

THE JOURNAL OF LAW, MEDICINE & ETHICS

Volume 50:2 • Summer 2022

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



20,679* Physicians
say **“LUCKIES**
are *less irritating*”
“It’s toasted”
Your Throat Protection against irritation against cough

INDEPENDENT ARTICLES

**Public Reason, Public Comments,
and Public Charge: A Case Study in Moral &
Practical Reasoning in Federal Rulemaking**
Rachel Fabi and Lauren Zahn

**Optimizing Ethics Engagement in Research:
Learning from the Ethical Complexities of
Studying Opioid Use in Pregnancy**
*Seema K. Shah, Marielle Gross,
and Camille Nebeker*

**Voluntary Registries to Support Improved
Interaction Between Police and People
Living with Dementia**
*Heather M. Ross, Diana M. Bowman,
and Jessica M. Wani*

SYMPOSIUM

Commercial Speech and Commercial Determinants of Health



GUEST EDITED BY Amandine Garde and
Oscar A. Cabrera

- 212 Introduction** *Amandine Garde and Oscar A. Cabrera*
- 216 Commercial Speech and Unhealthy Food Products:
Conceptual Foundations** *Andrés Constantín,
Martín Hevia, and Oscar A. Cabrera*
- 221 Economic Perspectives on Food Choices,
Marketing, and Consumer Welfare** *Fabrice Etilé*
- 233 The Influence of the Commercial Speech Doctrine
on the Development of Tobacco Control Measures**
Margherita Melillo
- 240 Commercial Advertising of Alcohol: Using the Law
to Challenge Public Health Regulation** *Paula O'Brien,
Robin Room, and Dan Anderson-Luxford*
- 250 Freedom of Commercial Expression and
Public Health Protection at the European Court
of Human Rights**
Kanstantsin Dzehtsiarou and Amandine Garde
- 259 Commercial Speech and the Prohibition of Tobacco
Advertising: The Colombian Constitutional Court
Approach** *Silvia Serrano Guzmán, Ariadna Tovar
Ramírez, and Oscar A. Cabrera*
- 265 United States: Protecting Commercial Speech under
the First Amendment** *Jennifer L. Pomeranz*

Plus more inside...

ISSN: 1073-1105

 **CAMBRIDGE**
UNIVERSITY PRESS

The Journal of Law, Medicine & Ethics (JLME): Material published in *The Journal of Law, Medicine & Ethics* (JLME) contributes to the educational mission of the American Society of Law, Medicine & Ethics (ASLME), covering public health, health disparities, patient safety and quality of care, and biomedical science and research, and more.

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

ISSN: 1073-1105

E-ISSN: 1748-720X

Copyright © 2022, the American Society of Law, Medicine & Ethics. 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

Journal of Law, Medicine & Ethics, 765 Commonwealth Avenue, Suite 1704, Boston, MA 02215 USA
Phone: 617-262-4990; Fax: 617-437-7596
E-mail: thutchinson@aslme.org

Letters to the Editors: Comments on articles in the Journal should be addressed to the Editor at the editorial office or emailed to thutchinson@aslme.org

Submission Guidelines: For submission guidelines, please contact the editorial office at thutchinson@aslme.org or go to cambridge.org/jlme/submit

Supplements: Initial inquiries should be directed to the Editor at the editorial office or emailed to thutchinson@aslme.org

Subscribe or Recommend a Subscription to your Librarian: Go to cambridge.org/jlme/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 republishing, reproducing, or distributing material from this journal, please visit the desired article at cambridge.org/jlme and click "Rights & Permissions." For additional 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 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 address, back issues, claims, and membership renewal requests should be addressed to Membership Director, American Society of Law, Medicine & Ethics, 765 Commonwealth Avenue, Suite 1704, Boston, MA 02215; telephone: (617) 262-4990. 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 JLME Back Archive: cambridge.org/jlme/read

Follow JLME on Twitter @JLME_ASLME

THE JOURNAL OF LAW, MEDICINE & ETHICS

VOLUME 50:2 • SUMMER 2022

BOARD OF EDITORS

Anita Allen-Castellitto, J.D., Ph.D.
University of Pennsylvania Law School

Wendy K. Mariner, J.D., LL.M., M.P.H.
Boston University School of Public Health

R. Alta Charo, J.D.
University of Wisconsin Law School

Maxwell J. Mehlman, J.D.
Case Western Reserve University

Ellen Wright Clayton, M.D., J.D.
Vanderbilt University School of Medicine

E. Haavi Morreim, Ph.D.
University of Tennessee College of Medicine

Bernard M. Dickens, Ph.D., LL.D., LL.M.
University of Toronto Faculty of Law

Thomas H. Murray, Ph.D.
The Hastings Center

Barry Furrow, J.D.
Drexel University Earle Mack School of Law

Wendy E. Parmet, J.D.
Northeastern University School of Law

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

Karen H. Rothenberg, J.D., M.P.A.
University of Maryland School of Law

Lawrence O. Gostin, J.D., LL.D. (Hon.)
*Georgetown University Law Center
Johns Hopkins University*

Margaret A. Somerville, A.M., FRSC
McGill University

Ana Smith Iltis, Ph.D.
Wake Forest University

Daniel P. Sulmasy, O.F.M., M.D., Ph.D.
University of Chicago

Nancy M. P. King, J.D.
Wake Forest School of Medicine

Lois Snyder Sulmasy, J.D.
American College of Physicians

John D. Lantos, M.D.
Children's Mercy Hospital

Susan M. Wolf, J.D.
University of Minnesota Law School

Stuart J. Youngner, M.D.
Case Western Reserve University

THE JOURNAL OF
LAW, MEDICINE & ETHICS
C O N T E N T S

VOLUME 50:2 • SUMMER 2022

Symposium Articles

**Commercial
Speech and
Commercial
Determinants
of Health**

Guest Edited by
Amandine Garde and
Oscar A. Cabrera

205
*Letter from
the Editor*

*Cover image courtesy of
SRITA (Stanford Research
into the Impact of Tobacco
Advertising)*

212

Introduction

Amandine Garde and Oscar A. Cabrera

I. Legal Challenges and Opportunities

216

**Commercial Speech and Unhealthy
Food Products: Conceptual
Foundations**

*Andrés Constantín, Martín Hevia, and
Oscar A. Cabrera*

This article provides a critical and philosophical assessment of arguments invoked for and against the constitutional protection of commercial expression and the regulation of commercial speech with a focus on the commercialization of unhealthy food products.

221

**Economic Perspectives on Food
Choices, Marketing, and Consumer
Welfare**

Fabrice Etilé

This contribution reviews the main normative and positive arguments that can be used in the assessment of the costs and benefits of food marketing restrictions, focusing specifically on developments in the economics of advertising since the 70s. The literature revolves around two competing approaches to advertising. Firstly, the neoclassical approach to rationality and consumer choices contends that advertising is either informative or that it adds value to consumer experience. Under these premises, theoretical analyses developed until the 90s dealt mostly with issues revolving around the efficiency of companies' advertising spendings and their effects on consumer welfare. Secondly, and since the 90s, experimental studies have revitalized the old idea that marketing can have persuasive effects on consumer decisions, especially on food choices, by exploiting consumers' behavioral biases. Results from observational studies tend to support the informative view rather than the persuasive view, but these studies present methodological limits. Recent results from behavioral industrial organization theory suggest that food companies can durably exploit consumers' behavioral failures to decrease competition, thus harming consumer welfare in addition to biasing their choices toward unhealthy food. Finally, the conclusion highlights the need for observa-

tional studies validating the turn from the neoclassical approach to the behavioral approach.

**II. Marketing and Individual Risk
Factors**

233

**The Influence of the Commercial
Speech Doctrine on the Development
of Tobacco Control Measures**

Margherita Melillo

This contribution reviews the main normative and positive arguments that can be used in the assessment of the costs and benefits of food marketing restrictions, focusing specifically on developments in the economics of advertising since the 70s. The literature revolves around two competing approaches to advertising. Firstly, the neoclassical approach to rationality and consumer choices contends that advertising is either informative or that it adds value to consumer experience. Under these premises, theoretical analyses developed until the 90s dealt mostly with issues revolving around the efficiency of companies' advertising spendings and their effects on consumer welfare. Secondly, and since the 90s, experimental studies have revitalized the old idea that marketing can have persuasive effects on consumer decisions, especially on food choices, by exploiting consumers' behavioral biases. Results from observational studies tend to support the informative view rather than the persuasive view, but these studies present methodological limits. Recent results from behavioral industrial organization theory suggest that food companies can durably exploit consumers' behavioral failures to decrease competition, thus harming consumer welfare in addition to biasing their choices toward unhealthy food. Finally, the conclusion highlights the need for observational studies validating the turn from the neoclassical approach to the behavioral approach.

240

**Commercial Advertising of Alcohol:
Using Law to Challenge Public Health
Regulation**

*Paula O'Brien, Robin Room,
and Dan Anderson-Luxford*

In most countries, the alcohol industry enjoys considerable freedom to market its products. Where government regulation is proposed or enacted, the alcohol industry has often deployed legal arguments and used legal forums to challenge regulation. Governments considering marketing regulation must be cognizant of relevant legal constraints and be prepared to defend their policies against industry legal challenges.

III. Comparative Experiences

250

**Freedom of Commercial Expression
and Public Health Protection at the
European Court of Human Rights**

*Kanstantsin Dzehtsiarou and Amandine
Garde*

This contribution considers the case law of European Court of Human Rights (ECtHR) and focuses on the extent to which the Contracting Parties to the European Convention on Human Rights (ECHR) can regulate the tobacco, alcohol, and food industries in a manner compatible with their ECHR obligations. After briefly presenting the two key cases dealing specifically with tobacco advertising, this contribution considers the main factors that the ECtHR takes into account when balancing competing concerns, and in particular freedom of commercial expression and public health protection. It concludes that none of these factors is absolute, as the Court considers the strength of each one of them on the facts of each case. Nevertheless, it is clear from its case law that States have a wide margin of appreciation to regulate marketing practices that are inimical to public health and the prevention of non-communicable diseases more specifically, to the extent that even extensive advertising restrictions can be compatible with Article 10 of the ECHR.

259

**Commercial Speech and the Prohibition
of Tobacco Advertising:**

**The Colombian Constitutional Court
Approach**

*Silvia Serrano Guzmán, Ariadna Tovar
Ramírez, and Oscar A. Cabrera*

This article argues that the decision by the Colombian high court to totally ban the advertising and promotion of tobacco products is sound and could indeed be applied to other types of harmful products.

265

**United States: Protecting Commercial
Speech under the First Amendment**

Jennifer L. Pomeranz

The First Amendment to the U.S. Constitution protects commercial speech from government interference. Commercial speech has been defined by the U.S. Supreme Court as speech that proposes a commercial transaction, such as marketing and labeling. Companies that produce products associated with public health harms, such as alcohol, tobacco, and food, thus have a constitutional right to market these products to consumers. This article will examine the evolution of U.S. law related to the protection of commercial speech, often at the expense of public health. It will then identify outstanding questions related to the commercial speech doctrine and the few remaining avenues available in the United States to regulate commercial speech including the use of government speech and addressing deceptive and misleading commercial speech.

276

**Balancing the Scales: The Role of the
Canadian Supreme Court in Weighing
Commercial Speech and Public Health**

*Margherita M. Cinà
and Francesca E. Nardi*

The Supreme Court of Canada has established that commercial speech is protected under the Canadian Charter of Rights and Freedoms and that commercial speech exists along a continuum of utility and value, which is balanced against objectives such as public health. This article examines jurisprudence to determine when infringements on commercial speech are acceptable, analyzing considerations of evidence, rational connections between policies and outcomes, proportionality, and minimal impairment.

284

**Right to Commercial Speech in India:
Construing Constitutional Provisions
Harmoniously in Favor of
Public Health**

*Sujitha Subramanian, Nikhil Gokani,
and Kashish Aneja*

This article examines the right to commercial speech that has been read into the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India. Restrictions on this right are only permitted if they come within the ambit of the exhaustive list of reasonable restrictions under Article 19(2), under which public health is notably absent. Nevertheless, through the doctrine of harmonious construction, the Indian judiciary have adopted a purposive interpretation to circumvent the omission of public health by carving up freedom of commercial speech into two parts: protected speech which furthers public interest and unprotected speech which is purely commercial. Moreover, the Indian courts have construed these provisions in light of the right to life under Article 21 and the health-related Directive Principles of State Policy under Part IV of the Constitution. This article concludes that judicial creativity in India has consistently been used in favor of protecting public health.

IV. Case Studies

291

**Restricting Unhealthy Food and
Beverage Advertising in Brazil:
Challenges and Opportunities**

*Isabel Barbosa, Fábio Leite,
and Carla Britto*

In Brazil, the normative landscape around advertising is complex, not the least because of limitations inherent to dispute resolution mechanisms. Focusing on unhealthy food and beverages, this case study identifies some challenges and opportunities around advertising restrictions, including in relation to freedom of speech.

298

**Chile: Front-of-Package Warning Labels
and Food Marketing**

Marcelo Campbell

This Article aims to show how the food industry has instrumentalized the right to freedom of expression to oppose innovative laws in Chile aimed at creating healthier food environments.

304

**Public Health Protection vs. Freedom
of Commercial Expression in the
Commonwealth Caribbean:**

The Case of Barbados and Jamaica

*Shajoe J. Lake, Kimberley E. Benjamin,
and Nicole D. Foster*

This chapter explores the tension between public health protection and the freedom of commercial expression from a Commonwealth Caribbean perspective, using Barbados and Jamaica as case studies. First, it assesses the scope of the right to freedom of expression. Second, it discusses the extent to which public health protection may be invoked to restrict the right. The authors conclude that Commonwealth Caribbean states can justifiably restrict commercial speech about tobacco products and unhealthy food and beverages.

312

**The Regulation of Alcohol Marketing in
France: The Loi Evin at Thirty**

Marine Friant-Perrot and Amandine Garde

When adopted in 1991, the French Loi Evin was pioneering as one of the first in the world to regulate alcohol marketing as extensively. This short contribution assesses whether it remains fit for purpose over 30 years later. To this effect, it assesses its main provisions, considers the legislative amendments that have ensued as well as the extensive interpretation French courts have given of its scope, before concluding that the prospects for its revisions are limited in the near future.

317

**The Right to Free Commercial Speech in
South Africa and its Tension with Public
Health Interventions**

*Petronell Kruger, Mikateko Mafuyeka,
and Safura Abdool Karim*

Marketing restrictions to promote public health invoke competing rights, including the right to free commercial speech which for-profit entities use to protect their freedom to market products without undue regulation. The right to free commercial speech in South Africa has been developed through case law since the adoption of the first democratic constitution in South Africa in 1996. This article examines the impact of this recent judgment and the lessons for policy makers to ensure effective regulation of marketing practices in South Africa.

Independent Articles

322

Public Reason, Public Comments, and Public Charge: A Case Study in Moral & Practical Reasoning in Federal Rulemaking

Rachel Fabi and Lauren Zahn

The “public charge” rule is a long-standing immigration policy that seeks to determine the likelihood that a prospective immigrant will become dependent on the government for subsistence. When the Trump administration sought to expand the criteria that would count against an applicant for permanent residency to include public benefits historically excluded from the calculation, thousands of commenters wrote to oppose or support the proposed changes. This paper explores the moral and practical reasons commenters provided for their position on the public charge rule and considers the value of the public comment process for immigrant health policy.

336

COMMENTARY

C. Joseph Ross Daval

339

Optimizing Ethics Engagement in Research: Learning from the Ethical Complexities of Studying Opioid Use in Pregnancy

Seema K. Shah, Marielle Gross, and Camille Nebeker

Research on opioid use in pregnancy is critically important to understand how the opioid epidemic has affected a generation of children, but also raises significant ethical and legal challenges. Despite existing national regulations, independent oversight, and research ethics consultation services, important gaps remain for ethically complicated studies like these. In particular, studies on substance use in pregnancy may run into challenges if state laws consider substance use a form of child abuse that can result in removal of custody. While direct engagement between research teams and research ethicists can help address ethical issues, how best to engage research ethicists is understudied. We examine an NIH-funded network of projects studying opioid use in pregnancy to distill recommendations for research ethics engagement. We argue that ethicists engaged within research teams need to strike a balance between integration and independence to be effective, which requires sufficient and secure funding and support from sponsors, organizations, and research teams.

348

Voluntary Registries to Support Improved Interaction Between Police and People Living with Dementia

Heather M. Ross, Diana M. Bowman, and Jessica M. Wani

This paper provides an overview of the societal impact of a rising dementia population and examines the legal and ethical implications posed by voluntary registries as a community-oriented solution to improve interactions between law enforcement and individuals with dementia. It provides a survey of active voluntary registries across the United States, with a focus on Arizona, which has the highest projected growth for individuals living with dementia in the country.

364

COMMENTARY

Brandon del Pozo and Michael T. Compton

Columns

368

CURRENTS IN CONTEMPORARY
BIOETHICS

**The OSHA COVID-19 Case and the Scope
of the Occupational Safety and Health
Act**

Mark A. Rothstein

375

PUBLIC HEALTH AND THE LAW

**Regressive Federalism, Rights Reversals,
and the Public's Health**

*James G. Hodge, Jr., Jennifer L. Piatt, Leila
Barraza, and Erica N. White*

380

HEALTH POLICY PORTAL

**High-Priced Sickle Cell Gene Therapies
Threaten to Exacerbate US Health
Disparities and Establish New Pricing
Precedents for Molecular Medicine**

*Frazer A. Tessema, Ameet Sarpatwari,
Leah Z. Rand, and Aaron S. Kesselheim*

385

GLOBAL HEALTH LAW

**COVID-19 Law Lab: Building Strong
Legal Evidence**

*Kashish Aneja, Katherine Ginsbach,
Katie Gottschalk, Sam Halabi, and
Francesca Nardi*

390

BOOK REVIEW

**For the Common Good: Philosophical
Foundations of Research Ethics** by Alex
John London

*Jaime O'Brien, Lou Vinarcsik,
and Yolonda Wilson*

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.

Columns are written or edited by leaders in their fields and appear in each issue of JLME.

Next Issue:

**A Critical
Moment for
Transgender
Health Equity**

A Symposium
Guest-Edited
by Heather
A. Walter-
McCabe