uses of autonomy and what associations and influences could be discovered in associations of use with the Academy;

(ii) Hermeneutic enquiry (cycle two), to study the continuity of meanings and interpretations of autonomy in the law reports and in the legal and academic literature;

(iii) Critical realist enquiry (cycle three), to study the extent of patterns of variation between judges use of autonomy and the structural contexts of the reports (location in court hierarchy, the nature of the cases etc.), and the role of legal traditions in influencing the judges decisions.

The unfolding of the first cycle of enquiry is discussed below following Bryman's scheme above in Figure 2.1. The application of this scheme to cycle two and three will be developed in Chapters 4 and 5.

2.3.1 The nature, development and purpose of the object of study: *Cycle 1*

Cycle 1 consisted of: an explication of the nature of the law reports; a consideration of the purpose of the research question; theoretical sampling; data collection; coding and concept formation; and constant comparison, saturation and relationships.

2.3.1.1 Purpose and research question: The question of what autonomy meant in the judicial context was one that seemed to cry out for clarification and the answer to which would have had major implications in the healthcare context. If healthcare practitioners are required by law, ethics and professional guidance, to uphold and promote patient autonomy, then it would be a good idea if they knew what it meant. Thus the purpose of the research in this first cycle of enquiry was to describe the variety of judges' use of autonomy. The research questions at this stage were: do

judges use the concept of autonomy? Do judges express a variety of uses of autonomy? And, is there evidence of an association between judges' use of autonomy and concepts developed in the academy?

2.3.1.2 Theoretical sampling: My initial conjecture, derived from background reading of the literature around autonomy over 20 years, proposed that medical law and ethics were closely related, that medical law as a distinct legal topic was inextricably bound up with ethics, and that there had been a legalistic influence on medical ethics since its inception. The rise of legalism, the assimilation of morality to law and the legalisation of morality, in medical ethics has been well-documented from the inception of medical ethics and bioethics (Ladd, 1979; Faden and Beauchamp, 1986; Jonsen, 1992). Thus, whether the judiciary were at some level being influenced by developments in the academy, in particular medical ethics and bioethics, needed to be examined: were judges conceptions of autonomy similar to uses in the ethico-medical and bioethical literature? It was clear from my background reading that medical law and ethics were frequently referred to in conjunction, including standard medical law textbooks, e.g. the highly-praised *Mason and McCall Smith's Law and Medical Ethics*.

2.3.1.3 Data collection: The period of study began with a programme of activities and enquiry designed to develop understanding of the field of study. These included: (1) Review of the appropriate literatures on the uses and understandings of autonomy in the bioethical and academic medico-legal literatures, in philosophy and political thought; (2) Background reading on changes taking place in public law and jurisprudence, in particular the significance of the rise of medical law as a distinctive

legal topic, the introduction of the European Convention on Human Rights (2000) and the Mental Capacity Act (2005). The literature included Beauchamp and Childress (2009) in bioethics; Veitch (2007) in medical law; Bingham (2000) in judicial thought; Loughlin (2003) in public law; Raz (1986) in philosophy; and Bogdanor (2009) in political thought (3) The search for, selection, and early reading, of medical law cases which were to become the focus of the study.

2.3.1.4 Coding and concept formation: The identification of the primary data base was inevitably influenced by background reading in medical and public, including constitutional, law, and academic discourse (the secondary data base). The initial reading focussed on academic medico-legal and bioethical debates concerning the concept of autonomy and shaped by awareness that autonomy had been a matter of intense concern and contestation within the legal and bioethical community since the late 1960's. The early work was marked by an exclusive focus on the range of elemental conceptions of autonomy in use by the judiciary and academics.

2.3.1.5 Constant comparison, saturation and relationships: Reading of the literature developed my understanding that lawyers and ethicists tend to use the concept of autonomy without conceptual precision. They seem intuitively to assign to the concept a range of elemental uses of autonomy, without making it clear whether autonomy has a unitary meaning, or whether it is a more complex concept encoding values. It seemed difficult to form categories of autonomy from the diversity of usage, though it appeared that there was evidence suggesting an association between judicial and academic understandings of conceptions of autonomy that invited further investigation.

2.4 CONCLUSION

The principles and practices of grounded theory provide a powerful intellectual and practical scheme for engaging with, and working out, from the primary database of law reports in iterative interaction with the broader secondary database of academic literature. It has proved true to the practice and experience of research which was initially concerned with the language and vocabulary of the law reports (semantic use) but was driven, through continued iteration between law and literature, to question the descriptive limitations of empirical enquiry and to deepen analysis of judges' uses of autonomy. A second cycle sought to deepen textual analysis of the meanings implicit in judicial use and then a further cycle of enquiry developed critical realist analysis of underlying structures of meaning in the practice of use. Coding of the uses of autonomy developed with greater sophistication through these three cycles of enquiry as summarised in Figure 2. 2

The law reports selected for analysis were coded at three levels and in each of the three stages. In the first cycle of enquiry, the law reports were read through and coded for 'elemental uses' of autonomy.[3] In the cycle, the reports were iteratively re-coded for the concepts of 'self' or person entailed in the elemental uses of autonomy. In the third cycle of enquiry, the law reports were again recoded for 'traditions' of freedom entailed in both the elemental uses and concepts of person identified as a

[3] In this thesis, a terminological distinction is drawn between the *concept* of autonomy, and its various *conceptions*, i.e. the various different ways in which autonomy is presented in the literature, e.g. bodily inviolability, freedom of choice etc.

result of the first two levels of enquiry. The description of this practice of coding will be developed in detail in the appropriate chapters to follow.

Cycles of Enquiry	Levels of Coding		
	Level 1	Level 2	Level 3
	Particulars	Concept	Category
I. Elemental Uses	Implicit and explicit uses	e.g. bodily inviolability	The self/person
II. Concepts of Person	e.g. bodily integrity, capacity, dignity	Body, mind and identity	Capability
III. Categorisation of traditions	e.g. freedom from interference, privacy, self-realisation	Negative and positive liberty	Freedom-from (liberty), freedom-to (freedom)

Figure 2.2 Cycles of enquiry and levels of coding

As a result, grounded theory as a powerful processual research methodology has enabled findings which were not anticipated and a theory of medical jurisprudence as potentially a tradition-constituted complex practice which simply could not otherwise have been hypothesised.

In the next chapter, the first cycle of empirical enquiry into the law reports and the literature will be undertaken. The framework and basis of the semantic enquiry into judicial uses of autonomy will be set out including analysis of the elemental meanings which have been assigned to the concept in the literature.

CHAPTER 3

THE FIRST CYCLE OF EMPIRICAL ENQUIRY: THE LAW REPORTS

3.1 INTRODUCTION

The aim of this chapter is to justify and explain the strategy of enquiry and detail the first stage of field work investigation, entailing semantic content analysis of the research sample of law reports. It articulates the precipitating research questions and provisional hypothesis and explains the procedure for the selection and sampling of the law reports. The chapter then goes on to describe the elemental uses of autonomy in the law reports, its relationship with the academy and the limitations of empirical analysis in this enquiry. The research design involved the construction of a unique data base of medical law reports, and a strategy of constant interaction with, and progressive focussing, of the cases. The strategy of investigation was constructed on the realist assumption that a qualitative methodology such as grounded theory was needed in order to collect evidence of the meanings (judicial constructions of autonomy) revealed in experience (judicial decision-making contained in law reports). This knowledge is not of the harder, observable, tangible and quantifiable kind requiring a quantitative methodology, such as Landes & Posner's (1987) statistical study of the economic structure of the law of tort.

3.2. THE DATA BASE OF LAW REPORTS

Law reports are documentary records of judicial decisions of legal interest decided in the superior courts. According to Lindley (1885) a case is of legal interest 'if it promises to introduce a new legal principle or rule, or materially settle a question upon which the law is doubtful, or offer material which is, for any reason, particularly instructive' (1885: 143). The principle Lindley proposed has been adopted by the International council of Law Reporting (ICLA). Certain elements are common to all law reports. The figure below is drawn from Clinch & Hart (2001) and illustrated with reference to one of the cases in the sample selected for empirical analysis (*Pretty* (2002)). The catchwords indicate briefly what the case is about. The headnote is not part of the judgement but the law reporter's summary of, or guide to, the judgement, and can occasionally be inaccurate (Williams, 1982). A law reporter must be either a barrister or solicitor (section 115 of the Court and Legal Services Act) and a report which has not been prepared by either will be rejected by the courts (Zander, 2004).

The submissions of counsel do not form part of the judgement and appear only in some of the published series of law reports, e.g. *The Law Reports*. However, the relationship between the arguments of counsel and the content of judicial decisions is complex. On the basis of the contents of the précis of counsel's arguments in the law reports, and the contents of the judgements, there is good *prima facie* evidence to suggest that the judiciary are significantly reliant on those submissions, although not all the cases cited by counsel in argument appear in the text of the judgement(s). Foster (2009) has colourfully characterised judgements as "cut and paste jobs from

barristers' skeleton arguments" (2009: 4), alluding to the convention that judges are restricted to the authorities actually cited in court and from considering authorities not cited but of which they are aware. There is evidence in some of the more recent cases not only of increased acknowledgment of judicial indebtedness to the arguments of counsel (e.g. *NHS Trust A* (2001) (p. 351*H*; 359*B*-*C*)), but, in one case, an example of an extract from the skeleton argument of one barrister in another case; (*Burke* (2005) (p.457*D*-*E*)). The 'veil' between the primary data base (judicial decisions) and the secondary data-base (the arguments of counsel) can at times seem paper-thin.

There is no set structure to a written legal judgement in a superior court (i.e. High Court, Court of Appeal, House of Lords (or Supreme Court). Traditionally, they have been marked by the intertwining of fact and law, with a special emphasis on the importance of facts. Munday (2002) states that the "common-law judge's judgement is ground in and grows out of fact" (2002: 613). A distinctive feature of the common law tradition is the way it has firmly sought to ground enunciations of legal principle in a case's factual context with an eye to the implications that those will have in practice, especially where ethical questions are concerned. The form of legal judgements may be evolving with signs of an increasing tendency on the part of the higher courts to deliver a single judgement written by a single judge with whom the others concur, or a composite judgement. Another recent development is the tendency to divide up the judgements into numbered paragraphs, with headed sections which may, under European legal influence, be leading to a subtle separation between a case's factual and legal dimensions, with emphasis on issues of legal principle. The changing form of judgement may itself be a register of the

increasing influence of European legal traditions (with their associated dimensions of moral and political order) on the common law.

The Australian judge Atkinson (2002) has identified four chief purposes, and four basic constituents of a judgement. The four chief purposes are: (1) to clarify thought; (2) to explain the decision to the parties; (3) to communicate the reasons for the decision to the public; and (4) to provide reasons for an appeal court to consider. Atkinson expresses the four basic constituents of a judgement using the acronym FLAC: F – for facts; L – for law; A – for application; and C – for conclusion. The recitation of the relevant facts is foundational to any common law judgement. This usually occurs at length in High Court judgements, but not necessarily in the higher courts (the Court of Appeal, House of Lords/Supreme Court) where the facts are usually only briefly reprised. This latter is more likely to be the case in the Court of Appeal which can entertain mixed fact-law appeals. The Supreme Court/House of Lords only deals with questions of law. The second aspect of FLAC is the law. In order to come to the right decision, the law needs to be stated clearly and persuasively, including the way in which counsel for the parties have stated it, so that the rationale for the overall decision is more transparent. Thirdly, the law needs to be applied to the facts. In the common law tradition, the enunciation of legal principle is grounded in the facts, and a clear demonstration of how the law applies to the facts is essential to the acceptance of the decision. This leads, fourthly, to the conclusion to the case, which should follow on logically, and practically, from the application of the law to the facts.

Common elements	**Case Illustration**
Names of the parties	*Regina (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)*
Name of the Court	House of Lords
Name of Judge(s)	Lord Bingham of Cornhill, Lord Steyn, Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote
Dates of hearing and judgement	2001 Nov 14,15; 29
Catchwords	e.g. Aiding and abetting — Suicide — Terminally ill claimant seeking undertaking from Director of Public Prosecutions not to consent to prosecution of husband for assisting proposed suicide
Headnote	e.g. 'In particular she claimed that article 2 protected a right to self-determination, entitling her to commit suicide with assistance'
Commentary on notes	There were no notes in this particular case
List of cases cited in judgement	e.g. *Airedale Trust v Bland* [1993] AC 789; [1993] 2 WLR 316; [1993] 1 All ER 821, CA and HL(E)
List of other cases cited in argument	e.g. *McKay v Essex Area Health Authority* [1982.] QB 1166; [1982] 2 WLR 890; [1982] 2A11ER$_{77}$I,CA
Details of proceedings	APPEAL from the Divisional Court of the Queen's Bench Division The claimant, Diane Pretty, appealed, with leave of an Appeal Committee of the House of Lords (Lord Bingham of Cornhill, Lord Steyn and Lord Hope of Craighead) granted on 30 October 2001…'
Names of counsel	Philip Havers QC and Fenella Morris for the claimant; Jonathan Crow for the Secretary of State ; David Perry and Robin McCoubrey for the Director
Judgement	e.g. 'For these reasons, which are in all essentials those of the Divisional Court, and in agreement with my noble and learned friends, Lord Steyn and Lord Hope of Craighead, I would hold that Mrs Pretty cannot establish any breach of any Convention right.'(per Lord Bingham of Cornhill at para. 37)
Formal order	Appeal dismissed
Names of solicitor	Liberty; Treasury Solicitor.
Name of law reporter	DECP

Figure 3.1 Sample structure of a law report (based on Clinch (2001: 108))

3.2.1 The doctrine of precedent

The judgement is the only part of the law report which exerts legal authority. The catchwords, headnote, submissions of counsel (where they appear) and notes do not. The judgement alone contains the legal rules, and principles, which can 'bind', or otherwise legally influence, another superior court. The doctrine of *stare decisis* (literally 'let the decision stand') or binding precedent – is the distinctive feature of

the common law system. The English courts (*Practice Statement (Judicial Precedent*) [1966] 1 WLR 1234) have described the use of precedent as:

> An indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Stare decisis is one of the normative premises of the common law, and the rational form of ordering of court decisions. It seeks to create stability, predictability and certainty in the law, however short it may fall of these aspirations in practice. The common law precedent-based approach is characterised principally by its method, a mode of example-based legal reasoning which accords prudential value to past decisions, in combination with a pragmatic approach to later cases. This distinctive method of common law reasoning is a form of 'constraint'. Judges cannot adjudicate on an *ad hominem* basis but are required to justify their decisions on the basis of precedental reasoning.

The governing rule, principle or rationale, of a court decision is known as *the ratio decidendi.* Lower courts are bound by the previous decisions of higher courts in analogous cases. The *ratio* of a case is distinguishable from ancillary judicial utterances know as *obiter dicta* ('by the way') which may exert 'persuasive' authority on any other court in the hierarchy, but which those courts are not bound to follow. Decisions in foreign jurisdictions may not bind English courts, although they may exert persuasive authority. This includes the jurisprudence of the European Court of Human Rights (ECtHR), and the opinions of the European Commission and

Council of Ministers, which English courts are obliged by virtue of section 2(1)(a) of the Human Rights Act 1998 to 'take into account'(Zander, 2004).

Distinguishing the *ratio* of a case from *obiter dicta* is a matter of judgment based on legal practice and experience. Judicial decisions do not have special headings labelled *ratio* and *obiter*. Extracting either from a judgement is a matter of interpretation: law reporters in the formulation of a headnote, and legal commentators in the form of academic case-notes and articles, may experience considerable difficulty extracting the *ratio* of a case where several judgements are handed down. In *Sidaway* (1985), a case concerning the liability of a neurosurgeon for failure to disclose an inherent risk of an operation for spinal cord decompression, five Law Lords offered different justifications for a shared finding of negligent non-disclosure. Judges in their construction of the *ratio* of an authority may well be in disagreement with the judge who decided that authority had the latter been asked at the time to make what he thought was the *ratio* of his decision explicit (Slapper and Kelly 2006). Laster (2001) has stated, "[w]hile easy in theory, the distinction between *ratio* and *obiter* is more difficult to put into practice" (2001: 111).

3.2.2 The hierarchy of citation

The doctrine of precedent depends on the existence of a clear hierarchy of courts and an efficient retrieval system in which the previous decisions of the courts can be made known (Wacks & Allan, 1993). The superior courts in England and Wales are the Supreme Court (formerly the House of Lords), the Court of Appeal, and the High Court. The Court of Appeal and High Court are divided into criminal and civil divisions, and, within the latter, the High Court into further specialist divisions, e.g.

Family Division and Court of Protection. The Supreme Court (formerly the House of Lords) is not bound by its previous decisions, although it will rarely depart from them. With its judicial elite, the Supreme Court may review existing, and make new, law. The Court of Appeal and High Court are bound by decisions in a higher court and, as a basic rule, bound by their own decisions. Higher courts may nevertheless adopt a rule or principle articulated in the lower courts, thus entrenching its authority.

A classic example of such entrenchment can be found in the case of *Bolam* (1957) case which established the 'prudential doctor' standard of care in the law of negligence, has infiltrated a wide variety of areas of medical law at the very highest levels of the court hierarchy, e.g. the House of Lords in *Re F* (1990). The *Bolam* case is also notable for taking the form of a direction to the jury in the days when most civil trials were jury trials (Brazier and Miola, 2000). Another closely related premise of the common law is the greater prudential weight given to decisions of the higher courts, in part because there are more judges deciding a single case and more time for deliberation (Laster 2001).

In England and Wales, modern law reports are 'official' publications only in a qualified sense. The most authoritative reports are those independently produced, or approved, by the Incorporated Council of Law Reporting (ICLA), a charitable organisation founded in 1865 and dedicated to the expeditious professional production of cheap and accurate law reports (Slapper and Kelly 2006). Before 1865, law reports were produced privately ('the nominate reports') of which there were hundreds of different series, many short-lived and many of dubious accuracy and

authority. The electronic revolution, and the growing availability of computerised systems of data retrieval, has made legal resources speedily available and to an unprecedented degree. The growth of computerised systems of data retrieval has given unprecedented access to legal materials and means that virtually every case is reported in one form or another thus making the concept of an 'unreported' case problematic (Spencer et al., 2002).

This measure of accessibility has put the concept of an 'unreported' case into issue. Munday (2004) goes further stating that "the demarcation line between reported and unreported case law has always been porous" (2004: 229). Even though case reports can be accessed directly from the courts, or online databases, or through the Internet, an unreported case can be classified as one which has not been considered sufficiently important to merit publication in one of the citable series of law reports. In addition, the growth of primary online legal resources by government publishers has lent 'official' status to such material even though it has not been subject to the scrutiny procedures which have traditionally characterised the most authoritative reports. The Internet publication of court decisions precipitated the introduction in 2001 of a neutral citation system of identifying court decisions independently of traditional citation formats pertaining to printed law reports, and a system of paragraph, as opposed to page, numbering *(Practice Direction (Judgments: Form and Citation)*, [2001] 1 WLR 194).

Not all modern law reports are of exactly equivalent authority. The hierarchy of citation for the various series of law reports is laid down in a special protocol

relating to procedure in the civil courts *(Practice Direction (Court of Appeal: Citation of Authority)*, [1995] 1 WLR 1096).The protocol stipulates that:

> When authority is cited, whether in written or oral submissions, the following practice should in general be followed. If a case is reported in the official Law Reports published by the Incorporated Council of Law Reporting for England & Wales, that report should be cited…If a case is not (or not yet) reported in the official Law Reports, but is reported in the *Weekly Law Reports* or the *All England Law Reports*, that report should be cited. If a case is not reported in any of these series of reports, a report in any of the authoritative specialist series of reports may be cited.

The trustworthiness ascribed to the official law reports, that is, the series called *The Law Reports*, derives from the judicial endorsement and authentication procedures to which the case reports contained within them are subject. *The Law Reports*, which appear in four parts as Appeal Cases (AC), Chancery Division (Ch), Family Division (Fam) and King's/Queen's Bench Division (KB/QB), are written by professional lawyers (barristers and solicitors) who remain in court for the arguments of counsel and the handing down of judgement. These reports contain 'headnotes' (which distil the facts of the case and the applicable rule or principle of law), a skeleton summary of the arguments of counsel, as well as the judgement itself (see above). These are all subject to pre-publication judicial revision. Because, in England and Wales, headnotes, and arguments of counsel, are edited by lawyers and legal publishers, they do not constitute part of the judgment proper (i.e. the judicial *stare*) and therefore part of the case's 'authority', unlike in other jurisdictions where the court itself supplies these and therefore form part of the judicial opinion and precedent.

Cases reported in *The Weekly Law Reports*, also a publication of the ICLA, do not contain précis of the arguments of counsel or benefit from pre-publication judicial revision. However, many of the cases reported there appear, after judicial revision, in *The Law Reports*. Cases in the *All England Reports*, a series published by noted legal publishers Butterworths/Lexis – do not (like the Weekly Law Reports) contain the arguments of counsel, but do (unlike the Weekly Law Reports) benefit from judicial revision. Another procedural protocol (*Practice Statement* [1998] 2 ALL ER 667 at para. 8) has added specialist or subject- based reports to the hierarchy of citation (e.g. *Butterworth's Medical Law Reports* (BMLR)).Where a case is not reported in a series apparent in the hierarchy of citation, then less substantial reports may be cited, such as legal journals, such as the *Criminal Law Review*, or newspaper law reports, such as *The Times Law Reports*.

3.3 STRATEGY OF INVESTIGATION

The initial interest in this research project was borne of experience as a practising barrister working principally in the field of medical law and subsequent experience as a teacher of medical ethics and law at an English university (see Prologue). The perception that the concept of autonomy was being used imprecisely, and yet exalted, in legal and bioethical discourse was a matter of both concern and intellectual interest. The variety of other terms that my legal colleagues and my early untutored background reading of the literature seemed to be using in close association with autonomy led to the suspicion that autonomy might be a complex, multifaceted concept.

3.3.1 Research questions and hypothesis

These experiences guided the formulation of the initial research questions:

(1) Is there use of autonomy?

(2) Do judges express a variety of uses of autonomy?

(3) Is there association between judges' and academic usage?

3.3.2 Sampling the Law Reports

The law reports selected for analysis were drawn from full-text UK court judgments, freely available online. It was possible to search for judgements at all levels of the court hierarchy against terms of interest and relevance. Search terms "autonomy" and "medical treatment" were used. Lexis Library yielded 255 cases and Westlaw 215 cases

In Lexis Library, there were 166 'duplicate' cases. A duplicate case is one published in more than one format or published series of law reports. These duplicates were removed. Of the 89 cases left over, a further three non-domestic cases were eliminated. For reasons difficult to ascertain, 2 decisions of the New Zealand Court of Appeal and 1 decision of the Northern Irish Court of Appeal were thrown up by the search engine. The search in Westlaw (see below) produced 76 of the 86 Lexis cases. Nine (out of 10) cases not produced by Westlaw were excluded either because they fell outside the medical treatment context, although they include references to patient autonomy. This meant that there was only one case produced by Lexis which remained potentially analysable.

The Westlaw search yielded 215 cases. Of these 51 of were excluded because they were non-domestic cases. Westlaw (unlike Lexis Library) did not have a function to restrict the search to English decisions alone. Of the 164 cases left over, 115 were excluded because the legal decision either did not contain the word autonomy, or did not directly concern medical treatment. It is a quirk of Westlaw, that even if the term 'autonomy' does not appear in the law report or transcript, it can nevertheless appear in documents registered under 'case analyses. Westlaw, unlike Lexis Library, did not have a function on allowing a search restricted to the law reports and transcripts alone. Even though the search terms were specific, it is nevertheless possible for non-medical treatment cases to appear in the search results if the judgements relied on medical treatment cases as legal authorities. This left 49 cases potentially suitable for analysis.

This was considered too large a population of cases for proper scrutiny. Therefore, further cases were excluded from the research sample if they did not contain all of the following criteria: (1) the status of a 'stigmata' case; (2) significant judicial discussion of the concept of autonomy; (3) significant academic discussion of the concept of autonomy; and (4) elemental uses of the concept of autonomy. These cases are tabulated at Appendix 4.

Firstly, cases were excluded which were not considered revelatory of broader concerns in society, i.e. 'talismatic' (Montgomery, 2006a: 8). Lee and Morgan (2001) have called these 'stigmata' cases (see Chapter 1). These cases have five features: (1) they are relatively recent and ethically-controversial; (2) raise the balance of personal and public interests; (3) compel consideration of the goals of

medical practice; (4) prompt reflection on the boundaries between the normal and anomalous; and (5) "require the courts to develop a social, even moral, vision to respond to the social and cultural revolution of contemporary medicine" (Montgomery, 2006b: 189).

Secondly, cases were removed from the sample where judicial discussion of autonomy was either non-existent, or insufficiently substantial to merit further consideration. For example, in *Portsmouth Hospitals NHS Trust v Wyatt* [4] the Court of Appeal (at p. 4024*F*) makes a single reference to 'parental' as opposed to 'patient' autonomy. This takes the form of a quotation from the High Court judgement in the same case[5] which involved the question whether further invasive treatment to prolong the life of a profoundly disabled baby was in her 'best interests'. In *R (on the application of B) v Haddock* the *Trust A and Trust B v H (an Adult Patient)* there are two passing references to 'autonomy' in the form of quotations from other cases (cf. paras. 10 and 16).

Thirdly, cases were removed from the research sample if they failed to generate a pool of academic commentary and reflection contributing to wider discourse on questions of autonomy. In order to guard against selection bias, cases were excluded if they failed to generate more than five academic articles according to the 'Journal Articles' function in the 'Case Analysis' section of the Westlaw search engine. For

[4] [2005] 1 WLR 3995

[5] *Portsmouth NHS Trust v Wyatt* [2005] 2 F.L.R. 480.

example, the case of *Chester v Afshar*[6] has generated nearly 90 academic articles, and *Re T (Adult: Refusal of Treatment*[7]*)* 31, while the case of *NHS Trust v D*[8]a mere 4 articles.[9]

It is proposed that this academic literature constitutes a public body of objective evidence as to the importance of the cases to which they refer to in relation to questions of autonomy. The cases were also apt for close scrutiny because they could, within the span of 21 years (1990-2011), be influenced by background changes in public law and jurisprudence which may influence the use and interpretation of autonomy. The 23 selected cases are distributed over a 21 year time line (1990-2011) into two periods: cases from 1990 – 1999 (T1); and cases from 2000 – 2011 (T2). The second (T2) encompasses the period of important legislative change: the coming into force into domestic law of the European Convention on Human Rights in 2000 and the Mental Capacity Act 2005.

Fourthly, cases were removed from the sample if they failed to contain descriptors of autonomy, i.e. elemental uses or 'conceptions', e.g. bodily inviolability, self-determination. These descriptors supply the empirical content of the various uses to which the concept of autonomy is being put in the law reports.

---

[6] [2005] 1 AC 134

[7] [1993] Fam 95

[8] [2005] EWHC 2439 (Fam)

[9] It is notable that the cases which Lee and Morgan (2001) identify as 'stigmata' cases - the cases of *Bland* (1993), *Blood* (1997) and *Re A* (2001) – have generated great academic controversy, with the *Medical Law Review* – perhaps the leading British medical law journal – devoting a whole issue to the latter case (Volume 9(3) 2001).

23 of the 49 cases (See Figure 3.2) satisfied all four criteria, i.e. 'stigmata', judicial discussion, academic discussion, and elemental uses of autonomy and these were chosen for focussed analysis. It should be noted that in Appendix 4, 19 cases are highlighted to this end. References of *Re F, Bland, Burke,* and *Purdy* each comprise 2 cases at different levels of the court hierarchy, i.e. High Court, Court of Appeal and House of Lords (19+ 4 = 23). The cases more than adequately attained the threshold of 'data saturation' as regards identification of 'elemental meanings' of autonomy. The initial restriction of the empirical analysis to these terms was justified on two grounds.

First, wider background reading had indicated that a search using these terms promised more effectively to locate the judiciary's more discursive treatments of the concept of autonomy in the medical jurisprudence. Secondly, the justification for restricting the search to one for cases rather than legislation is of the dearth of philosophical discussion to be found in the latter. "Philosophically, [legislation] is something of a desert….The point of Acts is to act, not to discuss" (Foster, 2009: 173). Most other domains of medical law are regulated by statute, e.g. abortion (Abortion Act 1967 (as amended)), human tissue and organ donation (Human Tissue Act 2004); assisted reproduction (Human Fertilization and Embryology Act 2008). Therefore, judicial discussion of legislation is philosophically-etiolated, being restricted to questions of statutory interpretation, rather than concepts. The word 'autonomy' does not appear in any legislation. This is not to say that issues of autonomy do not arise for academic reflection out of the nature and purpose of legislation. The broader question whether, and to what extent, the relevant statutory

provisions as a whole reflect an ethical commitment to the value of autonomy is not strictly relevant to this thesis.

No.	**Cases**	**Hierarchy of Court**	**Law Report Series**
1, 2	*Re F (Mental Health: Sterilisation)* [1990] 2 AC 1	Court of Appeal and House of Lords	*The Law Reports*
3	*Re W (A Minor)(Medical Treatment* [1993] Fam 64	Court of Appeal	*The Law Reports*
4	*Re T (Adult: Refusal of Treatment)* [1993] Fam 95	Court of Appeal	*The Law Reports*
5, 6	*Airedale NHS Trust v Bland* [1993] AC 789	Court of Appeal and House of Lords	*The Law Reports*
7	*Re C (Adult: Refusal of Treatment)* [1994] 1WLR 290	High Court	*The Weekly Law Reports*
8	*Re MB (Caesarean Section)* [1997] 2 FLR 426	Court of Appeal	*Family Law Reports*
9	*St George's Healthcare NHS Trust v S* [1999] Fam. 26	Court of Appeal	*The Law Reports*
10	*Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147	Court of Appeal	*The Law Reports*
11	*Re AK (Medical Treatment: Consent)* [2001] 1 F.L.R. 129	High Court	*Family Law Reports*
12	*NHS Trust 'A' v. M; NHS Trust 'B' v. H* [2001] Fam 348	High Court	*The Law Reports*
13	*R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800	House of Lords	*The Law Reports*
14	*Re B (Adult: Refusal of Medical Treatment)* [2002] EWHC 429 (Fam)	High Court	*Official Transcript*
15	*R (on the application of Burke) v General Medical Council* [2005] QB 424	High Court	*The Law Reports*
16	*Chester v Afshar* [2005] 1 AC 134	House of Lords	*The Law Reports*
17	*R (on the application of Burke) v General Medical Council* [2006] QB 273	Court of Appeal	*The Law Reports*
18.	*Yearworth and others v North Bristol NHS Trust* [2010] QB	Court of Appeal	*The Law Reports*
19, 20	*R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345	Court of Appeal House of Lords	*The Law Reports*
21	*D Borough Council v AB* [2011] 3 W.L.R. 1257	High Court	*The Weekly Law Reports*
22	*Re A (Capacity: Refusal of Contraception)* [2010] EWHC1549 (Fam)	High Court	*The Law Reports*
23	*Re M* (2011)	High Court	*Official Transcript*

Figure 3.2 Table of selected law reports

3.3.3 Research methods: documentary analysis

Jupp (2001: 103) has defined documentary analysis as 'the detailed analysis of documents with a view to making assertions about some aspect of the social world.' Bryman has provided a useful checklist for evaluating documents as sources of data for authenticity, credibility, representativeness, and meaning (Scott, 1990; Bryman, 2004). These are put in question form (2004: 392):

Who produced the document? It was demonstrated in a previous section that law reports are quasi-official documents produced by judges and, in their most authoritative form, published under the auspices of the ICLA, or other specialised publishers, and endorsed by the judiciary through special judicial protocols, e.g. practice directions.

Why was the document produced? Law reports are records of judicial decisions in legally, and perhaps morally and politically, significant cases which contribute to the body of judge-made law, known as 'common law'. Judicial decisions are constrained by precedent, but may also involve the interpretation of statutes (parliament-made law) and the European Convention of Human Rights. Law reports contain reasons for the judicial decision and are available for public, as well as specialist, scrutiny.

Was the person or group that produced the document in a position to write authoritatively about the subject or issue? Members of the judiciary are chosen from amongst the most eminent members of the legal profession, principally the English Bar, and are, accordingly, well-equipped to enunciate the legal principles which emerge from the factual contexts of the cases upon which they are called to

adjudicate. Judges have been immersed, first as practitioners, and then as members of the judiciary, in the complex practice of common law, and disciplined according to its customs, rules, canons and conventions.

Is the material genuine? The issue of authenticity is dealt with by the strict protocols relating to the hierarchy of citation.

Did the person or group have an axe to grind and if so can a particular slant be identified? The presence of ideological bias, where it exists, is constrained by the virtues judges are required to cultivate within the framework of the complex practice of judicial decision-making, including the prudential, pragmatic, precedent-based rationality of law making.

Is the document typical of its kind and if not is it possible to establish how untypical it is and in what ways? Although law reports are not perfectly uniform in organisation, and may be changing under the influence of the electronic revolution and European influence, they invariably share a number of common features which distinguish it from non-law reports (Clinch, 2001; Atkinson, 2002).

Is the meaning of the document clear? Law reports may reflect certain standards of FLAC clarity (Atkinson, 2002). However, judicial decisions are also matters of interpretation especially with regard to the legal principles which the judges enunciate on the basis of the cases' factual contexts, and other data within the law reports which may indicate implicit factors which have influence on judicial determinations.

Can the events or accounts presented in the document be corroborated? This is not normally a problem in the context of law reports. Issues of fact appear on the face of the pleadings (the documents which set out the factual and legal cases of the parties), which can either be agreed, or disputed. If the latter, then each set of legal representatives will set out vigorously to corroborate the events and accounts presented on which the outcome of the case may turn, and air them in court. The judiciary on the basis of the evidence it has heard will make the final determinations of fact. In the criminal courts, the Crown's case must be established 'beyond reasonable doubt', and in the civil courts, a party must establish his case 'on the balance of probabilities'.

Are there different interpretations of the document from the account offered and if so what are they and why have they been discounted? There are a number of different ways of interpreting law reports as sources of data.

Law reports generally, and those selected for empirical analysis in particular, are high quality documents according to Scott's (1990) criteria. They are authentic because they are genuine and of unquestionable origin. They are credible in that there is no basis for thinking that reports of judicial decisions have been, or are, distorted in some way. They are representative insofar as the existence of sophisticated legal search engines (Westlaw/LexisLibrary) and a plethora of electronic retrieval systems have greatly facilitated access to a wide variety of law reports. As a result, it is relatively easy to acquire a representative sample of law reports by entering the appropriate search words. The method of interpreting law reports in order to make sense of their contents is the greatest challenge.

3.3.4 Qualitative content analysis: ethnographic content analysis

There are a number of research methods for interpreting documents. Bryman (2004) identifies three qualitative research methods for interpreting documents: qualitative content analysis, semiotics and hermeneutics. Qualitative content analysis (QCA) is the most prevalent qualitative research method and the one best suited for scrutiny for law reports. It is an approach to documents which emphasises the role of the researcher in the construction of the meaning of, and in, texts, and of allowing concepts and categories to emerge out of the data.

Altheide has formulated a form of QCA called ethnographic content analysis (ECA) which follows the processual and iterative movement between researcher and data redolent of GT. Altheide (1996) characterises the research methods as:

> … following a recursive and reflexive movement between concept and development-sampling-data, coding-data, and analysis-interpretation. The aim is to be systematic and analytic but not rigid. Categories and variables initially guide the study, but others are allowed and expected to emerge during the study, including an orientation to constant discovery and constant comparison of the relevant situations, settings, styles, images, meanings and nuances (1996: 16).

They are material objects, clearly sources of data, and properly take their place within that heterogeneous set of sources congenial to forms of documentary analysis. Law reports are not ‘official’ documents in the sense that they do not derive directly from the state, but they nevertheless form the basis for the common law legal system characterised by its adherence to the doctrine of precedent and access to authentic reports of legal cases. Law reports therefore contain a great deal of textual material

of potential interest. Judicial decisions are embodied in documentary form as law reports and therefore congenial to suitable forms of documentary analysis.

The initial impulse to undertake a semantic content analysis of the medical law reports was prompted by the suspicion that judges were both intuitive in their use and interpretation of autonomy and that there was variation of such usage. This suspicion was accompanied by a hunch that the potential use and variety of use of autonomy in decision-making was influenced at some level by developments in academic medical law, bioethics and philosophy. From an early stage in the research, therefore, the scrutiny of the law reports was accompanied by wider background reading in the literature in order to determine whether there existed similar use and variation of use. The findings of the initial analysis of the law reports and the review of the literature are considered next.

3.4 THE CODING OF THE LAW REPORTS

The first cycle of enquiry sought to identify and code elemental uses of autonomy in the law reports. At the first level stage (*Coding Level 1*), the law reports were scrutinised and coded for specific examples of judicial elemental uses of autonomy. The identification of these uses of autonomy was informed, but not determined, by a 'lexicon' of such uses which was constructed for the purpose based on a systematic analysis of the academic legal and bioethical literature. Alphabetic codes were assigned to the elemental uses of autonomy identified in the law reports. The paraphrases of these particular uses in the reports, and their alphabetic codes, are

shown in Figure 3.3. The particulars of the case analysis were then grouped into similar, and more workable, *concepts* (*Coding Level 2*) and then formed into *categories* (*Coding Level* 3), which provided the basis for the emergent *theory*.

For example, in the case of *Re T* (1993), the court declares that "the right to decide one's own fate presupposes a capacity to do so" (p. 112*G*). The identification of this phrase as being entailed in the conception of *self-determination* is informed by its use in the academic literature. The academic lawyer Foster (2010) paraphrases his understanding of McLean's (2010) use of self-determination as the ability to follow "a carefully-drafted life-plan" (2010: 178). The philosopher Frankfurt (1971) defines self-determination as the "ability to choose, revise and pursue one's own particular life plan, or suitable aims and values" (1971: 6-7). It should be noted, however, that in many of the examples, the judiciary explicitly use conceptions of autonomy, thus eliding particular into concept and thereby conflating Stages 1 and 2, e.g. "to deny them assistance will thus interfere with their Article 8 right to personal autonomy and self-determination" (*Purdy* (2010) at p. 404*B*).

3.5 DESCRIBING ELEMENTAL USES OF AUTONOMY

The principal finding of the initial stages of analysis is that the judiciary assign a wide range of elemental meanings to the concept of autonomy as Table 3.3 shows and as the Tables in the Appendix demonstrate. These conceptions include in no particular order: self-determination,; self-control; freedom of choice; freedom from

Particulars	**Code**	**Paraphrase**	**Concept**	**Code**	**Category + Code**
NHS Trust A (2001) at p. 357 *F*	*I (a) (i)*	Freedom from unwanted bodily interference	Bodily inviolability	*I (a) (ii)*	Autonomy (*I (iii))*
Re A (2001) at p. 219*C*	*I (b) (i)*	Control of one's body through time and space	Physical sovereignty	*I (b) (ii)*	
Bland (1993) at p. 884*B*	*I (c) (i)*	A composite of bodily inviolability and physical sovereignty	Bodily integrity	*I (c) (ii)*	
Re F (1990) at p. 12*C*	*I (d) (i)*	Freedom from unwanted physical, psychological and political interference	Freedom from interference (or *liberty*)	*I (d) (ii)*	
Re W (1992) at p. 77*H*	*I (e) (i)*	A protected sphere of spatial separateness from others	(Spatial) Privacy	*I (e) (ii)*	
Re A (2011) at p. 82*C*	*I (f) (i)*	Truly thinking and deciding for oneself	Independence	*I (f) (ii)*	
Re B (2002) at para. 21	*I (g) (i)*	Being in possession of one's own person	Self-possession	*I (g) (ii)*	
Yearworth (2009) at p. 14*C*	*I (h) (i)*	Self-belonging entailing rights of self-disposal and self-sovereignty	Self-ownership	*I (h) (ii)*	
Re B (2002) at para. 21	*I (i) (i)*	Capacity to control one's body, behaviour or life	Self-control	*I (i) (ii)*	
Re T (2002) at pp. 102*D*	*I (j) (i)*	Freedom to choose one way or another	Freedom of choice	*I (j) (ii)*	
Re MB (1997) at p. 436	*I (k) (i)*	Decision-making capability unimpaired by mental injury or disability	Mental capacity	*I (k) (ii)*	
Re C (1994) pp. 294 *D* – 295 *E*	*I (l) (i)*	Freedom to conduct one's life in the manner of one's own choosing	Self-determination	*I (l) (ii)*	
Purdy (2009) at para. 35	*I (m) (i)*	Freedom from unwanted psychic intrusion, including the space to reimagine who one is and what one seeks to become	Psychological integrity	*I (m) (ii)*	
Burke (2005) at p. 446*A*	*I (n) (i)*	The holistic treatment of a person as morally worthy of respect, including the preservation and promotion of her mental health	Moral integrity	*I (n) (ii)*	
Chester (2005) at p. 144*B*	*I (o) (i)*	The affirmation and protection of one's physical and psychological integrity and the avoidance of humiliating and demeaning behaviour	Dignity	*I (o) (ii)*	
Pretty (2002) at p. 807*G*	*I (p) (i)*	A composite of bodily, psychological and moral integrity and dignity, including physical and social identity	Privacy (as 'private life')	*I (p) (ii)*	
Chester (2005) at p. 144*D*	*I (q) (i)*	Freedom to self-define through choice and action	Self-creation	*I (q) (ii)*	
Purdy (2009) at para. 42	*I (r) (i)*	The manifestation of the 'self' through respect for personal values	Self-realisation	*I (r) (ii)*	
Re B (2002) at para. 81-83	*I (s) (i)*	Respect for the irreducible differences that separate us as subjects	Subjective character of experience	*I (s) (ii)*	

Figure 3.3 – Coding of elemental uses of autonomy

interference; liberal individualism; independence; dignity; self-creation; bodily inviolability; bodily integrity; mental capacity; self-ownership; psychological integrity and moral integrity. The rationale for the identification of an elemental meaning of autonomy has been explained in the previous section.

Although a number of these conceptions are explicitly used by the judiciary, some represent first-order abstractions from the particulars in the law reports. Thus, in the case of *Re T* (1993) the statement that a person has a "right to live his own life how he wishes, even if it will damage his health or lead to his premature death" (p. 112*E*) is abstracted as "self-determination" which is paraphrased for the purposes of analysis as the "voluntary determination of one's future". This paraphrase is influenced, but not determined, by the meaning of self-determination in the literature. Again, "the right to decide one's own fate" is abstracted as "self-determination". But this right to self-determination "presupposes a capacity to do so" (p. 112*G*) which is abstracted as a distinct conception: "mental capacity". The justification for the identification of "mental capacity" as a distinct conception of autonomy is that it is associated as such elsewhere in the research sample, according to the coding procedure described above (e.g. *Re B* (2002) at para. 100(x)).

On the whole, the judiciary do not tend to define the terms they use. Rather, they are drawn fluidly into play as it responds to the particular medico-legal problems which it is required to address. The findings support the initial hunch which precipitated the thesis, that the judiciary tends to use the concept of autonomy intuitively and that there is variation in such usage. Judges, as has been pointed out in the some of the literature (e.g. Pannick, 1987; Foster, 2011), do not have the luxury of reflecting on

their discourse under pressure of delivering judgement. Accordingly, the implicit meanings of the concepts they use need to be related to their broader discourse and practice through a process of inferential analysis (cf. Brandom, 1994).

Following initial scrutiny of the data base of law reports the research begins to develop enquiry into the literature on autonomy in medical law as well as philosophy to enable understanding of the potential links with judges' interpretations of autonomy in the law reports. In Chapter 1, what was seen as the central issue of autonomy in the context of ethically-contentious medical law cases was set out. It was stated there that the conception for this project was prompted by the intuition that the judiciary was using autonomy in a variety of senses. Initial involvement, and engagement, with the medical jurisprudence indicated that there was variety of judicial usage. This observation encouraged theoretical inquiry into factors explaining this diverse usage and the possible influence of the academic literature as an explanatory factor. Experience of legal practice and twenty years' reading in medical law and ethics, aroused my suspicion that law, ethics and philosophy were closely related. This suspicion was confirmed through more systematic engagement with the literature.

3.5.1 The special relationship between medical law and ethics

The relationship between medical law and the academic literature has been entangled in a way that other legal topics have not. When medical law was in its infancy it relied on materials from outside the law, such as bioethics, philosophy, sociology, and theology. Since then medical law has been 'normalised' as a legal topic, with its flood of cases, statutes, and regulations, making textbooks look more like those in

traditional legal fields, and a subject of greater interest to legal practitioners. In addition, unlike most other academic disciplines, bioethics and applied philosophy are practical disciplines whose theories have been regularly tested in the courts and by legislation. Capron & Michel (1993) write that "the field grew out of the practical realities of the physician-patient relationship, biomedical research, and the behavior of health care institutions" (1993: 33). Rothstein (2010) has pointed to medical law's role in providing consistent responses to bioethical issues. Elliot (1999) has drawn attention to the 'law-like' structure of modern bioethics, describing law as its *lingua franca*. There has thus been closeness between medical law and bioethics and applied philosophy which distinguishes it from other legal topics and academic disciplines.

3.5.2 Elemental uses of autonomy in the bioethical and philosophical literature

This early suspicion that there were regularities of usage between medical jurisprudence and the literature prompted a semi-systematic semantic analysis of the latter as a means of investigating the potential variations of usage of autonomy in it. An electronic search using legal (Lexis Library; Westlaw) and bioethical (PubMed) databases, search terms 'autonomy', 'medical law', and 'medical ethics', over a 27-year time line (1980-2007), yielded 43 bioethical and 27 academic legal articles that appeared to contain discussions of autonomy, creating an initial 'pool' of academic discourse concerning autonomy. This pool of material was enlarged by reviews of their bibliographies and investigation of books and articles which promised discursive treatment of the concept. The results of the analysis were arranged into four sections: the particular meaning assigned to the concept of autonomy; an exemplar quote which best represented the meaning assigned; my own paraphrase of

such based on examination of the literature; and a number of further examples of the way the assigned meaning of autonomy were in use. This empirical investigation provided the database for the semantic and hermeneutical analysis of the literature which followed.

This wider background reading revealed that the literature on autonomy is sizeable and complex, figuring in a number of recent, sophisticated philosophical treatments (Feinberg, 1986; Lindley, 1986; Raz, 1986; Young, 1986; Christman, 1988; Dworkin, 1988; Rawls, 1993; May, 1998; Taylor, 2005). These reveal a widespread conviction that the concept of autonomy, and the principle of respect for personal autonomy, is a legal, ethical and philosophical value of paramount importance (e.g. O'Neill, 2002; Brazier, 2006). In addition, it confirms that there are numerous *desiderata* of autonomy which vary between philosophers (cf. O'Neill, 2002; Beauchamp & Childress, 2009; Taylor, 2009; Sumner, 2011). Dunn & Foster (2010) have argued that its complexity, the fact that it "means different things to different people", might militate against its consistent use by the courts (2010: 88). In philosophy, Sumner has stated that:

> The concept of autonomy has received a great deal of attention (arguably too much attention) in recent decades, resulting in a bewildering array of competing analyses, many of which have little or nothing to do with the decision-making context of informed consent. The more robust concepts of autonomy require sophisticated capacities – for rational determination of the will or a high level of critical self-reflection – which no informed consent protocol demands. (Sumner, 2011: 33).

For the purposes of this thesis, eight different elemental meanings assigned to the concept of autonomy in the analysed literature have been selected. There are no doubt others which might have been chosen, but it is proposed that the classes of elemental meanings (or *conceptions*) of autonomy set out in what follows provides a serviceably comprehensive range. The analysis has been complicated by the lack of consensus in the literature about the meaning of the various conceptions. The definitions of the elemental uses of autonomy are meant to be heuristic; influenced, but not determined by, its use in the literature. Eight elemental uses of autonomy have been identified: (1) *Self-government* –the individual as the ultimate arbiter in matters affecting one's own person; (2) *Self-determination* – the freedom a person has to follow a self-chosen 'life-plan'; (2) *Self-creation* – the freedom to construct a self *ex nihilo* ; (4) *Self-realisation* – the freedom to manifest one's 'core' self, or true being; (5) *Self-ownership* – the quasi-proprietary freedom of self-disposal; (6) *Self-legislation* – being responsible for who one is and what one does; (7) *Privacy* – freedom from unwanted spatial interference; and (8) *Dignity* – freedom from humiliating and degrading treatment.

Sometimes, other conceptions of autonomy are given the sense assigned to one of those in the list (*self-rule* is used instead of self-government, or self-legislation). The analysis shows how mercurial is the ordinary language use of this terminology in the literature. This is an important observation, it is proposed, because while the meaning of autonomy is taken for granted in everyday discourse, it defies clear-cut definition. This should matter if it is regarded as a key value in law, ethics and medicine.

3.5.2.1 Self-government: Christman (1988) argues that whatever autonomy is, at the very least, the notion of self-government underlies the central use of the concept. Historically, the concept of autonomy has its genesis in the notion of political self-governance, initially characteristic of Hellenic city-states, a concept subsequently extended to notions of individual self-rule (Beauchamp & Childress, 2001). The ordinary language of self-government is, in many contexts of use, almost impossible to distinguish from notions of self-rule and self-control. In the historical record, self-government is understood in the negative or 'privative' sense as freedom from unwanted external constraint by other states. A lot of emphasis is normally placed in the literature on this negative construction of political self-government. But in Greek thought there is also a more 'positive' and individualised notion of individual self-government related to ideals of self-sufficiency (*autarkeia*) and independence deriving from the philosophical anthropologies of Plato and Aristotle.

In contemporary philosophy, Feinberg (1973; 1986) associates autonomy with self-rule, self-government and self-sovereignty. He states that a person is autonomous "… if I rule me, and no one else rules I" (1973: 16). Autonomy can also be understood four-fold as: the capacity for self-government, the actual condition of self-government, a character ideal, and as sovereign authority. Harris (1985) extends the semantic associations of self-government to capacities for self-control, self-determination and rational deliberation which equip a person to be the final authority or arbiter in decisions regarding his own body and other aspects of his person. Secker (1999), Jackson (2000) and O' Shea (2008) use self-government and self-determination synonymously. Levinsson (2008), in contrast, regards them as distinct interpretations of autonomy. Freyenhagen (2009) links self-government with mental

capacity. For Buss (2009), the authority a person has over her actions is an intrinsic feature of human agency.

3.5.2.2 Self-determination: Self-determination is the elemental meaning most commonly identified with autonomy in the literature. In the literature, self-determination seems to encapsulate the idea of having freedom to pursue one's goals in life, rather than freedom of choice *simpliciter*. Harris (1985) states that the:

> …point of autonomy, the point of choosing and having the freedom to choose, between competing conceptions of how, and indeed, why, to live, is simply that it is only thus that our lives become in any reasonable sense our own.

On this version of self-determination, freedom of choice is not an absolute value, but linked to having freedom to pursue one's own vision rather than someone else's (Jones, 1999; Smith, 1999). This version does not always hold in the literature. Fan (1997) identifies it (citing Beauchamp & Childress (1994)) with "autonomous actions [that] should not be subjected to controlling actions by others" and that insofar (citing Brody (1990)) "as an agent's choices do not infringe upon the rights and liberties of others that person should be able to carry out his or her choices." Struhkamp (2005) explicitly associates self-determination with freedom from unwanted interference:

> [T]he mainstream interpretation of patient autonomy in contemporary liberal bioethics [is] giving the patient the right to self-determination in order to protect him from unwanted interference (2005: 105).

Self-determination has a wide range of reference in the literature. For example, it is used in association with preferential choosing (Stirrat & Gill, 2005); self-control (Drought and Koenig, 2002); self-direction (Callahan, 2002); a counterpoint to the ethical value of the sanctity of life (Morgan and Veitch, 2004); and political freedom. Marshall (2008) conjoins self-determination and self-creation in her characterisation of one of two versions of autonomy. On this construction, self-determination is "the freedom to be and become the person one chooses" (2008: 349). She explicitly associates it with liberal and postmodern ideals of human personhood in contrast with the other version of autonomy she considers – self-realisation and self-discovery – which is informed by Aristotelian, communitarian and feminist perspectives.

It is clear from the literature that self-determination is a fluid concept easily conjoined with a range of other conceptions. Although it is premised on freedom of choice, there is no consistency in the literature about the ends to which self-determining choices should be directed, though it tends to be associated with freedom to pursue a life 'vision' or life-plan.

3.5.2.3 Self-creation: Schmitt (2005) defines self-creation as the capacity and ability to:

> … make ourselves be who we are….We are autonomous when we choose our own ideas and values, create our own life plans, choose our own moral principles, and in all these ways create our own selves. A self is not something that comes with us at birth, but is of our own making (2005: 9)

This idea of self-construction is distinguishable from Schmitt's definition of self-realisation (see below). Self-creation imports the idea of bringing a self into being "out of nothing" through a succession of choices. On his version, self-creation presupposes, on its dominant construction, self-determination – the freedom to pursue a personal life plan. Indeed, this conjoining of self-creation and self-determination is a feature of Marshall's (2008) analysis. Husted (1997) states that human lives are "a continuous process of self-creation" which comes about through "the successful pursuit of freely chosen goals…through successive choices and actions during their lives." According to Moser et al. (2006) self-creation presupposes the requisite "competency' meaning 'the individual repertoire of skills that recognising the possibilities and having the ability, capacities and expertise that allow people…to shape their own lives" (2006: 423).

Self-creation is central to the theories of three major thinkers: Rawls (1972; 2001), Raz (1986) and Dworkin 1993). For Rawls & Kelly (2001), it is closely related to his concept of self-respect which he defines as a 'basic good' or 'primary good' normally essential if citizens are to have "a lively sense of their worth as persons" (2001: 59). Raz (1986) contends that "the ruling idea behind the ideal of personal autonomy is that people should make their own lives and that the 'autonomous person is a (part) author of his own life" fashioned through a succession of choices (1986: 369). Dworkin (1993) argues that autonomy makes self-creation possible for it "allows for each of us to be responsible for shaping our lives according to our own coherent or incoherent – but in any case distinctive – personality" (1993:223, 224).

Thus, the conception of self-creation is inextricably bound up with conceptions of self-determination, and the freedom of choice and mental competency it presupposes.

3.5.2.4 Self-realisation: Schmitt (1995) defines self-realisation as the process in which persons:

> …attain personal autonomy to the extent that we fully develop that self in the course of a lifetime. Thus philosophers have thought that one's conscience or one's free will are moral capacities that are ours from birth and that conformity to one's conscience or the exercise of free will made one fully autonomous (1995: 9).

This definition assumes that persons are born with a set of inborn characteristics and capacities which are, by degrees, made manifest through free choice-making out of which a self-emerges, or is acquired, or discovered. Thus choice is integral to the process of self-realisation. Sherwin (1999) states that making choices "is often an act of self-discovery or self-definition and as such it requires the active involvement of the patient" (1999: 21). Englehardt (2001) equates the process of self-realisation with the cultivation of virtue:

> Autonomy is not just freedom from internal impulses or external constraints, but human flourishing as self-possession or self-development. Autonomy as determination by what is must truly oneself is integral to self-realization. Such a self-realization allows one to act fully in accord with oneself and the good one affirms (2001: 290).

For Marshall (2008), the distinction between self-realisation and self-creation is substantive, not merely analytical. Self-realisation entails reconciliation with "one's,

perhaps pre-determined, core essence, through some sort of process of self-discovery" (2008: 349). There is thus a naturalistic property pertaining to self-realisation which contrasts with the voluntarist character of self-creation.

3.5.2.5 Self-ownership: The conception of self-ownership has deep roots in the history of English philosophy. The exemplary definition is perhaps offered by Locke who stated that every man has a "'property' in his own 'person'" (Locke & Laslett, 1988: 287). In the modern literature, Nozick (1974) describes individual human beings as being 'self-owners', although this appears to be a particular interpretation of the Kantian principle of treating persons as 'ends-in-themselves.' While self-ownership is explored in philosophy, there is scant discussion in medical law. This is perhaps because the proposition that that a person can own himself, or perhaps parts of himself, was not legally-recognised until very recently (Harmon & Laurie, 2010). Notwithstanding, self-ownership has been rendered in various ways.

Archard (2008) distinguishes two models: proprietarian and sovereignty. Proprietarian self-ownership, he contends, underpins injunctions against bodily trespass, which are essentially property claims. Sovereignty is Archard's alternative model of moral relationship of a person to her body defining the scope of legitimate authority. On Archard's analysis, therefore notions of self-ownership move fluidly into closely-related ideas of privacy and self-government. This broadly corresponds to Schmitt's (1995) analysis, who distinguishes self-ownership from self-creation and self-realisation. This is so in its emphasis on the idea of a person having some kind of proprietary right over his own self. This involves corresponding rights to

enforce “a certain kind of exclusion” (1995: 7) and thus to restrict access and use of one’s person (connoting spatial privacy).

But the concept also embraces the more positive idea of holding rights of absolute disposal over one’s own person, analogous with slaves and chattels (a form of self-government). In addition, Schmitt identifies, although he questions it, a popular association between “being one’s own person” and “living according to one’s own life plan” (connoting ‘self-determination’). Por (2002), in terms redolent of Berlin (1969)) implicitly connects self-ownership with ‘self-mastery’:

> Since I am master of myself, there is at least one thing that I own, mainly, I myself. No one may kill or cripple me. Hence my right to preservation. I own my body. So I may go where I like.

Thus, self-ownership is a concept which is revealed to be closely articulated with a wide variety of elemental meanings of autonomy.

3.5.2.6 Self-legislation: The idea of autonomy as self-legislation is principally associated with the philosophy of Kant. Although, as some would expect, there is a lot of discussion of its meaning in the philosophical literature, there is relatively little in the legal literature (although see Veitch, 2007). This is perhaps because the standards of rationality implicit in Kant’s thought are unrealistic in the context of quotidian medical practice and as a realistic legal standard (Beauchamp & Childress, 2009; Sumner, 2011). Apart from the notion of ‘self-rule’ with which it is often used synonymously, there is little association between self-legislation and the other

meanings assigned to autonomy in the literature. Englehardt (2001), however, seems to use self-legislation in terms that connote some form of 'self-realisation'. On his version, a person, by freely adopting the moral law by which she becomes 'self-ruled' gives expression to her 'true self' as a rational being and in that sense 'realises' her true nature.

The conception of 'self-control' can also be understood in the Kantian sense of a refusal to submit to laws that are given by others (heteronomy) as opposed to self-given (autonomy) (Gaylin & Jennings, 2003). Wolff (1970) further specifies this Kantian stances stating:

> As Kant argued, moral autonomy is a submission to laws that one has made for oneself. The autonomous man, insofar as he is autonomous is not subject to the will of another. The autonomous…man may do what another tells him, but not because he has been told to do it…By accepting as final the commands of others, he forfeits his autonomy (1970: 14).

Although there has been a great deal of critical reflection on what Kant means by self-legislation, it can perhaps be encapsulated through the notion of *responsibility*; that is, taking responsibility for who one is and what one does according to universalisable norms. O'Neill (2002) has provided an updated version of the Kant's conception of self-legislation which she calls 'principled autonomy'. By this she means those non-derivative, or self-given, laws which are delivered to us by practical reason, whose principle for action 'could be adopted by all others' (O'Neill, 2002: 85). O'Neill distinguishes *moral* autonomy from *individualistic* autonomy, locating

the latter at the nexus between reason and responsibility and the former in the deliveries of the individual's wishes, desires and inclinations.

3.5.2.7 Privacy: Autonomy as 'privacy principally refers to the right to be left alone to do one's own thing, to be free from unwanted interference and secluded from the presence or view of others. Dworkin (2003) identifies privacy with a version of autonomy he designates 'physical essentialism', "the view that one is entitled to be left alone, especially to have one's body left alone" (2003: 238-39). Channick (1999) categorises this as "a negative liberty interest establishing a zone of privacy and non-interference around each person" (1999: 585-86). This broadly corresponds with Wilson's (2007) equation of autonomy with "a sphere of decisional privacy" in which "we should respect autonomy by allowing persons to make choices for themselves without coercing or otherwise interfering with them" (2007: 353). Laurie (2001) defines privacy as "a state of separateness from others" further specified as "a state of non-access to the individual's body or psychological person", i.e. "spatial privacy" (2001: 27).

3.5.2.8 Dignity: The conception of dignity is used in close association with autonomy and a wide range of its other conceptions. It is used conjunctively with self-determination (Biggs, 2003), privacy (Jackson, 2008; Price, 2009), liberty, liberal-individualism and freedom (Feldman, 1999; Marshall, 2008). Bowman (2004) identifies autonomy as the intellectual and moral foundation of bioethics and the expression of the Western concept of individualism, that is, a "belief in the importance, uniqueness, dignity and sovereignty of each person and the sanctity of each individual life." (2004: 666). It is connected with 'bodily autonomy' (Gillon,

1985; Jackson, 2000) and Kantian rationality. Benkler (2001) states that "[A]utonomy is a value rooted in equal respect for the equal dignity of humans as rational beings" (2001: 58). He also contends that autonomy "is central to our intuitions about liberty and dignity generally. Bratza (2009) identifies "the dignity and distinct identity of all human beings" as key concepts with which the European Court of Human Rights has been involved in response to the field of medical law and practice (2009: 105).

The width of dignity's range of reference is implicit in Beyleveld and Brownsword's (2001) distinction between dignity as 'empowerment' and as 'constraint'. As empowerment, dignity is closely associated with liberal individualist notions of autonomy and human rights. As constraint, it is more concerned with duties, than rights. According to Brownsword (2003), dignity as empowerment makes a triple demand entailing respect for agential capacity for free choice; for the choices in fact made; and for the enabling and supporting conditions needed for free and informed choice. Thus, on this view, acknowledging the dignity of others requires 'respecting the autonomy of persons' (2003: 416). Dignity 'as constraint' entails setting limits on autonomous action (in the empowerment sense) because, following Kant, human beings "owe themselves a duty of self-esteem" (2003: 421). Failure to respect such dignity would militate against the common good (Andorno, 2009).

3.5.2.9 Summary of section on element meanings of autonomy: The *Cycle 1* analysis of a wide range of medico-legal, bioethical and philosophical literature shows that that a wide range of meanings are assigned to the concept of autonomy through conjunctive or associative use. It demonstrates that most academics do not use the

concept of autonomy with precision, but rather inflect its meaning through fluid use of a wide range of different conceptions. It is suggested that these conceptions encapsulate distinct notions which nevertheless bear 'family resemblances', allowing lawyers and philosophers to range mercurially over a range of ethical values associated with autonomy without defining their terms. This is not meant to advance a criticism of such quotidian philosophical use, but rather to draw attention to the need, given autonomy's paramount status as a legal and ethical concept, to make a little more clear what the law and medical practice is required to protect, uphold and promote in respecting the principle of patient autonomy.

It is a presupposition of this first cycle of enquiry that the law is not an immured, autonomous discipline, but potentially porous to broader intellectual currents, which might be reflected in judicial discourse responding to the ethical challenges of medical law and practice. In the next section the potential relationship between judicial usage and the literature is considered.

3.6 THE RELATIONSHIP OF THE ACADEMY TO JUDICIAL USAGE

To date, there has been no systematic analysis of the impact of academic thought on judicial thinking in medical jurisprudence, and therefore of academic influence on judicial interpretations of autonomy. There are, broadly speaking, two sources of evidence for academic influence on judicial constructions of autonomy in the medical law reports: the law reports themselves, and sources outside the law reports. Firstly, the law reports themselves may specify sources of influence and guidance. The sources of influence explicitly indicated in the law reports themselves can be

jurisprudential, academic legal and academic non-legal. Secondly, where the law reports do not supply direct evidence of academic influence on judicial thinking, the influence of the academy might plausibly be inferred on the basis of regularities of particular usages between the academy and the case decisions. In view of the history of the relationship between law, bioethics and philosophy, it is a plausible presupposition of enquiry that the judiciary might be at some level influenced by academic discourse in their constructions of autonomy in medical law cases.

The common law has traditionally adopted a dualist model of legal authority distinguishing between mandatory, or 'binding', and 'persuasive' legal authority; in other words, the 'binding sources' model (Moran, 2004). Binding authorities constrain a court to follow them, e.g. the decision of a higher court, or the earlier decision of the same court where a strong norm of *stare decisis* exists. Persuasive authorities do not constrain a court in that way, but rather provide reasons for decisions, or conclusions, which a court may follow because it finds them persuasive. These persuasive authorities may be found in legal reasoning in domestic law cases which are ancillary, rather than central, to the rationale of those decisions, or conclusions, or in the legal reasoning in cases decided in foreign common law jurisdictions, e.g. Australia, Canada, New Zealand, and the USA, whether such reasoning is central to the case or not,

A distinction can also be made between documents of primary or secondary authority. A document which establishes the law in a particular area, e.g. a statute or domestic case law, is referred to as a primary authority. Secondary authorities, in contrast, explain, or supplement, primary authorities and can include 'journal

articles, legal encyclopaedias, textbooks and the like' (Smyth, 2008: 145) The precise jurisprudential status of these secondary authorities is not certain. Although they clearly do not have the 'binding' authority of statute, or binding precedent, it seems that the courts have been prepared to assign them 'persuasive' or 'permissive' authority (Zander, 2004; Wacks, 2008). Braun (2010) has argued that judges are showing increasing interest in academic legal writing.

These changes in citation practice reflect deeper shifts in what counts as legal argument, and the place that ethical language has in such argument. Schauer (2008) states that if the law is construed as constituting authoritative practice, "then a great deal turns on what the authorities are" (2008: 1060). He contends that determining what a legal source is best understood as a practice in the Wittgensteinian sense:

> …a practice in which lawyers, judges, commentators, and other legal actors gradually and in diffuse fashion determine what will count as a legitimate source-and thus what will count as law (2008: 1957).

The reasons for citing secondary, and therefore non-binding, authority may vary. The judiciary may cite them because they: reinforce views it has arrived at independently; conveniently compile cases the judge want to rely on as authority; summarise the state of the law in domestic or foreign jurisdictions; or flesh out the policy implications of a decision (cf. Smyth, 2009).

Nature of authority	Legal influences	Non-legal influences
Binding	Statute law Domestic case law	
Persuasive/Permissive	Non-domestic case law Academic legal literature, e.g. textbooks, journal articles, Law Commission Reports	Non-academic legal literature

Figure 3.4 Table of sources of legal influence and guidance

The former refusal of the English courts to accept citations from living academics is giving way to increased reliance on non-legal sources of authority and guidance (Zander, 2004; Braun, 2006; Duxbury, 2001; Duxbury, 2008). Duxbury (2001) argues that the example of medical law supports the proposition that judges are more likely to rely on academic literature in order to resolve cases which do not fall squarely within traditional legal topics. He conjectures that 'when deciding cases revolving around cases of medical ethics ... appellate judges are possibly more inclined than they otherwise would be to introduce academic opinions…into their judgments.' He also suggests that the impact of the ECHR will further encourage the trend towards academic citation. To date, however, as Duxbury acknowledges, there has been no systematic study corroborating such academic conjecture. Nevertheless, it is suggested as a result of the empirical analysis carried out in this thesis that the cases in the selected medical law reports do provide *prima facie* evidence of academic influence on judicial thought.

3.6.1 The bases of judicial reliance on academic thought

It is proposed that there is enough evidence in the selected medical law reports to indicate that the judiciary are aware of academic developments which might

influence their interpretations of autonomy. Fourteen of the cases in the research sample refer to academic literature (see Appendix 3). The majority of these references are legal, although there is some reference to non-legal literature. The appellate courts tend to cite academic literature more frequently than courts of first instance (i.e. the High Court). The Court of Appeal case of *Re A* (2001) and House of Lords case of *Pretty* (2002) cite the literature most frequently. However, while the judiciary draw on academic literature, it is difficult to discern consistent pattern of usage. Illustrations of, and reasons for, this inconsistency are explored below:

3.6.1.1 Self-justification: The courts have used it for self-justificatory purposes. In *Re W* (1992), the Court of Appeal (Lord Donaldson) cites (p.75*A-D*) a cluster of literature (Bainham, 1992; Thornton, 1992; Dyer, 1992; Brazier, 1992), perfunctorily summarises it, before dismissing it as inapplicable to the case it was deciding. This literature was promoting the 'human rights' analysis of the law of consent dismissing as ethically incoherent the more conservative court stance which allowed for parental autonomy override of a competent child's treatment refusal.

3.6.1.2 Quest for legal and ethical guidance: The courts sometimes refer to academic authority for ethical guidance. In *Bland* (1993) (at pp. 825*H*-826*A*), one Court of Appeal judge (Lord Justice Hoffmann), not noted for citing academic authority (Rodger, 2010) claims to have gained assistance from the unpublished manuscript of a work by a noted legal and moral philosopher (Dworkin, 1993) and personal conversations with another well-known thinker (Bernard Williams). He states that these interlocutors have helped him in his attempts to think through the moral principles that have underpinned his decision to authorise the removal of life-

sustaining ANH from a permanently-insensate patient. However, the judge does not specify precisely what assistance he has received, or offers a philosophical analysis. It can be plausibly inferred (although the passage is neither cited nor quoted) that Dworkin's examination of autonomy has lubricated the judges' analysis of the relationship between ethical values of self-determination, dignity and sanctity of life.

In *Re A* (2001), the Court of Appeal's relatively wide-ranging appeal to academic authority appears to assist the judicial thinking process, rather than providing the intellectual framework within which the ethical and legal issues can be systematically explored and rationalised. The court refers to a range of precedents, legal treatises and textbooks, articles by medical lawyers and ethicists, and hypothetical case-studies. This is used to assist the court in the quest for a legal justification for separation surgery that would, without it, constitute murder and (despite the court's insistence that it was 'a court of law, not of morals' (p.155*D-E*)) to resource the search for an ethical justification for a foreseeably lethal invasion of the twins physical autonomy and bodily integrity (cf. p.218*F*). James (2008) argues that in the conjoined twins case, the Court of Appeal prefers real-life cases over hypothetical, and historical (precedents) over philosophical (generalisations) method.

3.6.1.3 Context of ethical pluralism: The courts sometimes consult academic literature to highlight the presence of ethical diversity, rather than as sources of guidance. In *Pretty* (2002), the House of Lords (Lord Steyn) (p.831*B-F*) cites a sizable body of academic literature addressing assisted suicide and euthanasia (Williams, 1958; Dworkin, 1993; Keown, 1995; Otlowski, 1997; Warnock, 2006). The House of Lords states:

> It is not for us, in this case, to express a view on these arguments. But it is of great importance to note that these are ancient questions on which millions in the past have taken diametrically opposite view and still do.

It is suggested that questions of autonomy lie at the heart of this diversity of opinion: does an individual's autonomy extend to the manner and timing of his death, or is it restricted for reasons of principle and good practice?

3.6.2 Academic authority and autonomy

In two cases, questions of autonomy have been more directly addressed by appeal to academic literature: *Re B* (2002) and *Chester* (2005).

3.6.2.1 The case of *Re B* (2002)

In *Re B* (2002), the High Court declared that a middle-aged professional woman, who was quadriplegic and ventilator-dependent following a cerebro-spinal haemorrhage, possessed mental capacity and was therefore entitled to refuse the continuation of the ventilator keeping her alive. This determination was in keeping with the legal proposition established in *Re T* (1993) that a person with mental capacity has an unqualified right to refuse all medical treatment for whatever reason. The court refers to a recently-published academic article (Atkins, 2000), which is brought to its attention via the testimony of an expert witness, Dr Sensky. At paragraph 82, the court quotes part of the article (2000) which states that:

> If we accept that the subjective character of experience is irreducible and that it is grounded in the particularity

> of our points of view, then we are bound to realise that our respect for each other's differences and autonomy embodies a respect for the particularity of each other's points of view. Respect for autonomy is at the same time recognition of the irreducible differences that separate us as subjects… While we can imagine, we cannot know objectively 'what it is like to be' another person, no matter how many facts we are in possession of …

The judge states that she finds the article helpful in the present case and "Dr Sensky to be a most impressive witness" (para.84). However, she does not specify why she has found the article of assistance, or how it in any ways influences the legal determination she is required to make having already rehearsed the chief precedents under heading "the principle of autonomy" (paras. 16-21). It might plausibly be suggested that the court is reaching for a robust ethical justification for a legal determination that would very likely eventuate in the patient's death once her ventilator was switched off.

The philosophical interpretation of autonomy as "respect for the particularity of each other's points of view" and "recognition of the irreducible differences that separate us as subjects" is meant to command empathy. It is also meant to encourage 'epistemological humility' on grounds that no one can have direct access to the contents of another person's mind and subjective values. Morgan & Veitch (2004) maintain that this argument is misplaced in the context of a capacitous patient who is perfectly capable of articulating and communicating subjective values. It is more appropriately applied to incapacitate patients, e.g. *Re F* (1990) (cognitively-impaired adult) and *Bland* (1993) (permanently-insensate adult).

3.6.2.2 The case of *Chester* (2005)

In *Chester* (2005), a majority (3:2) of the House of Lords extended the traditional rules of causation in medical negligence in order to compensate a patient for infringement of her autonomy. The case concerned the allegedly negligent failure of a surgeon to disclose the inherent risks of developing a serious neurologic condition (equina cauda syndrome). The dissenting minority in the court held that there could be no finding of negligence because the patient had agreed that she would have eventually have undergone surgery with its attendant risks, after seeking advice and making further enquiries. The majority, however, held that the principal harm for which she merited compensation was not the physical harm which ensued, but harm to her autonomy: the patient's 'right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles' (p.146*G*). The function of informed consent, held one of the majority (Lord Steyn) (p. 144*B-E*) is 'to ensure that due respect is given to the autonomy and dignity of each patient' as well as giving a patient an opportunity to avoid an unacceptable risk.

To this end, the House of Lords appeal to legal and philosophical authority (Hart & Honore, 1985; Dworkin, 1993; Honore, 1999). The majority draw upon legal causation theory, with whose interpretation the minority disagree, to provide a rational justification for discerning a causal link based on justice. They use an ethical argument to reinforce their view of the legal interests at stake (p.144*B-E*):

> The most plausible [account] emphasizes the integrity rather than the welfare of the choosing agent; the value of autonomy, on this view, derives from the capacity it protects: the capacity to express one's own character — values, commitments, convictions, and critical as

> well as experiential interests — in the life one leads. Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent — but, in any case, distinctive — personality. It allows us to lead our lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves. We allow someone to choose death over radical amputation or a blood transfusion, if that is his informed wish, because we acknowledge his right to a life structured by his own values.

The approach of the majority is, like *Re W* (1992, suggestive of the 'human rights' approach to medical law and the law of consent (Chapter 1) advocated by Kennedy (1988) and Grubb & Kennedy (2000); noting with approval Lord Scarman's statement in *Sidaway* (1985) (at p.152*H*) that 'the patient's right to make his own decision might be seen as a basic human right protected by the common law.' The decision in *Chester* (2005) could plausibly be interpreted as a modest attempt by the majority in the highest court to give rational structure to the law, around autonomy. It is noteworthy that this is attempted in the face of the dissenting minority who wished an outcome in conformity with traditional causation principles and precedent.

3.7 CONCLUSION: THE LIMITS OF EMPIRICAL ENQUIRY

The approach described in this chapter represents a methodical approach to the examination of judicial decisions which differs in important ways from conventional legal commentary on legal cases. The examination of the structure of a law report, the doctrine of precedent, methods of choosing the cases themselves and the

particular published series' of reports to examine are essential stages in the disciplined analysis of law reports.

The empirical analysis of the law reports undertaken is premised on the view that they constitute published material eminently suitable to forms of systematic, qualitative documentary analysis. This approach differs from methods of conventional legal analysis which tend to focus on the disjunction between the current state of the law and the law as it, in the view of the legal commentator, ought to be. Because this form of analysis of the law reports has not been undertaken before, it has been necessary to describe and explain at some length the nature of the database of law reports and the justification for choosing the cases in the research sample and excluding others.

Nevertheless empirical investigation, because of its preoccupation with description and association, is not adequate alone to understand and explain the focus of enquiry. A purely semantic enquiry would have resulted in trite description of the uses and variety of use of autonomy common to the jurisprudence and the literature. It would not have afforded any explanation why these uses, associations and variety of uses existed in the first place This rather truncated enquiry would have been understandable in view of the initial, descriptive, research questions. Instead, the prospect of an outcome restricted to trivial description forced a critical reappraisal of the nature of the enquiry and prompted the formulation of further explanatory research questions. These were designed to generate understanding of the meanings implicit in jurisprudential and academic use of autonomy (*Cycle 2*) and the structures and practices generating such meanings (*Cycle 3*).

Accordingly, a thesis which began as (with the benefit of hindsight) a rather limited linguistic analysis of the jurisprudence, became a more significant enquiry into the proximate and underlying influences explaining judicial meaning in practice of use. This development was not, and could not, have been predicted at the outset of the research and is testament to the 'revelatory' power of the grounded theory approach employed. Accordingly the next chapter, the investigation will proceed to the process and findings of the second cycle of (hermeneutical) enquiry.

PART 2

DEEPENING THE CYCLES OF RESEARCH ENQUIRY

CHAPTER 4

THE SECOND CYCLE OF HERMENEUTICAL ENQUIRY: UNDERSTANDING THE MEANINGS OF AUTONOMY

4.1 INTRODUCTION

This chapter sets out the main components of the second cycle of (hermeneutical) enquiry into the sources of meaning, understanding and interpretation of autonomy which were not evident to empirical analysis. In what follows, the philosophical grounds of the enquiry will be set out, followed by an account of the hermeneutical strategy of investigation. The differentiation of the elemental uses of autonomy into the personal dimensions of 'body', 'mind' and 'identity' in the literature and the law reports, and the development of an integrated concept of the autonomy as the capability of the person will be accounted for. This development will be placed in the context of an understanding of autonomy as relating to two traditions of freedom. The chapter will end with an account of the impact that the hermeneutical cycle of enquiry has had on the coding process and the limitations of hermeneutical analysis. This will then lead on into the third cycle of critical realist enquiry in the next chapter.

4.2 DEVELOPING THE PRESUPPOSITIONS OF ENQUIRY

The constant interaction between researcher and data generates the theory that explains the object of enquiry. In this research, the scrutiny of law reports on judges' use and understanding of autonomy in ethically-contentious medical law cases will generate analysis of the relative influences of common law precedent, the literature, and, as it is being proposed, wider traditions, on decision-making. The unfolding relationship between researcher and data develops a further level of theoretical analysis concerning the presuppositions underlying the research, enabling the researcher to deepen understanding of the nature of the objects of enquiry (ontology) and how they are to be known (epistemology). Pole and Lampard (2002) emphasise that the discovery of theory depends on the capacity of the researcher to relate the codes and concepts to the epistemological and ontological questions which shape the research. Glaser and Strauss (1967) did not offer a detailed methodology, nor one systematically related to questions of ontology and epistemology. Accordingly, in the development of grounded theory, there have been a variety of different ways of presenting the theoretical presuppositions reflecting the position taken by the researcher on the 'empirical data-theory construction' dimension. The work of Johnson et al (1984) provides a helpful analysis of different forms which presuppositions of enquiry can take, while recognising the limitations of the dualities embodied in typologies.

		How is Social Reality Known?	
		Nominal	Real
What is the nature of Social Reality?	Material	Empiricism	Substantialism
	Ideal	Interpretivism	Rationalism

Figure 4.1 A typology of forms of enquiry (Johnson et al, 1984)

Researchers can emphasise different aspects of the reality they perceive in their data. Some will stress the material qualities of the world they are studying, the solid nature of substantive experience, while others will argue that this misses what is distinctive about human activity and focus instead on the intentions and ideas that endow action with meaning. Researchers equally differ on the weight they attribute to conceptualising and categorising their data. Some believe that concepts are merely convenient names to summarise what remain in reality particular things or events which make up the social world (nominalists), while others believe that concepts reveal or disclose a reality, structures, that exist independently of any individual not immediately accessible to observation and experience (realist).

The first cycle of engagement with the research data began with the purpose of developing understanding of judges' interpretations of the meaning of autonomy in their decision-making and necessitated hermeneutic enquiry (*Cycle 2*). As the investigation proceeded, the presuppositions of enquiry needed further development. In the analysis of the law reports, the process of abstraction was driven by anxiety caused by initial reading of the reports and wider background reading. It was feared that the initial codes and concepts were not adequate to medical law reports. Reading and research suggested underlying structures – traditions of moral and political order

– which were not immediately appreciated, that needed to be unearthed and accounted for, adopting the presuppositions of critical realism (*Cycle 3*).

4.3 STRATEGY OF INVESTIGATION: ITERATIONS OF MEANING (*CYCLE2*)

The first cycle of enquiry was principally concerned with use. The second hermeneutical cycle is chiefly preoccupied with questions of meaning in use and the continuities of meanings and interpretations of autonomy in the law reports and literature.

4.3.1 Interpretation and understanding: the presuppositions of hermeneutics

'Hermeneutics' is the art of interpretation and principally refers to the method of understanding the meaning of texts and social practices (Gadamer (1989) and Ricoeur (1991; 2004)). The meaning of the social world is not inherent in a set of natural conditions, but consists in people's thoughts and interpretations of it. In order to uncover these, individuals' subjective interpretations need to be investigated. Interpretivism, which is a form of hermeneutics, rejects the view that the meaning of the world disclosed in texts is off-limits to human understandings. It also refuses purely creative interpretative processes in which human actors are free to interpret the meaning of the social world, including texts, in any way they desire or choose

This tension between subjectivism and objectivism exists within legal philosophy. The Critical Legal Studies movement which reached its zenith in the 1970s in the works of Unger (1983) and Kennedy & Klare (1984), argued against the objectivity

of legal operations to the point of existential solipsism. In contrast, Dworkin (1996) has contended for a 'purposive' interpretation of legal texts and practice, known as 'constructive interpretation'. Dworkin rejects the view that legal interpretation is necessarily whimsical and argues that legal interpreters can arrive at the correct legal answers based on the legal documentary tradition. There is a more stringently objectivist tradition of legal hermeneutics in contemporary legal philosophy focussing on 'original intent'. On this view, the correct interpretation is the one that supposedly most closely approximates what the original framers of the text intended.

Interpretivist approaches toward social reality share an opposition to positivism. They also share a weakness; they leave reality untouched. Delanty has stated that hermeneutics "has been conceived more in terms of a dialogue than an interrogation of reality" (Delanty, 1997: 57). Because it implies that social reality is wholly made up of personal interpretation, it declines to travel beyond interpretation to unearth the concealed structures which make sense of the surface reality. Its exclusive preoccupation with 'meaning' has led to its failure to engage with the structures of power and advantage that make up the public world.

4.3.2. Reflecting on meaning in the use of autonomy in the law reports and literature

The focus in *Cycle 1* was on semantic analysis of the law reports and literature with a descriptive focus on uses of autonomy disclosing variation in use, but not revealing the meanings or interpretations which inform such use. Accordingly *Cycle 2* developed enquiry into the meanings informing use of autonomy through investigating of the medical law and philosophical literatures in search of meaning.

4.3.2.1 Reflecting on data collection: It became apparent on further reflection that the various elemental meanings of autonomy identified in *Cycle 1* could be related to three distinct dimensions of the 'self', disclosing an emerging concept of autonomy as body, mind and identity. This discovery suggested that there might be layers, or sources, of meaning underlying and informing the elemental ones and that continued scrutiny of the law reports and the literature should be undertaken with this new level of awareness. The descriptive limits of the first cycle of enquiry led to the insight that the concept of autonomy was part of a wider field of discourse which required a different form of analysis (textual and hermeneutic) to locate the sources which informed meaning.

Deeper review of, and enquiry into, the literature (e.g. Arendt, 1985; Veitch, 2007; Bogdanor, 2009) led to a new appreciation of the significance of the importance of philosophical lineages and the implications of these for the relationship between the literature and the jurisprudence. As a result, the significance of the dimensions of person was not simply left at the level of a convenient general category for various elemental meanings, but rather as things which implicated distinct aspects of the philosophical heritage, e.g. the association of the body with the tradition of 'negative liberty', the mind with the rationalist tradition associated with Kant, and its relationship with notions of personal efficacy, self-mastery and positive liberty, and personal identity and its historical connections with the recognitive tradition of inter-subjectivity derived from Hegel. Cognisance of these contrasting traditions heightened awareness of the degree to which these discursive traditions were implicated in the different rationalities of bodies of law and the meanings of autonomy which are informed and underlain by them.

4.3.2.2 Theoretic elaboration: Closer attention to philosophical lineages, in turn, clarified the central importance of freedom, and its two contrasting traditions – 'freedom from' and 'freedom for' (which can be expressed as negative/positive liberty or liberty/freedom).Thus, underlying and informing the meanings in the use of autonomy are two contrasting traditions of freedom. The concept of autonomy is informed by discursive traditions of liberty and freedom. It was observed how fluidly this vocabulary of freedom is used, leading to the new observation that the law reports and the literature appear to refer to 'bodily', 'intellectual' and 'social' autonomy as if they were they were autonomies in their own right rather than simply a part of autonomy.

4.3.2.3 Recoded concepts and categories: As a result of this deepened understanding of the meanings in the use of autonomy in the literature and law reports, it was possible to construct a new conceptual hierarchy. It could be seen that the various elemental meanings assigned to autonomy identified at *Cycle 1* could be related to the concepts of body, mind and identity. These in turn could be connected more abstractly to new categories of liberty, self-determination and capability. The category of liberty could be seen to relate to 'bodily' constructions of autonomy which emphasised freedom from unwanted interference. Self-determination could be seen to be a more foundational concept than simply one conception amongst the range, encapsulating the notion of intellectual autonomy and its associated competencies, conditions and capacities. Capability, was a concept drawn from the philosophical literature (e.g. Sen, 2009; Nussbaum, 2011), which promised to encompass those more complex conceptions of autonomy informed by the jurisprudence deriving from the European Convention on Human Rights.

4.3.3 *Cycle 2* coding: concepts of person

The conceptions of autonomy identified in the first cycle of enquiry were iteratively and interpretatively re-coded following the second cycle of analysis of the literature. As a result of this second cycle, the various elemental uses autonomy identified in the first level of analysis could be seen to correspond with distinct aspects of the 'self' or 'person' (body, mind and identity) and conceptualised (Level 2) as distinct expressions of autonomy: bodily, intellectual and social.

For example, in *Re M* (2011), the link between the elemental use of autonomy and the distinctive bodily aspect of the person is made explicit at para. 95:

> Personal autonomy survives the onset of incapacity to consent or refuse medical treatment "Article 8 protects the right to personal autonomy, otherwise described as the right to physical and bodily integrity. It protects a patient's right to self-determination and an intrusion into bodily integrity must be justified under Article 8(2).

The link between privacy (as 'private life') and identity, or social autonomy is made explicit in the Court of Appeal judgement in *Purdy* (2009) at para. 55:

> Elusive though the concept is, I think one must understand "private life" in Article 8 [of the ECHR] as extending to those features which are integral to a person's identity or ability to function socially as a person.

The third level of analysis led to the formation of *capability* as a conceptual category, which can be seen to offer an interdependent theory of autonomy integrate the otherwise partial and incomplete perspectives of body, mind and identity. While not explicitly part of the jurisprudential lexicon, nevertheless the concept capability captures the concern extant in a number of the law reports decided under the

European Convention on Human Rights, with its emphasis on 'the whole person' and the means needed to promoted self–realisation.

	Levels of coding			
	Level 1		**Level 2**	**Level 3**
Cycle 2 **Concepts of person**	**Particulars**	**Code**	**Concept**	**Category**
	Bodily inviolability	*II (a) (i)*	Body (or *bodily autonomy*) *(II A (ii))*	Capability *(II (iii))*
	Physical sovereignty	*II (b) (i)*		
	Bodily integrity	*II (c) (i)*		
	Freedom from interference (or *liberty*)	*II (d) (i)*		
	(Spatial) Privacy	*II (e) (i)*		
	Independence	*II (f) (i)*		
	Self-possession	*II (g) (i)*		
	Self-ownership	*II (h) (i)*		
	Self-control	*II (i) (i)*		
	Freedom of choice	*II (j) (i)*	Mind (or *intellectual autonomy*) *(II B (ii))*	
	Mental capacity	*II (k) (i)*		
	Self-determination	*II (l) (i)*		
	Psychological integrity	*II (m) (i)*		
	Moral integrity	*II (n) (i)*	Identity (or *social autonomy (II C (ii)*	
	Dignity	*II (o) (i)*		
	Privacy (as 'private life')	*II (p) (i)*		
	Self-creation	*II (q) (i)*		
	Self-realisation	*II (r) (i)*		
	Subjective character of experience	*II (s) (i)*		

Figure 4.2 – Concepts of person (*Level 2*)

4.3.3.1 Research questions and hypothesis: In *Cycle 1*, three descriptive research questions guided empirical enquiry:

1a. is there judicial use of autonomy?

1b. is there variation in judicial usage?

1c. is there associations between the academy and judicial usage?

It was realised, however, that while empirical enquiry could identify autonomy's different usages, it could not establish its meaning in use. This prompted the second cycle of textual enquiry and hermeneutical analysis which helped to generate deeper understanding of its sources and layers of meaning. The limitations of the descriptive research questions which were focused on *what* uses and influences pertained to the judiciary, led to the formulation of an additional research question pertinent to *Cycle2*:

2. what meanings and interpretations do judges give to their usage of autonomy?

Though the semantic analysis of elemental meanings of autonomy in judges decisions had led to the discovery that there was use and variety of use of autonomy in judicial decision-making which corresponded to similar variation in the literature, it did not explain that use and variation. The regularities of particular usage between the jurisprudence and the literature provide good *prima facie* evidence that the use of autonomy in the literature is a source of influence on judicial thinking. However deeper enquiry into the literature led beyond observation of interdependence between the law reports and the literature to the discovery that the elemental meanings assigned to autonomy in both was materially related to an emerging concept of autonomy as body, mind and identity and thus a more holistic concept of the person. Thus, the autonomy of the whole person needed to be understood not simply in terms of autonomy's values, but also its purposes and conditions. This deepened enquiry led towards the search for an integrated theory of autonomy which reconciled each.

4.4 TOWARDS A HOLISTIC CONCEPT OF AUTONOMY AS THE CAPABILITY OF THE PERSON

In Chapter 3, a potentially confusing array of elemental conceptualisations of autonomy has been identified in the academic literature. There is, accordingly, a need to order these in terms of their distinctive values, purposes and conditions. This will be done in two sections: the first conceptualises the values and purposes of autonomy as focusing on 'the self'; the second conceptualises the social and political conditions of autonomy.

4.4.1 Dimensions of autonomy as the self in the literature

The foregoing analysis clearly demonstrates that the various conceptions of autonomy in the academic literature pertain to various aspects of the 'self', or person, e.g. self-government, self-determination, self-realisation etc. On closer inspection, it becomes apparent to particular dimensions of the self: (i) the body (e.g. self-ownership); (ii) the mind: reason and choice (e.g. self-legislation); and (iii) identity (e.g. self-realisation). Analysing autonomy as the self in three dimensions allows its further theoretical investigation and progress towards a fuller theory of autonomy.

4.4.1.1 The dimension of 'the body'

In philosophy and law, the concept of autonomy is strongly associated with conceptions of bodily integrity, or physical sovereignty. These notions have negative and positive sense. In its negative sense, bodily integrity refers to personal liberty or freedom from unwanted outside physical interference. In its positive sense, it

concerns a person's freedom to move her body through space and time as desired. The notion of bodily integrity has deep roots in part of the philosophical tradition. Hobbes (Hobbes & Gaskin, 1996) defines freedom in negative, and mechanistic, terms as the absence of external obstacles and hindrances: "[A free man] is he that in those things, which by his strength and wit he is able to do, is not hindered to doe what he has a will to" (1996: 167). Hobbes' view has been associated, albeit contestably, with an extreme version of negative liberty (van Mill, 1995). Hobbes' concept of 'bodily' autonomy is echoed by Locke (Locke & Laslett, 1988)) and Mill (Mill & Gray, 2008). For Locke, "to be at liberty is to be free from restraint and violence from others" (2008: 306). For Mill, "he only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others" (2008: 14). Locke also regarded persons as having "property in their own person". This is a central notion in the contemporary theories of Pufendorf (2005), Rawls (1971) and Nozick (1974).

Thus, the association between autonomy and freedom from bodily restraint, or hindrance, by material, or legal, obstacles runs deeply in part of the philosophical tradition. But although Hobbes has acquired a reputation as the primary theorist of 'pure negative liberty', Van Mill (1995) argues that Hobbes actually discusses a great many other conditions of freedom apart from the absence of external constraints. Similarly, Locke and Mill place their concepts of bodily autonomy as part of their wider concern with freedom from arbitrary third-party or state interference.

English law reflects the concept of bodily autonomy in a number of different ways. It is the premise on which criminal and civil laws proscribing non-consensual touching are based. In the healthcare context, consent functions to transmute otherwise unlawful physical intrusions into professionally responsible behaviour. These proscriptions reflect the importance English law places on notions of negative liberty. Dworkin (1992) distinguishes physical essentialist from liberal individualist concepts of autonomy. Physical essentialist autonomy is 'rooted not so much in choice as in being left alone. If you touch me or eavesdrop on me, you have injured my autonomy by invading my space' (1992: 733). Similarly, Laurie (2001) defines 'spatial privacy' in terms of a person's physical and psychological separateness from others. The legal, and philosophical, emphasis on bodily autonomy may reflect an even deeper concern. The commitment to negative liberty may be a manifestation of a more profound commitment to notions of personal dignity, and the principle of non-humiliation.

The status of the doctrine of consent is a bone of contention within English medical law. There are broadly two views. Firstly, it has been regarded as an exculpatory factor justifying or excusing otherwise unlawful behaviour in the healthcare context. This is the 'defensive' construction of medical law in which individual consent supplies the doctor with a 'legal flak-jacket', providing her with a defence in criminal and/or civil proceedings.[10] Brazier summarises (2003: 30):'[o]nce consent is obtained, the doctor is protected from legal gunfire. Consent protects his back. He

[10] See the judgment of Lord Donaldson in *Re W (a minor) (medical treatment)* [1992] 4 All ER 627at 635.

cannot be sued'. Secondly, consent has been regarded as the legal expression of autonomy rooted in human rights (cf. Kennedy, 1996; 2000; Wicks, 2007)). This ideological difference has had one important practical implication in medical law, the law of consent relating to treatment refusals by 'mature minors'. It is a very good example of how the common law works within the interstices of statute.

The common law currently confers on 'Gillick-competent children rights of consent and refusal of consent to medical treatment (*Gillick* (1986). However, statute (Children Act 1989) confers on parents as legally-authorised proxies' rights of consent on behalf of their minor children. So where a child refuses treatment, parents are empowered to override that refusal by supplying collateral consent under the protection of the 'flak-jacket' principle. The logic of a human rights analysis (*pace* Kennedy), however, would eschew the asymmetry introduced into the law by this parental autonomy override, on the basis that an unqualified right of a competent child to consent to treatment, must entail a corresponding, and unqualified, right to refuse it. Thus, in this context, the appeal to common law, and statutory, principles has created a legal structure which human rights advocates would regard as rationally indefensible on human rights principles.

4.4.1.2 The dimension of 'the mind': choice and reason

In philosophy and law, there is an equally strong association between the notion of a 'self', the workings of the intellect, and the authority of reason. According to Kant's conception of self-legislation, autonomy is a property of the human will which is designed by nature to render universal laws to which the individual is subject as a matter of pure, practical reason. Kant (1998), in the social contract tradition of

Rousseau (1997), understands autonomy as acting on intentions (or 'maxims') that all rational persons in the moral community could adopt, i.e. 'giving the law to oneself'. While the basis of the moral law lies beyond comprehension, in the noumenal realm, reason mediates our ability to know and to follow the dictates of reason in the phenomenal realm (Tauber, 2001). O'Neill (2002), in her highly-influential contemporary interpretation of Kant's moral philosophy, has argued that autonomy is the property of choosing freely and rationally, as opposed to merely free of coercion, constraint or deception.

Kant's view of the autonomy of the will, and reason (i.e. moral autonomy), contrasts sharply with the role of choice in the tradition of Hobbes, Locke and Mill, who associate autonomy with the freedom to act on the basis of individual desires, preferences and inclinations; in other words, 'being a law unto oneself.' Mill, in particular, gives weight to the roles of passion and emotion, over against reason (Dryden, 2010). Freedom of choice is not subject to rational constraints, but rather constrained by the rights of others according to the 'harm principle': "the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others'"(Mill, 2008). For Mill, the authority of choice also functions as a means to 'self-realisation'. In this, distinctive personhood is "realised through acts of self-determining inner freedom that engender processes of personal growth" (Carter, 2009).

Like the bodily dimension of the self, the dimension of choice is regarded as a central manifestation, or component, of autonomy in academic medical law (Kennedy and Grubb, 2000; Laurie, 2001). Dworkin (1992) has distinguished what

he calls ‘liberal individualistic’ autonomy, from ‘physical essentialist’ autonomy. On a liberal individualist view, autonomy refers to “…the ability and the opportunity to choose one’s course of action and to act to effectuate one’s choice” (1992: 733). Manson and O’Neill (2007) state that autonomy in the medical law context is operationalised through the legal consent procedures. The largely cognitive criteria for rendering a legally valid consent, which were initially developed at common law, are now enshrined in statute through the Mental Capacity Act 2005 (MCA).

In addition to the informational and non-coercion requirements, a person must, in order to qualify, or, rather, avoid disqualification, as legally competent, have the requisite mental capacity. The MCA stipulates both diagnostic and functional criteria. The presumption of legal competence in adults is overridden if: (1) it can be demonstrated on diagnostic grounds that a person is incapable of expressing a true wish ‘because of an impairment of, or a disturbance in the functioning of, the mind or brain’ (section 2(1) of the MCA); and (2) it can be demonstrated on functional grounds that they are incapable of understanding and retaining information, and using, or weighing up, that information as part of the process of making that decision, and communicating that decision (section 3(1)).

There is considerable debate relating to the standard of intellectual autonomy the law requires and how it relates to philosophical standards. In the earlier analysis of the various elemental uses of autonomy (see above), the connection between ‘choice’ and decision-making authority was shown to be a central component of the theories of three of the twentieth century’s most important legal and moral philosophers: Rawls (1971); Raz (1986) and (Ronald) Dworkin (1993). Although the standards of

rationality required by those theories are not precisely specified, some minimal degree of rationality is required, e.g. enough to choose 'basic goods' from behind the veil of ignorance in the original position in Rawls' (1971) theory. In law, whatever the standard is, it is a standard that attempts, however imperfectly, to address the quotidian realities of healthcare decision-making. The law requires more than the ability merely to evidence a choice, but less than fully, comprehensive actual understanding (Roth et al., 1977; Gunn, 1994). Whether the courts look for particular standards of rationality, or acceptability of outcome, is a matter of continuing controversy.

Veitch (2007; Morgan and Veitch, 2004) has argued that the courts in the judicial determinations of treatment refusal cases are implicitly requiring patients to give account of their reasons for refusal, while at the same time, explicitly claiming that the content of patients' decision is beyond the judicial remit. Judges, he argues, are importing moral considerations into their assessment of a patient's mental capacity, even though the capacity criteria are meant to be value-neutral in content. Veitch (following Kennedy (1997)) argues that this is inevitable for two reasons. Firstly, it is impossible to make an inquiry into the state of a patient's mind without taking into account the nature of the decision the patient has in fact made, a matter which is meant to lie beyond the scope of judicial consideration.

Secondly, on closer inspection of the legal capacity criteria, it transpires that the requirement for a patient to demonstrate that he has weighed up the information relevant to the treatment decision in order to arrive at a decision is itself inherently value-laden and, thus, invites inquiry into the patient's reasoning process. As a

result, the courts have merged the procedure for making assessments of mental capacity with their moral concerns over the nature, and content, of the patient's decision. In so doing, the judiciary is, in reality, subverting the judicial impartiality, and procedural neutrality, that supposedly lie at the core of the mental capacity test.

Veitch, therefore, identifies two distinctive stages in the judiciary's determination of a patient's legal competence. Firstly, there is *the mental capacity* stage, which is designed to establish whether the patient is capable of making a decision. Secondly, there is the *autonomy* stage, which is directed to demonstrate whether this patient in this context is the sort of person to whom the court is prepared to attribute, or ascribe, autonomy. These two stages, though formally consecutive, are in reality concurrent, or interpenetrative. For Veitch, the autonomy stage represents those aspects of a patient's decision – its nature, the patient's values and personal traits – that have a bearing on the judicial evaluation of the patient's reasoning process. The results of judicial deliberation at this stage are then 'retrojected' into the mental capacity stage of judicial deliberation. Miola (2009: 116), commenting on Veitch (2007) contends that "capacity cases are shown to present a qualifying round for autonomy that allows the courts to remove autonomy from undeserving patients." Thus, the assessment of mental capacity itself is subject to the prior value-laden determination of a patient's status as autonomous.

4.4.1.2.1 Individualistic and principled autonomy

Veitch goes on to identify two constructions of autonomy present in a number of medical law cases: individualistic autonomy and principled autonomy. At the level of judicial rhetoric, he contends the legal system is ideologically committed to the

construct of the 'atomistic', rights-bearing patient and a self-image as a neutral, impartial, and objective legal system. The courts do this in order "to promote a certain image of the patient and the courts themselves." However, this rhetoric under-determines the role autonomy actually plays in the cases he considers. Rather, Veitch demonstrates that the courts are in fact upholding a concept of 'principled' autonomy which is 'inextricably bound up with ideas of obligation and responsibility' (2007: 77). Veitch concludes that the courts are not, in fact, protecting, upholding, and promoting a concept of individualistic autonomy based on rights, but rather one in which patients' responsibilities are lexically-prior to their rights, e.g. obligations of identity, ability and sympathy, i.e. the 'responsible' patient. Veitch (2007: 86) states that:

> …this conflation of the nature of the decision with the assessment of mental capacity points not to the casting aside of autonomy; rather it is consistent with a certain notion of autonomy, albeit one that some commentators in the medical law field, and the judiciary itself, would not feel comfortable recognizing. This autonomy is of the principled, rather than of the individual, variety…it is bound up with obligations and responsibilities rather than rights.

Veitch gives the presence of the concept of principled autonomy in medical law a wider interpretation. It plays a structural role, needing to be understood in relation to 'the nature of law's regulation of the existence and non-existence of life [and] the manner in which the law regulates the threshold between life and death' (Morgan and Veitch, 2004: 107).

4.4.1.3 The dimension of 'personal identity'

In addition to the emphasis on the bodily and intellectual dimensions of the self, the academic literature has also emphasised the dimension of personal identity. One recent philosophical development of autonomy in its dimension of identity is through the concept, or concepts, of recognition (Honneth, 1995; Taylor, 1995; Margalit, 2001) Ikaheimo (2002) has observed that "recognition' has many different senses which have not been clearly distinguished in the literature by their authors, although they are clearly related. It is beyond the scope of this thesis to undertake an in-depth analysis of the theory of recognition. Nevertheless, various recognition theories share the view that autonomy should principally be conceived in terms of the development of the individual's personality, which happens not in isolation, but in relationship with others. The theory of recognition draws upon a philosophical tradition more dependent on the early Hegel, with his emphasis on inter-subjectivity, rather than on the classical liberal thinkers such as Kant and Mill. Hegel describes freedom as "being at home with oneself in another" (Baynes, 2010: 562). Honneth and Anderson (2005) have proposed a recognitional model of autonomy "that emphasises the intersubjective conditions for being able to lead one's life as one's own" (2005: 144).

Honneth and Anderson contend (2005: 138) that "gains in freedom and power come from having other's see one's needs and aspirations as legitimate." They argue that their recognitional account, as with other such accounts, demonstrate that full autonomy, which they describe as "the real and effective capacity to develop and pursue one's own conception of a worthwhile life", can only be achieved "under socially supportive conditions" (2005: 130). The very possibility of identity

formation depends on the cultivation of three particular ways of "relating to oneself practically", namely (i) self-respect – one's self-perception as a legitimate source of reasons for acting; (ii) self-trust – a disposition of openness and trust towards one's own feelings, desires, impulses, emotions etc.; and (iii) self-esteem – a proper sense of self-worth. All this presupposes a supportive recognitional infrastructure. The distinctive contribution of this particular interpretation of early Hegelian philosophy is that the development of personal identity is not an atomised, introspective process; rather it is intersubjective in which an individual's attitude to herself is influenced by how others perceive her and her condition.

4.4.1.3.1 Individualistic and relational autonomy

There is little evidence in the medico-legal literature that academic lawyers are reflecting deeply on the Hegelian tradition, or recognition theory, and how it might help to reconfigure the legal, or judicial, construction of autonomy. There is evidence, however, that medical lawyers (e.g. Herring, 2008; Maclean, 2009; McLean, 2010) are becoming increasingly influenced by an emphasis on the importance of interdependency present in feminist, and communitarian reflection upon the concept, and conceptions, of autonomy (e.g. Nedelsky, 1989; Mackenzie and Stoljar, 2000; Donchin, 2001). The concept of relational autonomy is now being drawn upon to challenge the traditional legal construct of the atomised, rights-bearing, individual exercising self-determination in the healthcare context through the mechanisms of free, informed, uncoerced choice. Herring (2008: 1) states that in "medical law, as often in legal thought, the focus is on the image of an autonomous, competent man who can enforce his rights". However, there is a growing consciousness amongst medical lawyers of a need in law to understand autonomy

socially and to develop legal concepts which capture the daily realities of relationships of interdependence and care (Williams, 2005; Gilbar, 2005; Dunn and Foster, 2010).

The signs of this growing consciousness of the need for a more complex concept of autonomy are operative in law in the context of care of vulnerable adults, and genetics. This consciousness is implicit in the recently enacted Mental Capacity Act 2005 which has blurred the formerly somewhat binary common law distinction between autonomy and 'best-interests', e.g. by repeatedly stipulating throughout the legislation a requirement to optimise the conditions in which otherwise incompetent, vulnerable adults become capable of rendering legally competent decisions. The Nuffield Council on Bioethics (2009), in its report on the ethical issues arising in the context of care for persons with dementia, argue that autonomy should be construed in relational terms:

> … that is, that a person's sense of self and self-expression should be seen as being firmly grounded in their social and family networks. In addition, most people would wish that their carer's interests should be given considerable weight: their interests include their carer's interests.' (2009: 117).

The Nuffield Council's concept of relational autonomy is brought into close alliance with the concept of 'solidarity' ('we are all in this together'), which, through the Council's various reports, is becoming an ethical principle of first-rank.

Herring (2008) has argued that the culture of individualism and medical law's focus on individual rights has had deleterious effects in the context of caregivers and

vulnerable adults. The dominant, individualistic, right-based, approach, he argues, grossly underdetermines the degrees of dependency, and vulnerability, that actually characterises the carer-cared-for relationship. Herring castigates the separation of the interests of carer and cared-for because in reality their interests are inextricably bound up, and that this reality should be reflected in law. As this is not possible on a solely rights- or rule-based approach, a legal approach based on responsibilities and relationships, rooted in an ethics of care, might provide a better legal framework. Herring, however, does not clarify how a care-based approach would be translated into law. Although he cites the seminal work of Gilligan (1982) and Held (2006), he makes no reference to the work of Annette Baier (1986; 1994) whose concept of 'appropriate trust' supplies one attempt to reconcile the universalising demands of justice, with the particularising requirements of care.

Two important medico-legal monographs have emphasised the importance, and even presence, of relational autonomy in medical law (Maclean, 2009; McLean, 2010). McLean's is the first to undertake a rigorous analysis of models of autonomy present in a range of situational contexts in medical law. Although aware of O'Neill's (2002; Manson and O'Neill, 2007) seminal work on principled autonomy, McLean chooses to compare, and contrast, individualistic and relational models. One of her key insights is that medical law is ambivalent about the applicable model of autonomy in its various situational contexts:

> … a certain ambivalence has emerged that has resulted in an inconsistent application of apparently clear legal rules, and – on occasion – a perceptible drift away from respecting the individual's choices and preferences, sometimes in the alleged interests of

> others and on other occasions with an eye to policy implications. (2010: 219)

McLean argues that in the context of treatment refusals at the end-of-life, the courts seem to adopt an individualistic approach to autonomy which is expressed in the courts' explicit endorsement of an adult competent patient's unqualified right to refuel life-saving, or life-sustaining medical treatment. In the assisted suicide context, however, the patient's right of self-determination is qualified by the state's discretion to pass laws which are designed to protect the interests of the vulnerable. These decisions, McLean states "are tested against a version of autonomy that seems more akin to a relational model" (2010: 219).

McLean's second key insight is her view that distinction between individualistic and relational autonomy is overdrawn. She maintains that the contrast is drawn too sharply because in reality the self-governing self does acknowledge its social formation:

> … it seems counter-intuitive to suggest that even a firmly individualistic form of autonomy necessarily ignores the link between those participating in a caring interaction based in trust –that is, the patient and the healthcare provider (2010: 39).

Moreover, the encapsulation of relational dimensions of autonomy within the language of rights is possible because few rights are absolute, usually admitting of qualifications (e.g. the derogations set out in Article 8(2) of the ECHR). These derogations specifically take societal and democratic values into account and thus potentially qualify the individualism implicit in the primary right.

The discussion has so far construed the autonomy of the person in largely pre-social and separatist terms, although attention has been drawn to a growing consciousness of the contribution notions of inter-subjectivity and relationships are making to concepts of the person in the philosophical and medico-legal literature. It has also focussed on what is valued about the self, or person, i.e. the body, the mind, personal identity. The aim of the next discussion is to develop the insight that autonomous personhood is an emergent property of the natural and social context of which the person is inescapably a part, and that personal values, preferences and choices are not simply self-generated, but acquired in social contexts.

4.4.2 Dimensions of autonomy as the self in the law reports

The analysis in this chapter addresses the second research question; do judges express a variety of uses of autonomy in complex cases? As the medical jurisprudence develops, it becomes apparent that autonomy can be understood in a number of different senses. These different constructions are not so much competing alternative interpretations of autonomy, but rather ones that address different dimensions of the 'whole' person. The courts do not address these different dimensions of the person as discrete categories; rather the courts begin to develop a much more complex concept of autonomy, differentiating its distinct constituent meanings, incorporating the idea of bodily integrity, but subsuming it within a larger concept of autonomy of the person as body, mind and identity. This development is not neat and sequential, but rather arises discernibly, if somewhat piecemeal, out of the factual contingencies of the cases arising for adjudication.

4.4.2.1 Autonomy as 'bodily integrity': the case of *Bland* (1993)

This case arose out of the Hillsborough football disaster in 1989 when a teenage supporter was crushed and asphyxiated by an entrapped crowd. The patient was eventually diagnosed as being in a persistent vegetative state (PVS), retaining a functioning brain stem, but lacking all higher cerebral function. After two-and-a-half years, the patient's family, with the agreement of the hospital authorities, sought a legal declaration that would allow his treating clinicians to withdraw the artificial nutrition and hydration, and antibiotic treatment, that was keeping him alive. The High Court, the Court of Appeal and the House of Lords were successively asked to determine the lawfulness of withdrawing life-sustaining artificial nutrition and hydration and other medical treatment from the permanently insensate adult patient. The House of Lords held that withdrawal would count as a lawful 'omission' rather than a criminal 'act'. ANH constituted 'treatment' rather than 'care' which in the circumstances was legally-permissible to discontinue because of its medical futility.

In *Bland* (1993) the issue of bodily integrity is fundamental. The key legal (and ethical) question was whether it was right to continue invading the insensate patient's body with medical tubes when there was no prospect of the patient recovering consciousness. The House of Lord's opined that the whole case turned on the extent of the "right to continue lawfully to invade the body of Anthony Bland without his consent" (p.883*E*), concluding "… that perpetuation of life can only be achieved if it is lawful to continue to invade the bodily integrity of the patient by invasive medical care" (p.884*B*). That the case raises questions of 'bodily autonomy' is confirmed in the recent Court of Appeal case of *Yearworth* (2010), where *Bland* is explicitly referred to in this connection (p.13*G*):

> Notwithstanding these principles, the law compensates by making an elaborate series of rules for the protection of the body and bodily autonomy: see, e g, *Airedale NHS Trust v Bland* [1993] AC 789.

Both appellate courts in *Bland* refer to recently-decided and analogous American and Commonwealth authorities which had emerged in the meantime, e.g. *Quinlan* (1976); [11] *Conroy* (1985);[12] *Jobes* (1987); *Cruzan* (1990); [13] *Jane Doe* (1992)[14]; and *Auckland* (1993). [15] Like *Bland*, all these cases involve patients who for reasons of disability are not able to express their wishes and on behalf of whom decisions need to be made by others. The Court of Appeal (quoting *Conroy* via *Jobes*) triangulates bodily integrity, dignity and privacy and holds that (p.821G):

> Eventually, pervasive bodily intrusions, even for the best of motives, will arouse feelings akin to humiliation and mortification for the helpless patient. When cherished values of human dignity and personal privacy, which belong to every person living or dying, are sufficiently transgressed by what is being done to the individual, we should be ready to say: ["enough"].

The fundamental importance of bodily integrity is heavily reiterated throughout both appellate court judgements, running closely together with conceptions of dignity and privacy, principally because of their centrality to the American legal and constitutional framework in the cases relied upon. The sight of the supine patient

---

[11] *Quinlan, Re* 70 N.J. 10, 355 A.2d 647 (NJ 1976)).

[12] *Conroy, Re* 486 A. 2d. 1209 (1985).

[13] *Cruzan v. Director, Missouri Department of Health et al.* 497 U.S. (1990).

[14] *In re Jane Doe, 418 SE 2d 3 - 1992*

[15] *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235.

framed by the medical apparatus that was keeping him, albeit insensately, alive led the Court of Appeal to speculate that the 'privacy' of the patient's body was being "invaded' with 'tubes, catheters, probes and injections" (p.828*C*).

Although in *Bland* the concept of bodily autonomy is fundamental and forms part of the rationale (or *ratio*) of the decision, the case also offers an extended, albeit ancillary (or *obiter*), discussion of the conception of self-determination. This is not strictly required because the patient was clearly unconscious and not in a position to express his wishes. In *Re F* (1990), where such discussion was also not strictly required, self-determination is only used three-times, twice in the Court of Appeal and once in the House of Lords. It is used only once in *Re W* (1992) where the case required direct consideration of the scope of a child's right to self-determination. In *Bland*, it is used twenty-two times, nineteen times in the Court of Appeal (*per* Lord Justices Butler-Sloss and Hoffmann), and three times in the House of Lords (*per* Lord Goff). In addition, the conception of self-determination is tied to the use of the term autonomy on the three occasions it is used (twice in the Court of Appeal, once in the House of Lords). In the Court of Appeal, Lord Justice Hoffmann states (p.826*F*):

> Another is respect for the individual human being and in particular for his right to choose how he should live his own life. We call this individual autonomy or the right of self-determination. And another principle, closely connected, is respect for the dignity of the individual human being: our belief that quite irrespective of what the person concerned may think about it, it is wrong for someone to be humiliated or treated without respect for his value as a person.

The preoccupation in *Bland* with self-determination has a two-fold explanation. Firstly, the court is concerned with the question of whether the patient had made an anticipatory decision which could have been valid and applicable in the circumstances which had arisen in the instant case. A treatment decision made on behalf of an incompetent patient in violation of such an advance decision could potentially have constituted trespass. This question is directly addressed by Lady Justice Butler-Sloss who had been one of the appeal court judges in the case of *Re T* (1993). In *Bland* (p.816*F*), she reiterates, as she had done in *Re T*, a statement of Lord Templeman in *Sidaway* (1985), that a self-determining must be respected whether it is "rational or irrational". This applies even if the patient puts her life in jeopardy as a result. Secondly, and relatedly, the court argues that the right to self-determination sets a limit to the scope of the sanctity of life principle *(per* Lord Hoffmann; cf. Lord Goff at p. 864*E*) Both the Court of Appeal and the House of Lords affirm that it the state's duty to protect life must give way to the patient's right of self-determination (e.g. at p827*A*).

The *Bland* case reveals the closely related natures of bodily and 'intellectual' autonomy. Bodily integrity provides the necessary foundation for more complex constructions of autonomy, encompassing patient choice. This close association of bodily integrity and patient choice probably has its seedbed in the *Schloendorff* (1914) case. This case, cited four times in *Bland,* combines physical and intellectual autonomy, i.e. the right an adult person of sound mind to determine what shall be done with her body and without whose consent to physical touching an action in trespass may ensue (*Bland* (1993) at p.864*D*). *Schloendorff* is twice-cited in *Re F*

(1990) (once in the Court of Appeal and once in the House of Lords), cited in argument, but not referred to in judgement in *Re T* (1993).[16]

4.4.2.2 Autonomy as 'self-determination' and 'freedom of choice': the case of *Re MB* (1997)

The case of *Re MB* (1997) concerned a 23-year old woman who was 33 weeks pregnant and admitted to hospital with a footling breech. This posed mortal danger to her foetus, requiring an emergency caesarean section. The patient had had an intermittent attendance record at ante-natal clinic largely due to her fear of needles and the need to supply routine blood samples. The alternative possible procedure involved epidural anaesthesia during vaginal delivery to minimise the risk of pushing prematurely, with emergency section as a last resort. Although the patient had given consent for surgical intervention on several occasions, she repeatedly refused pre-operative venepuncture because of her needle phobia. The hospital sought and obtained a High Court declaration that she was incapable of making a legally valid treatment refusal and could therefore be treated non-consensually in her 'best interests'. The Court of Appeal upheld that decision her irrational fear of needles had rendered her temporarily incompetent and thus incapable of making a decision. As a result, it would be lawful to undertake a caesarean section without her consent.

The Court of Appeal emphasises the link between the concept of autonomy and the state of the patient's mind. The single reference (p.436) to the term 'autonomy' is in a discussion about the conditions under which autonomy might be removed from a

[16] *Schloendorff* (1914) is also cited in argument in *Sidaway* (1985).

person: “the cause of the disability must be examined so that only disabilities caused by disorder or disability of the mind result in the removal of the patient's autonomy.” The Court of Appeal also develops the common law concept of mental capacity set down in *Re T* (1993) and *Re C* (1994). In *Re T* (1993) the Court of Appeal notes that mental capacity can be undermined in various ways (pp.112*G* – 113*E*). In *Re C* (1994), the High Court lays out a set of capacity (or more accurately incapacity) criteria (p.295*D-E*) stating that the presumption of adult capacity can be overridden where the patient “does not sufficiently understand the nature, purpose and effects” of the treatment proposed. The court in *Re C* analyses the decision-making process in three stages: “first, comprehending and retaining treatment information, second, believing it and, third, weighing it in the balance to arrive at choice.”

The Court of Appeal takes the development of the common law concept of mental capacity a step further. Building on the test in *Re C* (1994), and the recommendations of the Law Commission’s report on mental incapacity (Law Commission, 1995), the court formulates a ‘diagnostic’ and ‘functional ‘test of capacity.[17] The diagnostic test (principally influenced by the Law Commission report) requires a “disorder or disability of the mind”. The functional test (principally influenced by *Re C*) states (at pp.433-4) that a person will not have mental capacity if she is “unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision’ or ‘unable to make a decision based on that information”. The

[17] The terms ‘diagnostic’ and ‘functional’ are used in *Re M* (2011) a p.76*F-G* decided under the MCA which focus on the interpretation of sections 2 and 3 of the MCA which largely enshrines the common law capacity criteria.

patient's freedom of choice in refusal context depends on the presence of mental capacity: A "mentally competent patient has an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death". The patient's right to self-determination depends on the patient's state of mind: "The right to decide one's own fate presupposes a capacity to do so" (p.433).

The emphasis on freedom of choice and self-determination emerges from a basic concern to preserve the patient's right to be protected from unwanted bodily invasions. The Court of Appeal juxtaposes (p.432) for the first time two legal propositions which had been independently established in the case law. Firstly, the court affirms the proposition established in *Re F* (1990) that non-consensual physical invasions may amount to criminal or unlawful behaviour: "it is a criminal and tortious assault to perform physically invasive medical treatment, however minimal the invasion might be, without the patient's consent". Secondly, the stress on the patient's right to bodily integrity is reinforced by the principle drawn from *Sidaway* (1985), and reiterated in *Re T* (1993), that a mentally capacitous patient has an unqualified right to decide. This freedom of choice, and right to self-determination is not compromised simply by the presence of mental disorder (pace *Re C* (1994)), or advanced pregnancy (contra the *obiter* suggestion in *Re T* (1993) a p.102*G*).

The nature and scope of a heavily pregnant woman's right to refuse potentially life-sustaining (for both her and her foetus) medical treatment raises issues of bodily and intellectual autonomy. The conception of bodily integrity appears once in the

judgement in the context of a line of American case-law establishing the paramount rights of the pregnant woman over her foetus:

> a competent woman's choice to refuse medical advice to obtain a Caesarean section during pregnancy must be honoured, even in circumstances where choice may be harmful to her foetus because her rights to bodily integrity and religious liberty were not diminished during pregnancy.

The case of *Re MB* (1997) is a vivid example of the way the court is required to develop a more complex concept of autonomy in order to address the ethically-contentious question of pregnant women's rights. The presence of a foetus raised the stark question whether the law was justified in undertaking a massive physical intrusion into the woman's body in order to preserve not only the mother's life but also that of her unborn child. Rights to freedom of choice, and self-determination, depend on the presence of mental capacity which supplies the intellectual condition for the protection of a person's bodily integrity.

4.4.2.3 Autonomy as identity and dignity: the case of *Burke* (2005)

The claimant was a 44 year-old man, suffering from a fatally progressive neuro-degenerative disease, cerebellar ataxia. He was concerned that that professional guidelines (General Medical Council, 2002) governing the withdrawal of potentially life-sustaining treatment, would give his treating clinicians discretion to discontinue life-support once he became insensate, or sensate, but unable to communicate his wishes to the contrary. He felt that the way the relevant provisions of that guidance were drafted were incompatible with several of his rights under the ECHR, in particular, Articles 2 (the right-to-life), 3 (protection against inhuman and degrading

treatment) and 8 the right to private-life) and would be unlawful under domestic law. He sought a court declaration to that effect by way of judicial review. In an unusually long and detailed judgment, the High Court upheld his challenge.

The judgment uses the term autonomy forty-nine times, self-determination twenty-six times, freedom of choice thirteen times, dignity seventy-four times, and physical integrity seventeen times. Though the judgement is long (225 paragraphs), the sheer number of references to autonomy and autonomy-related concepts represents a step-change from previous law. The court acknowledges that the concept of autonomy has become embedded in common law: "the personal autonomy which our law has now come to recognise" (p. 430F; cf. *Chester* (2005) at p. 163*H*). In a section headed "Autonomy and self-determination" (at pp.443*E*- 444*E*), the High Court rehearses a chain of legal authority establishing the autonomy's bodily and intellectual dimensions. It quotes *Schloendorff*, the seminal American authority underlying both (p.443*F*).

In an important section of the judgment (444*F*-451*D*), the court develops a concept of autonomy as identity and dignity. It takes into account ECtHR jurisprudence, starting with the decision in *Pretty v. UK* (p.444F-*H*). This case is the first to identify an autonomy right with Article 8 of the ECHR which protects the right to "private life" or 'privacy':

> … the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity … Article 8 also protects a right to

> personal development, and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self- determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.

The ECtHR goes on to add that the "very essence of the Convention is respect for human dignity and human freedom."

The court affirms the ethical value of bodily integrity, but extends this to include psychological integrity. The court associates psychological integrity with notions of mental health and stability.[18] Mental health is treated as an aspect of moral integrity (p.446*A-B*), which is interpreted as the holistic treatment of a person as someone morally worthy of respect and security (p.446*D*). The concept of private life is extended still further to embrace aspects of an individual's physical and social identity. The meaning of this is not explained at any great length in *Burke*, but it implies that social conditions have an impact on the formation of individual identity and personality.[19]

The conception of dignity is of great significance in *Burke*. It is regarded, at the very least, as a notion closely associated with the concept of autonomy, protected by

---

[18] *Bensaid v. United Kingdom* (2001) 33 EHRR 205.

[19] The background to the meaning of integrity and identity can be found in the ECtHR jurisprudence that informed the court in *Pretty*. The gist of this background law is that autonomy can never be private in a strongly negative sense, but that autonomy has a public dimension which the right to "private life" encompasses.

common law and the ECHR. At common law, it is regarded as an 'intrinsic value' pertaining to the whole person (p.443*C*), "a solemn affirmation of the law's and of society's recognition of our humanity and of human dignity as something fundamental" (p.444*F-H*). Dignity is regarded as immanent within the provisions of Article 8 and therefore also an aspect of an expansive definition of 'private life':' personal autonomy and dignity are both aspects of the "private life" respect for which is guaranteed by Article 8 of the Convention' (p.445*F*). The High Court states (at.p.443*F-H*):

> The recognition and protection of human dignity is one of the core values — in truth the core value — of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention. It is a core value of the common law, long pre-dating the Convention.

The court affirms that the notion of dignity is under-determined by freedom of action and choice. It needs to be used to "to promote respect for the inherent dignity of all human beings but especially those who are most vulnerable to having that dignity ignored" (p. 451*C-D*).

4.4.3 Conclusion to section

The empirical analysis of the law reports in Chapter 3 show that there are various elemental uses of autonomy in the law reports which the judiciary use in intuitive and fluid ways and that there is an association between judicial and academic usage. The meaning and interpretation judges give to their usage of autonomy has been explored in this chapter and shown that they have initially differentiated their

interpretations to describe elemental concepts of autonomy as the autonomy of body, mind and identity. It is contended that the description of autonomy as identity is tending towards an integrated concept of autonomy that is beginning to be expressed in terms which approximate the notion of the capability of the person.

It can be seen, with reference to Figure 4.3 that autonomy not only has values and purposes, but also conditions.. The *values* of autonomy are largely represented by its elemental uses, *what* autonomy in its elemental sense is. The *purposes* of autonomy pertain to particular theories of autonomy expressing *why* autonomy is valued which, in turn finds its basis in some particular conceptualisation of the person, e.g. as body, mind, or identity. Most of autonomy's elemental uses can be aggregated to some particular dimension of the human person which has invited emphasis on some aspect of the philosophical tradition. It can further be seen that most of these theories of autonomy that underpin its purposes tend to be partial taking a one-sided view of the human person and the tradition of freedom. It is proposed that the elements of autonomy – its values, purposes, conditions – need to be taken as an interconnected whole. Such an inter-dependent model, or theory, of autonomy would allow a critique of each, or both, traditions of freedom. It is suggested that a theory of 'capability' may represent a promising candidate for such an interdependent model.

4.4.4 Towards a theory of autonomy as capability

Over the last twenty-five years, Capability Theory (CT) has emerged as a powerful analytical framework for understanding the nature of human liberty, autonomy, and freedom. It has emerged within the context of development and theoretical economics (e.g. Sen, 1995; 1999; 2009), and, latterly, political philosophy (e.g.

Nussbaum, 2000; 2006; 2011). On this view, freedom is not simply freedom from constraint (as in the Hobbesian tradition), or exemplifying a rational or psychological ideal (in the Kantian tradition), but actually having the social, economic, political and material conditions necessary for achieving freedom (as in the Marxian perspective). Capability theorists hold in common that freedom rights cannot be exercised outside the polity which either affords or denies the necessary capabilities. Paraphrasing Sen (1999), true freedom means having rights to do or be what one has reason to value.

CT employs a technical vocabulary which defines the meaning of 'capability'. Sen (1999) distinguishes 'functionings' and 'capabilities': functionings are the goals or things that a person might value doing or being. Capabilities are related to the freedom a person actually has to pursue or to realise what they value. Building on Sen, Nussbaum (2011) distinguishes 'innate', 'internal' and 'combined' capabilities. Innate capabilities are undeveloped capabilities which require cultivation and maturation. Internal capabilities are matured capabilities which are ready to be employed. Combined capabilities are internal capabilities which supporting conditions have enabled.

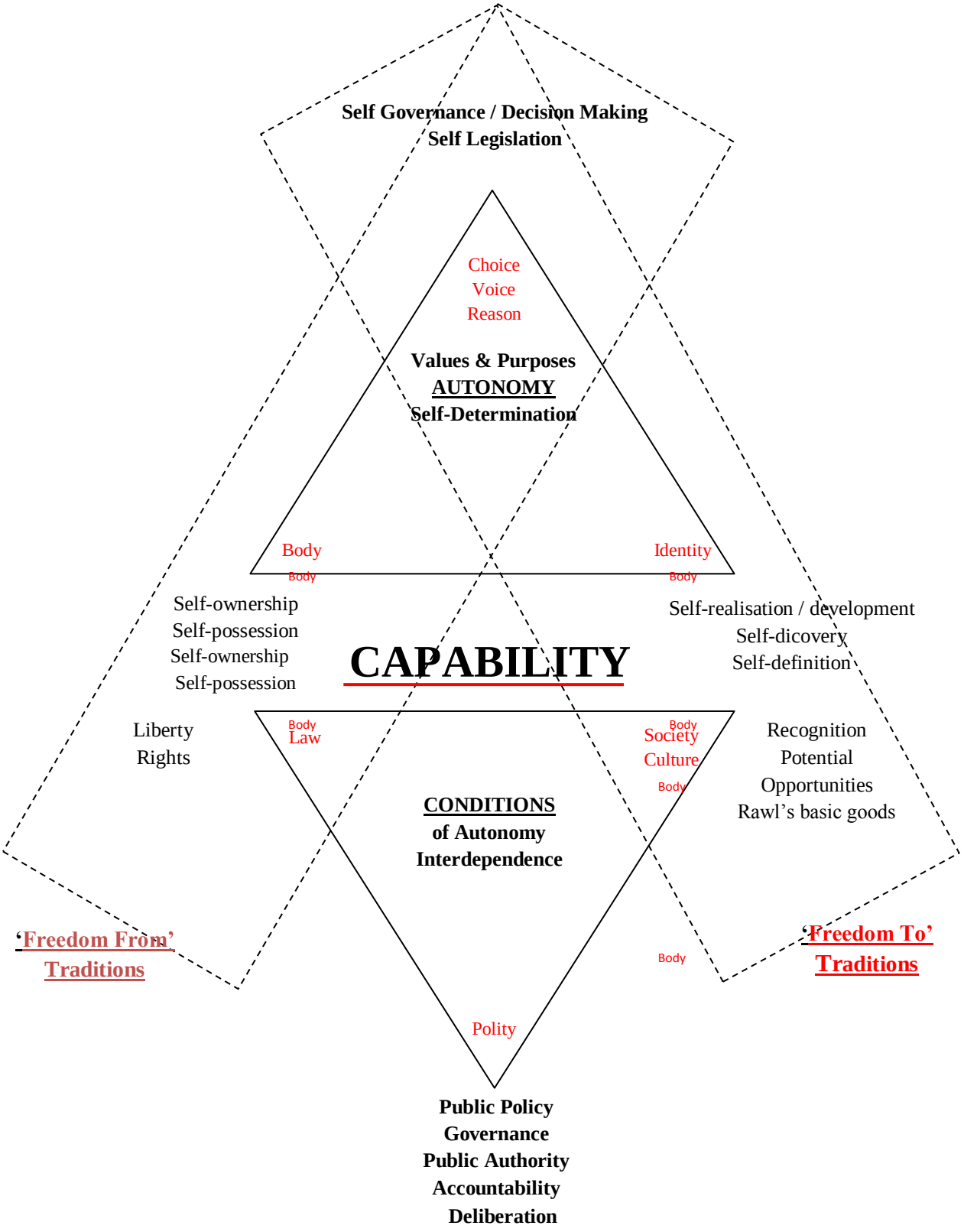

Figure 4.3 Towards a theory of autonomy

Nussbaum's concept of innate and internal capabilities broadly corresponds with Sen's functionings, and, indeed, Nussbaum uses the term in these senses. Sen's capabilities are Nussbaum's combined capabilities: "the totality of opportunities she has for choice and action in her specific political, social and economic situation" (2011: 21). These are "trained or developed traits and abilities, developed in most cases, in interaction with the social, economic, familial and political environment." Nussbaum (2001; 2011) identifies ten central capabilities to which a person should be entitled in order to live a life of dignity. These encompass bodily (e.g. bodily integrity), intellectual (e.g. practical reason) and identity (e.g. imagination, emotion, play) dimensions. Nussbaum challenges the enlightenment construction of personhood articulated by Kant who establishes reason and rationality as the defining features of personhood and the status of person's as 'ends-in-themselves'. She also challenges Mill's privative theory of liberty restricts state intervention to the confines of the 'harm principle'. For Nussbaum, substantive freedom involves a combination of personal abilities and supporting social and political conditions.

In Sen and Nussbaum, the relationship between liberty, autonomy, freedom and capability is left rather vague. It is never clear what the principal category is in relation to which the others must be brought into systematic relation. Liberty seems to be construed mainly as negative liberty. However, Nussbaum (2011) argues that the idea of negative liberty is incoherent because the liberty to do or to be something is by definition positive because they require the inhibition of interference by others. This echoes the point made by Skinner above in the context of his discussion of civic republicanism. The same point is powerfully made in the legal context by Fredman (2008) who points out that even the most 'negative' of civil and political rights

protected by the ECHR require state guarantee, e.g. rights of access to justice under Article 6. Sen, in contrast, argues that negative liberty has both instrumental and intrinsic value and that, with regard to the latter, violation of another's negative liberty involves a failure of moral agency on the part of the perpetrator.

The dividing line between 'capacity' and 'capability' is also left unclear. In Sen, 'functionings' is a broad concept which could encompass the notion of capacity if understood in Nussbaum's terms as internal capability. Nussbaum's concept of innate capability might also connote some form of more limited capacity. The concept of functionings might therefore embrace the concept of 'positive' liberty in the sense that Berlin (1969) and Taylor (1985) might give it to the extent that it encompasses the notion of sufficient capacity to amount to agency. Castillo (2009) argues that autonomy involves both agency and structure. She equates agency with Nussbaum's concept of internal capabilities, "being able to make reasoned choices and act accordingly", while autonomy is the equivalent of combined capabilities, "…being able to make reasoned choices in significant matters, authentically motivated" (2009: 8).

The transformation of agency into autonomy requires multi-levelled structural support in the form of natural, material, social and political resources and entitlements. These involve legal and regulatory contexts, economic, social and political relationships, and organisations. Castillo identifies two forms of autonomy: 'basic' and 'critical'. Basic autonomy requires "an adequate level of competence and realisation of human potentials" and critical autonomy involves "a critical level of competence, multi-cultural knowledge and political freedom" (2009: 9). Thus

autonomy is more than negative liberty, but agency, and the presence of structural conditions that enable the agent to realise their valued functionings.

Claasen (2010), like Castillo, argues that CT should promote autonomy by attending to the cultivation and realisation of those capabilities that contribute to it. Unlike Castillo, however, he takes issue with the inherent perfectionism of Nussbaum's approach. He argues that her 'primary good' interpretation of her list of central capabilities is too 'thick' to remain politically uncontroversial and seeks to offer a minimally perfectionist, politically less controversial version of CT. He claims to offer this by seeking to inform Nussbaum's list with further autonomy-developing capabilities, and making it sufficiently determinate by drawing upon Feinberg's (1986) widely-anthologised distinction between four meanings of autonomy: (i) the capacity for self-government; (ii) actual self-government; (iii) autonomy as an ideal of character' and (iv)the sovereign right to govern oneself.

According to Claasen, the capacity for self-government requires (i) the capacity to form and revise one's plan of life; and (ii) the capacity to realise this plan in one's actions. Drawing, with slight modifications, on Raz (1986), Claasen identifies three conditions for autonomy: (i) personal, including cognitive, emotional and volitional, conditions; (2) independence; and (iii) an adequate range of options. The first two conditions are treated as basic capabilities which constitute citizen entitlements to be guaranteed by the state, while the third is a secondary capability, which the state is not required to guarantee, though it may have a direct responsibility to make citizens aware of an adequate range of options. This itself depends on the "spontaneous

processes of economic life', rather than the direct involvement of the political authorities (2010: 12).

Claasen then attempts to translate the two limbs of self-government (or autonomy) into a list of primary capabilities (to supplement Nussbaum's own list) and to this end draws on Rawls' list of primary goods which were proposed "to enable people to live a life of their own choosing" (2010: 14). These include: (i) basic rights and liberties; (ii) freedom of movement and free choice of occupation; (iii) powers and prerogatives of offices and positions of authority and responsibility; (iv) income and wealth; and (v) the social bases of self-respect. While the first three of Rawls' primary goods are easily translated into Nussbaum's list of fundamental entitlements, especially her tenth (control over one's material and political environment), the other two are less so. Claasen jettisons the fifth. But he expands the fourth into a broader concept of "capability for economic security" (2010: 16). This encompasses the modicum of income and wealth necessary for 'independence' (in Raz's terms), but is extended to incorporate the personal, and political difficulties that threaten independence, e.g. in the workplace. Claasen adds two further primary goods (or now capabilities) to Rawls' list: healthcare and education – which in combination with the others is subject to the relevant distribution rule which accepts that autonomy may admit of degrees beyond a minimum threshold.

4.5 AUTONOMY AND THE TWO TRADITIONS OF FREEDOM

Reflection upon the values, purposes, and conditions, for achieving autonomy involves recognition that "the effective pursuit of personal autonomy requires forms

of legal, political, and moral autonomy as well" (Baynes, 2009: 552). As Figure 4.4 illustrates, the values of autonomy pertain to the concept of the person – *what* is it about the person which is valued. Is it, for example, the bodily, intellectual or identity dimension? The *purposes* of autonomy (*why* autonomy should be protected, upheld or promoted) refer to the concept of moral order which will be dealt with in this section. Is the purpose of autonomy to promote individual rights, or to bring about personal self-realisation? Reflection on the *conditions* of autonomy (*how* autonomy can be protected, upheld or promoted) brings to the fore fundamental political questions relating to the kind of freedom the State is called upon to promote or refrain from hindering.

There is a fundamental distinction in contemporary moral philosophy and ethics between 'the right' and 'the good'. (See Figure 4.4) The 'good' can be construed as the morally positive goal to be achieved through our acts. The right, in contrast, is principally concerned with rules, laws, or moral norms, which constrain pursuit of the good.

Values, purposes and conditions	**Value Neutral (the 'right')**	**Value Laden (the 'good')**
WHAT: Values Concept of a person	Non perfectionist The individual	Perfectionist Persons in relation/communities
WHY: Purposes Concept of moral order	Right/ rights Self-ownership Self determination	The good Self-realisation Collective determination
HOW: Conditions Concept of a polity	Freedom from Private sphere procedures	Freedom to Public sphere Participation/ voice

Figure 4.4 The values, purposes and conditions of autonomy

In contemporary moral philosophy, this distinction between 'good' and 'right' is often related to three others: (1) between means and ends: (2) between substantive and procedural notions of ethics; and (3) between perfectionist and non-perfectionist accounts of ethic. The legal and moral philosophies of Dworkin (1993) and Raz (1986) provide an illuminating contrast. Both construe autonomy as self-creation, or self-authorship. While Dworkin interprets autonomy within a theoretical framework that prioritises the 'right' over the 'good', Raz insists that "autonomy is only valuable if exercised in pursuit of the good" (1986: 381).

Dworkin holds that autonomy is inherently good, regardless of the moral quality of the choice actually made. This because it allows individuals to shape their lives out of their own distinctive personalities: "[r]ecognising an individual right of autonomy makes self-creation possible" (Dworkin, 1993: 224). Because self-creating choices are intrinsically valuable, the state should not intervene simply because it believes the choices immoral, remaining neutral between competing conceptions of the good. Raz agrees with Dworkin that autonomy is (at least in part) the basis of self-authorship. He defines autonomy as:

> …the thought that what we are is, in significant respects, what we become through successive choices during our lives, that our lives are a continuous process of self-creation (Raz 1994: 104).

However, in contrast to Dworkin, Raz contends that in order to be autonomous, or self-authoring, one must not only be free to make uncoerced choices, but also have an adequate range of options to choose from. Because the value of autonomy lies in its forming part of leading a good worthwhile and flourishing life, freedom of self-

creating choice does not extend to making bad choices. An autonomous life "is valuable only if it is spent in the pursuit of acceptable and valuable projects and relationships" (1986: 330). So it is no abrogation of autonomy in restricting an individual's actions in order (*pace* Mill) to prevent harm to others, or even to the individual himself.

In the academic medico-legal context, very few, if any, commentators advocate the value of mere, sheer, choice, consistent with certain theories of the market. For Montgomery (2006), giving value to choice *simpliciter* is ultimately incoherent because it would "[undermine] the creation of a value system by presenting choices over time as unconnected with each other and encouraging arbitrariness rather than consistency"(2006: 186). Academic medical lawyers have usually explicated the value of autonomy in terms of a person's capacity to pursue, or realise, a 'life-plan', or living according to one's own system of values. Jackson (2001: 2) states that "the liberal notion that an individual's life may be enriched by her capacity to direct the course of her life according to her own values." McLean (2010) offers a non-perfectionist, and 'negative', account of choice roughly along Millian lines. She holds that in the interests of personal self-respect and self-development, an individual's private behaviour should not be subject to societal scrutiny, unless it is calculated to produce harm to others, in which case, outside intervention to prevent that harm becomes legitimate.

Donnelly (2011), while acknowledging Mill's philosophy as highly influential, has argued that that the negative liberty approach to autonomy and freedom has under-determined the true character of autonomous agency. She advocates, following Raz,

a notion of autonomy as *empowerment*. In her view, the development of the law has proceeded too individualistically, insufficiently attuned to the concrete realities of healthcare decision-making and the impact of the social context and the values of responsibility and trust. Autonomy, therefore, is best seen as "a kind of achievement" (Donnelly, 2010: 41). There are 'positive' obligations to build and develop agency and to deliver adequate choice. It is perfectionist in a way in which traditional liberalism is not, in that it contends that the state (and the law) has a role in developing individual autonomy and facilitating individual empowerment. Donnelly goes on to make the important observation that the ECtHR may be the harbinger of a "jurisprudence of positive rights" (2011: 271), underscoring the duty of the state to supply enabling conditions for the cultivation, and exercise, of autonomy.

The presence of a perfectionist ethics driving judicial determinations in medical law cases is implicit in Veitch's identification of a disjunction between judicial rhetoric and reality in the earlier discussion. According to Veitch, the judiciary is claiming to employ a value-neutral, cognitive test of legal competence, which allegedly takes no account of the reason's patients give for their decisions (i.e. a non-perfectionist ethic). In practice, however, a form of judicial 'perfectionism' is being brought into play through the manipulation of the malleable element of the capacity criteria in order to achieve the desired outcome.

The debate over the nature, and scope, of individual autonomy is, at heart, an inquiry into the very character of human freedom, one of the most highly contested areas in political philosophy. Judgements concerning the values, purposes and conditions of

autonomy will vary according to the particular theory of freedom being considered. Berlin (1969) famously distinguished 'two concepts of liberty': negative liberty; and positive liberty. The former was a development of the Hobbesian tradition which identifies freedom with the absence of physical, legal and political constraints which would otherwise hinder the moral agent in the fulfilment of her will. Hobbes stated that "liberty or freedom signifies (properly) the absence of opposition" and, similarly, Locke, that "liberty consists in a power to do nor not to do; to do or forbear doing as we will." The latter Berlin identifies with 'self-mastery', to be self-dependent in life and choice, rather than dependent, to be self-directed, rather than directed by others. The concepts of negative and positive liberty, broadly correspond with Taylor's (1985) distinction between 'opportunity' and 'exercise' concepts of freedom, 'freedom-from' and 'freedom-to'.

Taylor (1985) argues that for a person to be free in any meaningful sense, he must enjoy not only the absence of external obstacles (i.e. negative liberty), but also the internal motivational fetters which hinder the pursuit of his important purposes. The identification of these purposes is not a task that can be advanced in isolation but only with the support and enabling conditions supplied in the public sphere. Freedom requires a positive definition, for the journey to self-realisation cannot be undertaken solitarily but only within the framework of institutional structures that make the journey possible in the first place. Accordingly, self-determination and self-realisation presuppose a range of opportunity and exercise conceptions of autonomy. Skinner (2002), in his critique of Berlin, argues that the heart of positive liberty is in self-realisation: "the freedom of human agents' consists in their having managed most fully to become themselves" (2002: 16).

The meaning of the concept of autonomy varies within the frameworks of different theories of freedom. For example, the bioethicists, Gaylin & Jennings (2003) and Beauchamp & Childress (2009) distinguish *liberty* and *autonomy*, the former pertaining to negative liberty, and the latter to agency, which presupposes conceptions of positive liberty. Elsewhere, autonomy and liberty are used synonymously. Nelson (2005) argues that the distinction between negative and positive liberty is "one concept too many", and that all freedom-talk entail absences of constraint. The only relevant distinction is between 'narrow' and 'broad' liberty, which relates only to the degree of specificity with which those constraints are defined, e.g. constraints on movement (narrow) as opposed to constraints on my self-realisation (broad). What is of relevance is not the distinction between negative and positive liberty, but rather "the substantially different claims about the ends of human life, the character of human beings and the elements that can constraint us"(2005: 73-4).

Skinner (1984) has observed that a number of contemporary negative liberty theorists, influenced by the Hobbesian tradition, have maintained that a theory of negative liberty is tantamount to a theory of individual rights. Skinner, with reference to the tradition of neo-republican thought (of which Machiavelli was an exemplar), contends that this is a wholly unrealistic construction of freedom and a corruption of citizenship:

> …the prudent citizen recognises that, whatever the extent of negative liberty he may enjoy, it can only be the outcome – if you like the reward of – a steady

> recognition and pursuit of the public good at the expense of purely individual and private ends (1984: 218).

The civic structure, and the cultivation of civic virtues, is the indispensable condition for the attainment of private ends, or interests, or individual rights at all. Thus, even if there were legal and political support for the most extreme versions of negative liberty, some form of governance, is required. This would, in the modern democratic polity, also entail various positive rights for citizens, requiring action from the state, e.g. education to help new skills, physiotherapy to help one walk again, various forms of welfare assistance that raise a person out of poverty etc. (see also O'Shea, 2008).

In the medical law context, most of the rights protected by the courts, statute, and human rights are negative, non-interference rights (Feldman, 2002; Herring, 2010). In Hohfeldian terms, the law mainly protects 'liberty –'rather than 'claim-rights' (Hohfeld, 1913). The most obvious form of negative liberty rights in law relate to rights of freedom from interference, e.g. civil and criminal laws against non-consensual touching, save *de minimis*, and, in the healthcare context, the right of adult competent patients to refuse all and any medical treatment, the medico-legal form of negative autonomy right. However, according to Donnelly (2011), there has been little analysis of 'negative liberty' autonomy at the level of principle, which has resulted in a superficial treatment of the questions of the right's limits and the nature of autonomy.

This lack of analysis is especially relevant to the characterisation of the rights and duties pertaining to the consent procedures which 'operationalise' individual autonomy. Manson and O'Neill (2007), Maclean (2009), and Donnelly (2011) have each taken issue with the "take-it-or-leave-it' dynamic between doctor and patient. Manson and O'Neill (2007) distinguish the current approach to consent in which healthcare practitioners assume that they have discharged their legal obligations once they have conveyed the relevant parcel of information to the patient, thus obviating the genuine communicative interaction necessary for adequate understanding of the treatment being proposed. They advocate an agency model of communication which "locates informed consent in communicative transactions between agents" (2007: 69). Maclean (2009) has also joined the search for a more 'relational' model of consent, distinguishing 'consent-as-agreement' from 'consent-as-permission' (2009: 112), implying a genuine meeting of minds, rather than the mere transfer of information. Donnelly argues that a "liberal account of autonomy fails to recognise the relational nature of capacity and the practical and normative consequences of the epistemological fallibility of capacity assessment" (2011:130).

Notwithstanding these critiques of the liberal stress on non-interference in the treatment refusal context, Donnelly (2011) observes that there is evidence in statute and the European human rights jurisprudence of a growing emphasis on positive rights. For example, in spite of the fact that the Mental Capacity Act 2005 perpetuates the liberal principle that a competent adult patient may refuse treatment for any, or no, reason, it is notable for the emphasis it places on optimising the circumstances in which otherwise incompetent patients may exercise choice, a form of positive right. This requires sensitivity on the part of healthcare practitioners, and,

in the case of vulnerable adults, carers, to the relational and institutional context within which decisions are made and the factors which may be conspiring to prevent the possibility of autonomous choice.

Donnelly (2011), along with Marshall (2008), has also drawn attention to developments in European human rights jurisprudence which place obligations on the State to take steps to protect individuals. A number of cases[20] have suggested that the protection of an individual's privacy right under Article 8 could entail the imposition of positive obligations by the state. Marshall (2008) has argued that the courts have begun to read autonomy rights out of Article 8 which are not restricted to the protection of individual rights of non-interference, but also rights to personal identity and recognition rights which require the state to take active steps to secure them, e.g. changing the law to recognise the changed gender status of post-operative transsexuals.

Following the analysis of the discourse of autonomy in the literature, I propose to draw a clear distinction between liberty, freedom, and autonomy. The concept of liberty is assimilated to its 'negative' construction, notwithstanding that Berlin (1969) distinguishes it from 'positive' liberty, which he associates with conceptions of self-mastery and self-control. The medico-legal and bioethical literature often distinguishes liberty, meaning freedom from constraint, from agency, which broadly connotes a person's physical and psychological efficacy (Jennings, 1998;

[20] *X and Y v. The Netherlands* (1986) 8ECRR 235; *Pretty v. United Kingdom* (2002) 35EHRR 1; *Goodwin v. United Kingdom* (2002) 35EHRR 447; and *Tysiac v. Poland* (2007) 45 EHRR 42.

Beauchamp and Childress, 2009). The distinction between liberty and freedom has been explored in depth by Arendt (1973), whose analysis of the history of political ideas, identifies liberty with the Hobbesian tradition "whose fruits are the absence of restraint and possession of 'the power of locomotion" (1973: 32). Freedom, in contrast, while presupposing the absence of restraint, is construed as the portal to political life. It is "participation in public affairs, or admission to the public realm" (1973:32). Arendt's conceptual distinction is similar to the one to which attention was drawn in the Chapter 1 between the permissive character of 'civil liberties' and the prescriptive character of positive 'human rights'.

In this thesis, autonomy as 'capability' presupposes liberty, and embraces the expansive 'positive' concept of freedom. Autonomy understood in this sense provides a potentially powerful conceptual basis for a legal concept of (decision-making) capability rather than capacity *simpliciter*, which would assume the presence of the components of freedom – decision-making ability, decision-making supports, and the reasonable accommodations of third-parties, i.e. goods and services. This chapter has established that 'capability' is a paradigm tradition of autonomy potentially to rival the dominance of other paradigmatic traditions of autonomy derived from Hobbes, Kant and Mill. It is a journey that has progressed in stages. Firstly, the investigation into the academic literature as a possible source of influence on judicial decision-making in complex medical law cases has ascertained that a wide variety of elemental meanings are assigned to the concept of autonomy in the academic literature. This finding reflects the academy's own perception that academic usage of the autonomy concept is largely intuitive and under-theorised.

The investigation disclosed that this raft of elemental meanings, or conceptions, of autonomy was principally centred on the concept of the person, or 'self'.

This finding was the point of departure for the second, more conceptual, stage of investigation. On closer inspection of the various elemental meanings assigned to autonomy in the literature, it was determined that they tended to converge on the human 'self' in three principal dimensions of body, mind and identity, representing different values, purposes, and conditions, and informed by two principal concepts of liberty, or freedom, styled positive and negative liberty, or 'freedom-from', or 'freedom-to'. Further reflection on these two senses of liberty and/or freedom led to a realisation that these two concepts represented distinct 'traditions' of liberty/freedom and that the different theories of autonomy which make up the philosophical heritage develop according to traditions which are partial and take a one-sided perspective.

This led to the third stage of the investigation which enquired whether there existed, or could be constructed, an interdependent model or theory of autonomy that could allow a critique of each or both theoretical traditions. This led to the consideration of a capability approach to autonomy which offers the possibility of a reconciliation of autonomy's otherwise disaggregated values, purposes and conditions, and the two traditions of freedom: freedom-from and freedom to. This led, fourthly, to the distillation of the function of this chapter for the next part of this thesis, how freedom can be deconstructed into analysable elements for research and what strategy of investigation is required to interrogate them in the medical law reports.

4.6 CONCLUSION: THE LIMITS TO HERMENEUTICAL UNDERSTANDING

The discovery of the role of philosophical traditions of freedom in the use and interpretation of autonomy, together with the recognition drawn from the background reading in Chapter 1, about the potential clash between traditions of law point to the need for a further cycle of enquiry to investigate the influence of traditions on the practice of judicial decision-making. The hypothesis is that these philosophical and legal traditions are informed by traditions of moral and political order. Textual analysis is insufficient to establish whether these philosophical and legal traditions are present in the practice of judicial decision-making. While it has helped to deepen understanding of the concepts of autonomy by providing tools to explore its layered discourses, it is ill-equipped to uncover the material, structural relations between the concepts, discourses and practices of the judiciary in their determinations in ethically-contentious medical law cases. Thus, there is need to return to the law reports using a strategy of investigating the inferential relations between concept, discourse and practice, as well as mapping and contextualising the cases over time in order to reveal the influence of policy and politics. It is to this third and final level of enquiry and discovery that the next two chapters are devoted.

CHAPTER 5

THE THIRD CYCLE OF CRITICAL REALIST ENQUIRY: ANALYSING DIMENSIONS OF INFLUENCE AND THE TRADITIONS

5.1 INTRODUCTION

In this chapter the strategy for developing a critical realist analysis designed to interpret whether there are structures that may underlie the data of the law reports will be set out. This will be followed by a synchronic and diachronic analysis of the underlying structures of variation in the use of autonomy of autonomy in the law reports. This analysis will be followed in the next section with the development of a framework for analysing the concept of tradition and its application to judicial decision-making in ethically-contentious medical cases. In this connection, the work of MacIntyre (1981; 1988; 1990) - who has provided a sophisticated theoretical concept of tradition – and Brandom (1994) – who has developed a set of analytical tools to investigate the claims and sentences expressed in discursive traditions – will be set out. This will lead on in the next chapter to the application of the framework of analysis and the tools derived from both to assess whether judicial use of autonomy has been influenced by tradition.

5.2 THE STRATEGY OF INVESTIGATION

The need for a need to develop a critical realist analysis of the data to determine the presence of underlying structures in the medical jurisprudence was driven by the limitations of empiricism (which provides descriptive data without understanding or explanation) and hermeneutics (which provides understanding but no explanation). Philosophically, the strategy of investigation is constructed on the basis of materialist understanding of social reality and a realist approach towards the problem of acquiring knowledge of that reality. Employing a critical realist strategy which combines the materialist and realist solutions to the problem of understanding of the social world, the construction and investigation of a distinctive data base of law reports proceeded on the critical realist assumption that what could be observed would need to be explained in terms of underlying structures of material relations.

The feasibility of theory-neutral observation of the social world associated with purely empiricist views of grounded theory have been subjected to widespread criticism on theoretical and practical grounds (Bulmer, 1979; Bryman, 2004). The motivational impulse for the research mentality and process is difficult to understand without conceptual and theorised awareness of the world within which the researcher 'lives and moves and has her being'. The task for the researcher is to make the presuppositions explicit. It is accepted amongst qualitative researchers that grounded theory does not supply researchers with an algorithm guaranteeing robust theoretical outcomes, but a set of procedures which may be flexibly used within the constraint of keeping theory related to data. Following Bryman's processual account of practice, concepts and categories do not readily emerge, but come from dialectic

between researcher and the field of investigation, processual analysis informing data collection and shaping the direction of research. This account captures the nature of the interaction between the researcher, the law reports (the primary data base) and background reading in academic law, bioethics and political philosophy (the secondary data base) and how the researcher was led towards deeper analysis of the law reports.

The substantialist argues that the structures which underlie experience are real phenomena, not just conceptual labels, and rejects the empiricist view that reality is given to experience. As Johnson et al. observe:

> Science is not, for the substantialist, the mere accumulation of empirical factors. Science goes beyond the observation that things are related to one another in a regular fashion, for such knowledge merely describes an existing state of affairs, which must, in turn, be explained (Johnson et al., 1984: 116).

It is the task of research to investigate and disclose underlying structures which explain the regularities of experience. For the substantialist, knowledge of the underlying realities can only be gained by attempting to understand the structures which are not observable and to construct hypotheses to explain the relationship between structure and experience. Thus, the effort to make sense of the regularities of particular usages, and understandings of autonomy in the law reports and the academy (the first research object) has led to the hypothesis that legal (second research object), moral and political (third research object) traditions underlie and explain these regularities.

Contemporary critical realists, working across a range of disciplines, have further developed the substantialist position: in theology (Wright, 1992); philosophy (Collier, 1994); sociology (Archer, 1995); law (Norrie, 2010); and philosophy of science (Bhaskar, 2008). This approach is committed to the proposition that all knowledge of the social world is theory-laden and eschews the relativist claim that because knowledge of the underlying structures of reality cannot be verified they cannot exist. As a counter to the epistemic fallacy, Bhaskar , cited in Archer et al. (2004), has drawn a distinction between the world's transitive and intransitive dimensions, between "our beliefs and knowledge claims about the world' and 'what the world is actually like apart from us" (Archer, et al., 2004: 2). Knowledge in the transitive dimension is a "social' product which is in a constant process of development, revision and change, but is nevertheless knowledge of an intransitive object." Critical realism affirms that there is an objective material world which exists independently of our thoughts about it, and which our thoughts can in principle grasp.

The dynamic methodology of grounded theory, focussing as it does on the interactive relationship between researcher and the data is well-equipped to research the hidden material structures proposed by substantialism and critical realism. Grounded theory can provide, it is proposed, the methodology required by critical realism. Within this critical realist framework, grounded theory's processual approach is well-equipped to build up, in the transitive dimension, a knowledge-base of its material object(s), iteratively, developmentally, and subject to constant revision. The truth about the material world is yielded through the researcher's critical engagement with the world, i.e. the data, rather than through passive receipt

of sense impressions from objective reality (empiricism), or as the construction of the social world as the outcome of the interpretative activities of individuals (subjectivism), or through that reality's construction in thought (rationalism). The test of the truth of knowledge of the world acquired through theoretical sampling and data collection is its capacity to generate effective action, namely ongoing fruitful engagement of researcher and social world.

Thus, an empiricist view of grounded theory which presupposes that the social world can be directly reflected in the senses of the observer atheoretically is rejected as academically untenable and practically unrealistic. Rather, grounded theory was developed not to advance empiricism as the truth about the world and the physical senses as the criteria of validity, but rather in reaction to a brand of rationalism that threatened to assimilate the nature of social reality to logic and the structures of the human mind obviating engagement with the real world. The power of a substantialist approach to grounded theory is that it abjures the passive orientation of the researcher to the world, redolent of the empiricist approach, giving him instead a central role requiring continuous interaction between the interpretive activity of the researcher and the data. This approach rejects the imposition of a given theory to provide a predetermined explanation and interpretation of the data, but allows theory to emerge from an analysis which is unique, or tailored, to the enquiry in hand and its specific data, and avoids the fiction of atheoretical enquiry into the social world.

The discussion now proceeds to develop a first stage of analysis to examine the potential underlying dimensions that explain why judges might use and interpret autonomy in complex medical cases.

5.3. PROXIMATE PATTERNS OF VARIATION IN THE LAW REPORTS

The discussion in this section will take place in two parts. Firstly, it will examine dimensions of potential variation in the law reports. Secondly, it will examine variation in use of autonomy over time (diachronic analysis).

5.3.1 Dimensions of variation (synchronic analysis)

In this section, the dimension of potential variation will be considered by type of case, by nature of case, by judge and between levels of the court hierarchy.

5.3.1.1 Variation by type of case

The first dimension to be analysed is the potential influence of the type of case on judges' use of autonomy. Does the judge in one type of case give a different interpretation and use of autonomy than if the same judge were hearing a different type of case? The cases suggest that there can be such an association between case-type and the language of autonomy being used. It is proposed that judges, broadly speaking, do differ in their interpretation and use of autonomy in relation to three types of case: firstly, cases concerning patients who are cognitively under-developed or impaired; secondly, cases relating to patients whose capacity to consent or refuse medical treatment is in dispute; and thirdly, cases relating to patients who are clearly capable of making a legally-valid treatment decision but who, for legal reasons, are not able to realise their choices.

5.3.1.1.1 Cognitively-impaired or underdeveloped patients

In cases involving patients who are unable to express a legally-valid treatment choice, either because they are too young to do so, or because they are cognitively impaired, the meaning the courts have assigned to autonomy is typically its overriding importance as bodily integrity. In *Re A* (2001), which concerned the lawfulness of separation surgery on infant conjoined twins, the concept of bodily inviolability (which is a dimension of integrity) is enunciated as a fundamental principle of medical law (p.176*D*-*G*). The Court of Appeal provides the first instance of the term 'physical autonomy' medical law reports (p.219*B*). Similarly, in *Re F* (1990), which concerned whether a cognitively-impaired adult should be permanently sterilised on grounds of necessity, the Court of Appeal and House of Lords undertake extensive analyses of English assault law, in the course of which the term 'bodily inviolability' is coined (p.13*F*; cf. p.72*E*). Their reasoning is adopted in *Bland* (1993) (p.892*B*-*D* to which the Court of Appeal in *Yearworth* (2010)) refers as a case "making an elaborate series of rules for the protection of the body and bodily autonomy" (p.13*G*). In *Re M* (2011), the High Court, in a case determining the lawfulness of withdrawing life-sustaining medical treatment from a woman in a 'minimally-conscious state' declares that "the right to personal autonomy, otherwise described as the right to physical and bodily integrity" is a right protected under Article 8 of the ECHR (para. 95).

The courts focus on the concept of bodily inviolability, integrity and autonomy in cases where patients lack an intellectual dimension. It is noteworthy that notions of bodily inviolability and integrity seem to be gradually assimilated to a concept of bodily autonomy in the post-2000 cases.

5.3.1.1.2. Patients with ambiguous mental capacity

The reports also reveal an association between case-type and meanings assigned to autonomy in relation to patients of ambiguous mental incapacity. In these cases, concerns about the precise state of the patient's mind, have invited courts to determine criteria for mental incapacity and thus the scope of self-determination and freedom of choice. It is proposed that these can be regarded as forms of 'intellectual autonomy' which relate to the mental dimension of the 'self'. Dworkin (1992) has coined the term 'liberal individualism' to refer to autonomy as an intellectual concept to which freedom of choice and self-determination are integral. In *Re T* (1993), which concerned the lawfulness of a potentially life-sustaining treatment refusal on supposedly religious grounds by a pregnant woman, the Court of Appeal declared that an adult patient with mental capacity had unqualified freedom to choose "notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent" (p.102*E-F*). The High Court, in the subsequent case of *Re Z* (2005), which concerned the scope of the right of a vulnerable woman with an incurable degenerative brain disease to travel abroad for an assisted suicide, explicitly refers to this seemingly untrammelled freedom to refuse, as an expression of "adult autonomy" (p.965*G*).

This seemingly 'absolutist' approach to intellectual autonomy is dependent on the presence of mental capacity in the first place. The courts have developed law relating to mental capacity over the last twenty years. The law had held, rather vaguely, that to be deemed capable of giving valid consent to medical treatment, the patient needed to understand in broad terms the nature, purposes and consequences of the treatment being proposed (cf. *Re C* (1994), p.295*C*). Subsequently, the law has

clarified the degree of cognitive ability required to demonstrate understanding. In *Re C* (1994), which concerned a psychiatric patient's right to refuse a potentially life-saving leg amputation which the court concluded was fundamentally motivated by his personal values rather than his mental disorder, the High Court established a three stage analysis: "(1) to take in and retain treatment information, (2) to believe it and (3) to weigh that information, balancing risks and needs" (p.292*E*). This analysis was affirmed clarified, slightly amended, and deepened in the case of *Re MB* (1997), pp.433-4). In that case, the Court of Appeal declared that it would be lawful to perform a caesarean section on a woman who was non-compliant due to her 'needle phobia'.

The courts have determined a number of 'capacity' cases under the Mental Capacity Act 2005 (MCA). This has introduced a statutory 'codification' of the law governing mental capacity. In keeping with the philosophy of the Act, the courts have read mental capacity in broader relational and institutional terms. In *D Borough Council* (2001), the court addressed the legal test to be applied in the case of a vulnerable adult as to capacity to consent to sexual relations. In *Re A* (2011), the court considered what level of capacity was required in the case of a cognitively-impaired adult woman who was refusing contraception. Both cases explicitly refer to section 1(6) of the MCA which stipulates that acts done or decisions made on behalf a person who lacks capacity are to be "as effectively achieved in a way that is less restrictive of the person's rights and freedom" (*D Borough Council* (2011), p.1264*D-E*; *Re A* (2011), p.70*C*). The broader philosophy of the MCA is clearly articulated in *Re A* (2011) (pp. 86*H*- 87*A*):

> The purpose, in respect of a capacitated but vulnerable adult, is to create a situation where he or she can receive outside help free of coercion, to enable him or her to weigh things up and decide freely what he or she wishes to do. In respect of an incapacitated adult, I consider the same should apply, except that the aim of providing him or her with relief from the coercion is first to gain capacity and, if achieved, then to enable him or her to reach a free decision.

In these cases, it is suggested, concern with a person's capacity and freedom to choose is matched by a corresponding concern with the provision of enabling conditions necessary to facilitate choice.

5.3.1.1.3 Patients with uncompromised mental capacity

Decisions under common law have established that, outside the scope of the mental health legislation, a competent patient has an unqualified right to refuse medical treatment. More recently, however, the domestic courts have been required to decide a number of cases under the provisions of the European Convention on Human Rights (ECHR) and to consider the scope of a person's right to demand sub-optimal 'treatment', including assisted suicide. Three cases, in particular (*Pretty* (2002); *Burke* (2005) and *Purdy* (2010)), have been decided under Article 8 (right to "private life") which, following the decision of the European Court of Human Rights in *Pretty v UK*, includes a right to personal autonomy and self-determination. In this section, two cases, decided after the decision in *Pretty v UK*, have been singled out for special attention.

In *Burke* (2005), a 44 year-old man, with a congenital degenerative brain condition that would eventually leave him unable to communicate with his doctors, sought a

court declaration that General Medical Council guidelines relating to the withdrawal of life-sustaining treatment did not represent an accurate summary of the law. The High Court gives (at p.445*F-H*) an extensive quotation from para. 61 of the judgement of the European Court of Human Rights (ECtHR) in *Pretty*, observing that:

> …the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity … Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.

The right to privacy "is not susceptible to exhaustive definition". It covers physical and psychological identity, which is enlarged and extended to comprise "social identity" and "the right to establish and develop relationships with other human beings and the outside world." The High Court, drawing upon the authority of domestic and European jurisprudence, further specifies the scope of the privacy, annexing to it all those features integral "to a person's identity or ability to function socially as a person", and without which personal identity, development and relationships would be compromised. Chief amongst these is the mental stability and mental health integral to a person's "moral integrity", which requires that she be approached and treated "holistically" and as "morally worthy of respect".

The identification of an implicit autonomy right within the broader framework of the express privacy right would imply that autonomy is a manifestation, or constituent, of privacy and therefore a subordinate principle. To suggest otherwise is complicated by the courts' failure to define autonomy's conceptual relationship with other specified ethical values (e.g. self-determination) with which it is used either conjunctively or in close association. However, it is proposed that the court is not simply using autonomy as a correlate of these other values; personal autonomy is described, more fundamentally, as "an important principle underlying the interpretation of the Convention's guarantees." It can plausibly be argued that the court brings the concept of autonomy into an equal, and integral, relationship with the indubitably fundamental notions of dignity and freedom, which are stated explicitly to be "the very essence of the Convention" (p.445*H*).

In *Purdy* (2010), the claimant sought judicial review of the Director of Public Prosecution's (DPP) refusal to publish details of his prosecution policy in relation to assisted suicide. This, she argued infringed her rights under the ECHR, in particular her rights under Article 8. She succeeded on the narrow point that the UK's assisted suicide law, though crystal clear on the face of it, was not sufficiently transparent for the purposes of European human rights law, because the prosecution policy was equivocal and insufficiently crime-specific. The case is legally important because the House of Lords affirmed, following the decision of the ECtHR in *Pretty*, that the claimant's right of personal autonomy included a right to determine how and when she chose to die, thus supplying her with a human right to an assisted suicide. This right, however, was only *prima facie*, and subject to the qualifications contained in Article 8(2), in particular "the protection of the rights and freedoms of others". The

UK's 'blanket ban' on assisted suicide was legitimate provided that it complied with the 'proportionality' requirements of European human rights law, with regard to 'accessibility' and 'foreseeability'.

The House of Lords (Lord Brown) affirms that the decision of the ECtHR in *Pretty* clearly regarded the absolute prohibition of assisted suicide in the UK as an infringement of her "personal autonomy and right to self-determination." The court recognises that interference with the right to autonomy cannot be justified on the basis that it is 'harmful' *simpliciter*; people are free, within limits at the extremes, to engage in dangerous and harmful activities and, in the healthcare context, to refuse life-sustaining treatment. The court (Baroness Hale) offers an explicit justification for the existence of a *prima facie* right to determine the manner and time of death in terms of self-determination (p. 399*B*): 'If we are serious about protecting autonomy we have to accept that autonomous individuals have different views about what makes their lives worth living.' However, the court advances a public policy justification for an Article 8(2) rebuttal of the presumptive right to autonomy in the assisted suicide context in spite of the argument from ethical pluralism (p. 399*F*):

> It is not for society to tell people what to value about their own lives. But it may be justifiable for society to insist that we value their lives even if they do not.

The court (Lord Hope) also reiterates the proposition that the "very essence of the Convention is respect for human dignity and freedom."

5.3.1.1.4 Concluding discussion

In this section, the examination of the law reports has led to the provisional conclusion that judicial interpretations of autonomy are influenced by case-type. There are, however cases where this association does not entirely hold. In *Bland* (1993), the Court of Appeal, and, to a lesser extent, the House of Lords devote considerable attention to the ethical and legal significance of self-determination, though the patient was permanently insensate. Judicial discussion of self-determination was not required because the central legal issue was whether the patient should have the medical treatment he was receiving removed in order to restore his bodily integrity and allow him to die. The lengthy discussion of this ancillary issue was prompted by judicial speculation about what the patient would have wanted had he been able to utter, and strong judicial conviction that he retained a personal interest in how his condition might be viewed by those who most cared for him.

5.3.1.2 Variation by judge

The second dimension to be analysed is the potential influence of the dispositions, or orientations, of judges towards the law. Does the judge in one case give a different interpretation and use of autonomy than another judge hearing the same case or similar, cases? It is proposed that while there is ample evidence to suggest that the judiciary share the same family of ideas, there is evidence that judges differ in their use of autonomy according to their orientations towards the law, the legal regime (common law, statute, ECHR), and the ethical issues being addressed.

In *Bland* (1993), decided under the common law, Lord Justice Hoffmann in the Court of Appeal delivers an erudite judgement exploring the status of self-determination in relation to other ethical principles, e.g. sanctity of life, and dignity, to a much greater extent than his fellow judges. This discussion forms part of his concern to show that a permanently insensate patient has interests which survive the loss of his intellectual autonomy. To this, he draws on a range of academic, as well as legal material.[21]

His treatment of 'dignity' is the most extensive in common law. He states (at p.826*F-G*) that this "deeply rooted ethical value", closely connected to "individual autonomy or the right of self-determination", concerns:

> … our belief that quite irrespective of what the person concerned may think about it, it is wrong for someone to be humiliated or treated without respect for his value as a person. The fact that the dignity of an individual is an intrinsic value is shown by the fact that we feel embarrassed and think it wrong when someone behaves in a way which we think demeaning to himself, which does not show sufficient respect for himself as a person.

The judge does not explore its precise relationship to physical integrity, self-determination, or individual autonomy, and sanctity of life. He may not have felt the need given the narrower basis on which the case was decided, i.e. necessity and 'best

[21] Although his reputation as a thinker and philosopher is acknowledged in the academic literature (Kramer, 2003), a fellow judge has drawn attention to his general reluctance to cite academic literature in his judgements. Lord Rodger of Earlsferry that 'Lord Hoffmann, who had been an Oxford law fellow for twelve years, showed no particular fondness for citing legal academic work in his judgments.'

interests'. His discussion of dignity may have served partly to offer an ethical foundation for an ethically-contentious decision.

The High Court and Court of Appeal judgements in *Burke* illustrate two contrasting approaches. The case was decided under the provisions ECHR, in particular Article 8. In the literature, the Court of Appeal's judicial 'conservatism', has been contrasted with High Court judge's judicial 'activism'(Miola, 2007; Veitch, 2007). It should be noted that the following analysis is relevant both to this section (variety by judge) and the next section (variety by court hierarchy). In the High Court, Mr Justice Munby undertakes a wide-ranging review of medical law. He, like Lord Justice Hoffmann, considers 'dignity', but at much greater length (pp. 445*F* – 451*D*). Dignity is not expressed in ECHR, but the ECtHR has acknowledged that with 'human freedom', 'human dignity' forms "the very essence of the Convention" (*Burke* (2005), p.445H; *Pretty v United Kingdom* (2002) 35 EHRR 1 at para. 61).

Although the Court of Appeal does not reject the High Court analysis of dignity (cf.Foster, 2011), it criticises in strong terms the High Court's panoptic survey of the legal and ethical issues:

> There are great dangers in a court grappling with issues such as those that Munby J has addressed when these are divorced from a factual context that requires their determination. The court should not be used as a general advice centre. The danger is that the court will enunciate propositions of principle without full appreciation of the implications that these will have in practice, throwing into confusion those who feel obliged to attempt to apply those principles in practice. This danger is particularly acute where the issues raised involve ethical questions that any court should

> be reluctant to address, unless driven to do so by the need to resolve a practical problem that requires the court's intervention.

The Court of Appeal's reluctance to address directly the ethical issues raised was made easier by its hypothetical nature. The patient in *Burke* (2005) was concerned that his incurable neuro-degenerative condition would eventually leave him unable to communicate a treatment choice. This circumstance had not yet arisen for the claimant – the legal action was to that extent pre-emptive – and so did not merit a legal determination.

In *NHS Trust A* (2001), the High Court (Dame Elizabeth Butler-Sloss) addressed the lawfulness of withdrawing life-sustaining nutrition and hydration, from two patients in a persistent vegetative state (PVS). The case, though factually similar to *Bland* (1993), was decided under the provisions of the ECHR, in particular Article 2 (right-to-life), which had subsequently come into force. Accordingly, the High Court was not bound by the decision in *Bland* as it otherwise would have been. The judge was at liberty to interpret the relevant provisions of Article 2 directly: "no one shall be deprived of his life intentionally". Nevertheless, in her use of Article 2 to justify the restricted obligation to give life-sustaining treatment to the patient in PVS, she states that her approach was "entirely in accord with the principles laid down in *Airedale NHS Trust v Bland* [1993] AC 789…" The court uses as its operational measure, the common law distinction, enshrined in *Bland* (1993), between 'acts' and 'omissions', to interpret the meaning of 'intentional deprivation of life':

> The analysis of these issues by the House of Lords in *Bland*'s case [1993] AC 789 is entirely in accordance

> with the Convention case law on article 2 and is applicable to the distinction between negative and positive obligations.

Consequently, the court holds that there can only be 'intentional deprivation of life' if someone on behalf of the state deliberately acts to bring about a death (p.358*F*). The discontinuance of medically contra-indicated treatment, which would otherwise "represent a violation of his autonomy" (p.359*H*), does not fall foul of the Convention, even if the effect is to shorten the life of the patient. Personal autonomy "otherwise described as the right to physical and bodily integrity" (p.361*F*) is construed as a right protected by Article 8 (right to "private life") and its invasion must be justified under Article 8(2). This autonomy extends to the protection "of a patient's right to self-determination" (p.361*F*). A patient's autonomy is something retained even in the midst of her incompetence, and therefore capable of being violated by non-beneficent treatment (p. 358*D*).

It can be said provisionally that there is sometimes a relationship between the orientation and disposition of the judge towards the law and their interpretations of the meaning to be assigned to the concept of autonomy.

5.3.1.3 Variation between levels of the court hierarchy

The third dimension of influence to be analysed is the potential impact of the level of the court hierarchy tend to give a more elaborate interpretation and use of autonomy than his lower court colleague. It is proposed that there is some evidence that courts further up the hierarchy enlarge on the concepts that are central to their judgements. In addition, there is some evidence that judges in the House of Lords are more likely

to depart from precedent in order to develop the law in a rational way more protective of patient autonomy.

In the case of *Re A* (2001), there were significant differences of approach between the High Court and the Court of Appeal. The case concerned the lawfulness of surgical separation on infant conjoined twins which would have inevitably fatal consequence for the weaker child because a number of vital organs on which she depended for survival were largely contained within the body of her stronger sibling. The High Court judge (Mr Justice Johnson) was compelled to address a complex case under great time-pressure. The Court of Appeal (at p.174*E*) sympathetically observed that his:

> … judgment was given, as so frequently happens in this kind of case, under even greater pressure of time than we have felt. He did not have the benefit of the searching arguments we demanded and received of counsel. The case as it was presented to him and the case in the shape into which we knocked it are as different as chalk and cheese. I would like to record my sympathy for the judge, sitting alone, having to take such a decision as this in such difficult circumstances.

The High Court judge relied heavily on *Bland* (1993) on the legal premise that to split the weaker from the stronger sibling was analogous to cases of withdrawing life-sustaining medical treatment from moribund patients. Mr Justice Johnson saw the stronger twin as an organic life-support system from which the weaker twin could be detached: The High Court judge argued that "the operation…would be lawful because it represents the withdrawal of [the weaker twin's] blood supply" (p.176*A*).

The Court of Appeal strongly disagreed with the High Court's analysis. It regarded his reliance on *Bland* (1993) as "utterly fanciful" (p.189*G*). Its three judges unanimously agreed that that separation surgery was an 'act', rather than an 'omission', and therefore required legal justification if a murder charge was to be avoided. For Lord Justice Ward, this took the form of 'quasi-self-defence' (p.204*A*). Lord Justice Brooke extended the 'necessity' defence (p.240*D*)). Lord Justice Walker stringently promoted the concept of bodily autonomy (at p.258*H*):

> Every human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy—the right to have one's own body whole and intact and (on reaching an age of understanding) to take decisions about one's own body.

Both the High Court and Court of Appeal, however, shared a common law methodology. They revealed preference for the authority of real-life cases (precedents) over philosophical principles. The Court of Appeal made profligate reference to, but restricted use of, hypothetical comparators drawn from academic literature (parachutists, mountain-climbers and lifeboat evacuees). While such appeals to academic authority seemed on the surface to indicate a need for non-legal sources of authority and guidance, the substance of the judgements is ultimately constituted on the basis of comparisons and contrasts with decided cases, especially *Bland* (James, 2008).

This rather conservative approach can be contrasted with the more adventurous approach of the House of Lords in *Chester* (2005). It involved a surgeon's allegedly negligent failure to disclose the inherent risks of a spinal operation (cauda equina

syndrome) which materialised leaving the patient in pain and physically incapacitated. The trial judge found that there had been negligent failure to inform. Moreover, the court agreed that the patient, properly notified of the risks, would not have undergone the operation when she did, though she might have undergone surgery later. The House of Lords (by a 3:2 majority) relaxed the normal rules of causation in order to compensate a claimant whose right to be fully informed, that is, her autonomy, had been violated. The traditional approach has connected conduct to an injury, which, 'but for' negligent non-disclosure, would not have transpired (the 'but for' test). However, in this case, the evidence suggested that the patient would have eventually undergone the procedure, although not at the time that she in fact did.

Two Law Lords (Lords Bingham and Hoffmann) followed tradition arguing that because she would probably would have submitted to surgery eventually, she could not succeed on the 'but for' test. In contrast, the majority (Lords Steyn, Hope and Walker), held the patient's "right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles" (p. 147*G*, per Lord Steyn). Lord Hope forsook traditional tort principles, which, in his view, undermined the link between consent and autonomy and thus perpetuated the perceived imbalance between doctor and patient (p154*A*-*C*). Instead, he followed a foreign authority in a progressive jurisdiction – the High Court of Australia (*Chappel v Hart* (1998) 195 CLR 232):

> The law is designed to require doctors properly to inform their patients of the risks attendant on their treatment and to answer questions put to them as to

> that treatment and its dangers, such answers to be judged in the context of good professional practice, which has tended to a greater degree of frankness over the years, with more respect being given to patient autonomy.

Lord Hope informed by academic commentary on *Chappel*, explicitly links consent and autonomy: "The principal reason for imposing this duty is to promote the patient's decision making autonomy" (p.159*H*). Lord Walker adopts Lord Scarman's human rights analysis in *Sidaway* (1985) to justify the imposition of a medical duty to respect patient autonomy stating that "during the twenty years which have elapsed since *Sidaway* the importance of personal autonomy has been more and more widely recognised."

It is proposed that in *Chester* (2005) the majority in the House of Lords demonstrate a desire to develop the law in a manner consistent with ethical principle – the paramount importance of patient autonomy and the assertive citizen – even if it means departing from a traditional common law authority which is wedded to a clear causative connection between failure to inform and damage. Instead, they rely on an Australian authority – which has persuasive not binding authority – reinforced by a raft of academic authorities on causation (cf. Hart & Honore, 1985). It is also proposed that the House of Lords thought it could be explicit in its preference for principle over precedent in view of its unwritten constitutional authority to depart from its previous decisions in a way that they lower courts cannot.

5.3.2 Variation in use over time (diachronic analysis)

This section will consider judicial variation in use of autonomy over time. It will look at pre-1990 cases where the term autonomy was not used. It will then look at restricted and elaborate uses of autonomy along the research sample timeline.

5.3.2.1 The emerging use of autonomy

This section focuses on the emerging use of autonomy in the medical law reports. It addresses the first research question; do judges use the concept of autonomy in their judicial deliberations and decisions? This tests an initial presupposition of enquiry that the judiciary use the concept of autonomy in its legal determinations. The empirical enquiry has found that although judges' use of the concept of autonomy, this is a recent phenomenon. It will be argued that judges' use of the concept of autonomy has emerged over time in four stages. Firstly, before the mid-1980s there are medical law reports in which there is no ethical language, i.e. neither the term 'autonomy' nor any of its conceptions, is used at all. This reveals a world of medical law cases prior to the development of ethically-contentious cases. Secondly, from 1985 to the mid-1990s judges begin to use an ethical language which expresses the component meanings of autonomy but not the concept of autonomy itself, e.g. self-determination, bodily integrity (and its variants); freedom of choice (and similar constructions). Thirdly, the term 'autonomy' is used in a medical law report for the first time in *Re F* (1990) and for a period is given a restrictive use. Fourthly, there are cases in which there is an elaborate use of the concept of autonomy. This classification of use and non-use of ethical language is summarised in Figure 5.1. The categories are discussed briefly before focusing on the cases which have been

selected for closer study and analysis. The periodisation reflected in the table below is not meant to be rigid but rather expresses predominant usage.

Autonomy and ethical language	Number of cases	Dominant period
Containing no ethical language	Indeterminate number	-1985
Containing ethical language	7	1985 - 1990
Containing restricted uses of the concept of autonomy	19	1990 -
Containing elaborate uses of the concept of autonomy	5	Post 1999

Figure 5.1 Classification of ethical language in law reports of medical case

5.3.2.1.1 Cases containing no ethical language

An indeterminate number of medical law reports dating before the 1980s do not contain ethical language. If medical law is by definition ethically-contentious, then a medical law report not containing ethical language could be seen as a contradiction in terms. If, however, medical law embraces all cases which have ever arisen in the healthcare context, then clearly there is a world of medical law cases prior to the development of ethically-contentious ones. For example, medical negligence is obviously a central topic within medical law. All established medical law textbooks devote substantial chapters to it. For example, Jackson (2010) devotes a chapter of 65 pages to 'medical malpractice'. A database search for 'medical negligence' cases yields a very large number of results (1776 cases by LexisLibrary and 811 cases by Westlaw). The connectors "medical negligence" (Westlaw) and medical w/3 negligence were used. 'Medical negligence' can be defined as behaviour involving

allegedly negligent acts and omissions by medical professionals who cause injury and damage. A search for 'abortion' which also yields a large database (1251 cases by LexisLibrary and 621 cases by Westlaw), of which a minority were considered in an explicitly healthcare context. A systematic search of these principal legal databases reveals that the English courts do not use ethical language in medical law cases before the 1980s. To double-check this unexpected result, leading medical negligence cases such as *Bolam* (1957),[22] *Whitehouse (*1981),[23] *McLoughlin* (1984),[24] and *Thake* (1986)[25] were perused and found to be wanting in ethical language in the sense used here. This point will be elaborated in more detail in the section immediately following.

5.3.2.1.2 Cases containing ethical language but not the term 'autonomy'

The judiciary rarely uses ethical language before the 1980s. From the 1980s onwards, the courts begin to use the component meanings of autonomy, but do not actually use the term itself, e.g. bodily integrity, bodily inviolability, self-determination etc. The first recorded use of the term 'bodily integrity' in an English medical law case appears in the High Court case of *Chatterton* (1981)[26] (at p.442D) a case in which a plaintiff brought actions in trespass and negligence against a doctor for his failure to warn her of the risks associated with an operation to relieve pain in the area of a post-operative scar on her groin. The dearth of precedent is evident in

[22] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

[23] *Whitehouse v. Jordan* [1981] 1 All ER 267.

[24] *McLoughlin v. O'Brien* [1983] 1 A.C. 410.

[25] *Thake v Maurice* [1986] QB 644.

[26] *Chatterton v. Gerson* [1981] Q.B. 432.

the judgement of Mr Justice Bristow who states that no "English authority was cited before me of the application of the principle in the context of consent to the interference with bodily integrity by medical or surgical treatment" (p.442*D*). All three of the cases in which the term 'bodily integrity' is used prior to the 1990 case of *Re F* (*Chatterton* (1981); *Freeman* (1984)[27] and *Sidaway* (1985)[28]) draw on the persuasive authority of a statement in the Canadian Supreme Court decision in *Reibl* (1980).[29] The closely-related term 'bodily interference' is used in the seminal case of *Gillick* (1986) at p.189G, which the House of Lords draws from the Ontario High Court case of *Johnston* (1970).[30] The first recorded use of the construction 'bodily inviolability' appears in the Court of Appeal judgement in *Re F* (1990) at p. 13*F*.[31] It was later in the House of Lords in the same case that the use of the term 'autonomy' is first recorded.

The earliest, and only, ascertainable use of the conception of 'self-determination' in an English law report before *Re F* was decided is in the medical negligence case of *Sidaway* (1985)[32]. The Sidaway case concerned a surgeon's allegedly negligent

---

[27] *Freeman v Home Office (No. 2)* [1984] 2 W.L.R. 130.

[28] *Sidaway Appellant v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and Other Respondents* [1985] A.C. 871).

[29] *Reibl v. Hughes* [1980] 2 S.C.R. 880.

[30] *Johnston v. Wellesley Hospital* (1970) 17 D.L.R. (3d) 13

[31] cf. *Wilkinson* (2002) at p.427D.

[32] *Sidaway Appellant v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and Other Respondents* [1985] A.C. 871at 882C. Outside the jurisdiction of the English courts, the conception of self-determination is used in the abortion context in a decision of the ECtHR in Brüggemann and Scheuten v Federal Republic of Germany (1981) 3 E.H.R.R. 244 in the context of the construction of the meaning of a right to 'private life' under Article 8 of the ECHR.

failure to disclose inherent and material risks of cervical cord decompression. Lord Scarman states (p.882*C*) that:

> The right of "self-determination" - the description applied by some to what is no more and no less than the right of a patient to determine for himself whether he will or will not accept the doctor's advice – is vividly illustrated where the treatment recommended is surgery.

The term is used twice by Lord Scarman and once by Lord Bridge. Both cite earlier use of the term in the US Court of Appeals, District of Columbia case of *Canterbury* (1972)[33], which crystallised the doctrine of 'informed consent' in American jurisprudence.

Only six medical law reports either directly, or in passing, address the issue of freedom of choice before *Re F* (1990): the High Court in *Chatterton* (1981); the High Court in *Hills* (1984)[34]; the High Court and Court of Appeal judgements in *Freeman* (1984); the House of Lords in *Sidaway* (1985) and *Gillick* (1986).[35] In *Sidaway* (1985), the House of Lords, drawing on the authority of the Canadian case of *Canterbury* (1972), states that "consent is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each" (p. 887*C-D*). At this point, it is important to draw attention to two noteworthy features of the English courts' approach to the

---

[33] *Canterbury v. Spence* (1972) 464 F. 2d 772.

[34] *Hills v Potter* [1983] 1 WLR 641.

[35] *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] 1 AC 112.

development of ethical language. Firstly, it is the lack of a developed domestic medico-legal jurisprudence that prompts appeal to the potentially persuasive authority of analogous foreign jurisprudence, or earlier English cases involving other, i.e. non-medical, areas of law. For example, the High Court and Court of Appeal in the case of *Freeman* draw on a statement articulating the nature of a truly free choice in the much earlier, non-medical, negligence case of *Bowater* (1944).[36] Secondly, in *Sidaway* (1985) at p. 887*C*, there are distinct echoes of the seminal American case of the *Schloendorff* (1914).[37] *Schloendorff* is the seedbed of the American doctrine of informed consent (Paola et al., 2010: 181-2). The influence of *Schloendorff* in *Sidaway* is important because the conceptions of bodily integrity, freedom of choice and self-determination are inextricably linked in Justice Cardozo's declaration that:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages.

Although *Schloendorff* is only cited in argument – in both Court of Appeal and House of Lords - in *Sidaway*, rather than referred to in the judgements themselves, it has an influential trajectory in later English medical law. *Schloendorff* is explicitly referred to in an English legal judgement for the first time in *Re F* (1990) at pp.35*E*, 73*D*. It is subsequently cited in argument in a number of cases: in the cases of *Re T*

---

[36] *Bowater v. Rowley Regis Corporation* [1944] K.B. 476, 479.

[37] *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914).

(1993) and *Pretty* (2002). It is referred to and quoted in *Bland* (1993) at p.864*C*; *Re A* (2001) at p.176*H*; *Burke* (2005) at p.443*F*; and *Purdy* (2009) (Court of Appeal) at para. 33. *Schloendorff* is explicitly associated with the concept of autonomy and conception of self-determination in *Re A* (2001) and *Burke* (2005).

The issue of mental capacity directly arose on one medical law case prior to 1990. In *Re B* (1988),[38] the House of Lord's exercising its wardship jurisdiction gave leave for a sterilisation operation to be carried out on a cognitively-impaired 17 year-old woman, who had the mental age of a 6 year-old, in her welfare interests. The court acknowledged that it was a case which had attracted considerable public interest and three of the Law Lords went out of their way to scotch the accusation that they were authorising eugenic sterilisation. Lord Oliver opined (p.207*B*):

> My Lords, none of us is likely to forget that we live in a century which, as a matter of relatively recent history, has witnessed experiments carried out in the name of eugenics or for the purpose of population control, so that the very word "sterilisation" has come to carry emotive overtones. It is important at the very outset, therefore, to emphasise as strongly as it is possible to do so, that this appeal has nothing whatever to do with eugenics.

Only one case uses 'privacy' in a sense that could be construed as a constituent sense of autonomy, but this only appears in the submissions of counsel (*Gillick* (1985), pp.158*G-F*). No cases use the language of 'dignity'.

[38] *Re B* [1988] A.C. 199.

There are not many cases in the pre-*Re F* era which use ethical language. Where ethical language is used, it is generally resourced by American and Canadian jurisprudence. The judicial use of ethical language emerges in response to new types of medical law cases characterised by their inherent ethical content. This is not to say that medical negligence and abortion are domains devoid of ethical significance. But they are not ethically-contentious in the sense used here insofar as it would be uniformly agreed that negligence is a 'bad thing' and that abortion is permissible where it conforms to law. The 'new' medical law differs because of ethical consensus about the desirable outcome. The incorporation of the term 'autonomy' in English medical jurisprudence seems to be part of an ongoing process of development and change in legal and judicial thought and practice in response to broader developments in medicine, social morals and politics.

5.2.3.1.3 The restricted use of autonomy in the medical law reports

From 1990, judges begin to use the term 'autonomy'. In a number of the early cases, the concept of autonomy tends to be used in a restricted sense, meaning the judiciary focus on a particular dimension of the 'self', typically focussing on autonomy as 'bodily inviolability' or 'bodily integrity'. As Chapter Two made clear, academics have distinguished autonomy as a physical concept from other concepts of autonomy, e.g. intellectual. Dworkin (1992) has called this physical concept of autonomy physical essentialism and associates it with the idea of 'being let alone' (1992; 733). Two cases which exemplify this 'physicalist' construction of autonomy have been singled out for discussion below: the cases of *Re F* (1990) and *Re A* (2001).

5.3.2.1.3.1 The case of *Re F* (1990)

In *Re F* (1990) the court (in both the Court of Appeal and the House of Lords) was invited to declare whether or not it would be lawful to surgically sterilise a cognitively-impaired adult woman who was unable to give a legally-valid consent to that surgery. It was argued that this was necessary in order to avoid the potentially damaging consequences for her of pregnancy and giving birth. The case was ethically-contentious because sterilisation surgery represented a major form of bodily invasiveness made legally problematic because of the patient's inability to express a true wish due to her impaired cognition. Both the Court of Appeal and House of Lords upheld the High Court's declaration that it would be lawful to sterilise this sexually-active adult woman without her consent in her 'best interests' on the basis of the principle of necessity.

Re F is significant in the history of English jurisprudence because in it an English court for the first time the term 'autonomy' is used in a medical law judgement. The House of Lords (*per* Lord Goff at p.78*F*) makes a single reference to 'reproductive autonomy' which is defined as "the right to control one's own reproduction". The House of Lords is clearly influenced in its use of the term by the arguments of counsel (p.45*E-F*) who contend that sterilisation 'impinges upon two fundamental human and personal rights, the right of self-determination and the right of reproductive autonomy.' The concept of autonomy is expressed as a 'right', the right to control oneself and one's reproduction and conjunctively used with the conception of self-determination to which the House of Lords earlier refers as the "libertarian principle of self-determination" (p.73C). This seems to echo a construction formulated by counsel (p.44*H*), which follows counsel's enquiry as to whether "the

common law is essentially libertarian in its philosophy or whether, at least in some cases, it adopts an authoritarian/paternalistic philosophy" (p.43*F*).

The court in *Re F* devotes the bulk of its analysis to the search for a legal justification for non-consensual touching. The court does not directly associate the concept of autonomy with conceptions of bodily integrity, or inviolability; but a direct association between these notions is explicitly made in later cases, e.g. 'physical autonomy' (*Re A* (2001)), and 'bodily autonomy' (*Yearworth* (2010)). The court (at both appellate levels) undertakes the most lengthy and detailed analysis of the law concerning physical touching in English medical law (rivalled only by *Bland* (1993) which itself was heavily influenced by the reasoning in *Re F* (1990)).[39] The Court of Appeal (per Lord Donaldson at p. 13*F*) refers to the "common law right of bodily inviolability". The House of Lords (per Lord Goff at p.72*E*) declares, more discursively, that it is "a fundamental principle, now long established that every person's body is inviolate".

Re F is procedurally significant because it established a legal process for pronouncing upon the legality of non-consensual treatment of adult patients who lacked requisite mental capacity to make treatment decisions the law would respect. This procedural development was necessary because at the time the case was decided there existed no legal means of making proxy decisions on behalf of incompetent adults, in contrast with the legal position governing treatment decisions for children

[39] In the Court of Appeal, Lord Donaldson's analysis of the criminal and civil laws relating to non-consensual touching runs to over six pagers (pp.11G-17B).

(see *Re B* (1988) above). The legal position concerning adults has since changed. From October, 2007, the MCA (sections 9-14) empowers the donee of a validly-executed Lasting Power of Attorney (LPA) to make treatment decisions on behalf of an incapacitous adult.

The illegality of non-consensual touching has deep roots in English criminal and civil law. The function of consent, proxy consent, or some other equivalent, is to transform criminal, or otherwise unlawful, acts, into lawful, professionally-permissible, or even obligatory, behaviour. The fact that the patient in this case could not consent explains why the courts thought it necessary to undertake an extensive analysis of the law of 'touching' stretching back into the Victorian and pre-Victorian era.

5.3.2.1.3.2 The case of *Re A* (2001)

In *Re A* (2001), conjoined twins known for legal purposes as 'Jodie' and 'Mary' were born joined at the lower and hinder part of the pelvis (ischiopagus) and with their four lower limbs (tetrapus), sharing a torso and umbilicus and bladder (emptying into two separate urethras), but each with their own set of vital organs (brain, heart, lungs, liver and kidneys). The twins' arterial circulation flowed from Jodie to Mary and the venous from Mary to Jodie through a united inferior vena cava and other venous channels in united soft tissues. The prognosis for the twins' was poor (death with 3 to 6 months) unless they were surgically separated. Such surgery would very likely enable the stronger twin Jodie to live on to lead a largely normal life, albeit with reconstructive surgery, but would almost certainly result in immediate death for the weaker twin Mary, who was entirely dependent on Jodie's

circulation system for survival. The twins' parents, committed Roman Catholic Christians, refused to consent to separation surgery on the grounds that surgery would effectively "kill" the weaker, and mentally and physically disabled, twin Mary.

The hospital authority applied to the High Court for a legal declaration that potentially lethal separation surgery would not open treating clinicians and surgeons to a charge of murder, and that their activity was otherwise lawful, being in the 'best interests' of the twins concerned. The High Court upheld the lawfulness of separation surgery treating it as a form of treatment withdrawal. The Court of Appeal upheld the High Court decision, but for different reasons. Unlike the High Court, the Court of Appeal construed separations surgery as a lethal assault, which was justified in these unique circumstances on medical, family and criminal law grounds. As a result, separation surgery was carried out, which resulted in Jodie's survival and recovery, and Mary's immediate death.

The Court of Appeal uses a range of concepts (e.g. bodily inviolability, physical sovereignty, freedom from interference, self-determination, privacy and dignity) with a strong emphasis on bodily integrity. The term 'physical autonomy' is used for the first time in a medical law report (p. 219*A-B*). This was severely reduced in the twins' case because of their unusual physical configuration. The court also uses the conception of 'bodily integrity', or 'physical integrity' conjunctively with the term 'autonomy' (pp. 249*E*, 258*H*). This term embraces two distinct notions: protection from physical invasion (p.218*B*); and 'physical sovereignty', that is, the 'natural right' intrinsic to every human being and his 'right to life' (p. 258*H*; cf. p.255*E*):

> Every human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy – the right to have one's own body whole and intact and on reaching an age of understanding to take decisions about one's body.

The court also uses bodily integrity conjunctively with conceptions of 'dignity', a term which appears six times in the judgement proper (pp. 184*B*, 258*D*), and which is itself used conjunctively with conceptions of 'independence', 'the dignity of independence' (pp.196*A*, 197*B*) and 'privacy': "Human dignity and personal privacy belong to every person, whether living or dying" (p. 258*D*). The latter is a citation from the New Zealand case of *Auckland Area Health Board v. Attorney General* [1993] 1 NZLR 235 at p. 245.

5.3.2.1.3.3 Concluding discussion: *Re F* (1990) and *Re A* (2001)

The cases of *Re F* and *Re A* confirm the academic observation that autonomy can be understood in physicalist terms. Persons have a right 'to be let alone' unless there is a good reason for interfering. These cases construe autonomy as a basic physical concept. The cases reveal that the conception of bodily integrity has deep roots in the English legal tradition, but that the courts only first articulate it clearly in the medical law reports. The conception is implicit in the criminal and civil law tradition which has historically protected and promoted a person's right to be free from unwanted touching. But it is made explicit in the healthcare context as part of the language drawn upon by the judiciary to express the personal interests at stake in the cases. The selected cases as a whole reveal that the concept of bodily autonomy, or integrity, not only has 'staying power' in the jurisprudence, but is also fundamental;

bodily autonomy is what remains after other dimensions of autonomy have disappeared.

In the recent case of *Yearworth* (2010) (a case which addressed the question whether frozen semen in storage constituted 'property') refers (p.13*G*) to 'bodily autonomy' and presupposes the full and complex analysis of bodily inviolability in *Bland* (1993). In the most recent case in the sample, *Re M* (2011), personal autonomy 'otherwise described as the right to physical and bodily integrity' and is said to survive 'the onset of incapacity to consent to or refuse medical treatment' (at para.95). This implies that physicalist autonomy is the necessary, but not sufficient, condition for the construction of a concept of autonomy that accounts for the complete person.

From 1993, the courts begin to develop a more elaborate and complex use of the concept of autonomy. The cases begin to respond to concerns about the nature and scope of patient choice and, under the influence of European human rights law, the nature of personal identity. The meaning and significance of this more elaborate use of autonomy by judges will be the subject of analysis in the remainder of this chapter.

5.3.2.2 Elaborate use of autonomy: the' millennium watershed'

It is proposed that there is a significant upsurge in its use and variety in cases decided after 1999 (the Human Rights Act was enacted in 1998 and implemented in 2000). In the previous section it was reported that the term 'autonomy' is used for the first time in a medical law report in 1990. Shortly beforehand, the courts begin to

use ethical language e.g. bodily integrity, self-determination etc., which they continue to use concurrently, and conjunctively, with autonomy. The autonomy term is used infrequently in cases decided prior to *St. George's* (1999). It is used once in *Re F (*1990) in the main text of a judgement (per Lord Goff at p.78*E*), although the term also appears in submissions of counsel which do not, strictly speaking, form part of the judgement proper. It is used on five occasions in *Re W* (1992), pp. *81E-F*, 87*G*, 87*H*, 88*A*, 88*E*), once in *Re T* (pp.116*H*-117*A*) in the context of a citation from a Canadian case, only four times in the lengthy judgement in *Bland* (1993) (three times in the Court of Appeal (pp.826F, 827E, 827F) and once in the House of Lords (p 893*A*)), three times in *Re C* (1994) and once in *Re MB* (1997) at p. 436.

In *Re W* (1992), it is noteworthy that judicial engagement in autonomy discourse is in direct response to its use by counsel representing the Official Solicitor, Mr James Munby QC (as he then was) (cf. p. 81*E-F*). It was in his submission to the House of Lords in *Re F* (1990) that the first reported use of the term 'autonomy' anywhere in a medical law report occurs. In *Re W* (1992), the court considered whether it had authority, in the use of its inherent jurisdiction, to override a legally-competent 17 year-old girl's refusal of life-sustaining specialist treatment for anorexia nervosa. The court held where a 16 or 17-year old refuses treatment, that refusal can be vetoed by anyone with parental responsibility, or the court.

The autonomy of the child to consent to medical treatment is potentially subject to parental, or judicial, override by virtue of statutory authority vested in parents through the Children Act 1989 and the inherent authority of the courts in relation to children. The Court of Appeal justifies the manifest asymmetry of consent law in

relation to children in traditional common law terms, implicitly rejecting (cf.75*H*-76*A*) the development of the human rights approach taken by Lord Scarman in Gillick (1986). The function of consent, it argued, is to provide doctor's with legal protection from criminal or civil proceedings to which they would otherwise be vulnerable, i.e. a legal 'flak-jacket' (p. 78*D-E*):

> I now prefer the analogy of the legal "flak jacket" which protects the doctor from claims by the litigious whether he acquires it from his patient who may be a minor over the age of 16, or "Gillick competent" child under that age or from another person having parental responsibilities which include a right to consent to treatment of the minor. Anyone who gives him a flak jacket (that is, consent) may take it back, but the doctor only needs one and so long as he continues to have one he has the legal right to proceed.

It is suggested that in the pre-1998-2000 cases there is some evidence in the judicial decisions themselves to suggest that the concept of autonomy is being insinuated into judicial thinking through submissions of counsel and the sources they are drawing upon, in particular more developed foreign medico-legal jurisprudence (cf. *Re T* (1993) at p.116*A* ff.) and perhaps academic sources as well (see below).

The case of *St. George's* (1999) represents an important landmark in the history of English medical jurisprudence. The case concerned an enforced caesarean section on an otherwise mentally capacitous and heavily 28-year-old pregnant woman. The patient, in spite of her pre-eclampsia, had refused potentially life-sustaining intervention (for both her and her unborn child) because she wanted a natural delivery. Although she clearly had mental capacity and was entitled at common law to refuse any medical treatment, the hospital authorities and social services deployed

the mental health legislation to justify (under section 63 of the Mental Health Act 1983) obstetric intervention as a procedure integral to the treatment of her mental disorder (for which, in the event, nothing was ever prescribed). The Court of Appeal upheld the patient's application for unlawful detention claiming that her pregnancy was a condition unrelated to her mental disorder, and that treatment against her will in the circumstances amounted to trespass.

It is suggested that *St. George's* represents an important conceptual shift indicating that autonomy has become part of judicial *lingua franca*. It is used nine times: eight in the judgement and once in the headnote. Autonomy is referred to for the first time as a 'principle' (p.47*B*) 'personal autonomy' also makes its first appearance (p.60*B*). The court demonstrates greater assurance in its definition of the legal issues in terms of autonomy: "we have been required to consider important questions about the autonomy of a pregnant woman and the effect of her right to self-determination on her unborn child" (p.35*C*; cf. pp.50*H*, 52*A*). There is also the first example in the medical law reports of 'autonomy' as a section heading (p.43*F*-*G*). The term autonomy also appears for the first time in the headnote, although that is the law reporter's editorial summary of the case and does not constitute part of the judicial decision itself. This is evidence, supplementing that of Chapter 5, that judges are developing a language which is unfolding through time with increasing familiarity and sophistication.

It is proposed that there are a number of reasons why evidence exists in *St. George's* of an upsurge of autonomy in judicial discourse. Firstly, it concerns the balance of rights between pregnant woman and foetus, the court concluding that there is no

balance to be struck because foetus has no legal personality until 'live-born' and therefore nothing to weigh-in.[40] Secondly, and relatedly, the court establishes that though the foetus has limited status in English law, its interests cannot outweigh the pregnant woman's right to self-determination, even if her behaviour puts her own life and health, and that of her unborn child, at risk. Thirdly, it was the first case decided by an English court which had not disregarded the pregnant woman's wish to forgo unwanted obstetric intervention in the form of caesarean section. The case has a number of characteristics which provided the court with a suitable opportunity to crystallise autonomy as a permanent and familiar feature of the ethical vocabulary upon which judges could draw in suitable, ethically-contentious cases.

In later cases, there is considerably more use of autonomy. In *Re A* (2001), autonomy is used eight times. It appears twice in headings. It contains the first reference to 'physical autonomy' and the first direct reference to 'individual autonomy', apart from a citation of a Canadian decision in the earlier case of *Re T* (1993) at pp.117*A*. Autonomy appears on forty-nine occasions in the High Court judgement in *Burke* (2005). There are statements in the House of Lords case of *Chester* (2005) at p.163*H* where the court indicates that the principle of personal autonomy has become a key feature of medical law. In *Burke* (2005), *Burke* (2006), *Purdy* (2009), *Purdy* (2010), the courts affirm and reaffirm the legal proposition established by the ECtHR that personal autonomy is a human right protected by Article 8(1) of the ECHR subject to qualifications contained in Article 8(2).

---

[40] It is noteworthy that the word 'autonomy' is first used in a case concerning the limits of reproductive autonomy (*Re F* (1990)).

The House of Lord's judgement in *Purdy* (2010) illustrates the embeddedness of in judicial thinking under the influence of the ECHR. The *Purdy* case was decided in the context of continuing public debate about the state of the UK's assisted suicide law including arguments surrounding Lord Falconer's amendment to the Coroners and Justice Bill (p.399*A*). In it, the claimant successfully obtained judicial review of the Director of Public Prosecution's (DPP) refusal to issue crime-specific guidelines setting out the circumstances in which he would pursue a prosecution for an offence under section 2(1) of the Suicide Act 1961. The House of Lord's held that the UK's 'blanket ban' on assisted suicide could only be justified under the ECHR if it could make it more foreseeable when a clarify the circumstances in which a prosecution would be likely to be brought.

The case is significant in its use of autonomy for three inter-related reasons. Firstly, it is a sustained discussion regarding the nature and limits of personal autonomy in the assisted suicide context. Baroness Hale (the first academic as well as the first woman to be appointed to the House of Lords) states that 'If we are serious about protecting autonomy we have to accept that autonomous individuals have different views about what makes their lives worth living' (p.399*A*-*B*). Secondly, the *Purdy* case followed the ECtHR decision in *Pretty*, which had established a personal autonomy right was immanent to Article 8 of the ECHR. Accordingly, the UK's absolute prohibition of assisted suicide was an infringement of the claimant's prima facie autonomy right under Article 8(1). Lord Brown states (at p. 400*E*-*F*) that it was:

> … quite plain that the bar on assisted suicide under section 2(1) had to be regarded as interfering with Mrs Pretty's right under article 8 of the Convention to respect for her private life. More particularly it interfered with her personal autonomy and right to self-determination.

Thirdly, there is copious evidence of the use of autonomy in the submissions of counsel (cf. pp. 354*D*, 364*E*, 364*F*(x3), 364*H*, 366*H*, 367*D*). These, strictly speaking, form part of the secondary database because they do not form part of the judicial decisions themselves. However, the judicial decisions themselves reveal that there is such use (p. 401*E*). In the Court of Appeal decision in *Purdy* (2009), there is evidence (at para. 33) that the submissions of counsel have a rich texture:

> Lord Pannick answers by submitting that [Debbie Purdy] is asserting that her right to autonomy and self-determination permits her to decide how and when to end her own life so that suffering and indignity can be avoided. The fear of her husband's prosecution is an impediment to the exercise of that right for it affects her freedom of choice. This is, therefore, an interference with her right which needs to be justified under Article 8(2). This "libertarian principle" of self-determination (so described by Lord Goff of Chieveley in In Re: F (Mental Patient: Sterilisation) [1990] 2 A.C. 1, 73D and referred to again with approval in Airedale NHS Trust v Bland [1993] A.C. 789, 864) was expressed by Cardozo J. in Schloendorff v Society of New York Hospital (1914)105 NE 92, 93 in these terms: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body …

The case discloses that chains of authority have built up to resource a rounder discussion of autonomy. It can be conjectured that the more 'holistic' constructions of autonomy emanating from ECtHR (see above) will provide a richer database from

which counsel in future cases will find resources to bolster their arguments on autonomy.

It is suggested that there is considerable evidence of the development of the concept of autonomy over time. There is evidence of progression in the courts' use of the concept of autonomy, both in numerical terms and the sophistication of their formulations and discussions. This progress in not linear, but 'ebbs and flows' depending on the contingencies of the particular cases arising for adjudication and the extent to which the legal issues which turn on the facts of those cases invite more refined reflection. The influence of the ECHR which jurisprudence English courts are now statutorily obliged to 'take into account' is playing a role, mediated through the submissions of counsel, in the creation of a more wide-ranging jurisprudence of autonomy.

5.3.3 Concluding discussion

While variations are revealed in synchronic analysis, the most significant discovery is the unfolding of an ethical language for judging complex medical cases. These findings demonstrate, overall, that the development of English medical jurisprudence is not static, but dynamic. The judiciary is developing a language that informs the difficult practice of judicial decision-making in the context of medical law cases. This language has ethical layers and is being developed in stages, leading from 'simple' autonomy to 'complex' autonomy. Autonomy forms part of the historical development of language for this practice. In particular, there is suggestive evidence that the judiciary is developing a 'holistic' view of the 'self', principally under the influence of European human rights law.

This historical trend needs interpretation and analysis and prompts consideration of the potential influence of the changing context of jurisprudence (European Convention on Human Rights (ECHR) and Mental Capacity Act 2005) and the possible underlying influence of legal traditions. Thus, a number of elements of the preceding enquiry – the changing jurisprudence (Chapter 1) and discussion of the literature on autonomy (which has been interspersed throughout the various cycles of enquiry – point to the need to develop a systematic analysis of the concept of tradition and its application to judicial decision-making in ethically contentious medical cases.

The next section seeks to develop a framework of analysing the concept and application of traditions. It will look first to the work of MacIntyre (1981; 1988; 1990) who articulates a theoretical concept of tradition. It will then look to the work of Brandom (1994) and his method of investigating discursive traditions to draw out the logic, that is, the relations of inference that expresses explicitly what is implicit in the language, discourses and practices.

5.4 TOWARDS A FRAMEWORK FOR ANALYSING UNDERLYING TRADITIONS OF PRACTICE

The processual methodology of grounded theory described in the last chapter, in combination with the strategy of investigation described in this chapter, has made possible the disclosure of the presence and importance of the core category of

'tradition' and its relationship with the key categories of liberty, freedom and autonomy, which might not otherwise have emerged. The discipline of qualitative analysis has enabled the discernment of deeper objects of study – the influence of traditions of moral and political orders on the judicial construction of autonomy in ethically-contentious medical law cases – which might otherwise have remained hidden from view, had conventional methods of legal analysis have been employed instead. Critical realism offers a powerful methodology and disciplined analytical method enabling the construction of a powerful operational tool with which to analyse the law reports

The third cycle of enquiry (*Cycle 3*) seeks to examine the extent to which philosophical and legal traditions are evident in the practice of judges' decision-making. The works of MacIntyre (1981; 1988; 1990) and Brandom (1998; 2002; 2009) have provided the components of an intellectual framework within which to conduct an enquiry into the structure of practices and the substantial material (inferential) relations between those practices which inform judicial discourses and concepts in the law reports.

5.4.1 MacIntyre, practice and tradition.

MacIntyre advances, and elaborates, the notions of tradition-dependent rationality and tradition-constituted practice (1981; 1988). MacIntyre defines a 'practice' as (1981: 1988):

> any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially

> definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.

What is and is not a practice is contestable. To distinguish, MacIntyre offers examples, rather than criteria. In general terms, however, a practice must have the requisite degree of complexity to achieve internal goods and to enjoin 'acceptance of the authority of the standards and paradigms operative in the practice at the time' (Mulhall & Swift, 1996: 83). Loughlin (2003) designates 'public law' as a complex practice in the MacIntyrean sense.

MacIntyre regards law as sufficiently complex to qualify as a practice, while a "living tradition", for MacIntyre, "… is an historically extended, socially embodied argument and an argument precisely in part about the goods which constitute that tradition." (1981: 222). He states that:

> …when a tradition is in good order, it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose. So when an institution – a university, say, or a farm, or a hospital – is the bearer of a tradition of practice or practices, its common life will be partly, but in a centrally important way, constituted by continuous argument as to what a university is and ought to be or what good farming is or what good medicine is. Traditions, when vital, embody continuities of conflict.

As with practices, distinguishing traditions is also contestable. It is not always easy to discern where one tradition ends and another begins. Nevertheless, MacIntyre is open to the possibility of dialectical interchange within and between traditions,

through which traditions might acquire an enriched theoretical and conceptual structure.

The idea of legal tradition in the ordinary language sense is uncontroversial. There are incontrovertibly a range of different legal traditions, e.g. common law, civil law, Islamic law etc. (Baker, 2000; Glenn, 2007). However, Glenn (2007) and Holland & Webb (2010) explore the idea of legal tradition with explicit reference to MacIntyre. Holland & Webb (2010) write that:

> …'tradition' becomes a way of understanding and explaining the norms and values that make up a particular conception of the legal world, and the way in which the legal world embraces continuity and change (2010: 10).

MacIntyre and these legal scholars provide a good starting point for considering medical law as a tradition-constituted practice.

5.4.1.1 Medical law as tradition-constituted complex practice

Medical law is a subset of law generally and qualifies as a social practice. Judges in all legal cases refine the internal goods of their practice of law by cultivating the analytic skills appropriate to the judiciary and immersing themselves in the customs, rules, canons and conventions that constitute the practice. Standards of excellence can only be authoritatively gauged by those whose responsibility it is to reflect critically on judicial practice, the judiciary itself, legal practitioners and academic lawyers (Denning, 1979; 1980; Lee, 1988; Pannick, 1987; Bingham, 2000).

Medical law can perhaps be distinguished from other areas of law by the particular traditions that constitute it. In Chapter 1, it was contended that medical law is constituted as a distinct legal subject area by the inherently ethical content of the medical treatment cases that arise for adjudication. Over the last thirty or so years, judges have been required to respond to new kinds of case within a moral ecology of individualism and pluralism. A number of these have been characterised as 'stigmata' cases (Lee & Morgan, 2001; Montgomery, 2006a) because they exhibit the marks of the intense, legal, moral and public interests that converge on them.

Questions of autonomy have been central to many of these cases, and in response the judiciary has employed concepts within a discourse influenced by distinct traditions of legal rationality, informed by particular traditions of moral and political order. The uses and meanings of autonomy have been profoundly shaped by the particular traditions of freedom which have historically inhered in the common law, and more recently, relevant statutes and the ethical traditions embedded in the European Convention on Human Rights. These traditions have not emerged out of nothing but have evolved within the existing forms of social life and the political institutions which embody and carry them.

Medical law as a complex practice has in part been constituted by its diachronic and synchronic development. It has developed temporally as new cases have arisen for adjudication over time. It has also developed synchronically as the potential point of convergence for the three distinct legal rationalities of common law, statute and the European Convention on Human Rights.

5.4.1.2 Judicial uses of the autonomy concept: expansive or restrictive?

Chapter 4 identified a variety of conceptions of autonomy in the academic literature aiming to build up a conceptual map of autonomy which drew the different dimensions of the self (the body; the mind; and personal identity) into an integrated whole. It was also contended that these partial theories of the self were informed by traditions of moral and political order. It was proposed that capability theory offers grounds for a potentially integrated theory of autonomy which encompasses its values, purposes and conditions. Each layer of analysis will be activated to establish the connection between the measure, the theoretical concepts and dimensions, and the testing of the problematic, explicit.

The most basic layer of analysis is the scrutiny of selected medical law reports for conceptions of autonomy. It seeks to establish whether, and to what extent, the judiciary is emphasising different dimensions of the self; the courts are giving greater weight to particular dimensions; and the emphasis given to these particular dimensions alters according to the factual circumstances, and legal issues, which arise in each case. The next level of analysis is to identify whether and to what extent judicial use of autonomy is informed by traditions of moral and political order. In Chapter 4, procedural and substantive autonomy were distinguished at the level of moral order (is the judiciary using the concept of autonomy in value-neutral or value-laden terms?) and liberty (negative liberty or 'freedom-from') and freedom (positive liberty or 'freedom-for') were differentiated at the level of political order: is the judiciary using autonomy in the sense of liberty or freedom? do judges understand autonomy as independence or do they presuppose the presence of enabling conditions and accommodations?

5.4.2 Codes, concepts and categories: Brandom and inferential relations

Brandom's philosophy of language presents the basis for a potentially powerful elaboration of judicial linguistic practice by "making explicit" conceptual features of judicial practice from which it is elaborated (Brandom, 1994). In so, doing, he offers philosophical resources which have helped to render reflective one of the precipitating intuitions of this thesis, that judicial concepts and discourse contain an implicit philosophy which they are neither inclined, nor equipped, nor able, to make explicit.

Brandom (1994) develops a set of analytic tools to investigate the claims and sentences expressed in discursive traditions. It is the capacity of humans to assess the quality of the reasons articulated by traditions that transforms natural (sentient) beings into cultural (sapient) beings who can retrospectively rationally reconstruct the traditions they inherit so as to distinguish which elements are progressive and how the traditions can be developed.

Brandom's method of analysis focuses upon the role of concepts in discourses. Discursive practice is normative, that is, it asserts claims that such and such 'ought' to happen or 'should' be the case. Concepts confer content (beliefs) on expressions and it is the way these concepts serve as premises or conclusions in discursive claims that enables the implicit relations of inference to be examined, made explicit and thus the quality of reasoning to be assessed. Evaluating the quality of justification and evidence articulated in discursive claims embodies and reinforces the practices of giving and taking of reasons and thus the rationality of discursive traditions.

Brandom regards understanding of inference as pragmatic because inferentially articulated norms are related fundamentally to contexts of use, to the social and historical processes which constitute social discourses. Brandom thus refers to 'material' relations of inference, to ensure a contrast with formal logic. He wants to draw out the logic which is implicit in social and cultural practices that have developed historically. The conceptual develops within and expresses historical traditions.

Thus, Brandom's inferentialism is not hermeneutic in the sense of establishing meaning in use by looking at a text in context according to interpretive rules. Rather, it is a form of structural analysis which is equipped to uncover structural relationships between concepts by identifying their material inferential relationships. His inferential analysis goes one step further than hermeneutics (meaning in use) by elucidating meaning in the *practice* of use.

An important feature of Brandom's approach, which is influenced by Hegel (Hegel, Miller & Findlay, 1977), is that the normative dimension of discursive activity (the giving and receiving of reasons) has, by definition, a social dimension. The normative status of inferential commitment is also a social status. The normative dimension of discursive activity is socially synthesised by reciprocal recognition. This is the indispensable condition for the normative activity of giving and receiving of reasons and the normative basis of social practice. Brandom (happily for this thesis) gives Anglo-American common law as an example of a social practice within which concepts are inferentially articulated and thus acquire their meaning within its recognitive structure (see Chapter 1).

Brandom settles on common law as a good example precisely because unlike positive (e.g. civil) law or statutory law:

> …there is no originally authoritative statement of a principle to guide judges. *All* there is to go on is the tradition constituted by previously decided cases, in which legal concepts have been taken by other judges to apply or not to apply in determinate circumstances. The current judge's decision about the case before her is authoritative only insofar as it can be justified by appeal to a principle she finds implicit in the practice of her predecessors in the cases she treats as precedential (Testa, 2003: 569).

In order to give a normative account of the decision that she has made, there has to be a rational reconstruction of the common law tradition. What is given and received as rational within the recognitive structure of the common law involves the:

> …gradual unfolding into the explicit light of day of principles that were all along implicit (on her telling) in the practice of resolving disputes about the applicability of the concepts in question (Testa, 2003: 569).

In this way, the common law judge justifies his current decision by making himself (normatively) *responsible* (another important technical term for Brandom) for past judicial decisions and thus the tradition. The right to 'recognition' from future judges for the decision he has made will depend on how good a job those judges think the judge in the instant case has done in rationally reconstructing the tradition and made explicit a legal rule or principle that was implicit in previous cases. However, the judge deciding the instant case also exercises authority over past judges and future judges within in a diachronic recognitive structure. He *gives* authority to past judges

by determining whether or not they have used concepts from which legal rules and principles can be inferred. He also rationally compels futures judges to receive his reconstruction of the tradition by making explicit the rules and principles implicit in earlier cases. Brandom finds "in this complex diachronic recognitive structure a model that is of very great help in thinking about the constitution of conceptual norms and of normative statuses" (Pritzlaff, 2008: 369).

5.4.2.1 Explanatory coding and theoretical analysis: Cycle 3

Brandom provides a theoretical basis for the examination of inferential relations between the use of autonomy, the traditions of law and moral and political traditions which has led to the discovery of the existence and influences of legal, moral and political traditions. It can be seen that the medical jurisprudence exhibits a complex diachronic (temporal progression) and synchronic (cross-sectional influence) within which the concept of autonomy is developed. There has been a temporal progression in the development of autonomy in the medical jurisprudence evidenced in the familiarity with which the concept and its various conceptions are used and the retrospective rationalisation of the elemental meanings of autonomy into more explicit forms.

A further iterative and explanatory re-coding of the law reports was prompted by this third cycle of enquiry. This was consequent upon the discovery that the elemental uses of autonomy and dimensions of the 'person' revealed as a result of the first two cycles of enquiry. The various particular expressions of autonomy (e.g. bodily inviolability, self-determination, dignity etc.) can be seen to entail particular

concepts of *liberty* (negative and positive liberty) which are, in turn, inferentially related to the core category of *freedom* (freedom-from and freedom-to).

Thus, it can be seen (following Brandom's theory of logical, material relations) that there exists a material inferential relationship between the elemental conceptions of bodily inviolability, freedom from unwanted interference (spatial) privacy etc., the philosophical tradition of 'negative liberty'. There is a further inferential entailment between negative liberty and *liberty* understood as 'freedom-from' and *freedom* in the sense of 'freedom-for'.

	Coding levels		
	Level 1	**Level 2**	**Level 3**
Cycle 3 Categories of tradition	**Particulars**	**Concept**	**Category**
	Bodily inviolability *(III (a) (i)*		
	Physical sovereignty *(III (b) (i)*		
	Bodily integrity *(III (c) (i)*		
	Freedom from interference (or *liberty*) *(III (d) (i))*		
	(Spatial) Privacy *(III (e) (i))*		
	Independence *(III (f) (i))*	Negative liberty *(III (A) (ii))*	Freedom–from (liberty) *(III (A) (iii))*
	Self-possession *(III (g) (i))*		
	Self-ownership *(III (h) (i))*		
	Self-control *(III (i) (i))*		
	Freedom of choice *(III (j) (i))*		
	Mental capacity *(III (k) (i))*		
	Self-determination *(III (l) (i))*		
	Psychological integrity *(III (m) (i))*		
	Moral integrity *(III (n) (i))*		
	Dignity *(III (o) (i))*		
	Privacy (as 'private life') *(III (p) (i))*	Positive liberty *(III B (ii))*	Freedom-to (freedom) *(III (B) (iii))*
	Self-creation *(III (q) (i))*		
	Self-realisation *(III (r) (i))*		
	Subjective character of experience *(III (s) (i))*		

Figure 5.2 – Categories of tradition (*Cycle 3*)

5.5 CONCLUSION

The third cycle of investigation has drawn upon critical realism in response to the limitations of empirical and hermeneutical enquiry. The restriction of empirical investigation to descriptions of judicial uses of autonomy prompted the search for *meaning in use* through hermeneutics. While this second cycle of enquiry develops understanding of autonomy as tending towards an emerging holistic concept of the person as body, mind and identity ii fails to deliver an adequate account of *why* there was variation in judicial uses and understandings of autonomy. The restrictions of these two cycles points towards the need for an analysis of the potential underlying structures and traditions that may influence in their use and interpretation of autonomy. The proximate patterns of variation in the law reports have been analysed disclosing that judges over time have developed an elaborate ethical language of the autonomy of the person to decide ethically-contentious medical law cases.

The work of MacIntyre and Brandom provide a sophisticated concept of tradition and the analytical tools needed to examine the discursive practice of traditions within the complex tradition-constituted practice of medical law. In the next chapter these framework and analytical tools are used to assess whether judicial uses of autonomy have been influenced by tradition(s). The law reports are analysed as cases in time in their legal, moral and political contexts.

CHAPTER 6

AUTONOMY IN THE LAW REPORTS: THE INFLUENCE OF TRADITIONS

6.1 INTRODUCTION

The last two chapters have begun to develop understanding of judges' interpretation of and decision-making about autonomy in the ethically-contentious medical cases under consideration in this thesis. The findings of the investigation so far reveal that an ethical language and specifically the use of the concept of autonomy, has only developed gradually over a couple of decades and more. The findings also show that judges' tend to vary in their use of autonomy; the analyses revealing patterns of variation associated with case-type, the judge hearing the case and level of court hierarchy. While the findings prompt the suggestion that judges' use of autonomy is becoming increasingly sophisticated over time it is nevertheless not clear that the developing pattern of use of autonomy has been completely explained. This chapter takes up one of the central questions informing this enquiry, that is, whether the theoretic concept of 'tradition' provides a deeper underlying account of the direction and shape of change (research question 5), using the operational measures articulated in Chapters 3 and 4

The term 'tradition' is used, as discussed in chapter 3, in the theoretical sense assigned to it in the work of Alastair MacIntyre, namely as a "historically extended,

socially embodied argument" (1981: 222). The relevance of tradition to this analysis emerged out of the processual nature of the inquiry required by grounded theory's methodology, and associated strategies of investigation. Interest in the concept of tradition grew out of preliminary engagement with different aspects of the data base: background reading on context of change in national and European jurisprudence; initial reading of particularly public complex ethically-contentious medical law cases; and reading of the literature on autonomy.

It was noted in chapter 1 that public discussion surrounding the creation of the Human Rights Act 1998 (HRA) and the incorporation of the European Convention on Human Right (ECHR) suggested that body of European law derived its authority from very different principles than English common law and would potentially be in tension with the dominant framework of precedent and legislation in English law (cf.Klug, 2000; Loughlin, 2000; Loughlin, 2003; Veitch, 2007; Barak, 2008; Bogdanor, 2009; Brandom, 1998). Public discussion of medical law cases such as *NHS Trust v A* (2001) *and Burke* (2005) suggested the existence of a tension between European human rights and common law methods of reasoning pointing to potential tension between different traditions of the law (Laurie, 2006; Miola, 2007; Veitch, 2007). The relevance of the concept of tradition for this thesis also emerged in reading of the literature on autonomy which led to greater understanding of the influences of contrasting traditions of interpreting freedom: 'freedom-from' and 'freedom-for'. The dimensions of autonomy could possibly be understood as being informed by distinct traditions of moral and political orders.

The challenge for this chapter is to examine the relationship between the influence on judges' use of autonomy of this changing context of jurisprudence, , and the extent of influence of the contrasting traditions of conceptualising autonomy as negative or positive freedom. Different strategies were devised in methodology chapters 3 and 4, for testing the existence and influence of traditions in judicial decision making. In Chapter 3, two analytical measures were devised to investigate whether judicial interpretations of autonomy in the medical law reports were influenced by 'traditions'. The first is designed to examine whether the reports exhibit different structures of legal rationality. The second measure is calibrated to test whether judicial uses of autonomy are restricted or expansive, and to what traditions, or political orientations, of autonomy these relate, i.e. liberty, self-determination and capability.

Chapter Four described the coding strategy and set out the justification for identifying terms as elemental meanings, or conceptions, of autonomy. The coding process comprised three levels of analysis which express the inferential relations between conceptual layers of autonomy (cf. Brandom, 1998; 2001; 2009). The first level of analysis identified conjunctive, non-conjunctive and implicit uses of autonomy; the second classified higher level concepts of autonomy corresponding to three dimensions of self- body, mind and identity – and three key categories – liberty, self-determination and capability; the third identified freedom as a key concept in its negative ('freedom-from') and positive ('freedom-for') constructions, and *freedom* as the core category – in particular, traditions of liberty ('freedom-from') and freedom '(freedom-for'). It is this core category of freedom that revealed,

it was proposed, the idea of traditions of interpretation It is the task of this chapter to put this proposition to the test.

The chapter draws upon these tests and operational measures to examine the question whether decision-making in ethically -contentious medical cases does reveal the influence of traditions: firstly, do the reports reveal different traditions of legal rationality? Secondly, do the reports reveal different traditions of conceptualising and interpreting the autonomy of the person? And, thirdly do the judges' interpretations of autonomy reveal the influence of traditions of moral and political order?

6.2 TRADITIONS OF LEGAL RATIONALITY

The first operational measure to test the existence of traditions is to examine whether the law reports reveal different structures of legal rationality that can be said to constitute a distinctive tradition of jurisprudence. By legal rationality is meant the form of justification for a judicial determination, or outcome. The structure of rationality to be applied to the cases examines: the relation of legal decision (judgement) to the principle of reasoning (the ordering of argument inductively or deductively); and the nature of the evidence recognised (empirical or logical). When these elements are ordered cogently then a legal decision acquires authority and legitimacy in the courts. When this test of rationality was applied to the research cases three very different types of rationality were revealed: the rationality of the past (Precedent and the case of *Re W* (1992); the rationality of the public sphere (Statute and the case of *D Borough Council* (2011)); and the rationality of values

(The case of *Purdy* (2010)). The discussion will identify exemplar cases of these different structures of legal rationality.

6.2.1 The rationality of the past (precedent and the case of *Re W* (1992))

In *Re W* (1992), the Court of Appeal refused to respect the potentially life-threatening treatment refusal of a legally-competent child suffering from *anorexia nervosa* and ordered her to be transferred to a unit specialising in the treatment of eating disorders. The law had already established the principle that a 'mature minor' could consent to medical treatment without parental consent (cf. *Gillick* (1986) and that an older child (i.e. 16 or 17-year-old) was to be treated as if an adult for the purposes of diagnosis and treatment by virtue of the Family Law Reform Act 1969 (FLRA). However, in this case, the court held that there was a basis on which the child's competent refusal could be lawfully overridden enabling doctors to treat her in her 'best interests' without opening themselves up to prosecution or civil liability.

The Court of Appeal could conceivably have held that because the mature minor had a 'human right' to consent to treatment, there was a corresponding, and unqualified, right to refuse it, as had been advocated in some of the literature (p.75*A-D*). Instead, the court seemed to be concerned to identify an alternative source of lawful consent, which, it held, could be sourced in the statutory empowerment of parents, or those exercising parental authority, or the courts exercising their inherent jurisdiction. In the healthcare context, consent functions, as it does in law generally, to transmute otherwise unlawful behaviour (i.e. non-consensual touching) into lawful. Consent, the court stated, supplied the doctor with legal immunity (a 'flak-jacket') in the face of a child's continuing refusal. The court contended that had Parliament intended the

FLRA to confer unqualified autonomy on children in the healthcare context, it would have made this explicit.

This exemplar case, it is proposed, clearly reveals a structure of common law rationality and tradition of argument (Other cases in this tradition are noted in Figure 1). The court could have followed the rationality of a human rights analysis and produced a more logical outcome, i.e. an autonomous child has the right to consent to, and refuse consent to, medical treatment, without hindrance. Instead, it followed the precedential logic of common law creating an asymmetry in the law of consent as it relates to children in the process. The court chose to focus on the question of how to confer legal immunity on the doctor using the traditional mechanism of consent, reinstating the 'status test' of competence for under-18s in cases where children make potentially life-ending decisions. What the outcome lacks in hard logic may be compensated for by its 'prudential logic'. That logic can be seen in *Re W* in the court's attempt attempting to reconcile the values of parental authority and child autonomy without stirring up too much ethical controversy. The court regards that as a matter of social policy which is the responsibility of Parliament which is better suited to comprehensive, systematic lawmaking. Kennedy (2004) has described English common law as a type of formal legal rationality that is not 'logical' describing it as being of a "primitive British precedential type". The past is a resource, from which reasons for change may be derived, as common law reason moves interstitially within existing principles and categories, without imposing broader conclusions than facts and precedent already authorised (Glenn, 2010).

Traditions	***Cases***
Common Law	*Re F* (1990), *Re W* (1992), *Bland* (1993), *Re T* (1993), *Re C* (1994), *Re MB* (1997), *St. George's* (1998), *Re A* (2001), *Chester* (2005)
Statute	*Re Z* (2005), *Pretty* (2002), *Purdy* (2009), *Purdy* (2010), *D Borough Council* (2011), *Re A* (2011), *Re M* (2011)
European human rights	*Re AK* (2001), *NHS Trust* (2001), *Pretty* (2002), *Re Z* (2005), *Burke* (2005), *Burke*, (2006), *Purdy* (2009), *Purdy* (2010), *D Borough Council* (2011), *Re A* (2011), *Re M* (2011)

Figure 6.1 The relationship of the research cases to the different legal traditions

6.2.2 The rationality of the public sphere (statute and the case of *D Borough Council* (2011))

In *D Borough Council* (2011), the High Court declared that a 41-year-old man under local authority supervision and in the low range of intellectual functioning (IQ = 48) lacked legal capacity under the provisions of the Mental Capacity Act 2005 (MCA) to consent to sexual relations with another man. The court issued an interim order directing the local authority to provide him with sex education in order to determine whether he could be brought up to the low threshold of capacity to consent whereupon a further final order would be made. This was one of the first cases decided in the Court of Protection under the provisions of the MCA. The court recognised that it raised "very profound aspects of civil liberties and personal autonomy" (p. 1259*H*).

The question of capacity was regulated by the Mental Capacity Act 2005 which has largely enshrined the common law in capacity criteria. The court held that because of his low intellectual functioning, the adult did not even meet the low threshold of capacity relating to consent to enter sexual relations. The court restricted the test of understanding to the mechanical and immediately consequential aspects of sexual

activity, preferring the lenient act- rather than stringent partner-specific test of legal capacity. However, it is a fundamental principle of the MCA, as it is of recent mental health legislation, that a person should not be deemed unable to make a legally-effective decision unless all practicable steps have been taken to help him do so (section 1(3)). As a result, the court only temporarily restricted access to certain others until it could ascertain whether the adult was capable of becoming legally capacitous with help and support.

The case reveals a structure of purposive rationality inherent in legislation. The MCA was drafted to do more than enshrine the previous common law position: it has provided the basis for a more 'capability-based' approach to adult decision-making. The case: (i) seeks to reconcile the legislative intent to promote some of the supportive and enabling conditions which may need to be in place to facilitate capacitous choice; (ii) is concerned with the need to protect vulnerable adults from harming themselves and others; and (iii) seeks to promote their freedom. It seeks to reconcile legislative intent (to promote supported decision-making) with the statute's public objectives (to protect and promote the welfare of vulnerable adults) and the fundamental values of the legal system (protection against unwarranted intrusion by the state with equality of recognition for all citizens) (cf. Barak, 2008).

6.2.3 The rationality of values (the case of *Purdy* (2010))

The facts of the case of *Purdy* (2010) were set out in detail in the last chapter. An MS-sufferer sought a judicial review of the Director of Public Prosecution's prosecution policy arguing that it was defective in relation to assisted suicide because it was unclear what factors would weigh in favour, or against, prosecution.

The House of Lords held that her autonomy rights under Article 8 were engaged and infringed insofar as the UK's 'blanket ban' on assisted suicide remained insufficiently crime specific and thus disproportionate.

The key source of law for the House of Lords was the ECHR and Article 8 (the right to 'private life') in particular. It does not directly address assisted suicide, or enshrine an explicit autonomy right. Judges, however, are authorised to interpret the Articles of the Convention directly, regardless of precedent and parliamentary will, taking into account the determinations of the ECtHR. In this case, the House of Lords held that the claimant had a human right to autonomy (established in the ECtHR decision in *Pretty*) and the key question was to determine whether her rights under that Article were engaged, and if so, how the Article was to be applied. The House of Lords held that her right to autonomy was engaged and unless it could be qualified, she had a right to determine how and when she chose to die in the face of the unequivocal criminality of assisted suicide under UK law. The positive entitlement to the human right to autonomy 'trumped' the clear expression of Parliament's sovereign will on the face of the Suicide Act 1961.

In the event, the House of Lords held that under Article 8(2), the UK's absolute prohibition on assisted suicide could be sustained on the basis that it was "in accordance with law" and "necessary in a democratic society … for the protection of the rights and freedoms of others." This was so provided that the application of the law satisfied European law tests of proportionality, accessibility and foreseeability. It failed this test in *Purdy* leading to the eventual introduction of prosecution guidelines specifically relating to assisted suicide at the House of Lords' behest.

Thus the ethico-deductive logic of Article 8(1) is qualified by the logic of Article 8(2). *Purdy* reiterates that direct interpretations of the ethical values encoded in Article 8 can supervene upon well-established common law and statutory positions with regard to autonomy. The crystal clarity of the UK's democratic statutory restriction on assisted suicide would simply give way to the ethical logic of Article 8 unless it could (as it has been) be justified on grounds accounted for in the Convention itself, i.e. Article 8(2).

The European Convention sets forth the basic ethical principles that govern the relationship between citizen and state. It constitutes a 'higher law'. The Articles of the Convention contain a set of positive entitlements which the courts are bound to secure for its citizens. The meaning of the ECHR is not self-evident. The courts must interpret and explain it. Its inherent ethical values are deduced and applied down to particular cases. The case is the site for the explication of a general principle, whereas at common law it is an instance which may coalesce into one.

In summary, it is possible to conclude that the significant differences between common law adjudication, legislation, and European human rights law adjudication derive less from their different legal sources than from the structures of rationality that reveal them as distinctive traditions of law. Common law adjudication employs inductive reasoning to resolve cases as and when they arise for adjudication. Statute law adjudication works by instrumental logic as the common law courts seek to given expression to the purposes of Parliament. European human rights law adjudication is deductive working downwards from the ethical principles enshrined in the ECHR to individual cases. The significant differences between these three

bodies of law, and the way judges determined to interpret their cases, enables the conclusion that the creation of the new body of European law did as hypothesised create tensions for the practice of traditional English Common Law. The cases, it is argued, have revealed traditions of legal rationality. The question now raised for analysis is whether these traditions of rationality embody traditions of interpreting and using the concept of autonomy.

6.3 TRADITIONS OF AUTONOMY IN INTERPRETING THE LEGAL PERSON

In the initial stages of analysis, the procedure of enquiry was principally concerned with interpreting the meanings the judiciary was assigning to the concept of autonomy in the law reports. This hermeneutical enquiry was directed towards elucidating the sense of autonomy used in the reports. In the course of the literature review of autonomy, it became apparent that the various elemental meanings were associated with different traditions of conceptualising the autonomy of the person, some traditions articulating a restricted concept of the autonomy of the person, while other traditions sought to express more elaborate conceptions of the autonomy of the person. This section explores a second test to examine the extent to which the reports reveal restricted, embryonic and expansive uses of autonomy by judges. These are discussed in turn.

6.3.1 Restricted use of autonomy: physical essentialism (the body)

A number of cases demonstrate a restricted concern with the body. The research cases reveal a number of elemental meanings of autonomy explicitly, or by strong

implication, associated with the body: bodily inviolability (or bodily integrity); physical sovereignty, privacy, dignity and freedom from unwanted interference. Three cases identify a distinctive 'bodily' autonomy. This is connected to the idea of 'physical sovereignty', that is, having a clearly circumscribed body to exercise control over (*Re A* (2001) (e.g. 249*G*)). It is used in relation to the elaborate series of rules which the criminal and civil law has created for the protection of the body (*Yearworth* (2010) (e.g. p. 13*G*)). It is also regarded as something which survives the loss of legal capacity (*Re M* (2011) (para. 95)). In these cases, bodily autonomy is used conjunctively with conceptions of bodily inviolability and bodily integrity.

There is an implication in the Court of Appeal judgement in *Bland* (1993) (p. 828*E*), that the withdrawal of the medical apparatus that was invading the patient's body, even though he would die of starvation and dehydration as a result, would restore to him his bodily integrity and give him back his privacy. In *Re A* (2001) (e.g. p. 184*B-C*), the Court of Appeal stated that surgical separation, which would be fatal for the weaker twin, would nevertheless, restore to her bodily integrity and dignity which is part of the 'natural order' for humans. These statements, rather startlingly, that bodily autonomy is something that can sometimes only be restored at the cost of the patient's life. In the literature, this bodily concept of autonomy has been called 'physical essentialism' The judicial sentiment is perhaps accurately captured in the literature by Dworkin (1992) who states:

> If you touch me or eavesdrop on me, you have injured my autonomy by invading my space. If you actually do something to change my body, you have injured my autonomy by changing the very constitution of what I am.

The cases reveal that the judiciary recognise a distinct concept of bodily autonomy. The elemental meanings associated with autonomy have deep roots in the history of English criminal and civil law as revealed in *Re F* (1990) (cf. p.11*G* – 12*B*). It appears to be the physical basis for the other manifestations of autonomy. It is the presupposition for the notion of *bodily* self-determination and an essential element in the more complex concept of autonomy being developed under the European Convention on Human Rights (see below) that will be explored below.

6.3.2 Embryonic expansion: self-determination (the mind)

The courts use a range of other elemental meanings of autonomy relating to the intellect (freedom of choice, mental capacity, self-determination, self-control and self-creation). The cases do not use the expression 'intellectual autonomy' to correspond with 'bodily autonomy'. However, it is proposed that such a concept is present by inference. It broadly corresponds with the Dworkin's concept of 'liberal individualism', referring to the ability to choose and make one's choices effective (Dworkin, 1992). There are, however, a number of different understandings of autonomy as an intellectual concept, mainly surrounding the meaning of self-determination. There is a concept of self-determination firmly anchored to the body. There is another, with a more 'existential' denotation. Then there is its more complex meaning under the ECHR.

A number of cases firmly link self-determination to the body, as 'bodily' self-determination. the roots of this idea are to be found in the American *Schloendorff* cases which states that "every 'human being of adult years and sound mind has a right to determine what shall be done with his own body". The bodily and

intellectual dimensions of autonomy are conjoined.[41] The *Schloendorff* case is referred to in argument or judgement in a further six cases in the sample of medical law reports (*Re F* (1990); *Re T* (1993); *Bland* (1993); *St. George's* (1999); *Re A* (2002); *Pretty* (2002); and *Burke* (2005)). In *Burke* (2005), in a section headed 'autonomy and self-determination', the High Court contends that the implications of *Schloendorff* 'have only gradually been recognised' (p. 443*F*).

In other contexts, self-determination seems to have an 'existential' dimension. The Court of Appeal declared in *Re T* (1993) (p. 112*E*) that:

> …the patient's interest consists of his right to self-determination – his right to live his own life as he wishes even if it will damage his health or lead to his premature death [because] it is well-established that in the ultimate the right of the individual is paramount.

In *Bland* (1993) (p. 864*C*), the House of Lords states that the principle of self-determination dictates that "respect must be given to the wishes of the patient". In *Burke* (2005), this existential connotation is explicitly attributed to "personal autonomy': "the choice of how we are to live and how we are to die — should be left to the individual" (p. 430*E-F*). Self-determination is closely associated with the idea of 'freedom of choice' and the 'mental capacity' on which the former turns. In

---

[41] Though *Schloendorff* does not use the construction 'self-determination', it is easily inferred from the language of the statement, as the American Supreme Court does in the landmark case of *Canterbury v. Spence* 464 F.2d 772 (D.C. Cir. 1972) which articulated a new standard of 'informed consent' designed for the communication needs of the patient.

the context of treatment refusals, freedom of choice is 'absolute' provided mental capacity is present. If it is, then that refusal can be for "any reason rational or irrational, or for no reason at all, even where that decision may lead to his or her own death" (*Re T* (1993) (p. 102*E*, 113*D*, 115*G*).

Self-determination and personal autonomy are 'fundamental' to the interpretation of Article 8 of the ECHR and can be seen to incorporate both bodily and existential interpretations of it. Self-determination can be seen to be a 'bridging concept' connecting physical, intellectual and identity dimensions of the person.

6.3.3 Expansive uses of autonomy as the person (capability)

There is evidence under common law, the influence of the Mental Capacity Act 2005 and the European Convention on Human Rights, of a developing understanding of agency. At common law, there is evidence of increasing judicial awareness that people need to be able to exercise their choices, rather than merely having the formal right to do so. In *Re T* (1993), *Re MB* (1997) and *Re B* (2002), the courts focus on potential 'internal' obstacles to freedom of choice. This develops the common law's previous preoccupation with external hindrance, e.g. third party coercion (cf. *Re T* (1993)). Under the MCA, the statutorily-established incapacity criteria are supplemented by a requirement that practical steps be taken to ensure that those with limited decision-making abilities are supported. Autonomy is a function, not simply of choice and capacity, but also of 'capability', presupposing supporting and enabling conditions of choice-making.

Under the ECHR, the concept of autonomy is further expanded. In *Pretty* (2002), the House of Lords affirms that Article 8 (the right to 'private life') "protects the physical, moral, and psychological integrity of the individual" (p.818*C*). This is supported by decisions of the Canadian Supreme Court and the European Court of Human Rights where these elements are used conjunctively with the concepts of autonomy and dignity (pp. 819*G*, 821*G*). In *Burke* (2005), this is extended to include a person's 'physical and social identity', including a right to personal development and to establish personal relationships, following the seminal decision of the ECtHR in *Pretty*. The case of *Pretty v. UK* [42] described autonomy as an 'important principle' inherent in Article 8 of the ECHR. Subsequent cases *(Burke* (2005), *Burke* (2006), *Purdy* (2009), *Purdy* (2010), and *Re M* (2011) have taken the *Pretty* decision into account in their interpretations of autonomy, including the ECtHR jurisprudence which underlies it.

This section reveals the developing of a holistic concept of the autonomy of the person, embracing not only bodily and intellectual dimensions of the self, but also psychological, relational and the moral. The function of Article 8 is to guarantee as an aspect of 'private life' a person's right to express personal identity. The concept of autonomy inherent in this Article cannot be restricted to 'physical essentialism', the right to be 'let alone', or to 'liberal individualism', the right to choose and to effect that choice. Instead, the English courts, under the influence of the ECHR are incorporating a 'psychosomatic' and 'psychosocial' understanding of autonomy into the jurisprudence that reaffirms its bodily and intellectual dimensions, but extends it

[42] (2002) 35 E.H.R.R. 1 at [61]

to include a dimension of 'relational consciousness'. There is awareness in the developing jurisprudence of the interdependent nature of persons and their connections with the wider world.

In addition, it is proposed that there an inferential relationship between autonomy as a concept fundamental to the interpretation of 'private life' respected by Article 8, and the concept of 'dignity'. According to the ECtHR in *Pretty* 'human dignity' is, with 'human freedom' "the very essence of the Convention". With the exception of *Bland* (1993), the notion of dignity is used sparingly before the advent of the ECHR and, although used more frequently subsequently, is nowhere defined. It is, like autonomy, a foundational concept. Deciding what is best for your body is part of one's 'persona' and human dignity. Dignity is a 'core value' commanding a broad international consensus and inextricably bound up with respect for human life (*Pretty* (2002) (p. 842*D*).

It is used in repeated conjunction with physical and intellectual concepts of autonomy (cf. *Pretty* (2002) (p. 819*G*)[43]; Burke (2005 (p.453*G*)). The fullest analysis of dignity in the jurisprudence appears in *Burke* (2005)[44]. It is identified as a core value predating the Convention (p. 444*G*; cf. *Bland* (1993) (p. 826*G*)). Although dignity appears to be used as a distinct concept to autonomy, the right to it is designed, amongst other things, to protect 'mental stability'. Mental stability, however, is part of the complex concept of autonomy which is foundational to the

[43] The court relies heavily on the Canadian *Rodriguez* (1994) case

[44] The term appears 75 times

guarantee of rights to private life under Article 8 as established in the ECtHR in *Pretty*. At both common law and under European law, the protection of dignity entails the avoidance of experiences of debasement and humiliation that threaten to undermine the persona and identity of the individual (*Burke* (2005) (p. 474*C*).

6.4 THE INFLUENCE OF TRADITIONS OF MORAL AND POLITICAL ORDER ON JUDGES' DECISIONS

The second operational measure for the testing of traditions which was advanced in chapter 4 is based on the hypothesis that there are different layers of interpretation at work in the use of autonomy and that more elemental meanings are connected to and subsumed by moral and political traditions of interpreting liberty and freedom (freedom- from and freedom to). Brandom (1994) argues that it is possible to identify strong relations of inference between layers of meaning. Reading from the background data suggested the need to examine whether and the extent to which concepts of rights and freedom introduced under the European Convention on Human Rights and the Mental Capacity Act 2005 have influenced judges' patterns of interpreting and using autonomy, and whether any such influence has created tensions between traditions of law.

6.4.1 Inferential relations between concepts of autonomy and moral orders of freedom

Chapter 4 set out for enquiry whether inferential relations existed between layers of the concept autonomy: particular expressions, underlying concepts and theoretical categories. At the level of conceptual analysis, particular conceptions of autonomy

are inferentially related to concepts of body, mind and identity and to categories of liberty, self-determination and capability. Many of these particulars can be related to their associated concepts fairly straightforwardly. For example, bodily inviolability and bodily integrity clearly relate to the body. Without much further extension, the notions of spatial privacy and freedom from unwanted interference are easily construed in bodily terms, especially when interpreted in their factual contexts (e.g. enforced caesarean cases such as *Re MB* (1997) and *St. George's* (1999). Sometimes support for positing particular inferential relationships can be found in the literature, e.g. self-ownership (cf. Archard, 2008).

6.4.2 The tradition of liberty: autonomy as negative freedom

The research has shown that there are number of conceptions of autonomy associated with a tradition of legal rationality based on precedent and a tradition of autonomy in interpreting the legal person which focusses on the body. The tradition of legal rationality based on the past is connected to the 'non-interventionist' character of English law. The notion of 'civil liberties' as opposed to 'human rights' is an outgrowth of the idea that citizens are free to do as they please without infringement unless authorised by law (cases or statute).

The conceptions of bodily integrity, privacy, and freedom from interference are clearly resonant with the negative concept of freedom: 'freedom-from'. The cases involving cognitively-impaired patients expounded earlier in this thesis are deeply concerned with protecting the bodily integrity or autonomy of the persons concerned. The cases of *Bland* (1993) and *Re A* (2001) each advance on the basis of their own facts the remarkable proposition that taking action (removing tubes or separation

surgery) which would hasten death would simultaneously restore to them the bodily autonomy that the continuance of the status quo (medical treatment or lack of surgery) denied them. The bodily construction of negative freedom expresses such a powerful cultural ideal that bodily autonomy is something that can survive the loss of mental capacity and legal competence. The citizen can be autonomous by mere fact of his bodily 'let-aloneness' even if he lack cognitive awareness (intellectual autonomy) or the wherewithal to express a sense of self. The concept of 'freedom-from' expresses the tradition of liberty which in particular underlies the common law tradition.

The concept of self-determination is a 'bridging concept' straddling the concepts of 'freedom-from' (non-interference with the body) and 'freedom-to' (enabling development of the person), and the traditions of liberty and freedom. Self-determination has a bodily sense – bodily self-determination – has deep roots in Anglo-American jurisprudence based on common law (cf. *Schloendorff* (1914)). The function of consent (which is an expression of freedom of choice based on mental capacity) is an intellectual concept which is designed to authorise interventions which would otherwise infringe the negative liberty to which citizens are presumptively entitled. Cases involving heavily pregnant women are powerfully illustrative. The legal proposition that treatment refusals by heavily pregnant women which threaten their own lives and those of their unborn children cannot be overridden if they are competent, however idiosyncratic their reasons, is a powerful rhetorical expression of the tradition of liberty exemplified by the common law tradition of legal rationality (cf. *Re T* (1993); *Re MB* (1997); *St. George's* (1999)).

The common law – the body – the tradition of liberty appears in a clear inferential relationship.

6.4.3 The developing tradition of autonomy as positive freedom

In the developing tradition, the conception of self-determination can be seen to encompass the various elemental meanings of 'intellectual autonomy' identified in the case law: freedom of choice and mental capacity. In addition to the 'negative' construction of self-determination as 'consent', self-determination can support a number of 'positive' constructions which suggest a concept of 'freedom-to', or 'freedom' (in the sense used by Arendt (1973)). The idea of determining what happens to one's body presupposes some measure of 'self-control' and personal efficacy which allows the citizen to live a life of his own choosing. Self-determination is also used in a 'liberal individualist' sense of being able to choose and realise one's choice. In *Re T* (1993), the Court of Appeal explicitly defines self-determination as a person's right to live as he chooses and to decide their own fate (p. 112*E-H*). This, the court makes clear, presupposes the capacity to do so, and it is on the basis of this capacity, that the individual has an 'absolute' right to choose, both deliberatively or non-deliberatively.

The developing tradition of autonomy as positive freedom has also been influenced by the rationality of the public sphere (the Mental Capacity Act 2005). Two research cases decided under the MCA (*Re A* (2011) and *D Borough Council* (2011)) reveal the practical repercussions of its underlying philosophy to optimise the decision-making powers of persons who in isolation lack decision-making competence. The idea that a person is not to be treated as unable to make a decision unless all

practicable steps to help him to do so have been taken without success represents a major change of policy from the common law. The effects of this have been seen recently seen (noting that there have not yet been many cases decided in the Court of Protection raising questions of capacity) in the two research cases where judges have issued interim orders pending final determination in order to leave time for autonomy-enhancing interventions by the State.[45]

The development of a tradition of autonomy as positive freedom has been radically affected by the introduction of the European Convention on Human Rights into English law. The Convention represents a tradition of legal rationality as 'value'. It has introduced a 'higher law' in the form of ethical principles, from which the English judiciary are invited to deduce propositions of law. Through a process of deduction, the courts have identified and instantiated autonomy as a 'human right' inherent in Article 8 of the European Convention (cf. *Burke* (2005), *Purdy* (2009), *Purdy* (2010), and *Re M* (2011). Autonomy is now a positive entitlement guaranteed by the State, subject only to the 'derogations' contained in Article 8(2). It is also a much more complex concept than exists at common law or under the Mental Capacity Act, embracing bodily, intellectual and identity dimensions of the person.

There is a strong sense in these cases that the human right of autonomy is not exercised in isolation, but in relationship with other people and the world. The

[45] It should be noted, however, that these cases leave open the question of what standard of competence these autonomy-enhancing interventions are aiming for. In *D Borough Council* (2011), there could be something rather paradoxical about a philosophy which seeks to supply enabling conditions for a low threshold of capacity which would lead to potentially deleterious welfare consequences for the patient.

spheres of private and public life are not mutually exclusive but porous. Capabilities for autonomy are evolved and realised in relations with others and through the social (and by extension the economic and political) conditions that make this possible. The concept of 'capability' which is inherent in the relational model of autonomy which the courts are developing under the Convention and its jurisprudence can plausibly be related inferentially to concept of still underdeveloped concept of 'dignity' which is foundational to the Convention. The incipient understanding of autonomy-as-dignity (or capability) in these new cases adumbrates a holistic approach to autonomy that recognises that autonomy is not simply about the values and purposes of autonomy but also about enabling conditions (cf. Chapter 2).

6.4.4 Tensions between traditions?

The analysis of reports in the previous section suggests that there is evidence of judges interpreting and using the concept of autonomy so as to tie its meaning to the larger moral and political ideas of positive or negative freedom. The argument that there is an influence of such traditions on judicial decision making in complex medical cases can be further developed by analysing the influence of the ECHR. The incorporation of the ECHR has introduced a new tradition of legal rationality directly into English law which has until now been based on the prudential rationality of common law and the instrumental rationality of statute. Three cases (*NHS Trust v A* (2001); *Burke* (2005); and *Burke* (2006)) may disclose evidence of a 'tension' between traditions which has resulted from the confluence of legal traditions. This tension, it is suggested, can be discerned within the text of the judgement in the first case, and between the judgements of the two levels of court hierarchy in the second cases. Though the influence of traditions can be discerned in these cases, the chapter

will, nevertheless, proceed to conclude that analysis of the set of cases over time reveals judges developing a much more sophisticated practice of interpretation and decision-making about autonomy rather than expressing a simple affiliation to this or that legal or moral and political tradition.

6.4.4.1 The Case of *NHS Trust A* (2001)

The case of *NHS Trust A* (2001) concerned the lawfulness of withdrawing ANH from two patients who had been in PVS for four years. Because the ECHR had recently been passed, a declaration as to lawfulness was required even though the facts were closely analogous to those of *Bland* (1993). The passing of the Human Rights Act (1998) meant that the case was governed by the general ethical principles enshrined in Articles 2 and 8 of the ECHR, not by common law. Cases decided under the latter now have at best 'persuasive' authority. The alleged tension between traditions in the case concerns the interpretation of Article 2 (right-to-life) and the impact of Article 8 (right to 'private life') on that interpretation.

The legal issue was whether the withdrawal of ANH would amount to 'intentional deprivation of life' and thus infringe the human right to life protected by Article 2. The court had a chance to explore the scope and applicability of Article 2 without reference to common law and thus to engage in the kind of 'big thinking' associated with 'constitutional' adjudication. Instead the court chose to focus on whether the common law distinction between 'acts' and 'omissions' explored in *Bland* was relevant and whether an 'omission' which would have been lawful at common law fell outside the scope of the Article. It concluded that a lawful omission would not

amount to an intentional deprivation of life, i.e. that it satisfied the medical norms concerning 'best interests' established at common law.

The tension between traditions is perhaps best evidenced in the judge's ancillary comment that it might be relevant to scrutinise the reasons for the decision to withdraw life-sustaining treatment 'in the light of the positive obligation to safeguard life' (p. 358*D*). Otherwise, the court could see not difference between failures on grounds of 'best interests' to initiate treatment or to withdraw it. In both cases, the theoretic view that it would be the patient's condition that would take its course to death applied in accordance with common law analysis. The High Court held that if continued treatment were not in the patients' best interests then it would violate their personal autonomy which was retained despite the loss of legal capacity (p.358*G*; cf. *Re M* (2011)).This was construed as 'bodily integrity' intrusion into which would need justification under Article 8 (2). This appears to underscore the common law's traditional common law commitment to the unencumbered body, in keeping with English political traditions of non-interference.

6.4.4.2 The case of *Burke* (2005) and (2006)

In *Burke*, the alleged tension between traditions potentially lies between the judgements of the High Court and Court of Appeal. The case concerned a 44-year-old man with cerebellar ataxia, a terminal neuro-degenerative disease. The claimant sought judicial review of the legal content of some provisions of the GMC guidance on withholding and withdrawing life-sustaining treatment, fearful that a reasonable interpretation might leave doctors with discretion to determine the withdrawal of such treatment against his wishes once he became incommunicado or mentally

incapacitous. The High Court judge determined that questions of personal autonomy were central to the case, principally the nature and scope of patient choice, and to the larger issues of medical law and ethics (p. 430*E-F*).

The distinctive feature of the High Court judgement is its appeal to the ethical value of autonomy enshrined in Article 8 of the European Convention. The scope of personal autonomy, the court argues, extends to the preservation of one's physical and psychological integrity, and mental stability, which includes freedom to determine the means and timing of one's death. Unless this *prima facie* right was overridden by the qualifications in Article 8(2), then it extends even to a subjective interpretation of one's 'best interests' which under common law and the MCA are matters to be determined by the medical profession. This would lift the restriction of patient autonomy to treatment refusals and represent a significant recalibration of the power balance between doctor and patient. The patient would have an autonomy right to sub-optimal medical treatment, at least in the factual circumstance which obtained.

The Court of Appeal reacted with rare vitriol to the High Court's panoptic approach to the case and stringently reiterated a number of common law themes (p. 292*H*-293*B*). It acknowledged with faint praise his self-evident "erudition and industry" which it deemed "misplaced" (p. 296*C-D*) and found his 'intense jurisprudential analysis' unhelpful. In particular, it restated basic principles of common law methodology: the interdependence of factual context and the enunciation of legal principle and the implications of judicial decisions for practice, especially where issues of ethical controversy are involved (p. 293*E*). The wide-ranging approach of

the High Court judge was all the more inappropriate for its being hypothetical – what the claimant feared had not yet transpired. The Court of Appeal devoted little space to judicial reflection on the concepts of autonomy and dignity which formed a significant portion of the High Court judgement and which constitute the fundaments of the Convention.

Discussion of these two cases – of *NHS Trust* and of *Burke* – shows that there is the potential for different traditions of jurisprudence to clash when judges have to form decision about autonomy in complex medical cases. Yet the discussion of cases in the last three chapters shows a clear trend over time for judges to develop a sophisticated conceptual framework of autonomy that accommodates the separate emphases – of body, mind and identity – in different traditions of legal and moral interpretation.

6.5 CONCLUSION

The initial engagement with the data base – in initial reading of the more public cases in complex medical law as well as background reading about the potential influence of a new body of European jurisprudence in English common law – generated the hypothesis that judicial decision-making in ethically contentious medical cases would face a tension between legal traditions which were at the same time traditions of moral and political order.

This chapter has drawn attention to the operations of distinct traditions, informed by traditions of autonomy in interpreting the legal person and the influence of traditions

of moral and political order on judges' decisions. MacIntyre has, as was seen earlier in the thesis, provided a stipulative definition of 'tradition' as:

> A tradition (of enquiry) is an argument extended through time in which certain fundamental agreements are defined and refined in terms of two kinds of conflict, those with critics and enemies external to the tradition who reject all or at least key parts of those fundamental agreements, and those internal, interpretative debates through which the meaning and rationale of the fundamental agreements come to be expressed and by whose progress a tradition is constituted.

It can plausibly argued that the research cases reflect an internal debate within medical jurisprudence constituted by traditions of enquiry: the tradition of non-intervention represented by the common law, the judicial focus on the body, and the moral and political imperative of non-regulation; and the tradition of personal efficacy, enablement and support represented by the judicial focus on the whole person and the moral and political imperatives of providing options and means of enablement.

Nevertheless, the last three chapters have demonstrated that the judiciary have been developing an increasingly sophisticated ethical language in response to the new kinds of contentious medical laws case which are arising for adjudication. This development has been both 'diachronic' and 'synchronic'. In terms of temporal progression, there is evidence of a clear development of judicial language concerning questions of autonomy over time. This temporal progression can be explicated in terms of the increase in the number and type of cases which have arisen for judgement. The language of autonomy has become more sophisticated over time and

there is evidence that the judiciary have begun to synthesise the various elemental meanings they have assigned to autonomy in individual cases. This is in keeping with the common law methodology of addressing the issues raised by tailoring the law and the concepts on which it is based to the facts of particular cases.

This understanding of temporal development is reinforced by synchronic (cross sectional) analysis of distinct periods during the past thirty years. It was proposed that before the 1980s, ethical language was not being used in legal cases arising within the healthcare context. This language becomes current at the moment when medical cases with inherently ethical content begin to arise for adjudication (1980s). The first use of autonomy in a legal case in 1990 represented a major linguistic shift and signalled that the judiciary were beginning to develop a more sophisticated language and incorporating it into judicial practice. Throughout the 1990s there is a clear temporal progression in the use of autonomy. With the coming into force of the ECHR into English law and the Mental Capacity Act 2005 a richer concept of autonomy begins to be incorporated into judicial practice importing a more expansive use of autonomy as the person-as- capability over against the restricted use associated with the common law's physical essentialism (the body) and liberal individualism (the mind).

The discovery of these diachronic and synchronic dimensions of analysis thus reveals that the judiciary have been developing over time a more sophisticated intellectual and conceptual framework in order to ensure that their legal practice is responding adequately to the increasingly complex ethically contentious cases which are arising for judgement. Medical jurisprudence must be understood therefore, as an

impressive community of practice that is constantly developing medical law, integrating legal and conceptual resources from different traditions to meet the needs of their complex cases. MacIntyre himself describes law as a practice and 'public law' has also be so described (Loughlin, 2003). The notion of practice has already been elaborated in terms articulated by MacIntyre who has defined it as (MacIntyre, 1981: 187):

> …any coherent and complex form of socially established co-operative human activity through which goods internet to that activity are realised in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity.

The practice of medical jurisprudence is clearly neither fixed nor finished. It has been, as has been seen, modified by both incidental (the accidents of litigation) and major (new sources of law) developments. The judiciary as practitioners of the law may be likened to performers who operate within the framework of customs, rules, canons and conventions that comprise the practice. Medical jurisprudence as a complex practice is, as Oakeshott has observed of 'practice' generally, 'an instrument to be played upon, not a tune to be played'(Oakeshott, 1975: 56).

CHAPTER 7

CONCLUSION: A CONFLUENCE OF LANGUAGE AND TRADITION FOR JUDICIAL PRACTICE IN MEDICAL JURISPRUDENCE

7.1 INTRODUCTION

This chapter outlines the core findings of the research, reflects on the causes of changes to autonomy as a concept, and considers the likely trajectory of future changes for policy and practice. It concludes with consideration of the implications of the study for future research.

7.2 THE CORE FINDINGS OF THE RESEARCH

This research has investigated how and why judges use and interpret autonomy in ethically contentious medical law cases. The initial research question taken up by the study asked whether judges use the concept of autonomy and how they use it. The investigation led to two kinds of empirical finding: descriptions of judges' use of autonomy, and explanations of the connections and associations that begin to explain why judges have developed their interpretations of autonomy.

7.2.1 Describing judges' use of autonomy

The research discovered three basic findings about judges' use of autonomy: that judges express a variety of uses of autonomy; they have developed a concept of autonomy; and their concept of autonomy has developed over time. These findings are presented in turn:

7.2.1.1 Judges express a variety of uses of autonomy

This study has demonstrated that judges express a variety of uses of autonomy in the medical law reports. Nineteen distinct elemental uses of autonomy were identified which exhibit its multifaceted nature. Although, academic commentators have observed that judges use autonomy in different ways, this is based on knowledge acquired 'in passing' rather than via systematic analysis. The investigation of the law reports undertaken in this thesis is the first attempt of its kind at an empirical investigation of the concept of autonomy in the medical law reports. The discovery of a sizeable variety of elemental uses in the legal judgements invites further reflection on the nature of autonomy – its meanings and whether these fit together into a coherent concept.

7.2.1.2 Judges have developed a concept of autonomy

Further analysis of the law reports have progressed from elemental uses of autonomy to articulate a more coherent concept of autonomy as expressing aspects of the person: the body (self-ownership), the mind (self-determination), and identity (self-

realisation). This developing understanding of autonomy as the self in three dimensions has allowed a more sophisticated concept of autonomy to take shape. The concept of autonomy as *bodily integrity* or physical sovereignty has strong roots in common law. The physical dimension of autonomy has negative and positive senses. In the negative sense, bodily integrity refers to personal liberty or freedom from unwanted outside physical interference. In its positive sense, it concerns a person's freedom to move her body through space and time as desired. In the law reports, there is a strong association between the autonomy of the self and the concept of *mind as self-determination*: the property of choosing freely and rationally, as opposed to being free of coercion or deception. A third aspect of the autonomy of the person is expressed in the association of autonomy with *personal identity*, the capacity to relate to oneself practically, namely in self-respect, of self-trust (openness and trust towards ones feelings) and self-esteem, as a proper sense of self-worth. This understanding of autonomy as personal identity comes to be associated in medical jurisprudence as self-creation of being free to express and realise the person one chooses to become. The meaning and interpretation judges give to their usage of autonomy has elaborated a concept of autonomy as self-determination of body, mind and identity. The development of this more 'holistic' approach to autonomy has been encouraged by the enactment of the Mental Capacity Act 2005 and the domestic jurisprudence decided under the European Convention on Human Rights. Such events encouraged a third core finding.

7.2.1.3 Judges' concept of autonomy has developed over time

When the medical law reports were contextualised by placing them in historical order of publication the investigation also revealed an emerging use of autonomy over time. There is evidence of an unfolding in stages of judges' use of ethical language, informing the difficult practice of decision-making in ethically-contentious medical cases. Three 'watershed' moments in the development of the English medical jurisprudence have been identified. Firstly, there is the introduction of the term 'autonomy' for the first time in 1990 (*Re F* (1990) at p. 78*E*). Secondly, there is a 'moment', represented by the case of *St. George's* (1999), when autonomy exhibits itself as part of the judicial *lingua franca*; autonomy appears explicitly as a section heading in the judgement drawing together previously-decided cases under it and is referred to for the first time as a 'principle'. Thirdly, the incorporation in 2000 of the European Convention on Human Rights through the medium of the Human Rights Act 1998 represents a third pivotal moment in the jurisprudence of autonomy. The European Court of Human Rights identifies autonomy as a 'human right' under Article 8, leading the English courts to draw upon European jurisprudence providing more 'holistic' constructions of autonomy, autonomy as 'body', 'mind' and 'identity'.

The growing consciousness of an unfolding language of autonomy after 1990 led to the discovery that the judiciary was using a range of elemental uses of autonomy prior to the first judicial use of the term itself in 1990. The investigation discovered that the rise of ethical language, e.g. 'bodily inviolability', 'self-determination', 'mental capacity; in medical cases broadly corresponds with the emergence of

medical law as a distinct legal topic (i.e. early to mid-1980s). There is some evidence that English jurisprudence in related areas of law (e.g. criminal law) and non-English common law jurisprudence (e.g. American, Canadian) are sources of influence.

The emergence of the judicial concept of autonomy can thus be periodised in four stages constituting: (i) the period prior to the 1980's when there was no ethical language to speak of in medical cases; (ii) the emergence of cases containing ethical language, but not the term autonomy; (iii) the use of autonomy in a restricted sense prior to 2000; and (iv) the emergence after 2000 of a more elaborate concept of autonomy. This finding constitutes a significant contribution to the related literature demonstrating as it does that judicial thought and practice is developing as it continues to address the ethically-contentious medical cases that arise for adjudication.

This section has described basic findings of *what* has been discovered about judges' use of autonomy in ethically contentious medical cases. Descriptions invite analysis of *why* these developments in the use of autonomy have taken place. Change needs to be explained. Empirical investigation has also discovered connections and associations between judges' use of autonomy and aspects of the legal context of decision-making. Such empirical connections begin to suggest ways of interpreting and explaining judges' use of autonomy.

7.2.2 Explaining the development in judges use of autonomy

As the empirical investigation unfolded it began to deepen its understanding and explanation of associations that might explain why judges used autonomy as they did and why their uses developed over time. The study considered some evidence that judges interpretations of autonomy might be influenced by the level of court hierarchy at which they are decided suggesting that higher courts were prepared to give greater weight to ethical principles over case precedents in view of their greater law-making powers. But there is not sufficient evidence to point to a trend of the influence of judicial structure on uses of autonomy. Three more significant influences on judicial decision-making are the focus of discussion here: the influence of the Academy, of public policy and legislation, and the influence of traditions of judicial practice.

7.2.2.1 The influence on judges of academic thought

The research has disclosed that the variety of uses of autonomy in the medical law reports has a basis in academic thought. The research has confirmed the early suspicion of regularities of usage between the jurisprudence and the medical law and philosophical literature through a systematic semantic analysis of the latter. The variation evident in judicial usage of the autonomy concept has also been found to be present in the academic literature. In addition, the elemental uses of the concept of autonomy in both contexts have been shown to be fluid, if not interchangeable. These regularities of usage support the proposition that there is a degree of judicial reliance on academic thought reflected in the medical jurisprudence. This

proposition is supported by the observations of academics of a special relationship between medical law and ethics and that in its infancy medical law relied on non-legal sources (e.g. bioethics, philosophy, sociology and theology) to supply its foundational materials.

The investigation has also demonstrated that there is evidence in the law reports, and sources outside the cases, of a relationship between judicial usage and academic thought. The reports suggest that the judiciary is drawing upon academic materials for a variety of purposes, including as sources of legal authority and guidance. There is also a broader trend within the common law to accept citations from a range of academic sources, including living authors, although there has as yet been no systematic analysis of judicial citation practices in medical law. This thesis suggests that in the research sample that judges are referring to the academic literature in order to provide their decisions with ethical and legal justification, or as sources of ethical and legal guidance, or in order to highlight the plurality of ethical opinion which exists on medical law issues. This appeal to academic literature has, in one or two cases (e.g. *Re B* (2002)), has directly concerned the question of the meaning of autonomy.

It is proposed that there is sufficient evidence to suggest that the judiciary is aware of broader academic developments and that these have a measure of influence on judicial thinking.

7.2.2.2 The influence of public policy, legislation and law

Although the thesis began by looking at the connections between judges' use of autonomy and the academic literature in medical law, it was clear from early background reading that the creation of the European Convention of Human Rights (2000) and the Mental Capacity Act (2005) would constitute bodies of law with significant consequences for English Common Law. The discovery from the law reports that judges use of autonomy changed over time is also empirically associated with these fundamental changes to public policy and law in England and across Europe. Public policy accelerated change in use and interpretation of autonomy.

The more expansive interpretation of autonomy defined by the European Convention has transformed the legal context and influenced judges' decision-making in more recent cases (e.g. *Pretty* (2002); *Burke* (2005); *Purdy* (2009)). The Human Rights Act 1998 has enshrined the exact words of the Convention into English statute and made them the subject of direct interpretation by judges. The enactment of the Convention into English law has had the effect of giving judges new interpretative possibilities beyond the scope of existing precedents. The Human Rights Act has also made it a statutory requirement for English judges to 'take into account' the jurisprudence of the European Court of Human Rights and thus the more developed European case law on autonomy. The Convention has introduced a new *ethos* into the law based on ethical values and deductive logic, in addition to the common law tradition on particular cases and inductive reasoning.

The interpretation of the Mental Capacity Act and the European Convention on Human Rights has started to suggest a view of the self in which autonomy is not exercised in isolation, but intersubjectively, interdependently and in relationship with others. This complex interpretation of autonomy incorporates personal identity and relationships rather than being restricted to body and intellect alone. The Mental Capacity Act's emphasis on optimising conditions for competent decision-making and a person's autonomous right to form relationships with others derived from European jurisprudence represents the basis of a new political obligation to promote freedom rather than mere liberty. On this construction the state has a positive obligation to ensure that supporting and enabling conditions are in place to enjoy autonomy. Though few cases have yet been decided under the Mental Capacity Act (*D Borough Council* (2010*)*; *Re A* (2011); *Re M* (2011)) the legislative construction of the common law has introduced an important new emphasis on the provision of the supporting and enabling conditions vulnerable persons often need to exercise autonomous choice.

Public policy and legislation has acted as a proximate influence on judges' developing use of the concept of autonomy in complex cases. Yet while this is a necessary component of explanation it is not sufficient. It fails to identify the underlying structure of influence, the traditions of judicial practice which the study proposed historically were determining decision-making on autonomy.

7.2.2.3 The influence of traditions of judicial practice

The idea of a tradition in ordinary language, as an established custom handed down, is commonplace. In its more technical (MacIntyrean) sense, 'a living tradition is an historically extended, socially embodied argument about the goods which constitute the rationality of the tradition' (1981, 207). The notion of bodies of law as tradition-constituted 'practice' evincing tradition-dependent rationalities is only recently the subject of academic reflection. But the basis for such a characterisation is present in such. MacIntyre (1981) himself designates law as a complex practice and Loughlin (2003) has characterised the act of governing "a highly complex practice, replete with ambiguities and tensions" in the context of which "the idea of public law" can be grasped. Medical law is a good example of a complex practice which has constituted traditions and these can be seen to resource an internal argument within medical law about what concept of autonomy is worth pursuing. The three bodies of law considered in the study each express different structures of legal rationality: the common law deciding cases on the basis of precedent, European law enjoining judges to derive decisions from ethical principles, while the instrumental rationality of statute law reflects the ends of democratic reconstruction.

The study has shown not only that these bodies of law disclose traditions of legal rationality but that the concept of autonomy itself is shaped by living traditions of historically extended and socially embodied argument. Thus the concept of autonomy in its guises as bodily integrity, privacy and freedom from unwanted interference can be seen to be inferentially related to the notion of 'freedom-from' (liberty). The older notion of 'civil liberties' as opposed to 'human rights' is

associated with the traditional 'negative' interpretation of the English constitutional tradition. The concept of autonomy in its more positive guises as self-determination and self-realisation, supplements the concept of liberty with stronger notions of personal agency or freedom-for. On this interpretation, autonomy is understood not simply in terms of non-interference but broader notions of empowerment and achievement and the material accommodations and supports that these imply and necessitate.

Thus legal traditions which have influenced judicial uses and interpretations of autonomy in ethically contentious medical law cases have themselves been influenced by traditions of moral and political order of (negative) liberty and (positive) freedom. These two traditions of freedom have through inferential analysis been seen to be implicit within the elemental uses and meanings in use in examination of the law reports. For example, it is proposed that there are substantial material inferential relations between the judicial uses of autonomy as 'bodily inviolability' or 'bodily integrity' (*Bland* (1993), p. 883*E*), the concept of 'bodily autonomy' (*Yearworth* (2010) at p. 13*G*) and the category of liberty or negative freedom. By the same token, similar inferential analysis of the elemental uses of freedom of choice, mental capacity, and self-determination in its elemental sense, can be abstracted to the more fundamental concept of self-determination, or liberal individualism, which, in turn, can be seen to relate to a concept of agency, and, perhaps, (positive) freedom.

The discovery that medical law is a tradition-constituted practice that influences the decision-making of judges about autonomy in ethically contentious cases generated a question for the investigation of law reports concerning whether judges would be drawn into a clash of traditions. The study anticipated, in particular, that there was the potential for rivalry between the traditions of English common law and the European Convention. The common law tradition of non-interference has deep roots in the English moral and political tradition which can be glimpsed occasionally in the submissions of counsel (where included in the law reports), or the judgment of the court. Thus, five cases refer to the 'libertarian; principle of self-determination (*Re F* (1990; *Bland* (1993); *Re A* (2001); *Burke* (2005) and *Purdy* (2009). In the submissions of counsel in one case (*Re T* (1993) p. 98*G*), libertarian self-determination is explicitly connected with the philosophy of Mill. One case did suggest that a judge remained committed to the common law tradition against the growing influence of the European Convention. The more conservative approach of Lady Justice Butler-Sloss in *NHS Trust A* in which she appeals to the persuasive authority of common law precedent to justify her restricted interpretation of the European Convention, i.e. the obligation of continuing to give life-sustaining treatment to a patient in PVS. The patient's bodily autonomy (bodily integrity) which remains in spite of the loss of intellectual autonomy is capable of being breached by non-beneficent treatment.

The approach of Justice Butler-Sloss, however, has not been typical. The courts began to address directly the issue of whether there is a 'human right' to autonomy in the cases of *Pretty* (2002), *Burke* (2005) and *Purdy* (2010). Under the influence

the decision of European Court of Human Rights in the case of *Pretty v UK*, the English courts have in these cases deduced the existence of a *prima facie* right to autonomy from the broad wording contained in Article 8(1) of the European Convention. This autonomy right has been interpreted to extend in principle to a person's deciding the manner and timing of her death, subject only to the qualifications contained in Article 8(2). The definition of the autonomy read out of the Convention has been influenced by the exiting tradition of earlier European case law which developed a notion of freedom as more than mere non-interference and implying greater state responsibility to assist in the realisation of the self.

The overall investigation of the cases, however, has demonstrated that the judiciary has not been fractured into opposing groups who are compelled to support one or other of incommensurable traditions. Rather, the judiciary has been called upon, by broader legal and political developments for judgements of autonomy which draw appropriately upon different traditions to meet the needs of each specific case. For example, in the case of *Purdy* (2010), the scope of a person's autonomy right under Article 8 of the Convention is directly addressed. The court affirmed that the claimant had a human right to autonomy which could in principle extend to a right to an assisted suicide. The court also confirmed that the English suicide legislation was clear and amounted to a 'blanket ban 'on assisted suicide, which was permissible under the terms of the qualifying Article 8(2), provided it accorded with European standards of clarity, foreseeability and proportionality. The court, as it is required to do, does not favour the common law tradition, or statute or European human rights

law over against each other. Rather, it draws upon each in order to provide a robust legal and ethical justification for the decision it has made.

The core empirical findings of the investigation demonstrate a progressive development of judges' use of autonomy from a partial view of autonomy as body and mind towards an emerging holistic concept of the person as the identity and capability of the person. In light of this disclosure, the law reports can also be seen to reveal a development in the concept of autonomy from its traditional concern in criminal and civil law with the protection of bodily inviolability to the development of intellectual criteria for determining legal competence towards an 'anthropologically' fuller concept of autonomy emerging in the jurisprudence of the European Court of Human Rights and the English jurisprudence influenced by it. This is a more complex finding than the research anticipated at the outset when it hypothesised the possibility of rivalry between European and English traditions of law. These developments have generated reflections on the 'grounded theory' that emerges from the empirical investigations.

7.3 REFLECTIONS ON THE CAUSES OF CHANGE TO THE USAGE OF AUTONOMY AS A CONCEPT: AN EMERGING GROUNDED THEORY

The cycles of enquiry have generated an emergent grounded theory of medical jurisprudence as tradition mediated practice. Judges have developed their practice over time and have elaborated a sophisticated ethical language of autonomy in order

to mediate the distinct legal traditions of common law, statute and European human rights law in response to medical, moral, social and political changes in society. And in so doing, it suggests the emergence of a new practice of medical jurisprudence. This theory has arisen as a result of the interaction with the data and exemplifies the power the processual methodology of grounded theory has to gain real knowledge of the structures of the social world which might not otherwise be unearthed. The emergent theory of a tradition-mediating judiciary was not anticipated or envisaged at the outset of the research process.

The judiciary, it is being hypothesised, is called upon, by broader legal and political developments, to evolve as members of an integrated community of practice. The traditions of the law can better be interpreted as resources upon which the judiciary can draw in order to address the ethical dilemmas inherent in the new legal cases which arise for adjudication in legally and socially acceptable ways. This has inevitably involved in the cases a process of implicit 'inter-mural' reflection as the judiciary work out the implications of the changing legal ecology, particularly following the incorporation of the European Convention on Human Rights. This thesis has highlighted the manner in which judges in their development of medical jurisprudence have been the point of convergence of distinctive bodies of law (the common law, the Mental Capacity Act 2005 and the European Convention on Human Rights). Judges have not, on the whole, revealed themselves to be the sponsors of any one particular tradition over another, giving rise to a 'clash of traditions' between the advocates of liberty and freedom. They have displayed a

professional responsibility to engage with other traditions to ensure their interpretations and decisions are appropriate to the needs of each case.

Each legal tradition is both a decision-making constraint and resource. At common law, the judiciary is constrained to advert to past decisions, not simply because of legal doctrine but because a peculiarly English form of democracy is at work. In the common law tradition, the franchise of past decisions is extended through time on the premise that if they have stood the test of time then there is probably something in them of prudential value worth applying in the present. Statute law epitomises the rationality of the public sphere and constrains the judiciary give expression, through a rational reconstruction of parliamentary intent, to the franchise of the present. The European human rights tradition exemplifies a rationality of values, constraining the judiciary to give positive legal expression to ethical values of general applicability through the use of deductive logic.

Tradition, according to Brennan (2009) is: 'the crucible of creativity in which the current generation can add a layer of intelligence to what has been handed down, thus meeting the challenge of a world that has never before existed (2009: 451). "Judgement", as Hauerwas (1986) has observed, "is not a mechanical procedure" because "it often has to go beyond existing precedents and current generalisations if it is to work out the anomalies in the tradition or meet the demands of a new day" (1986: 43).

The discipline of medical law, as was observed in Chapter 1, arose in response to broader social pressures, the rise of the assertive citizen in particular, seeking a recalibration of the power relationship between the medical profession and the citizen which has traditionally been weighted firmly in favour of the former. In the current, era, perhaps, the citizenry of Europe are looking for more than rights to be 'let alone', or to have one's rational decisions respected. Rather, they are seeking the right to express a sense of self in the context of an increasingly reflective appreciation that human beings are not isolated entities, but rather 'persons-in-relationship'. There is increasing recognition that people, in their moments of vulnerability, a little bit of goodwill from others, to make their way through life towards some form of self-realisation.

The richer view of the capabilities of the human person, emanating from the law courts and the literature, means that the traditions of freedom, freedom-from and freedom-for, are not so conceptually incommensurable as to be rivals. It is more widely-appreciated that freedom presupposes liberty, and also requires the material resources of society and the state to flourish. The 'negative' and 'positive' traditions of freedom which have characterised the English constitutional settlement of common law are now in confluence with a different, more communitarian tradition of law and polity emanating from continental Europe and incorporated into the English constitutional settlement by statute. The complex construction of autonomy which is beginning to be read out of the European Convention and adopted into English medical jurisprudence is perhaps the imprimatur of a more integrated

'recognitive' tradition of autonomy to complement the other aspects of its philosophical heritage.

7.4 THE LIKELY TRAJECTORY OF FUTURE CHANGE: IMPLICATIONS OF THE STUDY FOR POLICY AND PRACTICE

The emergent grounded theory of the investigation suggests a likely trajectory of future change for judges in their judicial decision-making about autonomy. The judiciary can now be seen to be the carriers of an interpretive debate within the complex practice of medical law concerning questions of autonomy. MacIntyre's concept of tradition as a historically-extended argument about goods internal to (judicial) practice is a helpful way of conceptualising the manner in which judges now need to engage with different traditions of freedom as they address the new medical law cases which are arising for adjudication. This study of law reports therefore has implications for future policy and practice in key areas for: The healthcare professions; the role of 'intermediate' influences on the law-making process and judicial decision-making; and the contribution of medical jurisprudence to ethical and political debate about developments in medicine and the biosciences. These will be considered in turn.

7.4.1 The healthcare professions

This thesis began with the proposition that the concept of autonomy was a legal, ethical and cultural value of paramount importance. The investigation of the law reports was prompted by the suspicion that there was considerable variation of usage of autonomy in the law reports and the literature. The finding that such variation actually exists is significant for medical policy and practice because of the great importance attached in the medical profession to autonomy as a key principle of biomedical ethics. If autonomy is advanced as a value to be protected, upheld and promoted, then it is important that healthcare students and practitioners more fully understand its complex nature. There is, it is contended, a tendency for healthcare practitioners to reduce autonomy to the restricted dimension of 'intellectual autonomy', i.e. the requirements of a legally-valid consent.

This is understandable in view of medical concerns to avoid litigation for non-consensual interventions. This thesis, however, has drawn attention to two dimensions of autonomy of which the healthcare professions might become more fully aware. Firstly, the thesis has drawn attention to a 'physical essentialist' conception of autonomy which proposes that a person's autonomy can, in a sense, subsist beyond the loss of intellectual autonomy and that autonomy understood in this sense is closely associated with notions of 'dignity' (the idea that the person's body should continue to be respected even when the patient's capacity has been lost) and 'privacy' (the notion that that all persons have, in some sense, a presumptive right to be 'let alone'). Secondly, this thesis has also drawn attention to an understanding of autonomy which attempts to encapsulate the patient as a 'whole

person'. On this view, the patient should not be reduced to her physical or intellectual dimensions, but as an integrated totality of dimensions which the healthcare professions are called at some level to address. It is proposed that the implication for policy and practice of this multi-faceted use of autonomy is to induct the healthcare professions through education and training into a richer concept of 'the person'. There is already evidence of policy moves to promote 'equality of autonomy' in respect of the treatment and care vulnerable adults (cf. Nuffield Council on Bioethics, 2009; Bach and Kerzner, 2010). This 'equality' view of autonomy has enjoined a shift away from a view of autonomy based on liberty and rationality alone to one grounded in notions of 'identity' and 'dignity'.

The findings of this thesis could be disseminated in medical, legal and ethical journals, especially those likely to be read by members of the healthcare professions, e.g. the *Journal of Observational Pain* (whose editorial board I have recently joined), the *Journal of Medical Ethics* (for which I have already written), and the *Medical Law Journal* (for which I would like to write). The implications of my study could also be disseminated through teaching (e.g. Warwick Medical School), the organisation of inter-disciplinary seminars and the publication of research papers drawing from the content of the thesis.

7.4.2 The role of ‘intermediate’ influences on the law-making process and judicial decision-making

The role of ‘intermediate’ authorities, such as the legal and bioethical literature, professional guidance (GMC, HFEA) and the impact of interveners and their legal submissions on judicial decision-making have implications for descriptions of the law making process and the normative principles underlying judicial lawmaking. This elucidation of this role promises to contribute to a fuller account of how judges choose to take narrow or expansive approaches to the cases before them.

There are important questions to be asked about the extent to which judges rely on academic literature for sources of law and guidance in ethically-contentious medical law cases. Firstly, the traditionally close relationship between medical law and medical ethics in the academic context, and the inherently ethical content of medical jurisprudence, suggests that academic thought will continue to impinge on judicial thinking at some level. It is contended that the influence of European law on English common law will gradually make the English judiciary more aware of the interplay between juristic thought and jurisprudence on the European continent. The structure of English law reports are already beginning to reflect the distinction between ‘fact’ and ‘law’ which is less clear-cut in earlier English medical jurisprudence.

Secondly, the transformation of professional norm into legal norm has been show to occur frequently in the context of medical practice. Greater awareness of the influence of professional guidance on judicial lawmaking in the medico-legal context

will likely prompt further reflection on the influence of professional norms on legal norms (cf. Miola, 2007; Foster, 2009; 2011). This will encourage greater reflection on how the practices and policies that guide professional conduct in the clinical context ultimately acquire authority as norms recognised and enforced by judges in the medico-legal sphere. It will also lead to greater acknowledgement of these extra-judicial documents as sources of principles of medical ethics and corresponding reflection on the relationship between medical ethical principles and legal precedents as the bases of legal decisions.

Thirdly, this thesis has drawn attention to those who intervene in legal cases ('public interveners') in order to influence the outcome. Investigation the impact of these interveners and of their submissions on judicial thought offers a potentially revealing line of enquiry. There are important questions to be asked about the status, role and legitimacy of the various interventions by individuals and public bodies in ethically-contentious medical cases and the extent to which their submissions are relied on by the judiciary.

The significance of the influence of these various forms of 'soft law' on judicial thinking calls for a development in the 'community of practice' between the judiciary and legal and non-legal academics. This can perhaps be promoted by providing contexts within which the judiciary and academics (medical lawyers and political philosophers) can engage in collective reflection – through seminars, colloquia, retreats, joint writing of papers, the creation of specialist journals - on the

influence on jurisprudence on academic thought and *vice-versa*. There is also a case for contributing to an increasingly profession system of inducting the judiciary into judicial practice and continuing professional education. It is difficult – and undesirable – to be too prescriptive about how judicial practice should develop, but it is important in an ethically-controversial and politically-contentions area such as medical law, to encourage the judiciary to be more transparent about the influences which are brought to bear on legal judgements which can significantly influence public policy.

7.4.3 The contribution of the law to ethical and political debate

The judiciary has a vital function in contributing to ethical and political debate. Legal cases, such as *Bland* (1993), *Re A* (2001), and very recently *Nicklinson* (2012), demonstrate how medical court cases can become the focus of wider public participation in moral debate. Judges cannot avoid making moral decisions however much they may protest that they are simply applying the law. Yet it is essential that judges develop a clear normative framework for decision-making in ethically-contentious medical cases. If the judiciary is to undertake this task seriously, then there will need to be greater discussion by the courts of the moral conflicts inherent in the medical cases that arise for adjudication. The value conflicts which the courts tend current to obscure ('the court is a court of law, not an arbiter of morals') could be made more explicit and the court made a place where matters affecting the community can be discussed and deliberated upon. This would of course raise questions about the proper limits of judicial discretion in formulating social policy. Cases such as *Bland* and very recently in *Nicklinson* have prompted enquiries about

the competence and the constitutionality of the courts in this area, e.g. voluntary euthanasia, assisted suicide and withdrawal of treatment. But as this thesis has shown, the law is not autonomous, but informed by dimensions of moral and political order. Medical jurisprudence has, and is, tackling some of the most fundamental moral issues of the day touching on matters of personal liberty and human freedom in the most sensitive and intimate aspects of human life. The decisions and deliberations of judges in these cases may be one place where wisdom might be found.

7.5 THE STRENGTHS AND WEAKNESS OF THE RESEARCH

The distinctive feature of this thesis is its systematic investigation of a unique database of law reports, conducted in three layered cycles of enquiry, into judicial uses, meanings and formations of autonomy in ethically-controversial medical law cases. Its strengths are revealed in the result and the way the distinctive process of study enabled the result. The result is constituted in the empirical finding of the development of a conceptual language of autonomy over time; a temporal progression in conceptual language shaped by distinct traditions of legal rationality, informed by traditions of moral and political order; and a theory which proposes that judicial decision-making about autonomy in contentious medical cases is not to be understood as a rivalry of contested traditions, but as shaped by judges mediating of these traditions to meet the presenting cases. The results of the thesis on judicial decision-making were only possible because of the process of layered enquiry. The

distinctive methodology is constituted in the distinctive the interactive relationship with the data of law reports which required me to deepen the questions and method of enquiry if I was to answer the questions with which I began. When the limitations of each mode of enquiry were reached the investigation had to reach beyond the mode of investigation to a deeper mode of enquiry which extended the objects and form of analysis. This iterative methodology I came to understand as grounded theory which led to deepening layers of conceptual analysis, especially on the principal concept of the thesis autonomy.

Some of the weaknesses of the thesis are the result of limitations of the study that are there by design. The study would have been improved had it been feasible to investigate all domestic medical law cases in which the ethical language of autonomy was used, which would have included cases which were not of particular note legally, or publicly. Study of the more expansive database would have reduced the risks of selection bias caused by the restriction of the study to cases of public importance according to the criteria set out in Appendix 4. There is a good case for expanding the database of law reports for study in future research to include both domestic cases and cases decided in other jurisdictions, e.g. the European Court of Human Rights and the United States. The limitations of the data base may reflect some of the disadvantages of the application of grounded theory which normally demands large volumes of data and the tensions between the evolving and inductive style of a flexible enquiry and the systematic methods of gathering, conceptualising and categorising data systematically. Some other weaknesses of the thesis are functions of the research process and have been discerned more clearly with the

benefit of hindsight. For example, it was at a relatively late stage in the research process that the significance of cases decided before the earliest point on the timeline became apparent. It was recognised rather that the use of ethical language in medical cases before 'autonomy' was first used in 1990 formed an important aspect of the periodisation of elemental uses of autonomy in English medical jurisprudence.

7. 6 AVENUES FOR FUTURE RESEARCH

A number of these dimensions of enquiry not developed in the thesis provide potential avenues for future research. These include detailed investigation of the influence of arguments of counsel on judicial determinations; the academic sources upon which the judiciary are relying in the medical law context; potential changes in the nature of judicial deliberation and judgement introduced by subtle changes in the structure and provenance of legal judgement; the history of medical law; and specifically in connection with autonomy, the disjunction between judicial rhetoric of autonomy and the reality of judicial decision-making.

Firstly, systematic scrutiny of the skeleton arguments of, and/or interviews with, barristers, who have appeared in the research, or other, cases, could provide a potentially fruitful line of enquiry by illuminating the extent to which judicial uses of autonomy, and judicial appeal to academic literature, is influenced by legal argument presented in court. To what extent do barristers' arguments in court serve as a source of philosophical ideas as well as legal and/or a register of broader social and

intellectual currents? To what extent is there evidence of a temporal progression of intellectual influence, explicit judicial acknowledgement of counsel's contribution?[46]

Secondly, examination of skeleton arguments and the law reports for evidence of academic influence on judicial deliberation could be taken further. It is acknowledged in the literature that there may be a growing trend of judicial reliance on academic literature for sources of law and guidance (Duxbury, 2008; Braun, 2010). It is also accepted that there has been little systematic analysis of judicial citation practices within medical jurisprudence (James, 2008). Thirdly, analysis of bioethical input through expert-witnesses, interveners (*amicus curiae* briefs) in the resolution of legal disputes provides a third element of further investigation.

This research would be important in order to determine whether and to what extent, the medical philosophic literature has had anything of merit to contribute to the analysis and resolution of cases with ethical dimensions or implications. It would also address a related concern (alluded to at the beginning of Chapter 2) relating to the ways in which the law might dictate, influence or shape the way in which bioethical issues are considered and resolved. Rich (2001) has considered the need to undertake an analysis of the *amicus* briefs in a number of landmark American cases with bioethical content in order to see whether and to what extent less dominant ethical approaches might have been aired in court, e.g. virtue ethics, narrative ethics,

[46] In a private conversation with Adrian Hopkins QC, he indicated that leading medico-legal barristers such as Robert Francis QC and Adrian Whitfield QC were regularly using skeleton arguments in the late 1980s and early 1990's. Mr Hopkins himself was a junior barrister at the time and involved in two cases included in the research sample *Re F* (1990) and *Re C* (1994) in which the barristers mentioned above appeared.

care ethics etc. His contention is premised on the view that questions of political morality lie at the heart of debates over the relationship between ethical theory and medical jurisprudence and that the ethical principle that is most consistently cited in medical jurisprudence is respect for patient autonomy.

Fourthly, the evolving character of legal judgements was alluded to. The introduction of a neutral citation system, numbered paragraphs and the increasing incidence of composite judgements may be exerting a loosening influence on the relationship between the factual and legal aspects of cases. These developments, in combination with the influence on European styles of adjudication, may be having an effect on traditional styles of adjudication within the English common law system (cf. Zander, 2004).

Fifthly, perhaps the most important area for future research suggested by this thesis is in the history of medical law. This research has made a modest contribution to the as yet underdeveloped historical jurisprudence in the medico-legal context (Laurie, 2006a). The relatively late usage of the term 'autonomy' in the English medical jurisprudence was a surprise and unexpectedly led to a 'periodisation' of the judicial use of ethical language which perhaps would not otherwise occurred. Brazier has written that the "history of medical law has been little explored, at least by legal scholars" (2008: 464). Little has been written about the social and historical processes that have contributed to the development of medical law taking into account the interaction between medicine, law, ethics and society (Price, 2010). A

more rigorous periodising of the discipline of medical law is needed, of how the development of the judicial use and understanding of autonomy fits into the general history of medical law and ethics. It has become apparent during the course of this research that judicial reliance on foreign case law was crucial to judicial use, understanding and development of autonomy. The jurisprudential roots of autonomy need to be more fully explored.

Finally, attention was drawn in Chapter 2 to Veitch's (2007) exploration of the disjunction between the explicit and implicit reasons that influence judicial determinations in medical law cases. Veitch argues that the respect shown by judges to the opinions of medical professionals is contributing the existence of a concept of 'principled autonomy' in the jurisprudence, in contrast with the rhetorical presence of 'individualistic autonomy'. Veitch's work has been supplemented by that of Maclean (2009) and McLean (2010), who have considered the presence of a concept of 'relational autonomy' in the jurisprudence. There is scope for a wider study investigating whether, and to what extent, contributions to concepts of autonomy other than individualistic autonomy are being made in other cases not considered by Veitch (especially principled and relational autonomy). This thesis has alluded to growing awareness within the literature that there are alternative models of autonomy to the dominant individualistic one (Mackenzie & Stoljar, 2000; O'Neill, 2002; Veitch, 2007; Foster, 2009; Maclean 2009; McLean, 2010).

Afterword

In the month in which this thesis was completed the High Court considered whether an ethically-contentious medico-legal case should receive a full-hearing.[47] Mr Justice Charles sitting in the Queen's Bench Division of the High Court was required to consider the preliminary question whether the claimant's arguments had a realistic prospect of success at a full hearing and whether there was any other compelling reason why the case should be tried. The case concerns a 58-year-old man who suffered a stroke in 2005 which left him paralysed below the neck and unable to speak. He can communicate with an Eye Blink computer and limited head movements. He states that he has "no privacy or dignity" left and does not wish to spend the next 20 years of his life in such condition. He states that he is "asking for my right to choose when and how to die to be respected" (para. 3).

The High Court judge remarks that the underlying issues in the case 'have great social, ethical and religious significance' (para. 1) echoing the sentiments of Lord Bingham in the House of Lords case in *Pretty* (2002). These 'are questions on which widely differing beliefs and views are held, often strongly.' The court acknowledges, by implication, that its determination will represent a particular response to these issues in a culture of moral pluralism. Whether it likes it or not, the court will be dictating a moral position to individuals (to Mr and Mrs Nicklinson) in

[47] *Nicklinson v Ministry of Justice & Ors* [2012] EWHC 304 (QB).

a liberal democracy, thus more raising once the issue of medical law's 'legitimacy' (Montgomery, 2006a). The court considered whether to 'strike out' the proceedings or to allow judicial review, concluding that the claimant's arguments had a realistic prospect of success and was therefore justiciable. Amongst the legal orders sought were declarations that the doctrine of 'necessity' (which had been extensively explored in *Re A* (2001)) could be extended to allow the termination or assisted termination of Mr Nicklinson's life, and that the current UK law on voluntary euthanasia and assisted suicide was contrary to his rights under Article 8 of the European Convention.

The court's decision, albeit at a preliminary legal stage, is surprising in view of intense Parliamentary scrutiny to which these legal issues have recently been subjected, e.g. Assisted Dying for the Terminally Ill Bill [HL], two unsuccessful assisted suicide amendments to the Coroners and Justice Bill (now the Coroners and Justice Act 2009) . As late as March 2012, the House of Commons' Backbench Business Committee affirmed its support of the Director of Public Prosecutions' (DPP) official prosecution guidelines on assisted dying, while refusing to enshrine those guidelines in statute. Richard Ottaway MP opined that "Parliament and not the courts should have the last word on prosecuting policy and the criminal law."[48] Yet, were the claimant to succeed in their claim at a full trial of the issues, the courts will have effected one of the most significant and controversial changes in medical law in

[48] *Hansard* HC Deb vol 542 col 1363 (27 March, 2012) [Electronic version].

recent years. It will have done so either through the inductive common law strategy of incrementally extending a common law principle ('necessity') to cover a new situation (assisted suicide/voluntary euthanasia), or the deductive European human rights strategy of identifying a full (i.e. non-rebutted *prima facie*) autonomy right to decide the manner and timing of one's death. These common law and civil law strategies would obviate the current lack of democratic will (through the elected representative) expressed through the instrumental rationality of statute.

Mrs Nicklinson, the claimant's wife and an interested party to the litigation, succinctly express the reason for the appeal to the courts:

> I'm delighted that the issues surrounding assisted dying are to be aired in court. Politicians and others can hardly complain with the courts providing the forum for debate if the politicians continue to ignore one of the most important topics facing our society today. "It's no longer acceptable for 21st Century medicine to be governed by 20th Century attitudes to death". [49]

This claimant clearly has not felt "listened to", even though there has been copious Parliamentary debate and scrutiny of the issues surrounding the assisted termination of life. Perhaps this is because Parliamentarians are required to think about these in general, rather than particular, terms. The fact-based nature of the common law process promises detailed and focussed engagement with the predicament of a particular individual, or individuals, and a clear resolution of the case. The processes of "tough law" seem to offer litigants the possibility of a *catharsis* which generalised

---

[49] http://www.guardian.co.uk/society/2012/mar/12/locked-in-syndrome-sufferer-court-hearing [accessed 15th March, 2012]

legislative scrutiny cannot hope to achieve. Even though the court will take the final decision about what happens to Mr Nicklinson out of his hands, there will perhaps be the consolation, of knowing that he and his wife could have done nothing more to influence the outcome.

The courts continue to play an important role in the modern English polity. They look like the only forum currently willing and equipped to resolve cases of ethical complexity. While philosophy and ethics has many, and perhaps increasing, opportunities to make a contribution in the legal arena, the courts alone seem capable of achieving some form of closure when ethical controversy seems otherwise intractable: making decisions, imposing sanctions and establishing priorities. The complex practice of medical law, and the ethical discourse which is inherent, will continue to develop and become more sophisticated in response to the demands of the assertive citizen in a morally plural culture as this most recent case demonstrates.

Appendix 1

Case Summaries: facts, determination and legal significance

Re F (1990) – Court of Appeal and House of Lords

A cognitively-impaired 36-year-old woman developed a sexually-active relationship with another patient in the hospital where she was a voluntary in-patient. The patient's mother and hospital authorities considered that it would be in her 'best interests' to seek compulsory sterilisation because it would be impractical to apply contraceptive measures, or to restrict her movements. The Court of Appeal and the House of Lords held that compulsory sterilisation would be lawful if the procedure was required as a matter of 'necessity' or as a result of an assessment of the patient's 'best interests'. Although the court could not authorise the procedure itself under its inherent jurisdiction at common law, it did have the authority to make a declaration as to whether sterilisation surgery would be in the 'best interests' of a patient who was unable to give consent by virtue of mental incapacity. In the circumstances, the court held that it would be lawful to sterilise the women concerned.

Re W (1992) – Court of Appeal

A 16-year-old girl with a tragic family history developed symptoms of *anorexia nervosa* and was admitted to a residential unit for treatment. When her condition worsened it was proposed that she be transferred to a new unit specialising in eating disorders. The girl made it clear that she would refuse consent to this prompting the local authority to apply for leave to transfer her to it. The Court of Appeal upheld the High Court decision that it had authority to authorise medical treatment in spite of

her competent refusal. It held that although 16 or 17-year-old children had a statutory right to be treated as if they were adults for the purposes of consenting to diagnosis and treatment, it did not include a comparable right to refuse such. Refusal could be overridden by lawful parental authority or the court in the exercise of its inherent jurisdiction, especially in cases in which treatment was necessary to prevent death or serious harm to the patient.

Re T (1993) – Court of Appeal

A young pregnant woman, injured in a car accident, refused a potentially life-sustaining blood transfusion, allegedly under the influence of her mother, an observant Jehovah's Witness. The Court of Appeal unanimously determined that she lacked legal competence and that a blood transfusion could be administered without her agreement. Their reasons for doing so varied: one judge held that the patient lacked mental capacity; another that she had not made her decision voluntarily; the third judge seemed to hold that the reasons for the patient's refusal were not applicable in the circumstances. Nevertheless, the Court of Appeal unanimously and explicitly recognised a right to refuse medical treatment even if the decision is irrational and life-threatening, including the right to make an anticipatory refusal. This statement of law was, strictly speaking, ancillary (i.e. *obiter*) because while the patient's right to refuse was recognised, it was not actually applied because of the patient's lack of competence.

Bland (1993) – Court of Appeal and House of Lords

A 17-year-old football supporter was crushed and asphyxiated at the Hillsborough football disaster, suffered hypoxic brain damage and was eventually diagnosed as

being in a persistent vegetative state (PVS). Although he had a functioning brain stem, he had lost all higher brain function and it was agreed by his treating clinicians and family that there was no realistic prospect of recovery. The hospital authorities, with the agreement of the family, sought declarations authorising the discontinuance of existing, and withholding of all future, life-sustaining measures, including ventilation, nutrition and hydration by artificial means, except treatment that would enable him to die peacefully, with dignity, and without pain or distress. The Court of Appeal and House of Lords upheld the declarations sought. They held that: the sanctity of life principle was not absolute; artificial nutrition and hydration (ANH) constituted medical treatment rather than basic care; withdrawing medical treatment included ANH, was an 'omission' rather than an 'act'; prolonging the patient's life had ceased to be in his 'best interests'; and, accordingly, his medical practitioners were no longer under a duty to continue life-prolonging treatment and might be under a duty to cease it.

Re C (1994) – High Court

A 68-year-old detainee in Broadmoor Hospital with diagnosed paranoid schizophrenia refused a potentially life-sustaining below-the-knee leg amputation. The High Court held that his refusal was legally competent because, in spite of his mental disorder, he was capable of understanding the 'nature, purpose and effects' of the treatment. In upholding this treatment refusal, the court rejected 'status' and 'outcome' tests of competence for the mentally disordered, fin favour of a functional one. The court formulated a three-stage incapacity test, which the court held the patient satisfied. This involved the ability to understand information, to use it and weigh it up. Because the patient was competent, the court, in contrast to *Re T*, the

court was able to apply legal rights (the right to refuse treatment, including advance refusals), rather than merely recognising them.

Re MB (1997) – Court of Appeal

A heavily-pregnant 23-year-old woman was admitted to hospital with a footling breech which posed mortal danger to her foetus and required an emergency caesarean section. The Court of Appeal declared her legally incompetent because her irrational fear of needles led her to refuse the operation, although she hoped for a successful delivery. The court, with minor modifications, reaffirmed the three-stage incapacity test laid down in *Re C* (1994) and established that it had no jurisdiction to authorise medical intervention regarding a competent pregnant woman who decides to forego treatment even though it might result in the death or serious harm to the foetus. In so doing, it rejected the proposition, intimated in *Re T* (1993) that the presence of a viable foetus qualified a competent adult's right to refuse medical treatment which threatened harm. The case also established that the assessment of 'best interests' included emotional and welfare factors in addition to medical.

St George's (1999) – Court of Appeal

A heavily pregnant 28-year-old woman with pre-eclampsia, fully aware of the risks to her and her foetus, refused admission to hospital because she wanted a natural birth. She was detained under the mental health legislation and a court declaration obtained, dispensing with her consent. This was overturned on appeal on grounds that the legislation had been improperly applied and that the hospital authorities had acted unlawfully in treating her against her wishes. The court reaffirmed that a competent person's treatment refusal could not lawfully be overridden in the context

of advanced pregnancy and that the interests of the foetus could not outweigh those of the pregnant woman. It also established that the mental health legislation could not be employed simply because a person's thought processes were idiosyncratic and to treat a condition unrelated to the treatment of her mental disorder.

NHS Trust A (2001) - High Court

Hospital authorities, with the support of their families and hospital staff, sought legal declarations under the Human Rights Act 1998 (HRA) that it would be lawful to withdraw ANH from two adult patients who had been in PVS for nearly four years, and would not suffer pain and discomfort in the process. Granting the declarations, the court held that though such withdrawal was calculated to bring the patients' lives to an end, they were not tantamount to 'intentional deprivation of life' in contravention of Article 2 of the European Convention on Human Rights (ECHR). Where medical professionals responsibly judge the continuance of life-sustaining medical treatment to be futile, its withdrawal is to be construed as a lawful 'omission', rather than an 'act' falling outside the ambit of the ECHR. The court also held that continuance of intervention against the 'best interests' of the patient would represent a violation of the patients' autonomy, and thus Article 8 of the Convention even though they were permanently insensate. Moreover, because the patients' would be unable to experience continued treatment as 'inhuman and degrading', such treatment would not constitute breach of Article 3 of the ECHR.

Pretty (2002) – House of Lords

A 40-year-old woman in the advanced stages of motor neurone disease (MND) sought an undertaking from the Director of Public Prosecutions (DPP) that he would

not, in the exercise of statutory discretion under the Suicide Act 1961, prosecute her husband should he help her to commit suicide. The DPP declined to do so on grounds that he lacked legal authority to grant the proleptic immunity sought. The claimant argued by way of judicial review that the DPP's refusal infringed her Convention rights incorporated by the Human Rights Act 1998 (HRA). The court held (a decision subsequently upheld by the European Court of Human Rights (ECtHR)) that while legalised assisted suicide was compatible with the HRA, this did not confer a right to it. It found that there had been no *prima facie* violations of any of the claimant's rights, and that even if Article 8 (the right to 'private life') were engaged the UK's 'blanket ban' on assisted suicide could be justified under Article 8(2).

Re B (2002) – High Court

A 42-year-old woman suffered a haemorrhage of the blood vessels in the spinal column of her neck which left her tetraplegic and ventilator dependent. Though not terminally-ill, the negligible prospect of recovery and a normal life led her to request the discontinuance of the ventilation which was keeping her alive. Her treating clinicians refused to accede to her wish on grounds that it would amount to killing and was incompatible with the integrity of the medical profession. After much equivocation, they changed their minds and concluded that she had regained capacity, but were still unwilling to switch off the ventilator. The patient refused various options for rehabilitation including transfer to a spinal rehabilitation unit and 'one-way weaning'. The High Court declared that the patient had had from the date of an independent psychiatric assessment mental capacity to make her own decisions and that the continuance of life-supporting against her wishes constituted an assault

for which the hospital authorities and clinicians would be liable in damages. She was therefore entitled to have her ventilation removed notwithstanding that it would lead to her death. The court preferred the autonomy of the severely disabled patient over the qualms expressed by the medical professionals.

Chester (2005) – House of Lords

A woman with a degenerative spinal condition (cauda equina syndrome) underwent surgery to remove three discs in order to relieve long-standing lower back pain. She suffered nerve damage resulting in increased incapacity and pain. There had been a small risk of significant harm (1-2%) which materialised and of which she claimed she had not been informed by her consultant neuro-surgeon. She agreed that had she been so informed she would not have undergone the operation when she did but might have done so eventually. The majority of the House of Lords (3: 2) held that even though she was not entitled to succeed according to traditional causation principles (the so-called 'but for' test), she could nevertheless recover in damages. The majority justified this by modifying the traditional legal position arguing that the duty to inform was based on the principle of autonomy (which failure to respect was regarded as a form of 'damage') rather than just compensating a successful claimant for physical damage consequent upon failure to inform.

Re Z (2005) – High Court

A 65-year-old woman suffered from the fatal progression of a neuro-degenerative disease (cerebellar ataxia). Having lost the physical ability to commit suicide herself, she wished with the help of her husband to travel to Switzerland for an assisted suicide there. The local authority, holding that she was a vulnerable adult, invoked

the inherent jurisdiction of the court which granted a temporary injunction restraining the woman's husband from removing her from the jurisdiction on grounds that he would be committing an offence under section 2(1) of the Suicide Act 1961. The case raised the narrow issue whether the local authority had a statutory duty to prevent a person from assisting somebody fro travelling abroad for an assisted suicide.

Burke (2005) and (2006) – High Court and Court of Appeal

A 44-year-old man with cerebellar ataxia sought judicial review to determine whether certain provisions of the General Medical Council's (GMC) guidelines on the withdrawal of life-sustaining treatment, accurately reflected the law, in particular the relevant Articles (3 and 8) of the European Convention. He was fearful that a reasonable interpretation of those provisions might allow his treating clinicians lawfully to withdraw treatment once he was unable to express his true wishes, either through the loss of mental capacity, or because he had become *incommunicado*. The High Court judge held that the guidelines did not accurately summarise the law as it stood as they gave insufficient weight to patient autonomy. The Court of Appeal overturned the High Court decision holding that the GMC guidelines in the hypothetical scenario the claimant envisaged adequately addressed his concerns and therefore did not impinge upon his human rights.

Purdy (2009) and (2010) – Court of Appeal and House of Lords

A 45-year-old woman with progressive multiple sclerosis (MS), leaving her wheelchair dependent and with swallowing problems, feared the consequences of progressive weakness and decreasing mobility and deteriorating cognitive ability.

She wanted the option of pre-empting these consequences of her condition by seeking an assisted suicide abroad with the help of her husband. She sought judicial review of the Director of Public Prosecution's (DPP) refusal to produce a crime-specific prosecution policy for assisted suicide and clarify the factors that would weight into the exercise of his discretion under section 2(4) of the Suicide Act 1961. The Court of Appeal rejected her application reaffirming that human rights under Articles 8 did not incorporate the right to be assisted by others to die. It also held that even if her rights were engaged under Article 8, the UK's "blanket ban" on assisted suicide was justified under Article 8 (2) of the Act. The House of Lords upheld her appeal from the Court of Appeal. The House of Lords, following the decision of the European Court of Human Rights (ECtHR) in *Pretty*, as opposed to its own decision in the same case, held that the claimant's rights under Article 8 were engaged and extended to the protection of personal autonomy in end-of-life decision-making. The DPP could not rely on the clear legal basis for the limiting autonomy in the suicide legislation because the discretion it afforded him, and the manner in which he exercised it, was insufficiently clear and accessible to allow foreseeability. Accordingly, the court directed the DPP to produce offence-specific guidelines guaranteeing legal certainty.

Yearworth (2010) – Court of Appeal

Six male claimants consented to undergo chemotherapy treatment after being diagnosed with cancer and were invited by the hospital authorities to provide samples of their semen for frozen storage in their licensed unit. The samples were frozen immediately and stored, but, in spite of the authorities' undertaking that the samples would be looked after "with all possible care", they were later irretrievably

damaged when the liquid nitrogen in which they were stored fell below the requisite temperature. The Court of Appeal affirmed the High Court's decision that the loss of the sperm was not bodily injury recoverable in damages, and that there was there evidence of psychological harm which would if present at most attract nominal damages. However, the Court of Appeal held, overturning the High Court's decision on this point, that the destruction of the sperm amounted to "damage to property" and that the claimants' could have property interests in parts or the products of the human body. The Court declared that for the purposes of their claim in negligence the men had ownership of the sperm which their bodies had produced.

Re A (2011) – High Court

A 29-year-old woman with a low IQ (53) was married to a man with a similarly low level of cognitive functioning. Before her marriage, she had had two children removed from her at birth, made subject to care orders and later adopted. She had also been made subject to guardianship order under the Mental Health Act 1983 and provided with local authority accommodation and support including a monthly depot injection of contraception. After her marriage, her contact with social services was severely reduced and concerns arose for her welfare, including allegations of domestic violence and discontinuance of contraceptive treatment. It was agreed that the extent of her cognitive impairment amounted to mental impairment for the purposes of the Mental Capacity Act 2005 (MCA) but there was dispute as to whether she had capacity as to the use of contraception. The High Court held that she lack capacity to refuse it because she was unable to understand, retain, and weigh the "information relevant to the decision". The court held that test of understanding was restricted to the 'proximate medical issues' rather than the "wider social

consequences" of childbirth and childrearing, because the application of the wider test would blur the boundary between capacity and "best interests". But the woman failed even the restricted test, not through lack of understanding, but because of the coercive pressure of her husband rendered incapable of weighing up the relevant information adequately. The court in the exercise of its broad inherent jurisdiction, decided not to enforce continued contraceptive treatment in the woman's "best interests" but a regime of enablement and support designed to empower her, free of coercion, to weigh up the relevant information relating to contraceptive treatment.

D Borough Council (2011) – High Court

A 41-year-old man with an IQ assessed at 48 developed a sexual relationship with another man and began expressing sexually-inappropriate behaviour in public. The local authority sought a court order stating that he lacked mental capacity to consent to sexual relations and restricting contact with his sexual partner. Analogous precedents concerning tests of capacity to consent to marriage and contraception set a low threshold of understanding. The court held that the test for capacity to engage in sexual relations was directed towards the nature of the act (act-specific), rather than the identity of the sexual partner (person-specific). The court held that the coming into force of the Mental Capacity Act 2005 (MCA) had not changed this. An act-specific test of capacity to consent to sex required understanding and awareness of (1) the mechanics of the act; (2) the health risks involved; and (3) the possibility of a woman becoming pregnant through sex. The court held that the man did not even satisfy the narrower 'act-specific' test. However, the court held that it was a fundamental principle of recent mental health legislation (especially the MCA) that a person should not definitively be treated as mentally incapacitous unless all

practicable steps had been taken to help him. The court was aware that the curtailment of sexual autonomy raised profound questions of civil liberties and personal autonomy. The court issued an interim order directing the local authority to provide the man with sex education in the hope that he would gain capacity and a review order with a view to making a final determination 9 months hence.

Re M (2011) – High Court

A 43-year-old woman suffered viral encephalitis, fell into a coma, and was eventually diagnosed as being in a minimally-conscious state (MCS), with minimal prospect of substantial recovery. Although the woman was clinically stable, the applicant sought a court order for the withdrawal of medical treatment under the Mental Capacity Act 2005 (MCA) on the basis that it would be in her 'best interests'. The High Court held that it needed to employ an objective test in order to determine the patient's best interests and that any decisions relating to the withholding or withdrawing of life-sustaining treatment from patients in permanent vegetative state (PVS) or MCS required a court hearing. The court found that the patient had not executed a valid and applicable advance refusal of treatment of life-sustaining treatment. The principle of the sanctity of life (SOL), although not determinative, weighed heavily in this case and was not offset by the patient's previous generally-expressed wishes regarding life-sustaining treatment. The determination of best interests with reference to established (common law) legal principles and/or the 'balance sheet' approach, or the assessment of best interests, did not constitute breach of the patient's rights under Articles 2 (right-to-life) and 8 (right-to-private life) of the European Convention on Human Rights (ECHR). The court further held that the balance sheet approach, comparing the advantages and

disadvantages of continuing treatment, should be applied in every case apart from PVS, where continued treatment was futile. This was the first case addressing the legality of withdrawal of artificial nutrition and hydration (ANH) from a patient in a MCS.

Appendix 2 – Autonomy: the concept and its conceptions

1. Autonomy

Cases	Direct references	Domestic cases	Overseas cases	Counsel's arguments	References in headnotes
Re F (1990)	p. 78*F*			p. 45*E-F*	
Re W (1992)	pp.81*E-F*, 87*G*, 87*H*, 88*A*, 88*E*				
Re T (1993)			p.117*A*		
Bland (1993)	pp.826*F*, 827*E*, 827*F*, p 893*A*				
Re C (1994)	p. 292*G* (x3)				
Croydon (1995)					p.134*F*
Re MB (1997)	p. 436				
St. George's (1999)	pp.35*C*, 43*F-G* (heading), 43*G*, 46*H*, 47*B*, 50*H*, 52*A*, 60*B*, 62*B*				p.27*A*
Re A (2001)	pp.153*E-F* (heading), 176*G-H* (heading), 177G, 219*B*, 230*H* (x2), 249*G*, 255*E*, 258*H* (x2)			pp.350*C*, 350*F*	
NHS Trust A (2001)	pp.358*D*, 358*H*, 361*F*				
Re AK (2001)	p. 134				
Pretty (2002)	pp. 821*A*, 821*C*, 830*D*, 831*B*, 835*H*,		pp.819*G*, 819*H*, 820*G*		p.801*C*
Re B (2002)	paras. 15-16 (heading), 22, 27, 68, 70 (x2), 72, 80, 81, 82 (x3), 83 (x2), 94 (x2), 100(x),	para.19	para.19		
Wilkinson (2002)		p.427*B*			
Re AK (2004)	p. 134				
Burke (2005)	pp. 443*B*, 443*D*, 443*E* (heading), 444*B*, 445*F* heading, 445*F*, 445*G-H*, 447*B*, 447*C*, 451*E*, 451*H* (x2), 452*C*,	pp. 430*E-F* (x2), 444*A* (x2),467*E*	pp. 444*A* (x2), 447*B*, 447*C*		

	453*C* (x2), 453*G* (x2),453*H*, 465*B*, 465C, 465D, 467*F*, 467*G*Q, 468*F*, 468*G*, 469*A* (x2), 469*C*, 469*D* (x2), 475*G*Q, 479*D*, 479*E*, 481*D* (x2), 481*H*, 482*A* (x2), 494*E* (x2), 495*B* (x2), 495*C* (x2)				
Re Z (2005)	pp. 965*C*, 966*G*	pp.963C, 965F, 965*G*			
W Healthcare Trust (2005)	pp.838*D*				
Burke (2006)	pp.280*E*SA (x2), 283*B*SA, 283*D*SA, 284*D*SA (x2), 286*A*SA, 286*B*SA,286*C*SA, 287*C*SA, 295*G*, 296*E*, 296*F* (x2), 297*F*				
Purdy (2009)	paras .9, 33 34, 35, 36, 47 (x2), 52, 55,	paras. 35, 36, 57 (x2), 58, 59, 60,	para. 42[61,][66] (x2), 44[74],		
Purdy (2010)	pp. 353*C*SA, 354*C*SA, 387*F*, 389*A*, 397*B*Q, 397*C*, 398*D*, 398*H*, 399*A* (x3), 400*A*, 400*F*, 404*A*			pp. 354*D*,364*E*, 364*F*(x3), 364*H*, 366*H*, 367*D*,	
D Borough Council (2011)	pp.1259*H*, 1267*E*(x2), 1267*F* , 1268*H*				
Re A (2011)	pp.64*B*, 81*C*				p.61*G*
Re M (2011)	paras. 94(x2), 95 (x2), 225(x1), 226 (x2)				

3. Bodily Integrity

Cases	Direct references	Domestic cases	Overseas cases	Counsel's arguments	References in headnotes
Re F (1990) – Court of Appeal and House of Lords	pp.11*G*, 13*B*, 13*F*, 13*H* - 14*A* 16*F*, 17*F*, 29*G*, 70*D*, 70*E*, 72*E-G*, 73*B-D*, 76*E*	pp. 11*H*-12*A*, 14*E*, 16*C*, 27*G*, 35*B*, 36*A-B*, 36*F-G*,	pp. 35*E* (USA), 35*F* (Canada)	pp. 44*B*, 44*F*, 45*A*	
Re W (1992)				p. 69*E*	
Re T (1993)			pp.116*H*-117*A* (Canada)	p. 101*E*	
Bland (1993) – Court of Appeal and House of Lords	pp.821*E*, 822*A*, 822*G*, 828*E*, 829*E*, 859*D*, 880*E*, 883*E*, 884*B*, 891*D*, 891*F*, 892*C*,			pp. 838*D* , 846*H*, 848*C*, 848*H*, 849*A*, 849*B*, 849*C*, 849*D*, 850*B*, 850*C*, 850*D*, 850*G*,	p.789*H*
Re C (1994)					
Croydon (1995)					
Re MB (1997)	pp. 443-4,		p.444 (USA)		p.426
St. George's (1999)	pp. 26*H*, 27*A*, 44*D*, 44*E*, 46*H*, 50*G*, 50*H*,		p. 47*E* (USA), 49*C* (Canada)	p.32*B*,	
Re A (2001)	pp. 165*D*, 177*E*, 184*B-C*, 189*H*, 190*B*, 199*F*, 215*A*,218*B*, 219*A*, 240*E*, 249*G*,251*H*, 255*H*, 257*C*	pp. 176*E-F*, 177*D*,	p. 176*H* (USA)		
NHS Trust A (2001)	p.361*F* (x 2)			p.351*E-F*	
Re AK (2001)					
Pretty (2002)	p. 818*C*	pp., 813*G*	p.819*G* (Canada)		804*H*
Re B (2002)		paras.17. 23, 24			
Wilkinson (2002)	pp.427*D*, 427H, 428*A*, 433*D*	pp. 427*B*			
Razgar (2004)	p.382*F*				
Burke (2005)	pp. 446*F*, 448*E*, 466*F*, 469*A*, 472*H*, 482*A*, 495*C*	p.467*G*			
Re Z (2005)					

W Healthcare Trust (2005)	p.838*D-E* (x2)				
Burke (2006)					
Purdy (2009)	Paras. 34, 35, 42, 47 (x2), 55, 57, 58				
Purdy (2010)	p.397*C-D*				
D Borough Council (2011)					
Re A (2011)					p.61*G*
Re M (2011)	Para.95 (x2)				

4. Self-determination

Cases	Direct references	Domestic cases	Overseas cases	Counsel's arguments	Headnotes
Re F (1990) – Court of Appeal and House of Lords	pp.44*H*-45*A*, 45*E-F*, 73*C*				
Re W (1992)				pp.69*E*, 70*B-C*, 71*D-E*	
Re T (1993)	pp.112*E*		pp. 116*H*-117*A*		
Bland (1993) – Court of Appeal and House of Lords	pp. 816*F*, 819*C-D*, 820*G*, 821*E*, 822*E*, 826*F*, 826*H*, 827*A*, 827*B*, 827*D*, 827*G*, 827*H*, 828*C*, 829*F*, 829*H*-830*A*, 838*A-B*, 839*A*, 842*A-B*, 864C, 848*C-D*, 849*C-D*, 849*F*, 852*A*, 864*C-D*, 864*D-E*, 865*B*				
Re C (1994)	pp. 290*B* , 290*E*, 295*D-E*				
Croydon (1995)					
Re MB (1997)	p.443				
St. George's (1999)	pp.35*C*, 35*G* (x2), 44*A*, 44*B*, 46*H*, 47*F*, 52*B*				
Re A (2001)	pp. 176*H*, 177C, 177*F*, 248*D-E*, 255*E*				
NHS Trust A (2001)	pp.350*A*, 361*F*				
Re AK (2001)		pp.133-4 (x3)			
Pretty (2002)	pp. 810*F*, 811*A-B*, 817*E-F*, 817*G-H*, 842*B*, 842*G-H*, 846*E*,			pp. 804*H*, 805*A*, 805*F*, 808*E*	pp.800*E*,800*G*
Re B (2002)	paras. 47, 70, 95	paras. 19, 23, 25,			
Wilkinson (2002)	pp. 427*D*,				
Burke (2005)	pp.443*B-C*, 443*E-F*, 469*A*				

Re Z (2005)	pp.963*C*,. 965*C*, 965 (x2)				
W Healthcare Trust (2005)		p.839*G*			
Burke (2006)	pp.296*F*, 296*G*, 298*F*				
Purdy (2009)					
Purdy (2010)	pp. 400*E-F*, 401*F-G*, 404*A-B*, 405*A*	pp. 389*B-C*			
D Borough Council (2011)					
Re A (2011)					
Re M (2011)	para. 62				

5. Freedom of Choice

Cases	Direct references	Domestic cases	Overseas cases	Counsel's arguments	Headnotes
Re F (1990) – Court of Appeal and House of Lords					
Re W (1992)					
Re T (1993)	pp. 102*C*, *102D-E*, 102*E*, 102*F*, *102G*, 102*H*, 102*H*-103*A*, 103*B-D*, 111*G*, 112*B*-C113*D*, 115*F-G*, 116F-*G*, 120*H*-121*A*, 122*C*		pp. 116*H*-117*A* (Canada)	p.98*F*	
Bland (1993) – Court of Appeal and House of Lords	pp. 817*A*, 828*F*, 829*H*,830*A* 891G-*H*, 830*E*, 830*G*, 891*H*			p.842*E*	p.790*B*
Re C (1994)	pp.293*A*, 295*C*	p. 294*E*			
Croydon (1995)					
Re MB (1997)	pp.431, 432, 436, , 444(x3)	pp. 433, 435, 440	pp. 443-444 (USA)		
St. George's (1999)		pp. 44*F*, 45*E*,	p.49*D* (Canada)	p.34*C*,	
Re A (2001)		pp.177*A*, 177*E-F*			
NHS Trust A (2001)					
Re AK (2001)					
Pretty (2002)	pp.810*F*, 817*F*, 834*G-H*, 835*H*		pp. 819*B* (Canada), 819*G* (Canada)		
Re B (2002)	paras., 68, 69, 70	paras. 18, 19, 20, 22, 23	paras.21 (USA)		
Wilkinson (2002)					
Burke (2005)	pp. 430*E-F*, 443B-*C*Q, 443*E-F*, 443*H*-444AQ, 444A-*B*Q,				

	444*B-C*,447B-*C*, 453*F*Q, 465*C*, 482*D*, 494*D-E*				
Re Z (2005)					
W Healthcare Trust (2005)					
Burke (2006)	pp.301*C*, 301*F*				
Purdy (2009)					
Purdy (2010)	pp. 388*F*, 388*F*-389*A*, pp.389*B-C*Q, 389*F*, 397*B-C*Q, 397*C-D*Q, 397*G*, 398*C-D*, 398*H*-399*A*, 400*E-F*				

6. Dignity

Cases	Direct references	Domestic cases	Overseas cases	Counsel's arguments	Headnotes
Re F (1990) – Court of Appeal and House of Lords					
Re W (1992)					
Re T (1993)					
Bland (1993) – Court of Appeal and House of Lords	pp. 802*F*, 805*D*, 808*A*, , 826*F-G*, 827*C*, 829*F*, 830*C*, 830*D*, 830*F-G*856*H*, 861*E-F*, 869*D-E*, 877*G-H*, 879-880*A*, 897*B-C*		821*G-H* (USA), 822*B-C* (New Zealand)	pp.838*C-D*, 846*G-H*, 848*D-H*, 849*A-D*, 850*B-C*, 850*F-G*, 851*G*, 852*F*, 852*H*, 853*A*,	pp.789*C*, 794*G-H*,
Re C (1994)	p. 294*C*				
Croydon (1995)					
Re MB (1997)	p.432				
St. George's (1999)			p.955 (Canada)		
Re A (2001)	pp., 182*D-E*, 184*B-C*, 186*B*, 188*C*, 196*A*, 197*A-B*, 203*C-D*, 258*D*				pp. 148*G-H*
NHS Trust A (2001)				p. 350*C*, 362*F*,	
Re AK (2001)	p.137				
Pretty (2002)	pp. 807*E-F*, 817*F*, 822*H*-823*A*, 827*G*, 832*E-G*, 842*C-D*, 848*E-F*		812*G-H* (ECtHR) , 819*G* (Canada), 820*G* (Canada)		pp. 804*D*
Re B (2002)	paras.45, 62				
Wilkinson (2002)		p.421*C*			
Razgar (2004)					
Burke (2005)	pp.436*E*, , 443*D*, 444*E-H*, 445*C*, 445*E*, 445*F-H*,	pp. 443*B-C*, 453*E-*	pp. 474*E* (ECtHR)		

	446*H*, 447*D*, 448*C*, 448*F-H*, 449*E-F*, 450*F-H*, 451*C-D*, 451*E*, 453*C*, , 453*G*, 465*B*, 465*E*, 466*E-F*, 467*B-C*, 468*G-H*, 469*A*, 469*C-E*, 470*C-D*, 471*F*, 473*H*-474*A*, , 474*D*, , 479*D-E*, 481*B-C*, 481*D*, 481*E*, 481*F*, 481*F*-482*A*, 483*A*, 494*D-E*, 494*E-F*, 494*G*, 494*C*, 494*E*, 497*B-E*,	*F*, 466*B*, 474*C*			
Re Z (2005)	p. 963*C-D*				
W Healthcare Trust (2005)	p.840*E*				
Burke (2006)	p.297*F-G*				
Purdy (2009)	paras. 7, 33, 38, 42, 47, 56				
Purdy (2010)	p.389*D*, 392*G*, 399*E*			pp.353*C*, 354*C*,	
D Borough Council (2011)					
Re A (2011)	p.85*F*				
Re M (2011)	paras. 24, 35, 61, 95, 119, 199, 217, 225, 239 (heading)240, 241, 247	p.ara. 64			

7. Privacy

Cases	Direct references	Domestic cases	Overseas cases	Counsel's arguments	Headnotes
Re F (1990) – Court of Appeal and House of Lords	pp.21*F*, 45*B* , 61*C*				
Re W (1992)	p.77*H*	p. 86*D* (Latey Committee Report)			
Re T (1993)	p.102*B*				
Bland (1993) – Court of Appeal and House of Lords	pp.821*E*, 828*E*, 829*E-F* , 894*E-F*		pp. 821*G* (USA), 822*B* (New Zealand),	pp. 846*H*, 848*A-D*, 848*E-G*, 848*H*, 849*A-D*, 850*B*, 850*F-G*, 851*G*, 851*G-H*, 852*A*, 852*E-F*, 853*A-B*	
Re C (1994)					
Croydon (1995)	p.139*H*-140*A*				
Re MB (1997)	p.442				
St. George's (1999)			p.49*C* (Canada)		
Re A (2001)	pp. 156*B*, 156*C*, 194*A*				
NHS Trust A (2001)					
Re AK (2001)					
Pretty (2002)	pp. 800E, 817D-E, 817G, 818B, 821B-C, 821D- F, 835E-G, 836C-D, 846B-C, 846E-F			p. 807*G*	p. 800*E*
Re B (2002)					
Wilkinson (2002)					pp. 419*E*, 428*A* ,

					432*G*
Burke (2005)	pp.440*B* 445*F-H*, 446*B-D*, 446*E-F*,	pp. 445C, 492E, 491A-*B*	pp. 446*A-B* (ECtHR), 448D-*F* (ECtHR), 469*C-F* (ECtHR),		
Re Z (2005)					
W Healthcare Trust (2005)					
Burke (2006)	p.306*E-F*				
Purdy (2009)	para. 32[13] (x2), 35[23],				
Purdy (2010)	pp. 386*C-H*, 387*G*, 388*C*-391*G*, 393*C*, 397*C*, 397*G*, 399*D*, 400*F*			pp.350*C*, 351*C*, 353*A*, 364*H*, 365*A*, 366*C*,	pp. 345*F*, 345*G*
D Borough Council (2011)		paras. 32[27], 33[42]			
Re A (2011)	paras. 3, 77				
Re M (2011)	para. 261 (x2)				

8. Physical Sovereignty

Cases	Direct references	Domestic cases	Overseas cases	Counsel's arguments	Headnotes
Re A (2001)	pp. 219*A-B*, 249*C*, 255*E*, 258*H*				

9. Freedom from unwanted interference

Cases	Direct references	Domestic cases	Overseas cases	Counsel's arguments	Headnotes
Re F (1990A)		p.12*C*			
St George's (1999)		pp.951, 953, 954, 957-8			
Re A (2001)		p.176*E-F*			
Re B (2002)		para. 16			

Appendix 3 – Academic literature in the medical law reports

Cases/literature	Classical legal	Contemporary legal textbooks, articles and reports	Non-legal articles and documents
Re F (1990) – Court of Appeal and House of Lords	Blackstone (1830) (p.12A); Hawkins and Curwood (1824) (pp.15B, 36C);	Keeton (1984) (p.74G)	
Re W (1992) – Court of Appeal		Bainham (1992) (p.75A-D); Thornton (1992) (p.75A-D); Dyer (1992) (p.75A-D); Brazier (1992) (p.75A-D)	Department of Health (1991)(p.75C); Latey (1967) (pp.77F, 86C)
Re T (1993) – Court of Appeal			Mill (1859) (Counsel's submission at p.98G)
Bland (1993) – Court of Appeal and House of Lords	Coke (1797) (p.853F (CS))	Beynon (1982) (p.898B); Williams (1983a) (pp.866B, 882C, 895E); Kennedy (1988) (p.863G; 868C, 895E); Skegg (1984) (p.882A-C, 895E-F); Gunn & Smith (1985) (p.898B); Smith (1988) (p.898B); Smith (1992) (p.853F (CS)); "Medical Technology (1990) (p.886H).	Berlin (1969) (p.830D-F); LRCC (1982) (pp.811F, 852A (CS); 872F-H); BMA (1992)(pp.812C, 824C, 870F-G, 875H, 885A); UKCCN (1992) (p.898F); Dworkin (1993) (p.826A)
Re C (1994)			
Re MB (1997) – Court of Appeal		Kennedy and Grubb (1994) (p.437)	Law Commission (1974) (p. 442; RCOG (1994) (p.438)
St. George's (1999) – Court of Appeal		Powers et al. (1994)(p.40G-H)	
Re A (2001) – Court of Appeal	Bacon (1630)(p.221E-G); Hale (1736) (p. 200H, 212G); Coke (1797) (p.210F-G, 213B); Hale (1800) (p.221A-D, 222C); Blackstone (1830) (p.178C); Blackstone (1857) (p. 200H, 212G, 221D-E, 222C); Stephen (1883) (p. 223E-G; 224D; 225C-D) ; Stephen (1887) (p.225C-D); Bracton (1968) (p.220G); Archbold (2000) (p.210H, 211B, 212G)	Royal Commission No.2 (1836) (p. 222E-F); Royal Commission No.4 (1839) (p.222G-H); Williams (1958) (p. 213C); Fletcher (1973) (p. 236G); Law Commission (1974) (p. 226A); Law Commission (1977) (p.226B); Cross (1978) (p. 226 D); Huxley (1978) (p.226 C-D);Williams (1978) (p.226C-D); Beynon (1982) (p. 247G); Williams (1983b) (pp.226D-227F, 238C-D, 240A); Simpson (1984) (p. 224C); Gunn & Smith (1985) (p.247G); Law Commission (1985) (p.227F-G, 233C);Annas (1987) (p.197A-B, 209H,	Hobbes (1650) (p.213A); Locke (1689) (p.213A); Cicero (1913) (p.229B); Hobbes (1968) (pp.221G-221A); Hoyle & Thomas (1989) (p.206G); HoL (1994) (p.186E-F); Hsu et al (1995) (p.209E); Thomasma et al (1996) (p. 218F, 252E); Freeman et al (1997) (p. 208C-D); Atwell (1998) (p.206G-H); Wilcox et al (1998) (p.208 H)

		218F, 229G-230A, 241D); Kennedy (1988) (p.189A-B);Smith & Hogan (1988) (p. 247G); Law Commission (1989) (p.228B); Smith (1989) (p.229B-D, 237H-238B, 252E); Gardner (1991) (p. 230B); Finnis (1993) (p.184F-G); Law Commission (1992) (p. 228C, 239H); Kennedy & Grubb (1993) (p.184F-G); Kennedy & Grubb (1994) (p.184F-G; 217E); Keown (1997) (p.184F-G, 186B, 187A, G-H; 197A); Sheldon & Wilkinson (1997) (pp.207G, 241C); Ashworth (1999) (p. 230E); Smith & Hogan (1999) (p. 230D);	
Pretty (2002) – House of Lords	Blackstone (1769) (p. 839C);	Williams (1983b) (p.830D, 831D); CLRC (1980) (p. 822D, 823F); Marston (1993) (p. 133F); Otlowski (1997) (pp. 831E, 832C); Vickers (1997) (p. 832E); Clayton & Tomlinson (2000) (p. 811D);	Boswell (1970); Dworkin (1993) (p. 831E); HoL (1994) (pp. 822G, 823G, 829F-G, 838E, 842C-D, 845A); Response (1994) (pp. 844C, 845A); Keown (1995) (pp. 831E, 832E); Johnson & Symonides (1998) (p. 833B); Council of Europe (1999) (pp.822H-823A, 832E, 845E-H); Glendon (2001) (p. 833B); UNHRC (2001) (p.832D); Warnock (2006) (p. 831E)
Wilkinson (2002) – Court of Appeal		Law Commission (1995) (p.443D); DoH (1999) (p 446H);Jones (1999) (p. 435H-436A); LCD (1999) (p. 443D); Powers et al (Powers et al; 2000) (p. 437 F)	Council of Europe (1998) (p. 433A); Grisso & Applebaum (1998) (p. 427A-B)
Re B (2002)			Gardner et al (1985) (para. 63); Atkins (2000) (para. 81-83)
Re Z (2005)			
Burke (2005)		Hale (2004))(p. 451*B-D*; 474*H*); Kennedy & Grubb (2004) (p. 461*A-C*; 484*D*, 484*H*);	GMC (2002) (pp. 430*D*,431*E;* 499G); BMA (2001) (p. 463*E*-464*A*).
Burke (2006)			GMC (2002) (p. 287*F;*290*H;* 294*C;* 294*D*; 294*E*)
Purdy (2009)	Nil	Nil	Nil

Purdy (2010)		Williams (1965) (p. 383*F-G*); Hall (1972) (p. 383*H*); Law Commission (1998) (p. 392*D*; 360*G*); Smith & Hogan (2008) (p. 379*D*); Hirst (2009) (p. 382*D-E*; 384*D*)	National Centre for Social Attitudes (2007) (p. 399*C*).
Re A (2011)	Nil	Nil	Nil
D Borough Council (2011)	Nil	Nil	Nil
Re M (2011)	Nil	Nil	Nil

Appendix 4 – criteria for selecting law reports

Case name	Year	'Stigmata'	Significant Academic Commentary	Significant Judicial Discussion	Elemental Uses of autonomy
Re M	**2011**	✓	✓	✓	✓
A London Local Authority *v JH*					
Wright (A Child) v Cambridge Medical Group (A Partnership)			✓		
D Borough Council	**2010**	✓	✓	✓	✓
R (on the application of Purdy) v Director of Public Prosecutions*		✓	✓	✓	✓
Re A		✓	✓	✓	✓
D County Council v LS		✓		✓	✓
Yearworth v North Bristol NHS Trust		✓	✓	✓	✓
L v Human Fertilisation and Embryology Authority	2008	✓		✓	✓
Trust A v H (An Adult Patient)	2006	✓			✓
*R. (on the application of B) v S (Responsible Medical Officer, Broadmoor Hospital)**				✓	✓
R. (on the application of Axon) v Secretary of State for Health			✓	✓	✓
An NHS Trust v D	2005				
R. (on the application of Burke) v General Medical Council*		✓	✓	✓	✓
R. (on the application of B) v Haddock				✓	✓
R. (on the application of B) v SS					
Chester v Afshar		✓	✓	✓	✓
Re Z	2004				
*Portsmouth NHS Trust v Wyatt**		✓	✓		

Appendix 4 – continued

Name of case	Year	'Stigmata'	Significant academic commentary	Significant judicial Discussion	Elemental Uses of autonomy
W Healthcare NHS Trust v H	2004	✓	✓		
*Evans v Amicus Healthcare Ltd**		✓	✓		✓
X NHS Trust v T (Adult Patient: Refusal of Medical Treatment)					
Rees v Darlington Memorial Hospital NHS Trust		✓			✓
R. (on the application of PS) v G (Responsible Medical Officer)					✓
HE v A Hospital NHS Trust			✓		✓
R. (on the application of Wooder) v Feggetter	2002		✓		✓
Re W (Adult: Refusal of Medical Treatment),					✓
B (Consent to Treatment: Capacity)		✓	✓	✓	✓
R. (on the application of Pretty) v DPP	2001	✓	✓	✓	✓
R. (on the application of Wilkinson) v Broadmoor Hospital			✓		✓
NHS Trust A v M*; *NHS Trust B v H		✓	✓	✓	✓
Re A (Children) (Conjoined Twins: Medical Treatment)		✓	✓	✓	✓
Re AK (Adult Patient) (Medical Treatment: Consent)		✓	✓	✓	✓
McFarlane v Tayside Health Board	1999	✓			✓
St. George's Healthcare N.H.S. Trust v S. Regina v. Collins and Others, Ex parte S		✓	✓	✓	✓

Appendix 4 – continued

Name of case	Year	'Stigmata'	Significant academic commentary	Significant judicial discussion	Elemental uses of autonomy
R. v Bournewood Community and Mental Health NHS Trust Ex p. L			✓		✓
Re MB	**1997**	✓	✓	✓	✓
C (Adult: Refusal of Medical Treatment),	**1994**	✓	✓	✓	✓
Airedale NHS Trust v Bland*	**1993**	✓	✓	✓	✓
Re T (Adult: Refusal of Treatment)		✓	✓	✓	✓
Re W (A Minor) (Medical Treatment: Court's Jurisdiction	1992	✓	✓	✓	✓
Re F (Adult)*	1990	✓	✓	✓	✓

Note that 18 cases are highlighted. The cases of *Re F*, *Bland*, *Burke* and *Purdy* comprise 2 judgements each a different levels of the court hierarchy (cf. p. 74 of this thesis).

References

Allan, G. (2003) A Critique of Using Grounded Theory as a Research Method. *The Electronic Journal of Business Research Methods* 2(1): 1-10.

Altheide, D. L. (1996) *Qualitative Media Analysis.* London: Sage.

Anderson, J. & Honneth, A. (2005) Autonomy, Vulnerability, Recognition, and Justice. In: Christman, J & Anderson, J. eds. *Autonomy and the Challenges to Liberalism: New Essays*. New York: Cambridge University Press: 127-149.

Andorno, R. (2009) Human dignity and Human Rights as a Common Ground for a Global Bioethics. *Journal of Philosophy and Medicine* 34: 223 – 240.

Archard, D. (2008) Informed Consent: Autonomy and Self-Ownership. *Journal of Applied Philosophy* 25(1): 19-34.

Archer, M. S. (1995) *Realist Social Theory: The Morphogenetic Approach*. Cambridge: Cambridge University Press.

Archer, M. S., Collier, A. & Porpora, D. V. (2004) *Transcendence: Critical Realism and God*. London: Routledge.

Arendt, H. (1973) *On Revolution.* London: Penguin.

Arpaly, N. (2002) *Unprincipled Virtue: An Inquiry into Moral Agency*. Oxford: Oxford University Press.

Atiyah, P. S. (1985) Common Law and Statute Law. *The Modern Law Review* 48(1): 1-28.

Atkins, K. (2000) Autonomy and the Subjective Character of Experience. *Journal of Applied Philosophy* 17 (1): 71-79.

Atkinson, R. (2002) Judgment Writing. In: *Australasian Institute of Judicial Administration Conference*. Brisbane, Australia.

Aveyard, H. (2000) Is There a Concept of Autonomy That Can Usefully Inform Nursing Practice? *Journal of Advanced Nursing* 32(2): 352-58.

Bach, M. & Kerzner, L. (2010) *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, prepared for the Law Commission of Ontario, October 2010.

Baier, A. (1986) Trust and Antitrust. *Ethics* 96 (2): 231-260.

Baier, A. (1994) *Moral Prejudices: Essays in Ethics.* Harvard: Harvard University Press.

Bailey-Harris, R. J. (1998) Pregnancy, Autonomy and Medical Treatment. *Law Quarterly Review* 114: 550-555.

Bainham, A. (1992) The Judge and the Competent Minor. *Law Quarterly Review*: 108: 194-200.

Baker, J. H. (2000) *The Common Law Tradition: Lawyers, Books, and the Law.* London: Hambledon Press.

Barak, A. (2008) *The Judge in a Democracy*. Princeton, NJ: Princeton University Press.

Beauchamp, T. L. & Childress, J. F. (1979) *Principles of Biomedical Ethics*. Oxford: Oxford University Press.

Beauchamp, T. L. & Childress, J. F. (1994) *Principles of Biomedical Ethics*. 4th edn. Oxford: Oxford University Press.

Beauchamp, T. L. & Childress, J. F. (2001) *Principles of Biomedical Ethics*. 5th edn. Oxford: Oxford University Press.

Beauchamp, T. L. & Childress, J. F. (2009) *Principles of Biomedical Ethics*. 6th edn. Oxford: Oxford University Press.

Beck, U. & Beck-Gernsheim, E. (2002) *Individualization: Institutionalized Individualism and its Social and Political Consequences.* London: Sage.

Benkler, Y. (2001) Siren Songs and Amish Children: Autonomy, Information, and Law. *New York University Law Review* 76: 23- 113.

Berlin, I. (1969) *Four Essays on Liberty*. Oxford: Oxford University Press.

Beyleveld, D. & Brownsword, R. (2001) *Human Dignity in Bioethics and Biolaw.* Oxford: Oxford University Press.

Bhaskar, R. (2008) *A Realist Theory of Science*. Abingdon: Routledge.

Biggs, H. (2003) A Pretty Fine Line: Life, Death, Autonomy and Letting it B. *Feminist Legal Studies*, 11 (3): 291-301.

Bingham, T. H. (2000) *The Business of Judging: Selected Essays and Speeches*. Oxford: Oxford University Press

Bingham, T. H. (2010) *The Rule of Law.* London: Allen Lane.

Bobbio, N. (1996) *The Age of Rights.* Translated by A. Cameron. Cambridge: Polity Press.

Bogdanor, V. (2009) *The New British Constitution*. Oxford: Hart.

Bourdieu, P. & Wacquant, L. J. D. (1992) *An Invitation to Reflexive Sociology*. Chicago: University of Chicago Press.

Bowling, A. & Ebrahim, S. (2005) *Handbook of Health Research Methods: Investigation, Measurement and Analysis*. Maidenhead: Open University Press.

Bowman, K. (2004) What are the Limits of Bioethics in a Culturally Pluralistic Society? *Journal of Law, Medicine and Ethics* 32: 664-669.

Brandom, R. B. (1994) *Making it Explicit: Reasoning, Representing and Discursive Commitment*. Cambridge, Massachusetts: Harvard University Press.

Brandom, R. B. (2002a) Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms. *European Journal of Philosophy* 7 (2): 164-189.

Brandom, R. B. (2002b) *Tales of the Mighty Dead: Historical Essays in the Metaphysics of Intentionality.* Cambridge, Massachusetts.

Brandom, R. B. (2009) *Reason in Philosophy: Animating Ideas.* Cambridge, Massachusetts: Belknap Press.

Bratton, M.Q. & Chetwynd, S. B. (2004) One into Two Won't God: Conceptualizing Conjoined Twins. *Journal of Medical Ethics* 30 279-285.

Bratza, N. (2009) The Tanner Lectures on Human Values 2009. *Human Rights and Bioethics.* Introduction to General Discussion. 20-21 February, 2009. Brasenose College, Oxford.

Braun, A. (2006) Professors and Judges in Italy: It Takes Two to Tango. *Oxford Journal of Legal Studies* 26 (4): 665-681.

Braun, A. (2010) Burying the Living? The Citation of Legal Writings in English Courts. *American Journal of Comparative Law* 58 (1): 27-52.

Brazier, M. (1992) *Medicine, Patients and the Law*. 2nd ed. London: Penguin.

Brazier, M. (2006) Do No Harm: Do Patients Have Responsibilities Too? *Cambridge Law Journal* 65 (2): 397-422.

Brazier, M. (2008) The Age of Deference: A Historical Anomaly. In: Freeman, M. ed. *Law and Bioethics*. Oxford: Oxford University Press: 464-476.

Brazier, Margaret & Glover, N. (2000) Does Medical Law have a Future? In Hayton, D. eds. *Law's Future(s)*. Oxford: Hart: 371-388.

Brazier, M. & Miola, J. (2000) Bye-bye Bolam: A Medical Litigation Revolution? *Medical Law Review*, 8 (1): 85.

British Medical Association (2001) *Withholding and Withdrawing Life-Prolonging Medical Treatment: Guidance for Decision-Makers.*2nd edn. London: BMA.

Brody, B. A. (1990) Quality of Scholarship in Bioethics. *Journal of Medicine and Philosophy* 15: 161-178.

Brownsword, R. (2003) An Interest in Human Dignity as the Basis for Genomic Torts. *Washburn Law Journal* 42: 413-487.

Bryman, A. (1988) *Quantity and Quality in Social Research*. London: Unwin Hyman.

Bryman, A. (2004) *Social Research Methods*. Oxford: Oxford University Press.

Bryman, A. & Bell, E. (2007) *Business Research Methods*. Oxford: Oxford University Press.

Bulmer, M. (1979) Concepts in the Analysis of Qualitative Data. *The Sociological Review* 27 (4): 651-677.

Burgess, R. G. & Bryman, A. (1999) *Qualitative Research*. London: Sage.

Burrows, N. & Greaves, R. (2007) *The Advocate General and EC Law*. Oxford: Oxford University Press.

Burton, F. & Carlen, P. (1979) *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State.* London: Routledge & Kegan Paul.

Buss, S. (2008) Personal Autonomy. *The Stanford Encyclopedia of Philosophy*. Zalta, E.N. ed. [online] Available from: http://plato.stanford.edu/archives/fall2008/entries/personal- autonomy/> (Accessed 24th March, 2012).

Callahan, D. (2002) A Commentary: Putting Autonomy in Its Place. *The Gerontologist* 42 (3): 129-131.

Campbell, T. (1999) Human Rights: A Culture of Controversy. *Journal of Law and Society* 26:1, 6–26.

Campbell, T. (2006) *Rights: A Critical Introduction*. Abingdon: Routledge.

Capron, A. & Michel, V. (1993) Law and Bioethics. *Loyola of Los Angeles Law Review*, 27: 25 - 40.

Carter, I. (2012) Positive and Negative Liberty. *The Stanford Encyclopaedia of Philosophy*. [online] Available at: http://plato.stanford.edu/entries/liberty-positive-negative/ (accessed 18th April, 2012).

Muñiz Castillo, M.R. (2009) *Autonomy as a Foundation for Human Development: A Conceptual Model to Study Individual Autonomy*, Maastricht Gradual School of Governance Working Paper. November 2009. Maastricht: University of Maastricht.

Channick, S. (1999) The Myth of Autonomy at the End of Life. *Villanova Law Review* 44: 577-641.

Charmaz, K. (2000) Grounded Theory: Objectivist and Constructivist Methods. In: Denzin, N. K. & Lincoln, Y. S. eds. *Handbook of Qualitative Research*. London: Sage Publications: 509–524.

Christman, J. (1988) Constructing the Inner Citadel: Recent Work on the Concept of Autonomy. *Ethics*, 99 (1): 109-124.

Claassen, R. (2010) The Place of Autonomy in a Capability Theory of Justice. *Draft Text for Presentation at Politicologenetmaal.* Leiden University, The Netherlands.

Clinch, P. & Hart, D. R. (2001) *Using a Law Library: A Student's Guide to Legal Research Skills*. London: Blackstone.

Coggon, J. (2007) Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism? *Health Care Analysis* 15(3): 235-255.

Collier, A (1994) *Critical Realism: An Introduction to Roy Bhaskar's Philosophy*. London: Verso.

Corbin, J. & Holt, N. L (2005) In: Somekh, B. & Lewin, C. eds. Research Methods in the Social Sciences. Sage: Thousand Oaks, California: 49-55.

Denning, A. T. D. (1979) *The Discipline of Law.* London: Butterworths.

Denning, A.T.D (1980) *The Due Process of Law.* London: Butterworth.

Denzin, N. K. & Lincoln, Y. S. (1994) Competing Paradigms in Qualitative Research. In: Guba, E. G. & Lincoln, Y. S. eds. *Handbook of Qualitative Research*: 105-118.

Devlin, P. (1962) *Samples of Lawmaking.* Oxford: Oxford University Press.

Dicey, A. V (1902) *Introduction to the Study of the Law of the Constitution.* 6 edn. London: Macmillan.

Doctrine Commission of the Church of England (1995) *The Mystery of Salvation*. London: Church House Publishing.

Donchin, A. (2000) Autonomy, Interdependence, and Assisted Suicide: Respecting Boundaries/Crossing Lines. *Bioethics* 14 (3): 187-204.

Donchin, A. (2001) Understanding Autonomy Relationally: Toward a Reconfiguration of Bioethical Principles. *Journal of Medicine and Philosophy* 26(4): 365-386.

Donnelly, M. (2010) *Healthcare Decision-making and the Law: Autonomy, Capacity and the Limits of Liberalism.* Cambridge: Cambridge University Press.

Drought, T. & Koenig, B. (2002) "Choice" in End-of-Life Decision Making: Researching Fact or Fiction? *The Gerontologist* 42 (3): 114-128.

Dryden, J (2010) Autonomy: An Overview.. *Internet Encyclopaedia of Philosophy*. [online] Available from: http://www.iep.utm.edu/autonomy/#H5 (accessed 18th April, 2012).

Dunn, M. and Foster, C. (2010) Autonomy and Welfare as Amici Curiae. *Medical Law Review,* 18(1): 86-95.

Duxbury, N. (2001) *Jurists and Judges: An Essay on Influence.* Oxford: Hart Publishing.

Duxbury, N. (2008) *The Nature and Authority of Precedent*. Cambridge: Cambridge University Press.

Dworkin, G. (1988) *The Theory and Practice of Autonomy*. Cambridge: Cambridge University Press.

Dworkin, R. (1986) *Law's Empire.* Oxford: Hart.

Dworkin, R. (1996a) Objectivity and Truth: You'd Better Believe It. *Philosophy & Public Affairs* 25 (2): 87-139.

Dworkin, R. B. (1992) Medical Law and Ethics in a Post-Autonomy Age. *Indiana Law Journal* 68: 727-742.

Dworkin, R.B. (1996) *Limits: The Role of the Law in Bioethical Decision-making*. Bloomington, Ind.: Indiana University Press.

Dworkin, R. B. (2003) Getting What We Should From Doctors: Rethinking Patient Autonomy and the Doctor-Patient Relationship. *Health Matrix* 13: 235-296.

Dyer, C. (1992) *Doctors, Patients and the Law*. ed. Oxford: Wiley-Blackwell.

Elliott, C. (1999) *A Philosophical Disease: Bioethics, Culture, and Identity*. London: Routledge.

Englehardt, T. H. (2001) The Many Faces of Autonomy. *Health Care Analysis* 9: 283-297.

Epp, C. R. (1998) *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

Fagan, A. (2004) Challenging the Bioethical Application of the Autonomy Principle within Multicultural Societies. *Journal of Applied Philosophy* 21 (1): 15-31.

Fan, R. (1997) Self-determination vs. Family-determination: Two Incommensurable Principles of Autonomy. *Bioethics* 11 (3-4): 309-322.

Faden, R. R., Beauchamp, T. L. & King, N. M. P. (1986) *A History and Theory of Informed Consent*. Oxford: Oxford University Press.

Feinberg, J. (1973) The Idea of A Free Man. In: Doyle, J.F. ed. *Educational Judgments: Papers in the Philosophy of Education*: 143-72.

Feinberg, J. (1986) *The Moral Limits of the Criminal Law*. Oxford: Oxford University Press.

Feldman, D. (1999) Human Dignity as a Legal Value: Part 1. *Public Law*: 682-702.

Feldman, D. (2002) *Civil Liberties and Human Rights in England and Wales*: Oxford: Oxford University Press.

Fineman, M. A. (2004) *The Autonomy Myth: A Theory of Dependency*. New York: The New Press.

Foster, C. (2009) *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law.* Oxford: Hart.

Foster, C. (2011) *Human Dignity in Bioethics and Law.* Oxford: Hart.

Fradella, H. F., Fogarty, A. & O'Neill, L. (2002) Impact of Daubert on the Admissibility of Behavioral Science Testimony. *The Pepperdine Law Review* 30: 403-444.

Frankfurt, H. G. (1971) Freedom of the Will and the Concept of a Person. *The Journal of Philosophy* 68 (1): 5-20.

Freeman, M. (2000) Introduction: Medicine, Health and the Law at the Millennium's End. In: M. Freeman & A. Lewis, eds. 3 *Current Legal Issues: Law and Medicine*. Oxford: Oxford University Press: xxix-xxxv.

Fredman, S. (2008) *Human Rights Transformed: Positive Rights and Positive Duties*. Oxford: Oxford University Press.

Freyenhagen, F. (2009) Personal Autonomy and Mental Capacity. *Psychiatry* 8(12): 465-67.

Fukuyama, F. (2002) *Our Posthuman Future: Consequences of the Biotechnology Revolution*. New York: Farrar, Straus and Giroux.

Gadamer, H. G. (1989) *Truth and Method*. Translated from German by Weinsheimer, J. & Marshall, D. G. New York: Crossroad.

Gaylin, W. & Jennings, B. (1996) *The Perversion of Autonomy: The Proper Uses of Coercion and Constraints in a Liberal Society*. New York: Free Press.

Gaylin, W. & Jennings, B. (2003) *The Perversion of Autonomy*: *The Proper Uses of Coercion and Constraints in a Liberal Society*. Washington, D.C.: Georgetown University Press.

Gearty, C.A. (1997) The United Kingdom. In: C. A. Gearty ed. *European Civil Liberties and the European Convention on Human Rights*. The Hague: Martinus Nijhoff: 53-103.

Geertz, C. (1973) *The Interpretation of Cultures: Selected Essays.* New York: Basic Books.

General Medical Council (2002) *Withholding and Withdrawing Medical Treatments.* London: GMC.

Giddens, A. (1998) *The Third Way: The Renewal of Social Democracy*. Cambridge: Polity Press.

Gilbar, R. (2005) *The Status of the Family in Law and Bioethics : The Genetic Context*. Aldershot: Ashgate.

Gilbar, R. (2011) Family Involvement, Independence, and Patient Autonomy in Practice. *Medical Law Review* 19 (2): 192-234.

Gilligan, C. (1982) *In a Different Voice.* Cambridge, Massachusetts: Harvard University Press.

Gillon, R. (1985) *Philosophical Medical Ethics*. Chichester: Wiley.

Gillon R. (2003). Ethics needs principles--Four Can Encompass the Rest--And Respect for Autonomy Should Be "First Among Equals". *Journal of Medical Ethics*, 29:307-312.

Glendon, M. A. (1991) *Rights Talk: The Impoverishment of Ethical Discourse.* New York: Free Press.

Glaser, B. G. & Strauss, A. L. (1967) *The Discovery of Grounded Theory: Strategies for Qualitative Research.* Chicago: Aldine Publishing Company.

Glenn, H. P. (2007) *Legal Traditions of the World: Sustainable Diversity in Law*. 3rd edn. Oxford: Oxford University Press.

Goff, L. (1987) Judge, Jurist and Legislature. *Denning Law Journal*, 2 (1): 79-95.

Gostin, L. O. (2012) Foreword in Honour of a Pioneer of Medical law: Professor Margaret Brazier OBE QC FMEDSCI. *Medical Law Review*, 20 (1): 1-5.

Grubb, A. (1987) The Emergence and Rise Of Medical Law And Ethics. *The Modern Law Review,* 50 (2): 241-267.

Grubb, A. & Kennedy, I. (2000) *Medical Law.* 3rd edn. London: Butterworths.

Guba, E. G., & Lincoln, Y. S. (1994). Competing Paradigms in Qualitative Research. In N. K. Denzin, N. K. & Lincoln, Y.S. eds. *Handbook of Qualitative Research*. London: Sage: 105-117.

Gunn, M. (1994) The Meaning of Incapacity. *Medical Law Review* 2 (1): 8-29.

Habermas, J. (2003) *The Future of Human Nature*. Cambridge: Polity Press.

Hale, B. (2005) What can the Human Rights Act do for my Mental Health. *Journal of Mental Health Law* May: 7-16.

Hall, L. (1972) Territorial Jurisdiction and the Criminal Law. *Criminal Law Review*: 276- 287.

Hall, M. A. & Wright, R. F. (2008) Systematic Content Analysis of Judicial Opinions. *California Law Review* 96(1): 63-122.

Harmon, S. H. E. & Laurie, G. T. (2010) Yearworth vs North Bristol NHS Trust: Property, Principles, Precedents and Paradigms. *Cambridge Law Journal* 69: 476-493.

Hammersley, M. (1992) *What's Wrong With Ethnography?* London: Routledge.

Harris, J. (1985) *The Value of Life.* London: Routledge & Kegan Paul.

Harris, J. & Keywood, K. (2001a) Ignorance, Information and Autonomy. *Theoretical Medicine and Bioethics* 22 (5): 415-436.

Hart, H. L. A. (1961) *The Concept of Law.* Oxford: Clarendon Press.

Hart, H. L. A. (1979) Between Utility and Rights. *Columbia Law Review* 79: 828.

Hart, H. L. A. & Honore, T. (1985) *Causation in the Law.* 2nd ed. Oxford: Clarendon.

Hauerwas, S. (1986) Suffering Presence: Theological Reflections on Medicine, the Mentally Handicapped and the Church. Edinburgh: T. & T. Clark.

Hegel, G. W. F., Miller, A. V. & Findlay, J. N. (1977) *Phenomenology of Spirit*. Oxford: Clarendon Press.

Held, V. (2006) *An Ethics of Care: Personal, Political, Global.* Oxford: Oxford University Press.

Henkin, L. (1990) *The Age of Rights*. New York: Columbia University Press.

Herring, J. (2008) Caregivers in Medical Law and Ethics. *Journal of Contemporary Health Law & Policy* 25: 1-37.

Herring, J. (2010) *Medical Law and Ethics*. 3rd edn. Oxford: Oxford University Press.

Hervey, T. K. & McHale, J. V. (2005) Law, health and the European Union. *Legal Studies*, 25 (2): 228-259.

Heyd, D. (1994) *Genethics: Moral Issues in the Creation of People*. Berkeley, CA: University of California Press.

Hirst, M. (2009) Suicide in Switzerland: Complicity in England? *Criminal Law Review* 5: 335-39.

Hobbes, T. & Gaskin, J. C. A. (1996) *Leviathan*. Oxford: Oxford University Press.

Holland, J. A. & Webb, J. S. (2010) *Learning Legal Rules: A Student's Guide to Legal Method and Reasoning.* 7th ed. Oxford: Oxford University Press.

Hohfeld, W. N. (1913) Fundamental Legal Conceptions as Applied in Judicial Reasoning. *Yale Law Journal* 23: 16-59.

Holmes, O.W. (1881) *The Common Law.* Boston: Little, Brown and Co.

Holmes, O. W. (1920) *Collected Legal Papers*. New York: Harcourt, Brace and Company.

Honore, A. (1999) Medical Non-disclosure, Causation and Risk: Chappel v Hart. *Torts Law Journal* 7: 1-9.

Honneth, A. (1995) *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge: Polity Press.

Hope, R. A. (1991) The Birth of Medical Law. *Oxford Journal of Legal Studies*, 11 (2): 247-253.

Husted J. (1997) Autonomy and a Right Not to Know. In Chadwick R., Levitt M., Shickle D., eds. The Right to Know and the Right not to Know. Aldershot: Ashgate: 55–68.

Ignatieff, M. (2000) *The Rights Revolution*. Toronto: Anansi.

Ikaheimo, H. (2002) On the Genus and Species of Recognition. *Inquiry* 45 (4), 447 - 462.

Jackson, E. (2000) Abortion, Autonomy and Prenatal Diagnosis. *Social & Legal Studies* 9 (4): 467-494.

Jackson, E. (2010) *Medical Law: Text, Cases, and Materials*. 2nd edn. Oxford: Oxford University Press.

Jacobson, P. D., Selvin, E. & Pomfret, S. D. (2001) The Role of the Courts in shaping Health Policy: an Empirical Analysis. *The Journal of Law, Medicine & Ethics* 29 (3-4): 278-289.

James, T. (2008) The Appeal to Law to Provide Public Answers to Bioethical Questions: It All Depends What Sort of Answers You Want. *Healthcare Analysis* 16: 65-76.

Jennings, B. (1998) Autonomy and Difference: The Travails of Liberalism in Bioethics.

In DeVries, R. G. & Subedi, J. eds. *Bioethics and Society: Constructing the Ethical Enterprise*. Upper Saddle River, N.J.: Prentice Hall: 258-69.

Jennings, W. (2007) Autonomy. In: Steinbock, B. ed. *The Oxford Handbook of Bioethics*. Oxford: Oxford University Press: 72-89.

Johnson, C., Dandeker, C. & Ashworth, C. (1984) *The Structure of Social Theory: Dilemmas and Strategies*. London: Macmillan.

Jones, M. (1999) Informed Consent and Other Fairy Stories. *Medical Law Review* 7(2): 103-134.

Jonsen, A. R. (1998) *The Birth of Bioethics.* Oxford: Oxford University Press.

Jupp, V. (2001) Documentary Analysis. In: McLaughlin, E. and Muncie, J. eds. *The Sage Dictionary of Criminology*. London: Sage.

Kane, R. (2010) *Ethics and the Quest for Wisdom*. Cambridge: Cambridge University Press.

Kant, I. & Gregory, M. (1998) *Groundwork of the Metaphysics of Morals*. Cambridge: Cambridge University Press.

Kennedy, D. (2005) The Disenchantment of Logically Formal Legal Rationality or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought. In: Camic, C., Gorski, P. & Trubek, D. eds., *Max Weber's Economy and Society: A Critical Companion*.: Stanford, California: Stanford University Press: 322-65.

Kennedy, I. (1981) *The Unmasking of Medicine.* London: George Allen & Unwin.

Kennedy, D. & Klare, K. E. (1984) A Bibliography of Critical Legal Studies. *Yale Law Journal* 94: 461-1855.

Kennedy, I. (1988) *Treat Me Right: Essays in Medical Law and Ethics*. Oxford: Clarendon
Press.

Kennedy, I. & Grubb, A. (1994) *Medical Law: Text with Materials*. 2nd ed. London: Butterworths.

Kennedy, I. (1997) Commentary to Re MB (Medical Treatment). *Medical Law Review* 5: 317 – 325.

Kennedy, I. & Grubb, A. (2004) *Principles of Medical Law.* Oxford: Oxford University Press.

Keown, J. (1995b) *Euthanasia Examined: Ethical, Clinical and Legal Perspectives*. Cambridge: Cambridge University Press.

Klug, F. (2000) *Values for a Godless Age: The Story of the UK's New Bill of Rights*. London: Penguin.

Komar, B. M. (1923) Text-Books as Authority in Anglo-American Law. *California Law Review* 11(6): 397-422.

Kramer, A. (2003) Common Sense Principles of Contract Interpretation (And How We've Been Using Them All Along. *Oxford Journal of Legal Studies* 23 (2) 173-196.

Ladd, J. (1979) Legalism and Medical Ethics in Philosophical Sources of Medical Morality. *Journal of Medicine and Philosophy* 4(1): 70-80.

Landes, W. M. & Posner, R. A. (1987) *The Economic Structure of Tort Law.* Cambridge, Mass.: Harvard University Press.

Laster, K. (2001) *Law as Culture*. Leichardt, NSW: Federation Press.

Laurie, G. (2001) Challenging Medical-Legal Norms: The Role of Autonomy, Confidentiality and Privacy in Protecting Individual and Familial Group Rights in Genetic Information. *Journal of Legal Medicine*, 22 (1): 1-54.

Laurie, G. (2006) The Autonomy of Others: Reflections on the Rise and Rise of Patient Choice in Contemporary Medical Law. In: McLean, S. ed. *First Do No Harm: Law, Ethics and Healthcare.* Aldershot: Ashgate Publishing: 131-150.

Law, I. & Widdows, H. (2008) Conceptualising Health: Insights from the Capability Approach. *Health Care Analysis* 16: 303-14.

Law Commission (1995) *Mental Incapacity*. Report No. 231. London: HMSO.

Law Commission Report (1998) *Consents to Prosecution.* London: Report No. 255.London: HMSO.

Lord Chancellor's Department (1999) Making Decisions: The Government's Proposals for Making Decisions on behalf of Mentally Incapacitated Adults: A Report Issued in the Light of Responses to the Consultation Paper *Who decides?* London: HMSO.

Lee, S. F. (1988) *Judging Judges.* London: Faber and Faber.

Lee, S. F. (2003) *Uneasy Ethics*. London: Pimlico.

Lee, R. G. & Morgan, D. (2001) Regulating Risk Society: Stigmata Cases, Scientific Citizenship and Biomedical Diplomacy. *Sydney Law Review* 23: 297-318.

Levinson, R. & Reiss, M. J. (2003) *Key Issues in Bioethics: A Guide for Teachers.* London: Routledge.

Levinsson, H. (2008) *Autonomy and Metacognition: A Healthcare Perspective.* Lund, Sweden: Media Tryck AB.

Lincoln, Y. S. & Guba, E. G. (1985) *Naturalistic Inquiry*. London: Sage.

Lindley, N. (1885) The History of the Law Reports. *Law Quarterly Review* 1: 137-149.

Lindley, R. (1986) *Autonomy*. Basingstoke: Macmillan.

Locke, J. & Laslett, P. (1988) *Two Treatises of Government*. Cambridge: Cambridge University Press.

Loughlin, M. (2000) *Sword and Scales: An Examination of the Relationship between Law and Politics.*: Oxford: Hart.

Loughlin, M. (2003) *The Idea of Public law*. Oxford: Oxford University Press.

MacIntyre, A. C. (1981) *After Virtue: A Study in Moral Theory*. London: Duckworth.

MacIntyre, A. C. (1988) *Whose Justice? Which Rationality?* London: Duckworth.

MacIntyre, A. C. (1990) *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy and Tradition.* Notre Dame, Ind.: University of Notre Dame Press.

Mackenzie, C. & Stoljar, N. eds. (2000) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self.* Oxford: Oxford University Press.

Maclean, A. (2009) *Autonomy, Informed Consent and Medical Law: A Relational Challenge*. Cambridge: Cambridge University Press.

Margalit, A. (2001) Recognition II: Recognizing the Brother and the Other. *The Aristotelian Society Supplementary Volume* 75 (1): 127-39.

Marshall, C. & Rossman, G. B. (1995) *Designing Qualitative Research*. 2nd edn. Thousand Oaks, California: Sage.

Marshall, J. (2008) A Right to Personal Autonomy at the European Court of Human Rights. *European Human Rights Law Review* 3: 337-56.

Mason, J. (2012) Autonomous humanity? In Tribute to Margaret Brazier. *Medical Law Review* 20 (1): 150-156.

Mason, J. K., McCall Smith, A. & Laurie, G. T. (2006) *Mason & McCall Smith's Law and Medical Ethics*. 7th edn. Oxford: Oxford University Press.

May, T. (1998) *Autonomy, Authority and Moral Responsibility*. London: Kluwer Academic.

McCrudden, C. A Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights. *Oxford Journal of Legal Studies* 20(4): 499-532.

McKeever, M. (2009) *God's Justice? Right Reason? Justice and rationality in Catholic social teaching in the light of Alasdair MacIntyre's Conception of Traditions of Enquiry.*

McLean, S. (2010) *Autonomy, Consent and the Law.* London: Routledge-Cavendish.

Mill, J. S $ Gray, J. (2008) *On Liberty and Other Essays.* Oxford: Oxford University Press.

Miola, J. (2007) *Medical Ethics and Medical Law: A Symbiotic Relationship*. Oxford: Hart.

Miola, J. (2009) Informed Consent and the Rise of Autonomy. *British Journal of Nursing* 18 (8): 504-506.

Moller, K. (2009) Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights. *Oxford Journal of Legal Studies* 29 (4): 757–786.

Montgomery, J. (2003) Health Care Law. 2nd ed. Oxford: Oxford University Press.

Montgomery, J. (2006a) The Legitimacy of Medical Law. In, McLean, S. A.M. (ed.) *First Do No Harm: Law Ethics and Healthcare.* Aldershot: Ashgate, 1-16.

Montgomery, J. (2006b) Law and the Demoralisation of Medicine. *Legal Studies*, 26 (2): 185-210.

Moran, M. (2003) Authority, Influence, and Persuasion: Baker, Charter Values and the Puzzle of Method. In: Dyzenhaus, D. & Moran, M. eds. *The Unity of Public Law.* Oxford: Hart: 389-430.

Morgan, D. (2001) *Issues in Medical Law and Ethics*. London: Cavendish.

Morgan, D. & Veitch, K. (2004) Being Ms B: B, Autonomy and the Nature of Legal Regulation. *Sydney Law Review* 26: 107-130.

Moser, A., van der Bruggen, H. & Widdershoven, G. (2006) Competency in Shaping One's Life: Autonomy of People with Type 2 Diabetes Mellitus in a Nurse-led, Shared-care Setting: A Qualitative Study. *International Journal of Nursing Studies* 43 (4): 417-427.

Mulhall, S. & Swift, A. eds. (1996) *Liberals and Communitarians*. Oxford: Blackwell.

Munby, J. (1998) Rhetoric and Reality: The Limitations of Patient Self-Determination in Contemporary English law. *Journal of Contemporary Health Law Policy* 14(2): 315-34.Munday, R. (2002) Judicial Configurations. *The Cambridge Law Journal* 61(3): 612-656.

Munday, R. (2004) Law Reports, Transcripts and the Fabric of the Criminal Law – A Speculation. *Journal of Criminal Law* 68: 227-243.

National Centre for Social Research (2007) *British Social Attitudes Perspectives on a Changing Society*, 23rd Report: Chapter 2.

Nedelsky, J. (1989) Reconceiving Autonomy: Sources, Thoughts and Possibilities. *Yale Journal of Law and Feminism* 1: 7-36.

Nelson, E. (2005) Liberty: One Concept Too Many? *Political Theory*, 33 (1): 58-78.

Norrie, A. W. (2010) *Dialectic and Difference: Dialectical Critical Realism and Grounds of Justice*. Abingdon: Routledge.

Nozick, R. (1974) *Anarchy, State, and Utopia*. Oxford: Blackwell.

Nuffield Council on Bioethics (2009) *Dementia: Ethical Issues*. London: Nuffield Council.

Nussbaum, M. (2000) Women's Capabilities and Social Justice. *Journal of Human Development* 1 (2): 219-247.

Nussbaum, M. C. (2001) *Women and Human Development: The Capabilities Approach*. Cambridge: Cambridge University Press.

Nussbaum, M. C. (2011) *Creating Capabilities: the Human Development Approach.* Cambridge, Massachusetts: Belknap Press.

Oakeshott, M. J. (1975) *On Human Conduct*. Oxford: Clarendon..

O'Neill, O. (2002) *Autonomy and Trust in Bioethics.* Cambridge: Cambridge University Press.

O'Shea, T. (2010) Autonomy and Value. *Essex Autonomy Project Green Paper Report*. Colchester: University of Essex.

Otlowski, M. (1997) *Voluntary Euthanasia and the Common Law*. Oxford: Clarendon Press.

Pannick, D. (1987) *Judges.* Oxford: Oxford University Press.

Parris, M. (2002) *Chance Witness: An Outsider's Life in Politics*. London: Viking.

Paterson, A. (1982) *The Law Lords*. London: Macmillan.

Pattinson, S. D. (2009) *Medical Law and Ethics*. 2nd edn. London: Sweet & Maxwell.

Pole, C. J. & Lampard, R. (2002) *Practical Social Investigation: Qualitative and Quantitative Methods in Social Research*. Harlow: Pearson Education Limited..

Poole, T. (2005) Legitimacy, Rights and Judicial Review. *Oxford Journal of Legal Studies* 25 (4): 697-724.

Popkin, W. D. (2007) *Evolution of the Judicial Opinion: Institutional and Individual Styles.* New York: London: New York University.

Pound, R. (1910) Law in Books and Law in Action. *American Law Review* 44: 12-36.

Por, Y.K (2002) Self-Ownership and its Implications for Bioethics. In: Tao, J. L. P. W. ed. *Cross Cultural Perspectives on the (Im)Possibility of Global Bioethics*: Dordrecht, The Netherlands: Kluwer Academic: 197-208.

Porter, J. (2003) Tradition in the Recent Work of Alasdair MacIntyre. In: Murphy, M. C. ed. *Alasdair MacIntyre*. Cambridge: Cambridge University Press.

Price, D. (2009) What Shape to Euthanasia after Bland? Historical, Contemporary and Futuristic Paradigms. *Law Quarterly Review* 125: 142-174.

Price, K. (2010) The Art of Medicine: Towards a History of Medical Negligence. *The Lancet* 375: 192 – 93.

Pritzlaff, T. (2008) Freedom is a Matter of Responsibility and Authority: An Interview with Robert B. Brandom. *European Journal of Political Theory* 7 (3): 365-381.

Pufendorf, S. (2005) *Of the Law of Nature and Nations: Eight Books*, Translated in English by George Carew,. Buffalo, NY, Hein.

Rawls, J. (1972) *A Theory of Justice*. Oxford: Clarendon Press.

Rawls, J. (1993) *Political Liberalism*. New York: Columbia University Press.

Rawls, J. & Kelly, E. (2001) *Justice as Fairness: a Restatement*. London: Belknap Press.

Raz, J. (1986) *The Morality of Freedom*. Oxford: Clarendon Press.

Rich, B. A. (2001) *Strange Bedfellows: How Medical Jurisprudence Has Influenced Medical Ethics and Medical Practice*. New York: Kluwer Academic/Plenum.

Ricoeur, P. (1991) *From Text to Action*. Evanston, Ill.: Northwestern University Press.

Ricoeur, P. (2004) *The Conflict of Interpretations: Essays in Hermeneutics*. London: Continuum.

Rockmore, T. (2002): Brandom, Hegel and Inferentialism. *International Journal of Philosophical Studies* 10 (4): 429-447

Rodger, H. L. (2002) The Form and Language of Judicial Opinions. *Law Quarterly Review* 118: 226-247.

Roederer, C. & Moellendorf, D. (2004) *Jurisprudence*. Cape Town, RSA: Juta Academic.

Rosen, M. (2012) *Dignity: Its Meaning and History*. Cambridge, Massachusetts: Harvard University Press.

Roth, L. H., Meisel, A. & Lidz, C. W. (1977) Tests of Competency to Consent to Treatment. *American Journal of Psychiatry*, 134: 279-84.

Rothstein, M. A. (2004) Growth of Health Law and Bioethics. *The Health Matrix* 14: 213.

Rothstein, M. A. (2010) The Role of Law in the Development of American Bioethics. *Journal International de Bioéthique* 20 (4): 73-84.

Rousseau, J. J. & Gourevitch, V. (1997) *The Social Contract and Other Later Political Writings.* Cambridge: Cambridge University Press.

Sandel, M.J. (2007) *The Case against Perfection: Ethics in the Age of Genetic Engineerin*g. Cambridge, MA: Belknap Press.

Schauer, F. (2008) Authority and Authorities. University of Virginia Legal Working Paper Series, 92.

Schermer, M. (2002) *The Different Faces of Autonomy: Patient Autonomy in Ethical Theory and Hospital Practice.* Dordrecht: Kluwer Academic.

Schmitt, R. (1995) *Beyond Separateness: The Social Nature of Human Beings in Their Autonomy, Knowledge and Power.* Boulder, Colorado: Westview Press.

Scott, J. (1990) *A Matter of Record*. Cambridge: Polity Press.

Secker, B. (1999) The Appearance of Kant's Deontology in Contemporary Kantianism: Concepts of Patient Autonomy in Bioethics. *Journal of Medicine and Philosophy* 24 (1): 43-66.

Sen, A. (1995) *Inequality Re-examined.* Oxford: Clarendon Press.

Sen, A. (1999) *Development as Freedom.* Oxford: Oxford University Press

Sen, A. (2009) *The Idea of Justice*. London: Allen Lane.

Sellars, W. S. (1957) Counterfactuals, Dispositions, and the Causal Modalities. In: Feigl, H., Scriven, M., Maxwell, M. eds. *Minnesota Studies in the Philosophy of Science*, vol. 2. Minneapolis, Minnesota: University of Minnesota Press.

Sheldon, S. & Thomson, M. (1998) *Feminist Perspectives on Health Care Law.* London: Cavendish.

Silverman, D. (2000) *Doing Qualitative Research: A Practical Guide*. London: Sage.

Slapper, G. & Kelly, D. (2006) *The English Legal System*. 8th edn. London: Cavendish.

Skene, L. (2006) Conjunctions and Disjunctions. *Macquarie Law Symposium – Law, Religion and Medical Science*: 51- 57.

Skinner, Q. (1984) The Idea of Negative Liberty: Philosophical and Historical Perspectives. In: Rorty, R., Schneewind, J. B. & Skinner, Q. *Philosophy in History: Essays on the Historiography of Philosophy*: 193–211.

Skinner, Q. (2002) A Third Concept of Liberty. *Proceedings of the British Academy* 117: 237-68.

Smith, A. (1997) Beyond Autonomy. *Journal of Contemporary Health Law & Policy* 14: 23-46.

Smith, A. M. C. (1999) Euthanasia: The Strengths of the Middle Ground. *Medical Law Review* 7(2): 194-207.

Smith, J. C. & Hogan, B. (2008) *Criminal Law.* 12th edn. London: Butterworths.

Smyth, R. (2008) Century of Citation: Case-Law and Secondary Authority in the Supreme Court of Western Australia, *University of Western Australia Law Review*, 34:145- 167.

Smyth, R. (2009) Citing outside the Law Reports: Citations of Secondary Authorities on the Australian State Supreme Courts over the Twentieth Century" *ExpressO*: Available at: http://works.bepress.com/russell_smyth/ [Accessed 10th April, 2012]**.**

Spencer, M., Spencer, J. & Kent, P. (2002) Practitioners' Use of Online Law Reports: Implications for Law Schools. *Web Journal of Current Legal Issues*, 2.. Available at: http://webjcli.ncl.ac.uk/2002/issue2/spencer2.html [accessed 17th April, 2012].

Spriggs, M. (2005) *Autonomy and Patients' Decisions*. Lanham, Md.: Lexington Books.

Steinbock, B. (1992) *Life before Birth: The Moral and Legal Status of Embryos and Fetuses.* Oxford: Oxford University Press.

Stirrat, G. & Gill, R. (2005) Autonomy in Medical Ethics after O'Neill. *Journal of Medical Ethics* 31: 127-30.

Strang, L. (2004) The Clash of Rival and Incompatible Philosophical Traditions within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition. *Harvard Journal of Law and Public Policy* 28: 909-1002.

Strauss, A. L. & Corbin, J. M. (1990) *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*. London: Sage.

Strauss, A. L. & Corbin, J. M. (1998) *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*. London: Sage.

Struhkamp, R. M. (2005) Patient Autonomy: A View from the Kitchen. *Medicine, Health Care and Philosophy* (2005) 8:105–114.

Sumner, L.W. (2011) *Assisted Death: A Study in Ethics & Law.* Oxford: Oxford University Press.

Sumption, J. (2011) Thirty-Fifth FA Mann Lecture. *Judicial and Political Decision-making: The Uncertain Boundary*. 9th November, 2011. Lincoln's Inn, London.

Tauber, A. (2001) Historical and Philosophical Reflections on Patient Autonomy. *Health Care Analysis* 9 (3): 299-319.

Taylor, C. (1985) *Philosophy and the Human Sciences*. Cambridge: Cambridge University Press.

Taylor, J. S. (2005*) Personal Autonomy: New Essays on Personal Autonomy and its Role in Contemporary Moral Philosophy*. Cambridge: Cambridge University Press.

Testa, I. (2003) Hegelian Pragmatism and Social Emancipation: An Interview with Robert Brandom. *Constellations* 10 (4): 554-70.

Thomson, J. J. (1990) *The Realm of Rights.* Cambridge, Mass.: Harvard University Press.

Thornton, R. (1992) Multiple Keyholders. Wardship and Consent to Medical Treatment. *The Cambridge Law Journal* 51 (1): 34-37.

Tompkins, A. (1997) Civil Liberties in the Council of Europe: A Critical Survey. In: Gearty, C. A. ed. *European Civil Liberties and the European Convention on Human Rights*. The Hague: Martinus Nijhoff: 1-51.

Tridimas, T. (1996) The Court of Justice and Judicial Activism. *European Law Review* 21 199-210.

Tuori, K. (2011) *Ratio and Voluntas: The Tension between Reason and Will in Law.* Farnham: Ashgate.

Unger, R. M. (1983) The Critical Legal Studies Movement. *Harvard Law Review*: 561-675.

Caenegem, R. C. (1987) *Judges, Legislators and Professors: Chapters in European Legal History.* Cambridge: Cambridge University Press.

Van der Burg, W. (1997) Bioethics and Law: A Developmental Perspective. *Bioethics* 11(2): 91-114.

Van Mill, D. (1995) Hobbes's Theories of Freedom. *The Journal of Politics* 57 (2): 443-59.

Varelius, J. (2006) The Value of Autonomy in Medical Ethics. Medicine, Health Care and *Philosophy* 9(3): 377-388.

Veitch, K. (2007) *The Jurisdiction of Medical Law.* Aldershot: Ashgate.

Wacks, R. & Allan, J. (1993) *Hong Kong, China and 1997: Essays in Legal Theory*. Hong Kong: Hong Kong University Press.

Wacks, R. (2008) *Law: A Very Short Introduction*. Oxford: Oxford University Press.

Warnock, M. (2006) *An Intelligent Person's Guide to Ethics*. London: Duckworth.

Weinreb, L. L. (1994) *Oedipus at Fenway Park: What Rights Are and Why There Are Any.* Cambridge, Massachusetts: Harvard University Press.

Weinreb, L. L. (2005) *Legal Reason: The Use of Analogy in Legal Argument*. Cambridge: Cambridge University Press.

Wicks, E. (2007) *Human Rights and Healthcare*. Oxford: Hart.

Wicks, E. (2009) Religion, Law and Medicine: Legislating on Birth and Death in a Christian State. *Medical Law Review,* 17 (3): 410-437.

Williams Glanville. (1958) *The Sanctity of Life and the Criminal Law.* London: Faber and Faber

Williams, G. (1965) Venue and Ambit of the Criminal Law (Part 3). *Law Quarterly Review,* 81: 518.

Williams, G. L. (1982) *Learning the Law.* 11th edn. London: Stevens.

Williams, S. (2005) Comment: Autonomy and the Private-Public Distinction in Bioethics and Law. *Indiana Journal of Global Legal Studies* 12 (2): 483-494.

Wilson, J. (2007) Is Respect for Autonomy Defensible? *Journal of Medical Ethics* 33: 353-56.

Wolff, R. P. (1970) *In Defense of Anarchism*. New York: Harper & Row.

Wright, N.T. (1992) *The New Testament and the People of God*. London: SPCK.

Young, R. (1986) *Personal Autonomy: Beyond Negative and Positive Liberty*. London: Croom Helm.

Zander, M. (2004) *The Law-making Process*. 6th edn. Cambridge: Cambridge University Press.