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Diane E. Hoffmann
Jack Schwartz
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Recommended Citation
Diane E. Hoffmann, Jack Schwartz & Evan G. DeRenzo, Regulating Research with Decisionally Impaired Individuals: Are We Making Progress?, 3 DePaul J. Health Care L. 547 (2000)
Available at: http://via.library.depaul.edu/jhcl/vol3/iss3/7

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REGULATING RESEARCH WITH DECISIONALLY IMPAIRED INDIVIDUALS: ARE WE MAKING PROGRESS?

Diane E. Hoffmann*
Jack Schwartz**
Evan G. DeRenzo***

INTRODUCTION****

The National Bioethics Advisory Commission (NBAC or Commission), as well as advisory panels in two states (New York and Maryland) have recently issued recommendations urging new regulation of research with decisionally impaired individuals.1 These

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****The authors wish to thank Sai Deepa Saggare for her research and editorial assistance.

recent governmental initiatives have resurrected a quarter-century old policy debate over whether this kind of research should be governed by regulations beyond those applicable to all human subjects. Considerations underlying the central question include how the population needing special regulatory protection should be defined, what limitations should be placed on the risk to which subjects are exposed, and how much discretion about these matters should be left to research investigators and local review boards.

Fueling this debate is a core ethical issue: how can research with subjects who are unable to consent be justified? The Nuremberg Code, a post-war foundational document regarding research ethics, states that the “voluntary consent of the human subject is absolutely essential.” "This means that the person involved should have legal capacity to give consent...." This language effectively rules out research involving decisionally incapacitated subjects and is cited as the central authority by those objecting to such research.

Yet, the prohibition suggested by the Nuremberg Code is itself ethically troublesome to many who point out that, “[b]ecause new treatments must eventually be tested in persons suffering from the relevant condition, a policy totally excluding incapable subjects from research would preclude the development of improved treatment for persons with serious psychiatric disorders, dementia, and other mentally debilitating conditions.” A source of authority for those who


³Id.

⁴Some commentators have suggested that the Nuremberg Code’s wording, which “seems to rule out research with children, with emergency patients, and with the decisionally impaired,” is more expansive than the Code’s intended scope. Jonathan D. Moreno, Regulation of Research on the Decisionally Impaired: History and Gaps in the Current Regulatory System, 1 J. HEALTH CARE L. & POL’Y 1, 12 (1998). The judges who issued the decision embodying the Code may only have intended “to rule out non-beneficial and highly risky experiments with easily coerced subjects such as prisoners.” Id.

⁵REBECCA DRESSER, NATIONAL BIOETHICS ADVISORY COMMISSION, Research Involving Persons with Mental Disabilities: A Review of Policy Issues and Proposals, in RESEARCH
argue that it is ethical to conduct research with the decisionally impaired is the Declaration of Helsinki (Declaration). The Declaration includes in its principles the following: "Where physical or mental incapacity makes it impossible to obtain informed consent, or when the subject is a minor, permission from the responsible relative replaces that of the subject in accordance with national legislation." This statement appears to assume the passage of national legislation permitting family members to consent to participation in research for an incapacitated individual. The implication of the statement is that sometimes the pursuit of scientific knowledge justifies research that the Nuremberg Code would prohibit, although the Declaration does not fully account for the circumstances under which proxy consent would be ethically permissible.

These two documents provide the historical context for the examination of subsequent efforts to regulate research with this population. Phrases from the documents have become battle flags for advocates. Those who believe that research with decisionally impaired subjects is ethically suspect, a danger to be avoided, often use the Nuremberg Code as the starting point for arguments that this research should be severely restricted. Those whose premise is that research with decisionally impaired subjects is ethically permissible, a necessity in the fight against serious illness, often use the Declaration of Helsinki as the starting point for arguments that this research must not be hobbled with restrictions. This article will examine how these

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Involving Persons with Mental Disorders That May Affect Decision-Making Capacity Commissioned Papers 5, 7 (1998)


7 Id.

8 The Declaration suggests that when research is solely for the advancement of scientific knowledge—that is, contains no element of possible direct therapeutic benefit for the subjects—"[t]he subjects should be volunteers...." Id.

9 See Katz, supra note 2, at 305-06.

10 See id.
seemingly irreconcilable moral views play out in the policymaking process.

Over twenty-five years ago, the U.S. Department of Health, Education and Welfare (DHEW) published an early working document as a prelude to proposed rules on research with "individuals institutionalized as mentally infirm." The proposals in the working document and proposed rules published a few years later would have significantly restricted—perhaps even effectively ended—this research. The proposals ultimately were abandoned, primarily because of comments from researchers that they would be too restrictive and burdensome on the research community.

Since DHEW abandoned its regulatory effort, little has changed, at least in terms of governmental policy directives. Federal regulations merely call on Institutional Review Boards (IRBs) to be attentive to the need for "additional safeguards...to protect the rights and welfare" of research subjects who "are likely to be vulnerable to coercion or undue influence, such as...mentally disabled persons...." No state comprehensively regulates research with decisionally impaired individuals.

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13 See Moreno, supra note 4, at 13.
14 45 C.F.R. § 46.111(b) (1999).
This article reviews the history of attempts to regulate research with the decisionally impaired and examines the question whether the recent proposals will merely reprise failed efforts of the past or instead mark progress toward consensus on the appropriate level of regulatory protection. In so doing, this article addresses some of the significant changes in the relevant research, social, and legal arenas during the past quarter-century as well as the more complex regulatory research environment that exists today, and their likely impact on the policymaking outcome.

EARLY REGULATORY EFFORTS: THE 1970s

Initial Proposals by the Department of Health, Education, and Welfare

The federal government first gave serious attention to the issue of research with those lacking decisional capacity in October 1973. At that time, the Secretary of DHEW issued a notice of “proposed rulemaking” and commented that “DHEW through the National Institutes of Health, had appointed a special study group to review and recommend policies and special procedures for the protection of children, prisoners, and the institutionalized mentally infirm in research....”16 A draft of the study group’s report was published in the Federal Register in November, 1973.17 The report was not considered proposed rulemaking but rather “a draft working document” for public review and comment.18

The draft defined “mentally infirm” as the “mentally ill, the mentally retarded, the emotionally disturbed, the psychotic, the senile, 

17See id.
18See id. The Federal Register Notice, in fact, stated “[i]t must be clearly understood by the reader that the material that follows is not proposed rulemaking in the technical sense, and is not presented as Departmental, Public Health Service, or NIH policy. Rather it is a draft working document on which early public comment and participation is invited.” Id. The drafters also recognized the controversial nature of the proposal. In the introduction to the draft, Robert S. Stone, Director of the National Institutes of Health, commented that “[t]here may be elements in the recommendations which will provoke debate and controversy.” Id
and others with impairments of a similar nature, residing as patients in an institution, regardless of whether or not the individual has been determined to be legally incompetent.19 Individuals institutionalized as mentally infirm were considered especially in need of protections for two reasons. First, they “might lack the...capacity to comprehend relevant information, and to make informed judgments concerning their participation” in research.20 Second, “they experience a diminished sense of personal integrity as a result of confinement in an institution.”21

Of particular focus was the question of informed consent and how it might be obtained in order to conduct research with individuals in this category.22 In the section on “general policy considerations,” the draft stated:

Whereas it is clear by law that consent of a parent or legal representative is valid for established and generally accepted therapeutic procedures performed on a child or an incompetent adult, it is far from clear that it is adequate for research procedures. In practice, parental or guardian consent generally has been accepted as adequate for therapeutic research, although the issue has not been definitively resolved in the courts. When research might expose a subject to risk without defined therapeutic benefit or other positive effect on that subject’s well-being, parental or guardian consent appears to be insufficient.23

19 Id. at 31,740.
20 Id.
22 See id. at 31,740.
23 Id. The draft also raised the possibility that legal guardians might not always have the best interest of the institutionalized individual foremost in their decisionmaking. Because long-term management of patients with mental disabilities is very expensive and time-consuming, the draft speculated that a research proposal that might “reduce either the expense or the supervision required in caring for such persons might be appealing, whether or not there is correlative benefit to the patient.” Id. at 31,745.
The draft concluded that, in general, research on the mentally infirm was not acceptable. The draft did leave the door open, however, for some types of research. These included "projects in which: the proposed research concerns diagnosis, treatment, prevention, or etiology of the disability from which [the subjects] suffer; the necessary information can be obtained only from those subjects; or the studies concern institutional life per se." The draft further required that the subject's legal guardian give consent to the individual’s participation in any research protocol, and that where the individual had "sufficient mental competency to understand what [was] proposed and to express an opinion as to his or her participation" that the individual give his or her consent.27

In cases where a protocol included mentally infirm subjects, the research was to be overseen by a "Protection Committee." The Protection Committee was to be overseen by an "Organizational Review Committee of the institution in which the research" was to be conducted or by which the research was sponsored. The Protection Committee was to provide guidance in the selection of subjects, monitor the progress of the research with special attention to "adverse effects on subjects," "evaluat[e] the process and reasonableness of consent of the legal guardian and (where applicable) of the subject," and advise the legal guardian and subject of the appropriateness of the subject’s continued participation in the research.29 Members of the committee could not have "any association with the research under review and the majority of members could not have any association.

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24 See id.
25 See id.
27 Id. at 31,748.
28 Id. at 31,745.
29 Id.
30 See id. at 31,746 (stating that the Protection Committee was to be composed of at least five members who would be competent to "deal with the medical, legal, social and ethical issues involved in the [proposed research]”).
with any organization or individual conducting or supporting the [research]."  

The Organizational Review Committee, in addition to its obligations for all research on human subjects within an institution, was to ensure that all aspects of the research would be "ethically appropriate for performance on healthy individuals," "conduct at least one on-site visit" to the institution where the research was being performed, "prepare a report of the visit," and "review and approve or modify the procedures proposed by the applicant to be followed by the Protection Committee in subject selection and recruitment."  

Based on critical commentary received on the draft report, in August 1974, DHEW published its proposed rules for research on vulnerable subjects. When these proposed rules were issued, however, the agency’s Federal Register notice pointed out that "[c]oincidentally with the development of the notice of proposed rulemaking set forth [herein]," the National Research Act was passed by both Houses of Congress and signed by the President. The Act established an eleven-member National Commission for the Protection of Human Subjects in Biomedical and Behavioral Research. The Commission was charged with identifying the basic ethical principles that should underlie the conduct of human subject research and

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32 Id. at 31,746. Furthermore, "no more than one-third of the members [could] be individuals engaged in research, development, or demonstration activities involving human subjects." Id.

33 Id. at 31,748. The report was to include "discussion of such matters as living conditions, availability of medical care, and quality of food." Id.

34 Id.


developing guidelines for research to assure that it be conducted in accordance with these ethical principles. More specifically, the Commission was required to address research with children, prisoners, and those institutionalized as mentally infirm.

In light of the four hundred and fifty comments regarding the November 1973 proposed guidelines for research on vulnerable populations, DHEW made several modifications to its earlier draft. DHEW received over forty comments specifically directed at the provisions covering research on the institutionalized mentally infirm. One common criticism was the use of the term "infirm." Commenters noted that it reflected an "antiquated notion of mental illness." DHEW agreed with the concern and changed the term to disabled.

In contrast, DHEW rejected suggestions that, in its view, weakened what it considered essential protections for those institutionalized as mentally infirm. For example, some argued that the restriction limiting research with this population to protocols that related to the particular subject's impairment was too narrow. Instead, they suggested, the provision should include "any illness from which the person suffers so that, for example, an institutionalized mentally disabled person with cancer could not be denied the benefits of research in cancer therapy." Despite these arguments, the Department concluded that research unrelated to the cause of this vulnerable population's mental disability was not appropriate because of the potential risks to the group. As in the earlier draft, research could

38 See id. at § 202(a)(1)(A)(i).
39 See id. at § 202(a)(2).
41 See id. at 30,652.
42 See id.
43 See id.
44 See id.
46 See id.
47 Id.
48 See id.
only be performed on those institutionalized as mentally disabled if it was "related to the etiology, pathogenesis, prevention, diagnosis, or treatment of mental disability or the management, training or rehabilitation of the mentally disabled and [sought] information which [could] not be obtained from subjects who [were] not institutionalized mentally disabled."49

Furthermore, DHEW retained the original scope of the proposal, largely rejecting suggestions that regulations should be established for research involving "students, laboratory employees, seriously ill or terminal patients, the noninstitutionalized mentally disabled, and other special groups."50 DHEW's response to this suggestion was that "abuses relat[ed] to these groups [were] less evident and that they [were] afforded the protection of the existing regulations" governing all human subjects.51 DHEW did state, however, that it would consider dealing with those who were legally incompetent but not institutionalized in a subsequent notice of proposed rulemaking.52

The National Commission's Process and Recommendations
DHEW did not move forward in this area while the National Commission was performing its own analyses regarding research with those institutionalized as mentally infirm. The task of the Commission on this topic specifically was to:

(1) Identify the requirements for informed consent to participation in biomedical and behavioral research by the institutionalized mentally infirm, and

(2) investigate and study biomedical and behavioral research conducted or supported under programs administered by the Secretary of HEW and involving the

49 Id. at 30,655.
51 Id.
52 See id. at 30,652.
institutionalized mentally infirm to determine the nature of the consent obtained.\footnote{Protection of Human Subjects, 43 Fed. Reg. at 11,328 (Mar. 17, 1978).}

The Commission was to use this information as a basis for making recommendations to the Secretary of Health, Education, and Welfare "to assure that biomedical and behavioral research conducted or supported under programs administered by him met the requirements respecting informed consent identified by the Commission."\footnote{Id.}

On April 10, 1976, the Commission conducted a public hearing on the issue of research involving the mentally infirm.\footnote{See id. (summarizing the testimony of fourteen individuals).} Commentators included both researchers and advocates for this population. The comments reflected the environment in which research on this population was conducted and the attitudes of those engaged in this research at the time.\footnote{See id.} Virtually all of those commenting supported the research enterprise, believing it necessary to make progress in the care and treatment of the mentally infirm.\footnote{See id.} The differences among the comments focused on the extent to which research on this population should be regulated beyond existing DHEW requirements for human subject research generally.\footnote{See Protection of Human Subjects, 43 Fed. Reg. at 11,352-55.}

The view of researchers that additional regulation may be counterproductive was perhaps best expressed by Dr. Roger Meyer, of Harvard Medical School, who commented that "the current environment is hostile toward needed research in biology and behavioral sciences."\footnote{Id. at 11,352.} He and others also expressed the view that it was inappropriate to categorize all individuals with mental disabilities as unable to give consent; doing so, in fact, ran "counter to modern concepts of mental illness and to court decisions which have restored their civil rights and limited judgments of incompetency."\footnote{Id.}
Among advocates for the mentally infirm, the statement by the American Bar Association's (ABA) Commission on the Mentally Disabled was the most detailed. While the ABA's Commission generally supported the practice of research with this population, it asserted that "experimentation" on this group should only be permitted when, among other criteria, "the research poses no more than minimal risk." The ABA Commission further argued that nontherapeutic research should not be performed over the objection of any subject, no matter how the objection is expressed. Therapeutic research should only be carried out on those institutionalized as mentally infirm under these criteria, with two exceptions. More than minimal risk research could be performed if "absolutely necessary to preserve the life, health or physical safety of the research subject" and if there was evidence of a "high level of therapeutic justification, the objections of [the subject] could be overridden with proper third-party consent and review.

61 See id.

62 Id. The ABA Commission advocated the following prerequisites:

(1) The protocol has scientific merit, verified by an independent multidisciplinary committee;

(2) medical care, direct care and other institutional services are sufficient;

(3) the experimentation will not reduce the amount or quality of therapy available to research subjects or to other residents;

(4) the research poses no more than minimal risk;

(5) the research is related to mental disability and seeks information that cannot be obtained from other subject groups; and

(6) the information sought is of significance for the advancement of acknowledged scientific or medical goals.

Id. at 11,353.


64 See id.
Furthermore, the term "therapeutic" was to be strictly defined "in terms of individual necessity and benefits."  

Of all the advocacy groups, Stewart Brown, representing the Pennsylvania Association for Retarded Citizens, took a position that was perhaps most protective of potential subjects. He argued that those conducting research on this population should be "qualified and licensed" and that a "regulatory-type agency should enforce regulations and impose sanctions where violations [were] discovered."

On March 17, 1978, DHEW published Notice of the National Commission's Report and Recommendations on Research Involving Those Institutionalized As Mentally Infirm and asked for public comments before May 16, 1978. In the Report, the Commission recommended that research involving those institutionalized as mentally infirm be conducted or supported only when "an Institutional Review Board" reviewed the research design, the qualifications of the research investigator, and the adequacy of pre-clinical studies. With respect to the rights and welfare of human subjects, the IRB was to determine that:

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65 id.  
66 id.  
67 id. at 11,355.  
69 The Commission retained the term "mentally infirm" because this term was used in the 1974 National Research Act. The Commission acknowledged, however, the comments received on DHEW's November 16, 1973, proposed policy stating that the term should not be used. See id. at 11,329.  
70 See id.  
71 See National Research Act, Pub. L. No. 93-348, § 474(a), 88 Stat. 342 (1974) (stating that "[t]he Secretary [of HEW] shall by regulation require that each entity which applies for a grant or contract under this Act for any project or program which involves the conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant or contract assurances satisfactory to the Secretary that it has established (in accordance with regulations which the Secretary shall prescribe) a board (to be known as an 'Institutional Review Board') to review biomedical and behavioral research involving human subjects conducted at or sponsored by such entity in order to protect the rights of the human subjects of such research.")  
73 id.
there are good reasons to involve institutionalized persons in the conduct of the research;

- risk of harm or discomfort is minimized by using the safest procedures consistent with sound research design and by using procedures performed by diagnostic or treatment purposes whenever possible;

- adequate provisions [have been] made to protect the privacy of the subjects and to maintain confidentiality of data;

- selection of subjects among those institutionalized as mentally infirm will be equitable; [and]

- adequate provisions [have been] made to assure that no prospective subject will be approached to participate in the research unless a person who is responsible for the health care of the subject has determined that the invitation to participate in the research and such participation itself will not interfere with the health care of the subject.\(^7\)

Of particular concern to the Commission was that individuals institutionalized as mentally infirm not be included in research studies where it was possible to obtain the same information from noninstitutionalized individuals.\(^7\) The IRB, then, was to consider whether the research being proposed would be "exploitive" of the institutionalized population by assessing whether the research would be

\(^{73}\)Id.

\(^{74}\)See id. at 11,331. Under contract with the Commission, the Survey Research Center at the University of Michigan (SRC) examined research being conducted around the country with individuals institutionalized as mentally infirm. The SRC report was based on a sample of studies reviewed by IRBs at 61 institutions. Research on this population constituted 9 percent of the research reviewed by these IRBs. In terms of subject selection, the SRC found that in "13% of projects involving the mentally infirm, the investigator did not mention the mental condition of the subjects as a factor in subject selection." The Commission speculated that it was possible that these studies could have been conducted on other populations and may have been conducted on this population as a means of convenience. Id. at 11,341.
“relevant to the subjects’ emotional or cognitive disability, whether individuals with the same disability [would be] reasonably accessible to the investigator outside the institutional setting, and whether the research [was] designed to study the nature of the institutional process or the effect of some aspect of institutionalization on persons with a particular disability.”

Concerning selection of subjects within the institution, the Commission recommended that subjects be selected so that “any burdens of research do not fall disproportionately on those who are least able to make decisions regarding participation in research.” The Commission also addressed the situation in which a potential subject’s physician or therapist was involved in the proposed research. In those situations, in order to avoid conflicts of interest, the Commission recommended that “independent clinical judgment” be obtained to determine the appropriateness of including a patient in the proposed research.

The Commission’s report included an influential analysis of the relationship among the risk-benefit profile of the research, subject assent, and third-party consent. If the research in question involved no more than minimal risk and the subject was incapable of

75Id. at 11,331.
76Id.
78Id. The SRC report, done for the Commission, found that in approximately 25 percent of the research with the mentally infirm, investigators enrolled their own patients. See id. at 11,341.
79The SRC study investigators found that written consent was sought in more than 80 percent of the research they reviewed involving the mentally infirm. Third-party consent was obtained in approximately one third of these cases. Third-party consent was most frequently obtained in research involving the mentally retarded and was obtained from the subject’s parents, other relatives, or legal guardians. See id. at 11,342. When interviewed, “most investigators reported that third party consent served to protect subjects “very well” or “fairly well,” but almost one-fifth of the investigators indicated otherwise. Reasons given included the third party’s not being able to understand the research or not caring about protecting the subject’s rights. Id.
80Minimal risk was defined by the Commission to mean the “risk (probability and magnitude of physical or psychological harm or discomfort) that is normally encountered in the daily lives, or in the routine medical or psychological examination, of normal persons.” Id. at 11,332. For subjects institutionalized as mentally infirm, the Commission elaborated that “routine examination procedures present no more than minimal risk if the likely impact of such
consenting, the Commission stated that the research must be "relevant to the subject’s condition."\(^{81}\) In addition, the Commission recommended that the subject "assent"\(^{82}\) or, at least not object to participation.\(^{83}\) If the subject did object, the subject could not participate in the research unless authorized to do so by a court of competent jurisdiction.\(^{84}\) In such cases, the Commission recommended that this authorization not be sought unless the research included an intervention or monitoring procedure that would be of direct benefit to the subject.\(^{85}\) In addition, "where appropriate," the Commission recommended that the IRB appoint "a consent auditor" to "observe the consent process and determine...whether each prospective subject consents, or being incapable of consenting, assents or objects to participation in the research."\(^{86}\)

IRB may determine that prospective subjects who are institutionalized as mentally infirm are likely to react more severely than normal persons to certain routine procedures; in such instances, the procedures present more than minimal risk to the subjects.... For each research protocol, the IRB must determine the degree of risk that would be presented to normal persons and then consider whether such risk is heightened by the illness or institutionalization of the prospective subjects or class of subjects.

Id.\(^{81}\)

\(^{82}\) The Commission used the term assent to "describe authorization by a person whose capacity to understand and judge is somewhat impaired by illness or institutionalization, but who remains functional." Protection of Human Subjects, 43 Fed. Reg. at 11,332. It further explained the standard as requiring "that the subject know what procedures will be performed in the research, choose freely to undergo those procedures, communicate this choice unambiguously, and be aware that subjects may withdraw from participation." Id. The standard was "intended to require a lesser degree of comprehension by the subject than would generally support informed consent." Id.

\(^{83}\) See id.

\(^{84}\) See id.

\(^{85}\) See id.

\(^{86}\) Id.
If the research under consideration involved greater than minimal risk, the Commission recommended that the research not be performed on this population unless it included an intervention that held out the prospect of direct benefit\textsuperscript{87} to the subject or included a monitoring procedure "necessary to maintain the well-being of those subjects."\textsuperscript{88} This risk would be acceptable if "all available treatments for a serious condition [had] been tried without success, and the remaining option [was] a new intervention under investigation."\textsuperscript{89} If the subject was incapable of consenting, the Commission recommended that the subject assent to participation.\textsuperscript{90} If the subject was incapable of assenting but did not object to participation, the Commission stated that the permission of a guardian or court should be obtained.\textsuperscript{91} If, however, the subject objected to participation in the research, his or her participation could only be authorized by a court of competent jurisdiction and only if the prospective benefit could not be obtained other than by participating in the research.\textsuperscript{92} For this type of research, the Commission recommended that an IRB determine the need to appoint an auditor "to observe and assure the adequacy of the consent process..."\textsuperscript{93} and if there was a "substantial question about the ability of the subjects to assent or there [was] a significant degree of risk involved in the research, the appointment of a consent auditor by the IRB would be appropriate.\textsuperscript{94}

\textsuperscript{87}See Protection of Human Subjects, 43 Fed. Reg. at 11,332. The Commission described a direct benefit as one that held out the possibility of fairly immediate benefit. Id. at 11,333.
\textsuperscript{88}See id. at 11,333.
\textsuperscript{89}Id.
\textsuperscript{90}See id. at 11,332.
\textsuperscript{91}See id.
\textsuperscript{92}Protection of Human Subjects, 43 Fed. Reg. at 11,332. An example of this type of situation, according to the Commission, would be where a new drug is being tested by the FDA for effectiveness and its use is not permitted outside of the drug trial. See id. at 11,333.
\textsuperscript{93}Id. The auditor was not to be involved "(except in the capacity of consent auditor) with the research for which subjects [were] being sought." In addition, the auditor was to be a person "familiar with the physical, psychological and social needs of the class of prospective subjects, as well as their legal status." Id.
\textsuperscript{94}Id.
The Commission also addressed research that posed greater than a minimal risk with no possibility of direct benefit to the subject population.\textsuperscript{95} Under these circumstances, the research could be conducted only if the anticipated risk of participation in the research was a "minor increase over minimal risk,"\textsuperscript{96} the knowledge expected from the research was "of vital importance for the understanding or amelioration of the type of disorder or condition of the subjects" or could "reasonably be expected to benefit the subjects in the future."\textsuperscript{97} Regarding participation of subjects incapable of giving consent, participation would be permissible if the subject assented to participation.\textsuperscript{98} If the subject was incapable of assenting but did not object to participation, the subject could participate only with the consent of a legally appointed guardian.\textsuperscript{99} If the subject objected to participation, he or she could not participate in the research.\textsuperscript{100} For this level of risk, the Commission recommended the mandatory appointment of a consent auditor by the IRB to observe the consent process and "determine whether each subject consents, or is incapable of consenting and assents, or objects to participation."\textsuperscript{101}

\textsuperscript{95}See id. at 11,334.
\textsuperscript{96}Id. at 11,333.
\textsuperscript{97}Protection of Human Subjects, 43 Fed. Reg. at 11,333. Such benefit could be remote to the subjects, "such as the eventual development of better treatment for their condition." \textit{Id.} at 11,334. As the Commission wrote in its later \textit{Belmont Report}:

Some populations, especially institutionalized ones, are already burdened in many ways by their infirmities and environments. When research is proposed that involves risks and does not include a therapeutic component, other less burdened classes of persons should be called upon first to accept these risks of research, except where the research is directly related to the specific conditions of the class involved.

\textsuperscript{98}See Protection of Human Subjects, 43 Fed. Reg. at 11,334.
\textsuperscript{99}See id.
\textsuperscript{100}See id.
This recommendation was particularly controversial even among Commission members. One commissioner, in fact, submitted a dissenting statement focusing on this recommendation, in which he argued as follows:

Since it is accepted that normal persons should not be enrolled in nontherapeutic research with more than minimal risk unless they can give informed and meaningful consent, it is doubly unreasonable that the institutionalized mentally infirm should be so enrolled when society has had so much recent concern for their greater protection, and when they live in environments which seriously discourage any kind of decision making and the nature of their illnesses weakens their abilities to choose responsibly in most of life's usual situations.

Lastly, the Commission addressed research that involved *greater than a minor increase above minimal risk and did not hold out the prospect of direct benefit to the subject.* Under these circumstances, the research could only be performed if:

(II) The research present[ed] an opportunity to understand, prevent or alleviate a serious problem affecting the health or welfare of persons institutionalized as mentally infirm; and

(B) A national ethical advisory board and, following opportunity for public review and comment, the head of the responsible Federal department or agency have determined that:

(I) The conduct of the research will be in accord with the

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101 *Id.* In all cases, the consent auditor was to be independent of the research team. *See id.* at 11,357.

102 *Id.*


104 *See id.* at 11,334.
basic ethical principles that should underlie the conduct of research involving human subjects; and

(II) adequate provisions are made for obtaining consent or assent of each subject or permission from a guardian of the person.  

The Commission stated explicitly that “because of the importance of the ethical issues at stake, debate [on this type of research] should be in a public forum, and conduct of the research should be delayed pending Congressional notification and a reasonable opportunity for Congress to take action regarding the proposed research.”

Revisions by the Department of Health, Education, and Welfare

On November 17, 1978, eight months after the Commission’s Report was printed in the Federal Register, DHEW issued its proposed rules on Research Involving Those Institutionalized as Mentally Disabled. The proposed rules took into consideration the more than one hundred comments received on the Commission’s report. While the proposed rules “in essence” accepted the Commission’s recommendations, they did depart from the Commission in some significant ways. For example, the proposed rules included a statement that DHEW was considering a requirement that consent auditors be appointed for all research with this population (even minimal risk research) and that an independent advocate be appointed for each research subject.

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105 Id.
106 Id.
108 See id.
109 See id.
110 See id. at 53,952. An advocate was defined to mean an individual appointed by the IRB to act “in the best interests of the subject” and who would be “construed to carry the fiduciary responsibilities of a guardian ad litem” toward the subject. This individual could not
For subjects determined capable of assenting but not consenting, DHEW also stated that it was considering whether to: 1) follow the Commission's recommendation to allow the subjects' participation if their guardians or legally authorized representatives (LAR), as DHEW termed them,\(^{111}\) consented, or 2) require additional protections including the "consent of...the Secretary, based upon the advice of an expert panel, or...an advocate."\(^{112}\) Also, with regard to subjects incapable of assenting, the Department stated that it was considering whether to:

(1) bar their involvement in such research (on the assumption that needed research could be done using other subjects);

(2) adopt the Commission's recommendation, which would permit their participation if they do not object and the legally authorized representative and a court of competent jurisdiction give their approval;

(3) require, in addition to the approval of the legally authorized representative and the court, approval by the Secretary; or

(4) require, in addition to that of the representative and the court, approval by an advocate.\(^{113}\)

These rules were clearly more protective of research subjects institutionalized as mentally disabled than those proposed by the

\(^{111}\)The term "legally authorized representative" was substituted by DHEW for the term "guardian" by the Commission "since the latter [it said] is normally associated with persons having responsibility for minors, while these regulations apply both to adults and minors institutionalized as mentally disabled." \textit{Id.} at 53,952.


\(^{113}\)\textit{Id.}
Commission. They were also the subject of considerable controversy. In fact, the proposed rules were ultimately rejected primarily because of comments from researchers that they would prevent needed research.\textsuperscript{114} According to Al Jonsen, a former member of the National Commission and prominent bioethicist, "officials at the National Institute of Mental Health (NIMH) and the Agency for Drug Addiction and Mental Health Association, objected that the recommendations would stifle important research with their populations."\textsuperscript{115} Groups like the Association of American Medical Colleges also found the proposed regulations overly burdensome, commenting that the requirements of consent auditor, patient advocate, and appointment of a guardian were "ponderous mechanisms of no demonstrated value."\textsuperscript{116}

Twice in the next several years, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research urged the Department to take up this issue again.\textsuperscript{117} However, according to at least one source, the Department "declined to do so, reportedly due to a lack of consensus on the need for them as well as the alleged adequacy of existing regulations."\textsuperscript{118}

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\textsuperscript{114} Although these proposed rules were never adopted, DHEW did adopt rules for research on other vulnerable populations including prisoners, pregnant women and fetuses and children. See 45 C.F.R. § 46.205 (2000) (providing for "additional protections pertaining to research, development, and related activities involving fetuses, pregnant women, and human in vitro fertilization").

\textsuperscript{115} See Jonathan Moreno, supra note 4, at 13.

\textsuperscript{116} Letter from John A. D. Cooper, M.D., President of AAMC, to Honorable Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare (Jan. 16, 1979) (on file with the authors).


SOCIETAL TRENDS INFLUENCING THE NATURE OF POTENTIAL REGULATION: FROM THE 1970s TO THE 1990s

Between the late 1970s and late 1990s, there were no new significant efforts to regulate research with the decisionally impaired population. Yet, during that time a number of significant societal, legal and medical changes took place that profoundly influenced attitudes toward the care and treatment of the decisionally impaired and may have affected the more recent proposals to regulate research with the decisionally impaired as well as how different groups now view the need for regulation of research with this group. These developments, described below, provide the backdrop for analyzing the recent proposals for regulation and the political reaction to them.

Deinstitutionalization

In the first half of the 20th century, aggressive efforts at finding treatments and cures for mental illness were undertaken in institutional settings. Although psychoanalysis or talk therapy, based on the work of Sigmund Freud in the late 1800s, had become the cornerstone of psychiatric practice, other, more interventionist, techniques were also developed with mixed results. Electroconvulsive therapy, a way of producing seizures through the administration of electrical shocks, became widespread in the treatment of psychosis. While effective in some patients, electroconvulsive therapy often resulted in disconcerting side effects, such as memory loss. During the 1930s, a surgical procedure known as a lobotomy, in which the frontal lobes of the brain were transected, was developed.

120 See id.
121 See RALPH REISNER & CHRISTOPHER SLOBOGIN, LAW & THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 870 (2nd ed. 1990).
were removed, was shown to reduce aggressiveness in animals. A modified form of the procedure was performed on humans.

While helping some of the mentally ill, these treatments were generally ineffective in the treatment of schizophrenia and the number of individuals in the country with the illness grew considerably. In 1954, however, a breakthrough in treatment of schizophrenia came with the availability of a drug called chlorpromazine, a tranquilizer. The new drug was able to sedate individuals without the systemic effects of other tranquilizers available at the time. Those who administered the drug to schizophrenic patients in mental institutions reported dramatic results. In the late 1950s and early 1960s, a number of other antipsychotic drugs came on the market. None were any more effective but they differed in terms of side effects and dosing requirements. These "antipsychotics" became widely available and allowed many who had spent years in institutions to live in the community.

124 See id. at 46 (stating that "[b]y 1960, about fifty thousand lobotomies had been performed in America, most on patients labeled incurable. Lobotomies reduced violent behavior in some patients but did not restore normal functioning. Many were left in a vegetative state, with severe brain damage; others developed seizure disorders. About 5 percent died."))
125 See id. ("In 1904, about two out of every one thousand Americans were diagnosed as schizophrenic. By 1955, that number had doubled").
126 Chlorpromazine is also known by the trade name Thorazine. It was the first of the antipsychotics, which are sometimes referred to as neuroleptics or drugs that act on the nervous system. See Merriam Webster’s Collegiate Dictionary 781 (10th ed. 1993) (a neuroleptic is “any of the powerful tranquilizers (as the phenothiazines) used especially to treat psychosis and believed to act by blocking dopamine nervous receptors...").
128 See Spiegel, supra note 127, at 39-40; see also Mindham, supra note 127, at 206.
129 See Stone, supra note 119, at 188. Examples of these early antipsychotics include haloperidol (Haldol) and thioridazine (Mellaril). See id.
130 See Mindham, supra note 127, at 207.
131 These drugs were specifically aimed at schizophrenia. While the drugs were effective, they all had significant side effects. Some of these side effects included "acute dysonia (muscle spasms) and akathisia (restlessness). Id. at 208. In addition, these agents
In 1955, the number of residents in mental hospitals was at its all time peak of 559,000.¹³² As the "introduction of neuroleptic drugs became widespread"¹³³ and individuals could be treated as outpatients, a long-term decline in the number of residents in these institutions began.¹³⁴ By 1970, the number of inpatients in these facilities was 339,000.¹³⁵ By 1978, the trend toward deinstitutionalization was well on its way.¹³⁶ In 1989 the number of institutionalized individuals was approximately 100,000.¹³⁷

While the process of deinstitutionalization began in the 1950s, fostered by exposés of sometimes abysmal conditions¹³⁸ and by the availability of major tranquilizers,¹³⁹ certain events accelerated the deinstitutionalization effort.¹⁴⁰ The push for deinstitutionalization was part of the larger "community mental health movement" advocated by President John F. Kennedy.¹⁴¹ As part of this movement, "[p]oliticians, mental health professionals, and others spoke out on behalf of the mentally ill, challenging the long-standing stigma against them. The government took a more active role in promoting mental health and were thought to have a greater likelihood of producing a long-term, irreversible neurological side effect known as tardive dyskinesia (uncontrollable muscle spasms). See id.


¹³³See id.

¹³⁴See id.

¹³⁵See id.

¹³⁶See id. at 199-200.

¹³⁷See DAVID A. ROCHEFORT, FROM POORHOUSES TO HOMELESsS: POLICY ANALYSIS AND MENTAL HEALTH CARE 219 (1993).

¹³⁸See id. In an illustrated exposé of the problems of mental health institutions in Life magazine in 1946 entitled "Bedlam 1946," journalist Albert Maisel called these institutions "a shame and a disgrace." Id. at 672. Some reports revealed that patients were being used as guinea pigs to test improbable hypotheses about the causes of mental illness. One physician, Dr. Henry Cotton, removed the tonsils and teeth of many patients, to prevent the infections that he believed could cause mental illness. Other physicians, believing that extreme fevers might reduce mental illness, exposed patients intentionally to infectious diseases such as malaria and typhoid to bring on a high fever. SHERROW, supra note 123, at 60.

¹³⁹See STONE, supra note 119, at 203.


¹⁴¹See id. at 82-85.
making services available to more people throughout the country.\textsuperscript{142} These activities included increased funding for the study of mental illness\textsuperscript{143} and a promise of increased federal support for the care of the mentally ill.\textsuperscript{144}

A combination of aggressive litigation and federal financial support for individuals outside of institutions further accelerated the deinstitutionalization of mentally ill individuals.\textsuperscript{145} A 1972 law suit, \textit{Wyatt v. Stickney},\textsuperscript{146} advanced the claim that involuntarily committed patients had a right to treatment.\textsuperscript{147} This treatment entailed, as one commentator opined, "staffing ratios and physical amenities so expensive that hospitals could not afford to meet them."\textsuperscript{148} As a result, while a few institutions did improve their conditions, many state mental hospitals began to discharge patients more rapidly in order to achieve improved staff-to-patient ratios.\textsuperscript{149} According to one author, in addition to other lawsuits, the availability of federal Supplemental Security

\textsuperscript{142}See SHERROW, supra note 123, at 55. This governmental interest in mental health was in large part a result of the military's experience during World War II. About 18 percent of draftees were rejected because of some type of mental illness. See id. at 56. Individuals who served in the war were also vulnerable to mental health problems due to the prolonged stress of military service. See id.

\textsuperscript{143}See id. at 57 (stating that, in 1946, Congress established the National Institute of Mental Health, which was to improve services for the treatment of mental health and conduct research on the causes of mental health problems).

\textsuperscript{144}See SHERROW, supra note 123, at 64. In 1955, Congress established the Joint Commission on Mental Illness and Health, which conducted the first "nationwide survey of mental illness in the United States." \textit{id.} at 64. In its 1960 report, the Commission made note of the disparity that had long existed in funding for mental health programs as compared to other medical problems and blamed the inequity "in part on unfair public perceptions of mental illness—for example, that it is often not recognized as illness and that the behavior of the mentally ill frightened and upset people." \textit{id.} In 1963, Congress passed the Mental Health Centers Act, which was to provide funds to communities to construct and staff community based mental health centers. See \textit{id.} at 65.


\textsuperscript{147}See \textit{id.} at 373.

\textsuperscript{148}See White, supra note 132, at 198.

\textsuperscript{149}See \textit{id.} at 199.
Insurance (SSI) in 1974 furthered the deinstitutionalization movement.\(^{150}\)

While many mentally ill patients were able to make the transition from institution to community successfully, residing in halfway houses or other supervised settings, others were not.\(^{151}\) Many, including the elderly with dementia, as well as those under sixty years of age with chronic mental illness, went to nursing homes.\(^{152}\) Also, because most states did not provide adequate outpatient services for this group, many became homeless and received no care or treatment.\(^{153}\) One might even describe them as having been socially abandoned.\(^{154}\)

This trend toward deinstitutionalization shifted the focus of regulation of research from the institutionalized mentally disabled to the broader population of individuals with decisional impairments.

**Autonomy and the Decisionally Impaired**

Other changes in the law and public policy reflect a movement from paternalism to autonomy, a recognition of the rights of the decisionally impaired to make their own decisions about a multitude of issues affecting their lives.\(^{155}\) This paradigm shift has led, for example, to some individuals who suffer from mental illness themselves becoming

\(^{150}\)See id. See also ANN BRADEN JOHNSON, OUT OF BEDLAM: THE TRUTH ABOUT DEINSTITUTIONALIZATION 98 (1990) (stating that in "the first year SSI was available, state hospitals saw a nationwide decrease in population of 13.3 percent, the largest decrease ever").

\(^{151}\)See JOHNSON, supra note 150, at 119.

\(^{152}\)See id. (quoting a 1977 U.S. General Accounting Office (GAO) Report stating that nursing homes had become the "largest single place of care for the mentally ill of all ages").

\(^{153}\)See id. at 181 (stating that after the institutions were closed, the mentally ill were to be given care in halfway houses or community centers, but officials and taxpayers never came up with enough money).

\(^{154}\)See Michael Winerip, Bedlam in the Streets, N.Y. TIMES, May 23, 1999, Section 6 (Magazine), at 42. See also Richard Jed Wyatt & Evan G. DeRenzo, SCIENCELESS TO HOMELESS, 234 SCI. 1309, 1309 (1986) (identifying a societal failure to conduct the research necessary to determine whether deinstitutionalization would, in fact, benefit the institutionalized).

\(^{155}\)See Arlene Mayerson, 1970's and Onward—The Civil Rights Perspective, in THE LEGAL RIGHTS OF CITIZENS WITH MENTAL RETARDATION 105 (Lawrence A. Kane, Jr., et al., eds., 1988).
more active participants in the debate about the regulation of research with this population.\(^{156}\)

**The Disability Rights Movement**

The disability rights movement, in particular, has had a profound effect on the care and treatment of those with cognitive and decisional impairments.\(^{157}\) In *The Legal Rights of Citizens with Mental Retardation*, Arlene Mayerson states that

> [A] profound shift in disability policy occurred in the decade of the 1970's. Rising visibility and activism in the disability rights movement, as well as passage of the first broad cross-disability piece of legislation, challenged traditional ideas about disability. The anthem of the disability rights movement became self-determination—disabled people demanded control over their own affairs on every level, from governmental decision-making to personal care. They attacked the medical model as oppressive. Doctors, social workers and other professionals were no longer accepted as the primary spokespersons; instead, disabled people began to speak for themselves.\(^{158}\)

As a result of the movement, disabled individuals established advocacy groups "to promote self-advocacy and independence."\(^{159}\) Groups such as "People First"\(^{160}\) emerged to enable individuals "with mental disabilities to gain a sense of power over their own lives, by developing means of self-help and support and establishing mental health and mental retardation services responsive to their needs."\(^{161}\) These groups


\(^{157}\)See Mayerson, *supra* note 155.

\(^{158}\)Id.

\(^{159}\)Id.

\(^{160}\)See *What Is People First* (visited Jan. 11, 2000) <http://www.open.org/~people1/whatis.htm> (describing People First as "developmentally disabled people joining together to learn how to speak for ourselves").

\(^{161}\)ROBERT M. LEVY AND LEONARD S. RUBENSTEIN, *The Rights of People with Mental*...
have undertaken noticeable efforts to influence legislative and regulatory policies regarding their care and treatment.¹⁶²

**The Law on Treatment Refusal**

Concurrently, courts began to change their views, questioning the "paternalistic" approach of institutions and recognizing the autonomy interests of patients.¹⁶³ Prior to the 1970s, courts, for the most part, deferred to institutional authorities in the care, treatment, and custody of institutionalized mental patients.¹⁶⁴ In 1972, with the federal court case of *Wyatt v. Stickney*,¹⁶⁵ courts started to recognize some rights of institutionalized patients. While the court ruled that institutionalized mentally ill patients had "a right to be free from unnecessary or excessive medication," the court did not recognize their right to refuse medication.¹⁶⁶ Yet, regarding research, the court stated, "[p]atients shall have a right not to be subjected to experimental research without the express and informed consent of the patient if the patient is able to give such consent, and of his guardian or next of kin, after opportunities

¹⁶²In the early 1990s over 800 self advocacy groups joined together to establish a national organization called Self Advocates Becoming Empowered (SABE). The group has developed "an advocacy agenda calling for the phase-down and closure of all state operated" institutions for the developmentally disabled in the U.S. See also SABE USA’s Online Directory (visited Jan. 22, 2000) <http://www.sabeusa.org> (describing organization).


¹⁶⁴See id. This approach contrasted markedly with court decisions affirming the right of non-institutionalized individuals to make decisions about their care and treatment. While the requirement for informed consent, for example, was already adopted by the courts for most individuals, it was not required for individuals in mental hospitals. See also *Paul S. Appelbaum, Almost a Revolution: Mental Health Law and the Limits of Change* 118 (1994) (discussing informed consent).


¹⁶⁶*Id.* at 400.
for consultation with independent specialists and with legal counsel...."\(^{167}\)

In 1978 and 1979, federal district courts in New Jersey\(^{168}\) and Massachusetts\(^{169}\) issued opinions concluding that involuntarily committed mental patients had a legal right to refuse antipsychotic drugs.\(^{170}\) While courts have differed in their approaches to these cases and the rationale supporting their determination, most courts have now recognized a right to refuse medication and other therapies by institutionalized mental patients.\(^{171}\)

**The Law on Civil Commitment**

The move away from paternalism and toward autonomy is further reflected in changes in civil commitment laws. Specifically, the basis for civil commitment shifted from the need to treat to the need to confine those deemed a danger to themselves or others.\(^{172}\) This policy shift was in large part the result of the holding in *Lessard v. Schmidt*,\(^{173}\) a 1972 federal court decision. In *Lessard*, a federal district court held that "the state must bear the burden of proving that there is an extreme

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\(^{167}\)Id.


\(^{170}\)See Cichon, *supra* note 163, at 286.

\(^{171}\)See *id* (stating that courts have differed on the right’s legal source and, in particular, on the procedural safeguards necessary to protect the right). Historically, state courts were quicker to recognize the right of a mentally ill patient to refuse medication than the federal courts. From 1980 to 1990, federal courts that addressed the issue, adopted a professional judgment standard under which “patients could not refuse medication unless the decision to administer drugs constituted a substantial departure from accepted judgment, practices or standards.” William M. Brooks, *Reevaluating Substantive Due Process As a Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 IND. L. REV. 937, 939 (1998). Since 1990, however, the Supreme Court has heard two cases involving a psychiatric patient’s right to refuse medication while in prison or while pending trial. In these cases, the Court appears to have embraced a “broader reading of the right to refuse” treatment under the federal Constitution. *Id* at 940.


\(^{173}\)See *id* at 1078.
likelihood that if the person is not confined he will do immediate harm to himself or others."174 In addition to defining dangerousness narrowly, the Lessard court called for greater due process safeguards in the commitment process.175 These requirements included representation by counsel, adequate notice of charges justifying detention, attendance at the hearing, exclusion of hearsay evidence, the privilege against self-incrimination, and a standard of proof beyond a reasonable doubt.176

By the end of the 1970s, all states had commitment laws that resembled the substance of the Lessard decision.177 These statutes either restricted commitment to persons who were dangerous to themselves or others (defining dangerousness to include "grave disability" as well), or were interpreted as already providing these requirements so as to remain constitutionally valid.178 These changes were not without controversy. According to some critics, these laws made it nearly impossible to commit patients involuntarily.179 One author stated that "a patient must literally be slashing his wrists or brandishing a weapon before he can be held in a hospital."180 Opposition to this view stems in large part from a concern for civil liberties.181 Advocates for the mentally ill are sharply divided on the issue: "[w]hile parent advocacy groups want to change the rules on involuntary commitment, patient groups want to keep the policy strict," that is, continue to make it difficult to institutionalize the mentally ill against their will.182

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174 See id. at 1093.
175 See id.
176 See id.
177 See APPELBAUM, supra note 164, at 28.
178 See id.
180 Id.
181 See White, supra note 132, at 201.
182 Id. In response, it appears, to concerns of parent advocacy groups, the restrictive standards of some states have been relaxed. Since the late 1970's, some states have expanded their restrictions for commitment beyond the justification of an immediate likelihood of harm to self or others. See APPELBAUM, supra note 164, at 49. In 1979, a Washington State statute
The Law on Guardianship and Advance Care Planning

Another example of the law's movement to afford those with decisional incapacities more autonomy involves the effort to limit the scope of state court guardianship orders. A 1976 Washington statute mandated that courts impose only such "specific limitations and disabilities on a disabled person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance." Under this standard, persons "institutionalized as mentally infirm...retain the right to consent or refuse to consent to research absent specific evidence concerning inability to exercise that right." The limited guardianship movement was largely supported by developments in thinking about decisional incapacity and its ties to functional ability. Capacity, it was recognized, was not an all or nothing issue, rather capacity is nuanced, with different levels of capacity required for different tasks. While courts do not consistently write limited guardianship orders, a significant majority of "state legislatures have taken major strides in recognizing the need for and appropriateness of limited orders." redefined grave disability to include "severe deterioration in routine functioning" of a person's physical and mental condition. WASH. REV. CODE ANN. § 71.05.020(1) (1995). Also, a North Carolina statute broadened the definition of danger to self to include behavior that is grossly irrational, inappropriate, or a sign of severely impaired judgment, creating a presumption that patients cannot care for themselves. N.C. GEN. STAT. § 122-58.2 (1995). In addition, several states have expanded their commitment criteria, facilitating hospitalization of certain classes of mentally ill persons. See APPELMAN, supra note 164, at 49. These states are Alaska, Arizona, Colorado, Hawaii, Kansas, Rhode Island, and Texas. See id.


Id.

See Hurme, supra note 183, at 157–161.


Parallelizing the adoption of "limited guardianship" provisions has been the establishment of guidelines for the execution of advance directives. Today, all states have statutory regulations regarding some type of advance directive (living wills and durable powers of attorney (DPA) for health care). These documents allow individuals, while competent, to express their wishes for medical treatment should they become decisionally incapacitated, especially concerning life-prolonging medical treatment. While virtually all states had enacted living will laws by the early 1980s, practitioners (both physicians and health law attorneys) soon realized that there were significant limitations to the static nature of living wills and advocated, instead, that individuals execute a DPA in which they could name a trusted family member or friend to make medical treatment decisions on their behalf should they become incapacitated. In these documents, patients might also express their wishes for medical treatment according to a number of hypothetical medical scenarios.

109 Living wills are written expressions of an individual's wishes regarding receipt of medical treatment if they should become terminally ill and medically incapacitated. See William J. Curran et al., Health Care Law and Ethics 637 (5th ed. 1998).

109 A recent survey of advance directive legislation of all fifty states and the District of Columbia found that, as of July 1999, 48 states have living will statutes. See ABA Commission on Legal Problems of the Elderly, Health Care Surrogate Decision-Making Legislation (visited Apr. 18, 2000) <http://www.abanet.org/elderly/health.html>. The exceptions are Massachusetts and Michigan. Of those states, 16 have a combined advance directive statute merging DPA's for health care and living wills. See id. These states are Alabama, Arizona, Connecticut, Delaware, Florida, Hawaii, Kentucky, Maine, Maryland, Minnesota, Mississippi, New Jersey, New Mexico, Oklahoma, Oregon, and Virginia. All 50 states and the District have some type of health care DPA statute, whether it be contained in a combined statute or only within a living will statute. See id. Eleven states currently have special mental health advance directive statutes. These states are Alaska, Hawaii, Idaho, Illinois, Minnesota, North Carolina, Oklahoma, Oregon, Texas, Utah, and Wyoming. See id.


109 See id. at 35 (describing the statutory constraints contained in living-will type laws).

109 See Barry R. Furrow et al., Health Law 715 (1995) (stating that "[i]n the early 1990s, the durable power of attorney quickly became the preferred form of advance directive").

Advance directives have also been developed as a tool for choice in psychiatric treatment and research participation. The Bazelon Center for Mental Health Law, for example, offers a "Psychiatric Advance Directive" that allows for both the designation of a proxy and "instructions about hospitalization and alternatives to hospitalization, medications, electroconvulsive therapy (ECT), emergency interventions (including seclusion, restraint and medication) and experimental studies or drug trials." Commentators have also analyzed the circumstances under which advance directives of this kind might be used. Moreover, advance directives (specifically, DPA) have been used by subjects in dementia research at the Clinical Center of the National Institutes of Health and are included in the more recent proposals to regulate research with the decisionally impaired.

Proxy Decision Making

At the same time that legislatures were passing laws authorizing the implementation of advance directives, in furtherance of the autonomy interest of people who wished to anticipate future periods of incapacity, it became clear that many individuals were disinclined to execute these documents. Other mechanisms were needed to allow for

198 See infra note 242 and accompanying text.
199 See FURROW, supra note 193 at 715.
decisionmaking regarding end-of-life care for individuals lacking decisional capacity. As a result, many states passed new laws or expanded existing surrogate consent laws allowing family members, and, in some cases, close friends of a patient, to make medical treatment decisions for an individual lacking decisional capacity.201

By 1999, thirty-seven states had passed surrogate health care consent statutes.202 In many states devoid of such statutes, courts articulated approval of surrogate consent.203 In both court decisions and statutes, the surrogate was expected to decide consistent with the patient's preferences and values (if known), or if not known, then consistent with what would be in the patient's best interest.204 This movement was facilitated by a presumption that family members are trustworthy and are better able to make these types of decisions for patients than are the courts.205 This was particularly true in the area of end of life decisionmaking. While state legislatures and state courts recognized the authority of surrogates (agents and family members) to consent to an incapacitated person's receipt of medical treatment, for the most part they did not address consent to participation in research.206 Yet, the legal recognition of family decisionmakers in the realm of clinical decisionmaking paved the way for families to have a voice in the research context.

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201 Typically, these surrogate consent statutes listed, in order of priority, who could make these various decisions, see, e.g., Virginia's Health Care Decisions Act, A1) guardian or committee; 2) patient's spouse; 3) adult child of patient; 4) parent of patient; 5) adult brother or sister of patient; or 6) any other relative of patient in descending order of blood relationship. Va. Stat. § 54.1-2986 (A) (Michie 1998).
203 See Furrow, supra note 193, at 718. See also New York State Task Force on Life and the Law, When Others Must Choose: Deciding for Patients Without Capacity (1992) 33-35 [hereinafter New York State Task Force].
204 See New York State Task Force, supra, note 204 at 35.
205 See id. at 51.
206 See Hoffmann & Schwartz, supra note 15, at 125.
Advances in the Treatment and Diagnosis of Mental Illness and Diseases of the Brain

Another historical factor shaping the current debate regarding the regulation of research with the decisionally impaired is the progress that has been made in the treatment and diagnosis of mental illness and diseases of the brain. Twenty-five years ago, when the Commission's recommendations were first published, there had not been long-term experience with antipsychotics and other drugs for the treatment of mental illness, and the psychiatric research and treatment community was somewhat divided between those advocating psychotherapy and those advocating pharmacotherapeutic agents. Today, drug therapy is the primary approach to treatment of individuals with serious psychiatric illness. There appears to be a consensus now that "[p]sychoanalysis and its derivatives...have not proved to be effective as primary treatment for serious psychiatric illness (e.g., schizophrenia and manic-depressive illness). That view, along with the development of effective medications for the treatment of these disorders, "led to a quiet revolution within American psychiatry and a return to its medical roots."

While the development of psychotropic medications revolutionized psychiatry and led to deinstitutionalization in the 1970's, many of the most promising breakthroughs in drug treatment have been relatively recent. In the last decade a number of new drugs for the treatment of schizophrenia—including, risperidone, olanzipine and

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208 See id.
209 Id.
210 Id. This revised understanding about the methods of psychiatric care evolved "over a period from the late 1960s to the 1980s. During those years, psychiatry changed more fundamentally than did any other area of medicine." Id. at 34.
211 See E. Fuller Torrey, Mental Disorders are Medical Diseases, in MENTAL ILLNESS: OPPOSING VIEWPOINTS 264, 269 (William Barbour, ed. 1995). In the late 1970s and eighties there was a hiatus in new drug developments for treatment of mental illness. See id. The lack of developments in this area may have been due in part to the lack of research money given to NIMH. See id. According to one author, "by 1985 the federal government was spending the same amount of research money on schizophrenia as it was on tooth decay." Id.
quetiapine—all with many fewer side effects than the prior generation of drugs, were approved by the FDA.\textsuperscript{212} Newer drugs have also been recently developed for the treatment of depression.\textsuperscript{213} These medications, known as selective serotonin reuptake inhibitors (SSRIs), are used more extensively than the older “tricyclics.”\textsuperscript{214} The more common use of the SSRIs has been attributed to “a less problematic side effect profile in these drugs, their lack of toxicity when taken in overdoses, and their ease of administration (once-a-day dosing).”\textsuperscript{215} In addition to these developments, the first two drugs for the treatment of Alzheimer’s disease were approved by the FDA within the last few years.\textsuperscript{216}

While drug developments have received attention, probably the most significant progress in psychiatric research during the past twenty years has been our heightened neuroscientific understanding of the brain.\textsuperscript{217} The development of magnetic resonance imaging (MRI) and positron emission tomography (PET) scans have enabled scientists to actually observe the brain and have offered psychiatric researchers the

\textsuperscript{212} See Grayson Norquist & Steven E. Hyman, \textit{Advances in Understanding and Treating Mental Illness: Implications for Policy}, \textit{Health Aff.}, Sept. 1, 1999, at 38. These new drugs, referred to as “atypical antipsychotics” do not require weekly blood monitoring and are better able to treat “the negative symptoms of schizophrenia such as withdrawal from social contacts.” \textit{Id.} at 38-39. They are also significantly more expensive than the older drugs they have begun to replace. \textit{See id.} at 40.

\textsuperscript{213} See \textit{id.}

\textsuperscript{214} See \textit{id.}

\textsuperscript{215} See \textit{id.} at 39.


opportunity to test hypotheses that they were previously unable to test.\(^{218}\)

These gains in psychiatric research and treatment have occurred in large part because of the involvement of mentally ill individuals in that research. In the debate over current efforts to regulate this research, researchers believe such efforts may lead to sacrificing future gains in understanding and treating mental illnesses and brain disorders.

**REGULATORY POSSIBILITIES AND POLICY CAUTION: THE LATE 1990s AND BEYOND**

**Recent Governmental Initiatives**
Against this background of prior regulatory failure and an increasingly complex legal and medical environment, the recent state and federal governmental initiatives to more stringently regulate research with the decisionally impaired, reflect a noteworthy insistence that the protection of these vulnerable subjects requires a renewed effort to find a policy solution.\(^{219}\) Within a six-month span in 1998, a Maryland working group, convened by the Maryland Attorney General, recommended state legislation on research involving "decisionally incapacitated subjects;"\(^{220}\) a New York advisory work group, convened by the New York Commissioner of Health, recommended regulations on research involving "protected classes," including adults who either lack or are likely to lose decisional capacity;\(^{221}\) and the NBAC, created by President Clinton in 1995, issued a lengthy report and policy

\(^{218}\)See Norquist & Hyman, *supra* note 212, at 36.

\(^{219}\)In addition to the three initiatives discussed in the text, the National Institutes of Health has developed what it terms "points to consider," which it has posted on its web site "to assist IRBs and clinical investigators in their effort to protect participants who are, or may be, or may become decisionally impaired." National Institutes of Health, *Interim - Research Involving Individuals with Questionable Capacity to Consent: Points to Consider* (visited Dec. 23, 1999) <http://grants.nih.gov/grants/policy/questionablecapacity.htm>.

\(^{220}\)MARYLAND REPORT, *supra* note 1, at 1.

\(^{221}\)NEW YORK REPORT, *supra* note 1, at 28-33.
recommendations on research involving "persons with mental disorders that may affect decisionmaking capacity."\textsuperscript{222}

Of these three initiatives, only New York's effort was the result of litigation. In \textit{T.D. v. New York State Office of Mental Health},\textsuperscript{223} plaintiffs—consisting of patients involuntarily hospitalized at various New York State psychiatric facilities who had been adjudicated incapable of consenting to medical treatment—challenged regulations promulgated by the Office of Mental Health.\textsuperscript{224} The plaintiffs alleged that, under the regulations, they could be forced to participate in research without their consent.\textsuperscript{225} The regulations were struck down at the trial court level because they were not consistent with a state statute requiring the Commissioner of Health to consent to all research involving children and incompetent adults.\textsuperscript{226}

On appeal, the appellate court upheld the trial court decision, and further deemed the regulations invalid based on additional statutory, common law, and constitutional grounds.\textsuperscript{227} The appellate court decision raised concern among researchers nationwide who feared they might be prevented from conducting scientifically valuable research on the psychiatric population.\textsuperscript{228} However, New York's highest court, while upholding the lower court decisions, ruled that, in declaring the

\begin{footnotesize}
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\item \textsuperscript{222}NBAC REPORT, supra note 1, at 2.
\item \textsuperscript{224}See T.D. v. New York State Office of Mental Health, 626 N.Y.S.2d at 1017.
\item \textsuperscript{225}See id.
\item \textsuperscript{226}See id. at 1021.
\item \textsuperscript{227}See T.D. v. New York State Office of Mental Health, 650 N.Y.S.2d at 183. See also Hoffmann & Schwartz, supra note 15, at 129 (noting that based on the appellate court decision, residents in a New York state facility operated or licensed by the Office of Mental Health who lack decision-making capacity [could] not be subjects in any (non federally funded) research determined to be "non therapeutic" and to pose a greater than minimal risk unless the individual (prior to incapacity) gave "specific consent or designated a suitable surrogate from whom such consent" could be obtained).
\item \textsuperscript{228}See Hoffmann & Schwartz, supra note 15, at 129.
\end{itemize}
\end{footnotesize}
regulations invalid on additional grounds, the appellate court had issued "an inappropriate advisory opinion." 229

As a result of the trial court's original ruling, however, a regulatory vacuum existed, and the Commissioner of Health could hardly fill it without first obtaining expert advice about the relevant ethical and policy issues. 230 The other two efforts, however, were entirely discretionary. The Maryland Attorney General perceived a problem—a gap in both federal and state law concerning proxy consent for research participation—and sought to develop a consensus on how to address it. 231 NBAC chose the issue of research involving decisionally impaired subjects as a topic for its first report on non-genetic human subjects research. 232 Thus, the Maryland and NBAC initiatives, in particular, suggest that at least some in the policy arena believe that the conduct of research with impaired-capacity subjects is a problem, not simply a condition. The distinction is important for the development of public policy—"[f]or a condition to be a problem, people must become convinced that something should be done to change it." 233

A belief that something should be done, however, is but the first step and does not necessarily imply agreement about the nature of the remedial action. Among the three governmental initiatives, one finds broadly similar recommendations in a number of areas as well as areas of disagreement. 234 All three initiatives adopted similar frameworks in

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230 See id. at 185 (noting that the Commissioner of Health would likely issue new regulations governing human subjects research in response to the court's invalidation of the regulations).
231 See Hoffmann & Schwartz, supra note 15, at 134. In light of uncertainty about the authority of agents and surrogates to consent to participation in research on behalf of decisionally impaired individuals, as well as the strong and differing views expressed by some researchers and advocates, the Maryland Attorney General's Offices established what was called a "Working Group" to begin a dialogue on the issue. Id.
232 See Exec. Order No. 12,975, 60 Fed. Reg. 52,063, 52065 (1995) ("[As a] first priority" the NBAC was to assess the "protection of the rights and welfare of human research subjects").
234 Because it is a federal entity, NBAC addressed some matters—for example,
their regulatory approach. Research on this population was first divided into two categories: research affording the prospect of direct medical benefits to participants and research without this prospect. Research was also categorized according to level of risk. Although proxy decisionmakers are given authority to enroll those lacking capacity in research, more protections are required, and greater restrictions on proxy decisionmakers are imposed, if research has no prospect of direct medical benefit or poses more than minimal risk. Many points emphasized are substantively similar to points emphasized in the earlier regulatory efforts by DHEW. These include:

- **Need for research with this population.** Researchers should not recruit subjects with impaired capacity if the research could be done with other subjects.

- **Justification of research design.** Researchers should be expected to pay especially careful attention to the risk-benefit profile of research involving these subjects.

- **Informed consent.** Individuals with psychiatric or other disorders potentially affecting their decision-making capacity are not, for that reason alone, disqualified from giving informed consent for research membership on an IRB by individuals who can represent the subject population—that were thought by Maryland and New York to be beyond the scope of a state effort. The omission of these matters from the Maryland and New York reports does not necessarily imply disagreement with NBAC.

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236 See id. at 139.

237 See id. at 139-49 (discussing Working Group’s consideration of five factual scenarios concerning research protocols with different levels of risk and potential benefits).

238 See NBAC REPORT, supra note 1, at 10; NEW YORK REPORT, supra note 1, at 30; MARYLAND REPORT, supra note 1, at 3, A8-A9.

239 See NBAC REPORT, supra note 1, at 10; NEW YORK REPORT, supra note 1, at 30-31; MARYLAND REPORT, supra note 1, at 3, A13-A16.
participation. Researchers should pay careful attention to capacity assessment.\textsuperscript{240}

- \textit{Assent and objection}. Potential research subjects who are incapable of giving informed consent but who are capable of giving assent—that is, explicit, albeit not informed, permission—for research participation should be asked for assent. Individuals should not be compelled to participate in research over their objection.\textsuperscript{241}

Newer provisions, not included in earlier regulatory drafts, but common to all three recent proposals include:

- \textit{Advance planning for research}. Individuals with present capacity who can anticipate future incapacity (for example, people with early Alzheimer's disease) should be able to express their wishes about future research participation. They should also be allowed to pick their own "legally authorized representatives." The exact effect of planning documents, however, was one area of disagreement among the three governmental efforts.\textsuperscript{242}

- \textit{Research involving the prospect of direct medical benefit or involving no greater than minimal risk}. Family members or others who may authorize clinical care for an incapacitated patient should be permitted to authorize participation in these categories of research.\textsuperscript{243}

\textsuperscript{240}See NBAC Report, supra note 1, at 57-58; New York Report, supra note 1, at 32; Maryland Report, supra note 1, at 3, A9-A11.

\textsuperscript{241}See NBAC Report, supra note 1, at 57-58; New York Report, supra note 1, at 32; Maryland Report, supra note 1, at 3, A21-A23.

\textsuperscript{242}See NBAC Report, supra note 212, at 61; Maryland Report, supra note 210, at 3.

\textsuperscript{243}See NBAC Report, supra note 1, at 53-54. Earlier proposals for research with institutionalized individuals, including the National Commission Report, did not include
Areas of disagreement among the three proposals include:

- **Characterization of the subject population.** To the dismay of many commentators, NBAC focused its analysis on "persons with mental disorders that may affect decisionmaking capacity." Maryland and New York considered that decisional incapacity itself, regardless of its clinical origin, was the key factor in identifying a class of vulnerable subjects.

- **Independent capacity assessment.** According to NBAC, when research involves greater than minimal risk, a professional who is independent of the research team should assess the potential subjects' capacity to consent, unless "there are good reasons" for using a less formal procedure. Neither Maryland nor New York would mandate this kind of independent capacity assessment.

- **Levels of risk and proxy authority.** NBAC recognized consent by a family member even at this level of risk. Patient assent or lack of objection was required. If a patient objected to participation, additional protections were required. See supra note 229 and accompanying text; MARYLAND REPORT, supra note 1, at 4; NEW YORK REPORT, supra note 1, at 26-27.

244See NBAC REPORT, supra note 1, at 2. NBAC acknowledged that "[p]ersons with mental disorders are not...unique in being at risk for loss of decisionmaking capacity." NBAC REPORT, supra note 1, at 5. NBAC explained rather cryptically that it "principally focused its attention on those who may be primarily considered for research protocols because it is their particular mental disorder that is being studied." Id. Taking NBAC to task for retaining its "mental disorders" focus despite vehement objections during the public comment period, one prominent psychiatrist accused NBAC of perpetuating "outmoded stereotypes." Robert Michels, Are Research Ethics Bad for Our Mental Health?, 340 NEW ENG. J. MED. 232, 1427-30 (1999).

245See MARYLAND REPORT, supra note 1, at 3; NEW YORK REPORT, supra note 1, at 2.

246See NBAC REPORT, supra note 1, at 58; This recommendation is similar to the "consent auditor" recommendation of the National Commission. See supra text accompanying notes 86 and 94.

247See MARYLAND REPORT, supra note 1, at 3; NEW YORK REPORT, supra note 1, at 30.
only two levels of risk, minimal and greater than minimal. In NBAC's view, when research presents greater than minimal risk and no prospect of direct medical benefit, a legally authorized representative should have authority to agree to research participation in an IRB-approved protocol only if the protocol were also approved by a special federal review panel. This approach, in the view of many commentators, would present a formidable barrier to various types of research involving, most significantly, brain imaging procedures like MRI. These and similar procedures have been viewed as falling into an intermediate risk category, "minor increase over minimal risk." Both Maryland and New York retained this intermediate risk category. Maryland would allow only a relatively small subset of legally authorized representatives (proxies named in durable powers of attorney for health care) to agree to an incapacitated subject's participation in this kind of research. New York would allow a broader group of legally authorized representatives (family members acting as surrogates) to do so.

Aftermath of the Initiatives—Policymakers' Caution
Each of the three initiatives recommended policy action. NBAC recommended amendments to the federal regulations governing research on human subjects, the New York task force recommended new Health Department regulations, and the Maryland working group

248 See NBAC REPORT, supra note 1, at 54. The NBAC envisioned that, after acquiring sufficient experience with protocol-by-protocol review, the federal panel would adopt guidelines enabling IRB approval of certain types of greater-than-minimal-risk research. See id.

249 See, e.g., Michels, supra note 244, at 1428 ("The NBAC considers the present system for evaluating a patient's capacity to consent to dangerous treatment inadequate even to assess the capacity to consent to MRI for research purposes").

250 This characterization of an intermediate level of risk is found in the Department of Health and Human Services regulations governing research with children. See 45 C.F.R. § 46.406(a) (2000).
recommended enactment of a statute. However, none of the recommendations has been implemented thus far.

Although the Secretary of Health and Human Services has taken NBAC's report under advisement, no regulatory action seems likely in the near future. Moreover, NBAC requested states "to confirm, by statute or court decision" that proxies for clinical purposes have authority to act as "legally authorized representatives" and that friends as well as relatives be able to serve in this capacity. NBAC also requested state legislatures to ensure that "persons who choose to plan for future research participation are entitled to choose" their research proxies. No state legislature has yet acted on these recommendations.

Action pursuant to the New York recommendations has been delayed in part by the resignation of the former Commissioner of Health and appointment of a successor, who would naturally require time to familiarize herself with the issues. Action has also been delayed because the recommendations produced sharp criticism from both advocates and researchers. A series of articles that appeared in the New York Post on the task force recommendations in early 1999 provide some insights into the politics of the situation. According to one article, John Cardinal O'Connor, "evoking Nazi Germany, warned...that the recommendations were dangerous" and "[a]dvocates for the mentally ill vowed to go to court if necessary to block them." A subsequent article stated that "hundreds of advocates for the mentally ill protested at the Capitol" against what they viewed as recommendations supporting "state-sponsored drug experiments using

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251 See NBAC REPORT, supra note 1, at 53; MARYLAND REPORT, supra note 1, at 2; NEW YORK REPORT, supra note 1, at 29.
252 See NBAC REPORT, supra note 1, at 52.
253 See id. at 52-53.
255 See infra notes 256-260.
vulnerable people as 'human guinea pigs.'” The article further recounted that Cardinal O’Connor, prior to a meeting on this issue with Governor Pataki, said that “to allow experiments with some risk—and no benefit to the subject—on adults who are too ill to consent on their own... could be a potentially horrifying thing.”

A short time later, an article appeared expressing the views of the research and medical community. The article described how many of the city’s leading hospitals and medical schools were lobbying the state to relax the proposed regulations and that they had “warned the state Health Department that the regulations will stifle research and cause drug companies to divert their funding to states that have less red tape.”

The Maryland Attorney General’s effort to win passage of detailed regulatory legislation collapsed after a divisive legislative hearing. On the one hand, a representative of the pharmaceutical manufacturers complained of the burdens that the proposal would place on researchers, and academic medical centers lamented the additional burden on IRBs. On the other hand, the Maryland Catholic Conference and various patient advocacy and disability rights groups attacked the proposal as opening the door to exploitation of vulnerable people.

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257 Id.
258 Id.
260 Id.
261 See GENERAL ASSEMBLY OF MARYLAND FINAL STATUS REPORT OF PROPOSED LEGISLATION (1999 Session) (reporting that SB 307 was reported out unfavorably by the Judicial Proceedings Committee) [hereinafter GENERAL ASSEMBLY OF MARYLAND].
262 See testimony of the Pharmaceutical Research and Manufacturers of America in Opposition to Maryland Senate Bill 307 (March 8, 1999) (on file with the authors). See also testimony of David B. Mallot, M.D., Associate Professor of Psychiatry and Associate Dean for Medical Education, University of Maryland, Baltimore (March 11, 1999) (on file with the authors).
263 See testimony of The Maryland Catholic Conference on Senate Bill 307 Presented Thursday, March 11, 1999 by Richard J. Dowling; testimony of The Arc of Maryland in opposition to SB 307 (March 11, 1999); testimony of Jamey George (for MCIL Resources for
proposal and discomfited by the controversy, promptly voted to halt the bill.\textsuperscript{264}

\textbf{A More Complicated Context for Regulation}

Today, as compared to twenty years ago, the context in which the debate over regulation of research with the decisionally impaired takes place is a much more complex one, with strong and cogent voices on each side. Arguments for and against the need for this type of regulation push and pull policymakers in opposite directions and make significant regulatory change a slim possibility at present.

\textit{The Pull for the Status Quo}

Today, arguments of the potential for great breakthroughs in research on psychiatric illnesses and diseases of the brain pull policy makers in the direction of opposing more stringent regulation of research in this area. With the relatively recent development of brain imagining techniques, researchers are hoping to find "biological indicators" for specific mental illnesses.\textsuperscript{265} In fact, "intensive efforts are under way to find such markers based on abnormalities found in brain structure or functioning for many mental disorders and on abnormalities in cognitive testing."\textsuperscript{266}

These recent developments bolster researchers' contentions that greater progress is imminent and regulations now will impede breakthroughs that may result not only in treatment of many forms of mental impairment but also in cures for these devastating illnesses.\textsuperscript{267}

\textsuperscript{264}See \textit{GENERAL ASSEMBLY OF MARYLAND}, supra note 261.
\textsuperscript{265}See Norquist & Hyman, supra note 212, at 36.
\textsuperscript{266}Id.
\textsuperscript{267}See Robert Pear, \textit{Inspector Warns of Hazards in Experimental Drug Tests}, THE \textit{PLAIN DEALER}, May 30, 1998, at A8 (stating that "[s]cientists are reporting explosive growth in promising new biomedical research, with hundreds of products being tested on tens of thousands of patients, including children and people with severe mental illnesses"). \textit{See also} Weiss, supra note 156, at A6 (quoting David Shore of the National Institute of Mental
Some members of NBAC, in fact, argued that the NBAC proposals went too far and would, in all likelihood, stifle important and needed research.268

Another argument of those opposed to more regulation in research is that researchers and IRBs are already adopting many of the suggestions called for by the recent regulatory proposals. These critics argue that, although there has been no change in this area since 1973 on the federal level either legislatively or through regulation, some subtle but recognizable changes are being made.

These changes are likely to be a response to the availability and visibility of the proposals by the prestigious NBAC and the states of Maryland and New York, but other factors may also be at play. For example, researchers may fear additional litigation such as the T.D. v. New York State Office of Mental Health case in New York, as well as the revitalized enforcement efforts of NIH's Office of Protection from Research Risks (OPRR) and the accompanying potential loss of research dollars.269 As one prominent psychiatric researcher, Dr. Health as saying, "[t]his is probably not the best time to put the brakes on...since the science is now progressing very fast and Congress has recently become generous with funds").

268See NBAC REPORT, supra note 1, at 85-86 (Bernard, Lo, dissenting)

[T]he Commission's recommendations...raise barriers to research that involves only small increases over minimal risks and is likely to result in important knowledge about the participant's disease. Hence, the recommendations will thwart a better understanding of the pathophysiology of the diseases that impair decisionmaking capacity, while providing little additional protection to vulnerable subjects. This is not the correct balance between protecting vulnerable persons and developing better treatments for patients with brain disorders.

Id. See also Patricia Maldonado, Presidential Commission Makes Recommendations to Protect Mentally Ill, BOSTON GLOBE, Nov. 18, 1998, (reporting that, in a letter to the Commission, Dr. Robert W. Buchanan of the Maryland Psychiatric Research Center, said "some of the commission's recommendations "reinforce concerns' among researchers that the commission is "antipsychiatric research").

William Carpenter, recently commented, "Although I believe much of the present public attention is ill-informed and unfair, the field has received a wake-up call." He outlined several suggestions for heightened subject protection that he said "have worked well" at his research facility. These included soliciting patient comment on proposed research and consent forms, including clinicians other than research investigators in the capacity assessment and informed consent process, conducting the informed consent process as a bona fide "educational procedure" with special efforts to overcome the "therapeutic misconception," and providing "educational and sensitivity-raising sessions in ethics for investigators and staff." NIMH is also proposing the implementation of guidelines designed to provide additional protections for decisionally impaired research subjects.

Another example of incremental change in this area is direct involvement by patient volunteers and advocates in IRBs. The National Alliance for the Mentally Ill (NAMI) has initiated a program to train and place NAMI members on IRBs across the country. With the first group of NAMI trainees almost fully placed, and the NAMI Program presented at a recent meeting of IRB members and administrators, NAMI is receiving requests for trainees and other advocacy groups are discussing training their members.


270 See William T. Carpenter, Jr., The Challenge to Psychiatry as Society's Agent for Mental Illness Treatment and Research, 156 AM. J. PSYCH. 1307 (1999).
271 Id. at 1309-10.
274 See id.
275 See id.
276 See id.
The Push for More Stringent Regulation

On the other hand, the push for more stringent regulations gains momentum with every new account of research abuses of vulnerable persons depicted in the popular press. These have not been limited to research on the decisionally impaired but have included research with racial minorities, the terminally ill, and other patients. For example, only recently has the federal government unequivocally apologized for the Tuskegee Syphilis study. In addition, a 1995 federal report revealed ethical lapses in a number of studies involving radiation, including some in which decisionally impaired subjects were involved.

Recent press coverage has described questionable research practices across a wide spectrum including research with individuals who are mentally ill or have other decisional impairments. Some articles have focused on conflicts of interest, in which physicians pressure patients into enrolling in clinical trials so that the physicians may receive the enrollment fee paid by the drug company testing their product. Other articles have exposed physician researchers engaging in fraudulent reporting of data in order to satisfy drug sponsors. These articles erode public trust in the research enterprise.

Generally, articles discussing research on the mentally impaired have focused on a few controversial types of research. These include washout and challenge studies. Washout studies require that

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277See infra notes 278-82 and 293.
280See infra notes 291-294.
281See Kurt Eichenwald & Gina Kolata, Drug Trials Hide Conflicts for Doctors, N.Y. TIMES, May 16, 1999, at A1 (stating that SmithKline Beecham P.L.C., was paying $1,610 for each patient that doctors signed up and that doctors can earn as much as $500,000 to $1 million a year for recruiting patients into clinical drug trials).
282See Kurt Eichenwald & Gina Kolata, A Doctor’s Drug Studies Turn into Fraud, N.Y. TIMES, May 17, 1997, at A1 (reporting on practices of Dr. Robert Fiddes who allegedly became rich by “conducting research fraud of audacious proportions, cutting corners and inventing data to keep the money flowing from the drug industry.”)
individuals be taken off their medication for a period of time. In studies seeking an understanding of the physiology of mental illness, scans are then taken of the brain to observe the natural course of the disease and its impact on the brain. Washout may also be necessary to make sure an individual is cleansed of one drug before a new drug is offered as part of a clinical trial. Challenge studies also require that individuals be taken off their medications. Research subjects are given drugs that exacerbate symptoms or induce psychosis. These “challenge agents” enable scientists to use the subjects as models for studying psychotic illnesses.

Articles in the lay press have focused on the risks inherent in these studies. In a number of cases, individuals were allegedly harmed and were not given informed consent prior to enrollment in the studies. Reports that a schizophrenic patient who had participated in a washout study committed suicide in 1991 by jumping off the roof of a building at the University of California at Los Angeles were taken by critics as damning evidence of the risks associated with this type of research. A series in the Boston Globe in November 1998 focused, in large part, on patients who were enrolled in washout and challenge studies without being told that they might experience relapses or be exposed to drugs

253 See infra note 293.
254 NBAC REPORT, supra note 1, at 13-14. Sometimes these medication free periods are referred to as “drug holidays.” Id. at 14.
255 See id.
256 See id. at 14 (“[S]uch a protocol often seeks to return the individual to a medication free baseline state so that behavior can be assessed or new drugs introduced without the confounding factor of other substances already in the person’s system”).
257 See id.
258 See id.
259 NBAC REPORT, supra note 1, at 13.
260 See infra notes 291-93.
261 See Philip J. Hilts, Agency Faults a UCLA Study for Suffering of Mental Patients, N.Y. TIMES, Mar. 10, 1994, at A1 (reporting that the OPRR found that the experiment “failed to comply with the requirements of H.H.S. regulations by not telling patients the extent of the risks they would be asked to take and not telling them that ordinary treatment would be safer for most of them”).
that would exacerbate their symptoms.\textsuperscript{293} An editorial appearing in the Globe on the heels of the series characterized the articles as presenting "an ethical wasteland where doctors not only cause anguishing psychotic symptoms in formerly functioning patients, but occasionally drive them to suicide."\textsuperscript{294} Individuals who bring forth this list of abuses argue that, while regulation of research with this population is necessary, the regulatory proposals do not go far enough.

Researchers defend this type of research by arguing that the conditions being studied are uniquely human conditions and there are no animal models for developing treatment.\textsuperscript{295} Researchers further contend that the risks of these studies have been exaggerated and that adequate safeguards for subject welfare are in place.\textsuperscript{296} The goal of these studies, according to the NBAC, "is to generate disease manifestations in a controlled setting so that they can be more fully understood and so that appropriate interventions can be designed, attempted, and evaluated."\textsuperscript{297} Yet, the NBAC Report raised several questions about these studies including whether it is "possible to obtain informed consent to participate in a study designed to provoke symptoms" and "whether the relationship between risks and potential benefits can ever justify enrolling individuals in such studies when the protocols include intentionally inducing what would otherwise be considered harmful."\textsuperscript{298} Those arguing for more stringent regulations express skepticism about the ability of IRBs to protect research subjects. Rejecting arguments that self improvement by IRBs is sufficient without additional regulations, critics argue that there are deeper, more fundamental

\textsuperscript{295}See Whitaker & Kong, supra note 293.
\textsuperscript{297}Id. See also Franklin G. Miller & Donald L. Rosenstein, Psychiatric Symptom-Provoking Studies: An Ethical Appraisal, 42 BIOLOGICAL PSYCHIATRY 403 (1997) ("Encouraging open discussion of potentially problematic psychiatric research coupled with refinement of research guidelines may obviate excessive regulatory restrictions that could hamper valuable research and its contribution to improved patient care").
\textsuperscript{298}See NBAC REPORT, supra note 1, at 13-14.
problems with the IRB system that these modifications do not address. For example, a June 1998 report of the Department of Health and Human Services Office of the Inspector General identified deficiencies in IRB oversight and concluded that IRBs are under considerable stress—faced with many more protocols for review than they can adequately handle. Others have criticized IRBs as being captives of the institutions over which they preside, heavily dominated by researchers and others motivated by the cash flow that comes to academic institutions from research grants, with only a token member from the community or representative of patient interests.

The Politics of Change—Alliances and Divergences Among Advocacy Groups for the Mentally III and those with Dementia

The complexity of regulating research in this area is further compounded by unexpected political alliances and rifts between advocacy groups that, in other circumstances, would be regarded as allies. New voices of patients, not heard twenty-five years ago; differences in perspective based upon disease category; and diverging interests between patients and family members have splintered stakeholders that might otherwise be unified in their approach to this issue.


301 See Sundram, supra note 117, at 49-50 (referring to the 1996 GAO Report which raised concerns about IRB “lack of independence, and collegial and institutional pressures upon IRB members that cloud their role as a safeguard on research practices”).


303 See Weiss, supra note 156, at A6 (stating that regulating psychiatric research “has even split the vociferous community of patient advocates, including the 185,000-member National Alliance for the Mentally Ill (NAMI). One camp perceives research as the key to
Patient advocacy groups have been the strongest proponents of research with decisionally impaired, even research that requires the involvement of persons unable to provide their own informed consent. Advocacy groups representing Alzheimer's disease patients have long been supporters of research, actively entering into partnership with researchers to assist in study advertisement and recruitment. Advocates for psychiatric patients, particularly NAMI, have also been strong supporters of research. Yet many factors have contributed to differences of opinion between these two patient groups regarding the regulation of research with those lacking decisionmaking capacity, including differences in disease manifestation and sequelae. Specifically, Alzheimer's disease is a late-onset disorder. Although there are subsets of the disorder that present in middle life, the overwhelming majority of cases surface at the end of the life span. Because of this fact, persons who suffer from Alzheimer's disease are likely to remain in the care of their extended families from whom they curing mental illness and wants to assure that new regulations are not unduly restrictive. The other camp sees its former colleagues as having sold out to wealthy pharmaceutical companies and private research enterprises, which in recent years have sought to integrate themselves into the patient advocacy movement.

In 1982, the Alzheimer's Association initiated its own grants program and since then "has awarded $60 million in research funding." The Association "has a long commitment to the direct support of research grants as well as a commitment, through public policy efforts, to increase federal funding for Alzheimer's disease research. See Alzheimer's Association (visited Jan. 24, 2000) <http://www.alz.org>. See also Local Opportunities for Participation in Research (visited Jan. 24, 2000) <http://www.alzcmd.org> (Maryland Chapter of the Alzheimer's Association website listing local clinical trials and other research opportunities for Alzheimer's patients.)


See id. ("The prevalence of dementia from all causes, ranges from 5% to 10% among persons age 65 and older and the rate increases exponentially as age advances").
can draw much support and sympathy. In contrast, psychiatric illness tends to strike much earlier in life, leaving many persons with psychiatric illness unable to finish school, start or sustain careers, or establish their own families. Unlike Alzheimer’s disease patients who have had a chance to contribute to society and raise a family, it is not uncommon for persons with psychiatric disease to have caused much burden and heartache for their families for many years. Much more so than in the Alzheimer’s context, a split exists between persons with mental illness and their family members regarding research on this population and how it should be regulated. As might be expected, relatives of individuals with a psychiatric disease are largely supportive of regulations that allow for family consent to participation in research of a patient lacking decisional capacity. Some individuals with mental illness, however, fear that they might, all too quickly, be tagged as decisionally impaired and enrolled, by a member of their family, in a clinical trial in which they would not wish to participate. The division is analogous to the debate over the laws for civil commitment—family members of the mentally ill would like to see the laws loosened to allow more flexibility in committing mentally ill


309See Laura Lee Hall & Laurie Flynn, Consumer and family concerns about research involving human subjects research, in Ethics in Psychiatric Research 219-38 (Harold Alan Pincus et al. eds., 1999).

310See id.

311See id.

312See id.

313Amici in the T.D. case criticized the New York regulations on research with institutionalized patients as allowing surrogates to consent to such participation without guidelines that require them to consider what the patient would have wanted or what would be in their best interest and argued that “without proper guidelines, surrogates may be influenced, however, subconsciously, by such improper considerations as the perception that the patient's continued care is dependent on participation in research, or desperation for a cure even when the research is non therapeutic.” Brief for proposed Amici Curiae, The Bazelon Center for Mental Health Law, et al. T.D. v. New York State Office of Mental Health, 650 N.Y.S.2d 173 (App. Div. 1996)(No. 5136/91). See also Richard Ketai et al., Family Influence in the Recruitment of Schizophrenic Research Subjects, 138 AM. J. PSYCHIATRY 351 (1981) (finding “striking manipulation” by family members to have their schizophrenic relatives participate in high risk research).
patients so that they can be treated; mentally ill patients prefer the narrow criteria of "dangerousness" to remain the commitment standard.\textsuperscript{314}

Another difference in disease manifestation has contributed to differences in the political force of each of these groups. Alzheimer's disease is a disease of the modern age. It has only been in the twentieth century that persons have lived long enough to develop the disorder. Psychiatric disease, in contrast, has been observed and recorded throughout all of human history. These differences, in part, contribute to the differentials in social stigma associated with these diseases. Although we now know that the loss of our mental faculties in late life is not normal aging but a manifestation of brain disease, we still tend to feel more kindly to our elderly neighbor when we find him or her wandering, disoriented and confused, than we do towards the young schizophrenic who gets on the subway with us, talking to him or herself and gesticulating in the air. These differential emotional reactions—pity versus fear, sympathy versus aversion—also contribute to differences in funding streams and reimbursement for care of persons with either of these conditions.\textsuperscript{315}

Thus, the sectors of support for research that, by the very nature of the questions it asks, involves persons decisionally unable to provide their own informed consent, have been composed mostly of physician-investigators, patient family members, and the friends of science in the halls of the U.S. Congress and state legislatures. Those raising concerns about the vulnerability of these subjects, and thus the need for caution and increased protections, on the other hand, have been disability rights advocates, medical ethicists and former decisionally-

\textsuperscript{314}See supra note 182 and accompanying text.

\textsuperscript{315}See Winerip supra note 154, at 45-46. The differences in social support for these two kinds of conditions show themselves in how their care is paid for by our society. See id. Much of our tax dollars goes to taking care of persons with Alzheimer's disease. See id. These are the residents of our nation's nursing homes who are taken care of with Medicaid dollars. See id. According, however, to a 1998 study by The Bazelon Center for Mental Health Law, "[f]ewer than half of the Americans with schizophrenia receive adequate care" and "spending by the 50 states on treatment for the seriously mentally ill is a third less today than it was in the 1950s (once numbers are adjusted for inflation and population growth)." Id.
impaired subjects, themselves.\textsuperscript{316} The former is a political alliance of the strong and powerful. The latter is a political alliance of what traditionally has been the weak and fragmented. As a result of many of the societal, legal and medical changes that have taken place in the last twenty years—deinstitutionalization, the disability rights movement, increased rights of the disabled to refuse medical treatment and limitations on our ability to institutionalize them or appoint a guardian to make decisions for them, and the development of medications that allow many of those with mental illnesses to function in the community—the voices of those with mental illness and disorders that affect the brain are now being heard. Yet, these voices are not speaking in unison and further complicate the future of regulatory initiatives.

\textbf{Longer Run Prospects—Working Toward the Opening of the Policy Window}

Given the history of controversy in this area and the sharply differing views of many participants in the debate, inaction on the three sets of recommendations to regulate research on the decisionally incapacitated is not surprising. This is especially true given the inability to reach consensus on the core ethical issue, that is, whether research that poses more than a minimal risk may be ethically conducted on persons who are both unable to give consent and unlikely to benefit from participation in the research. Indeed, the most likely short-term outcome is that the irreconcilable views of influential forces (researchers, academic institutions, pharmaceutical manufacturers, patient rights groups, family advocates, religious organizations) will lead policymakers to view inaction as the safest course.\textsuperscript{317}

Yet, policy inaction does not necessarily mean that progress on this issue will not continue. The very fact of three governmental initiatives, ratifying simultaneously the need for greater care when

\textsuperscript{316}See Wichman, \textit{supra} note 197, at 93 ("Vulnerable research subjects are people who are relatively or absolutely incapable of protecting their interests").

\textsuperscript{317}In that event, advocates might pursue a litigation-oriented strategy, with unpredictable consequences. If other courts were to accept the now-vacated opinion of the intermediate appellate court in \textit{T.D.}, policy change will be constitutionally compelled. \textit{See supra} notes 223-230, and accompanying text.
capacity-impaired subjects are enrolled in research, helps change the *zeitgeist*, the set of expectations that researchers and IRBs bring to the conduct and review of this type of research. The policy proposals, or publicity about them, may also have contributed to the phenomenon of improved self-regulation discussed above. Many psychiatric researchers, for example, will pay more attention than ever to capacity assessment and risk reduction. IRBs will continue to expand their membership to include those who can better represent the perspective of impaired-capacity subjects. Assent procedures will be made more explicit. None of these changes requires regulatory or legislative action. That they are incommensurable does not make them insubstantial.

Moreover, the struggles over the NBAC, Maryland, and New York reports may be viewed as an essential, albeit often frustrating, part of policy development. Policy change occurs, according to the trenchant analysis of a leading political scientist, John W. Kingdon, when three "streams of processes" come together: "(1) problem recognition, (2) the formation and refining of policy proposals, and (3) politics."\(^{318}\) At certain times, "when a policy window opens," these three streams merge into action: "A problem is recognized, a solution is available, [and] the political climate makes the time right for change...."\(^{319}\)

In other countries with significant biomedical research activities, the time has been right for change. In Canada, the Tri-Council Working Group completed and submitted its Code of Ethical Conduct for Research Involving Humans to the Medical Research Council of Canada (MRC), the Natural Sciences and Engineering Research Council of Canada (NSERC), and the Social Sciences and Humanities Research Council of Canada (SSHRC).\(^{320}\) This Code includes several articles specifically limiting the conditions under which persons unable to provide their own informed consent can be entered into research.\(^{321}\)

\(^{318}\) See KINGDON, supra note 233, at 87.

\(^{319}\) *Id.* at 88.


\(^{321}\) See *id.*
In Europe, the Council of Europe also issued convention articles explicitly limiting the involvement of persons in research unable to give their own voluntary consent.322

In the United States, the very existence of the three governmental initiatives, against a backdrop of extensive analysis and commentary in the academic literature,323 suggests that research with impaired-capacity subjects is now recognized as a problem. Still missing, as the reaction to the initiatives demonstrates, is anything approaching consensus about a solution. Thus, formal adoption of even modest regulatory proposals may still be far off. In Maryland, for example, the Attorney General recently proposed a drastically revised bill characterized by that office as "incrementally helpful in protecting vulnerable subjects, not unduly burdensome to investigators or IRBs, focused on matters that even people who disagree sharply about other things might accept as common ground, and relatively short and uncomplicated."324 Avoiding the most controversial areas in the bill rejected earlier in the year, the Attorney General's more recent proposal did not try to define "legally authorized representatives" or allocate authority by reference to risk categories. Nor did it address research advance directives. In that respect, the proposal maintained the status quo. In essence, the proposal merely sought to remind investigators and IRBs that they


324See Letter from Jack Schwartz, Maryland Assistant Attorney General, to Multiple Recipients (Oct. 6, 1999) (on file with the authors).
needed to think carefully about the welfare of these research subjects and that they are accountable to the public for their decisions.\textsuperscript{325}

Most who commented on the new proposal, including some who had opposed the Attorney General’s original proposal, agreed that it represented a step forward, with modest benefits for subjects and no appreciable burden on the research enterprise. The pharmaceutical manufacturers, however, continued to oppose any additional state regulation. Moreover, one influential patient advocacy group also opposed the revised proposal, arguing that it was inadequate because it did not, for example, prohibit controversial procedures like “washout” studies.\textsuperscript{326} Under the circumstances, the Attorney General concluded that the proposal still could not generate sufficient legislative support and withdrew it.

This latest episode in the Maryland policymaking process exemplifies the difficulty of trying to achieve consensus even on narrow issues in this public, legislative debate. As Kingdon observes, policy change can be accomplished if a proposal is “available, worked through, and ready to go.”\textsuperscript{327} This cannot now be said about research with impaired-capacity subjects. Indeed, the core ethical disagreement may never be resolved\textsuperscript{328} and future legislative and regulatory initiatives

\textsuperscript{325}See id. The proposal contains a requirement for IRB review of research, whatever its funding source, involving “decisionally incapacitated individuals” and individuals with a “potentially incapacitating condition”; a requirement for investigators to describe their plans for capacity assessment and assent, together with protection for subjects who refuse to assent; a requirement for an IRB to consider the investigator’s plans as well as other appropriate measures to protect the research subjects, to document the IRB’s decisions in its minutes, and to respond to valid complaints; and provisions for public access to IRB minutes and approved consent documents and for research subject access to research protocols, with protection for proprietary information. \textit{Id.}

\textsuperscript{326}See supra notes 283-294, and accompanying text.

\textsuperscript{327} KINGDON, \textit{supra} note 233, at 143.

\textsuperscript{328}In part, this may be a result of a lack of empirical data informing the policy debate. At present, we do not know how many decisionally impaired individuals are harmed as a result of their participation in research, nor do we know how the various proposals put forward would affect actual research \textit{e.g.,} whether they would prevent some beneficial forms of research. \textit{Sec. e.g.,} Letter from Laura L. Cain, Esq., \textit{Maryland Disability Law Center}, to The Honorable Walter Baker, \textit{Senate Judicial Proceedings Committee}, regarding SB 307, The Decisionally Incapacitated Research Subject Protection Act (Mar. 11, 1999) (on file with the authors) (stating that “[w]e find no credible evidence to support a claim that research or advancements
may simply be history repeated: prolonged, contentious debate followed by inaction. Against this pessimistic view, however, must be set both short-term gains and long-term possibilities. Actual progress has been and likely will continue to be registered in less formal ways, as funding agencies, academic institutions, IRBs, and researchers adopt reforms that they regard as ethically sound and practically feasible. This kind of incremental, ad hoc reform is likely to be responsive to educational initiatives, the development of professional guidelines, and, not least, the possibility (or threat) of formal regulation. Consequently, without the pressure that efforts to achieve policy change exerts, progress on this front may be elusive.

An additional reason for continued pursuit of a policy consensus is that sometimes years of effort unexpectedly pay off. As Kingdon points out, the framing of a solution that fits a problem, is broadly endorsed by policy advocates, and is politically acceptable often takes considerable time. Those working on possible solutions ("policy entrepreneurs," Kingdon calls them) must be willing "to invest their resources—time, energy, reputation, and sometimes money—in the hope of a future return." Policy advocates need time to refine their arguments, engage competing solutions, educate policymakers and the public, float trial balloons, and assess technical feasibility and cost. "Softening up seems to be necessary before a proposal is taken seriously. Many good proposals have fallen on deaf ears because they arrived before the general public, the specialized publics, or the policy communities were ready to listen. Eventually, such a proposal might be resurrected, but only after a period of paving the way." Just as the debate over DHEW's proposed rules and the National Commission's recommendations began the "softening up" process a quarter-century ago, so the three recent governmental initiatives carried it significantly forward. For the sake of the research subjects to whom society owes a special duty of care, and for the sake of the moral values that should be

in the treatment of mental disorders or impairments would halt in the absence of a pool of decisionally-incapacitated subjects").

329 KINGDON, supra note 233, at 122.
330 Id. at 130.
at the heart of the research enterprise, governmental agencies or bodies should continue to develop regulatory proposals for public review and debate.