Wisconsin Public Psychiatry Network Teleconference (WPPNT)

- This teleconference is brought to you by the Wisconsin Department of Health Services (DHS) Bureau of Prevention, Treatment and Recovery and the University of Wisconsin-Madison, Department of Psychiatry.
- The Department of Health Services makes no representations or warranty as to the accuracy, reliability, timeliness, quality, suitability or completeness of or results of the materials in this presentation. Use of information contained in this presentation may require express authority from a third party.

1

Conscience Clauses

David Mays, MD, PhD
dvmays@wisc.edu

2

Disclosure

- Dr. Mays is not on any drug advisory boards, paid for doing drug research, or otherwise employed, funded, or consciously influenced by the pharmaceutical industry or any other corporate entity.
- No off label uses of medications will be discussed unless mentioned in the handout and by the presenter.
- No funny business.

3

Conscience Clauses

4

Conscientious Objection

- Conscientious objection is the refusal to perform a legal role or responsibility because of personal beliefs.
- Conscientious objection in health care always involves someone else's health or access to care. So it is more than an issue of individual rights or belief.

5

History: Conscience Clauses

- Most states, including Wisconsin, have "conscience clauses" which describe the right of healthcare professionals to refuse to provide certain kinds of care (abortion, sterilization, emergency contraception, euthanasia.) These laws were a direct response to *Roe v. Wade*, 1973.

6

History: Conscience Clauses

- On a federal level, these state laws are supported by the Hyde-Weldon Amendment of 2004.
- This law requires that agencies must allow the institutions, insurers, health care facilities, and individual health care providers to refuse to provide, pay for, provide coverage for, or refer for abortions.
- The Hyde-Weldon Amendment does not limit a health care provider's objection to personal belief or conscience. Rather, any reason for refusal will suffice.

7

History: Conscience Clauses

- For example, St. Vincent's Hospital in Santa Fe, New Mexico, entered into an agreement which allows nurses to "conscientiously" object to circumcision.
- In addition to circumcisions, nurses and physicians have refused to participate in sterilizations, abortions, withdrawal of life support, and artificial insemination on grounds that these procedures conflict with their moral beliefs. The types of prescriptions that pharmacists have refused to provide include not only contraception and emergency contraception, but also pain-killers for terminally ill patients.

8

Wisconsin Example (Swartz 2006)

- "In 2002, a University of Wisconsin student brought a prescription for birth control to Menomonie pharmacist Neil Noesen. Noesen refused to fill the prescription, citing his "conscientious objection to participation in refilling a contraceptive order." He refused to inform her of any other local pharmacies that were capable of filling the prescription. When the student, on her own, located another pharmacy, Noesen refused to transfer the prescription, claiming that doing so would "induce another to do a morally wrong or sinful act pursuant to the doctrines of the Roman Catholic Church." As a result, the woman missed the first dose of her medication and was forced to use a back-up method of birth control."

9

The Decision

- The Wisconsin Pharmacy Examining Board subsequently disciplined Noesen for his failure to adequately inform his employer of his religious objections to participating in the filling of prescriptions for contraception and for his refusal to promptly transfer this prescription to another pharmacy.
- In March 2008, Court of Appeals held that Noesen's refusal to transfer the prescription did, in fact, violate a pharmacist's standard of care.

10

Also in Wisconsin

- Assembly Bill 207, introduced in March 2005, would have extended refusal rights to withholding or withdrawing nutrition or hydration from individuals who are not terminally ill (e.g. dementia patients who stop eating, brain dead individuals)
- Governor Jim Doyle vetoed the proposed law, refusing to permit such an expansion of health care professionals' rights of refusal. In justifying his veto, he announced that the law would "put a doctor's political views ahead of the best interests of patients," and therefore "ought to be called the 'unconscionable clause."

11

The Newest Wrinkle

(Rebecca Clay 2013)

- In 2009, Julea Ward was a student in a master's-level counseling program at Eastern Michigan University when she was assigned to counsel a gay client. While she was prepared to counsel the client on issues unrelated to sexual orientation, she did not want to address issues that might involve a same-sex relationship, which violated her religious beliefs. She sought advice from faculty regarding the situation, explaining that her religious faith prohibited her from affirming homosexuality and suggesting that the client be referred elsewhere before the counseling began.

12

Julea Ward

- The program did not support her request for various reasons and suggested remediation. After declining to participate in remediation, Ward was eventually expelled.
- The university argued that Ward had violated the program's curriculum requirements and the profession's code of ethics. Ward claimed that her First Amendment rights to free speech and free exercise of religion were being violated.
- The case ended with a $75,000 payment to Ward.

13

Other News

- In 2011, Arizona passed a law prohibiting psychology, counseling and social work programs from disciplining or discriminating against a student who refuses to counsel clients about goals that conflict with the student's sincerely held religious beliefs, if the student consults with the supervising instructor or professor to determine the proper course of action to take to avoid harming the client. Similar legislation has been proposed in Michigan and Tennessee.

14

A Collision of Values

- It is an age old tradition that caregivers have a right to refuse to perform certain procedures that they find morally objectionable, even though patients request them. Abortion, for example, has been morally and legally forbidden for centuries, as has euthanasia.
- Protecting an individual's right to conscience empowers them to think morally and solidifies a sense of integrity.

15

A Collision of Values

- On the other hand, conscience can guide people to do evil and morally repugnant things. Conscience has been used to justify slavery and segregation, laws preventing mixed marriage, and even justify murder.
- Furthermore, conscience can differ markedly between patient and caregiver (vaccination, birth control, end of life care, etc.)

16

Which Duty?

- A number of different duties and rights may be in conflict:
  - Provider's right of conscience
  - Provider's responsibility toward the patient
  - Patient's right of conscience
  - Government's duty to provide access to healthcare
  - Government's duty to prevent discrimination

17

Provider's Right of Conscience

(Heritage Foundation 2009)

- The conscience protection laws stem from a long tradition of defending religious and conscience rights in the United States, from the First Amendment to laws protecting conscientious objectors during time of war.
- While numerous federal laws and programs spend billions of dollars each year to promote access to health care services, including reproductive services, conscience protection laws are based on the premise that the nation should never require the violation of individual moral or religious beliefs to achieve health care access. These laws ensure that Americans from diverse faith and philosophical backgrounds are free to pursue their professional calling without fear of persecution or coercion.

18

Provider's Right of Conscience: Nursing Code of Ethics

- "Nurses have a duty to remain consistent with both their personal and professional values and to accept compromise only to the degree that it remains an integrity-preserving compromise."

19

Provider's Responsibility Toward the Client

- All of the examined professional ethics codes put the welfare and autonomy of the client as the first responsibility of the provider. In fact, none of these issues arise until after the 1970's when clients' rights became a social issue. Before that time, physician's, and other healthcare workers, did what they thought best (the paternalistic model.)

20

Provider's Responsibility Toward the Client

- Greater client participation in decision making has been endorsed, not just through professional codes, but also legislation and court rulings. The notion of the doctor's values as an integral part of patient care is seen as a drift backward to the old standard that the doctor shall do what he wants, i.e. the provider's self-interest is placed above devotion to client welfare.

21

Provider's Responsibility Toward the Client

- Patient's have a legal right to medical information, including risks, benefits and alternative treatments. Patients have a right to have their medical records and prescriptions transferred, and be treated respectfully. They have a right to be referred and to have emergency treatment.

22

Step Away vs. Step Between Metaphor

- A professional who has invoked a right to refuse to provide a service must not interfere with the patient's ability to obtain it elsewhere. It is inappropriate for the healthcare professional to step *between* the client and another provider. Instead the professional should step *away* from the care and allow the patient autonomy in finding the care that they need.

23

Provider's Responsibility Toward the Client: Nurses

- "The nurse respects the worth, dignity and rights of all human beings irrespective of the nature of the health problem."
- The nurse cannot refuse care due to personal preference, prejudice, convenience, or aribitrariness."

24

The Government

- Because the government licenses and grants a virtual monopoly on providing certain services (medicine, pharmacy, most therapies), it also has a responsibility to assure that this monopoly does not affect access to healthcare.
- In some areas, access to healthcare is so limited that patients do not have a choice as to who provides their care. They would be forced to participate in their caregivers' moral decision to refuse services.

25

The Government

- The government has a duty to prevent discrimination.
- There is a concern that conscience clauses may shield practitioners from civil and criminal liability if their moral convictions are offended by any client or client group (sex offenders, immunization refusers, adulterers, religious fundamentalists, etc.)

26

Discrimination: An Analysis

Haskins 4/6/15 (Legalzoom)

- "The entire United States is covered by the Federal **Civil Rights Act** of 1964, which prohibits discrimination by privately owned places of public accommodation on the basis of race, color, religion or national origin. Places of "public accommodation" include hotels, restaurants, theaters, banks, health clubs and stores. Nonprofit organizations such as churches are generally exempt from the law.
- The right of public accommodation is also guaranteed to disabled citizens under the Americans with Disabilities Act, which prohibits discrimination by private businesses based on disability."

27

Discrimination

- "The federal law does not prohibit discrimination based on sexual orientation, so gays are not a protected group under the federal law. However, about 20 states, including New York and California, have enacted laws that prohibit discrimination in public accommodations based on sexual orientation. In California, you also can't discriminate based on someone's unconventional dress. In some states, like Arizona, there's no state law banning discrimination against gays, but there are local laws in some cities that prohibit sexual orientation discrimination."

28

Discrimination

- "If there's an anti-discrimination law, does that mean that a business can never refuse service to a member of a group that is protected from discrimination?
- The answer is that you can refuse to serve someone even if they're in a protected group, but the refusal can't be arbitrary and you can't apply it to just one group of people.
- To avoid being arbitrary, there must be a reason for refusing service and you must be consistent. There could be a dress code to maintain a sense of decorum, or fire code restrictions on how many people can be in your place of business at one time, or a policy related to the health and safety of your customers and employees. But you can't just randomly refuse service to someone because you don't like the way they look or dress."

29

Discrimination

- "Second, you must apply your policy to everyone. For example, you can't turn away a black person who's not wearing a tie and then let in a tieless white man. You also can't have a policy that sounds like it applies to everyone but really just excludes one particular group of people. So, for example, a policy against wearing headscarves in a restaurant would probably be discriminatory against Muslims."

30

Discrimination

- "In one case, the baker refused service to a customer who wanted her to bake a cake with anti-gay Bible verses on it. The customer argued that he was discriminated against because of his religious beliefs. But the court ruled that this was not discrimination because the baker had a consistent policy of refusing to create cakes that used derogatory language or imagery."
- "In a second case, a baker refused to create a wedding cake for a same-sex couple, saying that it violated his religious beliefs. The court held the baker liable, saying that his reason was just a pretext for discriminating against gays."

31

The Julea Ward Case

- Ward argued that she was not opposed to serving homosexual clients, but rather she did not want to aid or facilitate certain aspects of same-sex relationships (e.g. marriage, relationship problems, etc.) She said she was willing to counsel him about other aspects of his life.
- Is this discrimination?

32

Court Cases
Pew Research Center (6/3/2010)

- Most court cases have been decided against the person claiming an exemption.
- Abortion-related legislation reflects the view that people should not be forced to perform an act that they believe is life-destroying. Courts, however, have not been inclined to exempt healthcare professionals from laws forbidding discrimination.
- Another distinction is the considerable difference between an obstetrician's refusal to perform an abortion and a therapist's refusal to counsel a gay client, especially f the counselor provides the same relationship service to non-gay clients.

33

Systematic Approaches

- Wicclair (2011)
- The spectrum:
  - Incompatibility thesis: if you don't agree with the core values of your profession, you need to find another job (e.g. you believe in suicide as an option for people and work in a crisis intervention service)
  - Conscience absolutism: no professional should ever be forced to take an action that goes against his/her conscience.

34

Martha Swartz (3/2/13)

Yale J of Health Policy

- "Health care professionals, who hold monopolistic state licenses, must participate in requested medical care that is not contraindicated or illegal, notwithstanding their personal moral objections. This model is based on the premise that it is the patient's best interest (as determined by the patient, but mediated by the health care professional's medical judgment), not the health care professional's personal interests, that should govern the professional relationship. "Conscientious objections" should be permissible based on prevailing medical ethics; however, to the extent that they are based on the personal morals of the health care professional, they should be actively discouraged."

35

Counterpoint: Don't we want providers to have a conscience?

- Forbidding providers from ever acting on their personal values would probably cause the profession to lose well-qualified, principled providers over situations that could be avoided or would rarely be faced.

36

Jehovah's Witnesses

- Jehovah's Witness doctors are forbidden from administering transfusions, even to non-Jehovah Witness patients, even if the blood is necessary to save a patient's life.
- No one publicly defends this, but Jehovah's Witness doctors universally say they avoid being alone on duty in any setting where patients needing transfusions might present, and would summon another health care professional to do the procedure.

37

Approaches

- Brock (2008)
- Healthcare providers can refuse services if:
  - The therapist informs the client about therapy options most relevant to the client's condition.
  - The therapist refers the client to another therapist who is willing to provide the desired treatment.
  - The referral does not create an unreasonable burden for the client.

38

Magelssen 2002

- Conscientious objection ought to be accepted if:
  - Providing the care would seriously damage the professional's moral integrity
  - The objection has a plausible moral or religious rationale
  - The treatment is not considered an essential part of the professional's work
  - The burdens to the patient are small

39

List of Real World Conscience Conflicts

- Sex/reproduction
  - Abortion
  - Sterilization
  - In vitro fertilization
  - Birth control
- Death
  - Physician assisted suicide
  - Withdrawal of life support
  - Palliative sedation
  - Foregoing medically provided nutrition and hydration
  - Organ donation
- Stem cell research
- Genetic testing

40

Final Thoughts

- Doctors aren't the only ones who face conflicts between their personal morality and the obligations of professional ethics. Parents, teachers, judges, ministers, etc, all have to deal with this.
- The problem of conscience
  - it has the power to stop arguments cold
  - It is unreliable
- In mental health, most of the time these issues are not going to effect us. We pick and choose who we will see all the time in our practices.

41

Training

- However, there is a problem with training. When we certify that a marriage therapist has been approved to do marriage and family counseling, do we need to add, "except for homosexual couples", or "children of gay parents"?
- It is unreasonable for an individual to choose a profession whose primary activity conflicts with his central values. (This also may lead to burnout.)

42

Finally…

- What we finally come up against is the problem of distinguishing conscience from cowardice, dislike, and prejudice.

43

"There are lots of patients we don't approve of. Get over it."

Anonymous nurse

44