NATIONAL CURRICULUM IN REPRODUCTIVE PSYCHIATRY

Pregnancy Termination
Self-Study

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Why is an understanding of abortion important for psychiatrists?

- Psychiatrists may be asked to:
  - Assess capacity for the procedure
  - Answer women's questions about mental health and its intersection with abortion vs. carrying an unwanted pregnancy to term
- Lack of abortion access disproportionately affects women with mental illness, for several reasons including the elevated risk of unplanned pregnancies in this population
- Psychiatry's involvement was critical with psychiatrists seen as 'gatekeepers' to abortion prior to *Roe v. Wade,* certifying the risk to a woman's health/ life, and could again become so

Informed Consent

- Informed consent is an ethical and legal obligation stemming from the principle of autonomy.
- Informed consent is a process that involves both the patient and the clinician and results in informed decisions about medical care.
- Informed consent requires three components:
  - The patient must have medical decision-making capacity.
  - The clinician must disclose relevant information.
  - The decision must be made by the patient voluntarily, without coercion.
- The following information must be disclosed by clinicians to meet informed consent requirements:
  - Diagnosis
  - Proposed treatment
  - Risks and benefits of proposed treatment
  - The risks and benefits of other available treatments, including foregoing treatment.

Medical Decision-Making Capacity

- Medical decision-making capacity refers to a patient's ability to make informed decisions about care and is a key element of informed consent.
- To have medical decision-making capacity, a patient must be able to:
  - Communicate a choice
  - Understand relevant information
  - Appreciate the situation and its consequences
  - Rationally manipulate information
- Medical decision-making capacity may fluctuate over time.
- Medical decision-making capacity is specific to the task at hand.

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- A sliding scale model is used when assessing capacity. The assessment becomes more stringent when the decision involves more risk.
- Adults are presumed to have medical decision-making capacity in general.
- The presence of a mental disorder does not equate to incapacity.

Informed Consent and Pregnancy Termination

- The informed consent process for abortion should follow the same principles as the informed consent process for any other serious, irreversible procedure.
- The process might be complicated by factors not encountered in other areas of medicine:
    - Time constraints on when abortions are allowed
    - Conflicting views and strong emotions among stakeholders
    - Political controversy
    - Media coverage
    - Rapidly changing abortion laws
    - Ambivalence about the decision
    - Widespread misinformation about the impact of abortion on mental health
- The informed consent process should follow a shared decision-making model.
- The process should include a patient-centered discussion of treatment options within the framework of the patient's own values and preferences.
- Pre-abortion counseling should include an accurate, understandable explanation of all available options and the risks/benefits of each.
- The clinician must take an impartial and non-directive approach. Any effort to persuade or manipulate a woman's decision is unethical.
- Ambivalence surrounding important decisions (such as pregnancy termination) is normal and does not signify a mental illness or preclude a woman from having medical decision-making capacity. Ambivalence should be explored and validated.
- Psychiatrists may be asked to evaluate medical decision-making capacity when a woman with mental illness seeks an abortion, although any physician can assess capacity for a medical decision. Consider providing education to the primary team, such as the OB/GYN physician, about capacity assessments if such a consult is requested, so that they feel empowered to make these determinations themselves for future patients.
- Assessing capacity to consent to abortion involves the same principles as any other capacity assessment.
- Capacity assessment should focus on determining whether the woman appreciates her current situation and the consequences of abortion versus carrying the pregnancy to term.
- Given that women with mental illness might be susceptible to coercion, it is important to ensure that the woman's choice is voluntary.
- Psychiatrists should be aware of their own biases and ensure that their personal opinions about abortion do not influence capacity evaluations.
- If a woman lacks medical decision-making capacity, it should be determined whether capacity can be restored. If so, the cause of incapacitation should be quickly treated so that the woman can participate in the decision-making process to the greatest extent possible.
- If capacity cannot be restored, a surrogate decision-maker must be used. A substituted judgment standard (what the woman would decide if she had capacity) is most commonly followed, but standards vary state to state with some statues using a best interests standard.

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- Even if a woman lacks full decision-making capacity, she should be included in the process wherever possible to maximize autonomy.
- Discussing reproductive wishes and anticipating needs with women when they do have capacity can help guide future treatment and avoid ethical dilemmas in the event of psychiatric decompensation.

History of Abortion in the USA: Pre- *Roe v. Wade*

- Abortion was a relatively common cause of death, linked to 18% of deaths in pregnancy and childbirth, as of 1930.
- Prior to 1973, illegal abortion was commonplace. Women of means traveled to different states where abortions could be obtained.
- Prior to 1973, most states allowed for abortion if the mother's life was threatened, as noted by a physician.
    - Increasingly, as abortion became safer, psychiatric justifications for abortion became more common.
    - Most frequently, a psychiatrist would note that a woman was imminently suicidal if she could not have an abortion, though the scientific basis for these determinations were sometimes dubious with psychiatrists sometimes acting more as advocates rather than objective clinicians.
    - Psychiatrists ranged in their decisions and their rationales; some refused to evaluate such women with others presuming that any woman was at such a risk.
    - Psychiatrists may have felt that they were caught in difficult ethical dilemmas, manipulated by the law, inserting themselves into a woman's private decisions.

History of Abortion in the USA: *Roe* Era

- In 1973, in *Roe v. Wade,* the US Supreme Court ruled that prohibiting abortion violated a woman's constitutional right to privacy.
- Psychiatrists no longer were asked to certify the risk of suicide in women pursuing abortions, however, psychiatrists were asked to provide evaluations of capacity to make the decision to terminate a pregnancy, and to participate in so-called 'Jane Doe evaluations'.
- When a minor seeks an abortion, they generally (depending on the state) would require parental notification or parental consent in order to obtain the abortion. However, for various reasons, a teenager may want to pursue an abortion without alerting a parent. Procedures through which a judge may instead authorize an abortion may require 'Jane Doe evaluations' or forensic psychiatric evaluations of (unnamed) minors who seek to obtain abortions, considering their maturity, level of understanding and capacity for informed consent, and whether parental involvement is not in the minor's best interest.
- Even during the *Roe* era, pregnant and postpartum women have been civilly committed and criminally prosecuted for acts related to alleged fetal harm (as further described below).

History of Abortion in the USA: Post- *Dobbs*

- In 2022, the Supreme Court overturned *Roe* in *Dobbs v. Jackson Women's Health Organization.*
    - Psychiatric opinions may be sought in the future regarding the psychiatric need for an abortion in states where abortions are permitted for mental health indications.
    - The fetal personhood movement (as described below) may lead to criminal punishment for women who obtain illegal abortions.
    - Physicians may be increasingly required to be mandated reporters of pregnant women who could be placing a fetus at risk (as we are for child abuse and neglect).

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- Some states have moved to restrict and even outlaw abortion since *Dobbs*. High-profile cases of women with serious medical issues and minors unable to obtain lawful abortions have been reported in the media.(See Media Module 2 for additional information.)

Criminalization of Acts During Pregnancy

- The *Dobbs* decision allows states to restrict abortion access. Some states have banned abortion completely.
- States could prosecute those who aid women in obtaining abortions. Aiding may include helping a woman obtain abortifacients and transporting her to obtain an abortion.
- Even prior to *Dobbs,* pregnant women have been prosecuted for various acts during pregnancy, on the basis of alleged fetal harm.
    - Women have been prosecuted during all stages of pregnancy.
    - The highest numbers of prosecutions targeted women who used substances during pregnancy. Other cases included pregnant women who attempted suicide.
    - There is often a tenuous or unclear link between their substance use and the miscarriage, prematurity, or stillbirth. Sometimes, there is no fetal harm at all.
    - Typically, feticide, child abuse and/or chemical endangerment laws are used to prosecute. Ironically, some laws, such as feticide, were passed to protect pregnant women from violence perpetrated by other parties.
    - Several states also allow civil commitment of a pregnant woman who is using substances because of "danger to the fetus."
    - Such laws may deter women from seeking substance/psychiatric treatment.
    - Organizations such as the American Congress of Obstetricians and Gynecologists (ACOG) do not support laws that prosecute pregnant women for substance use and/or mandate reporting by health care providers.

Fetal Personhood Laws

- Fetal personhood laws extend legal rights and constitutional protections to fetuses, often from the earliest point of conception.
- Fetal personhood laws would allow prosecution of pregnant women for any crime against a person; for example, homicide, assault, negligent homicide, etc.
- There may be an increase in fetal personhood laws post-*Dobbs.*
- There is a possibility that a psychiatrist would have a *Tarasoff* duty to "protect" in fetal personhood states.

Clinicians as Reporters

- States may pass laws which require physicians to report patients who have had abortions.
- One example is an Indiana law that mandates reporting of negative psychological effects of abortion outcomes, including depression or suicidality. Some states require reporting abortion complications as well.

Approach

- Psychiatrists should stay up to date with rapidly changing laws about abortion in their state of practice.
- They should consult with risk management or their malpractice carrier if uncertain about the law or how to interpret their legal duties.
- Laws restricting abortion access, and even providing misleading information about the consequences of abortion, may create criminal and ethical dilemmas for physicians. For example, a law that requires

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disclosure of incorrect information about abortions may conflict with physicians' obligations to the ethical principles of autonomy, beneficence, and non-malfeasance. Restrictive abortion laws also may infringe on a physician's ability to provide evidence-based and necessary clinical care. Unfortunately, there are no easy solutions to this predicament.

- Regardless of one's personal opinions, it is important not to attempt to influence a patient's decision about abortion.

References

1. Informed Consent and Shared Decision Making in Obstetrics and Gynecology: ACOG Committee Opinion, Number 819. Obstet Gynecol. 2021 Feb 1;137(2):e34-e41. doi: 10.1097/AOG.0000000000004247. PMID: 33481530.
2. American Medical Association. Informed Consent. Code of Medical Ethics Opinion 2.1.1. Available from: https://www.ama-assn.org/delivering-care/ethics/informed-consent. Accessed September 17, 2023
3. Angelotta C, Appelbaum PS. Criminal charges for child harm from substance use in pregnancy. J Am Acad Psychiatry Law. 2017 Jun; 45(2):193–203
4. Appelbaum PS, Grisso T. Assessing patients' capacities to consent to treatment. N Engl J Med. 1988 Dec 22;319(25):1635-8. doi: 10.1056/NEJM198812223192504. Erratum in: N Engl J Med 1989 Mar 16;320(11):748. PMID: 3200278.
5. Brody BD, Chaudhry SK, Penzner JB, Meltzer EC, Dubin M. A Woman With Major Depression With Psychotic Features Requesting a Termination of Pregnancy. Am J Psychiatry. 2016 Jan;173(1):12-5. doi: 10.1176/appi.ajp.2015.15030380. PMID: 26725341.
6. Friedman SH, Landess J, Ross N, Kaempf A. Evolving Abortion Law and Forensic Psychiatry. J Am Acad Psychiatry Law. 2022 Dec;50(4):494-501. doi: 10.29158/JAAPL.220076-22. PMID: 36535784.
7. Landess J, Friedman SH, Kaempf A, Ross N. Abortion and the Psychiatrist: Practicing in Post-Dobbs America. Psychiatric Times. 2023 Jan; 40(1). Available from: https://www.psychiatrictimes.com/view/abortion-and-the-psychiatrist-practicing-in-post-dobbs-america
8. National Association of Criminal Defense Lawyers. Abortion in America; 2021. Available from: https://www.nacdl.org/getattachment/ce0899a0-3588-42d0-b351-23b9790f3bb8/abortion-in-america-how-legislative-overreach-is-turning-reproductive-rights-into-criminal-wrongs.pdf.
9. Paltrow LM, Flavin J. Arrests of and forced interventions on pregnant women in the United States, 1973–2005: Implications for women's legal status and public health. J Health Pol Pol'y & L. 2013 April; 38(2):299–343
10. Ross NE, Webster TG, Tastenhoye CA, Hauspurg AK, Foust JE, Gopalan PR, Friedman SH. Reproductive Decision-Making Capacity in Women With Psychiatric Illness: A Systematic Review. J Acad Consult Liaison Psychiatry. 2022 Jan-Feb;63(1):61-70. doi: 10.1016/j.jaclp.2021.08.007. Epub 2021 Aug 27. PMID: 34461294; PMCID: PMC8792197.
11. Zalpuri I, Byatt N, Gramann SB, Dresner N, Brendel R. Decisional capacity in pregnancy: a complex case of pregnancy termination. Psychosomatics. 2015 May-Jun;56(3):292-7. doi: 10.1016/j.psym.2014.09.009. Epub 2014 Oct 2. PMID: 25591494; PMCID: PMC4400254.

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