

# Contents

|  |                |
|--|----------------|
| <i>List of Contributors</i>  | <i>page</i> xi |
| <i>Acknowledgments</i>   | xiii           |
| <b>Introduction</b>  | <b>1</b>       |
| Susannah Baruch, I. Glenn Cohen, Wendy Netter Epstein,<br>Christopher Robertson, and Carmel Shachar                            |                |
| <b>PART I WHAT IS PRIVATE LAW? THEORY AND STRUCTURE</b>  |                |
| <b>1 Public Funds, Public Functions, Private Actors: The Cognitive<br/>Dissonance of US Health Law</b>                         | <b>7</b>       |
| William Sage   |                |
| <b>2 Private Ordering Is Ubiquitous in Health Care, but Why?</b>   | <b>20</b>      |
| Barbara J. Evans   |                |
| <b>3 Abandoning Fiduciaries in Health Care</b>   | <b>32</b>      |
| Lauren R. Roth   |                |
| <b>4 European Distinctions between Private and Public Law in Health<br/>Care and the Emerging Influence of Private Lobbies</b> | <b>44</b>      |
| Barry Solaiman   |                |
| <b>PART II TOOLS OF PRIVATE LAW: TORTS, CONTRACTS, AND<br/>PROPERTY AS VEHICLES OF HEALTH POLICY INTRODUCTION</b>              |                |
| Wendy Netter Epstein   |                |
| <b>5 Data Transparency, ERISA Preemption, and Freedom of Contract</b>  | <b>61</b>      |
| Craig Konnoth  |                |

|   |   |     |
|---|---|-----|
| 6   | <b>States as Contractor: Attempts to Drive Health Care Cost Containment through State Purchasing Power</b>  | 73  |
|   | Christine H. Monahan, Maanasa Kona, and Madeline O'Brien  |     |
| 7   | <b>Adaptation of Tort Law to Modern Health Care Delivery in the Restatement of Medical Malpractice</b>  | 85  |
|   | Mark A. Hall  |     |
| 8   | <b>Pandemic Harms and Private Law's Limits: A Proposal for Tort Replacement</b>   | 96  |
|   | Jill R. Horwitz, Alberto De Diego-Habel, and Daniel B. Rodriguez  |     |
| 9   | <b>The Human Body Commons: A Private Law Contribution for the Advancement of the Right to Health</b>  | 108 |
|   | Enrique Santamaría Echeverría   |     |
| <b>PART III RUSSIAN DOLLS, REPRODUCTION, AND PRIVATE LAW INTRODUCTION</b> |   |     |
|   | I. Glenn Cohen  |     |
| 10  | <b>Employer-Sponsored Abortion Coverage: Private Law's Role in Reproductive Freedom</b>   | 123 |
|   | Valarie K. Blake and Elizabeth Y. McCuskey  |     |
| 11  | <b>Reproductive Innovation and Reproductive Exceptionalism: How Private Health Insurance Coverage of Fertility Treatment Complements Hostile Governmental Action and Expands Access to Assisted Reproduction in the United States</b> | 136 |
|   | Myrisha S. Lewis  |     |
| 12  | <b>Business Responses to <i>Dobbs</i>: The Return to a "Reproductive Rights" Approach, and Suspicions around Corporate Care</b>   | 148 |
|   | Asees Bhasin  |     |
| 13  | <b>Privatizing the Creation of Equity in Women's Health</b>   | 162 |
|   | Thomas W. Williams  |     |
| <b>PART IV HOW PRIVATE LAW CAN AND CANNOT CONTROL COSTS: INTRODUCTION</b> |   |     |
|   | Christopher Robertson   |     |
| 14  | <b>Federalism, Private Law, and Medical Debt</b>  | 179 |
|   | Erin C. Fuse Brown  |     |

|    |   |     |
|----|---|-----|
| 15 | <b>Paying for Health Care and Private Law's Internal Point of View</b><br>James Toomey  | 192 |
| 16 | <b>Health Law's Sheathed Sword: Why Hasn't Civil Litigation Dented Health Care Costs?</b><br>Jackson Williams   | 204 |
| 17 | <b>The Canary in the Coal Mine: Private Antitrust Law and New Dynamics in Health Care Markets</b><br>Jaime S. King  | 217 |
| 18 | <b>Health Care Finance Law's Relational Bias</b><br>Jessica Mantel  | 229 |
|    | <b>PART V PRIVATE LAW APPLIED: THE PHARMACEUTICAL INDUSTRY, NURSING HOMES, AND THE END OF LIFE</b>  |     |
|    | <b>INTRODUCTION</b><br>Carmel Shachar   |     |
| 19 | <b>The Financialization of Digital Clinical Trials: Tensions between Efficiency and Scientific Evidence Accessibility</b><br>Ximena Benavides                                     | 243 |
| 20 | <b>Shareholder Resolutions and Access to Medications</b><br>Rebecca E. Wolitz   | 255 |
| 21 | <b>The Hollowed-Out American Nursing Home: Using Private Law to Police Poor Quality Care and Expand Owner Responsibilities</b><br>Barry R. Furrow                                 | 270 |
| 22 | <b>Health Care Organization Policies about the California End of Life Option Act: The Paper Victory of the Medical Aid in Dying Movement</b><br>Megan S. Wright and Cindy L. Cain | 283 |

