# Ethical and Legal Issues

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# Outline

I. Competence

II. Informed consent and decision-making capacity

III. Exploitation and undue influence

# I. Competence

- Why are geriatric psychiatrists asked to assess competence?
- Types of competence
- Standards for competence
- Competence vs. decision making capacity

# Why are geriatric psychiatrists asked to assess competence?

- When a patient refuses recommended treatment
- When a family member/caregiver cannot manage the patient
- When the family and patient disagree
- To authenticate patient's particular decisions
- To recommend a decision-making process for a patient unable to make decisions

# Types of competence in the elderly

- Consent to treatment
- Consent to research
- Consent to hospitalization
- Financial competence
- Competence to formulate advance directives
- Ability to drive

*Jacoby R, Oppenheimer C (Eds.), 2002, pp. 943-947*

# Standards for competence

- Useful to distinguish between general competence and specific competence
- General competence determined by the ability to handle all one's affairs in an adequate manner
- Specific competence is defined in relation to a particular function or domain (e.g., execute a will, testify, consent to treatment)

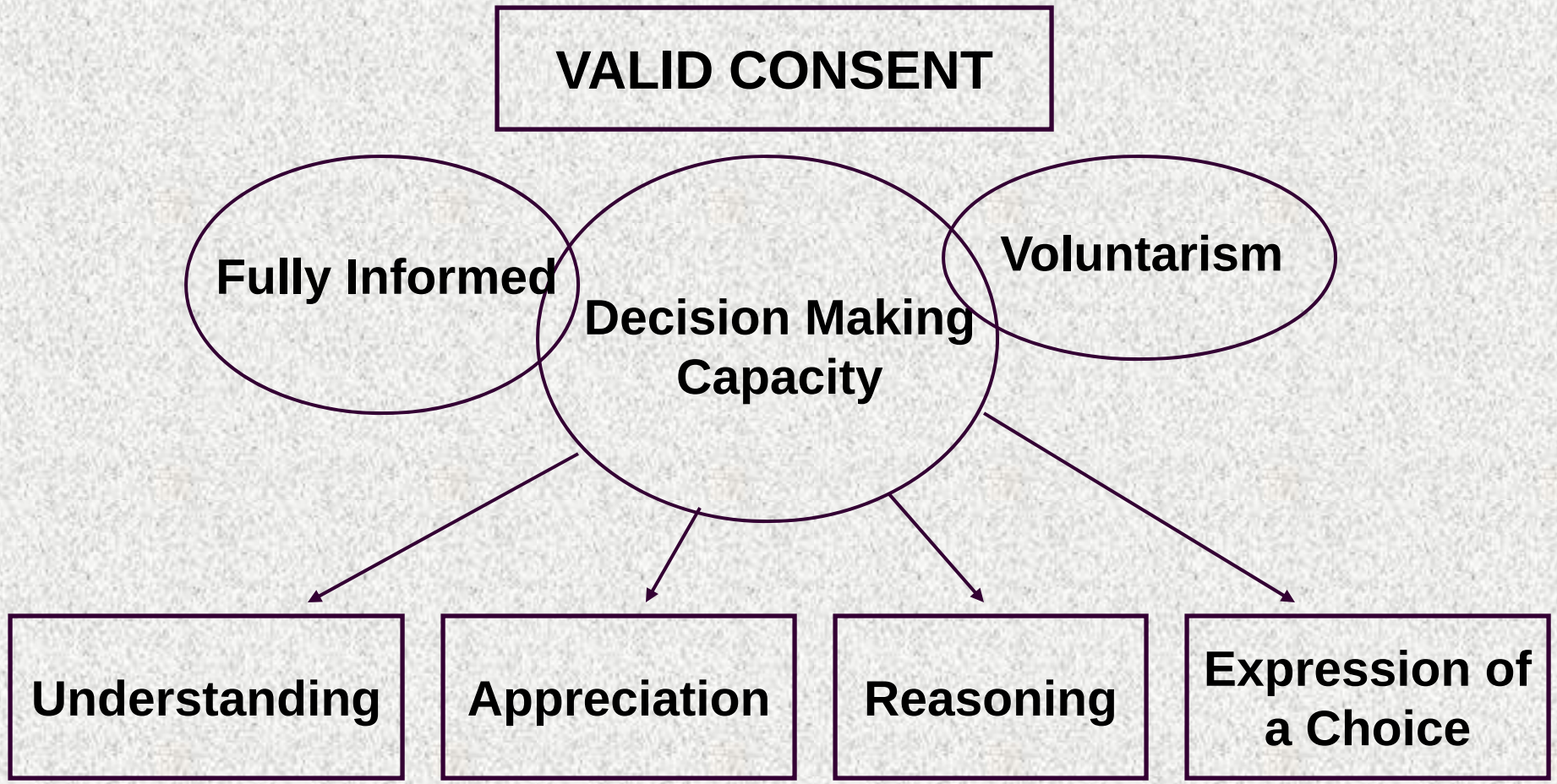
# Competence vs. decision-making capacity

- **Competency:**
  - **Legal term**
  - **Only a judge can declare a person "incompetent"**
- **Decision making capacity:**
  - **Widely accepted as the clinical equivalent of competency, for health-related decision-making**
  - **Can be assessed by a psychiatrist or other appropriately-trained clinician**

# II. Informed consent and decision making capacity

- Informed consent: Legal and ethical requirement
- Legal safeguard
- Process of informed consent can strengthen the therapeutic relationship by enhancing the trust and understanding between clinician and patient
- Patient education
- Clarify patient's values, preferences

# Informed consent: Conceptual model



# Barriers to informed consent (in treatment and research)

- **Patient/subject-related factors:**
  - **Age, education, vocabulary, cognitive impairment, previous experiences, emotional variables**
- **Consent- and protocol-related factors:**
  - **Readability, presentation/format, length, complexity/level of detail, risk:benefit ratio**
- **Clinician/investigator-related factors:**
  - **Attitudes/beliefs, knowledge, previous experience, conflict of interest**

# Barriers specific to older adults

- Less "decision-making reserve" with age *(Christensen et al., 1995)*
- Effects of age amplified by:
  - Lower vocabulary level
  - Comorbid chronic or acute medical illness
  - Cognitive impairment
  - Sensory impairment
- Vulnerability (e.g., to coercion)
- Cultural differences

# Voluntariness

- Absence of coercion, but…
- Coercion can be subtle
- What factors may influence voluntarism?
  - Developmental factors
  - Illness-related factors
  - Psychological issues; cultural and religious values
  - External features and pressures

*Roberts, 2002*

# Decision making capacity

- One component of valid informed consent
- Applicable in both treatment and research contexts
- Should not be presumed to be absent on the basis of a psychiatric diagnosis alone
- Should be assessed with a clinical interview
- Interview can be guided and augmented by a structured interview tool, e.g., MacCAT-T or MacCAT-CR (MacArthur Competence Assessment Tools for Treatment or Clinical Research)

# Components/standards of decision making capacity

- Factual understanding of relevant information
- Appreciation of the significance of the information/decision for one's own situation and future
- Reason with the information, weighing of information in context of personal values, goals
  - Comparative reasoning
  - Consequential reasoning
- Expression of a choice: must be able to communicate a choice that is stable over time

# Guidelines for informed consent

- **Provide (and document provision of) information about:**
  - **Nature of treatment/procedure**
  - **Risk/benefits of treatment/procedure/ alternatives (including no treatment)**
- **Use simple language (avoid jargon), think layperson**
- **Dialogue, not monologue**
- **Ample opportunity to ask questions**

*Gutheil and Appelbaum, 2000, p. 210-211*

# Guidelines (continued)

- Test understanding during/after process
- Review as needed (provide corrected feedback, retest)
- Consider presence of factors that might diminish voluntarism
  - May be subtle, including pressure from physician or family
  - Consider various domains of influence

*Gutheil and Appelbaum, 2000, p. 210-211*

# Assessing capacity in older individuals

- History/physical/neurological examination
- Include family or other informants
- Consider medications (including OTC), alcohol use, benzos
- Mental status examination, cognitive assessment (and not just MMSE – esp. executive functioning, abstract reasoning)
- Neuroimaging and neuropsychological testing (if indicated; can be helpful)
- Functional evaluation

*Grossberg & Zimny, 1996, p. 1039*

# Strategies to enhance consent process

- Applicable to both treatment and research context
- Most beneficial strategies:
  - More organized or structured procedures
  - Corrected feedback, multiple learning trials
  - "Advance organizers" (preview material about to be presented)
  - Summaries/reviews of information
  - Decision aids
  - ? Multimedia procedures

# III. Exploitation and undue influence

- Financial exploitation
- Aging and exploitation
- Testamentary capacity
- Threshold test for competence
- Undue influence

# Financial exploitation of the elderly

- Relatives, acquaintances, and thieves
- 20%-50% of elder abuse cases
- Misappropriation of assets by dishonest means
- Types:
  - outright theft (often by using Power of Attorney)
  - credit card fraud
  - real estate scams
  - telemarketing scams
  - insinuation into the victim's life

*Tueth, 2000*

# How aging increases likelihood of exploitation

- Medical, psychological, and environmental vulnerabilities
- Elder seeks friendship, companionship, and relief
- Becomes a "perfect victim" for the predator
- Elder tends to under-report to authorities out of fear of losing independence, being placed in a nursing home, or being perceived as gullible

*Naimark, 2001*

# Informed consent to make financial decisions (Civil)

- Financial exploitation if the transactor fails to obtain informed consent from the elder subject
- The transactee must be provided with information about the transaction
- The transactee must have the mental capacity to be able to understand and appreciate the information provided
- The consent must be voluntary and free from coercion

*Naimark, 2001*

# Testamentary capacity

**Those who would write a will "retain the power to understand the nature and extent of their property, their relationship to those persons who are usually the objects of a person's bounty, and the nature and operative effect of will making."**

*Hankin, 1995*

# Threshold test for competency

- **Recognizes that some decisions are complicated and some are simple**
- **A deficit in mental functioning may be considered only if the deficit by itself, or in combination with other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question**
- **Deficit is necessary, but not sufficient**
- **A specific incompetence in one area does not lead to a global incompetence**

*Hankin, 1995*

# Definition of undue influence

- Victimizer's "will" is substituted for the "will" of the victim
- Victim acts subject to the will or purposes of the domination party
- Victim agrees to give the perpetrator money or property

*Perr, 1981*

# Assessment of undue influence

- examines the dynamic interplay between the victim and the victimizer
- DSM-IV diagnoses may not be useful
- Unique in Forensic Psychiatry: does not require a finding of mental illness, disease, or disorder
- Affected by mental capacity, medical issues, and environmental factors
- Core finding: whether manipulation, coercion, compulsion or restraint occurred as a direct result of the relationship

*Perr, 1981*

# Undue influence cannot occur when the victim:

- Knows his own mind
- Can distinguish between his interests and the interests of another
- Can distinguish a neutral, disinterested assertion from an active, persuasive one

*Blinder and Marshall, 1998*

# Techniques used by perpetrators

- Isolation
- "Siege mentality"
- Dependence
- Powerlessness
- Fear and deception
- Unawareness

*Singer, 1992*

# “Stockholm Syndrome”

**A strange bonding occurs between captives and their captors (the Stockholm Syndrome was identified after four people held in a bank vault for six days became bonded to the bank robbers and saw the outside world as their enemy).**

*Strenz, 1980*

# "Four-Point" Model

- **Dependence (physical of emotional) on the perpetrator**
- **Isolation of the victim (preventing the elder from obtaining information from friends and family is sufficient)**
- **Emotional manipulation of the victim (induction of fear, anxiety, and agitation)**
- **Resultant control of the victim's money or property**

*Blum, 1999*

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- Strenz T: The Stockholm Syndrome: law enforcement policy and ego defenses of the hostage. Annals of the New York Academy of Science 1980; 347:137-150.
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