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In this issue

Health Law and Anti-Racism: Reckoning and Response

GUEST EDITED BY

Michele Goodwin and Holly Fernandez Lynch



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SYMPOSIUM

Health Law and
Anti-Racism:
Reckoning and
Response

Guest Edited by
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and Holly Fernandez
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Cover image ©Getty Images

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**New Preemption as a Tool of
Structural Racism: Implications for
Racial Health Inequities**

Courtnee Melton-Fant

Preemption is a substantial threat to achieving racial equity. Since 2011, states have increasingly preempted local governments from enacting policies that can improve health and reduce racial inequities such as increasing minimum wage and requiring paid leave. This new preemption is emblematic of colorblind racism. This paper uses preemption of paid leave policies and local police budgeting to illustrate how new preemption is being used as a tool of structural racism and how preemption policies produced racial health inequities and threaten future action.

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**Involuntary Commitment as
“Carceral-Health Service”:
From Healthcare-to-Prison Pipeline
to a Public Health Abolition Praxis**

Rafik Wahbi and Leo Beletsky

In the United States, the criminal legal system selectively surveils, captures, and incarcerates poor, Black, Indigenous, and other racialized people, in a broad system of social control. There is now broad recognition of the mechanisms through which the school-to-prison pipeline extends the reach of the carceral system into educational settings to disproportionately ensnare youth of color. Yet, little work has been done to critically examine the carceral functions of the health and public health systems in a similar fashion — collectively termed the “healthcare-to-prison pipeline.”

Involuntary commitment functions as one such “pipeline” into the carceral settings, by forcibly institutionalizing individuals with mental health disorders who are

deemed a “threat to themselves or others.” Prior work has shown that involuntary commitment laws for substance use disorders are ineffective and unethical. Despite mounting evidence of ineffectiveness and rights-based arguments against their use, involuntary commitment laws continue to expand in number and scope. At a time of increased attention to the harms of the US carceral system, coercive civil law interventions to address substance use disorders and serious mental health crises are being upheld as preferable alternatives to those deployed in the criminal legal system. By situating involuntary commitment within the framework of the carceral archipelago as a social system of racial and class control, this paper re-frames involuntary commitment as an extension, not an alternative, of the carceral system.

Drawing from Critical Race Theory and a Feminist abolition praxis, we will explain how involuntary commitment links the healthcare, public health, and legislative systems, to act as a “carceral health-service.” While masquerading as more humane and medicalized, such coercive modalities nevertheless further reinforce the systems, structures, practices, and policies of structural oppression and white supremacy. We argue that due to involuntary commitment’s inextricable connection to the carceral system, and a longer history of violent social control, this legal framework cannot and must not be held out as a viable alternative to the criminal legal system responses to behavioral and mental health challenges. Instead, this article proposes true alternatives to incarceration that are centered on liberation that seeks to shrink the carceral system’s grasp on individuals’ and communities’ lives. In this, we draw inspiration from street-level praxis and action theory emanating from grassroots organizations and community organizers across the country under a Public Health Abolition framework.

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An Antiracist Health Equity Agenda for Education

*Thalia González, Alexis Etow,
and Cesar De La Vega*

With growing public health and health equity challenges brought to the forefront — following racialized health inequities resulting from COVID-19 and a national reckoning around the deaths of unarmed Black victims at the hands of policy — an antiracist health equity agenda has emerged naming racism a public health crisis. Within this agenda, public and scholarly attention has generated a diverse set of responsive actions across multiple sectors and systems. Yet there exists a critical missing piece: scrutiny of — and actions to address — racism as a significant driver of health inequities within our preschool to 12 education system. More specifically, the agenda has all but ignored long-standing inequities in punitive discipline and policing practices and the disparate and negative health and mental health outcomes that Black, Indigenous, and people of color (BIPOC) students experience as result of persistent contact with them. This gap in the agenda is a missed opportunity for structural change to address discrimination and the social, political, and legal constructs that reinforce health inequities. Building on the growing antiracist health equity agenda we seek to intervene and advance health justice two ways. First, by mapping the relationship between school discipline and policing practices and health. Second, by presenting action steps for public health professionals across research, teaching, advocacy, and policy reform. Antiracism is central to the values of public health, and we must challenge the current movement to move closer to dismantling the systems and structures that maintain subordination and fuel racial health inequities.

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Engaging Disability Rights Law to Address the Distinct Harms at the Intersection of Race and Disability for People with Substance Use Disorder

Kelly K. Dineen and Elizabeth Pendo

This article examines the unique disadvantages experienced by Black people and other people of color with substance use disorder in health care, and argues that an intersectional approach to enforcing disability rights laws offer an opportunity to ameliorate some of the harms of oppression to this population.

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The Racialized Marketing of Unhealthy Foods and Beverages: Perspectives and Potential Remedies

*Anne Barnhill, A. Susana Ramírez, Marice Ashe, Amanda Berhaupt-Glickstein,
Nicholas Freudenberg, Sonya A. Grier,
Karen E. Watson, and Shiriki Kumanyika*

We propose that marketing of unhealthy foods and beverages to Black and Latino consumers results from the intersection of a business model in which profits come primarily from marketing an unhealthy mix of products, standard targeted

marketing strategies, and societal forces of structural racism, and contributes to health disparities. We consider what an equitable food marketplace might look like and what the private and public sectors can do to make progress in this area.

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Fresh Take: Pitfalls of the FDA's Proposed Menthol Ban

Amirala Pasha and Richard Silbert

In April 2021, the U.S. Food and Drug Administration announced its intention to ban menthol flavoring in cigarettes and cigars. The Agency's decision was based in part on the disproportionate impact of menthol in Black communities. While the aims are laudable, we argue that a menthol ban partially justified by race is a paternalistic approach that may contribute to formation of an illicit menthol flavoring market, exacerbate existing racial disparities in policing, and stifle community buy-in.

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Structural Discrimination in Pandemic Policy: Essential Protections for Essential Workers

*Abigail E. Lowe, Kelly K. Dineen,
and Seema Mohapatra*

An inordinate number of low wage workers in essential industries are Black, Hispanic, or Latino, immigrants or refugees — groups beset by centuries of discrimination and burdened with disproportionate but preventable harms during the COVID-19 pandemic. Significant reforms to ameliorate existing structural inequities are needed to avoid repeating this injustice. This essay focuses on the narrow issue of structural discrimination in research and pandemic preparedness efforts and calls for the incorporation of antiracist approaches to include low-wage workers in essential industries in future pandemic planning and research funding before the next epidemic or pandemic.

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Harmony between Man and His Environment: Reviewing the Trump Administration's Changes to the National Environmental Policy Act in the Context of Environmental Racism

Gabrielle M. Kolencik

On July 15, 2020, the Council on Environmental Quality finalized changes made under the Trump Administration to “modernize” the National Environmental Policy Act (“NEPA”). NEPA requires federal agencies to engage in “efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” For over 50 years, NEPA had propelled towards the accomplishment of this goal by consistently requiring federal agencies to: (1) take into consideration consequential environmental effects inflicted from large scale projects, (2) foster community engagement and participation in the development of the same, and (3) establish a Council on Environmental Quality (CEQ). This article aims to show how the changes to NEPA by the Trump Administration are an act of environmental racism, defined as “[i]ntentional or unintentional racial discrimination in environmental policy making, enforcement of regulations and laws, and targeting of communities for the disposal of toxic waste and siting of polluting industries.” My analysis reviews the changes the Trump Administration developed for NEPA, reflects on environmental racism, and ultimately shows that communities of color will be disproportionately affected by the changes to NEPA. I conclude that the Trump Administration's changes to NEPA are an act of environmental injustice, and the long-term results of these changes will lead to harmful impacts on minority communities around the United States.

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Framing Black Infant and Maternal Mortality

Wangui Muigai

This article looks to the past to consider how government officials, health professionals, and legal authorities have historically framed racial disparities in birth and the lasting impact these explanations have had on Black birthing experiences and outcomes.

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Mitigating Racial Bias in Machine Learning

*Kristin M. Kostick-Quenet,
I. Glenn Cohen, Sara Gerke, Bernard Lo,
James Antaki, Faezah Movahedi,
Hasna Njah, Lauren Schoen, Jerry E. Estep,
and J.S. Blumenthal-Barby*

Artificial intelligence (AI) applications in the health sector promise to revolutionize healthcare. However, for the benefits of AI to equally reach across socioeconomic, racial or ethnic, and gender lines, enduring challenges must be addressed, namely algorithmic bias. When applied in the health sector, AI-based applications raise not only ethical but legal and safety concerns, where algorithms trained on data from majority populations can generate less accurate or reliable results for minorities and other disadvantaged groups. Developers, policymakers and other stakeholders thus share an interest in mitigating potential bias. While regulatory proposals and guidelines are emerging in the European Union and United States, no formal best practices exist to guide or compel makers or users of AI systems to ensure fairness. This paper describes a specific example illustrating some challenges in applying existing guidelines for mitigating algorithmic bias in a Machine Learning (ML) tool for real-world clinical decision making by physicians and patients. We argue that attempting to address racial algorithmic bias can serve as a catalyst for uncovering broader systemic inequalities, provides leverage in calling for greater fairness and policy solutions and better documentation of race-related variables, and can also promote objectivity in clinical decision making.

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Applying Civil Rights Law to Clinical Research: Title VI's Equal Access Mandate

Joseph Liss, David Peloquin, Mark Barnes, and Barbara E. Bierer

Title VI of the Civil Rights Act of 1964 and its implementing regulations prohibit federally-funded educational institutions and healthcare centers from engaging in disparate impact discrimination “on the ground of race, color, or national origin” in all of their operations. We argue that federally-funded healthcare organizations must affirmatively offer clinically qualified patients equal opportunities to access clinical trials. Improving access to clinical trials using Title VI will require incisive guidance, better data collection, and thoughtful enforcement.

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An Interprofessional Antiracist Curriculum is Paramount to Addressing Racial Health Inequities

L. Kate Mitchell, Maya K. Watson, Abigail Silva, and Jessica L. Simpson

Legal, medical, and public health professionals have been complicit in creating and maintaining systems that drive health inequities. To ameliorate this, current and future leaders in law, medicine, and public health must learn about racism and its impact along the life course trajectory and how to engage in antiracist practice and health equity work. This article explores how Loyola University Chicago law, medical, and public health students are learning through volunteering, advocacy, clinical casework, and coursework.

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Towards Racial Justice: The Role of Medical-Legal Partnerships

Medha D. Makhoul

Medical-legal partnerships (MLPs) integrate knowledge and practices from law and health care in pursuit of health equity. However, the MLP movement has not reached its full potential to address racial health inequities, in part because its original framing was not explicitly race conscious. This article aims to stimulate discussion of the role of MLPs in racial justice. It calls for MLPs to name racism as a social determinant of health and to examine how racism may operate in the field. This work sets the stage for the next step: operationalizing racial justice in the MLP model, research, and practice.

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**“We Who Champion the Unborn”:
Racial Poisons, Eugenics, and the
Campaign for Prohibition**

Paul A. Lombardo

Dr. Caleb Williams Saleeby was the author of *Parenthood and Race Culture*, one of the first monographs on eugenics and the book that popularized the term “racial poison.” Some racial poisons were diseases, like syphilis or gonorrhea, that could kill off a population by causing sterility. The phrase also encompassed environmental toxins like lead, nicotine, and alcohol. Saleeby's coinage became shorthand for conditions and substances that simultaneously poisoned individuals and their “germ plasm,” the cellular repository of heredity. The goal of eradicating the racial poisons and the harm they caused — particularly infant morbidity and mortality — provided common ground for early 20th century reformers, and their concerns fed the growing support for legal prohibition of alcohol.

This article details Saleeby's focus on alcohol as the premier racial poison, linked to the societal maladies of crime, disease, poverty, and welfare dependence. Most critically, it links Saleeby's activities with William Jennings Bryan, who accompanied Saleeby on a speaking tour sponsored by the Anti-Saloon League, one of the most powerful lobbying groups that advocated for a prohibition amendment. It also highlights connections between Saleeby and the Woman's Christian Temperance Union, whose members incorporated Saleeby's eugenic insights into a long-term educational campaign that Bryan credited with making Prohibition a reality in 1920s America.

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**Anti-Selection & Genetic Testing
in Insurance: An Interdisciplinary
Perspective**

*Dexter Golinghorst, Aisling de Paor,
Yann Joly, Angus S. Macdonald,
Margaret Otlowski, Richard Peter,
and Anya E.R. Prince*

Anti-selection occurs when information asymmetry exists between insurers and applicants. When an applicant knows they are at high risk of loss, but the insurer does not, the applicant may try to use this knowledge differential to secure insurance at a lower premium that does not match risk. Predictive genetic testing could lead to anti-selection if individuals, but not insurers, learn of genetic risk. On the other hand, much of the existing literature indicates that there is little risk of such anti-selection playing out in practice.

To address fear of discrimination, several countries have, or are considering, limitations on insurers' use of predictive genetic test results. In this paper, we discuss anti-selection theory and modeling and illustrate how regulating insurer use of predictive genetic results could impact anti-selection. The extent of this impact turns on whether individuals alter their insurance purchasing behavior following predictive genetic testing. At first blush it may seem likely that those who learn they are at genetic high-risk would attempt to gain greater coverage. However, we highlight several domains of on-the-ground realities that challenge this baseline assumption. These real-world considerations should be incorporated into

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anti-selection modeling to truly assess the potential impacts of regulation limiting insurer use of predictive genetic testing.

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**Attorneys as Healthcare Advocates:
The Argument for Attorney-Prepared
Advance Healthcare Directives**

Grace W. Orsatti

Attorneys regularly prepare advance healthcare directives for their clients. However, attorneys, lacking medical knowledge, are often considered ill-equipped to prepare such documents. While recognizing and respecting the fact that advance healthcare directives pertain to decisions about medical care, this article proposes that attorneys who prepare advance healthcare directives nevertheless provide a valuable service. Although shortcomings do exist with respect to attorney-prepared advance healthcare directives, opportunities are available to address and remedy such deficiencies. Attorneys who prepare advance directives are uniquely equipped to benefit their clients, including underserved and diverse clients, whose healthcare wishes risk being ignored.

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**Raqeeb, Haastrup, and Evans: Seeking
Consistency through a Distributive Justice-
Based Approach to Limitation of Treatment
in the Context of Dispute**

*James Cameron, Julian Savulescu, and
Dominic Wilkinson*

When is life sustaining treatment not in the best interests of a minimally conscious child? This is an extremely difficult question that incites seemingly intractable debate. And yet, it is the question courts in England and Wales have set out to answer in disputes about appropriate medical treatment for children. The apparent inconsistency in the recent court decisions in Raqeeb, Haastrup and Evans illustrates the difficulty of applying the best interests test. This article argues that attempting to identify the best interests of a minimally conscious child is not an appropriate basis for resolving disputes about the provision of mechanical ventilation. Instead, it is argued that decisions about mechanical ventilation should be subjected to the same scrutiny as other treatment decisions, which includes ensuring it would be an effective and efficient use of resources. If such decisions were made on the basis of appropriate resource allocation, the courts could then perform the more appropriate role of judicial review of an administrative decision. This would ensure the courts remain focused on upholding the law, rather than attempting to make difficult and abstract value judgments.

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