

# AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME XVI NUMBER 3 1990

## ARTICLES

MAKING NON-DISCRIMINATORY  
FITNESS-FOR-DUTY DECISIONS  
ABOUT PERSONS WITH DISABILITIES  
UNDER THE REHABILITATION ACT  
AND THE AMERICANS WITH  
DISABILITIES ACT

Patricia A. Maffeo

THE CONUNDRUM OF  
CHARITABILITY: REASSESSING TAX  
EXEMPTION FOR HOSPITALS

David A. Hyman

## NOTES AND COMMENTS

THE ADVENT OF DNA DATABASES: IMPLICATIONS  
FOR INFORMATION PRIVACY

EDUCATED GUESSES: HEALTH RISK ASSESSMENT IN  
ENVIRONMENTAL IMPACT STATEMENTS

PUBLISHED BY THE AMERICAN SOCIETY OF LAW & MEDICINE 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 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/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 Ave., 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, 765 Commonwealth Avenue, 16th Floor, Boston, Massachusetts 02215. Business phone: (617) 262-4990.

Subscriptions: \$45.00 per year for institutions, and for individuals who are not members of the American Society of Law & Medicine. Foreign subscribers should remit, for a year's subscription, an additional \$25.00 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 \$13 (includes postage and handling).

Members of the American Society of Law & Medicine receive a free subscription to the JOURNAL as part of their dues (\$95.00 for 1990). Information concerning membership is available from the Membership Director, American Society of Law & Medicine, 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**

JON WESTLING, B.A., *President ad interim*

JOSEPH BRODLEY, B.A., LL.B., *Dean ad interim and Professor of Law*

CLAYTON P. GILLETTE, B.A., J.D., *Associate Dean*

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

DANIEL FREEHLING, B.A., M.S., *Director, Law Library*

MARGARET D. HAGOPIAN, A.C.S., *Executive Assistant to the Dean*

#### **OFFICERS OF THE AMERICAN SOCIETY OF LAW & MEDICINE**

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

BERNARD M. DICKENS, Ph.D., LL.D., *President-Elect*

CHRISTINE MITCHELL, R.N., M.S., M.T.S., *Secretary*

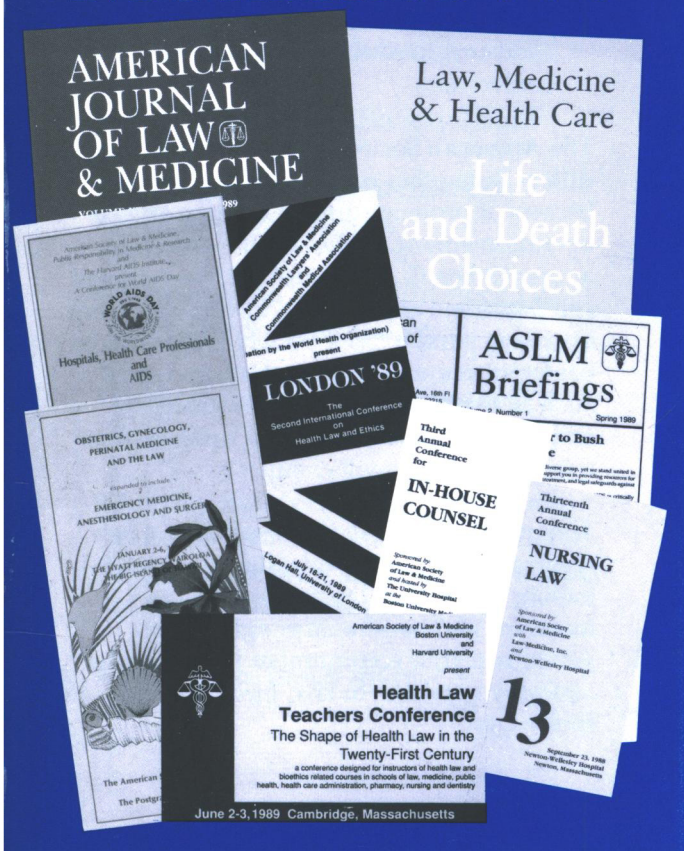
GEORGE J. ANNAS, J.D., M.P.H., *Treasurer*

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

ALEXANDER M. CAPRON, LL.B., *Immediate Past President*

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

# Some of the Best Reasons to Join the American Society of Law & Medicine . . .



## THE SOCIETY

In an era of technological advances and changing governmental policies that alter traditional methods of health care delivery and challenge basic bioethical beliefs, health care professionals need up-to-date information on the legal and ethical implications of health related issues.

For close to two decades the American Society of Law & Medicine has provided its international membership of attorneys, physicians, ethicists, nurses, allied health professionals, hospital administrators, risk managers, academics, and students with opportunities for multidisciplinary education.

Ongoing efforts include:

- Publication of two unique journals—*Law, Medicine & Health Care* and the *American Journal of Law & Medicine*
- Publication of medicolegal texts
- Sponsorship of continuing education conferences.

The American Society of Law & Medicine differs from other professional organizations because it promotes understanding and cooperation among professionals who often approach health care issues such as workers' compensation and medical malpractice from opposing perspectives. Society publications, conferences and research efforts on topics such as genetics, health care for children, and health care financing rely upon the contributions of its membership.

Today's medicolegal dilemmas cannot be resolved by any one professional group. By joining this national network of 8,000 members and non-member subscribers, you affirm your commitment to an interdisciplinary approach to law, medicine and health care.

## BENEFITS OF MEMBERSHIP

- ◆ Become a part of the largest and most prestigious medicolegal society in North America
- ◆ Stay at the top of your profession by receiving up-to-date information about today's vital legal and medical issues
- ◆ Annual subscription to *Law, Medicine & Health Care* (four issues)
- ◆ Annual subscription to the *American Journal of Law & Medicine* (four issues)
- ◆ The Society newsletter, *ASLM Briefings*
- ◆ Invitations to Society sponsored conferences including:
  - registration fee discounts
  - continuing education credit
- ◆ Price discounts on Society Books
- ◆ Periodic membership directory available for purchase
- ◆ Access to the Sagall Library of Law, Medicine & Health Care
- ◆ Participation in ASLM Speakers' Bureau
- ◆ An elegant Membership certificate suitable for framing. This certificate exemplifies your stature as a member of the medicolegal profession.
- ◆ And much, much more . . .

## PUBLICATIONS

### *Law, Medicine & Health Care*

*Law, Medicine & Health Care*, a quarterly publication, is read by over 6,500 physicians, attorneys, and health care administrators. It provides well-written and often controversial articles on such timely medicolegal issues as surrogate motherhood, AIDS, and euthanasia. Each issue also features review essays on significant recent publications, cases, and policy decisions.

Recent journal issues include:

- Life and Death Choices with articles by Ronald Cranford, Robert Weir, Nancy Rhoden, and James Childress
- Injury Prevention (Tom Christoffel, ed) with articles by William Foege and Dan Beauchamp
- Surrogate Motherhood (Larry Gostin, ed) with articles by George Annas, Lori Andrews, Alexander Capron and Margaret Radin, and John Robertson
- AIDS (William Curran, Larry Gostin, eds) with articles by Jonathan Mann, Martha Field, and Harvey Fineberg

### *American Journal of Law & Medicine*

The *American Journal of Law & Medicine* is a law review co-published quarterly with Boston University School of Law. It was founded to fulfill the need for a scholarly journal dedicated to improving communication among legal and medical professionals. Each issue contains scholarly articles written by national authorities, book reviews, and annotations of recent health care-related court decisions and legislative enactments.

Recent journal issues include:

- Antitrust Issues in Health Care
- Public Health and the Law dedicated to William Curran
- The Supreme Court and the Limits of Medical Privacy dedicated to Justice Harry Blackmun with a foreword by Justice William Brennan
- The Harvard Model AIDS Legislation Project

### Books

The Society has published a number of texts which are available to members at a reduced price. Each volume includes edited, supplemented and footnoted versions of papers presented to the conference the book was based upon as well as new and reprinted articles.

*AIDS and the Health Care System*

*Surrogate Motherhood*

*Institutional Ethics Committees*

*Health Care Labor Law*

*Human Organ Transplantation*

*Legal and Ethical Aspects of Health Care for the Elderly*

*Refusing Treatment in Mental Health Institutions*

*Legal and Ethical Aspects of Treating Critically and Terminally Ill Patients*

## CONFERENCES

A principal activity of the Society is the sponsorship of continuing education conferences. Society members receive advance notice of all conferences and are provided with the opportunity to register at substantially reduced rates. Students are also encouraged to attend and are given further price reductions.

Past and future conference topics include the Harvard Model AIDS Legislation Project, AIDS and health care professionals, institutional ethics committees, mental health law, life and death decisions, and privacy after Cruzan.

ASLM produces a number of conferences on a regular basis. These include its annual conferences for health law teachers, in-house hospital counsel, and nurses. Other annual programs are the Society's annual meeting and its off-shore conference on obstetrics, gynecology, perinatal medicine and the law. ASLM has also hosted two international conferences on health law and ethics: Sydney '86 and London '89. The next one is being planned for 1992.



# 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**  
**Merrill Kaitz**

**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

**Patrick R. Carroll, J.D.**  
Nutter, McClennen & Fish  
Hyannis, Massachusetts

**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.**  
Department of Preventive Medicine  
Medical College of Wisconsin

**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

**Honorable Max Rosenn**  
United States Court of Appeals for the  
Third Circuit

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

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

**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. Trembley**  
Boston College Law School

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

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



# 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  
Federal Republic of 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 J. Kirby**  
President, Court of Appeals  
Supreme Court  
Australia

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

**P.D.G. Skegg**  
Dean 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  
Federal Republic of Germany

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

# AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME XVI NUMBER 3 1990

BOSTON UNIVERSITY SCHOOL OF LAW  
STUDENT BOARD OF EDITORS  
1989-1990

## EDITOR-IN-CHIEF

Mark Cheffo

## EXECUTIVE EDITOR

Pamela D. Harvey

## MANAGING EDITOR

Robert G. Bannish

## PROJECTS EDITOR

James W. Tegtmeier

## ARTICLES EDITORS

Andrea de Gorgey

Stephen Freeland

Daniel Gindes

Leopold J. Luberecki, Jr.

## SYMPOSIUM EDITOR

Liane Cohen

## CASE & NOTE EDITORS

Rachel Fishman

Wayne S. Flick

Michael C. Fondo

Miriam Kelliher

William A. Kraiss

Joan Lieberman

Allison C. Linneman

Barbara A. Masterson

## THIRD YEAR EDITORS

Joan Andres

David Baum

David J. Breen

Karyn Finamore

Allen Glass

Anne Marie Jennings

Stephen P. Kelly

Marie Lavalleye

Linda Mesler

Laurie E. Meyers

Stephen B. Monick

James Nealon

Deborah A. Savarese

Meredith Skinner

Pamela L. Taylor

Susan Tribble

## STAFF MEMBERS

Evan Ackiron

Michael Adlin

Daniel Alcott

Marian Baldwin

Michael R.B. Balfé

Michael Borruso

Scott Brown

Kimberle Bruckno

Tim Busler

Richard A. Calame

Sally L. Davis

Michael Flynn

Randy Frisch

Carolann F.J. Hanselman

Joseph Hardcastle

Kenneth Joel

Andrew Kim

Anne Marie LaBue

Karen Levin

Suzanne D.T. Lovett

Nancy Lubin

Mark Mantooth

Michele L. Miller

Rebecca Morrissey

Heidi Poreda

Robert H. Rieders

Julie Rissman

Giselle Samuely

Wendy L. Schoen

Lynn A. Schweinfurth

Marc I. Seltzer

Webb Steadman

Terry Nicole Steinberg

Laura Sweeney

Mi Jung Yoon

David G. Yu



# AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME XVI NUMBER 3 1990

## ARTICLES

- MAKING NON-DISCRIMINATORY  
FITNESS-FOR-DUTY DECISIONS  
ABOUT PERSONS WITH  
DISABILITIES UNDER THE  
REHABILITATION ACT AND  
THE AMERICANS WITH  
DISABILITIES ACT 279 Patricia A. Maffeo
- THE CONUNDRUM OF  
CHARITABILITY: REASSESSING TAX  
EXEMPTION FOR HOSPITALS 327 David A. Hyman

## NOTES AND COMMENTS

- THE ADVENT OF DNA DATABANKS:  
IMPLICATIONS FOR INFORMATION  
PRIVACY 381
- EDUCATED GUESSES: HEALTH RISK  
ASSESSMENT IN ENVIRONMENTAL  
IMPACT STATEMENTS 399

## MEDICOLEGAL REFERENCE LIBRARY

- SELECTED RECENT COURT DECISIONS 429
- SELECTED BOOK RELEASES 447

Copyright 1990 by the American Society of Law & Medicine, Inc. and the Boston University School of Law. All or any part of materials appearing in the Journal may not be republished without the express written consent of the Editor-in-Chief.