…. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding." Justice Louis D. Brandeis

En masse subpoenaing of abortion and pregnancy records: a disturbing attack on medical records privacy

Hannah Stein

In today's world, it is increasingly difficult to keep one's personal information private. The internet has made access to public records easy, large corporations collect personal information and sell it to other corporations, and data thieves hack into accounts or trick the unwary into revealing sensitive private information.[1]

One of the most private and sensitive sorts of information is personal health information – what people generally refer to as their medical records. Peoples' medical records are intimately revealing, utterly personal, and extremely vulnerable to misuse by the unscrupulous.[2] Indeed, people are often so protective of such sensitive information that *any* sort of use not related to actual ongoing care is likely to feel like misuse.[3]

In response to these concerns, as well as the very real prospect of the misuse of certain types of medical records, the Federal and State governments have enacted various pieces of legislation to ensure the privacy of medical records.[4] Some of these laws have targeted only

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[1] *See Examining medical privacy issues, focusing on the standards for privacy of individually identifiable health information (private rule) and the proposed modification to those standards: Heading Before the Senate Committee on Health, Education, Labor, and Pensions*, 107th Cong. 421, 1 (2003) (statement of Sen. Edward Kennedy).

[2] Danel Michelle Nickels, *Casting the Discovery Net Too Wide: Defense Attempts to Disclose NonParty Medical Records in a Civil Action*, 34 IND. L. REV. 479, 486-489.

[3] *See id.*

[4] James G. Hodge, Jr. and Kieran G. Gostin, *Challenging Themes in American Health Information Privacy and the Public Health: Historical and Modern Assessments*, 32 J. L. MED & ETHICS 670, 670 (Winter 2004).

certain types of medical records; some have addressed medical records across the board.[5] Joined with common law doctor-patient privilege and possible constitutional privacy protections, these laws create a patchwork of protections for health information.[6]

However, in some areas, what one arm of the government has protected, another arm of the government is attempting to expose. Across the country, both federal and state prosecutors have begun crusades, attempting to use the subpoena power to gain access to sensitive medical records en masse.[7] Specifically, prosecutors have been attempting to force family planning clinics to hand over, for example, the names, addresses, and medical records for all the women who have taken pregnancy tests within a span of a few months.[8] Other prosecutors have attempted to compel abortion providers to produce all the medical records for women who have had certain types of abortions – or any abortions.[9]

These are not prosecutors seeking medical information of people who are parties to a case, or even witnesses.[10] They are seeking the information of thousands of women who have no connection to a case at all.[11] In some instances there is not even a case in progress, and no evidence that a crime has even been committed; the records are being subpoenaed simply to

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[5] Lisa M. Boyle and David M. Mack, HIPAA: A GUIDE TO HEALTH CARE PRIVACY AND SECURITY LAW 1:21-:25 (2004).

[6] *Id.*

[7] *See, e.g.*, Jodi Wilgoren, *Kansas Prosecutor Demands Files on Late-Term Abortion Patients*, NEW YORK TIMES, Feb. 25, 2005; *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir 2004).

[8] Wayne Loewe, *Is Pregnancy a Privacy Issue?* CNN.COM, Aug. 13, 2002, *available at* http://archives.cnn.com/2002/LAW/08/13/ctv.planned.parenthood/.

[9] Wilgoren, *supra* note 7.

[10] *Id; see also supra* note 8.

[11] *Id*.

search for possible infractions, much as all the houses in a neighborhood might be searched in case one contains evidence of a crime.[12]

This article will explore the legality of such mass subpoenas. In section I, this article will discuss the arguments for and against the protection of personal health information. Section II will detail current law regarding the privacy of personal health information. Section III will explain which law applies to which medical record requests. Section IV will outline the subpoena power. Section V will address restraints on the subpoena power. Section VI will discuss recent cases involving mass subpoenas. Finally, in Section VII this article will argue that en masse subpoenaing is an unwarranted violation of the legitimate expectation of privacy that women have in seeking reproductive services, and will discuss the dangerous precedent en masse subpoenaing sets for *any* individual seeking *any* medical care.

I. Arguments for and against the protection of medical records

Several arguments have been advanced for and against protecting medical records. The laws have struggled to reconcile privacy concerns with the legitimate need to sometimes make limited use of medical records.[13] By exploring the reasons for privacy and the needs of society, one can better analyze and apply these laws.[14] First, this article will lay out the arguments for privacy. Next, it will address the arguments for public use of medical records.

A. Medical records privacy: why it is important

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[12] *Id.*

[13] Wendy Parmet, *Public Health Protection and the Privacy of Medical Records*, 16 Harv. C.R.-C.L. L. Rev. 265, 265-266 (Summer 1981).

[14] *See* Robert J. Conroy and Mark D. Brylski, *Access to Medical Records v. Patient's Privacy Interests*, 173-Dec N.J. LAW. 25.; *see also* Lawrence I. Gostin *et al*, *The Nationalization of Health Information Privacy Protections*, 8 CONN. INS. L.J. 283, 305 (2001-2002)

Many people have advanced a primarily utilitarian argument supporting the privacy of medical records.[15] Specifically, the argument is one of deterrence: if people know their personal health information will be broadcast to the world, they are less likely to seek care for health problems.[16] This is particularly true if the health information will be of a sensitive nature.[17] For example, it seems reasonable to assume that people will be much less likely to seek HIV testing if there is even a small chance that they will be exposed to their community as HIV positive.[18] This reasoning has been applied to other sensitive areas, such as substance abuse treatment and mental health services.[19]

Aside from the utilitarian arguments, however, there is an equally important visceral concern: people simply feel very protective of their personal health information and do not want it disseminated.[20] The Seventh Circuit recently likened abortion medical records to nude photos in that even if abortion records were stripped of all identifying information, the subject would likely feel violated if the records were distributed without their consent.[21] While abortion

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[15] Patricia I. Carter, *Health Information Privacy: Can Congress Protect Confidential Medical Information in the "Information Age"?*, 25 Wm. Mitchell L. Rev. 223, 232 (1999)

[16] *Id.*; *see also* BOYLE, *supra* note 5, at 1:3. *But see* Parmet, *supra* note 13, at 274 ("it is a very questionable assertion that people would not seek medical treatment if their medical records were not confidential.")

[17] *See* Carter, *supra* note 15, at 231-232.

[18] Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451, 490-491 (March 1995); *See also* James G. Hodge, Jr. and Lawrence O. Gostin, *Personal Privacy and Common Goods: A Framework for Balancing Under the National Health Information Privacy Rule*, 86 MINN. L. REV. 1439, 1446 (June 2002).

[19] *See id.*; *see also* The Public Health Service Act, 42 U.S.C. § 290dd-2 (2005) (substance abuse treatment confidentiality provisions).

[20] *See* Gostin, *supra* note 18, at 489; *see also* Carter, *supra* note 15, at 231.

[21] *Northwestern Memorial Hospital*, 362 F.3d at 929.

medical records are (as the court noted) more sensitive than many other sorts of medical records, people are protective of even standard health information.[22] They tend to feel that their medical records, like their naked bodies, are pointedly "none of anyone else's business."[23]

Additionally, there are many indications that even if disclosure of medical records is theoretically "limited" or "protected" there is a significant risk that it may get out anyway.[24] Part of this is based on actual incidents where private data was disclosed to people who shouldn't have seen it (sometimes with disastrous results).[25] Part of it is common sense: the more people who see your records, the more likely it is that someone you know will see them, or that

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[22] *Id.*; see also BOYLE, *supra* note 5, at 1:2-3. Both sides of the political spectrum have voiced this opinion. *See, e.g.*, ACLU, *FAQ on Government Access to Medical Records* (May 30, 2003), *at* http://www.aclu.org/Privacy/Privacy.cfm?ID=12747&c=27; Phyllis Schlafly, *Clintonites Close in on Our Medical Records* (April 7, 1999), *at* http://www.eagleforum.org.

[23] *Id.*

[24] *See, e.g.,* Jane Daugherty, *Email Gaffe Reveals HIV, AIDS Names*, PALM BEACH POST, Feb. 22, 2005 (confidential list of 6,500 local people with HIV and AIDS was accidentally mass-emailed out to over 800 county employees); Jarvis v. Wellman 52 F.3d 125, 125 (6th Cir. 1995) (father, in jail for rape and sexual abuse of his children, obtains unauthorized access to his daughter's medical records and those of her infant child); United Press International, *Medical Records Jam Cleveland Traffic*, SCIENCE DAILY, April 6, 2005 (thousands of confidential medical records blow out of the back of a truck and all over the city streets); Sen. Natasha Stott Despoja, *Privacy Breaches Illustrate Urgent Need for Genetic Privacy Laws*, AUSTRALIAN DEMOCRATS, Jan. 07, 2003, *at* http://www.democrats.org.au/news/?press_id=2326&display=1; Office of the Australian Privacy Commissioner, *Media Release: Case Notes Shed Light on Financial Information Handling*, Mar. 26, 2003, *at* http://www.privacy.gov.au/news/media/03_3.html (discussing a case wherein a staff member of a financial institution looked up information about another person's investment account and told the staff member's family)

[25] *Id.*

someone will talk about them, or that they will accidentally be disclosed.[26] The strong desire for privacy and the legitimate fear of disclosure have prodded passage of a number of bills, most notably the privacy provisions in the Health Insurance Portability and Accountability Act ("HIPAA").[27]

B. Arguments for public use of private medical records

There are equally strong arguments for some disclosure of personal health information. In some areas, the public good is clearly served by use of such information.[28] For example, a community has a strong claim to be alerted to the sudden outbreak of a communicable disease. Private medical information can also be of great help when compiled into statistics to study public health.[29]

Most importantly from the perspective of this article, medical records are often essential to litigation.[30] A defendant in a tort suit, in order to conduct a defense, must be able to see the medical records of a plaintiff claiming physical injury.[31] And law enforcement officers – particularly prosecuting attorneys – must be able to obtain medical records of various parties to

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[26] *See id.*; *see also Northwestern*, 362 F.3d at 929-30.

[27] Robert W. Woody, *Health Information Privacy: The Rules Get Tougher*, 37 TORT & INS. L.J. 1051, 1052 (Summer, 2002).

[28] Gostin, *supra* note 18, at 453-454.

[29] Hodge, Jr., *supra* note 18, at 1440; *see also* Carter, *supra* note 15, at 279-280.

[30] Craig D. Tindall, *HIPAA and Medical Records: A Primer for the Personal Injury Lawyer*, 40-Dec ARIZ. ATT'Y 32, 34 (Dec. 2003); *see also* Lynne Bernabei and Andrew Schroeder, *Protect Clients' Private Health Records: In Employment Cases, Knowing How and When to release Medical Records Keeps Irrelevant Information Out of Court and Protects your Client's Privacy*, TRIAL 32 (Sept. 2004)

[31] *Id.*

their cases (for example, the medical records of a defendant claiming self-defense in an assault case).[32]

II. Current law regarding the privacy of medical records

The law has acquired some interesting twists in its attempt to satisfy all the concerns laid out in Section I above. First, this section will mention possible constitutional protections for medical records. Next, the section will outline the federal laws regarding the privacy of medical records which have been enacted to date. Finally, state law addressing the protection of health information will be discussed.

A. Possible Constitutional protections for medical record privacy

In *Whalen v. Roe*, the Supreme Court hinted that the government may have a Constitutional duty to keep medical records in its control private.[33] The court implied that some balancing of interests was required to determine whether the Constitutional protection had been violated.[34] While the Supreme Court has not spoken since on the subject, lower courts have affirmed and explored the Constitutional duty.[35]

Whalen dealt with a New York law establishing a database of prescriptions issued for certain drugs which have a high probability of abuse (such as heroin).[36] Those writing such prescriptions were required to report them for addition to the database.[37] Doctors challenged the law, stating their concern that the fact of the database would cause people genuinely in need of

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[32] *See id.*

[33] *Whalen v. Roe*, 429 U.S. 589, 605-606 (1977).

[34] *Id.* at 602, 605-606.

[35] *See, e.g., In re Crawford*, 194 F.3d 954 (9th Cir 1999); *Doe v. City of New York*, 15 F.3d 264, (2d Cir 1994).

[36] *Whalen*, 429 U.S. at 592-596.

[37] *Id.*

such medications to decline them out of fear of being labeled “drug abusers.”[38] The Court held that the statute provided sufficient protections for the information to be Constitutionally sound.[39] However, it noted “the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files” and warned that such accumulation may raise a Constitutional “duty to avoid unwarranted disclosures.”[40]

Though that case did not did not delineate the suggested Constitutional requirement, lower courts have attempted to do so.[41] In *U.S. v. Westinghouse Electric Corporation*, the government was attempting to subpoena the medical records of the defendant’s employees in order to ascertain whether the employees were being adversely affected by chemicals in the workplace”[42] In that case, the Third Circuit explained *Whalen* as holding that the Constitution protects “the right not to have an individual's private affairs made public by the government.”[43] The court emphasized that this right expressly included medical records: “There can be no question that… medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the "private enclave where he may lead a private life.""[44] The government may legitimately obtain medical

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[38] *Id.* at 595.

[39] *Id.* at 605-606.

[40] *Id.*

[41] *See supra* note 35 and accompanying text.

[42] *U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570, 572 (3d Cir 1980).

[43] *Id.* at 577.

[44] *Id.* The court also noted the special treatment accorded to medical records in other contexts. *Id.*

records, the court held, only when “the societal interest in disclosure outweighs the privacy interest on the specific facts of the case.”[45]

Similarly, in *Doe v. City of New York*, the Second Circuit labeled the right explained in *Whalen* as a constitutional right to “confidentiality.”[46] In that case, an HIV-positive man (“Doe”) settled a discrimination case with Delta Airlines in a proceeding which was supposed to be confidential.[47] Subsequently, without alerting Doe or asking his permission, the City of New York Commission of Human Rights published a press release on the settlement containing sufficient information that Doe’s co-workers and family identified him.[48] Doe suffered ostracism and embarrassment as a consequence.[49] The court held that Doe had a Constitutional right to confidentiality which had been violated by the unnecessary disclosure of his HIV status.[50] In determining whether Doe had such a right, the court weighed the sensitivity of the information involved and the probable (and indeed actual) consequences of disclosure. Once it was determined that the right existed, in order for the government to Constitutionally disclose Doe’s confidential information, the court held that “the city's interest in disseminating

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[45] *Id.* at 578.

[46] *Doe v. City of New York*, 15 F.3d at 267.

[47] *Id.* at 265.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 267. “Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over.”

information concerning conciliation agreements must be "substantial" and must be balanced against Doe's right to confidentiality."[51]

Finally, *In re Crawford*, a case dealing with public disclosure of an individual's Social Security number, the Ninth Circuit discussed what it termed the "right of informational privacy."[52] The court held that the right was not absolute, but rather involved "weighing competing interests to determine whether the government may properly disclose private information."[53]

However, one Circuit at least has gone the opposite direction. In *J.P. v. DeSanti*, juveniles protested compilation and dissemination of their "social histories."[54] The Sixth Circuit held that the court's applicable statements in *Whalen v. Roe* were incidental and did not create a constitutional right to confidentiality.[55] The Sixth Circuit re-affirmed this holding with a slight qualification in *Jarvis v. Wellman*, wherein a woman sued the correctional system for allowing her father (in jail for raping and sexually abusing his children) access to her medical records and to those of her infant child.[56] Denying the woman's claim, the court stated: "Disclosure of plaintiff's medical records does not rise to the level of a breach of a right recognized as "fundamental" under the Constitution."[57]

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[51] *Id.* at 269.

[52] *Crawford*, 194 F.3d at 958-59.

[53] *Id.* at 959.

[54] *J.P. v. DeSanti*, 653 F.2d 1080, 1082 (6th Cir 1981). These histories were created when the juvenile entered the juvenile justice system and were then disseminated to 55 different governmental, social, and religious agencies.

[55] *Id.* at 1089-90.

[56] *Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995).

[57] *Id.*

This constitutional theory has been applied in the arena of mass subpoenas of medical records. In *Planned Parenthood Federation of America, Inc. v. Ashcroft*, the Northern District Court of California denied a mass subpoena which demanded the medical records of all of the plaintiffs' patients who had had certain second-trimester abortion procedures.[58] The court relied on three grounds, each of which the court found to be independently adequate to sustain the denial of the subpoena.[59] One of the grounds was the Constitutional protection from *In re Crawford*; the court held that the "balancing of the relevant considerations" favored nondisclosure.[60] Cited reasons included the extremely sensitive nature of the information (both the abortion itself and the surrounding circumstances: for example, sexual abuse, sexually transmitted diseases, marital status, and contraception use), the potential injury to the patient-physician relationship should the records be disclosed, and the marginal benefit that would accrue to the government via disclosure.[61]

There are two different kinds of cases here: cases like *In re Crawford* and *Doe v. City of New York*, which involve actual governmental disclosure of obtained private health information, and cases like *Planned Parenthood* and *U.S. v. Westinghouse*, which involve a governmental request for information. A fundamental concern of *Whalen* was the use of governmental power to collect massive amounts of sensitive information, and whether such use of governmental power carried with it a concomitant duty to protect the gathered information from unnecessary

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[58] *Planned Parenthood Fed'n of Am. v. Ashcroft*, No. C03-4872 PJH, 2004 U.S. Dist. WESTLAW 432222, at *2 (N.D.Cal. Mar. 5, 2004).

[59] *Id.* at *1. The court also found that the requested information was irrelevant and that production would be unduly burdensome.

[60] *Id.* at *2.

[61] *Id.*

disclosure.[62] The latter cases implicitly treat the court as a gatherer and disseminator of information as opposed to the executive branch as a party to the lawsuit.[63] The government action seems to be the subpoena itself; the dissemination which is constitutionally questionable is the granting of the subpoena (and thus the disclosure of the sensitive information) to the government.[64] This is similar to state action doctrine in Constitutional law, wherein governmental enforcement itself (even of contracts between private parties) is government action and subject to Constitutional limitations.[65]

B. Federal laws protecting medical privacy

The Federal government has passed several laws which give various measures of protection to medical records. The most comprehensive was the Health Insurance Portability and Accessibility Act ("HIPAA"), which lays out a basic floor of protection for all "personal health information."[66] However, there are many other federal laws which also touch on medical record privacy.[67]

i. Pre-HIPAA federal laws affecting medical record privacy

[62] *Whalen*, 429 U.S. at 605-606.

[63] *See Planned Parenthood*, No. C03-4872 PJH, 2004 U.S. Dist. WESTLAW 432222, at *1; *Westinghouse*, 638 F.2d 570.

[64] *Id.*

[65] *Shelley v. Kraemer*, 334 U.S. 1, 13-15 (1948) (Supreme Court held that while a racist restrictive covenant was legal as between two parties, government enforcement (via the legal system) of such a covenant would be unconstitutional as a violation of the equal protection clause).

[66] JUNE M. SULLIVAN, HIPAA: A PRACTICAL GUIDE TO THE PRIVACY AND SECURITY OF HEATH DATA, 2 (2004).

[67] Carter, *supra* note 15, at 241.

Federal laws touching on medical record privacy issues include the Privacy Act of 1974, the Freedom of Information Act, the Substance Abuse Confidentiality Statutes, and the Federal Policy for the Protection of Human Subjects ("The Common Rule").[68] Most of these acts only peripherally affect medical records, or only affect certain very proscribed categories of medical records.[69]

The Privacy Act of 1974 was passed in the wake of Watergate, when concern regarding the government's control of personal information was high.[70] Accordingly, it only addresses the actions of federal agencies.[71] In substance, the Act prohibits federal agencies from disclosing identifiable personal information (including medical information) without an individual's prior written consent. The Act also gives the individual the right to access their records on request and the right to demand that their records be amended if the records are incorrect.[72]

However, the protections afforded by the Act are slim. While the Act does apply to federally-operated research or health care facilities, it does not apply to facilities which merely receive federal funds.[73] As most health care is provided by private parties, the result is that few medical providers must pay attention to the Privacy Act.[74] Additionally, the Act contains many

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[68] BOYLE, *supra* note 5, at 3:1.

[69] Carter, *supra* note 15, at 245.

[70] BOYLE, *supra* note 5, at 3:10.

[71] Privacy Act of 1974, 5 U.S.C. § 552a (2005) (codified as amended by the Computer Matching and Privacy Protection Act of 1988).

[72] 5 U.S.C.§ 552a(d). If the agency refuses or neglects to amend the records, the individual may sue. 5 U.S.C.§ 552a(g)(1).

[73] BOYLE, *supra* note 5, at 3:12

[74] Carter, *supra* note 15, at 243.

exceptions, where information may be disclosed and/or used.[75] Most importantly for the purposes of this paper, law enforcement requests and court orders are two of the exceptions to the privacy rule.[76]

The Freedom of Information Act ("FOIA") is actually an anti-privacy law – it provides that any citizen has a court-enforceable right to federal agency records, unless said records are protected from disclosure under the Act.[77] If disclosure is required under FOIA, the Privacy Act does not protect the information.[78] Medical records held by federal agencies are exempted from the Act's mandated disclosure under exception six.[79]

The Substance Abuse Confidentiality provision ("SACP") in the Public Health Service Act was passed in an attempt to encourage people to seek treatment for substance abuse.[80] The rationale behind the SACP (and similar state acts) is simple: if word gets out that an individual is seeking treatment for a drug addiction, they may face ostracism, humiliation, and possible negative consequences in obtaining work, health insurance, or other insurance.[81] Therefore, if people who attempt to obtain treatment for their addictions face exposure of the records of their treatment, people will be much less willing to seek treatment.[82] Since it is best for everyone if

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[75] *Id.*

[76] 5 U.S.C. § 552a(b)(7), (11).

[77] Freedom of Information Act, 5 U.S.C. § 551, 552.

[78] Carter, *supra* note 15, at 244.

[79] 5 U.S.C. § 552(b).

[80] Public Health Service Act, 42 U.S.C. §290dd-2 (2005).

[81] Amy M. Jurevic, *When Technology and Health Care Collide: Issues with Electronic Medical Records and Electronic Mail*, 66 UMKC L. REV. 809, 836 fn33 (Summer 1998).

[82] Parmet, *supra* note 13, at 282-3.

drug addicts receive treatment, the SACP was passed in order to ensure that treatment records are kept strictly secret.[83]

Accordingly, the SACP tightly restricts disclosure and use of records which show that an individual sought or obtained treatment.[84] Unsanctioned disclosure incurs criminal punishment.[85] Information covered under the SAC can only be obtained in very limited circumstances.[86] Disclosure is permitted where there is prior written consent, in emergency situations, for scientific research or audits, or pursuant to court order.[87] A court issuing such an order must generally find that the disclosure will avert an existing threat of death/serious bodily harm, or solve a serious crime, and that there is no other way of getting the information.[88]

However, the SAC applies to federally funded programs alone.[89] It also only applies to providers or programs who specifically hold themselves out as providing treatment for substance abuse problems.[90] Furthermore, the Act covers only records dealing with the individual's substance abuse treatment, rehabilitation, etc. – not their normal medical records.[91]

Finally, the "Federal Policy for the Protection for Human Subjects" (also known as the "Common Rule") extends certain medical record protection to persons participating in medical

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[83] *Id.*

[84] *See id.*

[85] 42 U.S.C. § 290dd-2(f).

[86] *See* BOYLE, *supra* note 5, at 3:17.

[87] 42 U.S.C. § 290dd-2(b).

[88] 42 U.S.C. § 290dd-2(b)(2)(C).

[89] BOYLE, *supra* note 5, at 3:16.

[90] *Id.*

[91] *Id.*

research studies.[92] The Rule requires investigators to obtain approval of a review board before involving human subjects – and one requirement for approval is adequate protections for the privacy and confidentiality of the human subjects.[93] However, this law is extremely narrow in scope. It only applies to subjects of federally funded research studies.[94]

ii. HIPAA

Though Congress included a wide-reaching federal law of medical record privacy in HIPAA, HIPAA was not instituted primarily for that purpose.[95] HIPAA is a large piece of legislation with several sections, only one of which addresses privacy at all.[96] Privacy protections were included because one of the main goals of HIPAA was to encourage health care providers to turn from paper to electronic systems (for example, for record keeping, billing, or direct care).[97] While electronic systems are faster, often easier, and cheaper than paper systems, these very qualities threaten the privacy of medical records.[98] In order to address patients' concerns about privacy which electronic record-keeping raised, Congress included in HIPAA a section which directed the Department of Health and Human Services ("DHHS") to come up with guidelines for protecting the privacy of individually identifiable health information.[99]

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[92] *Id.* at 3:25. The rule consists of a series of related regulations issued by the Department of Health and Human Services and the Food and Drug administration. *Id.*

[93] *Id.*

[94] *Id.*

[95] BOYLE, *supra* note 5, at 4:1.

[96] *Id.*

[97] SULLIVAN, *supra* note 66, at 1.

[98] Hodge, Jr., *supra* note 4, at 670.

[99] Heath Insurance Portability and Accountability Act, Pub. L. No. 104-191, § 264(a) and (b), 110 stat. 1936, 2025 (1996) (codified as 42 U.S.C. 1320d–2).

The DHHS's guidelines have now become law.[100] These guidelines created federal privacy requirements for "personal health information" ("PHI").[101] HIPAA lays a basic prohibition: providers falling under HIPAA ("covered entities") are not allowed to disclose PHI unless the situation falls under one of the specific exceptions outlined in the DHHS's guidelines.[102] This section will address what is protected, who must protect it, and when disclosure is allowed.

1. What is protected?

Under the DHHS's guidelines, the prohibition covers all "individually identifiable health information."[103] This is defined as written, oral, or otherwise recorded information regarding an individual's health or payment for health care which somehow identifies the individual or allows a reasonable basis to believe that it could identify the individual.[104] Such information is only protected if it is created or received by a covered entity (see next section).[105]

This category is clearly very broad – anything from names to phone numbers to email addresses to license plate numbers qualifies.[106] Additionally, in some circumstances, information of a more general sort may be included - because in some situations otherwise "anonymous" health information may enable people to identify the subject.[107]

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[100] *See* 45 C.F.R. § 164.

[101] *Id.*

[102] 45 C.F.R. § 164.502(a); BOYLE, *supra* note 5, at 6:3.

[103] BOYLE, *supra* note 5, at 6:23; *see also* 45 C.F.R. § 164.501 and 502(a).

[104] 45 C.F.R. § 164.514; *see also* SULLIVAN, *supra* note 66, at 1.

[105] 45 C.F.R. § 164.103

[106] BOYLE, *supra* note 5, at 6:27.

[107] 45 C.F.R. 164.514(a).

2. *Who must protect PHI?*

"Covered entities" (meaning covered by HIPAA) must protect PHI.[108] These include health plans, health care "clearinghouses," health care providers that conduct HIPAA transactions, and business associates of covered entities.[109]

"Health plan" is defined by the HHS's Privacy Standards as "an individual or group plan that provides, or pays the cost of, medical care."[110] Less obviously, "health care clearinghouse" is defined as "a public or private entity that processes or facilitates the processing of nonstandard data elements of health information into standard data elements."[111] Generally, this refers to outsourced administrative services.[112] For instance, billing is often handled for health care providers by free-standing billing services.[113] These services would also be required to comply with HIPAA.[114]

The category of "health care providers" is very broad under the Privacy Standards. There are three main types of providers covered: providers of services as defined in section §1861(u) of the Social Security Act, providers of medical or health services as defined in section §1861(s) of the Social Security Act, and any other person or organization who furnishes, bills, or is paid for

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[108] 45 C.F.R. 164.514.

[109] Frederick Y. Yu, *Medical Information Privacy Under HIPAA: A Practical Guide*, 32 COLO. LAW. 11, 14 (May 2003).

[110] BOYLE, *supra* note 5, at 6:12

[111] *Id.* at 6:16

[112] *Id.*

[113] *Id.*

[114] *Id.*

health care services or supplies "in the normal course of business."[115] Given the very wide range of covered services, it is wisest for anyone dispensing any health-related service or good to assume that they are required to abide by HIPAA's privacy regulations.[116]

However, "health care providers" only fall under HIPAA if they conduct HIPAA-approved standard electronic transactions.[117] This means the providers must transmit health information in a standard electronic form in some aspect of their business – for instance, to carry out financial or administrative activities.[118] The electronic form must comport with the HIPAA standards laid out in the Privacy Standards.[119] Additionally, if a health care provider outsources an aspect of its administration and the administrative service provider uses electronic means to transmit the health information it is using, the health care provider is subject to HIPAA (meaning that a provider cannot get around the rule by outsourcing its electronic billing).[120]

"Business associates" are defined as "a person or entity that performs or assists in the performance of a function or activity on behalf of a covered entity and uses PHI in the process of performing that function or activity."[121] This may include anyone from lawyers to claims processors.[122] It does not include marketing firms, pharmaceutical companies, or researchers.[123]

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[115] 45 C.F.R. § 160.103.

[116] *See* BOYLE, *supra* note 5, at 6:19

[117] *Id.*; *see also* 45 C.F.R. § 160.103.

[118] BOYLE, *supra* note 5, at 6:20.

[119] SULLIVAN, *supra* note 66, at 4.

[120] 64 Fed. Reg. 95,918, 59,927 (Nov. 3, 1999).

[121] 45 C.F.R. § 160.103.

[122] BOYLE, *supra* note 5, at 6:154.

[123] *Id.*

"Business associates" are not independently covered by HIPAA.[124] Instead, they are covered in that if an "associate" enters into a business relationship with a HIPAA entity, that HIPAA entity must require the associate to sign a contract stating that the associate will comply with HIPAA's privacy regulations.[125]

3. When is disclosure required?

HIPAA mandates that the covered entity disclose an individual's PHI to the individual him or herself on demand.[126] The covered entity must also provide the individual with an accounting of any other disclosures of the individual's PHI that the entity has made if the individual so requests.[127] Finally, the covered entity must disclose any PHI to the Department of Health and Human Services at the Department's request.[128]

4. When is disclosure allowed?

A covered entity *may* disclose PHI in many situations. First, covered entities may disclose information if the individual gives written authorization.[129] "Consent" is not enough; noting that standard "consent" form is generally a formality rather than an actual consent, the Privacy Standard lays out stringent requirements for such authorizations.[130]

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[124] 45 C.F.R. § 164.502(e).

[125] *Id.*

[126] 45 C.F.R. § 164.502(a)(2)(i)

[127] 45 C.F.R. § 164.528.

[128] 45 C.F.R. § 164.502(a)(2)(ii).

[129] 45 C.F.R. § 164.502(a)(1)(iv).

[130] 45 C.F.R. § 164.508. The requirements are: signature & date, identity, identity of party seeking disclosure, description of information for disclosure, purpose for disclosure, authorization expiration date, notice of right to revoke authorization, treatment not conditioned on disclosure, and notice that redisclosure is a possibility.

Covered entities may disclosure information without authorization for a variety of public uses and urgent situations.[131] Most importantly for the purposes of this article, covered entities may disclose PHI for court or administrative proceedings.[132] There are two categories of legal summons for this purpose: first, court or administrative tribunal orders, and second, subpoenas, discovery requests, or other forms of legal process.[133] It seems probable that the DHHS considered that parties seeking PHI would likely ask for more disclosure than was fair or necessary, while courts would weigh the exigencies of the case against the privacy rights of the individual and order no more disclosure than is strictly necessary.[134]

Therefore, when acting according to a court or tribunal orders, a provider may disclose whatever is specifically requested.[135] However, in the case of subpoenas and discovery requests, the provider must be more cautious.[136] They may only disclose in response to such requests if they have also received certain "satisfactory assurances" that the party seeking the PHI has made "reasonable efforts" to either a) notify the subject individual or b) to obtain a qualified protective order.[137] A qualified protective order is either a court order or a stipulation of the parties that i) the PHI will not be used for any purpose outside of the litigation; ii) that the parties will not

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[131] BOYLE, *supra* note 5, at 6:40. Such purposes include public health activities, research purposes, averting threats to safety or health, etc. *See generally* 45 C.F.R. 164.512.

[132] SULLIVAN, *supra* note 66, at 40-41; *see also* 45 C.F.R. § 164.512 (e).

[133] *Id.*

[134] *See id.*

[135] 45 C.F.R. § 164.512(e)(1)(i).

[136] *See* 45 C.F.R. § 164.512(e)(1)(ii).

[137] *Id.*

otherwise disseminate the information, and iii) that the requesting party will destroy or return all the obtained PHI at the end of the proceeding.[138]

"Satisfactory assurances" include documented evidence of a "good faith attempt" on the part of the requesting party to notify the individual whose PHI is sought and to give him or her a chance to object to disclosure.[139] This good faith attempt would generally take the form of providing (or attempting to provide) written notice to the individual in question.[140] The notice would have to include sufficient information about the litigation and what PHI is sought to enable the subject individual to raise an objection.[141] Once a reasonable time for objection has expired (an emerging consensus regards ten working days as a reasonable allotment of time), a good faith effort is held to have been made.[142]

In the alternative, a requesting party may present "satisfactory assurances" that they have made a good faith effort to obtain a qualified protective order.[143] Such assurances would include documentary evidence that either a) the parties agreed to a qualified protective order or b) the requesting party has requested the court or tribunal to issue a qualified protective order (though there is some suspicion that a mere request may not be sufficient).[144] A qualified protective

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[138] 45 C.F.R. § 164.512(e)(1)(v).

[139] BOYLE, *supra* note 5, at 6:51.

[140] 45 C.F.R. § 164.512(e)(1)(iii). The regulations state that mailing notice to the individual's last known address is sufficient. 45 C.F.R. § 164.512(e)(1)(iii)(A).

[141] 45 C.F.R. § 164.512(e)(1)(iii)(B).

[142] Robert R. Harrison, *Obtaining Medical Records After HIPAA: New Federal Privacy Protections Change the Rules for Attorneys*, 16 UTAH B.J. 16, 18 (Nov. 2003).

[143] 45 C.F.R. § 164.512(e)(1)(ii).

[144] SULLIVAN, *supra* note 66, at 41.

order is defined as an order that both 1) prohibits the parties from using or disclosing the PHI for any purpose other than the proceeding for which the information was requested, and 2) requires that the information and all copies be returned to the owners (or destroyed) at the end of the proceeding.[145]

The covered entity may also disclose in response to a subpoena or discovery request even without satisfactory assurances if the entity itself makes the required reasonable efforts to notify the subject individual or to obtain a qualified protective order.[146]

It is important to remember when considering whether or not an entity is allowed to disclose PHI that there may be applicable state laws to consider as well.[147] As will be discussed in Section III below, HIPAA does not preempt state privacy legislation that is “more stringent” than HIPAA’s Privacy Standards.[148] Therefore, if HIPAA would allow disclosure in a given situation but applicable state law would not, the provider may not disclose the PHI.[149]

5. Limits on disclosure under HIPAA

Even when disclosure is allowed, covered entities in most circumstances are required to “reasonably try to limit” the use and disclosure of PHI to the “minimum necessary” for the permitted purpose.[150] This rule does not apply to disclosures made under certain exceptions,

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[145] *Id.*

[146] 45 C.F.R. § 164.512(e)(1)(iv).

[147] BOYLE, *supra* note 5, at 5:3-4.

[148] *Id.*

[149] *Id.*

[150] 45 C.F.R. § 164.502(b)(1).

such as immediate treatment; however, for the purposes of this article it is important to note that the rule does apply to disclosures made for litigation purposes.[151]

Covered entities are required to generate guidelines for disclosure to ensure that they are complying with the minimum necessary requirement.[152] While the provider must limit disclosure to the "minimum necessary," in some circumstances the covered entity is allowed to assume that whatever is requested *is* the minimum necessary.[153] This assumption is permitted based on the type of requesting entity (public officials, law enforcement officials, etc.)[154] However, it is not the case in litigation requests; there, the covered entity must use their best judgment and their prearranged procedures to determine what information is necessary and what is not (unless the information is specifically required by court order).[155]

C. State law regarding medical records privacy

States generally have their own laws protecting the privacy of their citizens' health information.[156] As HIPAA does not preempt those state laws which are more restrictive than HIPAA, these laws are still valid and important.[157] They include common law doctor-patient privilege and duty of confidentiality (sometimes enshrined in statutes as well), privacy statutes, and condition-specific protections.[158] One common problem with state protections is that they

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[151] *See* 45 C.F.R. § 164.502(b)(2).

[152] 45 C.F.R. § 164.514(d).

[153] BOYLE, *supra* note 5, at 6:31.

[154] *Id.*

[155] *See id.*

[156] BOYLE, *supra* note 5, at 2:1.

[157] *Id.* at 2:4.

[158] *Id.* at 2:1-2.

often only apply to entities or providers, not to secondary information recipients.[159] This means that if a health care provider lawfully discloses a patient's health care information to a non-provider, the non-provider may, in many states, distribute the information freely to whomever it sees fit.[160]

i. Doctor-Patient confidentiality; duty and privilege

While there is no federal doctor-patient privilege, most states have such a privilege (either via common law or via statute), which prohibits use of patient confidences in court.[161] Most states also have imposed a duty of confidentiality on doctors, which levels civil liability on doctors who wrongly disclose confidential information.[162] The purpose of the privilege and the duty of confidentiality is to encourage people to be open with their doctors, so that they may be cured.[163]

Doctor-patient privilege and the duty of confidentiality are limited in that they generally only apply to certain providers.[164] They may, for example, apply to a doctor, but not a nurse.[165] Or they may apply to doctors and nurses, but not to a billing service employed by the health care provider.[166] The contours of the privilege and the duty differ from state to state.[167]

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[159] Parmet, *supra* note 13, at 285-6; *See also* BOYLE, *supra* note 5, at 2:20-21.

[160] *Id.*

[161] BOYLE, *supra* note 5, at 2:5-6.

[162] Carter, *supra* note 15, at 247.

[163] Roberta M. Berry, *The Genetic Revolution and the Physician's Duty of Confidentiality*, 18 J. LEGAL MED. 401, 414 (Dec. 1997).

[164] BOYLE, *supra* note 5, at 2:4-6.

[165] *Id.*

[166] *Id.*

[167] *Id.*

ii. State medical records privacy or general privacy laws

Many states have their own privacy laws which prohibit indiscriminate disclosure of medical records or other personal health information.[168] In order for providers to disclose personal health information, these rules generally require some sort of indication of patient consent to disclosure, or that the situation fit into one of the given exceptions.[169] Common exceptions include disclosure for the purposes of consultation, payment, current treatment, fraud investigations, medical emergencies, and compliance with a subpoena or court order.[170]

State privacy laws vary in terms of to whom and what they apply.[171] One serious failing in such laws is that they often apply only to direct providers.[172] Additionally, they frequently regulate only initial disclosures, not secondary disclosures.[173]

iii. Condition-specific protections

Most states have privacy protection laws passed for specific sensitive medical conditions.[174] For example, many states give extra protection to the records of those who have sought mental health treatment, substance abuse treatment, or STD treatments.[175] Protection is also often extended to the test results of those who are found to have HIV or AIDS, and to

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[168] Gostin, *supra* note 14, at 293; *see also* BOYLE, *supra* note 5, at 2:1-2 and Appendix 2-A (table of states and their privacy laws).

[169] BOYLE, *supra* note 5, at 2:11-2:12.

[170] *Id.* at 2:13.

[171] *Id.* at 2:20.

[172] Carter, *supra* note 15, at 250-51.

[173] BOYLE, *supra* note 5, at 2:20-21. *See also* Gostin, *supra* note 14, at 294 (Discussing more problems with current state laws).

[174] BOYLE, *supra* note 5, at 2:14.

[175] *Id.*

individuals' genetic information.[176] All these laws relate to special diagnoses which would potentially subject the individual to serious negative consequences if their condition became public.[177] It is best for the public welfare if these individuals do seek treatment or related health care; therefore, in order to encourage people to seek testing or treatment, state governments have put these laws into place so the treated individuals are safe from public exposure.[178]

Where disclosure of medical information under these laws is more restricted than under HIPAA (as is generally the case), the laws are not preempted by HIPAA.[179] Therefore, anyone seeking discovery of such records in a state court would need to review and follow procedures laid out by state law in these areas.[180]

III. Which law applies?

With all these laws, it is complicated to figure out which laws apply to which pieces of PHI. Each law applies to some information which other laws may not; few if any laws are rendered obsolete even by HIPAA.[181]

Federal law generally preempts state law, so the starting point would normally be federal law.[182] First, federal constitutional protections would be supreme over all conflicting law, but such constitutional protections are so far very vague and limited in scope.[183] Next, there is

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[176] *Id.*

[177] Gostin, *supra* note 18, at 1442; *see also* Harrison, *supra* note 142, at 486-87.

[178] *See id.*

[179] SULLIVAN, *supra* note 66, at 2.

[180] *See id.*

[181] *See supra* notes 66-180 and accompanying text.

[182] *See* BOYLE, *supra* note 5, at 5:2.

[183] Carter, *supra* note 15, at 243.

statutory federal law. In this area there is HIPAA, which directly applies to medical records, and other pieces of legislation which apply only to certain curtailed areas of medical records.[184] HIPAA applies to all medical records and beyond; however, it is somewhat curtailed by its requirement that it only applies to *individually identifiable* health information.[185] Therefore, health information with any identifying characteristics erased would not fall under HIPAA.[186] Additionally, some health care providers will not be subject to HIPAA because they do not use any electronic means in their financial or administrative activities.[187] In the areas which HIPAA does not cover, state law and other federal law will control.[188]

HIPAA does not specifically say whether it preempts previous federal law.[189] The DHHS has chosen to use an implied repeal process in analyzing the federal preemption issue.[190] First, if both laws can be applied, they should both be applied.[191] Second, if the laws conflict, examine which law is more specific.[192] If the law passed first is more specific and the second law does not explicitly preempt that law, the first law should be followed.[193] If the law passed second is more specific, that law should be followed.[194]

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[184] *See supra* notes 66-155 and accompanying text.

[185] *See supra* notes 103-107 and accompanying text.

[186] *Id.*

[187] *See supra* notes 108-125 and accompanying text.

[188] *See* BOYLE, *supra* note 5, at 6:23.

[189] *Id.* at 3:4

[190] *Id.* at 3:5-6

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

Generally, any federal laws preempt contrary state laws; HIPAA itself preempts state law which is *less* protective of privacy than HIPAA.[195] However, HIPAA explicitly does *not* preempt state law which is "more stringent" than HIPAA.[196] A "more stringent" law is one which either prohibits more uses or disclosures of information (other than to the subject individual), permits greater rights to the subject individual, or permits more disclosure of the individual's own information to the individual.[197] This preemption policy is intended to set HIPAA as a "floor" of protection.[198] States may choose to give more protection than HIPAA provides, but they cannot give less.[199]

However, it is important to note that state laws providing more protection than HIPAA probably do not apply in federal court where a federal question is at issue.[200]

IV. The Subpoena Power

A subpoena *duces tecum* (calling for the production of documents) may be issued pursuant to controlling procedural rules in the court in which the proceeding is taking place.[201] This means that the subpoena power varies from state to state, and from state to federal

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[195] 42 U.S.C. § 1320d-7 and 1320d-2.

[196] *Id.*

[197] 45 C.F.R. § 160.203(b).

[198] BOYLE, *supra* note 5, at 5:11.

[199] *Id.* at 5:3.

[200] *See Nat'l Abortion Fed'n v. Ashcroft*, No. 03 Civ. 8695(RCC), 2004 U.S. Dist. WESTLAW 555701, *4-5 (S.D.N.Y. Mar.19, 2004).

[201] *See, e.g.,* FED. R. CIV. P. 45.

proceedings. Subpoena powers may also vary depending on whether the case is criminal or civil, according to the applicable rules of criminal or civil procedure.[202]

Subpoena powers can be divided into two categories: subpoena powers prior to the charging of a crime or instigation of a lawsuit, and subpoena powers after that time.[203] Traditionally, there was no prosecutorial pre-action subpoena power; if a prosecutor wished to investigate a crime via subpoena, she would have to go through a grand jury; such juries acted as a brake on the subpoena power.[204] However, many counties do not have grand juries, and grand juries are not convened for some crimes.[205] Additionally, grand juries are not used in civil matters.[206] This limits pre-charging and pre-action investigation.[207] To investigate in these circumstances, the prosecutor (or law enforcement) must obtain a search warrant, which requires a court determination of probable cause.[208]

The Federal rules do not permit the attorney general to issue "investigatory," or pre-action subpoenas, other than grand jury subpoenas.[209] However, some states do allow subpoenas to be issued prior to formal charging of an offense in criminal actions.[210] Additionally, the Federal power to issue investigatory subpoenas has recently increased with the addition of

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[202] *See id.*; *see also* FED. R. CRIM. P. 17.

[203] *See id.*

[204] H. Morley Swingle, *Criminal Investigative Subpoenas: How to Get Them, and How to Fight Them*, 54 J. MO. B. 15, 15-16 (Jan/Feb, 1998).

[205] *Id.* at 16.

[206] *Id.*

[207] *Id.*

[208] *Id.* at 15.

[209] *See* FED. R. CIV. P. 45, FED. R. CRIM. P. 17.

[210] Swingle, *supra* note 204, at 16.

administrative investigatory subpoena powers in certain areas of the law.[211] These increased prosecutorial powers are problematic because they allow prosecutors to sidestep the Fourth Amendment by issuing subpoenas instead of obtaining search warrants, as will be further discussed below. [212]

The states have split on the issue of whether prosecutors should be given an investigatory subpoena power.[213] Some states feel that, as there is not always a grand jury available, the prosecutor should be able to investigate crimes via subpoena, the better to judge whether a valid case exists.[214] Accordingly, in those states, prosecutors are given the power to issue subpoenas prior to charging a defendant with a crime – or even to detecting a crime at all (let alone a defendant).[215] For example, in Missouri, a prosecutor may use subpoenas to gather documents "merely on suspicion that the law is being violated, or even just because [he or she] wants assurance that it is not," without any evidence whatsoever that a crime has actually been committed.[216] In contrast, Utah requires a prosecutor to show "good cause" for the investigative subpoena.[217]

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[211] Risa Berkower, *Sliding Down a Slippery Slope? The Future Use of Administrative Subpoenas in Criminal Investigations*, 73 FORDHAM L. REV. 2251, 2251-2 (April, 2005).

[212] *Id.*

[213] Swingle, *supra* note 204, at 16.

[214] *Id.*

[215] *Id.* at 15-16 and 19.

[216] *Id* at 16 (Noting that the standard is very low:

> "Like a grand jury, the prosecutor can investigate "merely on suspicion that the law is being violated, or even just because [he or she] wants assurance that it is not." There only needs to be a reasonable explanation as to why the evidence or testimony sought "could be relevant to some legitimate criminal investigation." Once this is done, "a prima facie showing of relevance and legitimacy is created which is ordinarily irrebuttable." One reason for the low standard is that the prosecutor, just like a grand jury, cannot be required to justify the issuance of a subpoena by presenting evidence sufficient to establish probable

Other states, worried about prosecutorial overreaching, believe that a grand jury serves a different purpose from a prosecutor and is thus less likely to abuse an investigatory subpoena power.[218] There is a clear danger with such subpoena power that the prosecutor may use it inappropriately – running roughshod over the privacy rights of innocent people on a (possibly wrongheaded) crusade of his own.[219] These states, therefore, have made the statutory decision that if the prosecutor wishes to issue subpoenas they must first charge someone with a crime.[220] Accordingly, in those states, prosecutors who wish to "investigate" a crime on their own must do so via search warrant and voluntary cooperation.[221]

After the action is instigated (civil) or the defendant is charged with a crime (criminal), either party may subpoena documents (generally through their attorney), subject to the restraints outlined in the section below.[222]

V. <u>**Restraints on the Subpoena power**</u>

When a party subpoenas medical records, the subpoenaed party may raise objections and request that the court quash the subpoena.[223] Possible grounds include: that the subpoena does not comply with HIPAA; that it is in violation of a state privacy law; that the material within is

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cause "because the very purpose of requesting the information is to ascertain whether probable cause exists."")

[217] *In the Matter of a Criminal Investigation*,754 P.2d 633, 644, n. 11 (Utah 1988). ("mere suspicion" or "whim" is "clearly not enough to justify putting the judicial subpoena power into the hands of prosecutors.")

[218] *See id.* at 15.

[219] *Id* at 19-20.

[220] *Id.*

[221] *Id.*

[222] *See, e.g.,* FED. R. CIV. P. 45, FED. R. CRIM. P. 17.

[223] *Id.*

privileged; that the information is protected by a constitutional privacy right; that it violates a rule of civil or criminal procedure in being (for example) too vague, irrelevant, or burdensome; or that (should the party issuing the subpoena be the government) it violates the Fourth Amendment. As this article has already discussed HIPAA, state privacy law, privilege, and Constitutional privacy right issues (see section II) here it will outline general relevancy requirements, undue burden restrictions, and applicable Fourth Amendment law. Though the first two categories involve procedural restrictions and thus may vary from state to state, this article will examine the federal rules in order to convey an idea of the balancing conducted by courts.

i. General relevancy requirements

While the laws of civil and criminal procedure vary from state to state, they generally include a relevance requirement.[224] In Federal cases, both the criminal and civil rules of procedure include such a restriction under the rubric of "reasonableness" – if the information sought is irrelevant, it is unreasonable to seek it.[225]

In a recent case wherein a defendant protested a grand jury subpoena as seeking irrelevant material, the Supreme Court articulated the test as requiring that the subpoenaed party show that there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."[226]

Similarly, the scope of discovery allowed under the civil subpoena power is very broad – it incorporates Rule 26, which allows discovery on all nonprivileged matter which is relevant to

[224] Swingle, *supra* note 204, at 18.

[225] *U.S. v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991).

[226] *Id.*

the subject matter involved in the pending action, so long as it is at least reasonably calculated to lead to admissible evidence.[227]

ii. Vagueness

The standard for vagueness is, appropriately, vague. In some cases courts appear to consider it as a "burden" issue: a subpoena is impermissibly vague and overbroad if it requires "every scrap of paper" that the subpoenaed party possesses be turned over to the opposing party.[228] In others, the court appears to consider it to be a Fourth Amendment concern.[229] The overall test is whether the subpoena "describe[s] with reasonable particularity the papers to be produced and [is] confined to a reasonable period of time."[230]

iii. Undue Burden

Federal Rule of Criminal Procedure 17(c)(2) states that a court on petition "may quash or modify the subpoena if compliance would be unreasonable or oppressive."[231] To satisfy the court under 17(c), the Supreme Court has held that the party requesting the production of documents must show: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4)

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[227] CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE, §2459.

[228] *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1276 (7th Cir. 1982)

[229] *Application of Radio Corp of America*, 13 F.R.D. 167, 171 (S.D.N.Y. 1952)

[230] *Id.*

[231] FED. R. CRIM. P. 17(c)(2).

that the application is made in good faith and is not intended as a general 'fishing expedition.'" [232] In determining whether the burden is undue, the court will typically balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it.[233]

Similarly, Federal Rule of Civil Procedure 45(c) allows a court to quash a subpoena which subjects "a person subject to the subpoena" to an "undue burden."[234] Additionally, parties demanding documents are required to "take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena" or face monetary sanctions.[235] It is important to note that even if the evidence sought is completely relevant, compliance with the subpoena may still be protested and avoided if the subpoena is an undue burden on any person.[236]

iv. The Fourth Amendment

Prosecutors (and other government agents) may be barred from obtaining records by the Fourth Amendment, which forbids the government from conducting unreasonable searches and seizures.[237] Since HIPAA rules are procedural in nature, with substantive evaluation of what is being requested (aside from identifiability), it is quite possible that a subpoena (particularly a mass subpoena of third-party records) may be HIPAA-compliant and yet violate the Fourth

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[232] *U.S. v. Nixon*, 418 U.S. 683, 700 (1974). Note though: the requirements are different for grand jury subpoenas, as those have a presumption of validity. *See U.S. v. R. Enterprises, Inc.*, 498 U.S. 292, 292 (1991).

[233] *See, e.g., Positive Black Talk Inc. v. Cash Money Records, Inc*., 394 F.3d 357, 377 (5th Cir. 2004)

[234] FED. R. CIV. P. 45(c).

[235] FED. RULE OF CIV. PROC. 45(c)(1): …. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

[236] *Id.*

[237] Swingle, *supra* note 204, at 18.

Amendment.[238] Even where state subpoena rules differ from the Federal rules, the Fourth Amendment serves as a floor of protection where criminal or civil procedural rules do not cover unreasonable subpoena requests.[239]

A governmental intrusion must infringe on a legitimate expectation of privacy to be a search within the meaning of the Fourth Amendment.[240] Additionally, the Supreme Court has held that a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing (a possible problem for mass subpoenas).[241] The United States Supreme Court has held that the Fourth Amendment does not protect bank records because there is no expectation of privacy (a questionable conclusion),[242] but medical records may be held to be more sensitive.[243]

The Supreme Court has held that the Fourth Amendment does apply to subpoenas.[244] However, because subpoenas afford the receiving party the opportunity to protest the subpoena instead of immediately complying, subpoenas are subject to a lower standard of scrutiny than search warrants.[245] For instance, the Fourth Circuit held in *In re Subpoena Duces Tecum* that while search warrants require a court to make a probable cause determination, subpoenas require

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[238] *See Northwestern*, 362 F.3d at 925.

[239] *See* Swingle, *supra* note 204, at 18.

[240] *See Kyllo v. U.S.*, 533 U.S. 27, 32-33 (2001) (citing *Katz v. United States,* 389 U.S. 347 (1967)).

[241] *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

[242] *U.S. v. Miller*, 425 U.S. 435 (1976).

[243] S*ee Westinghouse*, 638 F.2d at 577.

[244] Swingle, *supra* note 204, at 18.

[245] *Id.*

only a determination of "reasonableness."[246] To pass Fourth Amendment scrutiny, demands for documents must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."[247] This standard, however, "cannot be reduced to formula," because "relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."[248]

The Fourth Circuit has elaborated on the reasonableness requirement: "a summons will be deemed unreasonable and unenforceable if it is overbroad and disproportionate to the end sought."[249] Other circuits have agreed that "the Government cannot go on a "fishing expedition" through [the subpoenaed party's] records."[250] Some circuits have also extended particular deference to third party files: "where it appears that the purpose of the summons is "a rambling exploration" of a third party's files, it will not be enforced… [t]his judicial protection against the sweeping or irrelevant order is *particularly* appropriate in matters where the demand for records is directed not to the taxpayer but to a third-party who may have had some dealing with the person under investigation."[251] For example, in *U.S. v. Theodore*, the Fourth Circuit quashed an

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[246] *In re Subpoena Duces Tecum*, 228 F.3d 341, 347-351 (4th Cir, 2000).

[247] *Donovan v. Lone Steer, Inc.*, 464 U.S. 408,

[248] *In re Subpoena Duces Tecum*, 228 F.3d at 347 (quoting *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 209 (1946)).

[249] *U.S. v. Theodore,* 479 F.2d 749, 754 (4th Cir.1973).

[250] *Id.*

[251] In *re Subpoenas Duces Tecum Nos. A99-0001, A99-0002, A99-0003 and A99-0004*, 51 F.Supp.2d 726, 736 (W.D.Va.,1999); *see also Theodore*, 479 F.2d at 754 (quoting *United States v. Harrington*, 388 F.2d 520, 523 (2 Cir. 1968)).

IRS subpoena which sought all the individual tax returns prepared by a CPA, with no evidence or indeed suspicion of any wrongdoing.[252]

Regarding medical records specifically, federal courts have held that an individual has a sufficient expectation of privacy in his or her medical records to invoke Fourth Amendment protections.[253] Additionally, the courts have held that doctors have standing to assert the Fourth Amendment rights of their patients regarding the patients' medical records which are in the doctors' possession.[254] However, should the doctor or other health care provider not wish to assert the Fourth Amendment rights, the patient may be unable practically to do so.[255] First, under HIPAA there is no need for a covered entity to even alert the patient that their records are being revealed if the records are being turned over via court order.[256] Additionally, where the patient does know of the request, their concern for anonymity may make protesting the subpoena worse than allowing it to proceed.[257] For example, in the case of a woman who has had a second-trimester abortion, the simple fact of having had the abortion is what she may wish to keep

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[252] *Theodore*, 479 F.2d at 751-52; *see also Hecht v. Pro-Football, Inc.*, 46 F.R.D. 605, 607 (D.D.C. 1969).

[253] *See, e.g., U.S. v. Westinghouse Elec. Corp*., 638 F.2d 570, 577 (3d Cir.1980).

[254] *See, e.g., In Re Subpoenas*, 51 F.Supp.2d 726 (citing *In re Search Warrant (Sealed)*, 810 F.2d 67, 69 (3d Cir 1986)). A related issue is whether the patients themselves have standing, as the records are not in their possession. The general rule is "[A] subpoena may only be challenged by the person to whom it is directed or by a person whose property rights or privileges may be violated." *People v. Owens*, 727 N.Y.S.2d 266, **269 (N.Y.Sup.,2001), quoting *In re Selesnick*, 115 Misc.2d 993, 995, (Sup.Ct. N.Y. Cty.1982).

[255] *In re Search Warrant*, 810 F.2d 67; *see also* SULLIVAN, *supra* note 66, at 41 (HIPAA rules do not require that the patient be informed of the attempt to reach their files in some circumstances).

[256] *Id.*

[257] *See Northwestern*, 362 F.3d at 928.

private.[258] For her to come forward would involve a serious practical risk of revealing her identity, at least to parties to the action.[259]

VI. <u>En Masse Subpoenaing of medical records: recent cases</u>

There have been several recent cases of mass subpoenaing of medical records, particularly in the reproductive arena.[260] In some of these cases, there is as yet no suspected crime; in others, there is a crime, but no suspect; in still others, the medical records are entirely third-party records.[261] None of these mass subpoenas have yet been appealed all the way to the Supreme Court.[262] The courts addressing them have had to wrestle with competing interests: the desire to find the truth and allow meaningful discovery to prosecutors, and on the other the desire to protect the privacy of thousands of uninvolved third parties.[263] Similar mass subpoena issues have been raised in other areas recently, such as the mass subpoenaing of names of anti-war demonstrators[264] and the mass subpoenaing of the tax returns of clients of CPAs.[265] This article will address the nationwide abortion subpoenas issued by Attorney General Ashcroft in the recent litigation regarding the Federal government's ban of certain abortion procedures, the mass

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[258] *Id.*

[259] *See id.*

[260] *See, e.g.*, *Planned Parenthood*, 2004 U.S. Dist. WESTLAW 432222, at *2; *Nat'l Abortion Fed'n*, 2004 U.S. Dist. WESTLAW 555701, at *6; Planned Parenthood, *A Privacy Storm in Storm Lake*, *available at* http://www.plannedparenthood.org (under "articles"); Wilgoren, *supra* note 7.

[261] *Id.*

[262] *See id.*

[263] *Id.*

[264] Associated Press, *Anti-War Activists fight judge's order*, CNN.com (Feb. 9, 2004), *available at* http://www.cnn.com/2004/LAW/02/09/activists.investigation.ap/.

[265] *Theodore*, 479 F.2d at 751-52.

subpoenas of pregnancy tests from Planned Parenthood by an Iowa County Attorney, and the mass investigatory subpoenas of abortion records issued by the Attorney General of Kansas.

A. Attorney General Ashcroft's mass subpoenas of the medical records of women receiving abortions

The most high-profile of the mass medical record subpoena cases was the attempt by former Attorney General Ashcroft to obtain the medical records of all women who had obtained second-trimester abortions from parties who were protesting the "Partial Birth Abortion Act." [266] The PBAA outlawed certain abortion procedures, but without making any exceptions for situations in which the procedure would be necessary to preserve the health of the mother.[267] Several abortion providers raised Constitutional objections to the act based on the lack of any health exception.[268]

In the course of the case, the Attorney General (an outspoken pro-life activist) attempted to subpoena the medical records of all women who had received second-trimester abortions from the protesting abortion providers.[269] In order to avoid HIPAA complications, the Attorney General subpoenaed the files with all "personally identifying information" redacted.[270] However, the government did not agree to destroy or return all files after the litigation, which is problematic considering HIPAA's regulation stating that a valid qualified protective order

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[266] Eric Lichtblau, *Defending '03 Law, Justice Department Seeks Abortion Records*, NEW YORK TIMES, Feb. 12, 2004, at A1.

[267] Partial Birth Abortion Ban Act, 18 U.S.C. § 1531.

[268] *See id.*

[269] *See Nat'l Abortion Fed'n, 2004 U.S. Dist. WESTLAW 555701*; *Northwestern*, 362 F.3d 923.

[270] *Northwestern*, 362 F.3d 923, 924.

requires that all records be destroyed or returned.[271] Three courts in different Circuits ruled on the subpoena issue, two quashing the subpoenas and one permitting them.[272] The government then withdrew the subpoena request.[273] However, the court opinions on the issue are still instructive.

The Northern District Court of California denied the government's motion to compel discovery of the abortion records from the plaintiff in *Planned Parenthood Federation of America, Inc. v. Ashcroft*.[274] The court cited three separate grounds for the denial of the motion, all independently sufficient.[275] First, the court held that the desired information was largely irrelevant to the case.[276] Second, the court held that the government's medical record requests imposed an undue burden on the plaintiff.[277] In finding an undue burden, the court pointed to the

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[271] *Nat'l Abortion Fed'n*, 2004 U.S. Dist. WESTLAW 555701 at *6, fn6.

[272] *Northwestern*, 362 F.3d 923 at 932-33 (denying subpoenas); *Planned Parenthood*, 2004 U.S. Dist. WESTLAW 432222, at *2 (denying subpoenas; *Nat'l Abortion Fed'n*, 2004 U.S. Dist. WESTLAW 555701, at *7 (granting subpoenas).

[273] Susan Saulny, *Justice Department Drops Demand for Hospital's Abortion Files*, NEW YORK TIMES (April 27, 2004) *available at* *http://www.nytimes.com/2004/04/27/politics/27ABOR.html?ex=1116475200&en=3a7e79cd427b7d07&ei=5070&oref=login*

[274] *Planned Parenthood*, 2004 U.S. Dist. WESTLAW 432222, at *2. The court also strongly suggested to the government that it drop its subpoenas against a number of Planned Parenthood affiliates, all but saying that they would not be enforced if challenged. *Id.*

[275] *Id.* at *1.

[276] *Id.* at *1 ("this court finds that the individual medical records are not relevant because they do not contain the information that the government seeks.")

[277] *Id.* at *1-2.

short time frame, the "enormity of the requests," and the privacy interests involved, and balanced them against the "marginal probative value" of the records to the government.[278]

Finally, the court held that the Constitutional right to informational privacy referenced by the Supreme Court in *Whalen v. Roe* forbade the granting of the government's motion.[279] The court expressed concern that even technically redacted information could lead to the identification of some women, particularly as the information left would be of an extremely sensitive and personal nature (e.g. sexual abuse, rape, sexually transmitted diseases, marital status, and contraceptive use).[280] The court also noted the fact that many of the actual patients would have no notice that their private medical records were being turned over to and scrutinized by governmental agents without their consent.[281] Finally, the court considered the possible chilling effect on the doctor-patient relationship that could result from a court-ordered breach of confidentiality regarding such a private procedure as a second-trimester abortion.[282] These considerations, balanced against the minimal usefulness of the records, caused the court to deny the government's motion on the constitutional ground as well.[283]

Next, the District Court for the Southern District of New York in *National Abortion Federation v. Ashcroft* considered the government's motion to enforce a subpoena for similar

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[278] *Id.* at *2.

[279] *Id*.

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

abortion records.[284] There, the court granted the motion.[285] The court considered only statutory law in its opinion.[286]

First, the court held that HIPAA's preemption provisions did not require or permit the incorporation of state privacy laws into federal question actions in federal court.[287] Second, it held that HIPAA's requirements regarding the PHI were satisfied by the issuance of a subpoena along with a qualified protective order (while the order requested did not comply with HIPAA because the government intended to keep a copy of all the records, the judge offered to amend the order to assure compliance).[288] Third, it held that HIPAA was intended to provide a "privilege" for the purposes of Federal Rule of Evidence 501.[289] Therefore, so long as the subpoena was in compliance with HIPAA, the information requested by it was not otherwise privileged.[290] Fourth, the court held that due to the redaction of personally identifiable information, the records ceased to be personally identifiable information in the first place and therefore were not subject to HIPAA's requirements regarding PHI at all.[291]

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[284] *Nat'l Abortion Fed'n*, 2004 U.S. Dist. WESTLAW 555701, at *1.

[285] *Id.* at *7.

[286] *Id.* at *2-7.

[287] *Id.* at *4-5. The argument was that because HIPAA specifically does not preempt "stricter" state laws, it requires the incorporation of state laws into federal actions within the state in question. The court held that HHS's interpretation of HIPAA as not so incorporating state law was entitled to Chevron deference, and was reasonable. "Thus, N.Y. C.P.L.R. 4504(a) remains the law in areas in which New York State has the authority to regulate, but it has not become the law in areas within the federal domain."

[288] *Id.* at *6 (the government said keeping a copy was necessary to comply with the Federal Records Act).

[289] *Id.*

[290] *Id.*

[291] *Id.*

Finally, the third party hospital in possession of the records protested that the disclosure of sensitive medical records would be an undue burden on it in violation of Federal Rule of Civil Procedure 45(c) because the hospital's patients would be angry at the hospital for divulging their personal information and would no longer trust it.[292] The court held that disclosure was not an undue burden on the producing party because the plaintiff's reputation would not be damaged due to its compliance with a court order.[293]

In the third case, the District Court's refusal to enforce the government's subpoena of abortion records was appealed to the Seventh Circuit.[294] That court affirmed the denial of the subpoena.[295] It agreed with the District Court for the Southern District of New York that HIPAA did not incorporate stricter state laws into suits to enforce federal law, both because it was not Congress's intent, and because in this case the information was de-identified.[296] It also agreed that HIPAA itself did not require denial of the subpoena.[297] While the court held that HIPAA did not intend to create a "privilege" within the meaning of Federal Rule of Evidence 501, and that therefore the information could legally be otherwise privileged, it also held that the information was not in fact privileged; there was no federal common law privilege for abortion records.[298]

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[292] *Id.* at *7.

[293] *Id.*

[294] *Northwestern*, 362 F.3d at 923.

[295] *Id.* at 932-3.

[296] *Id.* at 925, citing 45 C.F.R. 160.203(b): "The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard requirement."

[297] *Id.* at 926.

[298] *Id.* at 926.

However, the Seventh Circuit sided with the Northern District Court of California instead of the District Court for the Southern District of New York on the question of whether the subpoena created an “undue burden” and could thus be quashed under Federal Rule of Procedure 45(c).[299] The court held that the subpoena did create such a burden, even when redacted: “the burden of compliance with [the subpoena] would exceed the benefit of production of the material sought by it.”[300] In weighing the government’s benefit, the court expressed some frustration: “Although on appeal the hospital repeated at length its reasons for believing that the records sought by the government would have little or no probative value, the government's response in both its opening brief and its reply brief remained vague to the point of being evasive.”[301]

When addressing the opposing burden of compliance, the court took a realistic approach in assessing the burden imposed on the women whose personal medical information would be revealed:

> [T]he *administrative* hardship from compliance would be modest. But it is not the only or the main hardship. The natural sensitivity that people feel about the disclosure of their medical records--the sensitivity that lies behind HIPAA--is amplified when the records are of a procedure that Congress has now declared to be a crime… This is hardly a typical case in which medical records get drawn into a lawsuit. …. These women must know that, and doubtless they are also aware that hostility to abortion has at times erupted into violence…
>
> Some of these women will be afraid that when their redacted records are made a part of the trial record in New York, persons of their acquaintance, or skillful "Googlers," sifting the information contained in the medical records concerning each patient's medical and sex history, will put two and two together, "out" the 45 women, and thereby expose them to threats, humiliation, and obloquy….

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[299] *Northwestern*, 362 F.3d at 928-9.

[300] *Id.* at 927.

[301] *Id.*

> In its opening brief, as throughout the district court proceeding, the government expressly reserved the right, at a later date, to seek the identity of the patients whose records are produced.[302]

Interestingly, the court also expressed concern for the privacy rights of the patients even if they were never identified by those viewing their records:

> Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded. The revelation of the intimate details contained in the record of a late-term abortion may inflict a similar wound.[303]

B. Mass subpoenaing of Planned Parenthood pregnancy tests by Iowa County Attorney

In Storm Lake, Iowa, the body of a newborn baby boy was found on May 30, 2002, under grisly circumstances.[304] The Buena Vista County Attorney responded by issuing a subpoena to all area hospitals and clinics for all the names, addresses, and medical records of any and all women who had had positive pregnancy tests between August 15, 2001 and May 30, 2002.[305] Additionally, the County Attorney sought the records, names and addresses of all prenatal patients, expectant mothers, and women who gave birth from February 1, 2002 through May 31, 2002.[306]

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[302] *Id.* at 928-929.

[303] *Id.* at 929.

[304] Lynn Okamoto, *Officials Deny Plans for Clinic Arrests*, DES MOINE REGISTER, Crime & Courts, July 6, 2002. The body of the child had been put through a shredder at a local recycling center.

[305] Planned Parenthood, *A Privacy Storm in Storm Lake*, *available at* http://www.plannedparenthood.org (under "articles").

[306] *Id.*

While some area hospitals complied with the subpoena, the local Planned Parenthood challenged the court order.[307] Despite threats of a fine and significant jail time, Planned Parenthood refused to hand over the documents, citing deep concern over the invasion of their patients' privacy.[308] The district court judge ordered compliance with the subpoenas; Planned Parenthood appealed the decision.[309] The County Attorney elected to drop the subpoena request, citing lack of resources.[310]

Because the pregnancy test case was not pursued further, it is of largely theoretical interest. No solid legal holdings resulted from it, and few legal arguments appear to have been pursued.[311] However, despite the lack of legal holdings, it is an example of a possible application of mass investigatory subpoena power- with all the ethical questions such a power presents.

C. Mass investigative subpoenaing of abortion medical records in Kansas

Taking the en masse investigatory subpoena even further, the Attorney General of Kansas (a strident pro-life activist) has been seeking en masse women's abortion medical records without any evidence that a crime has actually occurred.[312] He has been seeking two main categories of records: all abortion records from girls 15 years of age or younger, and all abortion medical records from women who have had abortions in Kansas past 22 weeks of gestation.[313]

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[307] Loewe, *supra* note 8.

[308] Planned Parenthood, *supra* note 305.

[309] Lowe, *supra* note 8.

[310] *Id.*

[311] *Id.*

[312] Wilgoren, *supra* note 7.

[313] *Id.*

Ostensibly he is seeking these records for the purposes of detecting crimes: sex with a child under 14 (unless she or he is married to the accused) is a crime under Kansas law,[314] and abortions past 22 weeks are illegal in Kansas unless necessary for the health of the mother.[315] Sex between 14-15 year olds and approximate age peers, however, is legal in Kansas, yet the Attorney General is still seeking the abortion medical records of these children.[316] Additionally, the Attorney General does not appear to be seeking medical records of those girls 15 or younger who carry pregnancies to term.[317]

The Attorney General is seeking the full abortion medical records with no redaction whatsoever: names, addresses, and complete medical details are sought.[318] The files in question often include extremely private information, such as how patients became pregnant, their sexual history, their birth control practices, drug use, psychological profiles, information about fetal anomalies (particularly for late-term abortions) and communications with law enforcement.[319]

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[314] K.S.A. § 21-3502 (holding that sex with a child under 14 is illegal – it would be interesting to see what the state would do if two thirteen year olds had sex. Possibly prosecute both for rape?)

[315] K.S.A. § 65-6703(a). Abortion is also permitted past 22 weeks if the fetus is not viable. *Id.*

[316] K.S.A. § 21-3522 (holding that sex with a minor 14 or 15 years of age is illegal unless (a) the partner is less than 19 and (b) the partner is less than four years older than the minor and (c) the minor and the partner are the only two parties involved and (d) they are members of the opposite sex.

[317] *See* Wilgoren, *supra* note 9. My searches have revealed absolutely no information of any attempts to obtain pregnancy records. The absence of a fact which would be so pertinent is telling.

[318] *Id.*

[319] *Id.*

A district court has granted the mass subpoenas of abortion medical records; the grant is currently being appealed.[320]

VII. Analysis of law with current applications of mass subpoenas

Legally, the Federal Abortion Ban cases have given us a basic framework of ideas and tests to apply to mass subpoena cases.[321] Clearly, HIPAA procedures, state privacy laws, common law privileges, and even Constitutional confidentiality doctrines may come into play when a mass subpoena of medical records is ordered.[322] Furthermore, the courts have shown a willingness to use the discretion granted in the rules of procedure regarding subpoenas to quash unreasonable subpoenas.[323]

The Federal cases did not raise Fourth Amendment law.[324] That area of law would very probably play a role in litigation of the sorts of subpoenas that are being sought in Kansas, or that were being sought in Iowa.[325] As in *U.S. v. Theodore*, these subpoenas appear to be largely a "fishing expedition."[326] For example, the prosecutor in the Iowa case had no evidence that any of the hundreds of women whose privacy he was invading had done anything wrong whatsoever.[327] In fact, as the very best case scenario for the search would be that one woman

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[320] John Milburn, *Kansas Official Demands Abortion Records: Kansas Attorney General Demands Abortion Records of Almost 90 Women After Secret Probe*, ASSOCIATED PRESS (Feb. 25, 2005), *available at* http://abcnews.go.com/US/wireStory?id=530093

[321] *See supra* notes 266-303 and accompanying text.

[322] *See supra* notes 33-180 and accompanying text.

[323] *See supra* notes 266-303 and accompanying text.

[324] *Id.*

[325] *See supra* notes 237-259, 304-320 and accompanying text.

[326] *See supra* notes 250-252, 304-320 and accompanying text.

[327] *See supra* notes 312-320 and accompanying text.

involved would be the criminal sought, the search would inevitably involve the violation of the privacy of all but one of the women whose records were searched.[328] This is similar to searching the houses of everyone in a given city because someone who probably lives in that city committed a murder - or at the very least, to searching the houses of all the black people in a city because a black person committed a murder.[329] The Fourth Amendment requires individualized suspicion, not suspicion of an entire category of people, before allowing a search.[330] "All pregnant women" is not individualized any more than is "all Christians" or "all black people."

The Kansas case is even more similar to *Theodore*: the Kansas attorney general has in many cases no evidence that there has been any crime committed whatsoever.[331] He claims that performance of a sometimes-prohibited medical procedure could be evidence of a crime; but possession of a car could also be evidence of a crime, i.e. theft.[332] He, like the IRS in *Theodore*, is simply casting a wide net, with no proof that there is even a single fish wiggling underneath.[333]

This sort of "fishing" expedition is probably done for deterrent purposes. And what exactly is being deterred? Rationally, there is no avoiding the suspicion that mass subpoenas of this sort are perpetrated for inappropriate reasons.[334] In cases involving abortion, mass subpoenas of medical records – and the inevitable possibility of exposure that such subpoenas

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[328] *Id.*

[329] *See id.*

[330] *See supra* note 241 and accompanying text.

[331] *See supra* notes 312-320 and accompanying text.

[332] *Id.*

[333] *See supra* notes 249-252, 312-320 and accompanying text.

[334] *See supra* notes 217-229, 304-320 and accompanying text.

involve – may well be intended as a threat, either to women considering seeking abortions or to providers considering challenging anti-abortion laws.[335] If an abortion provider knows that the medical records of their patients will be subpoenaed and handed over to a pro-life activist prosecutor if the provider protests a law, the provider may well hesitate to challenge that law for the sake of his or her patients.[336] And if a woman knows that if she gets an abortion, her files (including her name, address, and detailed sexual history) will be handed over to an activist pro-life prosecutor, she may well fear for her privacy.[337] Indeed, as noted by the Seventh Circuit, she may even fear for her personal safety.[338]

The Kansas case provides the most support for fears of inappropriate usage of the mass subpoena power: one cannot escape the conclusion that if the aim of the Kansas Attorney General's subpoena spree was really the prevention of statutory rape, he would also be subpoenaing medical records from girls who give birth.[339]

The possible abuse of the subpoena power leads back to a very basic idea: the balance of power, wherein the government, in its laudable quest to prevent crime, must be restrained by constitutional and statutory law from overreaching and intruding on individual privacy.[340] There is a reason why prosecutors are not allowed to independently issue search warrants, and that reason applies equally to investigatory subpoenas.[341] Grand juries alone were initially instilled

[335] *See supra* notes 217-229, 302-320 and accompanying text.

[336] *See supra* notes 302-303 and accompanying text.

[337] *Id.*

[338] *Id.*

[339] *See supra* note 317 and accompanying text.

[340] *See supra* notes 201-221 and accompanying text.

[341] *See id.*

with the authority to issue investigatory subpoenas, specifically because grand juries are presumed to be more objective than prosecutors.[342] Likewise, there is a reason why individualized suspicion is required by the Fourth Amendment for a governmental search.[343] By instilling prosecutors with such broad powers, we make search warrants (and thus the probable cause requirement) all but obsolete.[344] When this occurs, the Fourth Amendment must rise to the occasion to protect innocent civilians from overzealous prosecutors.[345] Constitutional protections regarding informational privacy may also be useful in stemming the rush to disclosure.[346]

While HIPAA and other laws purport to protect privacy by putting some limits on disclosure of medical records obtained by subpoena, it is cold comfort, particularly to those living in small towns or lightly populated states.[347] The fact is that when medical records are released to one person, they may be passed to another, either by accident or by intention.[348] One cannot erase the memory of someone who has seen a file, or prevent them from "putting two and two together" and recognizing the circumstances of an acquaintance.[349] The government in

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[342] *See supra* notes 204, 208 and accompanying text.

[343] *See supra* note 241 and accompanying text.

[344] *See supra* notes 201-221 and accompanying text.

[345] *See supra* notes 238-259 and accompanying text.

[346] *See supra* notes 35-65 and accompanying text.

[347] *See supra* notes 15-26 and accompanying text.

[348] *See supra* notes 24-26 and accompanying text.

[349] *See supra* notes 24-26, 302-303 and accompanying text.

particular keeps copies of all records pursuant to the Federal Records Act.[350] Once private medical information has been released and recorded, it simply isn't private anymore.[351]

Finally, as a practical matter of personal privacy, if prosecutors continue to seek – and courts consent to grant – the power to subpoena the sensitive medical information of all people with certain diagnosis or who have undergone certain procedures, it will set a frightening precedent. This has obvious applications in the realm of reproductive health, as seen from the cases examined above, where mass subpoenas are being used to pry into the most sensitive and personal areas of a woman's body and life.[352] However, the principles born in reproductive cases have an obvious potential to threaten privacy in other cases as well.

For instance, suppose a statute was passed making it illegal for a person who knows that they have HIV to spread it to a new person without informing that person of their HIV status. Should a new person become infected with HIV and not know the identity of the person who infected them, a "reasonable" next step could be the en masse subpoenaing of all records of all those who have tested positive for HIV. Or (as an example of the inappropriate use of such records) the records of all homosexuals. Or possibly, should a person with an appendectomy scar commit a crime, all medical records of all those who have had appendectomies would be sought. We already have mass administrative subpoenaing of the medical records of employees.[353]

With such broad swaths of records in the hands of the attorneys, legal secretaries, and general office staff in prosecutorial offices, it is only a matter of time before people looking

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[350] *See supra* note 288 and accompanying text.

[351] *See supra* notes 24-26 and accompanying text.

[352] *See supra* notes 266-319 and accompanying text.

[353] *Westinghouse*, 638 F.2d at 572-73.

through the records find the records of people they know. The invasion of privacy would be immense. In a smaller town these concerns become even more serious: the county attorney's paralegal may be one of the women who took a pregnancy test at Planned Parenthood, and that may well be something she does not want the attorney she works for to know.[354]

Conclusion

Current statutory law, constitutional law, and common law put theoretical bounds of reasonableness on the power to subpoena medical records, particularly in the case of government-requested subpoenas (where the Fourth Amendment applies).[355] While HIPAA does not provide more than procedural safeguards for personal health information (and not even that if the information is "non-identifiable") stricter state laws may supply more meaningful protection.[356]

However, in a disturbing trend, government agencies, prosecutors, and attorneys general are employing mass subpoenas of third-party medical records to gain various ends in litigation.[357] Some states even grant their prosecutors the power to issue investigatory subpoenas – i.e. subpoenas where there is no crime charged as yet.[358] These can be issued even when there is no evidence of a crime, or where there is no evidence that the parties whose records are being subpoenaed were involved in the crime at all.[359] Circumstances indicate that in some cases these subpoenas are being issued due to inappropriate motivations – for example, to frighten abortion

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[354] *See supra* notes 20-23, 304-311 and accompanying text.

[355] *See supra* notes 33-180, 224-259 and accompanying text.

[356] *See supra* notes 95-201, 296 and accompanying text.

[357] *See supra* notes 266-319 and accompanying text.

[358] *See supra* notes 201-221 and accompanying text.

[359] *See supra* notes 334-345 and accompanying text.

providers or women seeking abortions.[360] This could easily extend to other circumstances; for example, the use of the mass subpoena power to oppress homosexuals or other minorities.[361]

Not only does this power raise the spectre of immediate harassment and pressure to comply with government demands, it also leads to concerns regarding long-term safety of medical records.[362] The plain fact is that the more people have access to one's medical records, the more likely it is that one's medical data will reach people one does not wish it to reach – either by accident or by design.[363] It is simply unrealistic to trust that none of the many government officials who will gain access to subpoenaed medical records will ever recognize an acquaintance in the files, or will never talk about what they see.[364]

Legitimate law enforcement interests can be served without recourse to invasive mass subpoenas of third-party medical records.[365] Prosecutors are not the appropriate personnel for criminal investigation, nor are subpoenas the appropriate tool.[366] Those duties are properly vested in our able police and investigative forces, who are properly equipped for the task with the tool of the search warrant.[367] We should not use the mass subpoena as a sort of citizen-wide strip-search. Medical records are widely considered to be as sacred as our homes; it is time we treated them that way.

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[360] *See supra* notes 352-354 and accompanying text.

[361] *See supra* notes 24-26, 302-303 and accompanying text.

[362] *Id.*

[363] *Id.*

[364] *See supra* notes 340-345 and accompanying text.

[365] *Id.*

[366] *Id.*

[367] *Id.*