Readings in
Comparative Health Law and
Bioethics
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Comparative Health Law and Bioethics

THIRD EDITION

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For N.S.C., H.A.C., and M.S.C.
— Nathan Cortez

For J.A.
— I. Glenn Cohen
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Introduction

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

Since the Second Edition was published in 2007, comparative health law has become a much more mature, substantial field. Legions of academic books and articles have been written about comparative health systems, comparative law, and/or comparative policy in health care over the last decade. Indeed, these topics have caught the attention of popular audiences in recent years. For example, immediately after the Second Edition was published, the PBS Frontline documentary *Sick Around the World* (2008) and T.R. Reid’s popular book *The Healing of America: A Global Quest for Better, Cheaper, and Fairer Health Care* (2009) highlighted for lay audiences how unique America’s health care system is, particularly when viewed in comparative context.

Like the Second Edition, the Third Edition is located within the discipline of comparative law. The traditional concerns of comparative law have been to analyze, classify, and (to the extent possible) understand 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 that country, 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 oneself from one’s own legal system and begin to see that 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. 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 instead fairly pragmatic. It is our hope that readers will come to a better understanding of the health care law of their own jurisdiction through absorbing these materials. Our assumption is that many (indeed likely most) users of these materials will be from the United States. We assume that many of these students will take an American health law course at some point. We 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. We 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.

We also hope that the book proves helpful for non-American readers to understand how unusual American health law is, but also draw important comparisons between their own health care system and those of a myriad of other countries. These countries cross divides between common and civil law, between countries with strong versus weaker rule of law traditions, and conservative or progressive issues on some of the most hot button topics (all covered in this book) such as abortion, end of life decision-making, and reproductive technologies.

We hope that every reader will come to see how contingent; how culturally, politically, and historically-determined; and how dependent on the substantive, procedural, and evidentiary law of particular legal systems domestic approaches to various health law issues are. We 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, we 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 and bioethics, it is not a book about comparative health policy and bioethics. 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 and bioethics, 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.

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 core questions of bioethics about the rights claims of patients and others at the beginning and end of life. This chapter examines abortion, assisted reproduction, and the right to die.

The fourth 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 infectious disease emergencies — focusing on SARS and Ebola. 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.

Five final comments may be useful to understand this book. First, throughout the book we 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 participant 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, readers of the Second Edition may notice that the Third Edition is broader in geographic scope. Our goal with this edition was to expand discussions beyond the traditional focus of comparative health law, which tends to linger on North American, European, British, and English-speaking jurisdictions like Australia and New Zealand, with occasional focus on Japan. This edition adds materials from jurisdictions in Africa, Asia, Latin America, and the Middle East to provide a more varied picture of the already-varied approaches to common legal and ethical challenges in health care. It also adds more material from supranational bodies. Comparative lessons can be more difficult to draw the more the jurisdictions being compared differ along social, economic, cultural, and religious dimensions. But we think the effort to be more expansive is worthwhile.

Third, 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.

Fourth, 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.

Fifth, 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.

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


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Regina (Quintavalle) v. Human Fertilisation and Embryology Authority, [2005]. Reprinted with permission of the Controller of Her Majesty’s Stationary Office.[14]


Chapter 4: The Rights of the Individual and the Interests of Society


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