

Reproductive and Sexual Health Law

Course Materials

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Faculty of Law, University of Toronto

Fall 2011

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Reproductive and Sexual Health Law 2011 Course Materials

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This course addresses national and international legal protection and promotion of reproductive and sexual health. It examines the comprehensive nature of reproductive health, including fertility control and promotion, treatment of sexually transmitted diseases, such as HIV/AIDS, and sexual violence. The course provides introductory overviews of the background law. The course surveys different disciplinary dimensions, such as biomedical, epidemiological and social science perspectives that can be used in the development and application of reproductive and sexual laws. It analyzes the effectiveness of the law in protecting groups at high risk of reproductive health disadvantages, such as adolescents.

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International Reproductive and Sexual Health Law Programme
Faculty of Law, University of Toronto
<http://www.law.utoronto.ca/programs/reprohealth.html>

Listserv: <http://www.law.utoronto.ca/documents/reprohealth/howtojoinlistserv.pdf>

Texts:

2011 Course Pack

Structure:

Part A: Accountability for Distributional Harms- Lack of Access to Treatments and Medicines (Sept 19, 26)

Part B: The Regulation of Reproductive and Sexual Health Care (Oct 3, 17, 24)

Part C: Equality and Non-Discrimination (Oct 31, Nov 14)

Part D: Access to Information (Nov 21, 28)

Evaluation:

80% Written Work: four short papers or SUYRP

20% Class Participation: regular attendance, reflective input into class discussion, on-call days

80% written work in the form of four short papers (1,563-1,875 words each, which is about 6-7 pages at about 250 words a page) analyzing the reading materials assigned for class. Students have to submit a paper for each of the 4 parts of the course, and may choose the class within each part. Papers must be handed in by **12 noon on the Friday** prior to the class in which the materials are to be discussed. Short papers should be placed **under the office door** of the professor responsible for the class. Permission for electronic submission will be given only in exceptional circumstances.

A limited number of students may arrange with Professor Dickens to complete a **Supervised Upper Year Research Paper ("SUYRP")** in the course. If a student completes the SUYRP, that paper will constitute 80% of the grade and will replace the four short papers. Please see *Academic Handbook: Supervised Upper Year Research Paper ("SUYRP")* for further requirements.

The schedule for the SUYRP is as follows:

- October 24: Outline and bibliography due
- October 31: Outline and bibliography returned with comments
- November 14: First draft due
- November 21: First draft returned with comments
- December 19, 10:00am: Deadline for written work, final paper due at records office

Please see Writing Guide for further information on evaluation of written work. The University of Toronto provides a number of writing resources: www.utoronto.ca/writing.

All students will be evaluated on 20% class participation, which will be measured by regular attendance with reflective input into class discussion, including on-call days when students will discuss their short papers, or if completing the SUYRP, will introduce one of the reading materials assigned for the class. SUYRP students must sign up for on-call days the week prior to the class in which the materials are to be discussed.

Email Policy:

Email will not be used as an alternative to meeting with the course instructors before or after class or by appointment. Email inquiries will be responded to only in exceptional circumstances. Please ensure you consult the syllabus and other course materials before submitting any email inquiry. All email messages must include in the subject line the course identifier and a concise and clear statement of purpose [e.g. RSH Law Seminar: short paper]. Inquiries of interest to all students will be addressed in class.

Reproductive and Sexual Health Law: Course Overview

First Term: 3 credits; 2 hours

Schedule: Monday, 4:10 – 6:00pm

SUYRP/ Perspective Course

1. Sept 12: Introduction and Course Overview (Cook)

Part A: Accountability for Distributional Harms-Lack of Access to Treatments and Medicines

2. Sept 19: Maternal Mortality - Preventable Death in Pregnancy (Cook)

3. Sept 26: Access to Reproductive Health Medicines (Cook)

Part B: Accountability for Appropriate Use of Criminal Law

4. Oct 3: The Role of Criminal Law (Dickens) (Morgentaler, Aziga)

5. Oct 17: Prostitution and Criminal Law (Lisa Kelly)

6. Oct 24: Assisted Reproduction and the Criminal Law (Dickens)

Part C: Accountability for Harms to Dignity- Stereotyping and Stigmatizing

7. Oct 31: Stereotyping as Discrimination (Cook)

8. Nov 14: Stigmatizing as Cruel, Inhuman and Degrading Treatment (Cook)

Part D: Accountability for Regulatory Restrictions

9. Nov 21: Regulation of Conscience (Dickens)

10. Nov 28: Sex Selection, Multiple Pregnancy and Fetal Reduction (Dickens)

The “See also” readings are optional. The references are provided to enable students to put particular issues in broader legal contexts, and for those students wanting to do more research.

1. Sept 12: Introduction and Course Overview (Cook)

Erin Nelson, Regulating Technologies in *Canadian Health Law and Policy* 4th ed. Downie, Caulfield and Flood eds LexisNexis Canada 2011, 295-340.

Part A: Accountability for Distributional Harms-Lack of Access to Treatments and Medicines

2. Sept 19: Maternal Mortality - Preventable Death in Pregnancy (Cook)

R.J. Cook and V. Undurraga, "Article 12" (health) in *The United Nations Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: OUP, forthcoming 2011) [20]

Alyne da Silva Pimentel v Brazil, Communication No. 17/2008, CEDAW/C/49/D/17/2008, 25 July 2011 (violation for avoidable maternal death of an Afro-Brazilian)

R.J. Cook, B.M. Dickens and M.F. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (OUP, 2003) 160-164; 185-196, 393-401

Read the following:

Right to life and survival-essential obstetric care 160-162;

Right to maternity protection-185-186

Right to health 187-194

Maternal Death Case Study-393-401

See also:

Maternal death cases and UN Resolutions

Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs. Inter-American Court of Human Rights Judgment of August 24, 2010. Series C No. 214 (Paraguay responsible for failure to prevent maternal death of an indigenous woman)

Laxmi Mandal v. Deen Dayal Harinagar Hospital, W.P. (C) 8853/2008 and *Jaitun v. Maternity Home MCD, Jangapura & Ors*, W.P. (C) 10700/2009. High Court of Delhi at New Delhi, June 4, 2010

United Nations Human Rights Council, Resolution on Preventable Maternal Mortality and Morbidity and Human Rights, June 16, 2009

Fact finding reports

Center for Reproductive Rights, *Broken Promises: Human Rights, Accountability, and Maternal Death in Nigeria*, 2008

Center for Reproductive Rights, *Failure to Deliver: Violations of women's Human Rights in Kenyan Health Facilities*, 2007

Center for Reproductive Rights, *Maternal Mortality in India: Using International and Constitutional Law to Promote Accountability and Change*, 2008

Social Conditions and Socio-economic rights

Paula Braveman, *Social conditions, health equity, and human rights*. 12 Health & Human Rights 31 (2010)

Varun Gauri and Daniel M. Brinks, Introduction 1-30, Daniel M. Brinks and Varun Gauri, a New Policy Landscape 303-352 in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Gauri and Brinks eds. (Cambridge, 2008)

3. Sept 26: Access to Reproductive Health Medicines - Misoprostol and Mifipristone/misoprosol (Cook)

R.J. Cook, BM. Dickens and M.F. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (OUP, 2003)

Right to life and survival (ARVs) 162-164 (see class 2)

Right to health 187-194 (see class 2)

Right to the benefits of scientific progress 194-196 (see class 2)

Access to Information for Safer Use of Misoprostol

J.N. Erdman, Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach, Harvard J. of Law and Gender 413, 413-424 (2011)

Choose one:

Neutrality Principle 424-437

Humanistic Principle 438-451

Pragmatic Principle 451-462

Registration of Mifepristone/Misoprostol for early abortion

J.E. Erdman et al, Medication Abortion in Canada: A Right-to-Health Perspective *American Journal of Public Health* 98: 1764-1769 (2008)

See also:

K.A. Petersen, Early Medical Abortion: Legal and Medical Developments in Australia, *Medical Journal of Australia*, 193(1) 26-29 (5 July 2010)

Off-label use of misoprostol used in combination with Mifepristone for early abortion- North Dakota, US

MKB Management Corp d/b/a Red River Women's Clinic and Kathryn Eggleston v. Birch Burdick and Terry Dwelle, pending 2011, District Court, East Central Judicial District, North Dakota, Civil Action 09-2011-CV-02205, complaint challenging North Dakota House bill 1297, enacted in 2011, restricting access to early medication abortion, www.reproductiverights.org

See also:

Roger Brownsword, *Rights, Regulation, and the Technological Revolution*, OUP 2008, ch 1: 6-21

Susan Rose-Ackerman and Peter L. Lindseth eds, *Comparative Administrative Law*, (EElgar, 2010)

Off-label Use of Misoprostol for Prevention and Treatment of Postpartum Haemorrhage

M. Potts & A. Hemmerling, "The worldwide burden of postpartum haemorrhage: Policy development where inaction is lethal." (2006) 94 *Int'l J. of Gynecology and Obstetrics* S116-S121

A.D. Weeks, C. Fiala & P. Safar, "Misoprostol and the debate over off-label drug use." (2005) 112 *BJOG: Int'l J. of Obstetrics and Gynaecology* 269-272

D.O.E. Gebhardt, "Misoprostol in a topsyturvy world" (2001) 27 *Journal of Medical Ethics* 205

Listing Misoprostol for Prevention and Treatment of Postpartum Haemorrhage as an Essential Medicine

May 19, 2011 letter from Jennifer Blum, Ndola Prata and Kirsten Moore

World Health Organization, *Misoprostol as an Essential Medicine*. Excerpts from Technical Report Series: *The Selection and Use of Essential Medicines* (2003, 2009) www.who.int

Part B: Accountability for the Appropriate Use of Criminal Law

4. Oct 3: The Role of Criminal Law (Dickens)

R. v. Morgentaler, [1988] 1 SCR 30, para 1-59

R. v. Cuerrier, [1998] 2 SCR 371, 127 CCC (3d) 1, para 77-78, 94-96, 118-130, 138-148

R. v. Mabior, 2010 MBCA 93

"Criminal law and HIV transmission or exposure" (2011) 15:2 *HIV / AIDS Policy & Law Review* 40

Assisted Human Reproduction Act, SC 2004, c 2, ss 4-9

In the matter of a Reference by the Government of Quebec pursuant to the Court of Appeal Reference Act, R.S.Q., c. R-23, concerning the constitutional validity of sections 8 to 19, 40 to 53, 60, 61 and 68 of the Assisted Human Reproduction Act, S.C. 2004, c. 2, 2008 QCCA 1167, para 18-24, 91-105, 126-128, 138-146

Attorney General of Canada v. Attorney General of Quebec; Attorney General of New Brunswick et al., Interveners, 2010 SCC 61, headnote

“Statutory Prohibitions and the Regulation of New Reproductive Technologies under Federal Law in Canada” (1995) 40 McGill LJ 905, p. 905, 924-946

www.aidslaw.ca; www.aidslex.org

5. Oct 17: Prostitution and Criminal Law (Lisa Kelly)

Bedford v. Canada, 2010 ONSC 4264 (Excerpts)

Canadian HIV/AIDS Legal Network, “Sex, Work, Rights: Reforming Canadian Criminal Laws on Prostitution - New Zealand & Sweden: Two models of Reform” (Toronto: Canadian HIV/AIDS Legal Network, 2005)

Act on prohibiting the purchase of sexual services (Swedish Code of Statutes, 1998)

Catharine A. MacKinnon, “Prostitution and Civil Rights,” 1 Mich. J. of Gender & L. 13 (1993) (excerpt: 13-17)

Elizabeth Bernstein, “Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns,” 36 Signs 45 (2010) (excerpt: 52-58)

Aboriginal Women Action Network (AWAN)’s Statement Opposing Legalized Prostitution and Total Decriminalization of Prostitution (Dec. 2007)

<http://www.prostitutionresearch.com/racism/000153.html>

Katrina Pacey et al., “Effects of Criminalization of HIV Disclosure on Street-Based Sex Work,” (Vancouver, B.C.: Gender and Sexual Health Initiative of the British Columbia Centre for Excellence in HIV/AIDS and Pivot Legal Society, 2011) (excerpts)

See also

Benedikt Fischer et al., “The socio-legal dynamics and implications of ‘diversion’: The case study of the Toronto ‘John School’ diversion programme for prostitution offenders,” 2 Criminology & Criminal Justice 385 (2002)

Lisa Kelly & Heidi Matthews, “Sex, Sin and Craigslist,” *Globe and Mail* (Dec. 30, 2010)

Pivot Legal Society, “Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws,” (Vancouver, B.C.: Pivot Legal Society, 2004)

Pivot Legal Society, “Beyond Decriminalization: Sex Work, Human Rights and a new Framework for Law Reform,” (Vancouver, B.C.: Pivot Legal Society, 2006)

6. Oct 24: Assisted Reproduction and the Criminal Law (Dickens)

Assisted Human Reproduction Act, SC 2004, c 2, ss 1-19, 45-64

In the matter of a Reference by the Government of Quebec pursuant to the Court of Appeal Reference Act, R.S.Q., c. R-23, concerning the constitutional validity of sections 8 to 19, 40 to 53, 60, 61 and 68 of the Assisted Human Reproduction Act, S.C. 2004, c. 2, 2008 QCCA 1167, para 25-44, 91-105, 120-128, 138-146

Attorney General of Canada v. Attorney General of Quebec; Attorney General of New Brunswick et al., Interveners, 2010 SCC 61, headnote, para 1-34, 41-46, 49-51, 59-76, 122, 156, 157-160, 168-169, 177, 191-194, 213-216, 233-236, 247-258, 281, 282-294

Part C: Accountability for Harms to Dignity

7. Oct 31: Stereotyping as Discrimination (Cook)

R.J. Cook and V. Undurraga, “Article 12” (health) in *The United Nations Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: OUP, forthcoming 2011) – see class 2 - review section on transformative equality

Gonzales v. Carhart, 550 U.S. 124 (2007); 127 S.Ct. 1610 (2007) Excerpts: per Kennedy (majority) at 1634-1635; per Ginsburg (dissenting) at 1647-1649 (United States, Supreme Court)

Corte Constitucional de Colombia, C-355/06, 10/05/2006, s 8.1 C-355/2006: Excerpts of the Constitutional Court’s Ruling that Liberalized Abortion in Colombia (2006), section 8.2- http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf

Cook, R.J., S. Cusack and B. Dickens, “Unethical Female Stereotyping in Reproductive Health” *Int’l J. of Gynecology and Obstetrics*, 2010; 109: 255-258

R.B. Siegel, “The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions” (2007) 3 *University of Illinois Law Review* 991-1053 (excerpt: pp. 994-997, 1009-1014, 1029-1050)

International Federation of Gynecology and Obstetrics, *Harmful Stereotyping of Women in Health Care*, 2011, www. FIGO.org

See also

C. Smearman. "Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists" (2006) 48 Arizona Law Review 469-540 (excerpt: pp. 492-507) see class 9 below

8. Nov 14: Stigmatizing as Cruel, Inhuman and Degrading Treatment (Cook)

Law, Stigma and Health

B.G. Link & J. Phelan. "Stigma and its public health implications" (2006) 367 The Lancet 528-529

S. Burris. "Stigma and the law" (2006) 367 The Lancet 529-531

R. Bayer, Stigma and the Ethics of Public Health: Not Can we But Should We, Social Science and Medicine 67 (2008) 463-472

Scott Burris, Stigma, ethics and policy: A Commentary on Bayer, Science and Medicine 67 (2008) 473-475

See also:

A. Brudner, Proportionality, Stigma and Discretion, Criminal Law Quarterly 38: 302 (1996)

Abortion Stigma

Kumar et al, Conceptualizing Abortion Stigma, Culture, Health and Sexuality 11(6) 625-639 (2009) 11

K.L. v. Peru, Comm. No. 1153/2003: Peru. 22/11/2005, U.N. Doc. CCPR/C/85/D/1153/2003 (2005). 6

See also:

RR v. Poland, App. No. 27617/04, ECHR, Judgment, 26 May 2011

HIV/AIDS Stigma

"India: Supreme Court denies right to marry for people living with HIV, then resiles from this conclusion" *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV*. (Geneva: Canadian HIV/AIDS Legal Network and UNAIDS, 2006), 21-26.

Mr. X v. Hospital Z, (1998) 8 SCC 296 varied 2002 (SC India)

Part D: Accountability for Regulatory Restrictions

9. Nov 21: Regulation of Conscience (Dickens)

Pichon and Sajous v. France, App. No. 49853/99 (2001) (European Court H.R.)

C. Smearman. “Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists” (2006) 48 *Arizona Law Review* 469-540 (excerpt: 492-507)

R.J. Cook, M. Arango Olaya & B.M. Dickens. “Healthcare responsibilities and conscientious objection” (2009) 104 *Int’l Journal of Gynecology and Obstetrics* 249-252

International Federation of Gynecology and Obstetrics, *Ethical Guidelines on Conscientious Objection*, 2005, www.figo.org

R.J. Cook & B.M. Dickens. “Conscientious Commitment to Women’s Health” (2011) 113 *Int’l Journal of Gynecology and Obstetrics* 163-166

10. Nov 28: Sex Selection, Multiple Pregnancy and Fetal Reduction (Dickens)

Final Report: *Proceed with Care*, 1993, Royal Commission on New Reproductive Technologies, chaired by Patricia Baird, p. 885-919.

<http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/baird1993-eng/baird1993-eng.htm>

Assisted Human Reproduction Act, SC 2004, c 2, s 5(1)(e)

Dickens, B.M., G.I. Serour, R.J. Cook & R.Z. Qiu, “Sex Selection: Treating Different Cases Differently” (2005) 90 *Int’l Journal of Gynecology and Obstetrics* 171-177

Dickens, B.M. and R.J. Cook, “Multiple Pregnancy: Legal and Ethical Issues” (2008) 103 *Int’l Journal of Gynecology and Obstetrics* 270-274

International Federation of Gynecology and Obstetrics, *Ethical Guidelines on Multiple Pregnancy*, 2005, www.figo.org

WRITING GUIDE: REPRODUCTIVE AND SEXUAL HEALTH LAW

Requirements:

- **Four Short Papers** analyzing reading materials from each of the **Four Seminar Parts**
- Length: 1,563-1,875 words each, which is about 6-7 pages at about 250 words a page
- Submission:
 - By 12pm on Friday prior to the class in which the materials are to be discussed.
 - Under office door of professor responsible for the class.
 - Rebecca Cook: Falconer Rm 210; Bernard Dickens: Library Rm 3023.
 - Permission for electronic submission given only in exceptional circumstances.
- Short papers will be used in class to guide discussion of the materials. Students will be on-call and required to discuss their short papers.
- Graded short papers will be returned after class with comments.

Objective: Active Reflection and Critical Engagement

Short papers should actively reflect on and critically engage with an assigned reading (or any part of the reading). This may include a section from the Green Book, a case or an article. Do not summarize or describe the reading. Analyze the reading. Additional research is not required.

Short papers may:

- Question and reflect on the meaning and uses of language or concepts
- Examine how the reading reinforces or challenges hierarchies, constructions and relations in law and legal practice; how the reading positions reproductive and sexual health processes or functions, behavior or services in legal regulation
- Investigate the assumptions, values and interests (related to, for example, gender, race and ethnicity, or sexual orientation) underlying a position or argument
- Articulate conflicts, contradictions or uncertainties in the reading
- Compare and contrast interpretations or analytical methods with those in other readings
- Challenge the assumptions or analytic framework of the reading
- Apply the reading to a different context (e.g. geographical, social, political, clinical or health system) or critique the reading from a different perspective or within an alternative discourse (e.g. critical, feminist, development, economic, human rights, public health)

Assessment Criteria:

Short papers will be assessed on: analysis, structure, and style.

- **Analysis:** Clearly state at the outset, your thesis or argument. What is of utmost interest is not your conclusion, but your reasons for drawing your conclusion. You must back up all assertions with reasons.

While it may be helpful to introduce the reading in your paper, your paper must go beyond description. You **MUST** analyze the reading and draw conclusions from your analysis.

Be certain to canvas alternative positions and arguments in the course of your paper and to rebut these to the extent that they are inconsistent with your arguments.

Use examples to illustrate your arguments. These may be cases, events, or hypothetical examples, where appropriate.

Some degree of originality is important. You are expected to develop your own thoughts and analysis, and not describe the thoughts and analysis of others.

- **Structure:** Structure is essential to a clear and well-argued paper. You should include an introduction and a conclusion. You should outline your structure in your introduction.

Arguments should be clear and logical and ideas should be linked coherently. Sub-headings are useful in delineating structure and moving from one idea or argument to the next.

Each paragraph should have something relevant to say about your thesis or argument. If it does not, ask yourself or try to explain why you have included that paragraph.

- **Style:** Clear expression, good presentation, accurate grammar and spelling, and appropriate use of vocabulary are essential.

Citations and Referencing:

For the accepted legal citation style at the University of Toronto Faculty of Law, see the *Canadian Guide to Uniform Legal Citation* (referred to as the “McGill Guide”) or the Bora Laskin Law Library website.

All use of others’ language **MUST** be indicated in quotation marks and referenced. Use of others’ ideas should be fully referenced. Failure duly to acknowledge the work of others constitutes plagiarism and is a serious academic offence.

Additional writing resources are available: www.utoronto.ca/writing.