

PLANNED PARENTHOOD IS NOT A BANK: CLOSING THE CLINIC DOORS TO THE FOURTH AMENDMENT THIRD PARTY DOCTRINE

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INTRODUCTION

On May 30, 2002, investigators in Storm Lake, Iowa found a dead baby at a recycling center.¹ The four-day-old boy had been run through a shredding device.² In search of more information to assist in investigating the crime, the county attorney subpoenaed records from the Planned Parenthood of Greater Iowa, a women's clinic, seeking the names of women receiving pregnancy tests from August 2001 to May 2002 at the organization.³ Other clinics and a local hospital cooperated with police and provided this information,⁴ but Planned Parenthood refused, calling the subpoena a "horrible assault to a young woman's sense of privacy."⁵

Buena Vista County District Judge Frank B. Nelson twice ordered the clinic to turn over the records, but the State Supreme Court stayed enforcement of the subpoena and scheduled a hearing for Planned Parenthood's appeal in December 2002.⁶ Prosecutors in Buena Vista County argued that the Iowa statute governing physician-patient privilege applies only to oral testimony in court.⁷ They also

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¹ Adam Clymer, *Furor as Baby Death Goes Unsolved*, N.Y. TIMES, Aug. 24, 2002, at A1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*; see also John McCormick, *Court Blocks Search of Pregnancy Data; Death Probe Raises Privacy Concerns*, CHI. TRIB., Aug. 7, 2002, at 1; Rekha Basu, *Iowa D.A. Seeks Data on 100s of Prenatal Patients*, at http://www.plannedparenthood.org/articles/020704_patientprivacy.html (last visited Oct. 28, 2002) (on file with author).

⁷ IOWA CODE ANN. § 622.10 (West 2002). Communications in professional confidence:

(1) A practicing attorney, *counselor*, physician, surgeon, physician's assistant, registered nurse practitioner, mental health professional

argued that no doctor-patient privilege existed because the staff administering pregnancy tests at the Planned Parenthood clinic are not necessarily nurses or doctors; indeed, non-medical professionals are allowed to administer pregnancy tests at the clinic.⁸ Planned Parenthood attorneys countered by citing a 1993 case where mental health records in Iowa were found to be private medical records and were afforded some protection by the Constitution, subject only to a balancing test.⁹ Complicating matters is Storm Lake's transient population, which makes many doubt the child's mother even lived in the area at the time she may have requested a pregnancy test.¹⁰

In October 2002, however, state officials withdrew their request for the information, citing time, expense, and the prospect of endless litigation regarding the decision.¹¹ Thus, left unresolved is the crucial issue regarding the privacy protection and the confidentiality of the personal health information of unidentified parties in the face of criminal investigation. This conclusion to the litigation does not necessarily diminish the threat of similar attacks on privacy in the future, by Iowa or other states. Indeed, it may have deprived

. . . who obtains information by reason of the person's employment . . . shall not be allowed, *in giving testimony*, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

Id. (emphasis added). Thus, because they requested the pregnancy tests during the investigation of the crime, prosecutors contended that the statutory privilege could not be applied. *See Clymer, supra* note 1.

⁸ Tresa Baldas, *A Legal Tug-of-War: Privacy v. Criminal Probe*, NAT'L L. J., Aug. 19, 2002, at A4.

⁹ *See McMaster v. Iowa Bd. of Psychology Exam'rs*, 509 N.W.2d 754 (Iowa 1993) (holding that mental health professional-patient privilege did not bar disclosure of patient's records, but could not be subpoenaed unless it was shown that the need for records outweighed patient's right to privacy). Planned Parenthood's position is also bolstered by the common-law definition of doctor-patient privilege, the traditional elements of which were articulated by Dean Wigmore:

(1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (1st ed. 1904).

¹⁰ McCormick, *supra* note 6, at 1.

¹¹ Staci Hupp, *Officials Yield in Demand for Records of Pregnancy*, DES MOINES REG., Oct. 10, 2002, available at <http://www.dmregister.com/news/stories/c4788993/19433042.html> (last visited Nov. 8, 2002) (on file with author).

defenders of privacy rights an opportunity to close an important gap in privacy protection.

This Comment examines the gap in privacy protection left between the Fourth Amendment prohibition against unreasonable search and seizure and common law and statutory provisions regarding doctor-patient privilege. It further explores the effect of this gap on women seeking the counsel and services available at reproductive health clinics. Part I outlines the privacy protections afforded by the United States Constitution, particularly those provided by the Fourth Amendment. Part II discusses the doctor-patient privilege asserted by state and common law. Part III then probes the limitations of these protections in guarding individuals from invasions of privacy in the face of state criminal investigations. In particular, it focuses upon the possible reach of the third party doctrine, which may limit Fourth Amendment protections when a request for an individual's information is directed to a third party institution. Finally, Part IV reconsiders the third party doctrine in cases involving medical privacy. It concludes that the third party doctrine should not be applied in these situations because of the unique aspects of the doctor-patient relationship, which do not exist in other situations where individuals reveal information to third parties.¹²

The Iowa court's order supporting prosecutors' blanket request for the records of all women who visited the clinic amounts to a judicially sanctioned fishing expedition, which ignores any probable cause requirements of the Fourth Amendment.¹³ Furthermore, the state's restrictive reading of the doctor-patient privilege also contributes to an invasion of the privacy of hundreds, if not thousands, of women. The problem also has the potential to be neatly sidestepped by law enforcement officials. They may rely upon the Supreme Court's interpretation of the Fourth Amendment in *United States v. Miller*,¹⁴ in which the Court held that "the Fourth Amendment does not prohibit the obtaining of information revealed

¹² See *id.* *United States v. Miller*, 425 U.S. 435 (1976), involved the government issuing subpoenas to banks to produce defendants' financial records. See discussion at Part I *infra*.

¹³ U.S. CONST. amend. IV.

The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.*

Id. (emphasis added).

¹⁴ 425 U.S. 435 (1976).

to a third party and conveyed by him to Government authorities.”¹⁵ The case involved the government issuing subpoenas to banks to produce defendants’ financial records.¹⁶ The Court held there was no expectation of privacy because the documents were “voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.”¹⁷ Thus, in this extraordinary situation, privacy protection may not extend to women visiting reproductive health clinics.

I. A CONSTITUTIONAL RIGHT TO PRIVACY

The Supreme Court recognizes a right to privacy in more than one provision of the United States Constitution. Notably, the Court interprets the Fourteenth Amendment to hold substantive due process rights,¹⁸ which protect intimate personal relations.¹⁹ These substantive due process rights range from parental control over the education of their children²⁰ to the selection of reproductive options.²¹ In *Griswold v. Connecticut*,²² Justice Douglas turned to “penumbras” of the First, Fourth, Fifth, and Ninth Amendments to find a “zone of privacy” to protect intimate relationships.²³ At least one scholar, however, notes that the Court has moved away from relying upon substantive due process to protect liberty interests in recent years, and its temperament likely “precludes any growth or invention of new guarantees beyond those bound to the

¹⁵ *Id.* at 443.

¹⁶ *Id.* at 438. The banks produced the records but failed to notify the defendant of the request. *Id.*

¹⁷ *Id.* at 442. The third party doctrine is discussed more in depth in Part III *infra*.

¹⁸ “The doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective.” BLACK’S LAW DICTIONARY 406 (7th ed. 2000).

¹⁹ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 420 (1997). The substantive due process doctrine allows courts to look at whether there is sufficient justification for government action interfering with the constitutional rights of the individual. *See id.* Whether there is adequate reasoning for this type of action depends upon the level of scrutiny used by the court. *See id.*

²⁰ *See Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding that required attendance of children at public rather than private schools was unconstitutional as the child was not a “mere creature” of the state).

²¹ *See Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that a person holds rights against “unwarranted governmental intrusion” when making decisions about reproduction).

²² 381 U.S. 479 (1965).

²³ *Id.* at 484. Justice Douglas wrote that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance.” *Id.*

constitutional text and the accepted values associated with it.”²⁴

An explicit source of privacy protection, however, can be found in the Fourth Amendment declaration against unreasonable search and seizure.²⁵ On its face, the text provides protection against the search and seizure of people and their possessions without probable cause, and also requires a warrant that specifically states what is to be examined or taken.²⁶ The Supreme Court supported the interpretation of the Fourth Amendment as a bastion of privacy as early as 1886, with its ruling in *Boyd v. United States*.²⁷ *Boyd* involved a court order directing partners to produce a business invoice for a shipment alleged to have been received without payment.²⁸ The Supreme Court held that the subpoena *duces tecum* was unconstitutional under both the Fourth and Fifth Amendments.²⁹ The Court found there was an “intimate relationship between the [Fourth and Fifth] [A]mendments” and declared that the essence of the offense lay in “the invasion of [the] indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited [due to] his conviction of some public offense.”³⁰

While the Fourth Amendment focuses upon protecting privacy against government activities,³¹ it allows for permissible searches and seizures, provided that the procedure of obtaining a warrant supported by probable cause is followed.³² The purpose of the warrant provision is to “prevent searches from turning into ‘fishing expeditions’” by inserting an independent party into the process, in the form of the judiciary, to ensure that the government has cause for

²⁴ Stanley H. Friedelbaum, *The Quest for Privacy: State Courts and an Elusive Right*, 65 ALB. L. REV. 945, 952 (2002). *But see* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that homosexuals’ right to liberty under the Due Process Clause gives them a right to engage in consensual sexual activity in home without intervention of government).

²⁵ Friedelbaum, *supra* note 24, at 946.

²⁶ U.S. CONST. amend. IV; *see supra* note 12 for full text of the Fourth Amendment.

²⁷ 116 U.S. 616 (1886).

²⁸ *Id.* at 620.

²⁹ *Id.* at 630.

³⁰ *Id.* Because *Boyd* involved business documents, however, the Court’s statements about non-business documents are generally considered to be *dicta*. *See* United States v. Ward, 448 U.S. 242, 252-55 (1980).

³¹ *See* Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1084, 1118 (2002). Government activity, in both civil and criminal cases, is limited to “searches” and “seizures.” *Id.* For example, activities such as seeing things in public are not searches. *Id.*

³² *See id.*

search and seizure.³³ Probable cause requires the government to have “reasonably trustworthy information . . . to warrant a man of reasonable caution in the belief that an offense has been or is being committed,” or that evidence will be found in the place to be searched.³⁴ It requires more than a “bare suspicion” and is measured on a case-by-case basis.³⁵

Furthermore, even if the requirements to obtain a valid warrant are met, the Fourth Amendment prohibits searches that are unreasonable.³⁶ The Court, however, has rarely found that a search accompanied by a warrant supported by probable cause was unreasonable.³⁷ Commentators have noted that, when addressing the question of what is “reasonable,” the Court has failed to sufficiently narrow the meaning to render it effective as a protection of privacy rights.³⁸

In the late 1960s, Fourth Amendment interpretations underwent a paradigm shift.³⁹ Rather than concentrating on property interests in determining whether or not an unreasonable search occurred,⁴⁰ in *Katz v. United States*,⁴¹ Supreme Court Justice Harlan articulated a “reasonable expectation of privacy” standard.⁴² The Court declared

³³ See *id.* at 1125.

³⁴ *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. U.S.*, 267 U.S. 132, 162 (1925)).

³⁵ See *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

³⁶ See AKIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 16 (1997).

³⁷ See *Schmerber v. California*, 384 U.S. 757 (1966) (holding that the withdrawal of blood to test for blood alcohol level was reasonable). *But see* *Winston v. Lee*, 470 U.S. 753 (1985) (holding that a surgical incision to remove a bullet from the suspect’s body to provide evidence was unreasonable, even pursuant to a warrant).

³⁸ See Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1645, 1687-88 (1988). Colb points out the lack of teeth in the Court’s current Fourth Amendment reasonableness analysis and proposes that the Court “recognize that an ‘unreasonable’ search in violation of the Fourth Amendment occurs whenever the intrusiveness of a search outweighs the gravity of the offense being investigated.” *Id.* at 1687-88; see also Tracy Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669, 719 (1988).

³⁹ Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1303 (2002); Solove, *supra* note 31, at 1128-33.

⁴⁰ See *Olmstead v. United States*, 277 U.S. 438 (1928) (holding that wiretapping of an individual’s phone was not an unreasonable search). The Court stated that “[t]he reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment.” *Id.* at 466.

⁴¹ 389 U.S. 347 (1967).

⁴² *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *Katz*

that what a person intends to keep as private, even in “an area accessible to the public,” is constitutionally protected.⁴³ Justice Harlan, in concurrence, referred to a “reasonable expectation of privacy” test, which looks to whether a person shows an actual or subjective expectation of privacy.⁴⁴ This test also looks to whether *society* is prepared to recognize the individual’s expectation of privacy as reasonable.⁴⁵ The Court indicated that the expectation of privacy turns on what a person exposed to the public, characterizing it as a form of secrecy.⁴⁶ Using this rationale, a person could not have a reasonable expectation of privacy in information that he or she divulges.⁴⁷

Similarly, in *Smith v. Maryland*,⁴⁸ the Court upheld the police’s warrantless use of a pen register⁴⁹ to record the numbers dialed from the home telephone of a robber charged with making obscene phone calls.⁵⁰ It reasoned that because people know the phone company keeps track of the numbers dialed for billing purposes, they cannot hold a reasonable expectation that this information will be kept secret.⁵¹

More recently, in *California v. Greenwood*,⁵² the Court applied the “reasonable expectation of privacy test” in holding that the Fourth Amendment does not protect against the search and seizure of garbage left for collection in an area accessible to the public.⁵³ In that case, a police officer asked a garbage collector to give her the trash bags that Greenwood left on his curb after she learned that a

overruled *Olmstead*. *Id.* at 356.

⁴³ *Id.* at 351. The Court went on to make the famous declaration that the Fourth Amendment “protects people, not places.” *Id.* Justice Stewart further noted that modern life involved many activities considered private, such as speaking on the phone, taking place outside of the home: “No less than an individual in a business office, in a friend’s apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment.” *Id.* at 352.

⁴⁴ *Id.* at 361 (Harlan, J., concurring).

⁴⁵ *Id.*

⁴⁶ Solove, *supra* note 31, at 1131.

⁴⁷ *Id.*

⁴⁸ 442 U.S. 735 (1979).

⁴⁹ A monitoring of the telephone numbers that a person had called. *See id.* at 740 n.4; Eugene Volokh & David Newman, *In Defense of the Slippery Slope: Despite the Metaphor’s Poor Reputation, a Good Decision Now Can Lead to a Bad One Later*, 2003-APR LEGAL AFF. 21, 22 (2003).

⁵⁰ *Smith*, 442 U.S. at 745-46.

⁵¹ *Id.* at 743.

⁵² 486 U.S. 35 (1988).

⁵³ *Id.* at 39.

truck carried drugs to Greenwood's home.⁵⁴ During a warrantless search of the bags, the investigator found items indicative of drug use.⁵⁵ In upholding the legality of the search, the Supreme Court held that the search would violate the Fourth Amendment "only if respondents manifested a *subjective expectation of privacy in their garbage that society accepts as objectively reasonable*."⁵⁶

In the thirty years since the *Katz* decision, courts have increasingly narrowed the decision's scope by making numerous exceptions to the warrant requirement.⁵⁷ Furthermore, the Fourth

⁵⁴ *Id.* at 37.

⁵⁵ *Id.* at 37-38.

⁵⁶ *Id.* at 39 (emphasis added) (internal citations omitted); *see also* State v. Hempele, 120 N.J. 182, 200 (1990) (holding that a determination of the reasonableness of an expectation of privacy "start[s] from the premise that [e]xpectations of privacy are established by general social norms") (quoting Robbins v. California, 453 U.S. 420, 428 (1981)).

⁵⁷ *See* Solove, *supra* note 31, at 1119; *see also* Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that police could stop and frisk an individual without a warrant or probable cause if there was a sufficient basis for the officer's suspicion).

Another important exception to warrant requirements made since the *Katz* decision include searches made incident to and contemporaneously with a lawful arrest. *See* Chimel v. California, 395 U.S. 752 (1969) (limiting searches incident to arrest to immediate areas, and noting that entire houses cannot be searched pursuant to this rule); *see also* U.S. v. Robinson, 414 U.S. 218 (1973) (allowing the person to be searched after lawful arrest); New York v. Belton, 453 U.S. 454 (1981) (allowing the search of the interior of a vehicle pursuant to lawful arrest in areas within the arrestee's immediate control).

The Court has also made an exception to the warrant requirements of the Fourth Amendment in cases involving exigent circumstances, such as investigations involving "hot pursuit," an imminent threat to persons or property, or the potential destruction of evidence. *See* Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) (holding that the scope of the search must reasonably be as broad as necessary to protect against the danger posed by the suspect at large).

The Court found a diminished expectation of privacy for vehicle and container searches. *See* Chambers v. Maroney, 399 U.S. 42 (1970) (stating that law enforcement must only show that it was reasonable to forgo the warrant procedure, and requiring probable cause); *see also* Texas v. White, 423 U.S. 67 (1975) (reasoning that if search would have been reasonable because of probable cause at the scene then a vehicle could also be examined at the police station without a warrant); California v. Acevedo, 500 U.S. 565 (1991) (stating that probable cause is not determined by the nature of the container where contraband is stored, but by the object of the search itself and the places in which there is probable cause to believe it may be found); Wyoming v. Houghton, 526 U.S. 265 (1999) (stating that, for purposes of searches, there is no distinction between the passenger and driver of the vehicle).

The Court has allowed relaxed requirements for inventory searches in the interest of protecting the owner's property as well as protecting law enforcement from danger and from claims for lost or damaged property. *See* South Dakota v. Opperman, 428 U.S. 364 (1976) (stating that, even if an inventory is categorized as a "search," it is constitutionally permissible under the Fourth Amendment "reasonableness" standard); *see also* Illinois v. Lafayette, 462 U.S. 640 (1983)

Amendment is generally interpreted only to protect procedural privacy.⁵⁸ This approach is concerned only with government officials following proper protocol in obtaining a warrant to conduct a search.⁵⁹ Theoretically, individual privacy concerns can only be set aside where the government shows a basis for believing that a search would uncover evidence of a crime.⁶⁰ Critics arguing for a more substantive approach—one that is more fact-sensitive rather than categorical—want an inquiry that applies a modified balancing test to determine whether the government’s interest in criminal investigation can override the privacy interests of the individual.⁶¹ Constitutional provisions protecting the individual against government intrusion are neither rigid nor comprehensive, and the Court’s proclivity to allow law enforcement some latitude in the application of the warrant requirement of the Fourth Amendment could leave a person’s most intimate and personal information exposed in the face of even a broad and unfocused investigation.⁶²

(allowing the search of personal effects incident to lawful arrest as part of routine administrative procedure in booking and jailing the suspect); *Colorado v. Bertine*, 479 U.S. 367 (1987) (requiring that inventory searches be shown to be in good faith).

In instances of law enforcement seeking consent to conduct a warrantless search, the Court has not required that the subject be informed of his right to decline the officer’s request, but rather has concentrated on whether or not the consent was given voluntarily. *See Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (holding that, even though person was not informed of his right to refuse consent to search, the consent was still given voluntarily); *see also* *U.S. v. Matlock*, 415 U.S. 164 (1974) (holding that a spouse residing in the same home may consent on behalf of the other spouse); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (holding that police search based on mistaken belief that person giving consent had apparent authority to do so was valid because of their reasonable belief that the consent was valid).

The Court has also allowed searches and seizure of objects in plain view when the criminal nature is immediately apparent and there is a lawful right to the object itself. *See Horton v. California*, 496 U.S. 128 (1990) (holding that warrantless search of object in plain view was allowable, even though its discovery was not inadvertent); *see also Arizona v. Hicks*, 480 U.S. 321 (1987) (noting that the object examined by law enforcement in plain view cannot be manipulated or moved without probable cause).

⁵⁸ *See* Colb, *supra* note 38, at 1643-45.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1644.

⁶¹ *Id.* Professor Colb argues that the individual’s sense of security and privacy is so important that courts should engage in a balancing test weighing the service that the government search provides to the public against the individual’s privacy interest even in situations in which the government must also provide probable cause and a warrant. *Id.* at 1642. She goes on to recommend that the Supreme Court recognize that a search is unreasonable whenever “the intrusiveness of a search outweighs the gravity of the offense being investigated.” *Id.* at 1645.

⁶² *See, e.g., Clymer, supra* note 1.

II. STATE PROTECTION OF CONFIDENTIAL COMMUNICATIONS BETWEEN PATIENTS AND DOCTORS

Common law, statutes, and state constitutions bolster the privacy protection offered by the Constitution, and one may look to state law and practice to seek relief from a breach of privacy by the government.⁶³ Furthermore, the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) is another avenue for privacy protection.⁶⁴ HIPAA mandates federal privacy regulation for medical information disclosed to law enforcement officials, previously a concern primarily left to the states.⁶⁵ Regulations apply to “health plans, health care clearinghouses, and health care providers.”⁶⁶ Because the purpose of HIPAA is to simplify and standardize the processing and transmission of health care information, however, the privacy rule only applies to providers who conduct insurance-related transactions.⁶⁷ Thus, the somewhat limited protections afforded by HIPAA would be unavailable to women visiting to a free reproductive health clinic.

Although the Iowa Constitution contains language that is very similar to that of the Fourth Amendment,⁶⁸ the United States Constitution sets a standard of protection for individual rights upon which states may expand.⁶⁹ In his dissent in *United States v. Miller*,

⁶³ U.S. v. Miller, 425 U.S. 435, 454 (1976) (Brennan, J., dissenting) (citing the “emerging trend among high state courts of relying upon state constitutional protections of individual liberties . . . protections pervading counterpart provisions of the United States Constitution, but increasingly being ignored by decisions of this Court”) (internal citations omitted); see also William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁶⁴ See 45 C.F.R. §§ 160-64 (2002). The primary purpose of HIPAA, however, was to permit employees to switch jobs without having the new health plans exclude pre-existing conditions, and privacy was not comprehensively addressed at the time legislation was passed. See DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 210 (2003) [hereinafter INFORMATION PRIVACY LAW].

⁶⁵ INFORMATION PRIVACY LAW, *supra* note 64, at 207.

⁶⁶ 45 C.F.R. § 160.102 (2002). “Health care provider” is defined as a “provider of medical or health services . . . and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.” 45 C.F.R. § 160.103. Examples of “health care providers” include physicians, hospitals, and pharmacists. See INFORMATION PRIVACY LAW, *supra* note 64, at 210.

⁶⁷ INFORMATION PRIVACY LAW, *supra* note 64, at 211.

⁶⁸ The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

IOWA CONST. art. I, § 8 (Iowa Bill of Rights—Personal security—searches and seizures).

⁶⁹ *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980) (holding that the

Justice Brennan approved the emerging trend of relying on state constitutions for protection of individual rights, as he supported the California Supreme Court's more expansive interpretation of the state's constitutional provisions.⁷⁰ Furthermore, Justice Brennan noted that parties might seek redress for invasion of privacy at the state level, where more protections are afforded.⁷¹ Following this reasoning, some state courts have explicitly held that their state constitutions are more protective of individual rights than the federal Constitution.⁷² For example, in *Sitz v. Dep't of State Police*,⁷³ the Michigan Court of Appeals stated that "[i]n determining whether compelling reasons exist, several factors may be considered, including any significant textual differences in parallel provisions of the federal and state constitutions, state constitutional and common-law history, and state law preexisting the constitutional provision."⁷⁴ In addition, the Minnesota Supreme Court in *O'Connor v. Johnson*⁷⁵ declared that it was "independently responsible for safeguarding the rights of [its] citizens."⁷⁶ The Minnesota court did go on to note, however, that where state constitutional provisions were practically identical to that of the Federal Constitution, a United States Supreme Court decision interpreting the federal provision would be an "inherently persuasive, although not necessarily compelling, force."⁷⁷

Of course, state laws and the levels of protection proffered vary by jurisdiction. California, for example, has a long tradition of

state had authority to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (holding that the state court could interpret state constitutional prohibition of unreasonable searches and seizures as being more restrictive than the Fourth Amendment of the Federal Constitution, but could not interpret the Fourth Amendment more restrictively than it was interpreted by the United States Supreme Court).

⁷⁰ *Miller*, 425 U.S. at 447, 454. Justice Brennan wrote that "[t]he California Supreme Court has reached a conclusion under Art. I, § 13 [of the California constitution] in the same factual situation, contrary to that reached by the Court today under the Fourth Amendment. I dissent because in my view the California Supreme Court correctly interpreted the relevant constitutional language." *Id.*

⁷¹ *Id.* (Brennan, J., dissenting) (*see supra* note 63 for relevant text).

⁷² Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 215 (1989).

⁷³ 485 N.W.2d 135 (Mich. 1990).

⁷⁴ *Id.* at 138. (emphasis added)

⁷⁵ 287 N.W.2d 400 (Minn. 1979).

⁷⁶ *Id.* at 405 (quoting *People v. Brisendine*, 531 P.2d 1099, 1114 (Cal. 1975)); *see also State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985) (noting that "[s]tate courts are, and should be, the first line of defense for individual liberties within the federalist system").

⁷⁷ *Fuller*, 374 N.W.2d at 727.

expansive protection for individual rights, and its constitution explicitly provides for broader protection than the federal Constitution.⁷⁸ Furthermore, California's constitution specifically protects privacy rights: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*."⁷⁹

When applying the reasonable expectation of privacy test articulated by the Supreme Court in *Katz*,⁸⁰ California courts have held that individuals can reasonably expect that institutions such as banks,⁸¹ credit card companies,⁸² and telephone companies⁸³ will not release information unless they are compelled by the legal process, and parties who seek such information must obtain a judicial finding that they are entitled to production.⁸⁴

Furthermore, in California, the therapist-patient evidentiary privilege is based on a constitutional right of privacy.⁸⁵ California legislators have also drafted strong statutory protections for doctor-patient privilege, providing that "[t]he willful, unauthorized violation of professional confidence constitutes unprofessional conduct."⁸⁶ The California Code allows for records to be turned over notwithstanding the professional conduct statute, but states that "[a]ny document relevant to an investigation may be inspected, and copies may be obtained, where patient consent is given."⁸⁷ Therefore, statutory privilege in California extends to all professional

⁷⁸ CAL. CONST. art. I, § 24 (1974). The California Constitution explicitly states that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." *Id.*; see also *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 131 n.3 (1980) (stating that "the federal right of privacy in general appears to be narrower than what the voters approved in 1972 when they added 'privacy' to the California Constitution").

⁷⁹ CAL. CONST. art. I, § 1 (the provision guaranteeing privacy rights was added on in 1972) (emphasis added).

⁸⁰ 389 U.S. at 361 (Harlan, J., concurring).

⁸¹ See *Burrows v. Super. Ct.*, 13 Cal. 3d 238 (1974) (holding that an individual had a reasonable expectation that bank would maintain confidentiality of records).

⁸² See *People v. Blair*, 25 Cal. 3d 640 (1979) (holding that the individual had reasonable expectation of privacy regarding charges made on his credit card, and a reasonable expectation of privacy with regard to his telephone calls).

⁸³ See *id.* at 654-55 (rejecting reasoning of *Smith v. Maryland*, 442 U.S. 735 (1979)).

⁸⁴ *Id.* at 655.

⁸⁵ See *People v. Stritzinger*, 34 Cal. 3d 505, 511 (1983).

⁸⁶ CAL. BUS. & PROF. CODE § 2263 (West 2002).

⁸⁷ § 2225(b)(1).

confidences, and patients are therefore accorded the opportunity to consent before their records are turned over, even if the request is served upon a third party.⁸⁸ This policy will at least complicate attempts by law enforcement agents to conduct sweeping, unfocused investigations in California like the one attempted in Iowa.

New York seemingly offers even more protection for individual privacy interests than California. For example, New York's constitutional provision against unreasonable search and seizure, like Iowa's, also reads much like the Fourth Amendment.⁸⁹ New York's constitution particularly states, however, that the rights of people against unreasonable interception of telephone and telegraph communication shall not be violated, and asserts that

ex parte orders or warrants shall issue only upon oath or affirmation that there is *reasonable ground to believe that evidence of crime may be thus obtained*, and identifying the particular means of communication, and *particularly describing the person or persons whose communications are to be intercepted and the purpose thereof*.⁹⁰

This expectation of privacy in the instance of private communications could reasonably be extended to encompass doctor-patient communications, specifically in the case of visitors to reproductive health clinics. The investigators in Iowa, for instance, requested records from Planned Parenthood as a last resort after other means of gathering evidence were unsuccessful. Thus, they showed no reason or expectation that a search of the clinic's records would prove fruitful, nor could they describe any particular persons whose records might be relevant to their investigation. The New York constitution would then seemingly provide a greater protection of patients' privacy interest in their pregnancy tests because investigators would not be able to show a reasonable expectation that such an order would significantly benefit their investigation.

New York also provides a wide range of statutory protections for privileged communications. Confidential information is privileged not only in the instance of physicians, dentists, podiatrists, chiropractors, and nurses,⁹¹ but also for psychologists⁹² and social workers.⁹³ These statutory protections are reinforced by New York common law. In a 1983 decision, the New York Court of Appeals

⁸⁸ *See id.*

⁸⁹ N.Y. CONST. art. I, § 12 (providing security against unreasonable searches, seizures and interceptions).

⁹⁰ *Id.* (emphasis added).

⁹¹ N.Y. C.P.L.R. § 4504 (McKinney 2002).

⁹² § 4507.

⁹³ § 4508.

allowed a hospital to assert doctor-patient privilege in order to protect its patients and foster an effective doctor-patient relationship.⁹⁴ The court held that the statutory doctor-patient privilege should be construed in accordance with its purpose, which is “to encourage full disclosure by the patient so that he can secure appropriate treatment from the physician.”⁹⁵ It held that the statute is to be given “a broad and liberal construction to carry out its policy.”⁹⁶ The court then stated that although the doctor-patient privilege belongs to the patient, the third party hospital or physician for the protection of a patient may assert it, even if the patient is suspected of or charged with a crime.⁹⁷

More recently, the New York Court of Appeals ruled that prosecutors cannot demand hospital medical records in their efforts to seek criminal suspects who have been wounded, holding that this would infringe upon patient confidentiality.⁹⁸ Prosecutors sought to get around the earlier decision in *Onondaga County*⁹⁹ by demanding all information “except any and all information acquired by a physician, registered nurse or licensed practical nurse in attending said patient in a professional capacity and which was necessary to enable said doctor and/or nurse to act in that capacity.”¹⁰⁰ The Court of Appeals refused to make the distinction, however, saying that

⁹⁴ In the Matter of a Grand Jury Investigation of Onondaga County, 59 N.Y.2d 130 (1983). In this case, the District Attorney issued a subpoena requiring the hospital to produce “any and all medical records pertaining to treatment of any person with stab wounds or other wounds caused by a knife, from June 15, 1982 to the present time” after a woman was found stabbed to death. *Id.* at 133. *But see* *People v. Bridges*, 538 N.Y.S.2d 701 (1989) (holding that statutory social worker privilege did not apply to rape victim’s communications to volunteer counselor at rape crisis center).

⁹⁵ *Onondaga County*, 59 N.Y.2d at 134 (quoting *Matter of Grand Jury Proceedings [Doe]*, 56 N.Y.2d 348, 352 (1982)).

⁹⁶ *Id.* (quoting *Matter of City Council of New York v. Goldwater*, 284 N.Y. 296, 300 (1940)).

⁹⁷ *Id.* at 135.

⁹⁸ In the Matter of Grand Jury Investigation in New York County, 98 N.Y.2d 525 (2002); Robert F. Worth, *Court Ruling Limits Prosecutors’ Access to Patient Records*, N.Y. TIMES, Oct. 16, 2002, at B8. The ruling stemmed from a case in which the Manhattan District Attorney’s office was looking for a suspect in a May 1998 murder whom investigators believed had been stabbed and bleeding when he left the crime scene. *Id.* Subpoenas were issued to twenty-three area hospitals, seeking the records of every man who appeared to have suffered stab wounds around the time of the murder. *Id.* The New York City Health and Hospitals Corporation, which owned four of the hospitals that were subpoenaed, cited doctor-patient privilege in refusing to turn over the records. *Id.*

⁹⁹ *Onondaga County*, 59 N.Y.2d at 134.

¹⁰⁰ *See* Worth, *supra* note 98, at B8.

prosecutors were simply seeking individuals with a particular injury.¹⁰¹ The court further stated that “[p]atients should not fear that merely by obtaining emergency medical care they may lose the confidentiality of their medical records and their physicians’ medical determinations.”¹⁰² Women seeking counseling and care at reproductive health clinics may share a similar interest and concern in the confidentiality of their records and health care workers’ notes.

The New York court also articulated three core policy objectives of the state’s doctor-patient privilege statute, which was the first of its kind:¹⁰³

First, the physician-patient privilege seeks to maximize unfettered patient communication with medical professionals, so that any potential embarrassment arising from public disclosure will not deter people from seeking medical help and securing adequate diagnosis and treatment.¹⁰⁴ Second, the privilege encourages medical professionals to be candid in recording confidential information in patient medical records, and thereby averts a choice between their legal duty to testify and their professional obligation to honor their patients’ confidences.¹⁰⁵ Third, the privilege protects patients’ reasonable privacy expectations against disclosure of sensitive personal information.¹⁰⁶

New York recognized not only the individual’s privacy interest in sensitive information, but also acknowledged the privacy interest of medical professionals and organizations, specifically the concern that breaches of privacy would deter the general populace from seeking treatment in the future.¹⁰⁷ The *New York County* search was less broad and sweeping than the one attempted by law enforcement in Iowa.¹⁰⁸ In the restricted context of this instance, the statutory privilege, supported by a strong judicial interpretation, somewhat alleviates the gaps in privacy protection that affect patients seeking to shield their medical records.

In contrast to the privacy protections guaranteed by other state constitutions, the parallel provision in the Iowa Constitution is far less expansive. Because Iowa’s constitutional clause regarding search and

¹⁰¹ *Id.* Justice Albert M. Rosenblatt wrote the unanimous opinion: “The inherently medical nature of this judgment is not obviated by attempting to qualify it in terms of what a layperson might plainly observe.” *New York County*, 98 N.Y.2d at 531.

¹⁰² *New York County*, 98 N.Y.2d at 532.

¹⁰³ *Id.* at 529.

¹⁰⁴ *Id.* (internal citations and quotations omitted).

¹⁰⁵ *Id.* (internal citations and quotations omitted).

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*, 98 N.Y.2d at 529.

¹⁰⁸ *See Clymer, supra* note 1, at A1; *see also New York County*, 98 N.Y.2d at 526.

seizure is so similar to the United States Constitution, the Iowa Supreme Court has held that accordingly it usually interprets the “scope and purpose of article I, section 8, of the Iowa Constitution to track with federal interpretations of the Fourth Amendment.”¹⁰⁹ This reluctance to expand the meaning of the state constitutional provision would thus provide women visiting reproductive health clinics within the state with little added protection of individual privacy rights.

Iowa’s statutory scheme also does not provide nearly as broad a protection of individual privacy in the face of criminal investigations as those in California and New York. For example, an Iowa statute provides guidelines for communications in professional confidence:

A practicing attorney, *counselor*, physician, surgeon, physician assistant, advanced registered nurse practitioner, [or] mental health professional . . . who obtains information by reason of the person’s employment . . . shall not be allowed, *in giving testimony*, to disclose any confidential communication properly entrusted to the person in the person’s professional capacity, and necessary and proper to enable the person to discharge the functions of the person’s office according to the usual course of practice or discipline.¹¹⁰

This statute protects a wide range of confidential communications, extending privilege to counselors and assistants who obtain information because of their employment in a medical facility. This statutory protection for privileged communication, however, is restricted to situations involving oral testimony in court or during a deposition.¹¹¹ Thus, patients are left exposed when their records are requisitioned by court order or subpoena, allowing law enforcement to embark on a “fishing expedition” to gather evidence, so long as this information is not used during a judicial proceeding.¹¹²

Common law doctor-patient privilege also protects patients to

¹⁰⁹ State v. Jones, 666 N.W.2d 142, 145 (Iowa 2003) (quoting State v. Showalter, 427 N.W.2d 166, 168 (Iowa 1988)).

¹¹⁰ IOWA CODE ANN. § 622.10 (West 2002) (emphasis added). The language limiting confidentiality to situations where third parties are requested to give testimony is discussed at Part III *infra*. But see IOWA CODE ANN. § 229.25 (West 2002): Medical records to be confidential—exceptions: “[T]he chief medical officer shall release appropriate information under any of the following circumstances: . . . (2) The information is sought by a court order.”

¹¹¹ See Roosevelt Hotel Ltd. P’ship v. Sweeney, 394 N.W.2d 353, 355 (Iowa 1986) (stating that “[t]estimony is a declaration by a witness in court or during a deposition”); see also discussion at Part III *infra*.

¹¹² See Clymer, *supra* note 1, at A1.

some degree.¹¹³ In the Iowa case, for example, the relationships fostered by the Planned Parenthood of Greater Iowa do qualify for privilege as defined by Wigmore.¹¹⁴ Visitors to reproductive health clinics depend upon the confidentiality of their consultations.¹¹⁵ A known lack of confidentiality could likely cause a retreat of women of diverse backgrounds from visiting these clinics.¹¹⁶ Critics challenge the assertion that privilege encourages communication, arguing that most know little or nothing about privilege, and that even those who do most likely would not take it into account in making decisions about communicating information to third parties.¹¹⁷ In the case of women visiting reproductive health clinics, however, it is unlikely that they would not be aware, at least to some degree, of the confidentiality that accompanies their visits.¹¹⁸ Admittedly, however, limited available data exists to show that most people believe they would not communicate as freely and completely without a privilege.¹¹⁹

Iowa courts require three necessary elements to establish a doctor-patient privilege: “(1) the relationship of doctor-patient; (2) the acquisition of the information or knowledge during this relationship; and (3) the necessity of the information to enable the doctor to treat the patient skillfully.”¹²⁰ In a situation such as the one facing the Planned Parenthood in Iowa, a health clinic could argue all three elements are satisfied. First, the doctors and medical professionals at the clinic could certainly claim that a doctor-patient relationship is reasonably assumed when a woman visits the clinic. Furthermore, particularly in the case of reproductive health clinics, it

¹¹³ See *supra* note 9 and accompanying text.

¹¹⁴ See WIGMORE, *supra* note 9.

¹¹⁵ Immediately after local law enforcement tried to force Planned Parenthood to open its records, the Planned Parenthood’s Storm Lake [Iowa] saw a 70-80 percent drop in women seeking pregnancy tests. This poses a serious health concern, considering that these women now may be dealing with a pregnancy on their own and may not return for early prenatal care or other vital reproductive health services provided at the center.

Statement by Gloria Feldt, President, Planned Parenthood Federation of America, Inc., at http://www.plannedparenthood.org/about/pr/020830_medicalprivacy.html (last visited Sept. 11, 2002) (on file with author).

¹¹⁶ See *id.*

¹¹⁷ *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1471, 1474 (1985) [hereinafter *Developments*].

¹¹⁸ See *id.* at 1475; see also Statement by Gloria Feldt, *supra* note 115.

¹¹⁹ See *Developments*, *supra* note 117, at 1476 (referencing two surveys that provide statistics based on very small samples).

¹²⁰ *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981).

is very likely that the health professional will acquire sensitive information or knowledge in the course of this relationship. The third element is particularly relevant, as women visiting reproductive health clinics rely on confidentiality and anonymity.¹²¹ Limiting doctor-patient privilege, even in the face of government investigations, could not only cause distress and harm to the patient whose privacy has been breached, but also weaken the reputation and integrity of the organization offering these services.

III. LIMITATIONS: EXPOSING THE GAPS IN PRIVACY PROTECTIONS

Although doctor-patient privilege can be asserted through constitutional, statutory, and common law avenues, the protections they afford are limited, particularly in the face of government investigation.¹²² In some cases, the language of the statutes themselves limits the privacy protection it provides.¹²³ Furthermore, the Fourth Amendment third party doctrine, as interpreted by the Supreme Court in *United States v. Miller*, could seriously curtail the doctor-patient privilege upon which many have come to depend, particularly in the instance of reproductive health clinics.¹²⁴

The Iowa statute that addresses doctor-patient privilege provides that communications in professional confidence shall not be disclosed “*in giving testimony*.”¹²⁵ This protected privilege leaves a patient, seeking to protect his or her records, exposed in the face of a criminal investigation. The privilege covered by the statute is limited to disclosure by the giving of testimony but does not speak to a

¹²¹ See *Developments*, *supra* note 117, at 1475.

¹²² See INFORMATION PRIVACY LAW, *supra* note 64, at 207.

¹²³ See Joy Pritts et al., *The State of Health Privacy: An Uneven Terrain (A Comprehensive Survey of State Health Privacy Statutes)*, at <http://www.healthprivacy.org> (last visited Feb. 22, 2003) (on file with author).

¹²⁴ See Solove, *supra* note 31, at 1135; see also *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980) (holding that defendant had no reasonable expectation of privacy in drugs concealed in girlfriend's purse because he entrusted them to a third party). See generally *Miller*, 425 U.S. 435.

¹²⁵ IOWA CODE ANN. § 622.10 (West 2002). The statute states that:

A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, *in giving testimony*, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

Id. (emphasis added).

subpoena that commands the information for the purposes of a criminal investigation.¹²⁶ Furthermore, Iowa courts have held that subpoenas of written records do not constitute the compulsion of confidential communications by the giving of testimony as protected by the statute, preferring to narrowly define “testimony” as a “declaration by a witness in court or during a deposition.”¹²⁷ Thus, the statute offers no protection for patients in cases where law enforcement authorities demand information through a court order.¹²⁸ This leaves discretion in the hands of the court to weigh the importance of the information to the criminal investigation against the individual’s privacy interest in keeping this information confidential.¹²⁹

¹²⁶ See *id.*

¹²⁷ See *Chidchester v. Needles*, 353 N.W.2d 849, 851-52 (Iowa 1984) (holding that doctor-patient privilege did not shield a clinic from producing subpoenaed records because there was no disclosure by the giving of testimony, and that this disclosure did not violate privacy rights because this interest of patients yields to the state’s interest in administration of criminal justice); *Roosevelt Hotel Ltd. P’ship*, 394 N.W.2d at 355 (Iowa 1986) (stating that “[s]ection 622.10 applies only to the testimonial use of privileged information . . . because it comes into play ‘in giving testimony.’ Testimony is a declaration by a witness in court or during a deposition”).

¹²⁸ IOWA CODE ANN. § 622.10 (West 2002); see also § 229.25 (providing exceptions to confidentiality of medical records: “the chief medical officer shall release appropriate information under any of the following circumstances: . . . (2) The information is sought by a court order”).

¹²⁹ See *Chidchester*, 353 N.W.2d at 853.

However broad the patients’ constitutional privacy interest may be, that interest constitutes at most a qualified rather than an absolute privilege. The privacy interest must always be weighed against such public interests as the societal need for information, and a compelling need for information may override the privacy interest. . . . We need not here decide the precise reach of the patients’ constitutional privacy right. Whatever that reach, the privacy interest must be balanced against society’s interest in securing information vital to the fair and effective administration of criminal justice.

Id. (internal citations omitted). Similar provisions stripping doctor-patient privilege of its significance limit other state and federal statutes. See CAL. BUS. & PROF. CODE § 2225(a) (West 2002) (noting that, “notwithstanding Section 2263 and any other provision of law making a communication between a physician and surgeon or a podiatrist and his or her patients a privileged communication, those provisions shall not apply to investigations or proceedings conducted under this chapter”); Health Insurance Portability and Accountability Act, § 164.512(f)(1) (1996). The statute states that:

[H]ealth information may be disclosed to law enforcement officials without consent or authorization if required by court order, warrant or subpoena. However, health information may also be disclosed ‘in response to a law enforcement official’s request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person.’

Id.

And while common law doctor-patient privilege prohibits health care providers from disclosing any patient records, the privilege does not stand up against court orders and subpoenas.¹³⁰ In most instances, prosecutors, rather than neutral judicial officers, control the issuance of subpoenas, dispersing them in the court's name and invoking the court's authority to enforce them.¹³¹ Furthermore, the Supreme Court's decisions since *Boyd* have not developed any meaningful restraints on law enforcement officials' power to issue subpoenas.¹³² Subpoenas are "presumed to be reasonable" and may only be quashed if "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."¹³³

The gap in privacy protection is not covered by asserting common law doctor-patient privilege, and invoking the privilege proves troublesome in another way. In Iowa, for example, courts require the party who seeks to invoke the privilege to show it exists.¹³⁴ This element is particularly problematic in the instant case where the people affected are numerous and unnamed, allowing state officials, armed with court orders and subpoenas, to avoid the burden of probable cause.¹³⁵ Because it is the *individual* whose privacy interests

¹³⁰ JO ANNE CZECOWSKI BRUCE, *PRIVACY AND CONFIDENTIALITY OF HEALTH CARE INFORMATION* 139 (2d ed. 1988).

¹³¹ Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell—New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 173 (2002). Cole further notes that federal prosecutors need not obtain prior authorization from the grand jury to issue a subpoena. *Id.*; see also Solove, *supra* note 31, at 1149.

¹³² Cole, *supra* note 131, at 176; see also *Boyd v. U.S.*, 116 U.S. 616, 630 (ruling that there is a presumption that a subpoena amounts to an unreasonable search and seizure). *But see Hale v. Henkel*, 201 U.S. 43, 73 (1906) (holding that it was "quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence"); see also *United States v. R. Enter., Inc.*, 498 U.S. 292, 301 (1991) (rejecting imposition of relevance or admissibility requirements on grand jury subpoenas).

¹³³ *R. Enter.*, 498 U.S. at 301.

¹³⁴ *State v. Tornquist*, 120 N.W.2d 483, 495 (Iowa 1963).

¹³⁵ See BRUCE, *supra* note 130, at 139; see also Solove, *supra* note 31, at 1149. Solove points to procedural deficiencies in the statutory regime regulating the government's access to third party records. *Id.* He quotes William J. Stuntz in discussing these deficiencies:

[W]hile searches typically require probable cause or reasonable suspicion and sometimes require a warrant, subpoenas require nothing, save that the subpoena not be unreasonably burdensome to its target. Few burdens are deemed unreasonable . . . [federal subpoena power is] akin to a blank check.

William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*,

are at stake, the statute would only allow them to assert the privilege against the court order or subpoena, not the third party from which the information is being sought.¹³⁶ Therefore, visitors to the clinic would have to come forward in order to assert the privilege, thus compromising their anonymity.¹³⁷ Furthermore, this element does not allow for a third party to assert privilege in order to protect the records it has obtained in confidentiality.¹³⁸

Although the Fourth Amendment assures individuals protection against unreasonable search and seizure by imposing probable cause and specificity requirements upon warrants issued,¹³⁹ these elements are negated in situations in which individuals share their personal information with third parties.¹⁴⁰ Generally, the Fourth Amendment is interpreted to protect procedural privacy, and privacy can only be breached where the government shows a basis for believing the search would uncover evidence of a crime.¹⁴¹ In the Iowa case, the government would fail outright based on this factor if it were not seeking the information from a third party, as its “fishing expedition” was launched only after it exhausted other avenues of investigation.

In *Miller*, however, the Supreme Court held that “the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities.”¹⁴² In *Miller*, the respondent appealed his conviction for carrying on the business of a distiller without giving bond and possessing whiskey upon which no taxes had been paid, contending that the lower court erred in denying his motion to suppress his bank records that had been subpoenaed.¹⁴³ He argued that he had a Fourth Amendment interest in the documents because they were facsimiles of personal

114 HARV. L. REV. 842, 857-58, 864 (2001).

¹³⁶ *Tornquist*, 120 N.W.2d at 495; see *In re Grand Jury Subpoena Dtd.* January 4, 1984, 750 F.2d 223, 224 (2d. Cir. 1984) (noting that “[i]t is axiomatic that the burden is on a party claiming the privilege protection . . . to establish those facts that are the essential elements of the privileged relationship”); *State v. Eldrenkamp*, 541 N.W.2d 877, 879 (Iowa 1995); *State v. Randle*, 484 N.W.2d 220, 221 (Iowa 1992).

¹³⁷ *Randle*, 484 N.W.2d at 221.

¹³⁸ See *id.*

¹³⁹ U.S. CONST. amend. IV.

¹⁴⁰ *United States v. Miller*, 425 U.S. 435 (1976); see *Katz v. United States*, 389 U.S. 347, 361 (1967). As discussed in Part I *supra*, the “reasonable expectation of privacy” standard articulated in *Katz* also led the Court to indicate that such an expectation would not be found in information that was not kept secret, namely information that had been revealed to a third party, even in confidence. See *supra* notes 40-46 and accompanying text.

¹⁴¹ See Colb, *supra* note 38, at 1643-44.

¹⁴² *Miller*, 425 U.S. at 443.

¹⁴³ *Id.* at 436-37.

records given to the bank for a specific and limited purpose; thus, he retained a reasonable expectation of privacy regarding the records.¹⁴⁴ The Court disagreed, finding no legitimate expectation of privacy in the contents of the respondent's bank records. Specifically, the Court characterized the checks and deposit slips not as confidential communications, but rather as "negotiable instruments to be used in commercial transactions."¹⁴⁵

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.¹⁴⁶

Thus, the "third party doctrine" effectively provides prosecutors with an end-run around the probable cause requirement of the Fourth Amendment. In *Miller* and subsequent decisions involving the extraction of personal information from third parties,¹⁴⁷ the Court overlooked the "limited purpose" relationships in which people routinely engage.¹⁴⁸

Furthermore, the Court has denied privacy in whatever a person "knowingly exposes" to the public,¹⁴⁹ treating information that is exposed to a limited number of people for a specific purpose as

¹⁴⁴ *Id.* at 442.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 443. *But see* *Burrows v. Superior Court*, 13 Cal. 3d 238 (1974) (holding that an individual has a reasonable expectation of privacy in his bank statements and records and that the voluntary surrender of such records by the bank at the request of prosecutors does not constitute a valid consent by the accused; acquisition of the records was therefore the result of an illegal search and seizure); CAL. BUS. & PROF. CODE § 2225(b)(1) (West 2002), discussed in Part II *supra*.

¹⁴⁷ *See Rakas v. Illinois*, 439 U.S. 128 (1978) (holding that a person's Fourth Amendment rights are not violated if evidence was seized during a search of a third person's property); *see also Rawlings v. Kentucky*, 448 U.S. 98 (1980) (holding a person had no reasonable expectation of privacy once he entrusted items to a third party).

¹⁴⁸ William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 39 (2001/2002). Heffernan offers as an example people who take specific steps to ensure that their financial records are not exposed to the public nonetheless routinely use banks in order to engage in personal and commercial transactions. *Id.*

¹⁴⁹ *See Katz*, 389 U.S. at 351-52 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

tantamount to a public revelation.¹⁵⁰ In holding that a person revealing information to a third party for a limited purpose no longer holds a “reasonable expectation of privacy” in that information, the Court adopted a very restrictive and limiting definition of that expectation, one that does not match the terms people expect in their everyday lives.¹⁵¹ If the third party doctrine is extended to cases such as the one in Iowa, there would consequently be little protection afforded to personal medical records compelled by the legal process, particularly when the information is sought by the government in the course of a criminal investigation.

IV. BRIDGING THE PRIVACY GAP: A RATIONALE FOR LIMITATION OF THE THIRD PARTY DOCTRINE

While a privacy interest in keeping medical records confidential is widely recognized,¹⁵² courts, scholars, and lawmakers alike have gone no further than applying a balancing test to determine whether the individual’s privacy interest is strong enough to outweigh the public interest in the free flow of information.¹⁵³ This method may seem sensible on its face, particularly in the context of criminal investigations where law enforcement officials are trying to combat crime and administer justice. Nonetheless, the Supreme Court noted that the public interest in the goals of law enforcement “can never by

¹⁵⁰ See Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 122 (2002) [hereinafter *Two Conceptual Flaws*].

¹⁵¹ Heffernan, *supra* note 148, at 44-45.

The system of privacy hinges on a series of convention-based expectations as to how people will behave These are reasonable expectations in that they constitute a widely acknowledged basis for social interaction. Moreover, given the Fourth Amendment’s text, they are also legitimate expectations, for failure to honor them undermines a person’s sense of security in everyday life.

Id.

¹⁵² Françoise Gilbert, *Emerging Issues in Global AIDS Policy: Preserving Privacy*, 25 WHITTIER L. REV. 273, 275 (2003):

Medical information is among the most sensitive and personal information about an individual. Any unwanted access, use, or disclosure of a person’s health information could cause embarrassment, problems with family, or loss of revenue. . . . A total commitment to ensuring privacy and security is central to the doctor-patient relationship. Without full access to the most intimate details, the physician cannot adequately treat the patient. . . . On the other hand, the patient may be reluctant to disclose sensitive information based on fear that it will be disclosed to third parties

Id.

¹⁵³ See *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996).

itself justify disregard of the Fourth Amendment,¹⁵⁴ saying that the Amendment rests on the principle that “the privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.”¹⁵⁵

In *Whalen v. Roe*,¹⁵⁶ the Supreme Court articulated an alternate, two-prong analysis considering another balancing factor.¹⁵⁷ In *Whalen*, the Court identified two different facets of privacy worth protecting.¹⁵⁸ The first facet is the individual’s interest in avoiding disclosure of personal matters.¹⁵⁹ The Court then identified another factor, which is ultimately the societal interest in maintaining independence in important decision-making.¹⁶⁰

The third party doctrine hampers not only the first prong of privacy interest articulated by the Court in *Whalen*, but also the second.¹⁶¹ Particularly in the case of people visiting reproductive health clinics, if one cannot be assured of confidentiality, one may simply choose not to visit the clinic.¹⁶² In a situation where confidentiality and privacy are held at a high priority, the amalgam of statutory provisions, common law privilege, and Fourth Amendment interpretations leaves a gap in privacy protection that may affect the crucial decisions of patients seeking medical care.

More recently, in *Jaffee v. Redmond*,¹⁶³ the Court framed a balancing test regarding the federal law of recognizing privilege under the rules of evidence, asking “whether a privilege protecting confidential communications between a psychotherapist and her patient ‘promotes sufficiently important interests to outweigh the need for probative evidence.’”¹⁶⁴ The Court determined that an asserted privilege must also “serv[e] public ends,”¹⁶⁵ concluding that

¹⁵⁴ *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

¹⁵⁵ *Id.*

¹⁵⁶ 429 U.S. 589 (1977).

¹⁵⁷ *Id.* at 599-600.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 599.

¹⁶⁰ *Id.* at 600; see Heffernan, *supra* note 148, at 51 (arguing that “[t]he Court’s fundamental error in its post-*Katz* jurisprudence is traceable to its failure to grasp privacy’s social function”).

¹⁶¹ *Whalen*, 429 U.S. at 599-600.

¹⁶² See Statement by Gloria Feldt, *supra* note 115; see also *Developments*, *supra* note 117, at 1471.

¹⁶³ 518 U.S. 1 (1996).

¹⁶⁴ *Id.* at 9-10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). The Court went on to decide that the delicate nature of the psychotherapist-patient relationship was enough to outweigh the evidentiary needs of the situation. *Id.* at 12.

¹⁶⁵ *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

“[t]he psychotherapist privilege serves the public interest by *facilitating the provision of appropriate treatment* for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”¹⁶⁶

This analysis could certainly be extended to organizations providing reproductive health services for women of all socioeconomic groups. In the instance of investigators obtaining records from reproductive health clinics by manner of court order or subpoena, such a balancing test may provide some protection of confidential medical information. It would allow the medical professionals administering pregnancy tests to be viewed in a similar context as psychotherapists, and would weigh the societal importance of maintaining privacy in personal records against the public’s interest in the government’s ability to gather evidence to further a criminal investigation. The privacy interest of women who visit a clinic could arguably outweigh the societal need for information, particularly in the instance of a blind search where there is little likelihood of finding any useful information.¹⁶⁷ Furthermore, the clinic has an interest in keeping these medical records confidential to protect its integrity in the face of its role in the community.¹⁶⁸

The balancing tests favored by state and federal courts regarding the application of privilege against government requests for information, however, do not take the complexities of instances into account, such as the situation Planned Parenthood of Greater Iowa faced when dealing with a court order demanding confidential records. The vague boundaries of such tests require that the information sought must “serv[e] public ends,”¹⁶⁹ or that a “compelling need for information may override the privacy interest.”¹⁷⁰ Most courts examine the need for information and weigh it against the immediate privacy interests of the individual.¹⁷¹ This

¹⁶⁶ *Id.* at 11 (emphasis added); *see also* *McMaster v. Iowa Bd. of Psychology Examiners*, 509 N.W.2d 754, 759 (Iowa 1993). In this case, the Iowa Supreme Court held that a Board of Psychology Examiners had the authority to subpoena records, but that they could not do so unless it showed that its need for the records outweighed a patient’s right to privacy. *Id.* “The privacy interest must always be weighed against such public interests as the societal need for information, and a compelling need for information may override the privacy interest.” *Id.*

¹⁶⁷ *See* Basu, *supra* note 6; *New York County*, 779 N.E.2d at 175.

¹⁶⁸ *See* Basu, *supra* note 6; *Jaffee*, 518 U.S. at 11; *Dillenbeck v. Hess*, 73 N.Y.2d 278, 284 (1989).

¹⁶⁹ *Jaffee*, 518 U.S. at 11.

¹⁷⁰ *McMaster*, 509 N.W.2d at 759.

¹⁷¹ *See Jaffee*, 518 U.S. at 11 (allowing that privilege may serve “public ends” and

methodology may ignore the long-term implications of these decisions, which may affect the individual's confidence when deciding to place her trust with a reproductive health clinic. This may ultimately undermine the service that these clinics provide to a certain segment of society.

Medical records differ fundamentally from bank records and telephone calls.¹⁷² In *Norman-Bloodsaw v. Lawrence Berkeley Lab.*,¹⁷³ the Ninth Circuit dealt with the collection of medical information by illicit means, but acknowledged that cases defining the privacy interest in medical information have typically involved disclosure to third parties.¹⁷⁴ The court recognized that constitutionally protected privacy interests plainly included medical information and an interest in its confidentiality.¹⁷⁵ The court further asserted that few areas are "more personal and more likely to implicate privacy interests than that of one's health or genetic make-up."¹⁷⁶ The third party theory is arguably valid in the face of criminal investigations into corporate wrongdoing and criminal activity. Confidences involving personal finances and communications, while they do involve some reasonable expectation of privacy, do not carry the same sort of personal sensitivity as the personal details of an individual's body.¹⁷⁷ Thus, the idea of the government being allowed access to bank and telephone records does not inspire the same sort of dismay as access to medical records; people would most likely continue to use banks and telephones even with the knowledge that these records could be open in a criminal investigation.

The Fourth Amendment third party mechanism should not be applied in the same way to medical records held by hospitals and clinics as it is to banks and telephone companies. When law enforcers request these records in search of evidence of a crime, the

acknowledging an interest in maintaining an outlet that serves the public).

¹⁷² Roy G. Beran, *The Doctor/Patient Relationship, Confidentiality and Public Responsibility*, 21 MED. & L. 617, 617 (2002):

The principle of confidentiality is fundamental to the relationship between doctor and patient. Respect for confidentiality, as with consent, gives expression to the patient's autonomy by acknowledging that it is the patient who controls any information relating to his or her medical condition or treatment. Medical information should not be divulged by a physician except with the consent of the patient.

Id. (quoting THE ROYAL AUSTRALASIAN COLLEGE OF PHYSICIANS (RACP), ETHICS: A MANUAL FOR CONSULTANT PHYSICIANS 16 (1992)).

¹⁷³ 135 F.3d 1260 (9th Cir. 1998).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1269.

¹⁷⁶ *Id.*

¹⁷⁷ AMITAI ETZIONI, THE LIMITS OF PRIVACY 151 (1999).

rules of particularity and specific suspicion inherent in the original language of the Fourth Amendment should apply.¹⁷⁸ Despite additional statutory provisions defining and providing for the protection of confidential communications and patient medical records, there remains a gap between these measures and federal and state constitutional provisions for individual rights. Rather than applying the third party doctrine in cases involving medical records, a more effective means of assuring individual privacy rights requires the strict adherence to the probable cause element of the Fourth Amendment. Law enforcement officers should have to show particulars regarding the persons or places they propose to search. In addition, they should demonstrate that the information sought is likely to provide investigators with relevant evidence to further their cases. Such requirements, added to existing statutory and common law protection, are likely to provide sufficient protection for individuals concerned with their medical privacy and will begin to bridge the current gap in medical privacy protection.

CONCLUSION

The protections afforded those who visit reproductive health centers are inadequate to protect their privacy interests. Although states may provide more expansive safeguards, state statutes still leave gaps in privacy protection. And while many states recognize a common law doctor-patient privilege, it is qualified by balancing the privacy rights of the individual with the societal interest in the information potentially revealed by the privileged communication, particularly in the context of criminal investigations. This added consideration in the application of the privilege places the privacy concerns of innocent people on a low priority in the face of unfocused criminal investigations and allows government officials to run roughshod over the privacy of the individual in the name of efficient law enforcement.

¹⁷⁸ *Id.* at 151-52. Etzioni states that:

[T]he American legal system already allows the search of records if a reasonable case can be made for doing so. If the FBI or a local police seeks to examine any *private* records, say a person's or a corporation's financial files, that authority needs to provide evidence to a magistrate that there is reasonable suspicion that a crime has been or is being committed. There seems to be no reason that medical records, correctly considered more intimate and hence having a higher claim to privacy, should be accessed more easily. In this scenario, if there is a legitimate need, a warrant can be obtained, but otherwise privacy can be well guarded.

Id. at 151. (emphasis added)

The analysis is further exacerbated by the possibility that courts could apply the third party doctrine to allow law enforcement access to patients' medical records without consent or a specific warrant fulfilling the probable cause requirements of the Fourth Amendment. Applying the third party exception to Fourth Amendment protections in this instance would be illogical. The individual holds a privacy interest in his or her medical records, and when he or she has "given" this information to a third party for a limited and specific purpose, one cannot reasonably infer that he or she has waived this interest. Furthermore, at the time the individual is sharing his or her personal information with a medical professional, he or she retains a "reasonable expectation of privacy"¹⁷⁹ in these records by any societal standards—to hold otherwise is unnecessarily restrictive. The unique and intimate nature of medical information has nearly always been held as a high priority.¹⁸⁰ To allow the patient's confidence to be breached without showing specific probable cause or a particular suspicion is unreasonable and unnecessary. Thus, the third party doctrine should be barred at the health professional's door, and a patient's medical records should remain private until law enforcement can specifically justify a breach of the individual's privacy.

¹⁷⁹ Katz v. U.S., 389 U.S. 347, 360 (1967).

¹⁸⁰ Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 470-72 (2002).