

# AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME XIX NUMBER 4 1993

## ARTICLES

THE EXCLUSION OF PREGNANT,  
PREGNABLE, AND ONCE-PREGNABLE  
PEOPLE (A.K.A. WOMEN) FROM  
BIOMEDICAL RESEARCH

Vanessa Merton

DOCTORS ON TRIAL: A COMPARISON  
OF AMERICAN AND JEWISH LEGAL  
APPROACHES TO MEDICAL MALPRACTICE

Joshua Fruchter

## NOTES AND COMMENTS

STATE REGULATIONS AND THE HIV-  
POSITIVE HEALTH CARE PROFESSIONAL:  
A RESPONSE TO A PROBLEM THAT  
DOES NOT EXIST

Susan L. DiMaggio

THE PHYSICIAN SELF-REFERRAL  
DILEMMA: ENFORCING ANTITRUST  
LAW AS A SOLUTION

Julie E. Mathews

PUBLISHED BY THE AMERICAN SOCIETY OF LAW, MEDICINE & ETHICS AND THE  
BOSTON UNIVERSITY SCHOOL OF LAW

The AMERICAN JOURNAL OF LAW & MEDICINE is published in the Spring, Summer, Fall, and Winter by the American Society of Law, Medicine & Ethics and the Boston University School of Law. All decisions concerning the content of the JOURNAL are made by a joint American Society of Law, Medicine & Ethics/Boston University School of Law Editorial Policy Committee. Statements of fact and opinion are the responsibility of the authors alone, and are not necessarily endorsed by the editors, the Society, or the law school.

The Editors invite the submission of manuscripts on medicolegal topics. For details, see inside back cover. Editorial communications, including original manuscripts and requests for permission to reproduce JOURNAL material, should be addressed to Editor-in-Chief, AMERICAN JOURNAL OF LAW & MEDICINE, 765 Commonwealth Avenue, Boston, Massachusetts 02215. Editorial phone: (617) 353-2912.

Business correspondence, including subscription correspondence, should be addressed to the Membership Director, American Society of Law, Medicine & Ethics, 765 Commonwealth Avenue, 16th Floor, Boston, Massachusetts 02215. Business phone: (617) 262-4990.

Subscriptions: \$70.00 per year for institutions, and \$60.00 for individuals (payment must be on personal check) who are not members of the American Society of Law, Medicine & Ethics. Foreign subscribers should remit, for a year's subscription, an additional \$30.00 for foreign postage.

Missing copies of the JOURNAL will be sent free of charge to subscribers or members of the Society provided that notice of such claim is received at the Society's subscription office within one month of receipt of the next issue published. Requests made after this period will be billed at the regular issue price of \$20.00 (includes postage and handling).

Members of the American Society of Law, Medicine & Ethics receive a free subscription to the JOURNAL as part of their dues (\$120.00 for 1994). Information concerning membership is available from the Membership Director, American Society of Law, Medicine & Ethics, 765 Commonwealth Avenue, 16th Floor, Boston, Massachusetts 02215. Society phone: (617) 262-4990.

Articles in the JOURNAL are indexed in *LEXIS*, *WESTLAW*, *Index to Legal Periodicals*, *Legal Contents*, *Index Medicus*, *Social Sciences Citation Index*, *Current Contents: Social and Behavioral Sciences*, and *Biosciences Information Service of Biological Abstracts*.

Library of Congress Catalog Number: 75-645516 (Shelf No. K1.M445).  
ISSN 0098-8588.

U.S. postage paid at Lincoln, Nebraska, in accordance with Permit No. 264 (Nonprofit Org.).

#### ADMINISTRATIVE OFFICERS OF BOSTON UNIVERSITY SCHOOL OF LAW

JOHN R. SILBER, B.A., M.A., Ph.D., LL.D. (hon.), L.H.D. (hon.), *President*,  
*University Professor and Professor of Philosophy and Law*

RONALD A. CASS, B.A., J.D., *Dean and Professor of Law*

JOSEPH BRODLEY, B.A., LL.B., *Senior Associate Dean for Research and Professor of Law*

ROBERT G. BONE, B.A., J.D., *Associate Dean and Professor of Law*

KENNETH W. SIMONS, B.A., J.D., *Associate Dean and Professor of Law*

CHRISTINE A. MARX, B.S., J.D., *Assistant Dean for Student Affairs*

#### OFFICERS OF THE AMERICAN SOCIETY OF LAW, MEDICINE & ETHICS

KAREN H. ROTHENBERG, J.D., M.P.A., *President*

ROBERT J. LEVINE, M.D., *President-Elect*

STEVEN MILES, M.D., *Secretary*

SANDRA H. JOHNSON, J.D., LL.M., *Treasurer*

ELLIOT L. SAGALL, M.D., *Founder and First President*

RUTH B. PURTILO, Ph.D., *Immediate Past President*

LAWRENCE O. GOSTIN, J.D., *Executive Director*

# AMERICAN JOURNAL OF LAW & MEDICINE

## BOARD of EDITORS

**FACULTY EDITOR-IN-CHIEF**  
**Frances H. Miller, J.D.**  
Boston University School of Law

**FACULTY EDITOR-IN-CHIEF  
EMERITUS AND FOUNDER**  
**John A. Norris, J.D., M.B.A.**

**EXECUTIVE EDITOR**  
**Lawrence O. Gostin, J.D.**

**DIRECTOR OF PUBLICATIONS**  
**American Society of Law, Medicine &  
Ethics**  
**Michael Vasko**

**CIRCULATION MANAGER**  
**Susan Reddy**

## EDITORS

**Michael Baram, J.D.**  
Boston University Schools of Law  
and Public Health

**Charles H. Baron, LL.B., Ph.D.**  
Boston College Law School

**Henry Beyer, J.D.**  
Boston University School of Law

**William J. Curran, LL.M., S.M. Hyg.**  
Harvard University School of  
Public Health

**Lee J. Dunn, Jr., J.D., LL.M.**  
Dunn & Auton  
Boston, Massachusetts

**Richard F. Gibbs, M.D., J.D.**  
Harvard Medical School

**Jay Alexander Gold, M.D., J.D., M.P.H.**  
Wisconsin Peer Review Organization

**Clark C. Havighurst, J.D.**  
Duke University School of Law

**Nathan Hershey, J.D.**  
University of Pittsburgh  
Graduate School of Public Health

**Bernard D. Hirsh, J.D.**  
Wildman, Harold Allen & Dickson  
Chicago, Illinois

**Edward E. Hollowell, J.D.**  
Hollowell & Silverstein  
Raleigh, North Carolina

**Richard G. Huber, J.D.**  
Boston College Law School

**Sheila Jasanoff, J.D., Ph.D.**  
Director, Program on Science Technology  
and Society  
Cornell University

**Jay Katz, M.D.**  
Yale University Law School

**Renée M. Landers, J.D.**  
Boston College Law School

**Sylvia A. Law, J.D.**  
New York University School of Law

**Aubrey Milunsky, MB.B.Ch., D.Sc.,  
F.R.C.P., D.C.H.**  
Boston University School of Medicine

**Irwin N. Perr, M.D., J.D.**  
University of Medicine and Dentistry  
of New Jersey

**Harvey E. Pies, J.D., M.P.H.**  
Blue Cross and Blue Shield of Florida  
Jacksonville, Florida

**Elliot L. Sagall, M.D.**  
Founder, American Society of  
Law, Medicine & Ethics  
Harvard Medical School

**E. Donald Shapiro, J.D., LL.D.**  
New York Law School

**Sidney Shindell, M.D., LL.B.**  
Medical College of Wisconsin

**Robert B. Shira, D.D.S.**  
Special Assistant to the President  
Tufts University

**Arthur F. Southwick, J.D., M.B.A.**  
Grad. Sch. of Business Administration  
University of Michigan

**Paul R. Tremblay**  
Boston College Law School

**David G. Warren, J.D.**  
Duke University

**Cyril H. Wecht, M.D., J.D.**  
Director, Pittsburgh Institute of Legal  
Medicine

**James G. Zimmerly, M.D., J.D., M.P.H.**  
Armed Forces Institute of Pathology  
Washington, D.C.

# AMERICAN JOURNAL OF LAW & MEDICINE

## INTERNATIONAL BOARD of EDITORS

**Dr. M.A.M. Wachter**  
Director  
Institute of Bioethics  
The Netherlands

**Dr. S.S. Fluss**  
Chief, Health Legislation  
World Health Organization  
Switzerland

**Prof. Dr. Erwin Deutsch**  
Institute for Pharmaceutical and  
Medical Law  
University of Gottingen  
Germany

**Bernard M. Dickens, Ph.D., LL.D.**  
Professor  
Faculty of Law & Faculty of Medicine  
University of Toronto  
Canada

**Prof. Dr. H.J.J. Leenen**  
Instituut voor Sociale Geneeskunde  
Universiteit van Amsterdam  
The Netherlands

**The Honorable Justice  
Michael D. Kirby**  
President, Court of Appeal  
Supreme Court of New South Wales  
Australia

**Koichi Bai**  
Professor of Law  
Director of Institute of Medical  
Humanities  
School of Medicine  
Kitasato University  
Japan

**Prof. P.D.G. Skegg**  
Faculty of Law  
University of Otago  
Dunedin  
New Zealand

**Prof. Dr. Iur. Dieter Giesen**  
Institute for International, Foreign  
and Comparative Law  
Director  
Working Centre for International  
Studies in Medical Malpractice Law  
The Free University of Berlin  
Germany

**Prof. Amos Shapira**  
Lubowski Professor of Law &  
Biomedical Ethics  
Faculty of Law  
Tel Aviv University  
Israel

# AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME XIX NUMBER 4 1993

## BOSTON UNIVERSITY SCHOOL OF LAW STUDENT BOARD OF EDITORS 1993-1994

### EDITOR-IN-CHIEF

David D. Dueno

### EXECUTIVE EDITOR

Laura C. Boujoff

### MANAGING EDITORS

David A. Lane  
Lisa Paolillo

### PROJECTS EDITOR

Stacy B. Margolies

### SYMPOSIUM EDITOR

Susan L. DiMaggio

### ARTICLES EDITORS

Thomas B. Bralliar, Jr.  
Jesse R. Lee  
Jonathan P. Serbin  
Stephanie N. Switzer

### ASLME DEVELOPMENTS EDITOR

Nikki M. Constantine

### CASE & NOTE EDITORS

David B. Allswang  
David R. Campbell  
Kathleen M. Crowley  
William C. Dennis

Stephen R. Fish, Jr.  
Melanie B. Jacobs  
Anthony D. Pellegrini  
Susan H. Upton

### THIRD-YEAR EDITORS

Jeffrey B. Araten  
Robert J. Blanch, Jr.  
Lawrence R. Bressler  
Cedric DeLaCruz  
Paula Domanski  
Rick J. Fucci

Eryn P. Gittleman  
William J. Graham  
Andrew A. Honegger  
Julie E. Mathews  
Arlene N. Meltzer

Cheryl A. Posegay  
Wendy J. Rothstein  
Robert W. Russo  
Brian Schulman  
Rachel L. Singer  
Terrence J. Talbot

### STAFF MEMBERS

Mark Appleberry  
Klio Arvanitidis  
Claire Breaux  
Patricia Cashman  
Derek Cohen  
Ellen M. Crowley  
Nicole E. Dale  
David Feniger  
Jessica Ferrell  
Michael G. Frankel  
Brian F. Freyeremuth

Natascha S. George  
Stacy Grossman  
Allison R. Handel  
Jeffrey M. Holoubek  
Patrick R. Jones  
Susan Lee  
Nicholas J. Maglio  
Daniel McCarthy  
Michael Moore  
David T. Morris  
Erin Newman  
Moy Ogilvie

Stephanie Pitcher  
Andrea Platner  
Andrew Seewald  
Ross D. Silverman  
Paul C. Smith  
Michael D. Sweet  
Jeffrey Trey  
Ukwani O. Udo  
Felecia Wein  
Jody M. Weisberg  
Aaron Wong

# AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME XIX NUMBER 4 1993

## ARTICLES

THE EXCLUSION OF PREGNANT, 369 Vanessa Merton  
PREGNABLE, AND ONCE-PREGNABLE  
PEOPLE (A.K.A. WOMEN) FROM  
BIOMEDICAL RESEARCH

DOCTORS ON TRIAL: A 453 Joshua Fruchter  
COMPARISON OF AMERICAN AND  
JEWISH LEGAL APPROACHES TO  
MEDICAL MALPRACTICE

## NOTES AND COMMENTS

STATE REGULATIONS AND THE 497 Susan L. DiMaggio  
HIV-POSITIVE HEALTH CARE  
PROFESSIONAL: A RESPONSE TO A  
PROBLEM THAT DOES NOT EXIST

THE PHYSICIAN SELF-REFERRAL 523 Julie E. Mathews  
DILEMMA: ENFORCING ANTITRUST  
LAW AS A SOLUTION

## MEDICOLEGAL REFERENCE LIBRARY

SELECTED RECENT COURT DECISIONS 547  
SELECTED BOOK RELEASES 557

Copyright 1993 by the American Society of Law, Medicine & Ethics, Inc. and the Boston University School of Law. Unless otherwise noted, the materials appearing herein may be copied for classroom use, provided that (1) the user notify the Editor-in-Chief of *American Journal of Law & Medicine* of having made such copies; (2) the author and *American Journal of Law & Medicine* are identified; and (3) the proper notice of copyright is affixed to each copy.