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DISCHARGE, DEPORTATION, AND DANGEROUS JOURNEYS:

A STUDY ON THE PRACTICE OF MEDICAL REPATRIATION

"They told me, 'Today you are going to your home,'" Ojeda Jimenez said, recalling being struck with terror and unable to get words out. "I wanted to say something, but I couldn't talk. I wanted to ask why."

- Quelino Ojeda

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A joint project from the Center for Social Justice at Seton Hall Law School and the Health Justice Program at New York Lawyers for the Public Interest

EXECUTIVE SUMMARY

This report, a collaborative project of Seton Hall University School of Law's Center for Social Justice (CSJ) and the Health Justice Program at New York Lawyers for the Public Interest (NYLPI), utilizes a human rights framework to critique the widespread but barely publicized practice of forced or coerced medical repatriations of immigrant patients. Through this practice, private and public hospitals in the United States are engaged in unlawful, and frequently extrajudicial, deportations of ill or injured immigrant patients to medical facilities abroad, completely circumventing the federal government's exclusive authority to deport individuals.

While most medical repatriations occur in the shadows, there is enough information to establish that the U.S. is in systematic violation of its human rights obligations under a variety of treaties that the U.S. has signed and/or ratified. Overall, hospitals, non-governmental organizations (NGOs), journalists, and advocates have been able to document more than 800 cases of attempted or successful medical repatriations across the United States in the past six years. As these medical deportations are likely to increase in frequency due to certain aspects of the Patient Protection and Affordable Care Act (PPACA), which will be discussed in more depth below, it is a particularly timely concern for both immigration and health care advocates.

Furthermore, standing at the intersection of these two highly controversial and complex political issues—immigration and health care policy—the debate about medical repatriation, to the extent that people are aware of it, largely focuses on the illegality of the immigrant and the costs to hospitals. In an effort to refocus the debate, this report takes a human rights-based approach to medical repatriation by examining (1) the fundamental human rights that all people should be afforded regardless of immigration status; and (2) the role of the U.S. in perpetuating this practice. The purpose of this report is to:

- Raise awareness about the practice of medical repatriation before we begin to see the practice increase, which it is likely to do in the near future, and quantify the accompanying harm to both the immigrants that face forced or coerced medical repatriation and their family members.
- Demonstrate how medical repatriation violates both international and domestic law.

- Persuade the U.S. Department of Health and Human Services to track medical repatriations, impose sanctions on hospitals that perform involuntary medical repatriations and develop regulations that impose greater accountability for hospitals discharging patients to facilities abroad.
- Encourage Congress to convene hearings on the practice and better comply with international human rights obligations.
- Promote dialogue between the U.S. State Department and foreign consulates with the goal of developing a formal procedure for international medical transfers.
- Impart to hospitals the importance and necessity of "informed consent" through disclosures of potentially severe immigration and health consequences regarding medical repatriation.
- Contribute to the current dialogue on the need for more humane immigration and health care laws and policies, particularly in light of the passage of the PPACA, which will make the conditions under which medical repatriations occur more common.

Why Does Medical Repatriation Happen?

Generally, medical repatriation occurs when a hospital sends critically injured or ill immigrant patients back to their native country without their consent. Although hospitals are required to provide emergency medical care to patients regardless of their immigration status, this obligation terminates once the patient is stabilized. At this point, federal law requires hospitals to create a discharge plan and transfer patients to "appropriate facilities" that ensure the health and safety of the patient. Unfortunately, many long-term care facilities, rehabilitation centers, and nursing homes are reticent to accept immigrant patients because many are ineligible for public health insurance due to their immigration status and cannot otherwise afford private health insurance.

This combination of vulnerable immigrant patients and lack of a reimbursement stream for their care has contributed to a situation in which many hospitals take matters into their own hands. Acting alone or in concert with private transportation companies, such hospitals are functioning as unauthorized immigration officers and deporting seriously ill or injured immigrant patients directly from their hospital beds to their native countries. Such hospitals are engaging in

de facto deportations either without the consent of the immigrant patient or by exercising coercion to obtain consent.

How Often Does Medical Repatriation Occur? Is It Increasing?

The secrecy surrounding medical repatriations and the failure of federal or state agencies to monitor these *de facto* deportations makes it difficult to assess the true magnitude of the situation. Despite this fact, hospitals, NGOs, journalists, and advocates have been able to document many cases of forced or coerced medical repatriations in the U.S. A snapshot of cases from media and CSJ research indicates that there have been more than 800 cases of attempted or successful medical repatriations across the United States in the past six years. CSJ has documented medical repatriation cases from 15 states; hospitals have deported these individuals to seven different countries including El Salvador, Guatemala, Honduras, Lithuania, Mexico, Philippines, and South Korea. This count, however, does not include the many medical repatriations that went unreported by hospitals and the federal government.

In all likelihood, the reduced allocation of federal funding under the PPACA will lead to more medical repatriations as hospitals, particularly those that provide a disproportionate amount of care to uninsured and publicly insured patients, face additional financial strain. Beginning in 2014, the federal government will dramatically reduce Medicaid Disproportionate Share Hospital (DSH) payments.[1] Historically, the federal government has distributed this funding to states to assist hospitals that provide a large volume of care to Medicaid and uninsured patients. Under health reform, millions of previously uninsured patients will become eligible for Medicaid. Since the number of uninsured patients is expected to decrease dramatically, the federal government will reduce the amount of DSH funding it distributes to states. Unfortunately, despite health reform, some patients, including many patients who may face medical repatriation, will remain uninsured. Faced with the prospect of decreased DSH payments, many hospitals that regularly treat this patient population may resort to medical repatriation in an effort to offset the costs of providing post-acute care to undocumented immigrants.[2]

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[1] PATRICIA BOOZANG ET AL., NEW YORK STATE HEALTH FOUNDATION, IMPLEMENTING FEDERAL HEALTH CARE REFORM: A ROADMAP FOR NEW YORK STATE 62 (2010).

[2] *See generally* Nina Bernstein, Hospitals Fear Cuts in Aid for Care to Illegal Immigrants, N.Y. TIMES (July 26 2012) *available at* http://www.nytimes.com/2012/07/27/nyregion/affordable-care-act-reduces-a-fund-for-the-

Who Does Medical Repatriation Affect?

Medical repatriation most obviously affects the lives, health, and well-being of immigrant, and at times even U.S. citizen, patients who have suffered a serious injury or illness. Hospitals have attempted to medically repatriate patients across a variety of age ranges with various immigration statuses, including a two-day-old U.S. citizen child born to undocumented immigrant parents, a nineteen-year-old lawful permanent resident, and an undocumented teenager who lived in the U.S. for eighteen years prior to being repatriated.

Medical repatriation also dramatically affects the lives of the patient's family, both in the U.S. and abroad. Medical repatriations often separate families in the U.S. at a time when family support is urgently needed. Similarly, when critically injured or ill immigrants are repatriated to countries and families that do not have the resources or medical advances to care for them, family members are helpless to sustain the lives of their loved ones.

What is the Harm That Follows Medical Repatriation?

When critically ill or catastrophically injured immigrant patients are transferred to facilities abroad, their lives and health are often jeopardized because these facilities cannot provide the care they require and the transfers themselves are inherently risky, resulting in significant deterioration of a patient's health, or even death. This report documents some of these tragic stories: a nineteen-year-old girl who died shortly after being wheeled out of a hospital back entrance typically used for garbage disposal and transferred to Mexico; a car accident victim who died shortly after being left on the tarmac at an airport in Guatemala; and a young man with catastrophic brain injury who remains bed-ridden and suffering from constant seizures after being forcibly repatriated to his elderly mother's hilltop home in Guatemala.

Unfortunately, the U.S. has failed to provide an adequate process through which immigrants who are unlawfully repatriated can seek redress. While there are some documented cases in which the hospital has admitted that it failed to obtain consent to transfer the patient abroad, immigration laws preclude the majority of unlawfully repatriated undocumented patients from returning to the U.S. For example, once an immigrant who has been in the U.S. without

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uninsured.html?pagewanted=all (noting the pressure that reduced DSH funding will place on hospitals that provide care to undocumented immigrants in need of emergency care).

lawful immigration status for over a year voluntarily departs from the country, s/he will be prohibited from returning to the U.S. for ten years, without special permission. Similarly, immigrants that voluntarily depart after more than six months (but less than a year) of unlawful status will be barred from reentering for three years, without special permission. Although the Immigration and Nationality Act (INA) establishes some form of recourse for immigrants who are ordered deported, these avenues are only available when a removal order exists. When a patient is repatriated by a hospital, outside of the federal immigration process, no such order exists. Thus, the U.S. effectively allows the hospital, a private actor, to circumvent the immigration process, leaving the immigrant patient without recourse to challenge serious immigration consequences of medical repatriation.

MEDICAL REPATRIATION VIOLATES INTERNATIONAL HUMAN RIGHTS LAW AND DOMESTIC LAW

The practice of repatriation violates a host of guaranteed human rights, including the right to a fair trial and due process; the right to life, liberty and personal security; the right to protection of the family; and the right to preservation of health and well-being. International human rights law mandates that countries exercise due diligence in order to protect individuals within its borders from human rights violations. Specifically, countries have a duty to prevent, investigate, and punish violations of human rights, and, when possible, ensure adequate compensation to victims as warranted for damages resulting from these violations. Under this standard of due diligence, even when the violation of a human right is not the result of any governmental action, responsibility can be imputed to the country when it fails to fulfill its duties. Because the U.S. has failed to exercise due diligence and enact a domestic legislative scheme to protect immigrant patients' rights, it is in systematic violation of the human rights obligations it has under a variety of treaties.

Medical Repatriation Violates Due Process

When hospitals remove immigrant patients from the U.S. against their will or under coercion, this action is tantamount to a *de facto* deportation, which violates the patients' right to due process. The U.S. is bound to protect immigrants' rights to due process under both international law and the U.S. Constitution. The United States has ratified a number of

international treaties that mandate protection of the right to due process for immigrants, including the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration on the Rights and Duties of Man (American Declaration). In addition, although the U.S. has not yet ratified the American Convention on Human Rights (American Convention) or the International Covenant on Economic, Social, and Cultural Rights (ICESCR), it has signed both treaties and thereby obligated itself not to engage in actions that would undermine the object and purpose of the treaties. The Fifth and Fourteenth Amendments of the U.S. Constitution also guarantee immigrants the right to due process.

Medical Repatriation Violates Rights to Life and Preservation of Health and Well-Being

When critically ill or catastrophically injured immigrant patients are transferred to facilities abroad that cannot adequately provide the care they require, their health, and in some instances even their lives, are put in jeopardy. Accordingly, these patients' rights to life and preservation of health and well-being are undermined. These rights are protected by the ICCPR, the American Convention, the American Declaration, and the ICESCR. Regrettably, the U.S.'s current legislative scheme restricts immigrants' access to public health programs, limits hospitals' ability to seek reimbursement for the care they provide to uninsured immigrants, inadequately enforces existing protections regarding patient dumping and federal discharge laws, and fails to create a regulatory framework concerning informed consent. Thus it does not protect immigrant patients' rights to life and preservation of health.

CONCLUSION

The practice of forced or coerced medical repatriation violates international and U.S. law and must be curtailed. The federal government has failed to remedy serious deficiencies in its overall legislative scheme, particularly with respect to patients' rights to due process, life, and the preservation of health and well-being. These deficiencies have very real and sometimes fatal consequences for immigrant patients, who find themselves back in their native countries, separated from their families, and in need of critical care they are unable to access. As medical deportations are likely to increase in frequency in the near future, there is an urgent need for state

and federal governments to address the issue of medical repatriation and prevent the escalation of these human rights violations.

RECOMMENDATIONS

To the U.S. Congress:

- Convene hearings to investigate the practice of unlawful medical repatriations by private hospitals under international and domestic law.
- Repeal all laws that impose bars to Medicaid benefits based upon immigration status.

To the Department of Health and Human Services:

- Immediately promulgate regulations that prohibit and impose sanctions on any hospital that performs an involuntary repatriation.
- Develop a process by which hospitals must document and report international patient transfers.
- Develop an auditing process through which the department can monitor compliance with such rules and regulations.

To the Department of State:

- Engage in a dialogue with foreign consulates within the U.S. and implement a formal procedure for international medical transfers, so that transfers can be verified with receiving hospitals prior to the issuing of travel documents.

To Hospitals:

- In the absence of state or federal regulations, establish protocols to ensure that consent to international transfers is *informed*, which would include disclosure of potential immigration consequences.
- Confirm (in cooperation with foreign consulates) that destination hospitals can provide the necessary long-term care before a transfer is deemed viable.
- Train hospital social workers and advocates on the special issues of working with immigrants, both documented and undocumented.

To States:

- Repeal any bars to funding for means-tested and long-term medical care based on immigration status.
- Establish a fund for long-term care for catastrophically injured immigrants.

To State Courts:

- Acknowledge federal preemption limitation on jurisdiction when discharge proceedings involve *de facto* deportations.
- Stay any orders of international discharge until determinations of immigration status, removability, and potential relief have been rendered by an Immigration Court.

- Direct any appointed guardians to consider immigration consequences when acting on behalf of the patient and seek independent assessment of the patient's situation

To Community Groups and Advocates:

- Document cases of actual or threatened medical deportation.
- Raise awareness concerning discharge and language access rights and Emergency Medicaid.
- Create a rapid response working group to assist undocumented immigrants at risk of medical deportation.