MEDICAL DEPORTATION: LEGAL AND ETHICAL ISSUES

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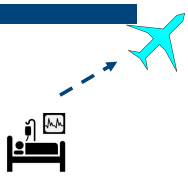
CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF MEDICINE

IDENTIFYING MEDICAL DEPORTATION



- Medical transfer
- Medical repatriation
- Hospital deportation
- Forcible/forced repatriation
- Forcible immigrant shipping
- Medical rendition
- Private deportation
- International patient dumping
- Hospital-effectuated international expulsion
- Extrajudicial deportation
- Extralegal deportation
- Patient export

HOSPITAL-EFFECTUATED INTERNATIONAL PATIENT EXPULSION

- >800 incidents in 6 year period from 15 states to ≥ 7 countries
- Cost of "repatriation": $35k-$200k (Harasim 2009)
- Often effectuated through reliance on private company, e.g. Mexcare
  - "An alternative choice for the care of the unfunded Latin American national"
  - Company website does not list facilities in Latin America with which it collaborates
  - NYT reports that the insurance offered by MexCare to encourage consent does not cover needed services, such as dialysis (Sack 2009)
  - Often no follow-up by sending healthcare facility (Sontag 2008)

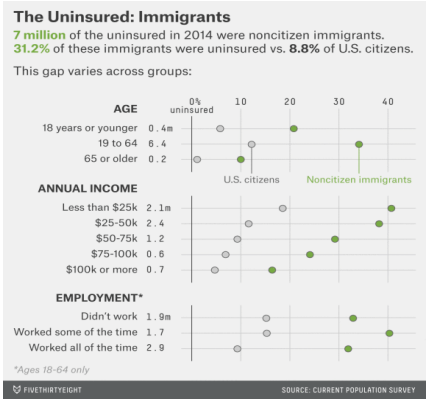
UNDERSTANDING THE CONTEXT

- Emergency medical situation or serious chronic illness
- Federal requirement to provide emergency medical care to stabilize patient
- Discharge plan and transfer to appropriate facility to ensure health and safety of patient
- Patient's lack of adequate resources or health care insurance
- Hospital's inability to recover long-term care costs or to identify accepting facility for transfer

SCOPE OF CHALLENGE

- 33m individuals in US (10.4% of population), lack healthcare insurance (Barry-Jester & Casselman 2015)
  - Disproportionately poor, black and Hispanic
  - 4.5m are children
  - 7m are noncitizen immigrants
    - Estimated 4m/7m undocumented
    - Estimated 600,000 in country <5 years; ineligible for publicly funded care
- Cost of providing uncompensated care to immigrants approx. $4.3b/yr; approx 10% of unreimbursed costs of care for uninsured and underinsured per American Hospital Assn (Moore 2013)
- 2007: California Medi-Cal spent $20m on 460 patients
- 2005 estimates: 75% of undocumented persons pay payroll taxes, contribute $7b to Social Security Administration and $1.5b to Medicare with no possibility of receiving benefits (Porter 2005)

From Barry-Jester & Casselman 2015



HOSPITAL-EFFECTUATED INTERNATIONAL PATIENT EXPULSION: Consequences 1.

- For hospital
  - Reduction in burden of uncompensated care
  - Use of third party may insulate hospital from liability
  - May comply with EMTALA provision requiring arrangement for implementation of discharge plan
  - Transforms hospital into self-funding travel agency (Appel 2012)
  - Blurs the boundary between provision of health care and law enforcement

HOSPITAL-EFFECTUATED INTERNATIONAL PATIENT EXPULSION: Consequences 2.

- For patient
  - Potential loss of immigration status, ineligibility for US citizenship or imposition of bar to re-enter the US
  - Potentially inadequate care
  - Separation from US-based family members
  - Legal costs
- For community
  - Distrust of health care providers (Moran 2009)
  - Possible upswing in untreated communicable disease

LEGAL AND ETHICAL ISSUES

- Constitutional issues
- Statutory issues:
  - Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)
  - Emergency Medical Treatment and Active Labor Act (EMTALA)
- Tort issues:
  - Absence of informed consent
  - Medical malpractice
  - False imprisonment
  - Emotional distress
- Quality of care; access to care
- Healthcare provider conflict of interest

CONSTITUTIONAL ISSUES

- U.S. Constitution, Art. I, Sec. 8: Grants to Congress the power : "To establish a uniform rule of naturalization"
- Montejo v. Martin Memorial Hospital, 874 So. D 654 (Fla. App. 2004)
  - Federal law preempts state power to deport persons within its borders
  - Circuit court judge did not have subject matter jurisdiction to authorize deportation

PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT (PRWORA)

- Legal immigrants who entered US after 8/22/1996 ineligible for public benefits during first 5 yrs in US; for those with affidavit of support, possibly 10 years
- Bar includes Medicaid, Medicare, State Children's Health Insurance Programs
- Exceptions for emergency medical care, immunizable diseases, tx for sx of communicable diseases
- Limits post-stabilization healthcare funding
- Coverage available to undocumented immigrants for post-emergency care—NYC, California
  - As of 2006, 22 states and DC extended some Medicaid coverage to undocumented immigrants (Kaiser Commission, 2006)

EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT (EMTALA)

- Established in 1986; known as "anti-patient dumping statute"
- Requires that hospitals participating in Medicare program that maintain ED provide for *appropriate medical screening* to determine existence of emergency medical condition
  - Appropriate if hospital screens indigent pt in same manner as it would paying pt (Cleland v. Bronson Health Care Group, 917 F.2d 266 6th Cir. 1990)
- Requires stabilization of emergency medical condition prior to transfer or discharge to an appropriate medical facility

INFORMED CONSENT

- Legal and ethical requirement
- Professional standard
  - What a reasonable physician would find necessary to disclose to a patient based on the circumstances
- Reasonable patient standard
  - What a reasonable patient would want to know about the medical procedure, its risks and benefits

MEDICAL MALPRACTICE

- Unlikely to succeed (Procaccini 2010)
- Physician or hospital has duty to exercise the dame degree of care as "a physician in good standing in the same medical specialty on a similar community in like circumstances" (Mello 2001)
- Standard of care shifts as professional consensus shifts
- Has repatriation become a customary and accepted medical practice?

FALSE IMPRISONMENT 1.

- Montejo v. Martin Memorial Medical Center, 874 So. 2d 654 (Fl. Dist. Ct. App. 2004)
  - Guardian appealed from circuit court order allowing hospital to intervene, obtain judicial review of guardianship plan, and medically repatriate Jimenez, an uninsured immigrant, to Guatemala
  - Fla Ct of Appeals found "there was no competent substantial evidence to support Jimenez's discharge from the hospital"
- Montejo, pt. guardian, sued for false imprisonment, claiming no informed consent for transfer given (935 So. 2d 1266 Fla. Dist. Ct. App. 2006)
  - Ct held hospital was not an agent of govt executing court order and was not entitled to qualified immunity or quasi-judicial immunity; remanded
- On remand, trial ct judge indicated that plaintiff (1) had been unlawfully detained (2) without legal authority (3) against his guardian's will
  - No damages awarded by jury, finding that hosp action not unreasonable and unwarranted under the circumstances (2009 WL 3260347, Fla. Cir. Ct. July 27, 2009)

FALSE IMPRISONMENT 2.

- Cruz v. Central Iowa Hospital Corporation, 826 N.W.2d 516 (Iowa Ct. App. 2012)
  - 2 undocumented men from Mexico, hit by truck, required long-term care
  - Hospital had them transported to Vera Cruz, Mexico while semi-comatose
  - Filed suit for false imprisonment
    - Court found consent due to families' lack of "vehement objection"
    - Court rejected plaintiffs' claim f harm, finding that it was not the hospital's fault that the men received poor medical care
    - Court found no emotional harm because they only learned of their confinement when they awoke in Mexico

IS THE PRACTICE ETHICAL

- In limited circumstances
  - Transfer seen by a reasonable person as being in pt best interests, apart from payment issue
  - Hospital exercises due diligence regarding medical support available at intended destination
  - Patient or appropriate surrogate has provided fully informed consent to have pt returned (Kuczewski 2012)

ACCESS TO CARE; QUALITY OF CARE

- Legal and ethical issue: Can a facility in a foreign country that does not meet the US standard of care for a specific condition be an appropriate facility even assuming that facility provides the best care available in that country?
- Issue of distributive justice at individual and societal levels:
  - "The indigent patient should receive equal care and be treated with the same respect and thoughtful concern as the patient who can pay for service" (*Am College of Physicians Ethics Manual* 1984)
  - "A physician must advocate for his pr her patient even if the hospital administration has debts or is near bankruptcy" (Greenough 2009)
  - Does society owe obligation to those who have paid into system, contributed through labor?

PROVIDER CONFLICT OF INTEREST

- Position, salary dependent on employer
  - Relatively few physicians remain in nonaffiliated practice
- AMA Principles of Medical Ethics, rev. 6/2001:
  - Preamble: As a member of this profession, a physician must recognize responsibility to patients first and foremost, as well as to society, to other health professionals, and to self.
  - III. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.
  - IX. A physician shall support access to medical care for all people

PROPOSED REMEDIES 1.

- Incorporate jurisdiction over medical repatriation cases into Executive Office for Immigration Review (Irshad 2012; see also Bresa 2010)
- Entertain individuals' application for asylum status (Oakley & Sorell 2012; Stead 2010)
- Effectuate repatriation through DHS/ICE following hospital notification (Johnson 2010)
- Repeal bars to medical coverage for (un)documented immigrants (Seton Hall University School of Law Center for Social Justice, CSJ & NY Lawyers for the Public Interest, NYLPI; Bresa 2010)
- Institute fedl requirement that nursing homes/long-term care facilities accept undocumented patients (Bresa 2010)
- Amend EMTALA so as to
  - Redefine "emergency medical condition" and amend PRWORA (Zoellner 2010)
  - Redefine "appropriate facility" (Agrahaekar 2010)
  - Expand right of recovery against physicians (Padron 2010)

PROPOSED REMEDIES 2.

- Federal ban on forced repatriation (Smith 2010)
- Claim pursuant to Racketeer Influenced and Corrupt Organizations Act (RICO) (Smith 2010)
- Actions under 42 USC 1983 against employees of public hospitals as state actors
  - Conduct under color of state law
  - Violation of rights under federal law or US constitution (O'Connell 2010; Vincent 2010)
  - But see Montejo v. Martin Memorial Medical Ctr (Ct held hospital was not an agent of govt executing court order and was not entitled to qualified immunity or quasi-judicial immunity)
- Court review of informed consent provisions and agreement (Cantwell 2012)
  - Informed consent to specify immigration consequences of repatriation and of refusal, e.g., hospital report to ICE
  - Review transfer agreement for procedural and substantive unconscionability

POSITION STATEMENTS

- American Medical Association Council on Ethical and Judicial Affairs, 2009
- California Medical Association House of Delegates, Resolution 105a-08: "CMA oppose[s] forced repatriation of patients"

PROPOSED FRAMEWORKS FOR ETHICAL ANALYSIS

- ETHICAL (Brown & Dobrin)
  - Examine the date
  - Think about which persons should be involved in decision
  - Humanize options by constructing decision tree
  - Incorporate ethical principles and legal statutes
  - Choose an action
  - Act
  - Look back and evaluate choices
- Theory of moral reckoning (Brown & Dobrin)
  - Recognize conflict in values, institutional values, code of ethics, and personal values
  - Healthcare provider addresses internal conflict; make a stand or give up
  - Reflect on actions

CONCLUSIONS

- Complex issue involving access to care, and extent and quality of care for individuals and hospital need to remain solvent
- Conflicting legal obligations placed on healthcare institutions through inconsistent statutory schemes
- Healthcare institutions are not competent to determine individuals' immigration/citizenship status
- Inadequate efforts made to amend legislation and to explore alternative solutions
- Increased outreach to immigrant groups warranted
- Additional research needed to document extent and context of occurrence
- Increased focus on education of healthcare professionals with respect to ethical and legal issues, e.g., in context of bioethics and/or cultural sensitivity