
INTRODUCTION

Health Law and Anti-Racism: Reckoning and Response

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Keywords: Health Law, Anti-Racism, Health Equity, Racial Justice, Systemic Racism

Abstract: Law and racism are intertwined, with legal tools bearing the potential to serve as instruments of oppression or equity. This Special Issue explores this dual nature of health law, with attention to policing in the context of mental health, schools, and substance use disorders; industry and the environment in the context of food advertising, tobacco regulation, worker safety, and environmental racism; health care and research in the context of infant mortality, bias in medical applications of AI, and diverse inclusion in research; and anti-racist teaching and practice in the context of building an interprofessional curriculum and medical-legal partnerships.

2020 was a remarkable year.

The world was hit with a pandemic that we proved ill prepared for, despite extensive warnings — a pandemic that laid bare excruciating inequalities along

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the lines of race, ethnicity, and social class, revealing a great deal about the law and politics of public health. The pandemic exposed underlying institutional and infrastructural inequalities across a broad spectrum of life, both in the U.S. and globally.

At the same time, long-standing efforts to address systemic and interpersonal racism swelled into a national reckoning following the murder of George Floyd by Minneapolis police officers, among many other examples of racial violence by both law enforcement and civilians. This violence is heaped on top of extensive evidence documenting the myriad ways that racism inhibits the flourishing of Black and other minoritized populations.

There is much to be criticized about what it has taken for the nation's current racial reckoning to scratch the surface of the social consciousness of many Americans and our institutions. Much remains to be done to address the barriers to full inclusion that remain at every level of society. But important work is beginning to get the attention and support it deserves.

Against this backdrop, the American Society of Law, Medicine & Ethics (ASLME), of which we have both served as members of the board, sought to use the tools at its disposal to advance the work of anti-racism in the realm of health law and policy. As one step, ASLME committed to produce this special issue of the *Journal of Law, Medicine & Ethics*, culminating in a public conference in March 2022 to further the discussion and related action. We are grateful to ASLME, the Department of Medical Ethics and Health Policy and the Carey Law School at the University of Pennsylvania, and the University of California Irvine for co-sponsoring this special issue and symposium.

As the articles included here demonstrate, law and racism are deeply intertwined, with legal tools bear-

ing the potential to be wielded as both instruments of racial oppression and means to promote racial equity. This potential is exemplified in the specific context of health law. For example, laws imposing work requirements as a condition of accessing health benefits disproportionately harm minoritized racial and ethnic groups,¹ while tobacco control laws and restrictions on environmental pollution can promote health equity. Government policies around vaccine allocation demonstrate how facial neutrality can mask inequitable access: allocating vaccines first to people 75 and older ignored the fact that a smaller proportion of Black Americans reach that age compared to white people.²

space over those who have been enmeshed in the work long before its value was widely recognized,⁴ we note that many of the articles in this special issue reflect the contributors' core work and career-long focus.

The issue begins with a foundational contribution from Courtnee Melton-Fant, "New Preemption as a Tool of Structural Racism: Implications for Racial Health Inequities." Melton-Fant argues that preemption is now being used to intentionally subvert and undermine local action or punish localities. She makes the case that the current iteration of preemption, "new preemption," is deployed and weaponized as a policy tool or mechanism of structural racism.

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The pandemic has also demonstrated how the lack of an equitable national paid family and medical leave program for all workers makes Black, Indigenous, and people of color (BIPOC) individuals and families most susceptible to economic and health-related harm.³ The law is, of course, not the only means to advancing health equity, and it has its limits, but it is nonetheless a critical tool.

Accordingly, we invited authors from all disciplines to explore the dual nature of health law and its connection to racial justice, from both a systemic and interpersonal perspective, welcoming contributions at the intersection of race and law, medicine, health, science, technology, and bioethics. We ultimately selected 12 articles for inclusion, as well as the winner of ASLME's inaugural graduate student writing competition. Contributions were selected on the basis of their relevance, clarity, and potential impact, also with an eye towards how they would complement one another in a cohesive set.

Although we did not formally collect demographic information about contributors, we did strive for diverse inclusion across race, ethnicity, gender, career stage, and perspective. In light of legitimate and growing concern about "health equity tourism," a term coined by Dr. Elle Lett to refer to circumstances in which those with "little or no background or training in health equity research, often white and already well-funded" rush in to scoop up new opportunities in this

The danger that Melton-Fant calls attention to is that efforts by local municipalities to promote health and social justice may be undermined by state legislatures or governors, thereby upending efforts to promote and advance equality at the local level.

The issue then proceeds in small groups of topically-related articles, the first of which focuses on how contemporary challenges intersecting law, public health, and social welfare extend to matters of health law and policing, with racially disparate impacts in various settings including mental health, schools, and substance use.

In their article, "Involuntary Commitment as a 'Carceral-Health Service': From Healthcare-to-Prison Pipeline to a Public Health Abolition Praxis," Rafik Wahbi and Leo Beletsky show how civil commitment functions as a "pipeline" into the carceral system, which disproportionately incarcerates poor and BIPOC individuals compared to white people, by "forcibly institutionalizing individuals with mental health disorders who appear to 'threaten the safety of society.'" The result, they argue, is a "social system of racial and class control" that disproportionately harms the most vulnerable people of color.

Similarly, Thalia González, Alexis Etow, and Cesar De La Vega argue in their article, "An Antiracist Health Equity Agenda for Education," that a glaring failure of the twin projects of education and criminal justice reform have yet to calibrate effectively to

address the harms to children of color receiving an education in the United States. They refer to this as a “critical missing piece” in the inquiry about racism serving as a “significant driver of health inequities within our preschool to 12 education system.” Particularly worrisome, as they note, are the increasing ways in which children become ensnared in the criminal justice system even while in elementary, middle, and high school. Most compellingly, the authors are able to convey the health crisis materializing in the wake of the rise of policing inside of schools.

A theme carried throughout the articles in this issue are the many ways in which a two-tiered system of social value and justice dominate not only law, but also healthcare access. Kelly Dineen and Elizabeth Pendo address substance use disorder (SUD) in their contribution, “Engaging Disability Rights Law to Address the Distinct Harms at the Intersection of Race and Disability for People with Substance Use Disorder.” As the authors note, the treatment of SUD reflects social biases — for good or bad — which can compound racism, sexism, and homophobia. They argue that meaningful solutions must include federal protections and to do better, treatments for people with SUD must be grounded in anti-racism and disability justice.

The next group of articles can broadly be described as addressing health law and race in the context of industry and the environment. The first contribution in this set, from Marice Ashe, Anne Barnhill, Amanda Berhaupt-Glickstein, Nicholas Freudenberg, Sonya Grier, Shiriki Kumanyika, Susana Ramírez, and Karen Watson, grew out of the 2021 Levi Symposium held at the Johns Hopkins Berman Institute of Bioethics. In “The Racialized Marketing of Unhealthy Foods and Beverages: Perspectives and Potential Remedies,” these authors draw attention to the phenomenon of racialized food marketing, a structural racism challenge stemming from marketers’ strategic decisions about how and where unhealthy foods are promoted and sold, as well as racially-driven product development and pricing factors. Although the authors note that food and beverage companies are not necessarily motivated by discriminatory intent, their approaches contribute to and exacerbate health disparities and therefore call for race-conscious structural solutions. In particular, the authors recommend that companies “consider the differential effects of their products on communities of color when formulating their business models, creating products, and designing marketing practices.” They also suggest legal and regulatory strategies for addressing the problem, in addition to proposing “dietary outcome sales targets,” similar to performance-based approaches to climate change. Overall, the authors argue that addressing racialized

food marketing and its disparate impacts would be an advance for racial equity.

Moving from unhealthy foods to tobacco, Amirala Pasha and Richard Silbert offer a controversial perspective in their article, “Fresh Take: Pitfalls of the FDA’s Proposed Menthol Ban.” The authors describe the disproportionate use of menthol cigarettes by Black Americans and the tobacco industry’s history of targeting the Black community, as well as state and federal efforts to regulate flavored tobacco products and menthol in particular. While recognizing the health concerns around smoking and the importance of efforts to avoid initiation and continued tobacco use, Pasha and Silbert take issue with FDA’s proposed menthol ban, arguing that it is inappropriately paternalistic, that it disproportionately impacts Black Americans, and that it may exacerbate problematic patterns in policing Black communities should an illicit market for mentholated cigarettes emerge. They further worry that the ban may not achieve its public health goals if it leads to use of non-flavored cigarettes rather than cessation or is not adequately supported by the community it is intended to benefit. In publishing this article, we recognize that it contrasts with arguments in favor of a menthol ban from both the public health community⁵ and leading Black community organizations.⁶ On this controversial and important topic, then, our goal is to build dialogue to help address potential unintended consequences and facilitate responses to critiques of FDA’s proposed action.

From consumer products to the workers who produce them, the next paper in this section addresses “Structural Discrimination in Pandemic Policy: Essential Protections for Essential Workers.” Authors Abigail Lowe, Kelly Dineen, and Seema Mohapatra draw attention to “the inequities in commitments to and funding for pandemic preparedness outside the context of traditional health care settings, using meat-processing workers as an example.” Meat-processing workers, many of whom are minoritized and multiply-marginalized, have long been “disenfranchised and disempowered” through structural racism in worker protection policies, health care access and quality, and social programs. During the pandemic, the authors explain that meat-processors were designated “essential,” but health and safety recommendations for their unique work environments did not keep up, with greater attention to infection and protection control measures in health care settings. As a result, meat-processing workers were left without critical protections, which the authors attribute to structural and individual racism. To prevent similar problems in future epidemics and pandemics, the authors propose that research and planning should “account for

the converging interests of the oppressors and the oppressed” in workplace safety. In other words, keeping meat-processing workers and other marginalized essential workers safe is good for them and good for business. The authors call for more funding and attention to address research gaps in infectious disease safety in essential industries beyond health care with high numbers of minoritized workers.

The final article in this section, Gabrielle Kolencik’s “Harmony between Man and His Environment: Reviewing the Trump Administration’s Changes to the National Environmental Policy Act in the Context of Environmental Racism,” was selected by a panel of judges as the winner of the 1st Annual ASLME Graduate Student Writing Competition in Health Law and Anti-Racism. In it, Kolencik draws attention to key changes to the National Environmental Policy Act adopted by the Trump administration — changes that are facially neutral but risk exacerbating environmental injustice to the detriment of minoritized communities by reducing both requirements and opportunity for careful analysis of the environmental impact of agency actions and making it more difficult for affected communities to engage. Given that Black, Native American, Hispanic and Latinx, and Asian communities are disproportionately exposed to environmental pollution in the U.S., Kolencik argues that structural efforts to weaken environmental protections amount to environmental racism and must be quickly addressed.

The third group of articles in this issue addresses topics focused on race in the context of health care and research. To this end, Wangui Muigai’s contribution, “Framing Black Infant and Maternal Mortality,” brings urgent attention to this prevailing tragedy and fills an important void in the academic literature by taking a historical perspective, examining efforts focused on regulating birth attendants and access to birthing spaces. Black infants and their mothers die at two to three times the rate of their white counterparts, excessive death rates that have persisted since the government first began reporting on such matters in the 1800s. Muigai concludes that the complex factors leading to these disparities cannot be adequately addressed by any single intervention and that we must “look[] to the past in order to explore new ways of thinking about the role of law and policy in combatting racial inequities in birth today.”

The next article, by Kristin Kostick-Quenet, Glenn Cohen, Sara Gerke, Bernard Lo, James Antaki, Faedah Movahedi, Hasna Njah, Lauren Schoen, Jerry Estep, and Jennifer Blumenthal-Barby, focuses on “Mitigating Racial Bias in Machine Learning.” Here, the authors argue that emerging responses to the problem

of bias in artificial intelligence/machine learning (AI/ML) in the health care sector “overemphasize developers’ responsibility for mitigating bias, even though many sources of bias found in algorithms may be systemic.” The authors use a case study of a prognostic ML algorithm intended to provide decision-support for patients with severe heart failure considering treatment with a left ventricular assist device (LVAD). They identified significant bias in the available training dataset, which was based only on individuals who had received an LVAD, excluding those who had not. However, since there are important disparities in the patients to whom LVAD is offered, the authors determined that “the apparent absence of racial differences may falsely convey equity in *outcomes* while masking socioeconomic inequities in *access or distribution*” of LVADs. Despite recognition of the problem, the authors note that it remains unclear what developers ought to do. Unfortunately, there is little existing hard law available to address this important concern, proposed initiatives to avoid discrimination in ML focus on improving data quality in ways that are insufficient to address systemic sources of bias, and suggestions to rely on transparency about the limitations of ML algorithms will not fix justice-based concerns. The authors end on a somewhat pessimistic note, emphasizing the difficulty but necessity of finding ways to generate data on systemic influences on health outcomes to incorporate into ML training datasets.

In the last article of this section, “Applying Civil Rights Law to Clinical Research: Title VI’s Equal Access Mandate,” Joseph Liss, David Peloquin, Mark Barnes, and Barbara Bierer offer an underappreciated tool in the push to diversify clinical research: federal civil rights law prohibitions on disparate impact discrimination. As the authors explain, Title VI of the Civil Rights Act of 1964 prohibits federally-funded educational institutions and health care centers — including the hospitals and universities that serve as sites of much clinical research in the U.S. — not only from overtly discriminating on the basis of race, color, or national origin, but also from behaving in ways that result in unequal opportunities for these groups, including the opportunity to participate in clinical research. However, because only the government may enforce disparate impact discrimination claims, the current lack of enforcement action on these grounds in research contexts has stood in the way of meaningful change. In fact, as the authors point out, many in the research and enforcement communities may not fully appreciate Title VI’s reach in this area, which could be used to demand that “clinical researchers at universities, academic medical centers, hospitals, and community centers take affirmative steps to ensure

that all individuals have an equal opportunity to participate in clinical research.” The authors call on the federal government to clarify these obligations and enforce them going forward.

In the fourth and final section of the special issue, authors address anti-racism in interprofessional practice. In their article, “An Interprofessional Antiracist Curriculum Is Paramount to Addressing Racial Health Inequities,” Kate Mitchell, Maya Watson, Abigail Silva, and Jessica Simpson present their experience offering the “Health Justice Lab” at Loyola University Chicago, an interprofessional course for law, medicine, and public health students covering topics such as medical experimentation, environmental justice, maternal mortality, epigenetics, and health impacts of inequities in policing and education — many of the topics covered here. The authors also describe additional experiential curricular and volunteer opportunities to facilitate work toward antiracist goals in improving health outcomes. Acknowledging that law, medicine, and public health professions have and continue to be complicit in contributing to structural racism and health inequities, the authors make a restorative call for training future professionals to dismantle these systems and their effects together. Although there are some challenges to providing this training, it is increasingly expected and supported by professional schools and their overarching organizational bodies.

Finally, in “Towards Racial Justice: The Role of Medical-Legal Partnerships,” Medha Makhoul urges medical-legal partnerships (MLPs) to move beyond their original framing as anti-poverty mechanisms intended to address “health-harming social conditions,” including income and insurance, housing and utilities, education and employment, legal status, and personal and family stability. Instead, she calls on the MLP movement to explicitly adopt an anti-racist frame, naming and addressing individual, institutional, and structural racism. Makhoul argues that an intersectional racial justice lens rather than a singular poverty lens will help MLPs reach their full potential in addressing the underlying causes of racially disparate health outcomes, for example, by centering the effects of racialization on the population served and avoiding the

ideology of personal responsibility for “problems that originate in racist policies, institutions, and systems.”

We thank all the contributors and the journal for making this special issue possible. There is much more to say on each of these topics that lie at the intersection of health law and anti-racism — and many other topics that we lacked the space to address here. Just as health law has been described as the “law of the horse” because it touches on such a diversity of legal topics, race and racism affect every aspect of life in the U.S., with a particular impact on health. We look forward to the evolution of the field in ways that apply legal tools to promote health equity for all and that teach generations of lawyers and health professionals to come to do the same.

Note

The authors have no conflicts of interest to disclose.

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