***American University Law Review* Annual Symposium Panel Discussion**
"Evolution of Healthcare Privacy"
Friday, February 5, 2021, 10:00–11:15 a.m.
Background Educational Materials: Continuing Legal Education

Executive Summary

On Friday, February 5, 2021 from 10:00–11:15 a.m. Eastern Time, the American University Law Review *will host a panel discussion on the evolution of healthcare privacy in response to the COVID-19 pandemic. Panelists discussing this fascinating topic include* ***Professor Leslie Francis****, Alfred C. Emery Distinguished Professor of Law & Distinguished Professor of Philosophy of the* University of Utah*;* ***Professor Seema Mohapatra****, Visiting Associate Professor of Law at* FAMU College of Law*; and* ***Professor Jennifer D. Oliva****, Associate Professor of Law at* Seton Hall Law. ***Professor Kirk J. Nahra****, Co-Chair of the Cybersecurity & Privacy Practice and Big Data Practice at Wilmer Cutler Pickering Hale & Dorr LLP and Adjunct Associate Professor of Law at the* American University Washington College of Law*, will moderate this discussion.*

Background

In late 2019, a novel coronavirus that causes a disease known as COVID-19 began to spread rapidly through mainland China, garnering international attention as clusters formed and spread internationally at the turn of the year.[1] Given the virus's uniquely high infection rate[2] and some infected individuals' asymptomatic presentation,[3] public health authorities around the world struggled in critical early days to control the virus's spread—particularly in the United States, where the federal government quickly delegated the brunt of pandemic management to state public

1. *See* Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 NEW ENG. J. MED. 929, 929 (2020) (detailing the first documented case of COVID-19 in the United States).

2. *See* David Adam, *The Limits of* R, 583 NATURE 346, 346, 348 (2020) (describing infectious diseases' reproduction number, signified in practice by the variable *R*, as the average number of people each person with a disease goes on to infect). *See generally* Joe Hilton & Matt J. Keeling, *Estimation of Country-Level Basic Reproductive Ratios for Novel Coronavirus (SARS-CoV-2/COVID-19) Using Synthetic Contact Matrices*, PLOS COMPUTATIONAL BIOLOGY 4 (2020) (estimating COVID-19's *R* value as hovering between two and three).

3. *See* Andreas Kronbichler et al., *Asymptomatic Patients as a Source of COVID-19 Infections: A Systematic Review and Meta-Analysis*, 98 INT'L J. INFECTIOUS DISEASES 180, 181 (2020) (reporting the results of an analysis of asymptomatic patients presenting as positive for the novel coronavirus).

health officials.[4] By March 11, 2020, the World Health Organization (WHO) classified COVID-19 as a pandemic,[5] and the virus's grip on society has persisted since.[6]

Numerous actors across industries have taken on various responsibilities in managing and responding to the pandemic, with the federal government leaning on private industry more than in previous health crises.[7] As these actors have become involved, their duties under the privacy laws have evolved as the virus has spread, particularly as federal and state authorities have activated emergency powers laws and protections have ceded to efficiency. These materials discuss the central privacy law governing the various actors at work in this space, how that law's implementation and bite has evolved in the wake of the pandemic, and the panelists scheduled to join us for this exciting discussion.

The Health Insurance Portability and Accountability Act (HIPAA) in the Age of COVID-19

The Health Insurance Portability and Accountability Act of 1996,[8] or HIPAA, is the preeminent federal law governing the maintenance and transfer of personally identifiable information in the

4. *See* Peter Nicholas & Kathy Gilsinan, *The End of the Imperial Presidency*, THE ATL. (May 2, 2020), https://www.theatlantic.com/politics/archive/2020/05/trump-governors-coronavirus/611023 ("Trump's posture has forced governors to confront a worldwide crisis they wouldn't have imagined would be theirs to solve. They've had to venture into a chaotic global marketplace to hunt for masks and ventilators. They've forged alliances to figure out the smartest ways to reopen their economy and curb the virus's spread. And they're building systems to help them cope with future pandemics."); Darryl Fears et al., *As National Parks Remain Open During a Pandemic, Seven Workers Are Infected*, WASH. POST (Apr. 1, 2020, 7:02 PM), https://www.washingtonpost.com/climate-environment/2020/03/31/national-parks-coronavirus (detailing viral spread in national parks, which are managed by the federal Department of the Interior); *see also* Farid Rahimi & Amin Talebi Bezmin Abadi, *Challenges of Managing the Asymptomatic Carriers of SARS-CoV-2*, 37 TRAVEL MED. & INFECTIOUS DISEASE 101677 (2020) (emphasizing the unique challenges asymptomatic patients pose to containment efforts).

5. *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19–11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—11-march-2020 [https://perma.cc/BZ4J-9PPV].

6. *See Coronavirus World Map: Tracking the Global Outbreak*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html#countries (Feb. 3, 2021, 7:49 AM) (showing the number of positive cases globally approaching 100 million by the end of January 2021).

7. *See, e.g.*, Noam N. Levey & Noah Bierman, *As Trump Lets Private Sector Supply the Coronavirus Fight, the Well-Connected Often Get First Dibs*, L.A. TIMES (Apr. 1, 2020, 10:34 AM), https://www.latimes.com/politics/story/2020-04-01/coronavirus-medical-equipment-goes-to-well-connected ("Rather than direct federal agencies to establish a nationwide system, the White House has largely deferred to medical distribution companies, commercial suppliers and the generosity of manufacturers and charities to fill the gaps."). One common criticism of public health authorities' response to the 2014 Ebola outbreak centered on those authorities' reliance on public sector institutions (and concomitant reticence to employ the services of the private sector). *See, e.g.*, Jeff Schlegelmilch, *Ebola One Year Later*, THE HILL (Oct. 29, 2015, 9:30 AM), https://thehill.com/blogs/congress-blog/healthcare/258406-ebola-one-year-later ("The much-criticized response of the World Health Organization and other global institutions to the Ebola crisis demonstrates that reliance solely on public sector institutions is not a sufficient disaster response system."); *cf.* Addar Weintraub et al., *Ebola: Harnessing the Potential of the Private Sector*, AFRICAN L. & BUS. (Dec. 11, 2014), https://iclg.com/alb/5305-ebola:-harnessing-the-potential-of-the-private-sector (theorizing ways private sector entities could bolster the public response to the Ebola outbreak and listing public authorities' mandates to better identify public sector-provided resources).

8. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

healthcare sector. With its companion implementing rules—the Privacy Rule[9] most famously, but also the Security Rule[10]—HIPAA governs so-called "covered entities" in this space,[11] though some of its edicts have changed with since-enacted legislation like the Health Information Technology for Economic and Clinical Health Act of 2009[12] (HITECH Act). The Department of Health and Human Services (HHS) Office for Civil Rights (OCR) is responsible for enforcing violations of HIPAA and its implementing rules.[13]

HIPAA's primary mandates governing private patient health information arise in the Privacy Rule, while the Security Rule establishes standards for safeguarding private health information from unauthorized access, use, or disclosure.[14] At base, the Privacy Rule governs "covered entities" (that is, health plans, healthcare clearinghouses, and healthcare providers) and their business associates in their creation, retention, maintenance, transfer, and receipt of "[p]rotected health information,"[15] and broadly prohibits these entities from using or disclosing that protected health information in a manner that is not expressly permitted or required by the Rule.[16] The Rule *mandates* disclosure under only two circumstances: to the individual who is the subject of the information (e.g., the patient herself) and to HHS officials investigating potential violations of the Rule.[17] The remainder of the Rule permits disclosure in certain circumstances, with broad latitude granted to health professionals in reference to their ethical duties. However, it holds that for all other disclosures or use of the covered information, the covered entity or business associate must obtain the patient's written consent.[18]

Specific to COVID-19, under HIPAA, covered entities still retain several options whereby they may share patient information without consent as part of pandemic management and response. In addition to the treatment function,[19] HIPAA directly addresses public health authorities' need to

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9. 45 C.F.R. §§ 160.101–.552, 164.102–.106, 164.500–.534 (2018); *see also The HIPAA Privacy Rule*, HHS.GOV (Dec. 10, 2020), https://www.hhs.gov/hipaa/for-professionals/privacy/index.html [https://perma.cc/2WZZ-6BLA] (noting that the HIPAA Privacy Rule is contained within 45 C.F.R. Part 160 and Subparts A and E of Part 164).

10. 45 C.F.R. §§ 160.101–.552, 164.102–.106, 164.302–.318 (2018); *see also The Security Rule*, HHS.GOV (Sept. 23, 2020), https://www.hhs.gov/hipaa/for-professionals/security/index.html [https://perma.cc/5Z4L-GJFV] (noting that the HIPAA Security Rule is contained within 45 C.F.R. Part 160 and Subparts A and C of Part 164).

11. *See* § 160.103 (defining "[c]overed entity" and other terms in the Privacy Rule).

12. Pub. L. No. 111-5, 123 Stat. 226, 467 (2009); *see also* C. STEPHEN REDHEAD, CONG. RSCH. SERV., R43991, HIPAA PRIVACY, SECURITY, ENFORCEMENT, AND BREACH NOTIFICATION STANDARDS 15–21 (2015) (discussing the HITECH Act's amendments to the HIPAA Privacy and Security Rules).

13. *See Filing a Complaint*, HHS.GOV (Mar. 31, 2020), https://www.hhs.gov/hipaa/filing-a-complaint/index.html [https://perma.cc/9PA5-VZL3]; *see also* REDHEAD, *supra* note 12, at 2–3 ("HIPAA established civil monetary penalties for failure to comply with the Administrative Simplification standards, including the privacy and security standards. It also created criminal penalties for certain instances involving the wrongful acquisition or disclosure of individually identifiable health information in violation of the standards. OCR refers such cases to the Department of Justice (DOJ) for criminal prosecution."). For the purposes of these materials, forgoing references to HIPAA include by reference the Privacy and Security Rules, unless otherwise stated.

14. *See* § 164.306(c)–(d) (establishing implementation specifications for security standards incumbent upon covered entities).

15. *See* § 160.103 (defining "[c]overed entity" and "[p]rotected health information"); *see also* § 164.306(a) (outlining the responsibilities of covered entities and business associates).

16. § 164.502(a).

17. § 164.502(a)(2).

18. §§ 164.508, 164.510.

19. The Privacy Rule allows covered entities to share protected health information as necessary to treat both the patient whose information is being shared and another patient. *See* §§ 164.502(a)(1)(ii), 164.506(c).

respond quickly to fast-evolving crises by permitting covered entities to disclose certain covered information to public health authorities, such as infection numbers and rates,[20] or to anyone as necessary to remedy, ameliorate, or prevent a "serious and imminent threat to the health or safety of a person or the public."[21] Further, HIPAA authorizes certain disclosures necessary not only to conduct contact tracing efforts, but also to inform the public writ large via disclosures to the police and press—though a particular case may mandate the covered entity receive the patient's consent through a "HIPAA authorization" prior to making such a disclosure.[22] With all of these avenues, however, HIPAA retains a "minimum necessary disclosure" requirement overlay as a guardrail to the total subsuming of the law.[23]

HIPAA's mandates still apply during a national public health emergency like the COVID-19 pandemic.[24] However, in early 2020, OCR began to release public guidance regarding HIPAA compliance in light of the pandemic's unique context.[25] The most significant of these updates are "Notifications of Enforcement Discretion" (NEDs): publications informing covered entities that HHS would not seek enforcement actions or penalties relevant to violations of certain provisions of HIPAA and its implementing regulations.[26] These notifications (and concomitant relaxations of HIPAA mandates and their protections) include the following:

- *Telehealth.* On March 17, 2020, OCR issued an NED indicating its intent to abstain from enforcement actions against covered entities choosing to interact with patients remotely through the use of telehealth systems or remote communications options outside the list of previously approved systems, such as Zoom and FaceTime.[27] Noting that these systems may not comport with HIPAA's Privacy and Security Rules, OCR stated it would not seek enforcement actions against providers who sought in good faith to examine patients through these products (though it explicitly stated the use of technology like TikTok, Twitch, and Facebook Live were "public-facing" and thus were not covered by the Rule).[28]

The definition of "treatment" is very broad and encompasses the coordination and management of healthcare and related services by one or more healthcare providers and others. *See* § 164.501.

20. § 164.512(b)(1)(i); OFF. FOR C.R., U.S. DEP'T OF HEALTH & HUM. SERVS., HIPAA PRIVACY AND NOVEL CORONAVIRUS 3 (2020), https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf [https://perma.cc/5U6E-BEAY] [hereinafter OCR BULLETIN]. 45 C.F.R. § 164.501 defines what constitutes a "public health authority" permitted to make these kinds of disclosures.

21. *See* § 164.512(j) (granting healthcare professionals broad discretion to determine the nature and severity of the threat); OCR BULLETIN, *supra* note 20, at 4.

22. § 164.510(b); OCR BULLETIN, *supra* note 20, at 3–5.

23. §§ 164.502(b), 164.514(d); OCR BULLETIN, *supra* note 20, at 5.

24. *See* OCR BULLETIN, *supra* note 20, at 3 (providing a bulletin to covered entities in the early days of the pandemic "to serve as a reminder that the protections of the Privacy Rule are not set aside during an emergency").

25. *See generally HIPAA and COVID-19*, HHS.GOV (Jan. 19, 2021), https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html [https://perma.cc/9VT4-H3FM].

26. *See, e.g.*, Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency, 85 Fed. Reg. 22,024 (Apr. 21, 2020) (briefly explaining the purpose of NEDs). An up-to-date compilation of these NEDs is available at *HIPAA and COVID-19*, *supra* note 25.

27. Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency, 85 Fed. Reg. at 22,024–5; OFF. FOR C.R., U.S. DEP'T OF HEALTH & HUM. SERVS., FAQS ON TELEHEALTH AND HIPAA DURING THE COVID-19 NATIONWIDE PUBLIC HEALTH EMERGENCY 1, 4–5 (2020), https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf [https://perma.cc/87MR-ZPPL] [hereinafter FAQS ON TELEHEALTH].

28. Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency, 85 Fed. Reg. at 22,025; FAQS ON TELEHEALTH, *supra* note 27, at 5.

- *Business Associates' Disclosures to Government Entities Engaged in Pandemic Response.* On April 2, 2020, OCR announced it would abstain from enforcement actions against covered entities' business associates for HIPAA violations if a violation occurred in a good faith effort to disclose covered information to public health entities and health oversight initiatives.[29]
- *Community-Based COVID-19 Testing Sites.* On April 9, 2020, OCR announced it would abstain from enforcement actions against covered entities and their business associates for violations of HIPAA implementing rule requirements connected to the operation of a community-based testing site (CBTS) for COVID-19.[30] Noting that pharmacies and their business associates have pivoted to operating these CBTSs in a short period of time, OCR encouraged the covered entities to use reasonable safeguards while noting the context of the pandemic.[31]
- *Internet-Based Appointment Scheduling for COVID-19 Vaccines.* On January 19, 2021, OCR issued an NED stating it would abstain from enforcement actions charging violations of the Privacy, Security, and Breach Rules promulgated under HIPAA and the HITECH Act as against covered entities—such as pharmacies and public health authorities—who chose to utilize internet-based appointment scheduling programs to coordinate the distribution of COVID-19 vaccinations.[32] Recognizing some of these programs may fail to comport with HIPAA or that some of the entities facilitating the appointment scheduling may not have experience operating as a covered entity prior to this context, OCR indicated its intent to abstain from enforcement action regardless of whether the noncompliant actor had actual or constructive knowledge of its failure to comply.[33]

In addition to the OCR NEDs, in March 2020, then-Department of Health and Human Services Secretary Alex Azar issued a limited waiver of HIPAA sanctions and penalties[34] against covered hospitals under the authority granted his position in the Project BioShield Act of 2004[35] and Section 1135(b)(7) of the Social Security Act.[36] This waiver provided protections for covered hospitals' failure to comply with the following mandates contained in the Privacy Rule:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care[;]
- the requirement to honor a request to opt out of the facility directory[;]

29. Enforcement Discretion Under HIPAA to Allow Uses and Disclosures of Protected Health Information by Business Associates for Public Health and Health Oversight Activities in Response to COVID-19, 85 Fed. Reg. 19,392 (Apr. 7, 2020); *see also OCR Announces Notification of Enforcement Discretion to Allow Uses and Disclosures of Protected Health Information by Business Associates for Public Health and Health Oversight Activities During the COVID-19 Nationwide Public Health Emergency*, HHS.GOV (Apr. 2, 2020), https://www.hhs.gov/about/news/2020/04/02/ocr-announces-notification-of-enforcement-discretion.html [https://perma.cc/DQN6-2H8G].

30. Enforcement Discretion Regarding COVID-19 Community-Based Testing Sites (CBTS) During the COVID-19 Nationwide Public Health Emergency, 85 Fed. Reg. 29,637 (May 18, 2020).

31. *Id.*

32. U.S. DEP'T OF HEALTH & HUM. SERVS., ENFORCEMENT DISCRETION REGARDING ONLINE OR WEB-BASED SCHEDULING APPLICATIONS FOR THE SCHEDULING OF INDIVIDUAL APPOINTMENTS FOR COVID-19 VACCINATION DURING THE COVID-19 NATIONWIDE PUBLIC HEALTH EMERGENCY 1–8 (2021), https://www.hhs.gov/sites/default/files/hipaa-vaccine-ned.pdf [https://perma.cc/KCB2-GNAE].

33. *Id.* at 4.

34. U.S. DEP'T OF HEALTH & HUM. SERVS., COVID-19 & HIPAA BULLETIN: LIMITED WAIVER OF HIPAA SANCTIONS AND PENALTIES DURING A NATIONWIDE PUBLIC HEALTH EMERGENCY 1 (2020), https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf [https://perma.cc/8C9P-JKTQ] [hereinafter COVID-19 & HIPAA BULLETIN].

35. Pub. L. No. 108-276, 118 Stat. 835 (2004).

36. 42 U.S.C. § 1320b–5(b)(7) (2018).

- the requirement to distribute a notice of privacy practices[;]
- the patient's right to request privacy restrictions[; and]
- the patient's right to request confidential communications.[37]

Notably, the waiver included its own sunset provisions.[38]

Beyond the formal waiver and NEDs, OCR has issued other guidance in an effort to assist struggling covered entities in their efforts to better provide healthcare and coordinate resources. Such guidance has included paths for covered entities to disclose a patient's health condition (including if the patient is infected with COVID-19) to a first responder while remaining in compliance with HIPAA;[39] reminders regarding providers' mandate to comply with civil rights laws despite the relaxation of other HIPAA provisions;[40] and ways covered providers can contact former COVID-19 patients with blood or plasma donation opportunities while remaining compliant.[41]

Conclusion

The unique context of COVID-19 has dramatically altered health privacy laws and the executive branch's discretion in enforcing those laws. As the nation looks to the end of the pandemic, potential reverberations from these changes may linger. Our panelists will examine the risks inherent to these momentary (but potentially long-lasting) sacrifices to privacy and the future of healthcare privacy law.

37. COVID-19 & HIPAA BULLETIN, *supra* note 34, at 1 (citing 45 C.F.R. §§ 164.510, 164.520, 164.522 (2018)).

38. *See id.* (explaining that hospitals must comply with the Privacy Rule requirements once the declaration of emergency terminates).

39. OFF. FOR C.R., DEP'T OF HEALTH & HUM. SERVS., COVID-19 AND HIPAA: DISCLOSURES TO LAW ENFORCEMENT, PARAMEDICS, OTHER FIRST RESPONDERS AND PUBLIC HEALTH AUTHORITIES 1 (2020), https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf [https://perma.cc/U2QX-DYTL].

40. OFF. FOR C.R., DEP'T OF HEALTH & HUM. SERVS., BULLETIN: CIVIL RIGHTS, HIPAA, AND THE CORONAVIRUS DISEASE 2019 (COVID-19) 1 (2020), https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf [https://perma.cc/P6JT-E2U4].

41. OFF. FOR C.R., DEP'T OF HEALTH & HUM. SERVS., UPDATED GUIDANCE ON HIPAA AND CONTACTING FORMER COVID-19 PATIENTS ABOUT PLASMA DONATION 1 (2020), https://www.hhs.gov/sites/default/files/guidance-on-hipaa-and-contacting-former-covid-19-patients-about-plasma-donation.pdf [https://perma.cc/2Q93-2NJ7].

Panelists

Professor Leslie Francis. Leslie P. Francis, PhD, JD, holds joint appointments as Alfred C. Emery Professor of Law and Professor of Philosophy, and adjunct appointments in Family and Preventive Medicine (in the Division of Public Health), Internal Medicine (in the Division of Medical Ethics), and Political Science, at the *University of Utah*. She was appointed to the rank of Distinguished Professor in 2009 and became Director of the *University of Utah* Center for Law and Biomedical Sciences in 2015. Professor Francis was President of the Pacific Division of the American Philosophical Association in 2015–2016. From 2015–2019, she served as the elected Secretary-General of the International Society for Philosophy of Law and Social Philosophy. She is a past member of the Ethics Committee of the American Society for Reproductive Medicine and past co-chair of the Privacy, Confidentiality, and Security Subcommittee of the National Committee on Vital and Health Statistics, where she currently serves as a member of the Working Group on Data Access and Use. Professor Francis has also served as a member of the Medicare Coverage Advisory Committee and the American Bar Association's Commission on Law and Aging.

Professor Francis's books include *The Patient as Victim and Vector: Ethics and Infectious Disease* (co-authored with M. Pabst Battin, Jay A. Jacobson, and Charles B. Smith; Oxford Univ. Press 2010) and *Privacy: What Everyone Needs to Know* (co-authored with John Francis; Oxford 2017). She edited the *Oxford Handbook of Reproductive Ethics* (Oxford Univ. Press 2017) and has authored many papers in the areas of disability law and ethics, privacy and data use, justice, and bioethics.

Professor Francis received her PhD in philosophy from the *University of Michigan*. Her capstone project was titled "Impartiality and the Justification of Moral Principles." She received her JD from the *University of Utah*.

Professor Francis's pertinent publications in this space include:

- Nicholas P. Terry & Leslie P. Francis, *Ensuring the Privacy and Confidentiality of Electronic Health Records*, 2007 U. ILL. L. REV. 681 (2007).
- Leslie P. Francis, *Consumer Expectations and Access to Health Care*, 140 U. PA. L. REV. 1881 (1992).
- Leslie P. Francis & Anita Silvers, *Debilitating* Alexander v. Choate*: Meaningful Access to Health Care for People with Disabilities*, 35 FORDHAM URB. L.J. 447 (2008).
- Leslie P. Francis, *The Roles of the Family in Making Health Care Decisions for Incompetent Patients*, 1992 UTAH L. REV. 861 (1992).
- Leslie P. Francis, *The Physician-Patient Relationship and a National Health Information Network*, 38 J.L. MED. & ETHICS 36 (2010).

Professor Seema Mohapatra. Professor Seema Mohapatra is currently a visiting Associate Professor of Law at *FAMU College of Law* for the 2020–2021 academic year while on leave from her tenured faculty position at *Indiana University Robert H. McKinney School of Law* in Indianapolis, Indiana. She is an Orlando native who has taught a wide variety of courses focusing mostly on tort law, health law, and bioethics. Professor Mohapatra is an expert in biotechnology and the law, public health law, reproductive justice, and health equity. During the COVID-19 pandemic, she has written about various issues, including structural racism, mask mandates and racial discrimination, mask mandates and disability law, immunity passports, advance directives, health justice, and online teaching. Professor Mohapatra is also regularly consulted by the media for her expertise. Her scholarship was featured recently in *Vox* and the *Indy Star*. She is the co-editor of *Feminist Judgments: Health Law Rewritten* (with Lindsay F. Wiley; Cambridge Univ. Press, forthcoming 2021). She is also a co-author of the forthcoming third edition of the textbook *Reproductive Technologies and the Law* (with Judith Daar, I. Glenn Cohen, and Sonia Suter; Carolina Acad. Press, forthcoming 2021).

Professor Mohapatra earned the Dean's Fellow title and award at *Indiana University Robert H. McKinney School of Law* in 2018–2019 and 2019–2020 for outstanding scholarship. She serves on the Ethics Advisory Committee at the UNMC Global Center for Health Security.

Professor Mohapatra earned her JD at *Northwestern University School of Law*, her Master of Public Health in chronic disease epidemiology at *Yale University*, and her bachelor's degree with a major in Natural Sciences and a minor in Women's Studies from *Johns Hopkins University*.

Professor Mohapatra's pertinent publications in this space include:

- Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiijah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, YALE J. HEALTH POL'Y, L., & ETHICS (forthcoming 2021).
- Seema Mohapatra, *Time to Lift the Veil of Inequality in Health-Care Coverage: Using Corporate Law to Defend the Affordable Care Act*, 50 WAKE FOREST L. REV. 137 (2015).
- Seema Mohapatra, *Law in the Time of Zika: Disability Rights and Reproductive Justice Collide*, 84 BROOK. L. REV. 325 (2019).
- Seema Mohapatra, *Use of Facial Recognition Technology for Medical Purposes: Balancing Privacy with Innovation*, 43 PEPP. L. REV. 1017 (2016).
- Elizabeth Pendo, Robert Gatter & Seema Mohapatra, *Resolving Tensions between Disability Rights Law and COVID-19 Mask Policies*, 80 MD. L. REV. ONLINE 1 (2020).

Professor Jennifer D. Oliva. Jennifer D. Oliva is an Associate Professor at *Seton Hall Law*, where she specializes in health law and policy, FDA law, drug policy, evidence, and complex litigation. An honors graduate of *Georgetown University Law Center*, Professor Oliva was a Public Interest Law Scholar and served as Executive Notes & Comments Editor of the *Georgetown Law Journal*. Before attending law school, Professor Oliva earned a Master of Business Administration at *Balliol College*, *Oxford University*. She was elected as a Rhodes and Truman Scholar while a cadet at the *United States Military Academy*. After law school, Professor Oliva served as a federal appellate law clerk to the Honorable Stephanie K. Seymour on the U.S. Court of Appeals for the Tenth Circuit and the Honorable Thomas L. Ambro on the U.S. Court of Appeals for the Third Circuit. She was subsequently appointed Deputy State Solicitor of the State of Delaware by then-Attorney General Beau Biden.

Professor Oliva has worked in the appellate and health/FDA law practice groups at national law firms and served as the General Counsel and Vice President of a regional behavioral healthcare company. She is U.S. Army veteran and admitted to the bar in Delaware, California, and the District of Columbia. She also is admitted to numerous U.S. district and appellate courts, including the U.S. Court of Appeals for Veterans Claims and the U.S. Supreme Court. The Harry S. Truman Foundation honored Professor Oliva with the 2019 Truman Scholarship Foundation Ike Skelton Award for her commitment to public service. She is the 2020–2021 Chair of the AALS Section on Law and Mental Disability and was selected as a 2019 Wiet Life Science Law Scholar. Professor Oliva's forthcoming article, *Dosing Discrimination*, was competitively selected for presentation at the 2020 Health Law Scholars Workshop co-sponsored by *Saint Louis University* Center for Health Law Studies and the American Society of Law, Medicine & Ethics, and she was recently selected as the recipient of the 2021 Health Law Community Service Award by the AALS Section on Law, Medicine, and Health Care.

Prior to joining the faculty at *Seton Hall Law*, Professor Oliva served three years as Associate Professor of Law and Public Health at *West Virginia University*, where she was selected as the College of Law's 2017–2018 Professor of the Year and the *West Virginia Law Review*'s 2017–2018 Professor of the Year. She also spent the Spring 2019 semester as a visiting research scholar at The Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at *Harvard Law School*. Her work has

been published by or is forthcoming in the *Duke Law Journal*, *Northwestern University Law Review*, *Ohio State Law Journal*, *Washington Law Review*, *American University Law Review*, *North Carolina Law Review*, and the online companion to the *University of Chicago Law Review*.

Professor Oliva's pertinent publications in this space include:

- Jennifer D. Oliva, *Prescription Drug Policing: The Right to Health Information Privacy Pre- and Post-*Carpenter, 69 DUKE L.J. 775 (2020).
- Jennifer D. Oliva, *Public Health Surveillance in the Context of COVID-19*, 18 IND. HEALTH L. REV. 107 (2021).
- Jennifer D. Oliva, *Policing Opioid Use Disorder in a Pandemic*, U. CHI. L. REV. ONLINE (2020), https://lawreviewblog.uchicago.edu/2020/11/16/covid-oliva.
- Jennifer D. Oliva, *Vulnerable Populations in the Context of COVID-19*, 2 ARIZ. STATE L.J. ONLINE 69 (2020).

Professor Kirk J. Nahra. Kirk Nahra has been a leading authority on privacy and cybersecurity matters for more than two decades. Indeed, he is one of the few lawyers in the world ranked in Band 1 by Chambers in privacy and data security. Professor Nahra counsels clients across industries, from Fortune 500 companies to startups, on implementing the requirements of privacy and data security laws across the country and internationally. He also advocates for clients experiencing privacy and security breaches and represents clients in contract and deal matters, enforcement actions, regulatory investigations, and related litigation.

Professor Nahra is best known for his work with health insurers, hospitals, service providers, pharmaceutical manufacturers, and other healthcare industry participants. He has a deep understanding of the privacy and security issues healthcare companies face relating to HIPAA rules, state and federal legislation, enforcement activities, internal investigations, international principles, due diligence in transactions, data breach risk assessments, and the key lines between regulated and unregulated data. During his decades of experience, Professor Nahra has developed compliance programs, drafted privacy and information security policies, negotiated agreements involving health data, responded to health incidents, and defended clients against government investigations.

Professor Nahra also has substantial experience working with clients in the financial services and insurance industries on privacy and data security matters relating to the Gramm-Leach-Bliley Act, Fair Credit Reporting Act, Fair and Accurate Credit Transactions Act, data aggregation and sharing practices, and privacy and data security compliance under a wide range of state and federal laws. He also has a breadth of experience drafting and evaluating data security practices and policies across varying industry standards, has investigated and litigated potential fraud against insurers, and has assisted with the development and oversight of corporate compliance programs.

Additionally, Professor Nahra is well versed in a variety of other privacy and consumer protection issues, including marketing laws pertaining to email, phone, and online communications; the Children's Online Privacy Protection Act; and the Family Educational Rights and Privacy Act of 1974.

A leader in the privacy bar, Professor Nahra has been involved in developing the privacy legal field for twenty years. As a founding member and longtime board member of the International Association of Privacy Professionals, he helped establish the organization's Privacy Bar Section and their first and most popular certification for Certified Information Privacy Professionals. He is a member of the Center for Cybersecurity and Privacy Protection National Advisory Board. He has taught privacy issues at several law schools, including serving as an adjunct professor at the *American University Washington College of Law* and *Case Western Reserve University*. In addition, he currently serves as a fellow with the Cordell Institute for Policy in Medicine & Law at *Washington University in*

St. Louis and as a fellow with the Institute for Critical Infrastructure Technology. He actively shares his privacy insights through numerous speeches, articles, and social media.

Event Run of Show

The entire event will be hosted virtually on Zoom. All times are Eastern Standard.

Day One: Thursday, February 4, 2021

Opening Remarks
5:00–5:05 p.m.: Robert Dinerstein, *AUWCL* Acting Dean, will welcome attendees and provide a brief history of the event.
5:05–5:15 p.m.: Kiran Jeevanjee, *AULR* Senior Symposium Editor, and John Verderame, *AULR* Editor-in-Chief, will give opening remarks.

Surveillance & Privacy in the Pandemic
5:15–5:20 p.m.: Panelist introductions
5:20–6:05 p.m.: Panel discussion
6:05–6:15 p.m.: Audience Q&A

Contact Tracing & Innovative Technological Responses
6:30–6:35 p.m.: Panelist introductions
6:35–7:20 p.m.: Panel discussion
7:20–7:30 p.m.: Audience Q&A

Closing Remarks
7:30–7:35 p.m.: Kiran Jeevanjee, *AULR* Senior Symposium Editor, will deliver end-of-day closing remarks.

Day Two: Friday, February 5, 2021

Opening Remarks
10:00–10:15 a.m.: John Verderame, *AULR* Editor-in-Chief, will deliver opening remarks and outline the day's events.

Evolution of Healthcare Privacy
10:15–10:20 a.m.: Panelist introductions
10:20–11:05 a.m.: Panel discussion
11:05–11:15 a.m.: Audience Q&A

Lessons Learned: The Future of Digital Privacy
11:30–11:35 a.m.: Panelist introductions
11:35 a.m.–12:20 p.m.: Panel discussion
12:20–12:30 p.m.: Audience Q&A

Closing Remarks
12:30–12:35 p.m.: John Verderame, *AULR* Editor-in-Chief, will close out the event with some brief closing remarks.