

**Readings in  
Comparative Health Law  
and Bioethics**

# Readings in Comparative Health Law and Bioethics

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SECOND EDITION

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Timothy Stoltzfus Jost

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# Contents

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Introduction	x
Acknowledgments	xiii
<b>Chapter 1 · The Right to Health and Its Implementation</b>	<b>3</b>
A. The Right to Health in International Law	3
Eleanor D. Kinney, <i>The International Human Right to Health: What Does This Mean for Our Nation and World?</i>	5
Notes	8
Karen Noelia Llantoy Huamán v. Peru	9
Note	13
B. The Right to Health in Constitutional Law	14
Eleanor D. Kinney & Brian Alexander Clark, <i>Provisions for Health and Health Care in the Constitutions of the Countries of the World</i>	15
Paschim Banga Khet Mazdoor Samity v. State of West Bengal	19
Note	21
Chaoulli v. Quebec (Attorney General)	22
Note	26
C. The Organization of National Health Care Systems	26
World Health Report 2000	27
Timothy Stoltzfus Jost, <i>Why Can't We Do What They Do? National Health Reform Abroad</i>	29
Notes	33
D. Perspectives on Health Care Systems	33
Ted Marmor, Richard Freeman, & Kieke Okma, <i>Comparative Perspectives and Policy Learning in the World of Health Care</i>	34
Notes	36
Uwe E. Reinhardt, <i>Reforming the Health Care System: The Universal Dilemma</i>	37
Notes	43
Carolyn Hughes Tuohy, <i>Dynamics of a Changing Health Sphere: The United States, Britain, and Canada</i>	44
Notes	47
George J. Annas & Frances H. Miller, <i>The Empire of Death: How Culture and Economics Affect Informed Consent in the U.S., the U.K., and Japan</i>	48
Note	51
E. The Role of Legal Institutions in the Allocation and Rationing of Health Care Resources	51
Timothy Stoltzfus Jost, <i>Health Care Coverage Determinations: An International Comparative Study</i>	51

Colleen Flood, Mark Stabile, & Carolyn Tuohy, <i>What Is In and Out of Medicare? Who Decides?</i>	55
Notes	58
Christopher Newdick, <i>Judicial Supervision of Health Resource Allocation—English Experience</i>	59
Note	70
Andre den Exter, <i>Patient Mobility in the European Union</i>	70
R. v. Secretary of State for Health, ex parte Pfizer Ltd.	74
Notes	82
F. Removing Barriers to the Exercise of the Right to Health: Access to Transplantable Organs	83
Act of 5 November 1997 on the Donation, Removal, and Transplantation of Organs	83
Notes	87
Bernard M. Dickens, Sev. S. Fluss, & Ariel R. King, <i>Legislation on Organ and Tissue Donation</i>	90
Notes	93
Margaret Lock, <i>On Dying Twice: Culture, Technology and the Determination of Death</i>	93
Note	98
<b>Chapter 2 · The Rights of Patients in Relationship with Health Care Professionals and Institutions</b>	99
A. Patients' Rights	99
Lars Fallberg, <i>Citizens' Choice and Patients' Rights</i>	99
<i>World Medical Association Declaration on the Rights of the Patient</i>	102
<i>A Declaration on the Promotion of Patients' Rights in Europe, 1994</i>	104
Notes	108
<i>Citizens' Choice and Patients' Rights</i>	110
B. The Right to be Free from Medical Negligence	111
1. Civil Liability	111
Cour de Cassation of France, 1st Civil Chamber, Decision of 25 February 1997	111
Note	112
Dieter Giesen, <i>Medical Malpractice and the Judicial Function in Comparative Perspective</i>	113
J.V. McHale, <i>Medical Malpractice in England—Current Trends</i>	116
Notes	120
Gerfried Fischer & Hans Lilie, <i>Medical Responsibility in Comparative European Law</i>	121
Notes	123
2. Criminal Liability	124
Robert B. Leflar, <i>Law and Patient Safety in the United States and Japan</i>	124
Note	126
3. Administrative Proceedings	127
4. "No Fault" Alternatives to Negligence Litigation	127
Lars H. Fallberg and Edgard Borgenhammer, <i>The Swedish No Fault Patient Insurance Scheme</i>	128

Marie Bismark & Ron Paterson, <i>No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety</i>	131
Notes	135
C. The Right to Consent to Treatment	136
1. The Standard of Disclosure	136
Sidaway v Bethlem Royal Hospital Governors and others	136
Notes	149
Rogers v. Whitaker	150
Notes	154
Robert B. Leflar, <i>Law and Health Care in Japan: The Renaissance of Informed Consent</i>	154
Notes	160
2. The Problem of Causation	160
Dieter Giesen, <i>International Medical Malpractice Law</i>	161
Notes	167
Chappel v. Hart	167
Notes	176
D. Rights to Control Over Patient Information	176
1. Confidentiality and Secrecy	176
Hank Leenen, Sjeff Gevers, & Genevieve Pinet, <i>The Rights of Patients in Europe</i>	177
Notes	179
Sabine Michalowski, <i>Medical Confidentiality and Medical Privilege—A Comparison of French and German Law</i>	179
Notes	186
Recommendation No. R (97) 5 of the Committee of Ministers to Member States on the Protection of Medical Data (1997)	187
Frits W. Hondius, <i>Protecting Medical and Genetic Data</i>	192
Notes	193
UNESCO International Declaration on Human Genetic Data	194
Note	197
Ragnhildur Guthmundsdóttir vs. The State of Iceland	197
Notes	200
2. Access to Medical Records	201
McInerney v. MacDonald	201
Breen v. Williams	206
Notes	217
<b>Chapter 3 · The Patient's Right to Self-Determination and Competing Considerations</b>	219
A. Abortion	219
<i>Abortion Policies: A Global Review</i>	220
Note	223
Joyce Outshoorn, <i>The Stability of Compromise: Abortion Politics in Western Europe</i>	224
Notes	229
R. v. Morgentaler	229
Notes	240

Kim Lane Scheppelle, <i>Constitutionalizing Abortion</i>	240
Notes	244
Decision 48/1998 (XI. 23.) AB	244
Notes	254
B. Assisted Reproduction	255
Kathryn Venturatos Lorio, <i>The Process of Regulating Assisted Reproductive Technologies: What We Can Learn from Our Neighbors—What Translates and What Does Not</i>	256
Melanie Latham, <i>Regulating the New Reproductive Technologies: A Cross-Channel Comparison</i>	259
Notes	269
Regina (Quintavalle) v. Human Fertilisation and Embryology Authority	271
Notes	277
C. The Right to Die	278
Herman Nys, <i>Physician Involvement in a Patient's Death: A Continental European Perspective</i>	279
Notes	294
In the Matter of A Ward of Court	296
Note	307
D. Assisted Suicide and Euthanasia	307
Sue Rodriguez, Appellant v. The Attorney General of Canada and the Attorney General of British Columbia Respondents	308
Notes	318
Herman Nys, <i>Physician Involvement in a Patient's Death: A Continental European Perspective</i>	319
Notes	324
Chabot	327
Notes	332
Tōkai University Hospital—Euthanasia Case	332
Note	339
<b>Chapter 4 · The Rights of the Individual and the Interests of Society</b>	341
A. Public Health Law: Legal Approaches to HIV/AIDS	341
John A. Harrington, <i>AIDS, Public Health and the Law: A Case of Structural Coupling?</i>	342
Notes	349
Peri H. Alkas & Wayne X. Shandera, <i>HIV and AIDS in Africa: African Policies in Response to AIDS in Relation to Various National Legal Traditions</i>	350
Notes	354
B. Public Health Law, Infectious Diseases: SARS	355
Chenglin Liu, <i>Regulating Sars in China: Law as an Antidote?</i>	355
Jason W. Sapsin, Lawrence O. Gostin, Jon S. Vernick, Scott Burris, & Stephen P. Teret, <i>SARS and International Legal Preparedness</i>	363
Notes	368
C. Public Health Law: Tobacco Regulation	369
Eric A. Feldman, <i>The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan</i>	369

Constance A. Nathanson, <i>Liberte, Egalité, Fumée: Smoking and Tobacco Control in France</i>	376
Erik Aibtek, <i>Holy Smoke, No More? Tobacco Control in Denmark</i>	381
RJR-MacDonald Inc. v. Canada	383
Notes	389
D. Research Involving Human Subjects	390
World Medical Association, <i>Declaration of Helsinki, Ethical Principles for Medical Research Involving Human Subjects</i>	391
Note	394
<i>European Convention on Human Rights and Biomedicine</i> , Oviedo, 1997	395
Notes	396
Timothy Stoltzfus Jost, <i>The Globalization of Health Law: The Case of Placebo-based Research</i>	397
Notes	401
Solomon R. Benatar, <i>Towards Progress in Resolving Dilemmas in International Research Ethics</i>	401
Notes	405
<b>Index</b>	407



# Introduction

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This book is a collection of annotated readings to be used for teaching comparative health law and bioethics.

While comparative health law is a relatively new field, this book is located within the tradition of the discipline of comparative law. The traditional concerns of comparative law have been to analyze, classify, and (to the extent possible) understand comparatively a foreign legal system as a whole. Traditionally, comparative law has concentrated on comparing continental European civil law systems with common law systems. It has also focused on private law. More recently, comparative law has attempted to apply new tools to comparative analysis—law and economics, feminist legal theory, critical legal theory, or postcolonial theory—to craft metatheories for understanding legal systems.

The task of understanding a foreign legal system as a whole is hard work, whatever approach one takes. One must be grounded in the culture and society of the country studied, which usually requires a knowledge of the country's language and some time spent on the ground. One must master procedural as well as substantive law. One must also distance one's self from one's own legal system. One must gain the ability to see one's own system as a foreign system.

This book stands in the tradition of micro, rather than macro, comparative law. It does not offer an understanding of other legal systems as a whole, but focuses rather on understanding how a wide variety of disparate legal systems deal with issues in a particular field—health care law. While this book attempts from time to time to describe the legal or societal context in which health care law is located in various countries, it does not pretend to present a complete picture of the legal systems of these countries. It also does not offer a metatheory that would make sense of the similarities and differences observed in health law in different legal systems.

The goals of this book are eminently pragmatic. It is my hope that readers will come to a better understanding of the health care law of their own jurisdiction through absorbing these materials. My assumption is that most users of these materials will be from the United States. I assume that many of these students will take an American health law course at some point. I also realize, however, that many students using this book will either be in American summer programs between their first and second year of law school, or in non-law school settings, and will not have taken an American health law course prior to using these materials. I do not see this as an impediment, as the textual notes (supplemented, of course, by the teacher's knowledge) should provide enough information about American health law to orient the novice.

Nonetheless, a primary purpose of these materials is to help American readers (as well as readers from other nations) to better understand their own health law. It is hoped that the reader will come to see how contingent; how culturally, politically, and historically-

determined; and how dependent on the substantive, procedural, and evidence law of particular legal systems domestic approaches to various health law issues are. I hope that readers will better understand the possibility that there are very different solutions to the very difficult health law problems we face than the ones we commonly imagine. Finally, I hope that at those points in the reader's later career when an opportunity arises to influence health law or policy, the reader will remember the wealth of alternatives available beyond those that are obvious in the reader's particular system.

While this book is in part intended to inform health policy, it is not a book about comparative health policy. Many excellent books are available, both in the United States and elsewhere, about comparative health policy, health economics, and health politics. Though the first chapter of this book contains a rather lengthy section describing and analyzing health care systems, it is not the intent of this book to duplicate these sources. Rather, this book focuses on how law, legal systems, and legal institutions influence health care recipients, professionals, institutions, and systems. Thus, for example, this book is not so much concerned with how various health care systems ration care as it is with the role of the courts or of administrative agencies in health care rationing.

Because this is a book about health law, it is organized, not surprisingly, around the notion of rights. Whatever else law may be, it is generally understood as an attempt to articulate and protect rights. This book's four chapters deal with legal rights in different settings. The first chapter examines the concept of a human right to health care, established by international law, national constitutions, and domestic legislation. As a context for this discussion, and indeed for most of the rest of the book, this chapter also includes readings describing generally how health care systems are organized and function. This chapter also examines the right to health care in a particular setting—organ transplantation.

The second chapter deals with the rights of patients in their relationships with health care professionals and institutions. After a brief section introducing the notion of patients' rights, the topics of malpractice, alternatives to malpractice litigation, informed consent, confidentiality and rights to access medical records are examined.

The third chapter addresses bioethics—here understood as the right of patients to autonomous decision making and the limits that bound this right. This chapter examines abortion, assisted reproduction, and the right to die, including the right to assistance with suicide and euthanasia.

A brief chapter examines the interface between the rights of individuals and the interests of society in four contexts. First, it looks at the role of public health law in reconciling the rights of the individual and of the public in the context of the worldwide HIV-AIDS crisis. Second, it looks at the role of public health law in combating a different sort of epidemic—SARS. Third, it examines the attempts of various nations to limit tobacco use. Finally, it looks at issues that arise in health care research, where the interests of society in advancing knowledge sometimes come in conflict with the rights of the individual research subject.

Four final comments may be useful to understand this book. First, throughout the book I generally use the word "patient" to refer to recipients of health care. The word "patient" has increasingly become only one of many words used to describe persons who receive health care in the United States—including also consumer, beneficiary, member, resident, or recipient, to name a few. Patient has, indeed, sometimes taken on a negative connotation, describing one who passively receives health care as opposed to an active par-

ticipant in the health care enterprise. The word is used here, however, for two reasons. First, it is still, even in the United States, the most specific word used to describe the person who receives health care from health care professionals and institutions. Second, it is the word that is used most widely throughout the world to describe recipients of health care. Given the international scope of this book, deference to international usage is perhaps appropriate.

Second, the reader will surely notice that, although this book resembles in many respects a traditional American law school casebook, the excerpts are much longer than would be found in most contemporary casebooks. It is for this reason that the book is entitled “*Readings in Comparative Law and Bioethics*.” These lengthy excerpts are used for a reason. At the outset, it was noted that to do comparative law properly one should really know the language of the country one is studying, and spend time there observing the cultural context. While most readers of these materials will not have yet had the opportunity to do this for the range of the countries whose law is examined here, this book attempts at least to let the reader stay with one court or one scholar long enough to not simply catch a snippet of black-letter law, but also to observe how the particular author or country thinks about health law. For example, with respect to courts like the British House of Lords or Australian High Court, where multiple opinions are customary, a range of these are reproduced to give the reader a sense of the debate that characterizes these courts.

Third, the reader may observe that some of the writing deviates from standard American English. While we are very fortunate that English has become the world language, the English that others speak and write is not always that with which we are most comfortable. We can also learn, therefore, from seeing how others use the English language. This experience may also help us to remember a very important fact: just because others are speaking English does not mean that we can understand them (or they us). Often, really understanding what another is saying is hard work for us, even when the other seems to be speaking our language.

Fourth, some explanation of editing conventions may be helpful. First, cites, which were appropriately numerous in all sources, were in most instances omitted. Second, internal section titles and paragraph numbers were omitted from many sources. Third, ellipses (\* \* \*) are inserted where text was omitted by the editor. Ellipses within a paragraph (or at its beginning or end) show that text was omitted from that paragraph. Centered ellipses between paragraphs show that a full paragraph or more of text was omitted. Brackets indicate additional explanatory text that has been added.

I am very grateful to the many authors and publishers who graciously allowed me to reprint their works in this text, often with no charge or at a reduced charge. The permissions table that follows lists their names. I am also grateful to Christopher Newdick and Herman Nys, who contributed original articles on the role of courts in rationing in the NHS and on assisted suicide and the right to die; Alain Garay, who assisted me in locating French sources; and Robert Leflar, Pierrick LeGoff, and Martine Jean who translated source materials for me. Finally, I would like to thank all of those who helped bring this work to fruition—Mark Hall, Barry Furrow, Rob Leflar, Norio Higuchi, Eleanor Kinney, Colleen Flood, Ted Marmor, Herman Nys, Eric Feldman, Margaret Lock, Kevin Outtersson, Chris Newdick, Hank Greely, Andre den Exter, Larry Gostin, Naoki Ikegami, and Fran Miller; my Dean, Brian Murchison; the Frances Lewis Law Center; and Vera Mencer, my assistant.

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## Chapter 1: The Right to Health and Its Implementation

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## Chapter 2: The Rights of Patients in Relationship with Health Care Professionals and Institutions

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