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Symposium Articles

SYMPOSIUM

Free Speech
and the
Regulation of
Reproductive
Health

Guest Edited by
Wendy Parmet

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*Letter from
the Editor*

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INTRODUCTION

Wendy Parmet

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**Abortion and Compelled Physician
Speech**

David Orentlicher

Informed consent mandates for abortion providers may infringe the First Amendment's freedom of speech. On the other hand, they may reinforce the physician's duty to obtain informed consent. Courts can promote both doctrines by ensuring that compelled physician speech pertains to medical facts about abortion rather than abortion ideology and that compelled speech is truthful and not misleading.

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**The First Amendment and Physician
Speech in Reproductive Decision
Making**

Sonia M. Suter

Courts are divided as to whether abortion informed consent mandates violate the First Amendment. This article argues that given the doctor's and patient's unique expertise, the patient's strong interests in autonomous decision making, and the fact that these laws regulate speech, rather than conduct, heightened or strict scrutiny should apply to such mandates.

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**A Matter of Context: Casey and the
Constitutionality of Compelled Physician
Speech**

Scott W. Gaylord

Under the Supreme Court's compelled speech cases, the context of government-mandated disclosures determines the standard of review. Pursuant to *Casey*, *Zauderer*, and *Whalen*, compelled disclosures in the medical context, such as speech-and-display ultrasound laws, are subject to — and survive — a form of rational basis scrutiny.

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**Informed Decision Making and
Abortion: Crisis Pregnancy Centers,
Informed Consent, and the First
Amendment**

Aziza Ahmed

Shifting laws and regulations increasingly displace the centrality of women's health concerns in the provision of abortion services. This is exemplified by the growing presence of deceptive Crisis Pregnancy Centers alongside new informed consent laws designed to dissuade women from seeking abortions. Litigation on informed consent is further complicated in the clinical context due to the increased mobilization of facts — such as the gestational age or sonogram of the fetus — delivered with the intent to dissuade women from accessing abortion. In other words, factual information utilized for ideological purpose. To preserve a woman's autonomy and decision-making capacity, there must be a concerted effort on the part of legislators and courts to place a woman's health at the center of abortion law and policy.

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**Casey Meets the Crisis Pregnancy
Centers**

B. Jessie Hill

Recent cases have found factual disclosure requirements to be constitutional when imposed on abortion providers but unconstitutional when imposed on crisis pregnancy centers. This paper argues that the outcomes in both kinds of cases can be explained by courts' perception of abortion as an ideological, political, or moral act rather than as health care.

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**When States Regulate Emergency
Contraceptives Like Abortion,
What Should Guide Disclosure?**

*Cameron O'Brien Flynn and
Robin Fretwell Wilson*

State laws dictating "informed consent" about surgical and chemical abortions sometimes ensnare emergency contraceptives (EC), as the science surrounding EC shows. Courts evaluating mandated disclosures gravitate to professional norms rather than the information most women would value: basic factual information about EC so that they can decide for themselves whether to use these drugs.

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**Are All Abortions Equal? Should There
Be Exceptions to the Criminalization of
Abortion for Rape and Incest?**

I. Glenn Cohen

Politics, public discourse, and legislation restricting abortion has settled on a moderate orthodoxy: restrict abortion, but leave exceptions for pregnancies that result from rape and incest. I challenge that consensus and suggest it may be much harder to defend than those who support the compromise think. From both Pro-Life and Pro-Choice perspectives, there are good reasons to treat all abortions as equal.

Independents

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**Acoustic Separation and Biomedical
Research: Lessons from Indian
Regulation of Compensation for
Research Injury**

Megan E. Larkin

In early 2013, the Indian government introduced new rules governing the conduct of clinical trials involving human participants. Among other provisions, the law requires that sponsors of research compensate participants who are injured during the course of their research participation. This article examines the effects of India's compensation law and the efforts that policymakers in India have made to tailor the law since its passage. I use the legal concept of acoustic separation as a framework to explain and justify the approach that India has taken in refining its regulation of research related injuries. I conclude that India's example may provide useful lessons for research sponsors and lawmakers in other regulatory states seeking to promote a well-regulated biomedical research industry.

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**Detecting, Preventing, and Responding
to "Fraudsters" in Internet Research:
Ethics and Tradeoffs**

*Jennifer Teitcher, Walter O. Bockting,
José A. Bauermeister, Chris J. Hoefler,
Michael H. Miner, and Robert L. Klitzman*

Internet-based health research is increasing, and often offers financial incentives but fraudulent behavior by participants can result. Specifically, eligible or ineligible individuals may enter the study multiple times and receive undeserved financial compensation. We review past experiences and approaches to this problem and propose several new strategies. Researchers can detect and prevent Internet research fraud in four broad ways: (1) through the questionnaire/instrument (e.g., including certain questions in survey; and software for administering survey); (2) through participants non-questionnaire data and seeking external validation (e.g., checking data for same email addresses, usernames, passwords, and/or fake addresses or phone numbers; (3) through computer information, (e.g., IP addresses and cookies), and 4) through study design (e.g., avoid lump sum compensation and interviewing participants). These approaches each have pros and cons, and raise ethical, legal, and logistical questions, given that ethical tensions can emerge between preserving the integrity of research vs. protecting the privacy and confidentiality of study respondents. While past discussions concerning the ethics of online research have tended to focus on the participants' ability to trust the researchers, needs now arise to examine researchers' abilities to trust the participants. This analysis has several critical implications for future practice, policy, and research.

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**On the Justifiability of ACMG
Recommendations for Reporting of
Incidental Findings in Clinical Exome
and Genome Sequencing**

Thomas May

This paper examines three possible justifications for original ACMG recommendations to return incidental findings from whole exome or genome sequencing independent of patient preferences. The first two potential justifications, based on a patient's authentic values, then on harms to others, are found lacking as a basis of justification for these recommendations. The third, grounded in analogous professional practices, might serve as a potential justification if several controversies can be avoided. However, given the nature of these controversies and the need to instill public trust in this newly emerging science, the paper finds that updated ACMG recommendations that recognize opt-out rights on behalf of patients is the most prudent, and justifiable, approach.

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**Global Justice and Health Systems
Research in Low- and Middle-Income
Countries**

Bridget Pratt and Adnan A. Hyder

Scholarship focusing on how international research can contribute to justice in global health has primarily explored requirements for the conduct of clinical trials. Yet health systems research in low- and middle-income countries (LMICs) has increasingly been identified as vital to the reduction of health disparities between and within countries. This paper expands an existing ethical framework based on the health capability paradigm — research for health justice — to externally-funded health systems research in LMICs. It argues that a specific form of health systems research in LMICs is required if the enterprise is to advance global health equity. “Research for health justice” requirements for priority setting, research capacity strengthening, and post-study benefits in health systems research are derived in light of the field’s distinctive characteristics. Specific obligations are established for external research actors, including governments, funders, sponsors, and investigators. How these framework requirements differ from those for international clinical research is discussed.

Column

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**CURRENTS IN CONTEMPORARY
BIOETHICS**

**The Patient as Consumer: Empowerment
or Commodification?**

Melissa M. Goldstein and Daniel G. Bowers

Discussions surrounding patient engagement and empowerment often use the terms “patient” and “consumer” interchangeably. But do the two terms hold the same meaning, or is a “patient” a passive actor in the health care arena and a “consumer” an informed, rational decision-maker? Has there been a shift in our usage of the two terms that aligns with the increasing commercialization of health care in the U.S. or has the patient/consumer dynamic always been a part of the buying and selling of health care in the American system? Recent discussions of the issue exist in the popular press and in social media forums such as TEDMED, but few direct analyses of the ethical, legal, and policy ramifications of this possible shift in terminology are available in the academic literature. This paper analyzes our usage of the terms and any recent changes in the dynamic and discusses the ethical, legal, and policy implications of this simple terminology for the physician-patient relationship.

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Calendar

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.

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**Intersections in
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Perspectives
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and Assisted
Reproductive
Technologies**
A Symposium
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and Kimberly
Mutcherson