AMERICAN JOURNAL OF LAW & MEDICINE

Volume 47. Number 2 & 3 • 2021

ARTICLES

- 157 Information Opacity in Biopharmaceutical Innovation Through the Lens of COVID-19 *Jordan Paradise*
- 176 Tailoring Public Health Policies Govind Persad
- 205 Infected by Bias: Behavioral Science and the Legal Response to COVID-19 Doron Teichman and Kristen Underhill
- **249** Too Important for the Bureaucrats: Rethinking Risk and Regulatory Presumptions in Times of Crisis *James Toomey*
- 264 Ruthless Utilitarianism? COVID-19 State Triage Protocols May Subject Patients to Racial Discrimination and Providers to Legal Liability Miriam F. Weismann and Cheryl Holder

STUDENT NOTE

291 Easing Medical Device Regulatory Oversight: The FDA and Testing Amidst the COVID-19 Pandemic Katelynn Maxwell

RECENT DEVELOPMENT COMMENTS

- **327** Access in a Crisis: The Modernization of OTC Drug Regulations *Mia Harris*
- **333** Pushing Past the Pandemic: Re-evaluating Tribal Exemptions to Medicaid Work Requirements *Kathrin Lozah*
- 341 Expedited Antitrust Review of COVID-19-Related Requests Victoria J. Lu

A Journal of the American Society of Law, Medicine & Ethics www.aslme.org



Published by the American Society of Law, Medicine & Ethics and Boston University School of Law. Copyright held by the Trustees of Boston University.





The American Journal of Law & Medicine (AJLM) is North America's leading health law journal devoted exclusively to the analysis of issues at the nexus of law and medicine. Its broad editorial scope includes health law and policy; updates on significant legal decisions and developments affecting health care; legal, ethical and economic aspects of medical practice, research and education; book reviews; and much more. The editors invite the submission of original manuscripts on medicolegal topics. For details, see the inside back cover.

The American Journal of Law & Medicine is published by Cambridge University Press on behalf of the Trustees of Boston University and the American Society of Law, Medicine & Ethics.

ISSN: 0098-8588

E-ISSN: 2375-835X

Copyright © 2021 by Trustees of Boston University. All rights reserved. No portion of the contents may be reproduced in any form without written permission from the publisher.

Printed in the USA by The Sheridan Group

Editorial Office

American Journal of Law & Medicine, 765 Commonwealth Avenue, Suite 1702, Boston, MA 02215 USA

E-mail: ajlm@bu.edu

Submission Guidelines: For submission guidelines, please contact the editorial office at ajlm@bu.edu or go to cambridge.org/ajlm/submit

Subscribe or Recommend a Subscription to your Librarian: Go to cambridge.org/ajlm/subscribe or email subscriptions_newyork@cambridge.org (in the USA, Canada or Mexico) or journals@cambridge.org (elsewhere).

Copyright and Permissions: To request permission for republish-ning, reproducing, or distributing material from this journal, please visit the desired article at cambridge.org/ajlm and click "Rights & Permissions." For addi-ntional information, please see cambridge.org/about-us/rights-permissions.

Advertising and Reprints: Contact ad_sales@cambridge.org. Acceptance of advertising in this journal in no way implies endorsement of the advertised product or service by Cambridge University Press, the Trustees of Boston University, American Society of Law, Medicine & Ethics or the journal editor(s). We reserve the right to reject any advertising it deems as inappropriate for this journal.

Member Subscription Information: American Society of Law, Medicine & Ethics member inquiries, change of ad¬dress, back issues, claims, and membership renewal requests should be addressed to Membership Director, American So¬ciety of Law, Medicine & Ethics, 765 Commonwealth Avenue, Suite 1704, Boston, MA 02215; telephone: (617) 262-4990 ext. 15. Requests for replacement issues should be made within six months of the missing or damaged issue. Beyond six months and at the request of the American Society of Law, Medicine & Ethics, the publisher will supply replacement issues when losses have been sustained in transit and when the reserve stock permits.

Claims or Change of Address for Non-Members: Should be directed to subscriptions_newyork@ cambridge.org (in the USA, Canada or Mexico) or journals@cambridge.org (elsewhere).

Discover the Entire AJLM Back Archive: cambridge.org/ajlm/read

ADMINISTRATIVE OFFICERS OF BOSTON UNIVERSITY SCHOOL OF LAW
ROBERT A. BROWN, Ph.D., President
ANGELA ONWUACHI-WILLIG, J.D., M.Phil., Ph.D., Dean; Professor of Law
FREDERICK TUNG, J.D., Associate Dean for Academic Affairs; Howard Zhang Faculty Research
JAMES E. FLEMING, J.D., Ph.D., Associate Dean for Research and Intellectual Life and Professor

OF LAW
KRISTIN COLLINS, J.D., ASSOCIATE DEAN FOR INTELLECTUAL LIFE; PETER PAUL CAREER DEVELOPMENT
PROFESSOR: PROFESSOR OF LAW

MARGARET MAISEL, J.D., ASSOCIATE DEAN FOR EXPERIENTIAL EDUCATION, CLINICAL PROFESSOR OF LAW

OFFICERS OF THE AMERICAN SOCIETY OF LAW, MEDICINE & ETHICS JAIME S. KING, J.D., Ph.D., PRESIDENT LINDSAY F. WILEY, J.D., M.P.H., IMMEDIATE PAST PRESIDENT ELLIOT L. SAGALL, M.D. (DEC.), FOUNDER AND FIRST PRESIDENT

LAW & MEDICINE

Volume 47, Number 2 & 3 • 2021

BOARD OF EDITORS

Faculty Advisors

Kevin Outterson, J.D., LL.M. Kathryn Zeiler, M.S., J.D., Ph.D. Christopher Robertson, M.A., J.D., Ph.D. Boston University School of Law

Faculty Editor-in-Chief Emeritus

Frances H. Miller, J.D.

Boston University School of Law

Editor

Edward J. Hutchinson

American Society of Law,

Medicine ♂ Ethics

Founding Editor

John A. Norris, J.D., M.B.A. *Health Discovery Corp.*

EDITORS

Gail B. Agrawal, J.D., M.P.H. University of Iowa College of Law

Michael Baram, J.D.
Boston University School of Law

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

Jay A. Gold, M.D., J.D., M.P.H. *MetaStar Inc.*, *Madison*

 $\begin{array}{c} {\rm Ernest~M.~Haddad,~J.D.} \\ {\it Boston~University~School~of~Law} \end{array}$

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

Nathan Hershey, LL.B. University of Pittsburgh Graduate School of Public Health (Retired)

David A. Hyman, M.D., J.D. University of Illinois College of Law

Sheila Jasanoff, J.D., Ph.D. Harvard University Kennedy School of Government

Timothy S. Jost, J.D. Washington and Lee University School of Law

 $Stephen\ Latham, J.D.,\ Ph.D. \\ Yale\ University \\ Interdisciplinary\ Center\ for\ Bioethics$

Silvia A. Law, J.D. New York University School of Law David T. Morris, J.D., M.B.A. *AbbVie, Chicago*

Joseph P. Newhouse, Ph.D. Harvard University

Irwin N. Perr, M.D., J.D. University of Washington School of Medicine

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

> Arti K. Rai, J.D. Duke University Law School

Philip R. Reilly, M.D., J.D. Third Rock Ventures, LLC

Marc A. Rodwin, J.D., Ph.D. Suffolk University Law School

Mark A. Rothstein, J.D. University of Louisville School of Medicine Institute for Bioethics, Health Policy and Law

David S. Szabo, J.D. Locke Lord

Linda V. Tiano, J.D. *Healthfirst, Inc.*

Sidney D. Watson, J.D. Saint Louis University School of Law

LAW & MEDICINE

INTERNATIONAL BOARD OF EDITORS

Koichi Bai

Director, Institute of Medical Humanities Kitasato University School of Medicine Japan

Erwin Deutsch

Faulty of Law University of Göttingen GERMANY

Bernard M. Dickens, Ph.D., LL.D.

Faculties of Law and Medicine
University of Toronto
CANADA

Honorable Justice Michael D. Kirby

President, Court of Appeal
Supreme Court of New South Wales
Australia

M.A.M. de Wachter

Director, Institute of Bioethics
The Netherlands

Christopher Newdick

Reader in Health Law University of Reading United Kingdom

Amos Shapira

Faculty of Law Tel Aviv University ISRAEL

Peter D.G. Skegg

Faculty of Law
University of Otago
New Zealand

LAW & MEDICINE

STUDENT BOARD OF EDITORS 2020-2021

Editor-in-Chief Jessa Boubker

Senior Articles Editor Sharon Jaquez

> Executive Editor Temi Omilabu

Managing Editors Alex Cruz Rodriguez Claire Wells Katelynn Maxwell Articles Editors Laura Murray Julia Thibault Bessie Frias Zahraa Badat

Notes Editors Shannon O'Connor Adrian Maraziti Richard Rousseau Victoria Lu

Projects Editor

Anna Cardoso

Administrative Editor

Symposium Editors

Kathrin Lozah Mia Harris Ornella Ngounou

Communications Editor
Court Tomplait

Staff Members

Jaffri Ahmad Charlie Cai Carissa Carson Susanna Chi Alexandria Conrad Rebecca Fliegel Kimberly Flores William Franzese Christina Fuleihan David Hidalgo
Alesha Ignatius Brereton
Amanda Joffe
Megan Kira
Brandon Klages
Kevin Marchand
Aris Margosian
Megha Mathur
Alexandra Maulden

Meghan McCarthy Olivia Meadows Amelia Melas Angela Nelson Christiana Prater-lee Katherine Quezada Jack Quinn Shabeena Sharak Grant Shearer

LAW & MEDICINE

Volume 47, Number 2 & 3 • 2021

ARTICLES

- 157 Information Opacity in Biopharmaceutical Innovation Through the Lens of COVID-19 *Jordan Paradise*
- 176 Tailoring Public Health Policies Govind Persad
- **205** Infected by Bias: Behavioral Science and the Legal Response to COVID-19 Doron Teichman and Kristen Underhill
- 249 Too Important for the Bureaucrats: Rethinking Risk and Regulatory Presumptions in Times of Crisis James Toomey
- 264 Ruthless Utilitarianism? COVID-19 State Triage Protocols May Subject Patients to Racial Discrimination and Providers to Legal Liability Miriam F. Weismann and Cheryl Holder

STUDENT NOTE

291 Easing Medical Device Regulatory Oversight: The FDA and Testing Amidst the COVID-19 Pandemic Katelynn Maxwell

RECENT DEVELOPMENT COMMENTS

- 327 Access in a Crisis: The Modernization of OTC Drug Regulations

 Mia Harris
- 333 Pushing Past the Pandemic: Re-evaluating Tribal Exemptions to Medicaid Work Requirements Kathrin Lozah
- **341** Expedited Antitrust Review of COVID-19-Related Requests *Victoria J. Lu*