

# THE JOURNAL OF LAW, MEDICINE & ETHICS

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## INDEPENDENT ARTICLES

### **“A Raw Blessing” – Caregivers’ Experiences Providing Care to Persons Living with Dementia in the COVID-19 Pandemic**

*Emily A. Largent, Andrew Peterson, Kristin Harkins, Cameron Coykendall, Melanie Kleid, Maramawit Abera, Shana D. Stites, Jason Karlawish, and Justin T. Clapp*

### **Ethics and Medical Aid in Dying: Physicians’ Perspectives on Disclosure, Presence, and Eligibility**

*Matthew DeCamp, Julie Ressalam, Hillary D. Lum, Elizabeth R. Kessler, Dragana Bolcic-Jankovic, Vinay Kini, and Eric G. Campbell*

### **Harvey & Gurvir’s Law: Ontario Bill for Quality Prenatal Information about Down Syndrome: Terminology, Feasibility, and Ethical Issues**

*Marie-Eve Lemoine, Anne-Marie Laberge, Marie-Françoise Malo, Stéphanie Cloutier, Marie-Christine Roy, Stanislav Birko, Andréa Daigle, and Vardit Ravitsky*

## SYMPOSIUM

# Seeking Reproductive Justice in the Next 50 Years

GUEST EDITED BY Nicole Huberfeld, Linda C. McClain, and Aziza Ahmed

- 463 Introduction**  
*Aziza Ahmed, Nicole Huberfeld, and Linda C. McClain*
- 468 What Would Justice Blackmun Say? A Response to *Dobbs*** *Radhika Rao*
- 473 “A Vigorous Campaign against Abortion”: Views of American Leaders of Eugenics v. Supreme Court Distortions** *Paul A. Lombardo*
- 480 (Re)criminalizing Abortion: Returning to the Political with Stories** *George J. Annas*
- 485 *Dobbs v. Jackson Women’s Health*: Undermining Public Health, Facilitating Reproductive Coercion**  
*Aziza Ahmed, Dabney P. Evans, Jason Jackson, Benjamin Mason Meier, and Cecilia Tomori*
- 490 The Reproductive Injustices of Abortion Bans for Disability** *Leslie Francis*
- 497 The Impact of *Dobbs* on US Graduate Medical Education** *Amirala S. Pasha, Daniel Breittkopf, and Gretchen Glaser*
- 504 Ethical and Legal Obligations for Research Involving Pregnant Persons in a Post-*Dobbs* Context**  
*Richard M. Weinmeyer, Seema K. Shah, and Michelle L. McGowan*
- 511 Reproductive Genetic Medicine in a Post-*Dobbs* World: Will it Make Life Harder for People with Genetic Disease?** *Sonia M. Suter and Laura Hercher*
- 518 Where Does Life Begin? Discerning the Impact of *Dobbs* on Assisted Reproductive Technologies**  
*Judith Daar*

*Plus more inside...*

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VOLUME 51:3 • FALL 2023

Symposium Articles

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Seeking  
Reproductive  
Justice in the  
Next 50 Years

Guest Edited by  
Nicole Huberfeld,  
Linda C. McClain,  
and Aziza Ahmed

455  
Letter from  
the Editor

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Tousey Matthews

463

**Introduction**

*Aziza Ahmed, Nicole Huberfeld, and  
Linda C. McClain*

**Beginnings**

468

**What Would Justice Blackmun Say?  
A Response to *Dobbs***

*Radhika Rao*

*Dobbs* appears more extreme when juxtaposed against *Roe*'s hidden history. Justice Blackmun was the author of *Roe*, but the opinion was the product of a remarkable collaboration that incorporated the suggestions of many Justices. Thus, *Roe*'s medical framing embodied the vision of the Court as a whole, not one individual.

473

**"A Vigorous Campaign against  
Abortion": Views of American  
Leaders of Eugenics v. Supreme Court  
Distortions**

*Paul A. Lombardo*

The Supreme Court decided *Box v. Planned Parenthood of Indiana and Kentucky* in 2019. Justice Clarence Thomas's opinion in the case claimed there was a direct connection between the legalization of abortion, in the late 20th Century, and the beginnings of the birth control movement a full three quarters of a century earlier. "Many eugenicists," Thomas argued, "supported legalizing abortion."

Justice Samuel Alito highlighted similar claims in *Dobbs v. Jackson Women's Health*, citing a brief entitled "The Eugenic Era Lives on through the Abortion Movement." That brief was an echo of Justice Thomas' misguided attempt at history in the *Box* opinion. Similar claims reoccur in Judge Matthew Kacsmaryk's opinion in the Texas mifepristone case, *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration*.

These false claims are the focus of this article. There is no evidence that early leaders of the eugenics movement supported abortion as part of the movement for birth control. It is accurate to describe those leaders as anti-abortion, and their followers as people who condemned abortion for moral, legal, and medical reasons.

480

**(Re)criminalizing Abortion: Returning  
to the Political with Stories**

*George J. Annas*

Abortion stories have always played a powerful role in advancing women's rights. In the abortion sphere particularly, the personal is political. Following the Court's reversal of *Roe v. Wade*, abortion politics, and abortion storytelling, take on an even deeper political role in challenging the bloodless judicial language of *Dobbs* with the lived experience of women. It is suggested that the future of the abortion debate will be situated not only in telling new stories, but also in retelling older abortion stories, published in both the pre-*Roe* era and during the *Roe* era, stories that will take on new meaning and power in our post-*Roe v. Wade* era.

485

***Dobbs v. Jackson Women's Health*:  
Undermining Public Health, Facilitating  
Reproductive Coercion**

*Aziza Ahmed, Dabney P. Evans, Jason  
Jackson, Benjamin Mason Meier, and  
Cecilia Tomori*

This commentary situates *Dobbs* in the context of a long historical shift in public health that increasingly places burdens on individuals for their own reproductive health care, moving away from the possibility of a robust state public health infrastructure.

**Social and Legal Dimensions  
of the Post-*Dobbs* Healthcare  
Environment**

490

**The Reproductive Injustices of  
Abortion Bans for Disability**

*Leslie Francis*

This article argues that state laws banning abortions for disability violate reproductive justice for parents with disabilities. These bans deprive people with disabilities of choices that may be important to their possibilities of becoming parents, including possibilities for abortion of pregnancies that have become risky to continue. Far from protecting disability civil rights, these state law bans restrict the abilities of people with disabilities to choose to have children and to parent.



497

**The Impact of *Dobbs* on US Graduate Medical Education**

*Amirala S. Pasha, Daniel Breitkopf, and Gretchen Glaser*

The *Dobbs* decision will directly affect patients and reproductive rights; it will also impact patients indirectly in many ways, one of which will be changes in the physician workforce through its impact on graduate medical education. Current residency accreditation standards require training in all forms of contraception in addition to training in the provision of abortion. State bans on abortions may diminish access to training as approximately half of obstetrics and gynecology residency programs are in states with significant abortion restrictions. The *Dobbs* decision creates numerous hurdles for trainees and their programs. Trainees in restrictive states will have to travel to learn in a different program in a protective state. As training opportunities diminish, potentially leading to a decline in clinical skills, knowledge, and experience in the provision of abortion, the rate of complications and maternal mortality are likely to rise. This will likely have a disproportionately negative effect on preexisting disparities in reproductive health fueled by a longstanding history of systemic racism and inequities. This work aims to both define the looming problem in abortion training created by *Dobbs* and propose solutions to ensure that an adequate workforce is available in the future to serve patient needs.

504

**Ethical and Legal Obligations for Research Involving Pregnant Persons in a Post-*Dobbs* Context**

*Richard M. Weinmeyer, Seema K. Shah, and Michelle L. McGowan*

In light of a history of categorical exclusion, it is critical that pregnant people are included in research to help improve the knowledge base and interventions needed to address public health. Yet the volatile legal landscape around reproductive rights in the United States threatens to undue recent progress made toward the greater inclusion of pregnant people in research. We offer ethical and practical guidance for researchers, sponsors, and institutional review boards to take specific steps to minimize legal risks and ensure the ethical conduct of research with pregnant people in an evolving legal environment.

511

**Reproductive Genetic Medicine in a Post-*Dobbs* World: Will it Make Life Harder for People with Genetic Disease?**

*Sonia M. Suter and Laura Hercher*

Post-*Dobbs* abortion restrictions impact access and choice in the context of reproductive genetic medicine, raising serious reproductive justice concerns. The consequences of these restrictions are particularly acute and far-reaching for individuals with genetic conditions and their families.

518

**Where Does Life Begin? Discerning the Impact of *Dobbs* on Assisted Reproductive Technologies**

*Judith Daar*

This article explores the impact of *Dobbs* on access to assisted reproductive technologies. Clinical aspects of IVF, including embryo discard and cryopreservation, preimplantation genetic testing, and selective reduction of multiple pregnancy are potentially jeopardized by a new legal landscape that protects embryos over the interest of infertility patients

528

**From Constitutional Protections to Medical Ethics: The Future of Pregnant Patients' Medical Self-Determination Rights After *Dobbs***

*Nadia N. Sawicki and Elizabeth Kukura*

This article argues that the Supreme Court's decision in *Dobbs* is likely to impact medical decision-making by pregnant patients in a variety of contexts. Of particular concern are situations where a patient declines treatment recommended for its potential benefit to the fetus and situations where treatment is withheld due to potential risk to the fetus. The Court's elevation of fetal interests, combined with a history of courts using abortion jurisprudence to guide their reasoning in compelled treatment cases, means that *Dobbs* has the potential to limit patient autonomy in a wide array of clinical settings. The article calls on professional medical associations to issue ethical guidance affirming the duty to respect the medical self-determination of pregnant patients.

**Legal Regulation of Pregnancy and Reproduction**

533

**Stopping Criminalization at the Bedside**

*Wendy A. Bach and Mishka Terplan*

Low-income women and, disproportionately low-income women of color seeking reproductive and pregnancy care are increasingly subject to what this article terms carceral care – care compromised by its proximity to punishment systems. This article identifies the legal and health care practice mechanisms leading to carceral care and proposes solutions designed to stop criminalization at the bedside.

538

**Beyond *Roe*: Implications for End-of-Life Decision-Making During Pregnancy**

*Joan H. Krause*

The end of *Roe v. Wade* has significant implications for the autonomy of pregnant patients at the end of life. At least thirty states restrict the choice to withhold/withdraw life-sustaining treatments from pregnant patients without decisional capacity, invalidating prior advance directives and prohibit-

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VOLUME 51.3 • FALL 2023

ing others from choosing these options for the patient. Many restrictions are based on the *Roe* framework, applying after “viability” or similar considerations of fetal development or prospect for live birth. Scholars have also relied on the abortion framework, arguing that the restrictions impose an undue burden. The end of *Roe* will free states from having to craft limited restrictions designed to work around prior abortion jurisprudence. Similarly, advocates will no longer be able to draw support from the abortion framework, forcing them to rely instead on cases supporting rights to autonomy/bodily integrity in medical decision-making.

544

**Leveraging the Tools Available:  
Using the Hyde Amendment to Preserve  
Minimum Abortion Access and Mitigate  
Harms in Restrictive States**

*Fabiola Carrión, Lee Hasselbacher, and  
Terri-Ann Thompson*

The overturn of *Roe v. Wade* has resulted in fewer rights and resources for people seeking abortion care, particularly in the South. The Hyde Amendment has historically restricted abortion access for those enrolled in Medicaid. We argue here that its guarantees of minimum abortion coverage should be leveraged to offset harms where possible.

549

**Health Inequities Among People Who  
Use Drugs in a Post-*Dobbs* America:  
The Case for a Syndemic Analysis**

*Jennifer J. Carroll, Bayla Ostrach, and  
Taleed El-Sabawi*

Punitive policy responses to substance use and to abortion care constitute direct attacks on personal liberty and bodily autonomy. In this article, we leverage the concept of “syndemics” to anticipate how the already synergistic stigmas against people who use drugs and people who seek abortion services will be further compounded the *Dobbs* decision.

554

**Mifepristone Paternalism at the FDA**

*Jordan Paradise*

This article explores the role of the Food and Drug Administration (FDA) in drug approval and restrictions to mifepristone access in the context of historical regulation and current litigation.

560

**Legally Recognizing Reproductive  
Coercion while Questioning Sexual  
Violence Exceptionalism**

*Jane Stoever*

While sexual violence should not be the prerequisite for legal abortion, expanding definitions of abuse to include reproductive coercion can open avenues of access to abortion following the *Dobbs* decision. Understanding the increased danger and compounding challenges of intimate partner violence can

inform legislative initiatives, healthcare responses, and movements for reproductive justice.

565

**Prosecutorial Discretion for Self-  
Managed Abortion Helpers**

*Patty Skuster*

Elected prosecutors have pledged not to enforce abortion laws, in response to state-level abortion bans. For their pledges to be meaningful, prosecutors must exercise their discretion in cases of individuals who face legal risk, including people who help others self-manage their abortions. With a harm-reduction approach to improving abortion access, prosecutors should aim to reduce abortion helpers’ involvement with the criminal justice system.

570

**Continuous Reproductive Surveillance**

*Michael R. Ulrich and Leah R. Fowler*

The *Dobbs* opinion emphasizes that the state’s interest in the fetus extends to “all stages of development.” This essay briefly explores whether state legislators, agencies, and courts could use the “all stages of development” language to expand reproductive surveillance by using novel developments in consumer health technologies to augment those efforts.

575

**Abortion Rights and the Child Welfare  
System: How *Dobbs* Exacerbates Existing  
Racial Inequities and Further Traumatizes  
Black Families**

*Elizabeth Tobin-Tyler*

This article explores how abortion bans in states with large Black populations will exacerbate existing racial inequities in those states’ child welfare systems.

**New Strategies and Approaches**

584

**Understanding Shield Laws**

*David S. Cohen, Greer Donley, Rachel  
Rebouché, and Isabelle Aubrun*

In anticipation of extraterritorial application of antiabortion laws, many states have enacted laws that attempt to shield abortion providers, helpers, and patients from civil, professional, or criminal liability associated with legal abortion care. This essay analyzes and compares the statutory schemes of the seven early adopting shield states: California, Connecticut, Delaware, Illinois, Massachusetts, New Jersey, and New York. After describing what the laws do and how they operate, we offer reflections on coming disputes, areas of legal uncertainty, and ways to improve future shield laws.

592

**The Impact of *Dobbs* on Health Care  
Beyond Wanted Abortion Care**

*Maya Manian*

While empirical evidence has exposed the harms and health disparities flowing from being denied a wanted abortion, we know less about how anti-abortion laws and policies impact health care more broadly. This article surveys the public health impacts of *Dobbs* on health care beyond wanted abortion care. It catalogs the ways in which abortion bans obstruct access to medical care beyond wanted abortions, and provides a roadmap for future empirical research on the health care ripple effects of the *Dobbs* decision. The essay aims to identify the areas where further public health research is most needed in order to ensure that the public understands the full breadth of health care consequences of the post-*Roe* policy landscape. This essay also argues that focusing the public's attention on the deleterious consequences of abortion bans for health care more broadly could help to fend off further restrictions on abortion.

601

**Protecting Abortion with State Health  
Care Freedom of Choice**

*Tracy Thomas*

This essay examines the right of health care freedom of choice contained in some state constitutions. It explores how courts have, and could, use this constitutional health care right as a basis for recognizing or reinforcing a fundamental right to choose an abortion.

606

**Reproductive Justice Beyond Borders:  
Global Feminist Solidarity in the Post-*Roe*  
Era**

*Gabriela Arguedas-Ramírez and Danielle  
M. Wenner*

The global impact of *Dobbs v. Jackson Women's Health Organization* and the backlash towards reproductive justice that it represents warrant a global feminist response informed by broad theoretical and geopolitical lenses. We consider how a solidaristic, transnational feminist movement might learn from Latin American feminist movements that have been successful in uniting broad coalitions in the fight for reproductive justice as situated within far-reaching political goals. The success of such a global movement must be decolonial and must contend with the fact that overlapping realities of global inequality, severe poverty, extractivism, and western-backed violence are fundamentally implicated in reproductive justice.

612

**Anti-Abortion Exceptionalism after  
*Dobbs***

*Elizabeth Sepper*

The end of the constitutional right to abortion with *Dobbs v. Jackson Women's Health* stands to generate massive conflict between abortion regulation and the First Amendment. Abortion exceptionalism within constitutional doctrine — which both treats abortion differently than other areas and

favors anti-abortion over pro-choice viewpoints — will not retreat but advance, unless confronted by the courts.

618

**Challenges for the Pro-Life Movement in  
a Post-*Roe* Era**

*Cathleen Kaveny*

This article argues that state laws banning abortions for disability violate reproductive justice for parents with disabilities. These bans deprive people with disabilities of choices that may be important to their possibilities of becoming parents, including possibilities for abortion of pregnancies that have become risky to continue. Far from protecting disability civil rights, these state law bans restrict the abilities of people with disabilities to choose to have children and to parent.

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## Independent Articles

626

**“A Raw Blessing” – Caregivers’  
Experiences Providing Care to Persons  
Living with Dementia in the COVID-19  
Pandemic**

*Emily A. Largent, Andrew Peterson, Kristin  
Harkins, Cameron Coykendall, Melanie  
Kleid, Maramawit Abera, Shana D. Stites,  
Jason Karlawish, and Justin T. Clapp*

**Background and Objectives:** The COVID-19 pandemic has been devastating for people living with dementia (PLWD) and their caregivers. While prior research has documented these effects, it has not delved into their specific causes or how they are modified by contextual variation in caregiving circumstances.

**Research Design and Methods:** Semi-structured phone interviews were conducted with 40 caregivers purposively stratified across PLWD's place of residence (community vs. LTC), the caregiver-PLWD relationship (spousal vs. non-spousal), and caregiver gender. Interviews were analyzed using constructivist grounded theory to understand the impact of the pandemic on caregiving relationships.

**Results:** We identified 3 trajectories of caregiving relationships in the pandemic: (1) continuity in caregiving between the pre-pandemic and pandemic period; (2) disruption in caregiving characterized by isolation with a PLWD in the community; and (3) disruption in caregiving characterized by isolation from a PLWD in a LTC facility. Caregivers on the two “disrupted” trajectories reported negative consequences for their wellbeing, the PLWD's wellbeing, and their dyadic relationship.

**Discussion and Implications:** Our findings identify mechanisms underlying caregiver and PLWD wellbeing during the COVID-19 pandemic. An understanding of these mechanisms can inform policies and practices to support caregivers and PLWD in the pandemic and beyond.

641

**Ethics and Medical Aid in Dying:  
Physicians' Perspectives on Disclosure,  
Presence, and Eligibility**

*Matthew DeCamp, Julie Resselam, Hillary  
D. Lum, Elizabeth R. Kessler, Dragana  
Bolcic-Jankovic, Vinay Kini, and Eric G.  
Campbell*

Medical aid in dying (MAiD), despite being legal in many jurisdictions, remains controversial ethically. Existing surveys of physicians' perceptions of MAiD tend to focus on the legal or moral permissibility of MAiD in general. Using a novel sampling strategy, we surveyed physicians likely to have engaged in MAiD-related activities in Colorado to assess their attitudes toward contemporary ethical issues in MAiD (including physicians' disclosure of their own views, physician presence during MAiD drug ingestion, expanding MAiD indications, and perceived utility of ethics consultation). From 583 potential respondents, we received 300 completed surveys (response rate, 55%). Of 157 physicians who had discussed MAiD, 62 (39.5%) had never disclosed their own views to a patient. Physicians who identified as women were more likely to report having never disclosed ( $p=0.001$ ). Physicians who served as attending or consulting MAiD physicians were more willing than physicians who had not served to be present at the time a patient self-administered MAiD drugs ( $p=0.046$ ). Physicians reported greater willingness to expand MAiD to the persistent vegetative state than to intractable psychiatric illness. Our findings suggest the need for additional moral clarity regarding how physicians interpret obligations of self-disclosure and for research to understand beliefs surrounding MAiD expansion.

651

**Harvey and Gurvir's Law: Ontario Bill for  
Quality Prenatal Information about Down  
Syndrome: Terminology, Feasibility, and  
Ethical Issues**

*Marie-Eve Lemoine, Anne-Marie Laberge,  
Marie-Françoise Malo, Stéphanie Cloutier,  
Marie-Christine Roy, Stanislav Birko,  
Andréa Daigle, and Vardit Ravitsky*

Harvey and Gurvir's Law aims to reduce stigma and bias associated with Down syndrome by developing and disseminating quality information about Down syndrome in the context of prenatal testing. The initial version of the bill proposed guidelines pertaining to up-to-date and evidence-based informational material, as well as the imposition of a 48-hour waiting period after disclosing test results, before discussing further options, to ensure that patients have enough time to process this information and make an informed choice. The waiting-period provision was abandoned in the second version of the bill. In this essay, we use the US experience to highlight the implementation challenges of prenatal information laws. Second, we discuss the notion of a 48-hour waiting period and the practical, ethical, and legal considerations that may have motivated the removal of this provision from the bill. We argue that a different formulation of this provision may have allowed proponents of Harvey and Gurvir's Law to keep it in line with practical, ethical, and legal requirements. We suggest reintroducing a modified version of the waiting-period provision to promote both informed and free choice in the context of prenatal testing for Down syndrome.

658

**COMMENTARY**

*Louise P. King*

661

**The ELSI Virtual Forum, 30 Years of the  
Genome: Integrating and Applying ELSI  
Research**

*Caroline B. Moore, Deanne Dunbar Dolan,  
Rachel Yarmolinsky, Mildred K. Cho, and  
Sandra Soo-Jin-Lee*

This paper reports our analysis of the ELSI Virtual Forum: 30 Years of the Genome: Integrating and Applying ELSI Research, an online meeting of scholars focused on the ethical, legal, and social implications (ELSI) of genetics and genomics. The proceedings and published literature demonstrate how justice in the implementation of genome science can be realized in two contexts: 1) by attending to equity in our decisions about how we allocate clinical and research resources, and 2) by attending to the equitable distribution of the benefits and risks of sharing genomic data. We conclude that members of the ELSI and genomics communities must work to ensure that human biases are not implemented along with genomic medicine.

672

**The Scholarly and Pedagogical Benefits  
of the Legal Laboratory: Lessons from  
the Consortium for the Advanced Study of  
Brain Injury at Yale Law School**

*Zachary E. Shapiro, Chaarushena Deb,  
Caroline Lawrence, Allison Rabkin Golden,  
Megan S. Wright, Katherine L. Kraschel,  
and Joseph J. Fins*

In our Article, we share the lessons we have learned after creating and running a successful legal laboratory over the past seven years at Yale Law School. Our legal laboratory, which focuses on the intersection of law and severe brain injury, represents a unique pedagogical model for legal academia, and is closely influenced by the biomedical laboratory. Our Article aims to encourage the growth of legal laboratories at other institutions, as legal labs have significant scholarly and pedagogical value, especially when addressing some of the most pressing interdisciplinary problems facing law and society. It is our hope that discussion of the advantages of the legal laboratory model, and the suggestions outlined in this Article, will allow other academics and law schools to learn from our experience, and develop legal laboratories of their own. We encourage law school leadership to develop this model of legal pedagogy to expand opportunities for students as they prepare for practice and scholarly careers in the law.

**Symposium articles** are solicited by the guest editor for the purposes of creating a comprehensive and definitive collection of articles on a topic relevant to the study of law, medicine and ethics. Each article is peer reviewed.

**Independent articles** are essays unrelated to the symposium topic, and can cover a wide variety of subjects within the larger medical and legal ethics fields. These articles are peer reviewed.

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*Next Issue:*

**Medical-Legal Partnerships**

A Symposium Guest Edited by Bhandary-Alexander, Cannon, Girard, Gluck, Huer, Kraschel, and Makhlouf

## Columns

684

**PUBLIC HEALTH AND THE LAW**  
**Supreme Court Impacts in Public Health Law: 2022-2023**

*James G. Hodge, Jr., Leila Barraza, Jennifer L. Piatt, Erica N. White, Summer Ghaith, Samantha Hollinshead, Lauren Krumholz, Madisyn Puchebner, and Emma Smith*

689

**HEALTH POLICY PORTAL**  
**Amgen v. Sanofi: The U.S. Supreme Court Reviews Patent Enablement**

*Gregory Curfman and Marcia M. Boumil*

694

**GLOBAL HEALTH LAW**  
**Global Health Law and the Climate Crisis: An Unfulfilled Opportunity**

*Lance Gable*

698

**TEACHING HEALTH LAW**  
*Brietta Clark*

703

**CURRENTS IN CONTEMPORARY BIOETHICS**  
**Providing the Gist of Medical Expertise in the Context of Laws, Rules, and Guidelines: Fuzzy-Trace Theory's Alternative Approach to Improve Patient Communication**

*Sarah M. Edelson and Valerie F. Reyna*

708

**EXPANDING PERSPECTIVES**  
**The Current State of U.S. Regulation of Electronic Monitoring to Combat Elder Abuse and Its Future**

*Laura C. Hoffman*

717

**LETTERS TO THE EDITOR**