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## YALE LAW & POLICY REVIEW

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### A Limited Defense of Clinical Placebo Deception

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## INTRODUCTION

Placebo treatments, like sugar pills and saline injections, are effective in treating pain and perhaps a host of other conditions. In fact, recent neuroimaging studies show that the pathways of placebo pain relief in the brain largely overlap the pathways of pain relief from drugs like morphine.<sup>1</sup> Placebos are also cheaper and safer than corresponding active medications. To most effectively use placebos to diagnose and treat patients in clinical practice, however, doctors must deceive patients as to the placebo nature of the intervention. Such deception runs counter to a fifty-year trend in medical ethics and health law that emphasizes patient autonomy and requires doctors to disclose the nature of a proposed intervention in order to obtain patients' informed consent.

The legality of deceptive placebo use has long been murky.<sup>2</sup> This changed to some extent in November 2006 when the American Medical Association (AMA), the most powerful and influential organization of doctors in the United States, adopted an ethics policy prohibiting the deceptive

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1. See, e.g., WALTER GLANNON, *BIOETHICS AND THE BRAIN* 92-103 (2007); Ginger A. Hoffman et al., *Pain and the Placebo: What We Have Learned*, 48 *PERSP. BIOLOGY & MED.* 248, 260-62 (2005); Predrag Petrovic et al., *Placebo and Opioid Analgesia—Imaging a Shared Neuronal Network*, 295 *SCI.* 1737 (2002); Tor D. Wager, *The Neural Bases of Placebo Effects in Anticipation and Pain*, 3 *SEMINARS PAIN MED.* 22 (2005); Tor D. Wager et al., *Placebo-Induced Changes in fMRI in the Anticipation and Experience of Pain*, 303 *SCI.* 1162 (2004).
  2. See *infra* Sections II.B-E.

use of placebos.<sup>3</sup> Because courts are likely to be influenced by the AMA Code of Medical Ethics when evaluating norms of professional conduct,<sup>4</sup> it is now more likely than ever that doctors who deceptively administer placebos can be held liable for failing to obtain patient informed consent.<sup>5</sup> They also risk professional discipline,<sup>6</sup> as well as civil or criminal liability under

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3. At a June 2006 meeting, the AMA's House of Delegates (the organization's policy-setting body) considered a proposal to prohibit placebo deception put forward by the AMA's Council on Ethical and Judicial Affairs (CEJA). In response, members of the House of Delegates made "lengthy vocal protests, demanding that [CEJA] reconsider its" proposal. Peggy Peck, *AMA: Ethics Council's Stance on Placebo Therapy Stirs Unease*, MEDPAGE TODAY, June 16, 2006, <http://www.medpagetoday.com/PublicHealthPolicy/HealthPolicy/tb2/3555>.

In November 2006, however, the House of Delegates adopted CEJA's revised proposal, even though its wording differed only slightly from the June 2006 version. See Council on Ethical & Judicial Affairs, Am. Med. Ass'n, Report 2-I-06, Placebo Use in Clinical Practice (2006) [hereinafter AMA Recommendations] ("Physicians may use [a] placebo[] for diagnosis or treatment only if the patient is informed of and agrees to its use."), available at [http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja\\_recs\\_2i06.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_recs_2i06.pdf).

CEJA also wrote a report supporting its recommendation that has not yet been published. Council on Ethical & Judicial Affairs, Am. Med. Ass'n, Report 2-I-06, Placebo Use in Clinical Practice (2006) [hereinafter AMA Report] (on file with the Yale Law & Policy Review).

4. While the Code of Medical Ethics does not itself carry the force of law, *see, e.g.*, *Bryant v. Hilst*, 136 F.R.D. 487, 492 (D. Kan. 1991), a number of courts have given the Code particular weight in resolving issues that turn on norms of professional conduct in the area of informed consent, *see Ketchup v. Howard*, 543 S.E.2d 371, 377 (Ga. Ct. App. 2000) (stating that the AMA's Code of Medical Ethics "reflect[s] the standard of care of the profession on the issue of informed consent"); *Culbertson v. Mernitz*, 602 N.E.2d 98, 103 (Ind. 1992) ("The . . . Code of Medical Ethics, as prepared by the Council on Ethical and Judicial Affairs of the American Medical Association, sets forth the medical profession's standard on informed consent."); *see also Marsingill v. O'Malley*, 58 P.3d 495, 504-05 (Alaska 2002) (quoting the AMA's Code of Medical Ethics on physician disclosure); *Matthies v. Mastromonaco*, 733 A.2d 456, 463-64 (N.J. 1999) (same).
5. *See infra* Sections II.B-D.
6. In many states, physicians can be sanctioned for violating the profession's ethical standards. *See, e.g.*, N.C. GEN. STAT. ANN. § 90-14(a) (West 2005) (permitting the state medical board to suspend or revoke the license of physicians who fail to conform to "the ethics of the medical profession, irrespective of whether or not a patient is injured thereby"); OR. REV. STAT. §§ 677.188-.190 (2005) (stating that physicians can be disciplined for "[u]nprofessional or dishonorable conduct," which is defined to include "[a]ny conduct or prac-

other theories of law.<sup>7</sup> I will argue, contra the AMA, that given current knowledge of placebo effects and patient preferences, we should not categorically prohibit the deceptive use of placebos.

The deceptive use of placebos by clinicians raises a number of legal issues that have received surprisingly little scholarly attention.<sup>8</sup> These issues are particularly hard to resolve because there is no safe harbor for even the most conscientious practitioners: Using placebos deceptively is thought to threaten patient autonomy, while deliberately not using them deprives patients of a potentially cheap, safe, and effective way of treating pain and other symptoms.<sup>9</sup> Although there is a substantial literature on the use of

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tice contrary to recognized standards of ethics of the medical or podiatric profession"); Kenneth Baum, "To Comfort Always": *Physician Participation in Executions*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 47, 72 (2001) (noting the statutory incorporation of medical ethics provisions into some state medical practice acts); see also Ben A. Rich, *A Placebo for the Pain: A Medico-Legal Case Analysis*, 4 PAIN MED. 366 (2003) (recounting an instance in which healthcare practitioners faced potential professional disciplinary proceedings for deceptively administering placebo treatment).

7. For example, depending on the facts, doctors who prescribe placebos might also be liable for breach of fiduciary duty, breach of contract, or fraud. See *infra* notes 235-246 and accompanying text. They may also face criminal liability for battery or for selling simulated controlled substances. See *infra* note 236 and accompanying text. This paper focuses almost exclusively on informed consent theories of liability because that is where the AMA focuses its concerns and because informed consent theories of liability are now likely to provide sufficient, though not exclusive, grounds for finding doctors liable.
8. I have found only two articles in the legal literature that focus specifically on the use of placebos in clinical practice. See Kathleen M. Boozang, *The Therapeutic Placebo: The Case for Patient Deception*, 54 FLA. L. REV. 687 (2002); Marshall B. Kapp, *Placebo Therapy and the Law: Prescribe with Care*, 8 AM. J.L. & MED. 371, 375 (1983). The issue also receives some attention in W. John Thomas, *Informed Consent, the Placebo Effect, and the Revenge of Thomas Percival*, 22 J. LEGAL MED. 313, 346-47 (2001). I have found only one article in the medical literature that explores the legal issues in any depth. See Rich, *supra* note 6.
9. A number of books about the placebo effect contain discussions of ethical issues raised by placebo use. See HOWARD BRODY, *PLACEBOS AND THE PHILOSOPHY OF MEDICINE: CLINICAL, CONCEPTUAL, AND ETHICAL ISSUES* (1980); DANIEL E. MOERMAN, *MEANING, MEDICINE, AND THE "PLACEBO EFFECT"* (2002); *THE PLACEBO EFFECT: AN INTERDISCIPLINARY EXPLORATION* (Anne Harrington ed., 1997); *PLACEBO: THEORY, RESEARCH, AND MECHANISMS* (Leonard White et al. eds., 1985); *THE SCIENCE OF THE PLACEBO: TOWARD AN INTERDISCIPLINARY RESEARCH AGENDA* (Harry A. Guess et al. eds., 2002); ARTHUR K. SHAPIRO & ELAINE SHAPIRO, *THE POWERFUL PLACEBO: FROM ANCIENT PRIEST TO MODERN PHYSICIAN* (1997); W. GRANT THOMPSON, *THE*