Justice: Bedside Clinical Ethics' Next Great Challenge

Bruce D. White, DO, JD
Professor of Pediatrics and Director
Alden March Bioethics Institute
Albany Medical College
Albany, New York 12208

1

The Focus of Clinical Ethics …

- Autonomy
- Beneficence
- Nonmaleficence
- Justice

—Beauchamp TL, Childress JR. *Principles of Biomedical Ethics,* 6th ed. New York: Oxford University Press, 2008.

2

"The teaching of medical ethics has long focused on a 4-pillar foundation of the profession: beneficence (provide good care), nonmaleficence (do no harm), respect for autonomy, and justice. It would appear that in the United States, however, attention to these 4 principles has become unbalanced. Currently, far less emphasis is given to considerations of justice (especially for society as a whole), relative to the other ethical principles.

—Kirch DG, Vernon DJ. The ethical foundation of American medicine: in search of social justice. [Commentaries.] JAMA. 2009; 301:1482-1484.

3

US Hospitals Transferring Ill (Recovering) Immigrants Back to Their Home Countries: Another "Dumping" Dilemma? Is There a "Just" Public Policy Resolution?

4

The New York Times

- Janofsky M. Burden grows for Southwest hospitals. 2003;Apr 4.
- Sontag D. Immigrants facing deportation by U.S. hospitals. 2008;Aug 3.
- Berger J. For immigrants, checking to see if the doctor is in. 2008;Oct 12.
- Sontag D. Getting tough: deported in a coma, saved back in the U.S. 2008;Nov 9.

5

The New York Times

"The American Hospital Association estimated that in 2000, the 24 southernmost counties from Texas to California accrued $862 million in unpaid medical care, a quarter of which was directly attributable to illegal immigrants."

"A study for the Maricopa County [Arizona] Board of Supervisors found that in 2001, the five biggest health care providers in the county amassed $318 million in uncompensated care, 23 percent of it by Maricopa Medical."

—Janofsky M. Burden grows for Southwest hospitals. 2003;Apr 4.

6

The New York Times

"The mounting pressures are causing hospital officials to re-evaluate the services they provide beyond emergency treatment. For example, he [Dr. Paul E. Stander, medical director at Good Samaritan Regional Medical Center, Phoenix] said, doctors could stabilize a patient with symptoms of gallstones, but not necessarily remove them. 'It's an uneasy situation for most of us to be in,' Dr. Stander said. 'As health care professionals, we usually desire to do whatever we can. But it's clear we cannot be the provider of choice for all northern Mexico. It's an impossible burden for us to take on.'"

—Janofsky M. Burden grows for Southwest hospitals. 2003;Apr 4.

7

Bruce Patsner, MD, JD

Research Professor of Law, Health Law and Policy Institute, University of Houston, Houston, Texas

"If one were searching the US health law arena for a new, controversial battlefront in the ongoing conflict over caring for the uninsured, controlling runaway health care costs, and limiting access to unlimited care under federal and state entitlement programs, it would be more difficult to find a situation more complicated and fraught with negative social intonation than that of repatriation of injured, undocumented immigrants back to their country of origin by US hospitals."

—www.law.uh.edu/healthlaw/perspectives/2008/(BP)%20deport.pdf

8

Key Definitions and Concepts

- Illegal v. legal uninsured immigrant
- Transfer v. repatriation v. deportation
- Voluntary v. involuntary repatriation
- "Dumping" v. transfer
- EMTALA (Emergency Medical Treatment and Active Labor Act, in the Consolidated Omnibus Reconciliation Act of 1986) and "screening examination," "stabilize," and "transfer"
- *Justice, fairness,* and *rationing*

9

Justice

n. **1.** The quality of being just, fairness. **2.a.** The principle of moral rightness, equity. **b.** Conformity to moral rightness in action or attitude; righteousness. **3.a.** The upholding of what is just, especially fair treatment and due reward in accordance with honor, standards, or law. **b.** *Law.* The administration and procedure of law. **4.** Conformity to truth, fact, or sound reason: *The overcharged customer was angry, and with justice.* … [Middle English, from Old French, from Latin, *iustitia,* from *iustus,* just.]

10

Fair

n. … **6. a.** marked by impartiality and honesty : free from self-interest, prejudice, or favoritism <a very *fair* person to do business with> **b. (1)** : conforming with the established rules : ALLOWED **(2)** : consonant with merit or importance : DUE <a *fair* share> **c.** : open to legitimate pursuit, attack, or ridicule <*fair* game> … [Middle English *fager*, fair, from Old English *fager*; akin to Old High German *fager* beautiful.]

11

Fair

synonyms FAIR, JUST, EQUITABLE, IMPARTIAL, UNBIASED, DISPASSIONATE, OBJECTIVE mean free from favor toward either or any side FAIR implies an elimination of one's own feelings, prejudices, and desires so as to achieve a proper balance of conflicting interests <a *fair* decision>, JUST implies an exact following of a standard of what is right and proper <a *just* settlement of territorial claims>, EQUITABLE implies a less rigorous standard than JUST and usually suggests equal treatment of all concerned <the *equitable* distribution of property> …

12

Ration

n. **1.** A fixed portion, especially an amount of food allotted to persons in military service or to civilians in times of scarcity. … **— ration** *tr.v.* **–tioned, -tioning, -tions. 1.** To supply with rations. **2.** To distribute as rations: *rationed out flour and sugar.* … **3.** To restrict to limited allotments, as during wartime. [French, from Latin *ratiō, ratiōn,* calculation, reason.]

13

The Arizona Republic

- Hensley JJ. Coma patient's transfer blocked: St. Joseph's wants to send ailing woman to Honduras. 2008;May 11.
- Haldiman P. Native of Honduras awakens from coma, woman's future in the U.S. at risk as court battle looms. 2008;May 14.
- Comatose Honduran woman won't be evacuated by hospital. Arizona Daily Star. 2008;May 21.
- Kiefer M. Legal migrant out of coma, still at St. Joseph's. 2008;May 21.
- Kiefer M. St. Joseph's had sought to send patient home. 2008;May 24.
- Kiefer M, Larreal A, Murillo S. Immigrants sent home by hospitals in some cases. 2008;Jun 21:B1, B2.
- Gonzalez D. For some ill migrants, free care has a price. 2008;Aug 3.

14

A.B.

A hypothetical case based on reports

As when reading newspaper articles, one should recall that editors hope to accurately inform others with some facts that are hopefully true and with some that clearly are not.

15

The Arizona Republic

- Hensley JJ. Coma patient's transfer blocked: St. Joseph's wants to send ailing woman to Honduras. 2008;May 11.
- Haldiman P. Native of Honduras awakens from coma, woman's future in the U.S. at risk as court battle looms. 2008;May 14.
- Comatose Honduran woman won't be evacuated by hospital. Arizona Daily Star. 2008;May 21.
- Kiefer M. Legal migrant out of coma, still at St. Joseph's. 2008;May 21.
- Kiefer M. St. Joseph's had sought to send patient home. 2008;May 24.
- Kiefer M, Larreal A, Murillo S. Immigrants sent home by hospitals in some cases. 2008;Jun 21:B1, B2.
- Gonzalez D. For some ill migrants, free care has a price. 2008;Aug 3.

16

A.B.

- 34 year old mother of five who is employed in Phoenix, Arizona, in a carpentry shop; she also does house cleaning part-time
- A native Honduran with no family there
- She came to the US more than 17 years ago as a refugee following a hurricane disaster; a legal US resident (holding a "temporary work visa") with next INS status review scheduled for 2009

17

A.B.

- Now pregnant with sixth child
- Presented to the St. Joseph's Hospital and Medical Center emergency department with vaginal bleeding and contractions on April 16, 2008
- She had no health insurance but was eligible for amended Medicaid coverage in Arizona
- She was found to be about 27-28 weeks pregnant
- Her bleeding and contractions subsided quickly; she was discharged home with follow-up scheduled the next day

18

A.B.

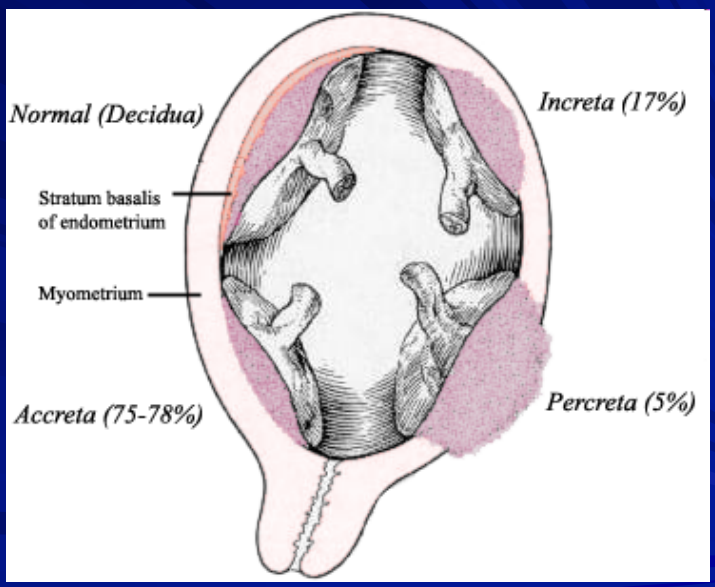
- She presented again to the emergency room the following day with abnormal bleeding and contractions; she was admitted for observation
- On April 20 her bag of water broke and she was immediately taken to labor and delivery for an emergency Caesarean section; the baby was 28 weeks premature and removed to the neonatal intensive care unit for further evaluation and care
- Obstetricians had difficulty with her surgery

19

A.B.

- Obstetricians learned at delivery that her pregnancy was abnormal and that the placenta had grown through the myometrium and onto and into the colon and bladder (placenta percreta)
- Obstetricians had difficulty controlling the bleeding; within 24 hours more surgery was required to control the bleeding

20



21

A.B.

- Obstetricians and trauma and pelvic surgeons in the general operating room explored the area to control the bleeding and removed the patient's uterus and an ovary
- She lost so much blood so quickly that she lapsed into unconsciousness (hypovolemic shock); over 72 hours she required 268 units of blood products to replace lost volume and promote clotting
- With the shock, she required ventilatory support and when her kidneys failed acutely, she required dialysis; she received naso-gastric tube feedings

22

A.B.

- She was cared for in the intensive care unit for several days; she weaned quickly from the ventilator but still required dialysis; her neurological recovery was doubtful
- By the first week of May, she was medically stable and ready to be transferred from the ICU to a long-term acute care hospital
- No local facility would accept the patient

23

A.B.

- The hospital made arrangements to transport (transfer and repatriate) the patient by plane to Hospital Escuela ("with adequate facilities for her care" but only with a four bed ICU and no dialysis unit) in Tegucigalpa, Honduras, on May 8, 2008
- The family said they were told on May 7; they objected

24

Centers for Medicaid and Medicare Services (CMS) Conditions of Participation (CoPs)

"If a hospital chooses to transfer a patient to another facility, it must comply with [CMS CoPs] relating to patient discharges. Among these requirements are that the patient be transferred only to an "appropriate facility"; interpretive guidelines suggest such a facility is one "that can meet the patient's medical needs on a post-discharge basis."

25

Arizona Health Care

"St. Joseph's spent more than $64 million on charity care and community benefit services last year (2007) alone. It transfers nearly 80 patients a year to out-of-state facilities at costs that sometimes exceed $1 million."

—Kiefer M, Larreal A, Murillo S. Immigrants sent home by hospitals in some cases. *The Arizona Republic.* 2008;Jun 21:B1, B2.

26

Arizona Health Care

"St. Joseph's now sends an average of seven uninsured immigrants a month back to their native countries for treatment, often against the wishes of family members, hospital officials say. Before 2000, the hospital rarely transferred any patients out of the country, perhaps only two or three times a year."

—Kiefer M. St. Joseph's had sought to send patient home. 2008;May 24.

27

Arizona Health Care

"Some critics suggest that St. Joseph's a non-profit hospital that is exempt from taxes and must provide some charity care, is simply dumping patients to save money. The hospital denies the allegation."

"Maricopa Medical Center [Phoenix] has sent five non-citizens out of the country for treatment since October [2007] … Banner Good Samaritan Medical Center [Phoenix] sent seven in 2007 and six in the year before."

—Kiefer M. St. Joseph's had sought to send patient home. 2008;May 24.

28

A.B.

- Her mother C.D. obtained a temporary restraining order from the superior court prohibiting her transfer to a Honduran hospital on May 9, 2008, but was required at a hearing to post a $20,000 bond by May 14, 2008 (later granted a three day extension to May 17, 2008)
- The hospital waived the bond requirement

29

A.B.

- She aroused from a coma on May 13, 2008, after being unconscious for 25 days
- "It's pretty amazing. She will still require long-term care … ." However, her amended Arizona Medicaid coverage did not include long-term care, or rehabilitation care, or home care.

30

A.B.

- On May 24, 2008, the hospital announced that it would "allow her to remain at the hospital until she can be transitioned to the kind of long-term care facility she needs"
- By that time she was sitting up, speaking, eating, and no longer required dialysis; her baby – still in the NICU – was doing well

31

Realization 1

There may not be sufficient funds to pay for any additional coverages without new allocations.

Unfunded mandates—as with EMTALA—burden the delivery of care by imposing additional costs on other funding sources already stretched. Is this the fairest choice?

32

Is this "just"? Is this "fair"?

- The unfunded EMTALA mandate is in reality "funded" by revenue sources already committed for other payments to those who are obliged to render the legally-mandated goods or services.
- Those who bear the obligation include: hospitals (but not a fair distribution of hospitals), physicians (but not a fair distribution of physicians), other patients (via cost-shifting, but not a fair distribution of patients), and taxpayers (but not a fair distribution of taxpayers).

33

Realization 2

The system is already "rationing" goods and services now, and without new allocations, reform will mean redistribution.

But is "ration" the most appropriate word for the situation? "Policy allocation"? "Distribution"? Recall the dilemma of providing educational opportunities for Katrina-displaced New Orleans pupils in Houston at a higher level than native residents.

34

Is this "just"? Is this "fair"? Is *ration* the right word?

Definition

- "fixed portion"?
- "times of scarcity"?
- "restrict to limited allotments"?

Concept

35

Probably not, but why?

- The size of the pie is not fixed.
- Stakeholders don't fix the slice sizes of the pie.
- The slices of the pie are not determinable (e.g., patients are different; the same diagnosis manifests itself differently in patients; providers are different; outcomes are not the same in different localities; some areas have good regionalization).
- The criteria for slicing the pie are not clear (e.g., "medical necessity").

36

Probably not, but why?

- There is no portion in the slice for research and development and education.
- It is unclear who might be entitled to a slice of the pie.
- Those contributing ingredients to the pie (all the stakeholders) are not fully known and recognized.

37

Probably not, but why?

- Like research and development and education, the mechanisms used to distribute the slices are unclear and burden the system.
- Mechanisms used to distribute the slices don't preclude the efforts of others to enlarge their slices after a "fair" schema has been established (e.g., some "game the system," providers sue for unpaid claims, legislators tinker with allocations).

38

Realization 3

It is impossible to ration or distribute health care goods and services according to Rawls' *A Theory of Justice* (1971).

Does the notion of *ration*—as from the dictionary definition—really apply? "Fixed"? "Scarcity"? "Allotment"? Would global budgeting resolve the unfairness?

39

Rawls' *A Theory of Justice* (1971)

- "a principled reconciliation of liberty [libertarian] and equality [utilitarian]"
- "Original Position"—an artificial device, hypothetical, not historical
- "First Principle"—"[E]ach person is to have an equal right to the most extensive of equal basic liberties compatible with a similar scheme of liberties for others."
- "Second Principle"—Social and economic inequalities are arranged so that: (a) they are to be of the greatest benefit to the least-advantaged members of society ("the difference principle"); and (2) offices and positions must be open to everyone under conditions of fair equality of opportunity.

40

Rawls' *A Theory of Justice* (1971)

"Rawls' theory of justice, often referred to as social justice, has gained prominence since the 1970s as a dominant theory of justice. This theory has 2 major principles. The first, that 'people should have maximal liberty compatible with the same degree of liberty for everyone,' defines the limits of individual liberty by focusing on the liberty of others. The second, that 'deliberate inequalities [a]re unjust unless they work to the advantage of the least well off,' focuses on social consequence and responsibility of actions. Considering the body of research and news reports that describe inequalities in US health care access and quality, and the fact that these inequalities do not work to the advantage of the least fortunate, it is clear that the US health system does not meet these [Rawls'] criteria for being just."

—Kirch DG, Vernon DJ. The ethical foundation of American Medicine: in search of social justice. [Commentaries.] JAMA. 2009; 301:1482-1484.

41

So, perhaps the goal should not be to fashion an exacting just or fair system or solution (an ideal system), but rather to craft a more just, a more fair solution than what we presently have?

42

Realization 4

Neither ethics, law, nor public policy demands absolute equity but rather pragmatic justice. "Allocation" is better handled by rational ("reasoned") public policy.

And, recall that tinkering with the delivery model to resolve one injustice (e.g., "patient dumping") may create or exacerbate others (e.g., unfunded mandate of EMTALA) which will require additional reforms.

43

Cynics will say we can always do better; and, of course, they're right. Fairness is a struggle (a continuing dilemma). The important question remains: Are people of good will striving to do what they can?

44

One is left with the realization that individual resolution is complex and that all each must in the end strive for an common ideal, correcting injustices as best can be done when identified, understanding that other injustices may surface and that single individuals by be disadvantaged by circumstances and any public policy (community) distribution schema.

45

Realization 5

The Ethical and Religious Directives for Catholic Health Care Services (2001)

"… who is my neighbor?"

—Luke 10:25-37 (The Parable of the Good Samaritan)

"You will always have the destitute with you, but you will not always have me."

—Matthew 26:11 (ISV)

46

A.B.

A hypothetical case based on reports

It has been estimated that annual health care expenditures average about $7900 per person in the United States.

47