

PREFACE

In the last decade, the ethics and regulation of biomedical research has moved from a sleepy backwater to center stage. As concerns mount about the inability of existing regulatory structures to protect the rights and welfare of human subjects, those involved in designing, conducting, and overseeing research have come under increasing scrutiny. In this environment, lawyers, administrators, and other professionals who may never have thought much about research are finding it necessary to become conversant with the relevant ethical and regulatory issues.

The genesis of this book was our desire to develop a set of teaching materials that could be used in an academic course on human subject research in a broad range of professional school settings. In developing these materials, we were mindful that our readers would include tomorrow's advisers, managers, and regulators of researchers and research institutions. If students are to be effective in these roles, they must not only understand the history of human subject protection and the relevant ethical and regulatory issues; they must begin to think critically about the existing regulatory system and to consider the desirability of policy reform.

We have, therefore, adopted as a model for this book a variation of the traditional law school "casebook," which has been used successfully by generations of law students. These books are designed to foster critical thinking about the subject matter involved at least as much as to familiarize students with a given body of law and regulations. That does not mean that we have designed this book primarily with law students in mind; on the contrary, we have gone to great lengths to make the material accessible to non-law students, including those at schools of medicine, nursing, public health, and health administration. All of us have taught in one or more of those settings, and we have found that the law school casebook format works remarkably well there. Nonetheless, recognizing that the book will be used by students in a variety of disciplines, we have modified the traditional casebook approach to make it equally accessible to those who have had no legal training whatsoever. As a result, some basic legal concepts that may seem obvious to law students or lawyers are accompanied by brief explanations. In like fashion, understanding that some readers will have little or no clinical background, we have provided similar basic explanations, where appropriate, of clinical concepts. Outside of degree-granting programs, we envision that the book will be useful in training programs for professionals whose work requires an appreciation of the ethical and regulatory issues surrounding human subject research, such as members and professional staff of institutional review boards.

The book is largely comprised of primary source documents, including governmental regulations, guidance statements, and court decisions, and excerpts from the voluminous commentary produced by scholars, advisory commissions, and others. These materials are accompanied by extensive notes and questions, which expand on some of the issues raised in the primary readings and ask the reader to think about the gaps, ambiguities, and conflicts those readings raise. In true law school style, many of the questions have no indisputably correct answer. Instead, they are offered to stimulate discussion, provoke independent thinking, or simply lead to quiet moments of thoughtful puzzlement by students as they review the readings outside of class.

We wanted to keep the book to a manageable size. As a consequence, we made a number of not-painless decisions in terms of coverage. One of those relates to research conducted outside the United States, which has rapidly been growing in importance. We resisted the temptation to explore international research in any significant way, although we occasionally raise international comparisons when doing so seemed highly relevant to a discussion of a domestic issue. Similarly, we decided to focus solely on biomedical research, as opposed to research in the social sciences. Although most of this book's content should be equally applicable to both types of research, to the extent that there are special issues that arise in social science research, those issues are not discussed at any significant length here. Finally, because this is a book about the use of human subjects in research, it provides little coverage of research integrity issues that are not unique to research involving human subjects, such as falsification of data or authorship practices.

Organization of the Book

This book is divided into three parts. Part I provides a general overview of the history of research with human subjects, the existing regulatory framework, and the major entities involved in overseeing research. Part II examines the key ethical and regulatory issues that arise in every research protocol. Part III looks at special situations that raise issues beyond the general considerations addressed in Part II. Finally, the Appendices contain a variety of primary source materials discussed throughout the book, including portions of the federal regulations known as the Common Rule.

Stylistic Conventions

Most of the excerpts that appear in this book have been edited. Citations or footnotes appearing in the original text have in most cases been deleted without any notation. (Excerpted pieces commonly omit text

that appeared in the original before or after the excerpted portion, and no notations have been used to indicate such deletions.) Where text has been deleted within the excerpted piece, however, ellipses have been inserted. Recognizing that students will sometimes wish to read the unedited original source, we have tried to provide web citations for many of the excerpts. All URLs provided in this book were functional as of the close of 2004. Even if you encounter a URL that is no longer functional, you can often still find the original web page by going to the Internet Archive at <http://www.archive.org>. Although we have not provided web citations for statutes or judicial opinions, the full text of those sources often can be found at FindLaw (<http://www.findlaw.com/casecode>) or at Cornell University Law School's Legal Information Institute (<http://www.law.cornell.edu>).

The journal whose full name is *IRB: Ethics & Human Research* (previously known as *IRB: A Review of Human Subjects Research*) is cited throughout this book, for simplicity purposes, with the shortened name *IRB*.

For Readers Without a Legal Background: A Brief Description of the U.S. Legal System

The basic structure of the American legal system is established by the United States Constitution. It creates a *federal* system, a term that refers to a system of government in which a group of smaller political units join together and agree to give up some of their power to a centralized government. In the case of the United States, the smaller units are each of the separate states, and the centralized government is the national (sometimes called federal) government. On the one hand, the Constitution spells out the details of how power is shared between the national government and the states. Under the Constitution's "supremacy clause," federal laws will generally override any conflicting laws enacted by the states. On the other hand, the Constitution does not say much about how each of the state's own internal governments will operate: for that very reason, each state has its own constitution.

In most instances, law is created from one of three sources: legislatures, administrative agencies, and courts. (Contracts — legally binding agreements created by private parties — represent an additional source of law, although one that is binding only on parties who voluntarily agree to accept a contract's

terms.) The legislature for the national government is, of course, the United States Congress, which is comprised of the Senate and the House of Representatives. It has the authority to enact statutes, which in most cases need to be signed by the President before they become effective. Each state's constitution determines the structure of that state's legislature, which has the power to enact state statutes.

Statutes, whether on the federal or state level, often will only provide a broad outline of what the law is supposed to be. The fleshing out of the details of the law, together with performing the day-to-day implementation of what a particular statute requires, is often left to administrative agencies. One of the most important functions of administrative agencies is to issue regulations and to interpret those regulations. As will be explained in this book, a great deal of the law relating to protecting research subjects is found in regulations issued and interpreted by two federal administrative agencies, the Office for Human Research Protections (OHRP) and the Food and Drug Administration (FDA), both of which are part of the Department of Health and Human Services (DHHS).

Controversies often arise over the interpretation of state or federal laws, and in those instances the courts often are asked to resolve the dispute. There are separate court systems at the federal and state levels. In the federal court system, the initial trial of a case usually takes place in what are called "district courts." Any party who is not satisfied with the decision of a federal district court can appeal the decision to one of the circuit courts of appeals. Decisions of the court of appeals can be reviewed by the United States Supreme Court, but in contrast to the court of appeals, which is usually required to take appeals from the federal district courts, the U.S. Supreme Court has a great deal of discretion in deciding which cases it wishes to review. The U.S. Supreme Court has the final word in interpreting federal law, and in resolving conflicts between federal laws and state laws. Each state has its own system of trial and appellate courts, including one highest court similar to the U.S. Supreme Court, which has the authority to make a final determination of how that state's laws should be interpreted.

Courts also establish and enforce legal principles that do not derive from statutes or regulations. These principles, known as the "common law," can be traced back to old English judicial deci-

sions, although they have been revised substantially over the centuries. Common-law principles are particularly important in resolving disputes over personal injuries (a body of law known as “torts”) and contracts. Each state develops its own body of common-law principles. While there is a great deal of similarity in the common law of the various states, some important state-by-state variations exist.