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PRIVACY RIGHTS IN MEDICAL RECORDS

I. Introduction

Medical records often contain intimate personal information.¹ If disclosed to others, this information could cause embarrassment and humiliation, lead to loss of employment, educational, financial and social opportunities and infringe on legal rights. Disclosure of medical information could also damage family relationships, reputation and self-esteem.² Public concern with confidentiality of medical information is not new,³ but since legal protections of personal information are relatively new,⁴ the privacy interest recognized in medical records

1. In addition to such non-sensitive information as name and address, medical records may contain personal details including age, life history, family background, medical history, present and past health or illness, mental and emotional health or illness, treatment, accident reports, laboratory reports and other scientific data from various sources. The record may also contain medical providers' notes and hunches, prognoses, and reports of the patient's response to treatment. *See generally* E. HAYT, *MEDICO-LEGAL ASPECTS OF HOSPITAL RECORDS* 39 (1977) [hereinafter cited as HAYT].

2. *Federal Privacy of Medical Information Act: Hearing on H.R. 5935 Before the Subcomm. on Health of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 40 (1980) [hereinafter cited as *H.R. 5935*] (statement of Marcia K. Goin, M.D., Chairperson, Comm. on Confidentiality, Am. Psychiatric Ass'n); *see also* H. SCHUCHMAN, *CONFIDENTIALITY OF HEALTH RECORDS*, 1-7 (1982) [hereinafter cited as SCHUCHMAN] (healing and helping relationships require confidentiality which compels that any disclosure of health information be carefully controlled; otherwise, "we place an unconscionable barrier before those needing assistance and treatment").

3. Confidentiality of medical information has been a part of medical practice since it began. Respect for patient privacy is reflected in the Hippocratic Oath and the American Medical Association's Principles of Ethics. *Confidentiality of Medical Records: Hearing Before the Subcomm. on Health of the Senate Comm. on Finance*, 95th Cong., 1st Sess. 4 (1977) [hereinafter cited as *Confidentiality of Medical Records*] (views of Rep. David E. Satterfield III).

The Hippocratic Oath states in part: "Whatever, in connection with my profession, or not in connection with it, I may see or hear in the lives of men which ought not to be spoken abroad I will not divulge as reckoning that all should be kept secret." The Hippocratic Oath, *quoted in* Britton, *Rights to Privacy in Medical Records*, *J. LEGAL MED.* 30, 30 (July/August 1975) [hereinafter cited as Britton].

The conflict between privacy interests and society's legitimate needs for information is apparent in section 9 of the 1957 Principles of Medical Ethics of the American Medical Association, which states:

A physician may not reveal the confidence entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.

Id. at 30.

4.

Until Congress enacted the Privacy Act of 1974, finding the right to

is in its infancy.⁵ Developments in medicine⁶ have reduced dependence on the family doctor's discretion to protect the patient's personal information.⁷ Vast changes in medical technology, the advent of third-party payment,⁸ government participation in medical care,⁹ and computerization of record-keeping systems¹⁰ have expanded the

privacy a fundamental constitutional right and empowering the Privacy Protection Study Commission to thoroughly review the significant and complex issues in this field, less attention had been paid by public and private policymakers to the universe of privacy issues than to any of the other major "rights" possessed by Americans.

H.R. 5935, supra note 2, at 11 (statement of Larry S. Gage, Deputy Assistant Secretary for Legislation (Health), HEW).

Legal privacy protections are constitutional, common law and statutory. They are discussed in detail *infra* in sections II.A, B and C respectively. Non-legal privacy protections include "physical barriers, distance and technological limitations," cost, moral respect for privacy, disapproval and resentment of intrusion, and professional ethics (*e.g.*, doctors, lawyers and ministers). K. GREENAWALT, LEGAL PROTECTIONS OF PRIVACY, FINAL REPORT TO THE OFFICE OF TELECOMMUNICATIONS POLICY, EXECUTIVE OFFICE OF THE PRESIDENT 13-14 (1975) [hereinafter cited as GREENAWALT]. Presently, there is no method for accurately determining a person's inner thoughts and emotions, other than by force or drugs; the lie detector and "body language" are not dependable, and inferences about a person from the books he reads, his type of friends and choice of activities are not easy to ascertain or interpret. *Id.* at 13. Furthermore, since enacting laws "inevitably involves restriction of someone's liberty and costs of enforcement, it is not always a method to be indulged even when it could improve a social situation in some respect." *Id.* at 14.

5. See SCHUCHMAN, *supra* note 2, at 6.

6. For a brief history of the development of medical record-keeping practices, see HAYT, *supra* note 1, at 39-40.

7. *H.R. 5935, supra* note 2, at 78 (statement of Frederick Ackerman, M.D., Chairman, Counsel on Legislation, American Medical Ass'n).

8. Third party payment includes payment by government, insurance and employer. By 1982, insurance companies or government agencies had paid for medical and hospital bills of two hundred million Americans. SCHUCHMAN, *supra* note 2, at 4. An example of government payment for health care is Medicaid. This program provides aid for medical payments of low-income individuals. The program is state-administered and federally reimbursed. SCHUCHMAN, *supra* note 2, at 81. Insurance, on the other hand, is a contracted-for promise, made in exchange for consideration, to pay the insured if a loss of a certain specified type ensues. BLACK'S LAW DICTIONARY 721 (5th ed. 1979).

9. *H.R. 5935, supra* note 2, at 78. In addition to medical payment programs such as Medicaid, the government participates in medical care through grant programs. For example, through the Department of Health and Human Services, funds are distributed to Health Maintenance Organizations, and Alcohol and Drug Abuse, Mental Health and Preventive Health programs. SCHUCHMAN, *supra* note 2, at 88-89.

10. Computerized medical information has caused much concern because of the ease with which it may be retrieved and shared.

Public concern over the protection of personal privacy has risen almost exponentially with the growth of our ability to store and rapidly transmit vast amounts of data. Not too many years ago, personal privacy was

amount, type and accessibility of health data available about an individual.¹¹ These factors have also increased the frequency of requests for medical records by individuals, private institutions and government bodies.¹² Health records may be sought for a variety of purposes: law enforcement,¹³ civil and criminal legal actions,¹⁴ public health evaluation including epidemiological¹⁵ and occupational

protected rather nicely by the cost and practical difficulties associated with storing and handling paper records. Modern data processing advances have changed all of that. Computers and telecommunications technology combined have caused a virtual explosion in the ability of people to manage information. As it has become easier to deal with information, more and more people have found new ways to use records that were once too cumbersome to store, handle and utilize.

H.R. 5935, supra note 2, at 5 (statement of Hon. Thomas N. Kindness).

11. See generally Boyer, *Computerized Medical Records and the Right to Privacy: The Emerging Federal Response*, 25 *BUFFALO L. REV.* 37 (1975) (discussing computerization in following areas: clinical medicine; statistical research and policy planning; and payment for medical treatment).

12. Another issue to consider is the patient's access to information contained in his own medical records. Traditionally, consumer access to health records was rarely possible. Recently, however, legislative, administrative and judicial attention has focused on this injustice, resulting in the recognition of this right by most American jurisdictions. See SCHUCHMAN, *supra* note 2, at 32-34. An example is a New York law, where unprofessional conduct for certain specified health-related professionals includes failure

upon a patient's written request . . . to make available to a patient, or, to another licensed health practitioner consistent with that practitioner's authorized scope of practice, copies of the record . . . and copies of reports, test records, evaluations or X-rays . . . [unless] in the reasonable exercise of [the practitioner's] professional judgment . . . release of such information would adversely affect the patient's health.

8 NYCRR 29.2(a)(6) (1977). On the federal level, the Privacy Act of 1974 includes medical records in its access provision: "Each [federal] agency that maintains a system of records shall—upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made . . ." 5 U.S.C. § 552a(d)(1) (1982). The underlying philosophy of such legislation is that the patient is the "person most concerned" with his medical record. SCHUCHMAN, *supra* note 2, at 33. The patient, then, should control the use of and access to that record. *Id.* In some cases, where access would be harmful to the patient, he should not have such control over his record.

13. See *infra* notes 186-93 and accompanying text for a discussion of law-enforcement purposes.

14. For example, medical records may be required in the following legal actions: third party claims for payment of health, accident and life insurance, claims for wrongful death, personal injury, medical malpractice, and probate, products liability and contract claims, and criminal cases. Britton, *supra* note 3, at 30.

15. Epidemiology is described as:

[T]he study of the distribution of disease and the dynamics of disease in the human population, [the purpose of which] is to identify specific agents or factors related to people and their environment that may either

health research,¹⁶ third-party payment,¹⁷ employment,¹⁸ credit-rating,¹⁹ and for use by other health care providers.²⁰

While granting access may be proper in some circumstances, where

cause disease or may identify people who have a high risk for developing a disease.

By finding these causes and eliminating the exposure for these causes, [epidemiologists] can hopefully prevent disease in the population. By finding people who are at high risk, [epidemiologists] can direct them to medical care and detect their diseases at an earlier stage

[I]n order to carry out these studies . . . individually identifiable information from medical records is essential. It is necessary so that [epidemiologists] can find individuals who have a specific disease and obtain followup information. It is also necessary in order to link records from hospitals, death certificates, and areas of employment in order to investigate specific diseases.

[E]pidemiologic investigations, whether they deal with environmental agents, newly developed medications, the natural history of disease, or the effectiveness of medical care, are of great potential benefit to society.

Confidentiality of Medical Records, *supra* note 3, at 51-52 (statement of Dr. Leon Gordis on behalf of Soc'y of Epidemiologic Research and Ass'n of Am. Medical Colleges).

16. Occupational health research entails investigations of employment conditions and employee health to determine if materials used in that environment, in the concentrations and exposure generally present, negatively affect employee health. See Occupational Safety and Health Act of 1970, 29 U.S.C. § 669 (1982). This Act authorizes the creation of a National Institute for Occupational Safety and Health to carry out this research. 29 U.S.C. § 671 (1982). For a discussion of toxicity in the workplace, see Piller, *Toxic Time Bombs in the Factory*, 232 NATION 395 (1981). See *infra* notes 160-175 and accompanying text for a discussion of occupational health research. For a general discussion of, and background to, the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982), see SMITH, *THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ITS ACHIEVEMENTS* (1976).

17. *H.R. 5935*, *supra* note 2, at 5. Much information pertaining to consumer health records is derived by insurance companies from the Medical Information Bureau (MIB). Over 700 life insurance companies are members of this organization. *Your medical records: Not so private anymore*, 35 CHANGING TIMES 41, 42 (July 1981) [hereinafter cited as CHANGING TIMES]. It collects medical information of applicants for insurance policies. This information is given out to other members on request. So far, information on 11,000,000 people has been collected. *Id.* at 42. MIB states that the information is shared only if the applicant has "authorized" it. *Id.* Most applicants for health insurance automatically sign a blanket consent form, often unwittingly authorizing such information sharing. Winslade, *Confidentiality of Medical Records: An Overview of Concepts and Legal Policies*, 3 J. LEGAL MEDICINE 497, 509 (1982) [hereinafter cited as Winslade]. Another company, Equifax, investigates applicants for health and life insurance. It also checks credit and employment background, and tries to "avoid mingling medical records with the information creditors might want to examine." CHANGING TIMES, *supra*, at 42.

18. See HAYT, *supra* note 1, at 187.

19. SCHUCHMAN, *supra* note 2, at 4.

20. For example, when a general practitioner refers a patient to a specialist, that specialist will want copies of or access to the medical information (X-rays,

medical information has been sought for illegitimate purposes such as curiosity and defamation, access should be denied.²¹ Furthermore, legitimate requests for information may succeed too well. Often the entire record has been shared where limited disclosure of the specific facts required would have been appropriate.²²

Although the privacy interest in medical records has been partially acknowledged,²³ society's legitimate need for the recorded information often supersedes that interest.²⁴ Current legislative²⁵ and

laboratory tests and so on) recorded by the general practitioner. This not only saves the patient the time, money and perhaps discomfort of going through duplicate tests, but also may be the only method of properly tracking the progression of the patient's illness.

21. See *infra* note 159 and accompanying text. Other potentially illegitimate uses of medical records are noted in the following statement:

The outward flow of medical data . . . has enormous impact on people's lives. It affects decisions on whether they are hired or fired; whether they can secure business licenses and life insurance; whether they are permitted to drive cars; whether they are placed under police surveillance or labelled a security risk; or even whether they can get nominated for and elected to a political office.

Confidentiality of Medical Records, *supra* note 3, at 2 (statement of Senator Robert Dole, quoting Alan F. Westin).

22. Winslade, *supra* note 17, at 509-10. This result has been attributed to the fact that medical records are perceived as belonging to their custodian—the doctor or hospital—rather than to the patient. *Id.*

23. An individual's privacy interest in preserving the confidentiality of his medical records has been recognized by both federal and state privacy laws governing record-keeping practices of public employers and agencies. See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a (1982) (forbidding disclosure of medical records without written consent, unless covered by specific statutory exception); N.Y. PUB. OFF. LAW § 89(2) (McKinney Supp. 1983-84) (requiring agencies to withhold or delete identifying material in medical records to prevent unwarranted invasions of personal privacy); see also *Final Report of the Privacy Protection Study Comm'n: Joint Hearing Before the Senate Comm. on Government Operations*, 95th Cong., 1st Sess. 3 (1977) [hereinafter cited as *Privacy Protection Commission*] (recommending criminal penalties in private sector to end deceptive methods of obtaining medical files).

24. Case law indicates that the privacy interest in medical records carries little weight and may be supplanted by legitimate societal needs. See *Whalen v. Roe*, 429 U.S. 589, 602 (1977) (New York State prescription reporting law, designed to combat illegal use of dangerous drugs, did not pose "sufficiently grievous threat" to patients' privacy interests to require its invalidation); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80 (1976) ("[r]ecordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible").

25. After publication of the Privacy Protection Study Commission report, authorized by the Privacy Act of 1974, *supra* note 23, Congress began to study the issue of privacy in medical records. Since that time, hearings have been held and several bills have been introduced which specifically would protect medical records. However, none have been enacted. See *H.R. 5935*, *supra* note 2, at 1 (Federal Privacy of Medical Information Act; proposed to protect patient privacy by controlling the use and disclosure of medical information); S.503 & S.865, 96th Cong.,

judicial²⁶ debate has focused on the interaction of these conflicting interests.

This Note examines the current constitutional, common law and statutory status of privacy rights and exposes pertinent medical records issues in each area.²⁷ Invasions of medical records privacy and corresponding legal responses will also be discussed.²⁸ The Note then analyzes the critical factors in medical records privacy cases and correlates the purposes for seeking medical records with the likelihood that a court will recognize the privacy interest.²⁹ This discussion will clarify the issues which should be addressed when analyzing medical records privacy issues in the future.

II. Overview of Privacy Protections with Respect to Medical Records

"Privacy" has no single definition; it changes according to its legal context. The constitutional and common law aspects of privacy indicate that it is a "right to be let alone"³⁰ and to be free from government intrusion,³¹ whereas the statutory definition focuses on

1st Sess. 3 (1979) [hereinafter cited as S.503 & S.865] (introduced by former Senator Javits and the Carter Administration, respectively) (these bills sought to provide for patient access to their own records, prohibit disclosure without patient consent, with a few exceptions, and restrict access to medical records by government authorities); H.515, 98th Cong., 1st Sess. 1983 (introduced by Rep. Crane) (died in committee) (providing for confidentiality of medical and dental records of patients not receiving assistance from federal government).

26. For example, while the Supreme Court in *Whalen v. Roe*, 429 U.S. 589 (1976), found that patients' constitutional rights in the privacy of their medical records were not sufficiently infringed upon by New York's prescription reporting statute, the Court did not clarify under what circumstances it would find that these privacy rights had been violated. 429 U.S. at 603-4. Four years later, the Court of Appeals for the Third Circuit stated: "There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (footnote omitted). For a discussion of case law on constitutional privacy in medical records, see *infra* Part II.A.

27. See *infra* notes 31-153 and accompanying text.

28. *Id.*

29. See *infra* notes 154-244 and accompanying text.

30. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis stated: "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Id.*

31. GREENAWALT, *supra* note 4, at vii.

Protection from governmental intrusion on privacy is predicated on a

an individual's right to control personal information.³² Constitutional and certain statutory protections are effective when an individual's privacy is invaded by the government,³³ while common law and other statutory protections are available against non-governmental intrusions.³⁴

A. Constitutional Privacy Protections³⁵

The right to privacy is not guaranteed by a particular constitutional

regard for individual liberty and political freedom. Classically, the privacy of a man's property, activity and expression from all but the most limited and well-controlled interference by government has been believed critical to political independence. Without protections of privacy, that independence would be jeopardized by the inherent coercive power of government.

Id. at viii-ix.

32. Statutory protections generally concern records maintained about individuals which are collected, retained and used by government agencies. These laws usually determine to whom, and under what circumstances disclosure will be allowed. *See, e.g., id.* at 57 (discussing Federal Privacy Act of 1974, 5 U.S.C. § 552a (1982)); SCHUCHMAN, *supra* note 2, at 67. The Privacy Act is intended to prohibit unnecessary collection of information, and to allow individuals to find out what information has been collected about them by government agencies. *Id.* It also allows individuals to delete or correct inaccurate information in these records. *Id.* Other statutory protections affect certain records maintained by private entities. For examples see *infra* note 99.

33. For a discussion of constitutional protections, see *infra* notes 37-69 and accompanying text. For a discussion of statutory protections, see *infra* notes 95-153 and accompanying text.

Under certain circumstances, intrusions by private entities may give rise to constitutional privacy protections. This requires government regulation of the entity and "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

Such interdependence may arise where a private entity exercises traditional governmental powers which have been delegated to it. *Id.* at 352. Government regulation alone is not state action. *Id.* at 358.

34. For a discussion of common law and statutory protections, see *infra* notes 70-153 and accompanying text.

35. While the constitutional protections considered in this Note concern the United States Constitution, it may be important in some cases to evaluate state constitutional provisions. Certain state legislatures and courts have been more responsive to privacy needs than have their federal counterparts. For example, California amended its state constitution in 1972 to expressly protect the "inalienable right" to personal privacy. CAL. CONST. art. 1, § 1. Resulting case law indicates that this right extends beyond protections against governmental intrusions (to which federal constitutional protection is limited) to protect against intrusions by private entities as well. *See generally* Linowes, *Preface* to PRIVACY PROTECTION STUDY COMM'N, PRIVACY LAW IN THE STATES, APPENDIX 1 TO THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION (1977) [hereinafter cited as PRIVACY LAW IN THE STATES]. For examples of privacy cases arising under the California section, see

provision.³⁶ Although there is no general constitutional "right to privacy,"³⁷ it is considered to be a fundamental right³⁸ derived from the constitution by implication.³⁹ Theoretically, a fundamental right may be regulated by government only when there is a compelling state interest.⁴⁰ However, in practice, the lesser standard of important state interest measures government privacy infringements.⁴¹ Consequently, state public health and law enforcement interests have been found to supersede privacy rights.⁴²

1. Historical Discussion

The right to privacy, first recognized by Thomas Cooley in 1888,⁴³ had its modern roots in a famous Warren and Brandeis law review article⁴⁴ which called for the creation of a tort right of privacy.⁴⁵

Loder v. Municipal Court, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976), *cert. denied*, 424 U.S. 1109 (1977); Porten v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (Cal. Ct. App. 1976); White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975). For a brief discussion of state constitutional privacy provisions, see PRIVACY LAW IN THE STATES, *supra* at 1.

36. Paul v. Davis, 424 U.S. 693, 712-13 (1976). However, the Supreme Court stated that "'zones of privacy' may be created by . . . specific constitutional guarantees, thereby imposing limits upon government power." *Id.*, *citing* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

37. Katz v. United States, 389 U.S. 347, 350 (1967).

38. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

39. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

40. Roe v. Wade, 410 U.S. at 155.

41. *See, e.g.*, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 80 (1976) (where record-keeping requirements concerning abortions are "reasonably directed" to their stated purpose of protecting maternal health, and "properly respect a patient's confidentiality and privacy," they will be permitted to stand); Roe v. Wade, 410 U.S. at 154 (states may "properly assert important interests in safe-guarding health, in maintaining medical standards, and in protecting potential life").

42. Roe v. Wade, 410 U.S. at 154-55 (citing cases where state interests have superseded privacy rights).

43. *See* T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (1888) ("[t]he right to one's person may be said to be a right of complete immunity: to be let alone").

44. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id. at 196.

45. Posner, *The Uncertain Protection of Privacy by The Supreme Court*, 1979 SUP. CT. REV. 173, 177 [hereinafter cited as Posner].

The notion of a constitutionally-based privacy right initially was derived from explicit constitutional guarantees concerning search and seizure, probable cause, self-incrimination and rights of association.⁴⁶ Justice Brandeis' dissent in *Olmstead v. United States*,⁴⁷ inspired the modern trend by contending that there existed a constitutional "right to be let alone,"⁴⁸ despite the lack of an explicit constitutional source. Thereafter, privacy law grew beyond protection of an individual's seclusion and physical privacy to become a general right to be let alone.⁴⁹

In *Griswold v. Connecticut*, the Supreme Court expanded its earlier privacy holdings, finding a general constitutional right to privacy.⁵⁰ However, this right is not absolute;⁵¹ the degree to which it is legally protected changes with the facts of each case. While the right has expanded in recent years,⁵² its limits have never been clearly defined by the Supreme Court.⁵³

2. Supreme Court Decisions on Medical Records Privacy Issues

In the late 1970's, the Supreme Court twice examined privacy issues in the context of medical records. In *Whalen v. Roe*, the Court analyzed the constitutionality of a New York statute which required records of all prescriptions for certain dangerous drugs to be filed with the State Health Department.⁵⁴ The record was required

46. For a discussion of the fourth amendment and development of privacy rights, see D. O'BRIEN, *PRIVACY, LAW, AND PUBLIC POLICY* 35-88 (1979) [hereinafter cited as O'BRIEN]. For a discussion of the fifth amendment and privacy rights, see *id.* at 89-137.

47. 277 U.S. 438 (1928); see *supra* note 31.

48. 277 U.S. at 478.

49. Posner, *supra* note 45, at 182.

50. 381 U.S. 479, 484 (1965). This right was derived from zones of privacy created by penumbras of specific guarantees in the Bill of Rights. *Id.*; see O'BRIEN, *supra* note 47, at 177 (calling constitutional right of privacy a *per se* right).

51. See *supra* note 43 and accompanying text; see also *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (because privacy right is not absolute, societal interests such as public health research may call for disclosure of personal information).

52. For a discussion of the privacy interests for which the Supreme Court has found support in the Bill of Rights' underlying right of privacy, see *J.P. v. DeSanti*, 653 F.2d 1080, 1087-91 (6th Cir. 1981).

53. *Westinghouse Elec. Corp.*, 638 F.2d at 577.

54. 429 U.S. 589 (1977). New York State's Controlled Substances Act of 1972 was enacted in response to growing drug-abuse problems involving legitimate but dangerous drugs being "diverted into unlawful channels." N.Y. PUB. HEALTH LAW § 3300 (McKinney 1978 & Supp. 1983-84). *Whalen v. Roe*, 429 U.S. at 591. Public disclosure is prohibited by the statute. *Id.* at 594; N.Y. PUB. HEALTH LAW § 3371 (McKinney 1978 & Supp. 1983-84).

to contain the name, address and age of patients obtaining the drugs, as well as the prescribing physician, dispensing pharmacy, and the drug and dosage prescribed.⁵⁵ The appellees⁵⁶ contended that the statute invaded patients' privacy by deterring those who legitimately needed such drugs from seeking treatment to avoid being stigmatized in public records as drug addicts. The Court, reviewing past privacy cases, determined that at least two interests were involved: (1) avoiding disclosure of personal matters; and (2) independent decision-making.⁵⁷ Both interests, the appellees argued, were violated by the reporting statute. The Court disagreed, finding that the statute did not interfere sufficiently with either interest to violate patients' constitutional rights.⁵⁸ The *Whalen* Court based its decision on four grounds: (1) the statute itself provided for security against public disclosure of the patients' names, and there was no reason to suspect that these provisions would not function as intended;⁵⁹ (2) the necessary disclosures to the Department of Health were not "meaningfully distinguishable" from many other disclosures often required for public health purposes;⁶⁰ (3) the argument that the statute would deter legitimate use of the drugs was not sound;⁶¹ and (4) the statute did not deprive patients of their right to decide independently, with the advice of their physicians, to use the medications.⁶²

Similarly, in *Planned Parenthood of Missouri v. Danforth*,⁶³ the Court found that Missouri abortion-recording laws did not violate women's privacy interests since: (1) women could still make abortion decisions without government interference; (2) the recording requirements would not interfere with the physician-patient relationship; (3) the records would be useful in maternal health issues; and (4) the recording requirements would respect a patient's privacy rights.⁶⁴

Although the Court acknowledged a privacy interest in medical records in both *Whalen* and *Planned Parenthood*, it decided that, given sufficient protections against public disclosure, the individual's

55. 429 U.S. at 593.

56. Suit was brought by patients receiving such prescriptions, prescribing doctors and two physician associations. *Id.* at 595.

57. *Id.* at 599-600.

58. *Id.* at 603-04.

59. *Id.* at 601-02.

60. *Id.* at 602. The Court gave these examples of other statutory reporting requirements for public health purposes: venereal disease, child abuse, injuries caused by deadly weapons, and certifications of fetal death. *Id.* at 602 n.29.

61. *Id.* at 603.

62. *Id.*

63. 428 U.S. 52 (1976).

64. *Id.* at 80-81.

privacy interest sometimes may be sacrificed.⁶⁵ Important needs of society, such as deterring drug abuse and preserving maternal health, outweigh privacy interests.⁶⁶

Since these Supreme Court decisions, other federal and state courts have considered issues pertaining to medical records privacy interests.⁶⁷ In each instance, the issue has remained a balancing of the public's need for information against the individual's privacy interest.⁶⁸

B. Common Law Protections

Common law privacy actions for damages or injunctive relief may be employed when an individual believes that another party, private individual or institution, has illegitimately obtained, disclosed or used the plaintiff's medical information.⁶⁹ However, if the challenged conduct is privileged the wrong is not actionable.⁷⁰ Common law privacy actions also may be available against government bodies or

65. An invasion of privacy interests is not automatically impermissible in the face of a reasonable exercise of a state's police power. *Whalen v. Roe*, 429 U.S. at 598, 602.

66. See *Whalen v. Roe*, 429 U.S. 589 (1977); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976).

67. Part III, *infra*, discusses critical factors in determining whether to disclose medical records.

68. See *Consumers Union of U.S. v. Consumer Product Safety Comm'n*, 590 F.2d 1209, 1214 (D.C. Cir. 1978), *rev'd on other grounds*, 445 U.S. 375, 386-87 (1980); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 313-17 (1979); *United States v. Westinghouse*, 638 F.2d 570, 578-80 (3d Cir. 1980); *G.M.C. v. Director of Nat'l Institute*, 636 F.2d 163, 165-66 (6th Cir.), *cert. denied*, 454 U.S. 877 (1980); *United States v. Lasco Industries*, 531 F. Supp. 256, 263-64 (N.D. Texas 1981).

69. Watson, *Disclosure of Computerized Health Care Information: Provider Privacy Rights Under Supply Side Competition*, 7 AM. J. LAW & MED. 265, 282 (1981). For a discussion of reasons for the traditional separation of legal protections against governmental and private intrusions on privacy, see GREENAWALT, *supra* note 4, at viii-ix. Fundamentally, the desire for freedom from government interference, which was essential to American political ideals and form of government, is the heart of this distinction; it was critical enough to require constitutional attention. Private interferences with privacy, on the other hand, were not "perceived as compelling." *Id.* at ix.

70. A privilege is a defense to tort. It differs from an immunity because it only avoids tort liability in certain circumstances, while an immunity does so under all circumstances. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 970 (1971) [hereinafter cited as PROSSER]. If the "circumstances make it just and reasonable that the liability shall not be imposed, [they will] go to defeat the existence of the tort itself." *Id.* On the other hand, immunity does not deny the tort, just the liability. The defense of privilege may be based upon consent, necessity, or the fact that defendant was "performing a function" of such importance that the tort committed was not actionable. *RESTATEMENT (SECOND) OF TORTS* § 10 (1977) [hereinafter cited as *RESTATEMENT OF TORTS*].

officials where the act complained of is not protected by the doctrine of immunity.⁷¹ Common law medical records privacy actions have succeeded occasionally.⁷² Nevertheless, many commentators believe such remedies are inadequate.⁷³

Common law protections for sensitive medical information include actions for invasion of privacy,⁷⁴ defamation,⁷⁵ breach of confi-

71. Immunity from tort liability is a protection applicable to various classes of defendants for policy reasons, based on the status, position or interests represented by the defendant. While not denying the tort, immunity "avoids" the resulting liability. PROSSER, *supra* note 70, at 970. Some examples of immunities are charitable, family and governmental. Governmental immunity is based on the premise that legal rights cannot exist against the authority which makes those rights. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). This immunity is derived originally from the divine right of kings. Under that doctrine the government may not be sued without its consent. PROSSER, *supra* note 70, at 970-71. However, governmental immunity is being eroded on the federal, state and municipal levels by statute and judicial decisions which make the relevant government body liable for some tortious conduct of its employees. The government is said to have "consented" to suit. See, e.g., the Federal Tort Claims Act, 28 U.S.C. § 1346 (1982). On the state level, some governmental immunities have been statutorily waived. PROSSER, *supra* note 70, at 975-76.

Municipal corporations have a "dual character" for tort immunity purposes. They are both corporations and governments. In their governmental capacity, they are immune, while in their proprietary capacity, they may be liable. *Id.* at 977-78. Government activities carried out for public health protection, for example operating hospitals, generally have been found to be governmental in nature. *Id.* at 979-80, citing *Butler v. City of Kansas City*, 97 Kan. 239, 155 P. 12 (1916). *Contra*, *City of Miami v. Oates*, 152 Fla. 21, 10 So. 2d 721 (1942).

72. See *infra* notes 74-87 and accompanying text; see also Le Blang, *Invasion of Privacy: Medical Practice and the Tort of Intrusion*, 18 WASHBURN L.J. 205, 219 (1979) (where physician is responsible for intrusions on patient's solitude, he may be liable for money damages in tort).

73. See Note, *Public Health Protection and the Privacy of Medical Records*, 16 HARV. C.R.-C.L. L. REV. 265, 286-89 (1981). Skeptics' views are based on the following grounds: patients have no legal interest in (*i.e.*, they do not own) their records; the physician-patient relationship is no longer significant in terms of informational privacy; common law actions are not easily applied to the majority of offenders such as insurance companies, epidemiologists and hospitals; and the patient may never learn of the disclosure even though he may be injured by it. *Id.* at 287-88. For example, disclosure of an individual's epilepsy to a prospective employer might influence the employer not to hire him.

74. RESTATEMENT OF TORTS, *supra* note 70, §§ 652A-652E. Most American jurisdictions now recognize the tort of invasion of privacy. *Id.* § 652A comment (a). This tort shares its historical roots with the constitutional right to privacy, described *supra* notes 43-49 and accompanying text.

There are four types of privacy invasions generally recognized by tort law: (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public. RESTATEMENT OF TORTS, *supra* note 70, § 652A.

With respect to intrusion, *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir.), *cert.*

denied, 395 U.S. 947 (1969) extended the tort of invasion of privacy to cover intrusion. The Restatement also states that the intrusion type of privacy invasion does not require publicity or publication: "It consists solely of an intentional interference with [an individual's] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man." RESTATEMENT OF TORTS, *supra* note 70, § 652B comment (a). Comment (b) states:

The invasion may be by . . . some . . . form of investigation or examination into [an individual's] private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents.

Id. at comment (b). These definitions indicate that an intrusion action could prove useful where the plaintiff's medical records are improperly disclosed.

Regarding appropriation as an invasion of privacy, the Restatement indicates that commercial appropriation is not required. As long as the defendant has used plaintiff's name or likeness for his own purposes and benefit, he is liable. RESTATEMENT OF TORTS, *supra* note 70, § 652C comment (a). In some states this form of protection is statutory. See, e.g., N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976) (protecting against commercial appropriation). In New York, there is no common law protection against appropriation. Delan by Delan v. CBS, 91 A.D.2d 255, 258, 458 N.Y.S.2d 608, 612 (2d Dep't 1983). At common law, a cause of action for violation of the right of privacy is not cognizable in New York State.

Id.

As to unreasonable publicity, the matter publicized must be (a) "highly offensive to a reasonable person, and (b) not of legitimate concern to the public." RESTATEMENT OF TORTS, *supra* note 70, § 652D. Thus, in a medical records case, part (b) might be the critical factor because of the difficulty in showing that a medical matter is not of legitimate concern to the public. For example, consider the highly publicized case, United States v. University Hospital, 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd*, 729 F.2d 144 (2d Cir. 1984). *University Hospital* involved a third party's challenge of the choice of medical treatment made by parents of a critically ill newborn.

The Justice Department, representing the Department of Health and Human Services, had requested the infant's medical file, contending that it was necessary to have access to the file to determine if she was being discriminated against because of her handicap. The district court denied the request, stating that the parents' choice was a reasonable one. *Id.* at 616.

Before the Justice Department brought suit, the case had gone through the New York State courts. *Weber v. Stony Brook Hospital*, 95 A.D.2d 587, 467 N.Y.S.2d 685 (2d Dep't), *aff'd*, 60 N.Y.2d 208, 469 N.Y.S.2d 63 (1983). The original action was brought by an unrelated party in order to obtain a court order directing the hospital to follow a different course of treatment than that chosen by the parents with medical advice. 60 N.Y.2d at 210. The New York Court of Appeals found no justification for "entertainment of these proceedings." *Id.* at 213. Based on the definitions of privacy invasions described *supra*, the parents and the infant in a situation like the *Weber* case may have a cause of action against the individual who initially brought unreasonable publicity to their plight.

75. Defamation is the holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community by publication of false information. PROSSER, *supra* note 70, § 111. It includes both libel and slander. *Id.*; RESTATEMENT OF TORTS, *supra* note 70, §§ 559, 563. For example, a libel action was brought against a psychiatrist who had revealed information about his patient (the plaintiff) in a letter to a physician who then passed the information

dence,⁷⁶ breach of statutory duty,⁷⁷ breach of fiduciary duty,⁷⁸ breach of contract,⁷⁹ and tortious interference with a contractual relation-

on to the parents of plaintiff's fiancée. *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958).

Truth is a defense to defamation actions. PROSSER, *supra* note 70, § 116. In addition, the publication may be privileged. *Id.* at § 115. For a list of commentaries on defamation regarding confidential medical information, see Watson, *supra* note 69, at 287 n.138.

76. A breach of confidence action may be based upon a duty arising out of the physician-patient relationship. While there is no common law physician-patient privilege, state statutes creating such a privilege may provide the basis for this action. *See, e.g.*, Rhode Island's Confidentiality of Health Care Information Act, R.I. GEN. LAWS, §§ 5-37.3-1 - 5-37.3-11 (Supp. 1983). Even without the statutory privilege, however, some courts have acknowledged a cause of action for breach of the confidential relationship which arises out of the Hippocratic Oath, professional ethics, and laws governing physicians' conduct. *See Clark v. Geraci*, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. Kings County 1960); *Alexander v. Knight*, 197 Pa. Super. 79, 177 A.2d 142 (Pa. Super. Ct. 1962); *Smith v. Driscoll*, 94 Wash. 441, 162 P. 572 (1917). Liability was not recognized in *Collins v. Howard*, 156 F. Supp. 322 (S.D. Ga. 1957); *Hammer v. Polsky*, 36 Misc. 2d 482, 233 N.Y.S.2d 110 (Sup. Ct. N.Y. County 1962); *Quarles v. Sutherland*, 215 Tenn. 651, 389 S.W.2d 249 (1965).

77. Cases in which patients have brought actions for breach of statutory duty against physicians who revealed confidential medical data include: *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793 (N.D. Ohio 1965) (case brought against physician's malpractice insurer for inducing physician to breach this duty); *Simonsen v. Swenson*, 104 Neb. 224, 177 N.W. 831 (1920); *Munzer v. Blaisdell*, 183 Misc. 773, 49 N.Y.S.2d 915 (Sup. Ct. New York County 1944), *aff'd*, 269 A.D. 970, 58 N.Y.S.2d 359 (1st Dep't 1945); *Schaffer v. Spicer*, 88 S.D. 36, 215 N.W.2d 134 (1974). The statutes invoked in these cases support the public policy of encouraging "a free flow of communication between physician and patient" which is required for optimal medical treatment. Watson, *supra* note 69, at 283. An example of a relevant statute is Nebraska's provision for revocation of a physician's license should he betray "professional secret[s] to the detriment of the patient." *Britton, supra* note 3, at 32, *citing* NEB. REV. STAT. § 71-148 (1981); *see also* *Abelson's Inc. v. New Jersey State Board of Optometrists*, 5 N.J. 412, 75 A.2d 867 (1950).

78. A fiduciary duty is "a duty, created by [an individual's] undertaking, to act primarily for the benefit of another in matters connected with his undertaking." Watson, *supra* note 69, at 285 (citing RESTATEMENT (SECOND) OF TRUSTS § 13 (1959)). Courts generally have required three elements before finding this relationship to exist: (1) that one party has special knowledge upon which the other relies; (2) that the party with knowledge exploits it for financial gain; and (3) that the reliant party suffers injury. Watson, *supra* note 69, at 285. Cases indicating that the physician's fiduciary duty to the patient encompasses a duty of confidentiality are *Emmett v. Eastern Dispensary & Cas. Hosp.*, 396 F.2d 931, 935 (D.C. Cir. 1967); *Hammonds v. Aetna Cas. & Sur. Co.*, 237 F. Supp. 96, 102 (N.D. Ohio 1965); *Cannell v. Medical & Surgical Clinic*, 21 Ill. App. 3d 383, 385, 315 N.E.2d 278, 280 (1974).

79. The contract arises out of the agreement of the patient to pay the medical care provider for treatment. Watson, *supra* note 69, at 292-93. Occasionally, the agreement will include express provisions protecting confidentiality. These are more likely to be found in psychotherapist-patient agreements than in physician-patient agreements. *Id.* at 293.

Whether or not there is an express provision for confidentiality, courts may infer

ship.⁸⁰ The focus in these causes of action, excluding those for invasion of privacy,⁸¹ is on the disclosure of confidential information,⁸² rather than on the medical records themselves.

Common law privacy cases have been held to be actionable where a physician discloses confidential information about his patient⁸³ by publishing articles,⁸⁴ photos,⁸⁵ or films,⁸⁶ often accompanied by

an implied duty of confidentiality, based upon traditional ethical considerations applying to physicians, of which the public has knowledge. *See, e.g.*, *Horne v. Patton*, 291 Ala. 701, 711, 287 So. 2d 824, 832 (1973); *Doe v. Roe*, 42 A.D.2d 559, 345 N.Y.S.2d 560 (Sup. Ct. New York County), *aff'd*, 33 N.Y.2d 902, 307 N.E.2d 823, 352 N.Y.S.2d 626 (1973). This public knowledge may be based on: the Hippocratic Oath, *supra* note 2; the AMA's Principles of Ethics, *supra* note 2; medical licensing requirements, *e.g.*, ARIZ. REV. STAT. ANN. §§ 32-1401(8)(a), 32-1422(A)(4) (Supp. 1977-83); and custom and practice, *Watson supra* note 69, at 293-94. *See also* *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793 (N.D. Ohio 1965); *Hague v. Williams*, 37 N.J. 328, 181 A.2d 345 (1962); *Alexander v. Knight*, 25 Pa. D. & C.2d 649, *aff'd*, 197 Pa. Super. 79, 177 A.2d 142 (1961); *Clayman v. Bernstein*, 38 Pa. D. & C. 543, 549 (1940) (contract between patient and physician contains many implied provisions which may include duty of trust or confidence); Note, *Action for Breach of Medical Secrecy Outside the Courtroom*, 36 U. CIN. L. REV. 103 (1967).

80. This common law action requires the existence of a contract, defendant's knowledge of its terms, and his unjustified intent to interfere. *Watson, supra* note 69, at 296. Causes of action could conceivably arise from interferences with contracts between patient and physician, patient and insurer, and patient and hospital. For discussions of this tort, see *Watson, supra* note 69, at 296-98; *Rosen, Signing Away Medical Privacy*, 3 CIV. LIB. REV. 54 (Oct/Nov 1976); Note, *Medical Data Privacy: Automated Interference with Contractual Relations*, 25 BUFFALO L. REV. 491 (1976).

81. Specifically, the intrusion type of privacy invasion could focus on medical records. *See supra* note 74.

82. *Privacy Protection Commission, supra* note 23, at 20. For a discussion of developing common law protections against disclosure of confidential medical information, see *id.* at 25-27.

83. *See, e.g.*, *Hammonds v. Aetna Cas. & Sur. Co.*, 237 F. Supp. 96 (N.D. Ohio 1965).

84. *See, e.g.*, *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (suit against magazine which published plaintiff's name and described her strange illness without her consent).

85. *See, e.g.*, *Griffen v. Medical Soc. of N.Y.*, 7 Misc. 2d 549, 11 N.Y.S.2d 109 (Sup. Ct. N.Y. County 1939). *Griffen* concerned a suit under New York's privacy statute, *supra* note 75, alleging the publication of plaintiff's photo accompanying an article written by defendant physicians without plaintiff's consent. The court concluded that the complaint was not sufficient to determine whether the article was scientific (in which case defendant would not be liable) or an advertisement. *See also* *Clayman v. Bernstein*, 38 Pa. D. & C. 543 (1940) (enjoining physician from printing photos taken of plaintiff's disfigured face while she was unconscious; it was an invasion of privacy, whether or not publication had occurred).

86. *See, e.g.*, *Feeney v. Young*, 191 A.D. 501, 181 N.Y.S. 481 (1st Dep't 1920). In this case, plaintiff consented to film being made of her Caesarean section operation, to be shown only for scientific medical purposes. Plaintiff had a cause of action against physician for invasion of privacy under New York's privacy statute when the film was shown as part of a commercial film.

the patient's name.⁸⁷

Defenses may be available against common law actions for disclosure of confidential information. For example, if the breach of confidence is necessary to protect the community or an important public interest, the complaint may not be actionable as where the plaintiff is mentally ill⁸⁸ or has a contagious disease.⁸⁹ Other instances might occur where the medical care provider has a higher duty which compels disclosure.⁹⁰ Where disclosure is to the patient's spouse⁹¹ or is required by law,⁹² it may not be actionable. In some jurisdictions, disclosure is not actionable unless it was made with malice or intent to harm.⁹³

C. Statutory Protections

In the last decade, legislative attention has been focused on privacy issues.⁹⁴ Statutory protections have been implemented on both the state⁹⁵ and federal levels.⁹⁶ Some statutes apply solely to governmental

87. In *Barber v. Time, Inc.*, 348 Mo. 1199, 1207, 159 S.W.2d 291, 295 (1942), the court noted that medical purposes were not served by publishing plaintiff's name along with information about her illness.

88. *See, e.g., Schwartz v. Thiele*, 242 Cal. App. 2d 799, 51 Cal. Rptr. 767 (Cal. Dist. Ct. App. 1966).

89. *See, e.g., Simonsen v. Swenson*, 104 Neb. 224, 177 N.W. 831 (1920).

90. *E.g., Hague v. Williams*, 37 N.J. 328, 181 A.2d 345 (1962) (duty to disclose existence of infant's pathological heart condition to insurer to whom parents applied for insurance on infant's life).

91. *See, e.g., Pennison v. Provident Life & Accident Ins. Co.*, 154 So. 2d 617 (La. Ct. App. 1963), *writ refused*, 244 La. 1019, 156 So. 2d 226; *Curry v. Corn*, 52 Misc. 2d 1035, 277 N.Y.S.2d 470 (Sup. Ct. Nassau County 1966).

92. *See, e.g., Boyd v. Wynn*, 286 Ky. 173, 150 S.W.2d 648 (1941) (physician refusing to disclose while testifying in court would have been held in contempt).

93. *See, e.g., Simonsen v. Swenson*, 104 Neb. 244, 177 N.W. 831 (1920).

94. The Federal Privacy Act of 1974, 5 U.S.C. § 552a (1982), established the Privacy Protection Study Commission which targeted privacy interests for legislative protection. SCHUCHMAN, *supra* note 2, at 70. The Commission stated that personal medical records were "one of the most sensitive areas of recordkeeping" they had examined. S.503 & S.865, *supra* note 25, at 2.

For Congressional and administrative viewpoints and statements of concerned parties on the issue of privacy in medical records, see H.R. 5935, *supra* note 2; *Confidentiality of Medical Records*, *supra* note 3; S.504 & S.865, *supra* note 25.

95. *See infra* notes 133-52 and accompanying text.

96. *See* Freedom of Information Act [FOIA], 5 U.S.C. § 552 (1982); Privacy Act of 1974, 5 U.S.C. § 552a (1982). The Secretary of Health, Education and Welfare's Advisory Committee on Automated Personal Data Systems stated in 1973 that: "it is for the legislative and administrative rulemaking bodies to balance individual privacy interests with the needs of society and record-keeping organizations." SCHUCHMAN, *supra* note 2, at 65 (quoting 1973 H.E.W. Report).

However, recognizing the limitation on medical records protection provided by the Act, the Privacy Protection Study Commission in 1977 recommended legislation

record-keeping activities,⁹⁷ while others reach only the private sector.⁹⁸

On the federal level, this Note focuses on the Freedom of Information Act (FOIA) and the Privacy Act of 1974.⁹⁹ Recently, Congress considered legislation specifically designed to protect information contained in medical records.¹⁰⁰ The proposed legislation was not enacted, however, primarily because of fears that critical health care and law enforcement functions might be impeded.¹⁰¹

1. Federal Freedom of Information Act (FOIA)

The FOIA's purpose is to permit public access to federal records.¹⁰² It is premised on the notion that a truly informed public is important to a democratic form of government.¹⁰³ Prior to enactment of the FOIA, access to and disclosure of federal records were irregular as was judicial treatment of these issues.¹⁰⁴ Under the FOIA, access is now permitted, and even encouraged, to the extent that the public's right to know outweighs the agency's need to preserve confiden-

specifically tailored to protect confidentiality of medical records not covered by the Act. *Privacy Protection Commission Report, supra* note 23, at 1-3 (remarks of Sen. Ribicoff). Legislation was then introduced, but not enacted, in both the House and Senate. *See supra* note 25.

97. The FOIA and Privacy Act apply to federal agencies, thus covering institutions providing health care and records maintained for Medicare and Medicaid programs. SCHUCHMAN, *supra* note 2, at 66. The Privacy Act also applies to records maintained by government contractors who carry out agency functions, hence covering insurance companies involved in the Medicare program. *Id.*

98. There are some federal statutes that protect against privacy invasions by the private sector. For example, the Fair Credit Reporting Act, 15 U.S.C. §§ 1681a-1681t (1982), regulates private persons or organizations regularly collecting and reporting on individuals for purposes of credit, insurance or employment.

Some states also have fair credit reporting statutes not vastly different from the federal law. *See, e.g.,* CAL. CIV. CODE §§ 1785.13, 1786.18 (West Supp. 1984); CONN. GEN. STAT. §§ 36-431 to 36-435 (1983). *See generally* *Privacy Law in the States, supra* note 35, at 7-11.

99. Although there are other statutes affecting privacy rights in medical records, *see supra* notes 94-98, this Note is only concerned with the Freedom of Information Act, 5 U.S.C. § 552 (1982), and the Privacy Act of 1974, 5 U.S.C. § 552a (1982).

100. *See supra* note 25.

101. For statements of law enforcement and health care providers in opposition to the concept of medical records confidentiality, see the Congressional Hearings cited *supra* notes 2 and 3.

102. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2418.

103. *See* 1966 U.S. CODE CONG. & AD. NEWS at 2423; *Washington Post Co. v. United States Dep't of Health and Human Servs.*, 690 F.2d 252, 264-65 (D.C. Cir. 1982).

104. *Consumers Union v. Consumer Prod. Safety Comm'n*, 590 F.2d 1209, 1213-14 (D.C. Cir. 1978), *rev'd on other grounds sub. nom. G.T.E. Sylvania Inc. v. Consumers Union of the United States Inc.*, 445 U.S. 375, 386-87 (1980).

tiality.¹⁰⁵ The FOIA's dominant objective is disclosure rather than secrecy.¹⁰⁶ However, the FOIA also specifies exemptions for certain materials such as those relating to national security, trade secrets and personnel and medical files.¹⁰⁷ Whether or not disclosure of any of these exempted classes of materials is permissible must be determined according to other sources of law, including statutes, regulations, administrative common law and general principles of equity.¹⁰⁸ These statutory exemptions must be narrowly construed in order to effectuate the legislative intent.¹⁰⁹ One exemption specifically exempts medical files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹¹⁰

When a party makes a FOIA request for medical files held by a government agency, that agency must determine whether to release or withhold the information.¹¹¹ This determination involves a determination of: (1) whether the material is a medical file, thus governed by the medical records exemption, and (2) assuming it is, whether disclosure would constitute an unwarranted invasion of individual privacy.¹¹² The second question entails weighing the individual's interest in non-disclosure against the public interest in disclosure.¹¹³ In light of the legislative intent to subject more federal records to public scrutiny, courts have interpreted this balance to

105. *Id.* at 1214.

106. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

107. 5 U.S.C. § 552(b) (1982).

108. *Consumers Union*, 590 F.2d at 1215.

109. *See E.P.A. v. Mink*, 410 U.S. 73, 79 (1973); *Consumers Union*, 590 F.2d at 1214.

110. 5 U.S.C. § 552(b)(6) (1982). This exemption applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* Once the medical records exemption is found to apply, the Privacy Act comes into play. *See infra* notes 130-32 and accompanying text for an explanation of the interaction of these two acts. Medical files are not to be exempted from disclosure unless disclosure would constitute a clearly unwarranted invasion of personal privacy. *Department of the Air Force v. Rose*, 425 U.S. 352, 370-72 (1976).

111. *See* discussion *supra* notes 102-10 and accompanying text; *see, e.g., Department of the Air Force v. Rose*, 425 U.S. 352 (1976); *E.P.A. v. Mink*, 410 U.S. 73 (1973). The FOIA and Privacy Acts are not applicable to medical records held by a private doctor or health care facility. The records may be obtained from private entities by anyone (attorneys, insurance companies, the patient himself) with written authorization of the patient. Telephone interview with Medical Records Custodian at New York Hospital and at New York University Medical Center, both in New York City (August 20, 1984).

112. *Washington Post v. Dep't of Health and Human Servs.*, 690 F.2d 252, 260 (D.C. Cir. 1980).

113. *Id.*

tip in favor of disclosure.¹¹⁴ Agency refusal to disclose is subject to judicial review by the Federal District Court which undertakes the same two-step analysis performed by the agency.¹¹⁵

On the other hand, should the agency grant disclosure, the subject of the record may bring an action in federal district court contending that the medical records exemption precluded disclosure.¹¹⁶ Under such circumstances, one circuit court of appeals has concluded that the individual has a "legally cognizable interest" in the privacy of his records.¹¹⁷ The court held that a party whose records have been disclosed by an agency may sue to determine the legality of the disclosure.¹¹⁸ In these cases, the court would follow the two-step FOIA analysis.¹¹⁹ If the court finds that the FOIA does not govern, it would consider outside sources of law in order to decide whether or not disclosure is warranted.¹²⁰

2. The Privacy Act of 1974

In 1974, Congress enacted the Privacy Act to counter the disclosure encouraged by the FOIA.¹²¹ Congress stated that the right to privacy is "personal and fundamental."¹²² The Privacy Act, which is intended

114. *Id.* at 261.

115. Should the agency decide not to comply with the disclosure request, the FOIA expressly provides for Federal District Court intervention to enforce its purposes. 5 U.S.C. § 552(a)(4)(B) (1982); see *Ackerly v. Ley*, 420 F.2d 1336, 1338 n.2 (D.C. Cir. 1969). "Where a purely medical file is withheld under the authority of [the medical records exemption to the FOIA] it will be for the District Court ultimately to determine any dispute as to whether that exemption was properly invoked." 420 F.2d at 1340.

116. This is assuming the subject is aware his records have been requested. An accounting of disclosures made under the Privacy Act must be kept. 5 U.S.C. § 552a(c) (1982). Disclosures allowed under the Privacy Act are listed in § 552a(b). Most accountings of disclosures must be made "available to the individual named in the record at his request." *Id.* In addition, an agency is supposed to make reasonable efforts to notify individuals when records pertaining to them have been disclosed. 5 U.S.C. § 552a(e)(8) (1982). For cases concerning so-called reverse FOIA suits, see *Consumers Union*, 590 F.2d at 1215 nn.27 & 28.

117. *Consumers Union*, 590 F.2d at 1215; cf *Department of the Air Force v. Rose*, 425 U.S. at 379 (courts are to determine *de novo* whether the exemption was properly used).

118. See *Consumers Union*, 590 F.2d at 1215 (citing *Charles River Park "A," Inc. v. H.U.D.*, 519 F.2d 935, 942 (D.C. Cir. 1974) and *Planning Research Corp. v. F.P.C.*, 555 F.2d 970, 977-78 (D.C. Cir. 1977)).

119. See *supra* notes 114-17 and accompanying text.

120. *Consumers Union*, 590 F.2d at 1216.

121. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1982)).

122. 5 U.S.C. § 552a (1982).

to "promote governmental respect for the privacy of citizens,"¹²³ requires government agencies and employers to comply with constitutional mandates when collecting, storing, using and disclosing personal information.¹²⁴

The Privacy Act forbids agency disclosure of records maintained on individuals except in certain specified situations¹²⁵ or when the subject of the record has granted written permission.¹²⁶ It provides that an individual may have access to his record¹²⁷ and permits him to request amendment of the record should he find it inaccurate, irrelevant, untimely or incomplete.¹²⁸ The Privacy Act states explicitly that "the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, . . . his . . . medical history"¹²⁹

The FOIA medical records exemption and the Privacy Act are not, however, contradictory but rather are complementary. If the two-stage determination mandated by the exemption results in a finding that disclosure would "constitute a clearly unwarranted invasion of personal privacy," then the FOIA relieves the record from "obligatory disclosure."¹³⁰ At this point, the Privacy Act becomes operative, prohibiting disclosure unless the subject of the record gives written consent.¹³¹ The Privacy Act gives individuals some limited control over their medical records which are held by government agencies. This control is significant because it sharply contrasts with

123. S. REP. NO. 1183, 93rd Cong., 2d Sess. 1, *reprinted in* 74 U.S. CODE CONG. & AD. NEWS 6916, 6916. "The Act drew upon 'the constitutional and judicial recognition afforded to the right of privacy and translate[d] it into a system of procedural and substantive safeguards against obtrusive government information-gathering practices.'" *Leib v. Veterans Admin.*, 546 F. Supp. 758, 761 (D.D.C. 1982) (quoting 20 CONG. REC. 40410 (Dec. 17, 1974) (remarks of Sen. Percy)).

124. S. REP. NO. 1183, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6916, 6916.

125. These situations include requests by Congress, the Census Bureau, and by law enforcement authorities and statistical researchers. 5 U.S.C. § 552a(b) (1982).

126. 5 U.S.C. § 552a(b) (1982). This section provides in part:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be [to certain specified persons or entities].

Id.

127. 5 U.S.C. § 552a(d)(1) (1982).

128. 5 U.S.C. § 552a(d)(2) (1982).

129. 5 U.S.C. § 552a(a)(4) (1982).

130. *Florida Medical Ass'n v. Dep't of Health, Educ. & Welfare*, 479 F. Supp. 1291, 1306 (M.D. Fla. 1979) (quoting 5 U.S.C. § 552a(b) (1982)).

131. *Id.* (quoting 5 U.S.C. § 552a(b)).

the common law under which the doctor or health care institution owns, and therefore legally controls the patient's medical records.¹³²

3. State Statutory Protections

a. Open Records and Privacy Statutes

A number of states have enacted open records and privacy statutes.¹³³ Privacy protections created by these statutes are available where the requested medical record is held by a state agency or state-funded entity in situations in which analogous federal laws are applicable.¹³⁴ Such laws generally have the same purpose as their federal counterparts: to regulate government "collection, maintenance, use and disclosure" of personal information.¹³⁵ In addition to the privacy and open records statutes, there are many other relevant state laws which may be useful to an individual in protecting medical records from disclosure.¹³⁶ These state laws are not applicable to federal

132. Winslade, *supra* note 17, at 507 (stating that medical records custodians own and legally control patient medical records).

133. Examples of state privacy protection statutes are the following: CAL. CIV. CODE §§ 1798.1 to 1798.76 (West Supp. 1984); CONN. GEN. STAT. §§ 4-190 to 4-197 (1983); IND. CODE ANN. §§ 4-1-6-1 to 4-1-6-9 (Burns 1982 & Supp. 1984); MASS. ANN. LAWS ch. 66A, §§ 1-3 (Michie/Law. Co-op. 1978); MINN. STAT. ANN. §§ 13.01 to 13.87 (West 1977 & Supp. 1984); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1983-84); OHIO REV. CODE ANN. §§ 1347.01 to 1347.99 (Page 1979 & Supp. 1983); VA. CODE §§ 2.1-377 to 2.1-386 (1979 & Supp. 1984).

Examples of state open-records, or freedom of information laws are: ARK. STAT. ANN. §§ 12-2801 to 12-2807 (1979 & Supp. 1981); CAL. GOV'T CODE §§ 6250-6265, 9070-9079 (West 1980 & Supp. 1984); DEL. CODE ANN. tit. 29, §§ 10001-10005 (1983); GA. CODE ANN. §§ 50-18-70 to 50-18-74 (Supp. 1984); IOWA CODE ANN. §§ 68A.1 to 68A.9 (West 1973 & Supp. 1984-1985); KY. REV. STAT. §§ 61.870 to 61.884 (1980 & Supp. 1984); MICH. COMP. LAWS ANN. §§ 15.231 to 15.246 (West 1981 & Supp. 1984-1985); N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1983-1984); TEX. STAT. ANN. art. 6252-17a (Vernon Supp. 1984); and VA. CODE §§ 2.1-340 to 2.1-346.1 (1979 & Supp. 1984).

Also relevant are the Information Practices Acts. See, e.g., UTAH CODE ANN. §§ 63-2-59 to 63-2-89 (1978 & Supp. 1983).

134. See *supra* notes 102-32 and accompanying text.

135. PRIVACY LAW IN THE STATES, *supra* note 35, at 2.

136. Provisions protecting privacy, providing for access, or providing for disclosure of medical records may be found in a great variety of state laws. Some examples are: (1) Medical Information Confidentiality Acts, e.g., CAL. CIV. CODE § 56-56.37 (West 1982 & Supp. 1984); D.C. CODE ANN. §§ 32-501 to 32-505 (1981 & Supp. 1984); TENN. CODE ANN. §§ 53-1319 to 53-1331 (1977 & Supp. 1982); and (2) Mental Health Information Acts, e.g., D.C. CODE ANN. §§ 6-2001 to 6-2076 (1981).

Other useful state provisions may be found in statutes regulating: (1) insurance practices, e.g., CAL. INS. CODE §§ 791-791.26 (West Supp. 1984); (2) health statistics data collection practices, e.g., Illinois Health Statistics Act §§ 1-11, ILL. REV. STAT.

agencies, and it should be noted that they differ markedly in type and extent of protection from the federal statutes.¹³⁷

ch. 111-1/2, §§ 5601-5611 (Supp. 1984-1985); (3) hospital records, *e.g.*, LA. REV. STAT. ANN. § 7(D) (West 1982); (4) Patients' Bill of Rights, *e.g.*, MINN. STAT. ANN. § 144.651(16) (West Supp. 1984); (5) voluntary and involuntary sterilization of the mentally retarded, *e.g.*, VT. STAT. ANN., tit. 18, § 8713 (Supp. 1984); and (6) confidentiality promised upon submission to drug and alcohol rehabilitation, *e.g.*, WASH. REV. CODE ANN., § 69.54.070 (Supp. 1984-1985).

The vast array of state legislative responses to the issue of privacy in medical records has prompted the American Medical Association to prepare a model bill for state legislatures to follow, adopt or consider, with the hope that some consistency will result. MODEL STATE LEGISLATION ON CONFIDENTIALITY OF HEALTH CARE INFORMATION, American Medical Ass'n (1976).

The numerous and inconsistent state privacy protections, and their inapplicability to federal government activities, have caused many to argue that privacy protections must be governed federally. *H.R. 5935, supra* note 2, at 7.

137. For a discussion of the federal privacy and open records laws, see *supra* notes 103-33 and accompanying text. A thorough analysis of these state statutes is beyond the scope of this Note. Cases involving two different types of statutes are discussed below.

Koudsi v. Hennepin County Medical Center concerned disclosure of information to callers by a medical center's Patient Information operator. 317 N.W.2d 705 (Minn. 1982). The patient had requested that this information be kept confidential. The question asked by the court was whether the disclosure violated either Minnesota's Data Privacy Act (DPA) or its Patient's Bill of Rights (PBR). *Id.* at 707 (citing MINN. STAT. §§ 15.162 to 15.167 (1978) (current version at §§ 13.01 to 13.10); MINN. STAT. § 144.651 (1980) (amended 1983)).

Analyzing the PBR's applicability, the court found that it was not intended to apply in a case like this. *Id.* The PBR was intended to protect medical records, which are information stored "in a form ensuring a degree of permanence." *Id.* While oral communication of such information might be a violation of the PBR, the information given out by the operator, stating that respondent had given birth and then been discharged from the hospital, was not a violation. *Id.*

Turning to the DPA, the court found that it did not protect the contested information because no law operated to place it in a "'private'" or "'confidential'" category; only private or confidential information was protected by this Act. *Id.* at 707-08 (quoting MINN. STAT. § 15.162(2a), (5a) (1978) (current version at § 13.02(3), (12))). It would only be considered private or confidential if a "statute or federal law" operated to make it so. *Id.* at 708; *accord* Minnesota Medical Ass'n v. State, 274 N.W.2d 84, 88 (Minn. 1978) (Department of Public Welfare may furnish abortion data regarding medical assistance recipients to publishing company without violating DPA because there is no federal or state statute or law showing these records to be confidential or private).

In contrast to *Koudsi*, *John P. v. Whalen*, 54 N.Y.2d 89, 429 N.E.2d 117, 444 N.Y.S.2d 598 (1981), demonstrates the protection afforded by a state privacy statute where data was considered confidential by operation of a state or federal statute. This case concerned an investigation of a physician by the New York State Board of Professional Medical Conduct. Pursuant to New York's Freedom of Information Law, N.Y. PUB. OFF. LAW § 84-90 (McKinney Supp. 1983-1984), the physician requested medical records which the commissioner had obtained during the investigation. The New York Court of Appeals held that these records were exempt from disclosure under that statute because they were confidential materials under the Public Health Law. *Id.* at 98, 429 N.E.2d at 122, 444 N.Y.S.2d at 603. New

b. Physician-Patient Privilege

Another aspect of state law affecting medical records is the physician-patient privilege.¹³⁸ This privilege, which has never been recognized at common law, is purely statutory.¹³⁹ The privilege is intended

York's Public Health Law authorizes the state board for professional medical conduct to "examine and obtain records of patients in any investigation or proceeding," and provides that the patient's name shall remain confidential unless expressly waived by the patient. N.Y. PUB. HEALTH LAW § 230(10)(l) (McKinney Supp. 1983-1984). Furthermore, the statute provides that the other information in the record may be disclosed where required for "proper function of the board and the New York state board of regents" or "pursuant to a valid court order." *Id.*

In the New York Freedom of Information Law there is also a provision for deleting portions of material whose disclosure would otherwise constitute an unwarranted invasion of personal privacy. N.Y. PUB. OFF. LAW § 89(2)(a) (McKinney Supp. 1983-1985). However, the New York Court of Appeals has held that deletion may not be used to avoid withholding of materials that are statutorily exempted from the disclosure mandate. *Short v. Nassau Medical Center*, 57 N.Y.2d 399, 442 N.E.2d 1235, 456 N.Y.S.2d 724 (1982).

Clearly, state privacy and open records acts vary with regard to disclosure or withholding of information contained in medical records. Given that the underlying purpose of open records statutes is to encourage public access, courts are not likely to uphold nondisclosure unless it is required by a confidentiality or privacy statute or a specific exemption to the open records law. Some statutes, such as New York's, *supra*, expressly define disclosure of medical records to be an unwarranted invasion of privacy. Under other statutes, a more difficult burden is placed on the subject of the record, requiring a showing that disclosure would invade constitutional privacy rights. Theoretically, the purposes of the privacy statutes conflict with those of the open records acts. In practice, however, it appears that reasonable compromises are possible which would allow disclosure for legitimate needs after sensitive or identifiable information is deleted.

138. For example, New York's physician-patient privilege is created by N.Y. CIV. PRAC. LAW § 4504(a) (McKinney Supp. 1964-1983) which reads:

Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, and the patients to whom they respectively render professional medical services.

Id. The physician-patient privilege does not exist in federal or state common law. *G.M.C. v. Director of Nat'l Inst.*, 636 F.2d 163, 165 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981).

139. *Whalen v. Roe*, 429 U.S. at 602 n.28. Where such a privilege exists, the communication from patient to physician is "privileged," and is only relevant when the medical provider (or his records) is subpoenaed "as a witness in a trial, administrative proceeding, legislative hearing, etc., to divulge" these communications; the privilege forbids disclosure of the confidential information without the patient's consent. *SCHUCHMAN*, *supra* note 2, at 18. The privilege is different from the concept of "confidential communications," which has been defined as a phy-

to promote trust and confidence in the physician-patient relationship.¹⁴⁰ A confidential relationship is believed to facilitate optimal treatment because it encourages the patient to disclose all relevant information, even that which may be embarrassing or humiliating.¹⁴¹

In general, the privilege is available only to the patient to protect his medical records from disclosure during discovery¹⁴² or at trial,¹⁴³ or to prevent his physician from testifying about information obtained in treatment.¹⁴⁴ Some courts have held that a hospital, physician or representative of the patient may assert the privilege on behalf of the patient.¹⁴⁵ However, this privilege may not be employed to protect the privacy of the physician or hospital.¹⁴⁶ For example, a physician

sician's duty "to maintain the confidentiality" of his patient. *Id.* at 17. This duty is imposed upon the physician by the ethics of his profession, and in some jurisdictions, by law. Thus, violation of this duty may give rise to common law causes of action. *Id.* at 18. See *supra* notes 69-93 and accompanying text for a discussion of common law causes of action pertinent to medical records issues.

140. SCHUCHMAN, *supra* note 2, at 24; *Schaffer v. Spicer*, 88 S.D. 36, 39-40, 215 N.W.2d 134, 136-37 (1974); *In re June 1979 Allegheny Cty. Inv. Gr. Jury*, 490 Pa. 143, 149, 415 A.2d 73, 77 (1980).

141. SCHUCHMAN, *supra* note 2, at 24.

142. See, e.g., *Roberts v. Superior Court of Butte County*, 9 Cal. 3d 330, 342, 508 P.2d 309, 319, 107 Cal. Rptr. 309, 316-17 (1973); *Eberle v. Savon Food Stores, Inc.*, 30 Mich. App. 496, 501, 186 N.W.2d 837, 839, (1971); *Weninger v. Muesing*, 307 Minn. 405, 406-08, 240 N.W.2d 333, 334-35 (1976); *Heinemann v. Mitchell*, 8 Ohio Misc. 390, 392, 220 N.E.2d 616, 617 (Ct. Com. Pleas 1964).

143. See, e.g., *Young v. McLaughlin*, 126 Colo. 188, 193, 247 P.2d 813, 816 (1952); *Newman v. Blom*, 249 Iowa 836, 842, 89 N.W.2d 349, 354-56 (1958).

144. See, e.g., *Pollitt v. Mobay Chemical Corp.*, 95 F.R.D. 101, 104 (S.D. Ohio 1982) (Ohio's privilege statute prohibits physician from testifying about information given him by his patient during treatment); OHIO REV. CODE ANN. § 2317.02(B) (Page 1981).

145. See, e.g., *In re Grand Jury Investigation of Onondaga County*, 59 N.Y.2d 130, 135, 450 N.E.2d 678, 680, 463 N.Y.S.2d 758, 760 (1983) (hospital or physician may assert privilege for benefit of patient, if not waived by patient); *People v. Doe*, 86 A.D.2d 672, 672, 446 N.Y.S.2d 382, 384 (2d Dep't), *aff'd*, 452 N.Y.S.2d 361 (1982) (privilege may be asserted by patient, physician or hospital "on behalf of the patient in criminal proceedings"); *Judd v. Park Ave. Hospital*, 37 Misc. 2d 614, 615-17, 235 N.Y.S.2d 843, 845-47 (Sup. Ct. Monroe County), *aff'd*, 18 A.D.2d 766, 235 N.Y.S.2d 1023 (4th Dep't 1962); *Bogges v. Aetna Life Ins. Co.*, 128 Ga. App. 190, 193, 196 S.E.2d 172, 175 (Ga. Ct. App. 1973) (deceased patient's widow did not waive physician-patient privilege by suing for death benefits from insurance policy).

146. *In re Grand Jury Investigation of Onondaga Cty.*, 59 N.Y.2d at 135, 450 N.E.2d at 680, 463 N.Y.S.2d at 760 (physician and hospital may not assert privilege to protect themselves from criminal proceedings arising out of crime committed against patient); *In re Weiss*, 208 Misc. 1010, 1012, 147 N.Y.S.2d 455, 456 (Sup. Ct. New York County 1955) (hospital cannot prevent patient from inspecting his own records pursuant to a discovery request); *Cynthia B. v. New Rochelle Medical Center*, 60 N.Y.2d 452, 454-55, 458 N.E.2d 363, 364-65, 470 N.Y.S.2d 122, 123-24 (1983) (where former psychiatric patient moved to compel discovery of own

or hospital may not assert the privilege to evade a patient's request for his own records in a negligence action against them.¹⁴⁷ On the other hand, physicians and hospitals may assert the privilege on behalf of non-plaintiff patients whose records are sought in a legal action.¹⁴⁸

The physician-patient privilege may be waived expressly by the patient.¹⁴⁹ Waiver may also be implied, for example, when an individual puts his medical records in issue by bringing a personal injury action.¹⁵⁰ This type of waiver pertains only to the part of the record relating to the injury at issue, rather than to the entire record.¹⁵¹ The privilege is further limited by statutory and common-law exceptions which have been created where important public interests are at stake and where the intrusion on patient privacy interests would be minor.¹⁵²

psychiatric records, court ordered full disclosure; court also held that treating hospital or physician who is custodian of records may be granted protective order on ground that disclosure "may be seriously detrimental to the interests of the patient, to uninvolved third parties or to an important program of the custodian of the records, notwithstanding a valid waiver of the physician-patient privilege").

147. See, e.g., *Emmett v. Eastern Dispensary and Casualty Hosp.*, 396 F.2d 931, 935-36 (D.C. Cir. 1967) ("medical professionals can and should vigilantly safeguard the patient's secrets from unauthorized scrutiny But we could not justify a refusal to yield the information to a qualified recipient, whether or not it stems from the dictates of self-protection"); *Young v. King*, 136 N.J. Super. 127, 130, 344 A.2d 792, 794 (N.J. Super. Ct. 1975).

148. See, e.g., *Parkson v. Central DuPage Hosp.*, 105 Ill. App. 3d 850, 853, 435 N.E.2d 140, 142 (Ill. App. Ct. 1982) (in malpractice and drug liability suit, hospital could assert non-party patient's statutory privilege protecting records from disclosure); *Argonaut Ins. Co. v. Peralta*, 358 So. 2d 232, 233 (Fla. Dist. Ct. App. 1978).

149. See, e.g., *Tucson Medical Center, Inc. v. Rowles*, 21 Ariz. App. 424, 429, 520 P.2d 518, 523 (Ariz. Ct. App. 1974) (patient must expressly waive privilege in order to allow disclosure of confidential information).

150. See, e.g., *Lambdin v. Leopard*, 20 Ohio Misc. 189, 192, 251 N.E.2d 165, 167 (Ct. Common Pleas 1968) (by bringing personal injury action, plaintiff is deemed to have waived privilege by conduct).

151. See, e.g., *Britt v. Superior Court of San Diego County*, 20 Cal. 3d 844, 863-64, 574 P.2d 766, 778-79, 143 Cal. Rptr. 695, 707-08 (Cal. Super. 1978) (lawsuit which puts in issue physical or mental condition of plaintiff does not constitute waiver of confidentiality of plaintiff's past and unrelated treatment).

152. See, e.g., New York's specific exceptions to the privilege: N.Y. CIV. PRAC. LAW § 4504(b) (McKinney Supp. 1964 & 1983) (identification by dentist of patients; identification by physician, dentist or nurse of victims of a crime who are under 16 years of age); N.Y. CIV. PRAC. LAW § 4504(c) (McKinney Supp. 1964 & 1983) (concerning mental or physical condition of deceased patient); N.Y. FAM. CT. ACT § 1046(a)(vi) (McKinney 1983) (no privilege exists in child abuse and neglect proceedings); N.Y. PUB. HEALTH LAW § 3373 (McKinney 1977) (no privilege exists in duty to disclose information regarding controlled substances); N.Y. SOC. SERV. LAW § 384-b(3)(h) (McKinney 1983) (privilege not available to exclude evidence in

III. Analysis of Factors Critical to Medical Records Access

Due to the multitude of variables involved, no simple formula can correlate purposes for seeking medical records with results one might expect. These variables include (1) the variety of methods for obtaining records, ranging from discovery requests, FOIA requests, grand jury and administrative warrants and subpoenas, to self-help such as simple requests to the record custodian, and even theft; (2) the different privacy interests invoked, based on constitutional, common law or statutorily conferred rights, and their concomitant methods of protection; and (3) the classes to which the seeking party and the subject of the record belong, that is, the government agency or private entity. For example, suppose an individual's employer has maintained health records on the employee. The National Institute for Occupational Safety and Health (NIOSH) might subpoena those records for an occupational health investigation. Perhaps a fellow employee will request the records through discovery for a malpractice action against a physician they had in common. An insurance company might wish to use the records to avoid payment on a policy. The records might be used to impeach the subject's credibility if he testifies adversely at a criminal trial. A relative might wish to obtain the records to show the subject was incompetent when executing his will. If the facts are further changed so that the medical records are in the possession of the individual's physician rather than his employer, in a state which statutorily protects the physician-patient privilege, an entirely new analysis is demanded. In each situation, different procedures and laws may govern.

Five factors must be analyzed in a discussion of privacy interests

guardianship or custody proceedings of destitute or dependent children); N.Y. PENAL LAW § 265.25 (McKinney 1980) (misdemeanor for doctor or hospital not to report knife or firearm-caused wounds which may result in death).

Non-statutory exceptions have been found, for example, in child custody and neglect cases. *See, e.g., In re Doe Children*, 93 Misc. 2d 479, 481-82, 402 N.Y.S.2d 958, 960 (Fam. Ct. Queens County 1978) (childrens' interest in being free from abuse and neglect outweighs privacy interests of parent in medical records). *Contra, Koshman v. Superior Ct. of Sacramento County*, 111 Cal. App. 3d 294, 297, 168 Cal. Rptr. 558, 559-60 (Cal. Dist. Ct. App. 1980) (records regarding mother's narcotics overdose not discoverable by father in child custody proceeding).

See also In re Grand Jury Investigation, 441 A.2d 525, 531 (R.I. 1982) (importance of Medicaid program requires obstacles such as the physician-patient privilege to fall); *In re Albert Lindley Lee Memorial Hospital*, 115 F. Supp. 643, 645 (N.D.N.Y.), *aff'd*, 209 F.2d 122 (2d Cir. 1953) (mere revelation that patient had been hospitalized, without revealing why or what treatment he received, did not violate privilege); *Barry v. State*, 44 Misc. 2d 568, 569-70, 254 N.Y.S.2d 306, 308-09 (N.Y. Ct. Cl. 1964) (information obtained by physician's observation may be disclosed, but his conclusions may not).

in medical records: (1) purpose for which the records are requested; (2) laws governing the request and the parties; (3) the individual who is the subject of the records; (4) the status of the party seeking access; and (5) the degree of confidentiality which would remain if the request is granted. Examination of these factors defines patterns useful in predicting the results of record requests.

A. Purposes for Which Medical Records are Requested

There are a few uses of medical information which are so valuable to society that the privacy interests involved diminish in relative importance.¹⁵³ Public health, including epidemiologic and occupational health research¹⁵⁴ and law enforcement purposes¹⁵⁵ fall within this category. Other legitimate uses are found in civil actions and criminal trials,¹⁵⁶ and insurance investigations.¹⁵⁷ Potentially unlawful uses are for credit-rating, employment and defamation.¹⁵⁸

1. Public Health Purposes

a. Research

While epidemiologic,¹⁵⁹ occupational and other medical research have vastly improved public health,¹⁶⁰ there remains some concern for the privacy of those whose medical information is used in this research.¹⁶¹ The records of large numbers of people must be studied in order to discern trends in health and disease. Yet, if privacy

153. Legitimate purposes are discussed in this Note because these present the difficult questions of whether to protect an individual's privacy interest or to support an important public interest.

154. See *supra* notes 15 and 16; *infra* notes 160-83 and accompanying text.

155. See *infra* notes 191-98 and accompanying text.

156. See *infra* notes 199-221 and accompanying text.

157. See *infra* notes 222-24 and accompanying text.

158. These uses are illegitimate because they do not benefit society by either their method of obtaining or their intended use of the medical records. Accordingly, in these cases, a balancing of the public interest in disclosure with the privacy interests of individuals is inappropriate. Rather, the issues involved are: (1) whether the subject of the record is aware of the disclosure; (2) what remedy he can seek under the various statutory, constitutional and common law protections available; and (3) whether the issue may be best resolved by legislative action. See *supra* notes 36-152 for a discussion of constitutional, common law and statutory protections.

159. See *supra* note 15.

160. See Kurland and Molgaard, *The Patient Record in Epidemiology*, 245 *Sci. Am.* 54 (1981).

161. See Gordis & Gold, *Privacy, Confidentiality and the Use of Medical Records in Research*, 207 *Sci.* 153 (1980) [hereinafter cited as Gordis & Gold].

protections are strictly enforced, this important public health research could be impeded.¹⁶² Patient consent requirements, such as those of the Privacy Act, could effectively preclude access to the needed records.

Under the open records statutes, which call for a balancing of privacy interests against the public's need to know,¹⁶³ the conflict is generally resolved in favor of the public need.¹⁶⁴ Quite often, health research studies do not need to follow up on the subsequent health of individuals, so that names may be redacted from the records before disclosure.¹⁶⁵ Deletion of identifying details satisfies both interests involved and should be implemented whenever possible. Indeed, because of the importance of research and the means available to protect privacy interests, legal battles over access to medical records rarely arise in the context of public health research. When conflicts do arise, it is often because the record custodian, for example, an employer, does not wish to have the medical information divulged.¹⁶⁶ The custodian usually cites "employee privacy interests" as its reason for withholding the records.

Occupational health studies often require employee health records maintained by employers. While subpoenas of these records by NIOSH¹⁶⁷ are usually upheld against employer assertions of employee

162. *Id.* at 154.

163. *See supra* notes 102-20 and 133-35 and accompanying text.

164. *See, e.g.*, *Washington Post Co. v. United States Dep't of Health*, 690 F.2d 252, 261 (D.C. Cir. 1982) (in view of Congressional purposes encouraging disclosure, the balancing of public need for disclosure against privacy interests is "instructed to 'tilt' . . . in favor of disclosure").

165. *See* 5 U.S.C. § 552(a)(2) (1982) (deletion of identifying details permitted to prevent unwarranted invasions of personal privacy).

166. *See, e.g.*, *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 580 (3d Cir. 1980).

167. The National Institute for Occupational Safety and Health (NIOSH), established by the Occupational Safety and Health Act of 1970 (OSHA), develops occupational safety and health standards and conducts related research. 29 U.S.C. §§ 651-678 (1982). The purpose of the Act is "to reduce the number and severity of work-related injuries and illnesses which, despite current efforts of employers and government, are resulting in ever-increasing human misery and economic loss." *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 579 (3d Cir. 1980) (quoting Occupational Safety and Health Act of 1970, S. REP. No. 1282, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177).

Among NIOSH's mandates are research, experiments and demonstrations to (1) identify toxic substances; (2) develop criteria describing safe exposure levels; and (3) explore problems created by new technology. *Westinghouse*, 638 F.2d at 579. In order to evaluate occupational health hazards, NIOSH is authorized to investigate reasonable complaints made by authorized employee representatives or employers. 29 U.S.C. § 669(a)(6) (1982). Some investigations may entail issuing a subpoena for employee medical records. 29 U.S.C. § 657(b) (1982). Investigations may also

privacy interests,¹⁶⁸ privacy interests of individual employees may be another matter. An individual employee might have particularly

include on-site inspections, medical interviews of employees, physical tests such as blood and pulmonary examinations, and tests of physical surroundings and conditions under which employees work. *Westinghouse*, 638 F.2d at 579. For a further discussion of OSHA and privacy rights of employees, see Note, *OSHA Records and Privacy: Competing Interests in the Workplace*, 27 AM. U. L. REV. 953 (1978).

168. See, e.g., *Westinghouse*, 638 F.2d at 580. The court recognized that employee medical records come within the scope of constitutional privacy protections, but that they are not absolutely protected. *Id.* at 577.

There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection It has been recognized in various contexts that medical records and information stand on a different plane than other relevant material.

Id. The court cites as examples of this recognition the Federal Rules of Civil Procedure (comparing FED. R. CIV. P. 35 with FED. R. CIV. P. 26(b) and medical records exemption of FOIA (5 U.S.C. § 552(b)(6) (1982)) (special treatment of medical files indicates "that information concerning one's body has a special character" and is entitled to privacy protection).

The court held that medical records are protected by one of the zones of privacy. 638 F.2d at 577. However, it also said that employee privacy rights must be weighed against the strong public interest represented by NIOSH investigations. *Id.* at 577-78. The court listed a number of factors to be considered in this balancing test: the kind of record involved, the information contained therein, the "potential for harm" should disclosure occur, the effect of disclosure on the relationship (e.g., physician-patient) in which the record was made, whether safeguards were provided against disclosure, and whether there were statutory or public interest reasons directing disclosure. *Id.* at 578.

The court found that (1) disclosures in the interest of occupational safety and health are as significant as other intrusions into records previously allowed; (2) NIOSH had demonstrated sufficient need; (3) the material requested was not very sensitive; and (4) NIOSH's procedures for securing the confidentiality of the information it was to receive were adequate. Thus, the interest in disclosure outweighed the privacy interests of the employees in general. *Id.* at 580.

Other courts have enforced NIOSH subpoenas to obtain employee medical records. See, e.g., *Donovan v. Union Packing Co. of Omaha*, 714 F.2d 838, 842 (8th Cir. 1983) (subpoena constitutionally permissible); *General Motors Corp. v. Director of Nat'l Inst.*, 636 F.2d 163, 165-66 (6th Cir. 1980), cert. denied, 454 U.S. 877 (1981) (parties' interests found not to be "mutually exclusive;" constitutional privacy interest of employees not invaded because no public disclosure of their medical information); *United States v. Amalgamated Life Ins. Co.*, 534 F. Supp. 676, 679 (S.D.N.Y. 1982) (NIOSH subpoena of insurer's records of deceased garment workers enforced; public interest in determining potential carcinogenicity of formaldehyde exposure outweighed privacy interest in records); *United States v. Lasco Indus.*, 531 F. Supp. 256, 265 (N.D. Texas 1981) (NIOSH had shown that societal interests in records outweighed privacy interests); *United States v. Allis-Chalmers Corp.*, 498 F. Supp. 1027, 1031 (E.D. Wisc. 1980) (employee health interests outweigh employer interest in protecting employee privacy rights and no evidence exists that NIOSH will improperly use the records; Wisconsin physician-patient privilege law not applicable); *E.I. duPont de Nemours & Co. v. Finklea*, 442 F. Supp. 821, 824-26 (S.D. W. Va. 1977) (NIOSH may subpoena employee medical records for study of cancer among duPont employees).

sensitive material in his file. Courts have been unwilling to assume that NIOSH's need for a file will always outweigh an employee's privacy interest.¹⁶⁹ To resolve this tension, some courts require that employees be notified that their records will be examined by NIOSH unless they raise personal claims within a specified period.¹⁷⁰

Courts have recognized that in these cases NIOSH, rather than the employer, acts in the true interests of the employees.¹⁷¹ Furthermore, NIOSH procedures safeguard the confidentiality of the records by prohibiting public disclosure.¹⁷²

Like NIOSH investigators, other health researchers should not be hindered in obtaining access to medical records, considering the important public interests they represent.¹⁷³ When examining confidentiality problems, legislators have emphasized the importance of facilitating research by providing exemptions to privacy laws.¹⁷⁴

Much medical research does not require the study of records of masses of individuals, but instead examines the individuals themselves.¹⁷⁵ Rather than use records already in existence, these studies create new records. The issues involved in this type of research are quite different from epidemiological issues. Confidentiality is a critical issue in this area.¹⁷⁶ In order to satisfy individuals that their

169. See, e.g., *Westinghouse*, 638 F.2d at 581; *United States v. Lasco Indus.*, 531 F. Supp. at 265-66.

170. 638 F.2d at 581; see also 531 F. Supp. at 266.

171. *United States v. Allis-Chalmers Corp.*, 498 F. Supp. at 1031.

172. In addition to safeguards against disclosure, record systems for medical research are not created without careful thought.

There are many careful controls on establishing systems of records. Under the Privacy Act, for example, there must be public notice, formal notification to OMB [Office of Management and Budget] and the Congress, and a careful delineation of the purpose of the record system. These requirements assure careful thought before embarking on the collection of individually identifiable information. The review process for grant and contract applications addresses the issues of the necessity of record systems. Other control devices, such as: agency regulations, OMB clearance under the Federal Reports Act, and Institutional Review Boards for the protection of human subjects, also serve as protections against casual or unnecessary establishment of new data files by contractors and grantees.

CONFIDENTIALITY OF MEDICAL RECORDS, *supra* note 3, at 25 (statement of C. Grant Spaeth, Deputy Assistant Sec'y for Legislation (Health)).

173. See *supra* notes 159-72 and accompanying text.

174. E.g., CONFIDENTIALITY OF MEDICAL RECORDS, *supra* note 3, at 7-8 (additional views of Paul G. Rogers); *H.R. 5935*, *supra* note 2, at 17-18; S.503 & S.865, *supra* note 25, at 17-21.

175. For example, clinical studies may be conducted using patients at research hospitals. Individuals may be closely monitored during their treatment, perhaps to investigate new treatment procedures and medications.

176. *Andrews v. Eli Lilly & Co.*, 97 F.R.D. 494, 502 (N.D. Ill. 1983).

participation as subjects of a study will not compromise their privacy, researchers assure them that the information will remain confidential. In addition, researchers are required to take safety precautions against invasions of privacy.¹⁷⁷

Despite promises of confidentiality, however, research information may still be subject to judicial subpoena.¹⁷⁸ This potential for disclosure has been criticized for its chilling effect on research.¹⁷⁹ At least one federal district court has held that a private party may not subpoena medical records from a researcher where (1) the seeking party's need for the evidence is "speculative and uncertain,"¹⁸⁰ (2) disclosure would have a chilling effect on this and similar projects even if names were deleted¹⁸¹ since confidentiality is necessary to prevent the "drying up of sources;"¹⁸² and (3) disclosure would force the researcher into a breach of confidentiality.¹⁸³ In light of the prevailing support for public health research, it is likely that more courts, when considering whether to order disclosure, will attempt to balance the need for the records with the effect on future research.

b. Reporting Laws

Access to medical information may also be required for non-research public health purposes. For example, many state health departments require reporting of medical information about venereal disease, child abuse, injuries caused by deadly weapons, fetal deaths,¹⁸⁴ abortions,¹⁸⁵ and prescriptions given for dangerous drugs.¹⁸⁶

c. Consumer Health Organizations

Private parties may also seek medical records for public health purposes. For example, consumer health organizations, pursuant to federal or state FOIA's, may research government-funded medical

177. See Note, *OSHA Records and Privacy: Competing Interests in the Workplace*, 27 AM. U. L. REV. 953, 962-63 (1978). For a discussion of researcher confidentiality, see Note *Protection From Discovery of Researchers' Confidential Information*: Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976), 9 CONN. L. REV. 326 (1977).

178. Gordis & Gold, *supra* note 161.

179. *Andrews*, 97 F.R.D. at 500.

180. *Id.* at 502.

181. *Id.*

182. *Id.* at 499.

183. *Id.* at 500.

184. *Whalen v. Roe*, 429 U.S. at 602 n.29.

185. *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. at 52, 79-81.

186. *Whalen v. Roe*, 429 U.S. at 603-04.

providers and publish their findings in order to advance consumer knowledge of available medical care.¹⁸⁷ The court or agency will conduct a balancing test of public interest in disclosure versus privacy interests as required by the FOIA.¹⁸⁸ Disclosure is likely where a strong public interest is shown and individually identifiable details are not needed,¹⁸⁹ since the underlying purpose of FOIA's is to promote disclosure.¹⁹⁰

2. Law Enforcement Purposes

Medical records are often subpoenaed for use in administrative¹⁹¹ and grand jury investigations.¹⁹² Once again, where the disclosure

187. See, e.g., *Public Citizen Health Research Group v. Department of HEW*, 477 F. Supp. 595 (D.D.C. 1979), *rev'd on other grounds*, 668 F.2d 537, 538 (D.C. Cir. 1981). In this case, a non-profit consumer health organization requested documents from the Department of HEW disclosing and evaluating federally funded medical services. The action was brought pursuant to the FOIA, and the medical records exemption applied. The court said that "[p]rotecting the intimate details of an individual's medical file is indeed a central goal of the privacy exemption." 477 F. Supp. at 603. The court weighed the competing interests of personal privacy and public interests represented by Public Citizen and asked two questions: (1) "will disclosure result in an invasion of privacy, and, if so, how seriously?" and (2) "what public interest factors favor, or oppose, disclosure and what weight should they be accorded?" *Id.*

Public Citizen maintained that disclosure would: (1) promote fully informed medical decisions among the consuming public regarding physicians and hospitals providing Medicare and Medicaid services; and (2) help physicians, state agencies and academics in various ways. *Id.* at 604. The court concluded that, rather than reflecting purely private interests, each of these groups had an interest in "scrutinizing government performance" which is the primary purpose of the FOIA. *Id.* Furthermore, Public Citizen insisted that it did not need or want individually identifying factors. *Id.* at 599. The balance tipped in favor of disclosure; the court held the privacy invasion was not "'clearly unwarranted' in light of the important public interests at stake." *Id.* at 605.

188. See *supra* notes 112-16 and accompanying text.

189. See *supra* note 187.

190. See *supra* note 102.

191. See, e.g., *Schachter v. Whalen*, 581 F.2d 35 (2d Cir. 1978). In this case the Court of Appeals for the Second Circuit considered patients' privacy rights in medical records subpoenaed by the executive secretary of the New York State Board for Professional Medical Conduct for purposes of investigating possible misconduct in the use of Laetrile for treatment. The court based its holding on *Whalen v. Roe*, 429 U.S. 589 (1977), and found the patients' constitutional rights were not infringed upon because: (1) the subpoenaed information was "crucial to the implementation of sound state policy;" and (2) confidentiality was guaranteed by the statute. 581 F.2d at 37. The state policy supported was to investigate "licensed physicians for medical misconduct" pursuant to N.Y. PUB. HEALTH LAW § 230 (McKinney Supp. 1977). The statute avoided public disclosure of patients' names by the use of codes in place of names. 581 F.2d at 37.

192. See, e.g., *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied*, 104 S. Ct.

is necessary for important public purposes, including investigations of possible medical misconduct,¹⁹³ non-payment of taxes,¹⁹⁴ employee health and safety,¹⁹⁵ or Medicaid fraud,¹⁹⁶ the request is likely to be granted.¹⁹⁷ Moreover, information obtained during these inves-

426 (1983). In this case, a grand jury had subpoenaed patient medical records from two doctors for an investigation of fraud in billings submitted to Michigan Blue Cross-Blue Shield. The court found that while a federal psychotherapist-patient privilege existed, it did not protect the patients' identities or the fact that they were treated. *Id.* at 640. However, even if this information had been privileged, the patients waived this privilege because they had previously disclosed their identities to the insurers. *Id.* Furthermore, the court found these patients' constitutional interests existed only to a limited extent; the court noted that individuals "possess no reasonable expectation that [their] medical history will remain *completely* confidential." *Id.* at 641.

Because the grand jury already knew the identity of these patients, their privacy interest was diminished. Additionally, the nature of the grand jury investigation protects the information with its "veil of secrecy." *Id.* at 642. Overall, the grand jury's need to investigate violations of the law outweighs the "slight intrusions" into patients' privacy interests. *Id.* The court's reasoning followed that of *Whalen v. Roe*, 429 U.S. 589 (1977), and *General Motors Corp. v. Director of the Nat'l Inst.*, 636 F.2d 163 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981).

193. *See supra* note 191.

194. *See United States v. Providence Hospital*, 507 F. Supp. 519 (E.D. Mich. 1981). An Internal Revenue Service summons of hospital information regarding operations performed by the surgeon under investigation for non-payment of taxes was enforced. The court dismissed the argument that disclosure was prohibited by the Michigan physician-patient privilege statute. *Id.* at 520.

195. *See Oil, Chemical & Atomic Workers Local Union v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). The court found that employers violated sections of the National Labor Relations Act by refusing to provide unions with health and safety information pertaining to employees. The employers contended that the employees' constitutional right to privacy and confidentiality in their medical records precluded disclosure. The court rejected these assertions, stating that deletion of identifiable information would have both protected these interests and conformed to the NLRB's orders. *Id.* at 363.

196. *See, e.g., In re Grand Jury Investigation*, 441 A.2d 525, 531 (1982) (Medicaid fraud investigations require disclosure of patients' records, otherwise a state may not continue to receive federal funds).

197. *See supra* notes 193-96 and the cases cited therein. However, a recent case forbade disclosure in the face of alleged public interests in part because the purposes of the statute at issue did not support disclosure of the records in question. *United States v. University Hospital*, 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd*, 729 F.2d 144 (2d Cir. 1984). This case involved a Justice Department subpoena for medical records of a seriously handicapped newborn whose parents had decided to forego certain operations that would have prolonged her life. The Department purportedly sought the records to determine whether she was being discriminated against because of her handicap. The Court of Appeals for the Second Circuit held that "under these circumstances it is [C]ongress, rather than an executive agency, that must weigh the competing interests at stake Until [C]ongress has spoken, it would be an unwarranted exercise of judicial power to approve the type of investigation that has precipitated this lawsuit." 729 F.2d at 161. *See supra* note 74 for a discussion of this case and tort law implications.

tigations remains unavailable to the public, so the privacy invasion is minimal.¹⁹⁸

3. Medical Records Requests in Civil Actions and Criminal Trials

Medical records may be sought through discovery procedures in civil actions.¹⁹⁹ These records are often necessary in actions involving personal injury,²⁰⁰ insurance policy disputes,²⁰¹ malpractice,²⁰² di-

198. *In re Zuniga*, 714 F.2d 632, 642 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 426. Public disclosures are prevented either by the deletion of identifiable details by administrative investigations or by the closed nature of investigations by grand juries, professional review committees or government branches such as the I.R.S. *Id.*; see also *Oil, Chemical & Atomic Workers Local Union v. NLRB*, 711 F.2d 348, 363 (D.C. Cir. 1983) (NLRB orders to delete "any information that could reasonably be used to identify specific employees" would sufficiently protect employees' privacy rights).

199. Statutes and rules governing discovery will apply. See, e.g., N.Y.CIV. PRAC. LAW § 3121 (McKinney 1970). Of course, if the action is brought in federal court, federal law governing discovery and evidence will apply. Discovery in federal courts is governed by FED. R. CIV. P. 26. Federal Rules 35 (physical and mental examination of persons) and 16 (pretrial procedure) should be taken into consideration as well. See, e.g., *Buffington v. Wood*, 351 F.2d 292, 298 (3d Cir. 1965) (use of Rule 16 to direct exchange of medical reports in pretrial discovery). For examples of how the Federal Rules of Civil Procedure are utilized in medical cases, see *Benning v. Phelps*, 249 F.2d 47, 48 (2d Cir. 1957) (whether to grant motion for production of medical records is within the trial court's discretion upon consideration of defendant's allegation of "good cause"); *Payne v. Howard*, 75 F.R.D. 465 (D.D.C. 1977); *Leszynski v. Russ*, 29 F.R.D. 10, 13 (D. Md. 1961) (for motion for discovery of medical records to succeed, where no absolute physician-patient privilege is involved, good cause must be shown); *Gillig v. Bymart-Tintair, Inc.*, 16 F.R.D. 393, 394 (S.D.N.Y. 1954) (in personal injury action, plaintiff may have discovery of copy of her physical examination conducted by physician for defendant's insurer).

200. See, e.g., *Luciano v. Moore*, 45 Misc. 2d 335, 337, 256 N.Y.S.2d 825, 827 (Sup. Ct. Monroe County 1965). In this personal injury action arising out of an auto accident, defendants sought discovery of plaintiff's hospital records. Although plaintiff claimed the hospitalization had nothing to do with the injuries at issue, the court held that defendants were entitled to obtain the records because the statutory physician-patient privilege should not be interpreted so as to allow plaintiff "to block pre-trial examination." *Id.* The court noted that defendants would only be able to use the records at trial if they were found to be material. *Id.*

201. See, e.g., *Lorde v. Guardian Life Ins. Co. of Am.*, 252 A.D. 646, 300 N.Y.S. 721 (1st Dep't 1937). In this action on an insurance policy defendant sought deceased's hospital records in an attempt to set up the defense that deceased had misrepresented the state of his health on his insurance application. Production was not ordered because the records consisted of statutorily privileged communications. *Id.* at 648, 300 N.Y.S. at 724.

202. See, e.g., *Eubanks v. Ferrier*, 245 Ga. 763, 267 S.E.2d 230 (1980). In this malpractice suit for the wrongful death of plaintiff's husband, plaintiff sought to discover records of a hospital medical review committee which had conducted an unfavorable investigation of the defendant doctor's treatment of deceased. Production was not ordered since the records were protected by a statutory privilege. 245 Ga. at 766, 267 S.E.2d at 232.

voce,²⁰³ and contested wills.²⁰⁴ The records are useful in determining and proving damages, showing pain and suffering, negotiating settlements, and proving causation, negligence and competency.²⁰⁵

Discovery requests for medical files may be opposed by statutes which make the information privileged. These include the physician-patient privilege²⁰⁶ and state laws protecting the confidentiality of state-conducted health emergency studies.²⁰⁷ Unless a waiver is found²⁰⁸ or the statute provides an exemption,²⁰⁹ the information given confidentially will remain undiscoverable.²¹⁰

While the medical records are considered the property of the doctor or hospital, the patient's attorney and opposing attorneys may inspect and copy them with the patient's authorization.²¹¹ How-

203. See, e.g., *Zilboorg v. Zilboorg*, 131 N.Y.S.2d 122 (Sup. Ct. N.Y. County 1954). In this action on a divorce decree, the court held that, where names of patients would not be publicly disclosed, husband (psychiatrist) may not assert the statutory privilege to withhold information from his wife's discovery request. *Id.* at 123.

204. See, e.g., *In re Ericson's Will*, 200 Misc. 1005, 106 N.Y.S.2d 203 (Sur. Ct. Suffolk County 1951). This case concerned a contested will. Discovery was sought of deceased's hospital records by next of kin who were excluded from the will which superseded a previous will. The majority of the estate was left to a friend who was at deceased's bedside at execution of the will. The family was in Sweden at the time the second will was executed. Discovery was granted. 200 Misc. at 1008, 106 N.Y.S.2d at 205.

205. 15 AM. JUR. TRIALS, *Discovery and Evaluation of Medical Records* § 2 (1968).

206. See, e.g., *Lorde v. Guardian Life Ins. Co. of Am.*, 252 A.D. 646, 300 N.Y.S. 721 (1st Dep't 1937); *supra* notes 113-29 and accompanying text.

207. N.Y. PUB. HEALTH LAW § 206(1)(j) (McKinney 1971).

208. See, e.g., *Sagmiller v. Carlsen*, 219 N.W.2d 885, 894 (N.D. 1974) (in malpractice action, plaintiff waived physician-patient privilege by putting her physical condition in issue); see also *In re Ericson's Will*, 200 Misc. 1005, 1008, 106 N.Y.S. 203, 204 (Sur. Ct. Suffolk County 1951) (privilege may be waived by personal representative of deceased, or in will contest by parties in interest). *Contra Luciano v. Moore*, 45 Misc. 2d 335, 336, 256 N.Y.S.2d 825, 826 (Sup. Ct. Monroe County 1965) (physician-patient privilege is "not waived by the institution of an action to recover damages for personal injuries until the claimant offered testimony with respect to his personal injury upon the trial of his case").

209. See, e.g., *Wilkins v. Durand*, 47 Wisc. 2d 527, 534, 177 N.W.2d 892, 896 (1970) (discovery statute required that defendant be allowed inspection of plaintiff's medical records for good cause shown).

210. *Rudnick v. Superior Court of Kern County*, 11 Cal. 3d 924, 929, 523 P.2d 643, 647, 114 Cal. Rptr. 603, 607 (Cal. Ct. App. 1974) ("there can be no discovery of matter which is privileged"); *In re Love Canal*, 112 Misc. 2d 861, 863, 449 N.Y.S.2d 134, 135 (Sup. Ct. Niagara County 1982), *aff'd*, 92 A.D.2d 416, 460 N.Y.S.2d 850 (4th Dep't 1983) ("any communication which is privileged when made remains privileged forever unless the privilege is waived by the client") (quoting *Yaron v. Yaron*, 83 Misc. 2d 276, 283-84, 372 N.Y.S.2d 518, 525 (Sup. Ct. N.Y. County 1975)).

211. Telephone interview with Medical Records Departments at New York Hos-

ever, parties may be forced to resort to discovery, subpoena or motions to have the records produced if the patient is reluctant to authorize disclosure.²¹²

Once obtained, admission of the records into evidence requires a consideration of the hearsay rule unless the declarant, the record-keeper is available to testify.²¹³ Medical records made in the regular course of business of a physician or hospital are generally admissible as an exception to the hearsay exclusion rule.²¹⁴

pital and New York University Medical Center, New York City, August 20, 1984. Insurance companies may also have access to patient records. They must provide a recent written authorization (usually within the last year) from the patient along with the company's request for specific information. The medical records custodian then will provide either a summary of the pertinent part of the file or a copy of some extract of it. *Id.* The patient may not inspect his own medical records maintained by private entities unless he reviews them with his physician. *Id.* There are guidelines available for changing or correcting inaccuracies in the file. These are provided by the Joint Commission on Hospital Accreditation and are followed nationwide by private hospitals. *Id.* However, plaintiffs may know the contents of their own medical reports which defendants have obtained. *Monier v. Chamberlain*, 66 Ill. App. 2d 472, 483, 213 N.E.2d 425, 432 (Ill. App. Ct.), *aff'd*, 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

212. 15 AM. JUR. TRIALS *Discovery and Evaluation of Medical Records* § 9 (1968); *accord* telephone interview with Legal Unit of Medical Records Department, New York University Medical Center, New York City (August 20, 1984).

213. *York v. Daniels*, 259 S.W.2d 109, 123 (Mo. Ct. App. 1953) (records of clinical laboratory admissible in evidence, where pathologist creating the records had died); *see* FED. R. EVID. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). FED. R. EVID. 802 states that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

214. *See, e.g., Korte v. New York, N.H. & H.R. Co.*, 191 F.2d 86, 90 (2d Cir.), *cert. denied*, 342 U.S. 868 (1951); *see also* FED. R. EVID. 803(4), (6). The federal act is found at 28 U.S.C. § 1732 (1982). Many states have adopted the business records exception. *See, e.g., N.Y. CIV. PRAC. LAW* § 4518 (McKinney 1963 & Supp. 1983). The purpose of the business records exception is to admit into evidence records which are kept regularly in the course of that business and to avoid the expense, inconvenience and perhaps the impossibility of calling as witnesses all the people who had a part in creating the record. *York v. Daniels*, 259 S.W.2d at 124.

To be admitted under the business records exception, the medical records must: (1) have been kept in the usual course of the doctor's or hospital's business; (2) consist of factual statements rather than opinion; (3) be relevant and material; and (4) be properly identified. *See Ettelson v. Metropolitan Life Ins. Co.*, 164 F.2d 660, 667 (3d Cir. 1947); *Kitchen v. Wilson*, 335 S.W.2d 38, 43 (Mo. 1960); *People v. Gower*, 42 N.Y.2d 117, 121-22, 366 N.E.2d 69, 70-71, 397 N.Y.S.2d 368, 370-71 (1977); *Brady v. Comprehensive Omnibus Corp.*, 5 N.Y.S.2d 781, 781-82 (1st Dep't 1938); *Glenn v. Brown*, 28 Wash. App. 86, 90, 622 P.2d 1279, 1282 (1980).

If the medical record consists of a physician's writing, it must be authenticated that either the physician or someone under his direction wrote it, that it was made

In criminal cases, medical records may be offered in evidence at trial by either the defendant or the prosecution,²¹⁵ used in pre-sentencing considerations,²¹⁶ or used to impeach a witness's credibility.²¹⁷ If the material satisfies the requirements of the business records exception to the hearsay rule, it will be admitted into evidence.²¹⁸ Conflicts between the right to impeach a witness with his medical records and privacy interests of the witness are resolved in favor of admission; the right to confrontation has been held to be more important than the right of privacy.²¹⁹ Victims' medical records are admissible if relevant to an element of the crime.²²⁰ The defendant's own records may be admitted if it is important to consider the state of his health or mind at the time of the alleged crime, or at the time of trial, if his competency to stand trial is at issue.²²¹

near the time of treatment, and that such records are usually made in the regular course of business. See *Masterson v. Pennsylvania R.R. Co.*, 182 F.2d 793, 797 (3d Cir. 1950).

Parts of a medical record may be admissible under the business records exception while other parts are not. Only those portions relevant to the symptoms, treatment, fact of hospitalization or medical or surgical history of the patient's particular illness or injury may be admitted. *Temple v. F.W. Woolworth Co.*, 167 Conn. 631, 633, 356 A.2d 880, 882 (1975). However, the diagnosis or other opinion is inadmissible because it is more in the nature of expert opinion. *Commonwealth v. Seville*, 266 Pa. Super. 587, 591, 405 A.2d 1262, 1264 (Pa. Super. 1979).

215. See, e.g., *People v. Gorgol*, 122 Cal. App. 2d 281, 294, 265 P.2d 69, 81 (Dist. Ct. App. 1953) (hospital records admissible, against defendant's objection, as evidence tending to disprove defendant's defense of mental incapacity); *State v. Paulette*, 158 Conn. 22, 25, 255 A.2d 855, 856 (1969) (medical test of rape victim admitted because it was in regular course of hospital business to make and record medical tests); *State v. O'Toole*, 520 S.W.2d 177, 181-82 (Mo. Ct. App. 1975) (hospital records describing victim's injuries required to prove element of crime charged: first degree robbery is violent taking of property from another).

216. See, e.g., *Farrell v. State*, 213 Md. 348, 355, 131 A.2d 863, 867 (1957) (after verdict is in, trial court is not limited by rules of evidence in what it may consider when sentencing).

217. See, e.g., *United States v. Lindstrom*, 698 F.2d 1154, 1167 (11th Cir. 1983) (in appeal from mail-fraud conviction, medical records of witness may be used to attack his credibility because "in the context of [a] criminal trial, [privacy rights of patients] must 'yield to the paramount right of the defense to cross-examine effectively the witness'") (quoting *United States v. Society of Indep. Gasoline Marketers of Am.*, 624 F.2d 461, 469 (4th Cir. 1980), *cert. denied sub. nom. Kayo Oil Co. v. United States*, 449 U.S. 1078 (1980); *Banks v. Wittenberg*, 82 Mich. App. 274, 266 N.W.2d 788 (Mich. Ct. App. 1978).

218. See, e.g., *State v. Paulette*, 158 Conn. 22, 23, 255 A.2d 855, 856 (1969).

219. See *supra* note 183; *United States v. Partin*, 493 F.2d 750, 763-64 (5th Cir. 1974), *cert. denied*, 434 U.S. 903 (1977); *Greene v. Wainwright*, 634 F.2d 272, 276 (5th Cir. 1981).

220. See *State v. Paulette*, 158 Conn. 22, 255 A.2d 855 (1969).

221. See *People v. Gorgol*, 122 Cal. App. 2d 281, 265 P.2d 69 (1953).

4. Medical Records Requests for Third-Party Payment Purposes

Third-party payers such as insurance companies, government and employers, have a legitimate need for some health information about their insureds or applicants for policies. However, litigation often arises when insurance companies attempt to avoid paying claims, alleging that the claimant misrepresented the state of his health on his application.²²² Also, methods used by insurance companies to obtain and share medical information may be questionable, as where insurance companies exchange, buy and even steal records.²²³ Furthermore, privacy concerns are valid where whole medical files are disclosed to insurers, rather than just the minimum information necessary.²²⁴

B. Likelihood of Disclosure

The variety of laws involved further complicates the outcome of medical records requests. If the records are held by a government agency, access must be obtained pursuant to a FOIA.²²⁵ If the records are in the possession of a private entity such as a physician, private hospital or clinic, these statutes have no relevance, and the request will be governed by rules of discovery and evidence.²²⁶ The requests are also affected by constitutionality issues²²⁷ and by statutes concerning the physician-patient privilege,²²⁸ privacy²²⁹ and confidentiality²³⁰ which may be invoked to prevent disclosure.

222. See *Croll v. John Hancock Mut. Life Ins. Co.*, 198 F.2d 562, 565 (3d Cir. 1952); *Ettelson v. Metropolitan Life Ins. Co.*, 164 F.2d 660, 667 (3d Cir. 1947); *Sovereign Camp, W.O.W. v. Sandoval*, 47 Ariz. 167, 173-74, 54 P.2d 557, 558 (1936); *New Empire Ins. Co. v. Taylor*, 235 Ark. 758, 764, 362 S.W.2d 4, 5 (1962); *Lorde v. Guardian Life Ins. Co. of Am.*, 252 A.D. 646, 647-48, 300 N.Y.S. 721 (1st Dep't 1937); *Freedom v. Mutual Life Ins. Co. of N.Y.*, 342 Pa. 404, 408-09, 21 A.2d 81, 83 (1941).

223. See *supra* note 17.

224. See *Winslade, supra* note 17, at 509.

225. See *supra* notes 103-20 and accompanying text for a discussion of the federal FOIA. See *supra* note 133 for a list of state open-records statutes.

226. See *supra* notes 199-221 and accompanying text for discussion of discovery and evidentiary rules as applied to requests for medical records.

227. See *supra* notes 36-68 and accompanying text for a discussion of constitutional issues relevant to requests for medical records.

228. See *supra* notes 138-52 and accompanying text for a discussion of the physician-patient privilege and its applicability to requests for medical records.

229. See *supra* notes 121-32 and accompanying text for a discussion of the Federal Privacy Act of 1974 and its protection against disclosure of medical information. See *supra* notes 133-37 and accompanying text for a discussion of state privacy protection statutes.

230. Confidentiality laws include the physician-patient privilege, discussed *supra*

Another factor to be considered is whose records are being sought. If the records concern a group under study by public health researchers, disclosure is likely to be enforced by the courts.²³¹ Similarly, if the requested medical information pertains to a party in a civil action, and if it is relevant to issues in the case, disclosure is also likely.²³² If the records pertain to non-parties, however, the physician-patient privilege clearly forbids disclosure.²³³ Where the party whose records are sought is under investigation on criminal charges, the strong public interest in an effective criminal justice system and the defendant's right to confrontation will generally outweigh any privacy interests.²³⁴

Accessibility of medical records also depends upon who is seeking them. NIOSH,²³⁵ grand juries,²³⁶ and investigations conducted by government bodies such as the I.R.S.,²³⁷ state health departments,²³⁸ and the National Labor Relations Board²³⁹ are favored in conflicts over disclosure. When the party seeking access is a private entity or individual who wishes to use another's records for private benefit, for example in civil litigation, the balance of competing interests tends to favor privacy. As a result, disclosure is not likely without some supervening factor such as waiver of confidentiality.²⁴⁰

Lastly, courts may consider the degree of confidentiality which would remain after disclosure. Medical records requests which do not require identifiable details or which use codes instead of names are the least intrusive.²⁴¹ However, some parties, such as NIOSH,

notes 138-52 and accompanying text, and laws which make particular types of records confidential. See, e.g., ARK. STAT. ANN. §§ 82-357, 82-349 (1976) (hospital records); CAL. HEALTH & SAFETY CODE § 1493 (West 1979 & Supp. 1983) (sexual assault records); DEL. CODE ANN. tit. 16 § 9116 (1983) (records of Health Maintenance Organizations). See *supra* note 136 for other relevant state statutes protecting privacy and allowing disclosure of medical records only in specific situations.

231. See *supra* notes 159-83 and accompanying text for a discussion of occupational and public health requests for medical records.

232. See *supra* notes 199-214 and accompanying text.

233. See *supra* notes 138-52 and accompanying text.

234. See *supra* notes 215-21 and accompanying text.

235. See *supra* notes 167-72 and accompanying text.

236. See *supra* note 192.

237. See *supra* note 194.

238. See *supra* notes 184-86 and accompanying text.

239. See *supra* note 195.

240. The issues will involve the constitutional right of privacy and confidentiality of the information such as the physician-patient privilege or other statutory protections. See *supra* notes 50-68 and accompanying text for constitutionality discussion. See *supra* note 230 for confidentiality laws.

241. See, e.g., *Public Citizen Health Research Group v. Dep't of HEW*, 477 F. Supp. 595 (D.D.C. 1979), *rev'd on other grounds*, 668 F.2d 537 (D.C. Cir. 1981).

public health researchers and grand juries often need these identifiers.²⁴² Their requests are usually granted, nevertheless, because of the important public interests they represent, and because they provide safeguards against public disclosure of the sensitive information.²⁴³ Where little or no confidentiality would remain, requests are less likely to be granted because, even where the request represents an important public interest, medical confidentiality remains a significant factor.²⁴⁴

Conclusion

Individuals have privacy rights in their medical records, but society, too, has interests in those records. An individual may have legal recourse against invasions of this privacy interest, depending upon who is the party seeking or having obtained access to the records, the purposes for which the record is sought, and whether there are common law, statutory or constitutional protections available. On the other hand, an individual's interest in maintaining the confidentiality of medical information is often sacrificed in the interest of legitimate public needs such as public health, or private needs such as defending a criminal charge.

With the ever-increasing storage and easy retrieval of computerized information, invasions of informational privacy are likely to increase. Presently existing legal protections are proving inadequate. To keep apace with these developments until legislatures act, courts must balance the competing interests involved and strive to satisfy all of the important interests by flexible methods such as deletion of identifiable information and limiting disclosure to the information requested.

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242. See *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 575 (3d Cir. 1980).

243. See, e.g., cases cited *supra* note 168.

244. See, e.g., 638 F.2d 570, 579 (3d Cir. 1980).