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Privacy in Personal Medical Information: A Diagnosis

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PRIVACY IN PERSONAL MEDICAL INFORMATION: A DIAGNOSIS

INTRODUCTION

Over the last ten years, the public has become increasingly aware of threats to their privacy.[1] Although both courts and legislatures have responded to this concern by attempting to determine which aspects of a person's privacy are entitled to legal protection, the precise scope of the individual's privacy right remains uncertain. One important privacy interest which merits protection is the control of personal information.[2] Medical information is of special concern as it may contain more intimate details about a person than any other single record. Nonetheless, the Privacy Protection Study Commission, appointed by Congress to investigate privacy concerns,[3] found current safeguards of medical records inadequate at both the state and national levels.[4]

Traditionally, the principal protection of medical information has been the physician-patient evidentiary privilege.[5] That privilege, however, only covers in-court disclosures and courtroom disclosure is, of course, only one

1. A recent Harris survey disclosed that sixty-four percent of Americans are concerned about threats to their privacy. This compares to a forty-seven percent figure reached in a survey taken a year before. Linowes, *Must Personal Privacy Die in the Computer Age?*, 65 A.B.A.J. 1180, 1184 (1979).

2. *See* A. WESTIN, PRIVACY AND FREEDOM 7 (1970) (Privacy is the claim of an individual to determine when, how, and to what extent information about him is communicated to others); Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968) (privacy is that aspect of social order by which persons control access to information about themselves); Gross, *The Concept of Privacy*, 42 N.Y.U.L. REV. 34 (1967). "Privacy is [a] condition of human life in which acquaintance with a person or with affairs of his life, which are personal to him, is limited." *Id.* at 36. *See also* Beaney, *Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253, 254 (1966); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 290 (1974).

3. Pursuant to the Privacy Act of 1974, Pub. L. No. 93-579, §5, 88 Stat. 1905 (1974), the Privacy Protection Study Commission was established to conduct a broad study of personal information activities and to recommend future legislation to Congress.

4. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 282 (1976) [hereinafter cited as PPSC]. The commission recognized the inherent intrusiveness of the physician-patient relationship and the grant of unrestrained discretion given the physician to investigate a patient's life and person. As to what may be included in the physician's report, the commission stated: "[a]s a practical matter, because so much information may be necessary for proper diagnosis and treatment, no area of inquiry is excluded. In addition to describing the details of his symptoms, the patient may be asked to reveal what he eats, how much he drinks or smokes, whether he uses drugs, how often he has sexual relations and with whom, whether he is depressed or anxious, where and how long he has worked, and perhaps what he does for recreation." *Id.* President Carter noted that threats to privacy are not the result of a plan to deprive the individual of privacy. Rather, they represent the natural growth of information systems which have developed with the growth of the economy, expansion of public and private institutions and the development of computers. The President, recognizing that these systems can create a dangerously intrusive society, endorsed the Privacy Protection Commission's recommendation to provide controls to protect the privacy of medical records. *See* H.R. REP. No. 832, 96th Cong., 2d Sess. 19 (1980).

5. For a general discussion of confidential communications *see* 8 J. WIGMORE, EVIDENCE §§2285-2287 (3d ed. 1940).

aspect of the problem. A physician's wrongful disclosure, out of court, of a patient's medical information should also be subject to privacy protection.[6] Further intensifying the privacy concerns of medical information disclosure is the recent trend towards computerization of medical records which has led to the ready availability of vast amounts of personal medical information for non-medical purposes.[7] While patients are beginning to receive some protection from the physician's ethical obligation of confidentiality[8] and from the state and federal constitutions, their protection against disclosure remains inadequate.

This note will address the issues surrounding a patient's right to privacy in the disclosure of medical information. First, the physician-patient privilege will be analyzed, with specific attention focused on Florida whose evidence code recognizes only a psychotherapist-patient privilege.[9] Second, the causes of action

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6. *See generally* Note, *Action for Breach of Medical Secrecy Outside the Courtroom*, 36 U. CIN. L. REV. 103 (1967).

7. Two examples of agencies which deal in computerized medical records are the Medical Information Bureau and Equifax Services. The Medical Information Bureau is a computerized network of over 700 insurance companies which collect information centrally, much of it medical, about insurance applicants. This information is available to any of the member companies through their computer terminals. *See* Boyer, *Computerized Medical Records and the Right of Privacy: The Emerging Federal Response*, 25 BUFFALO L. REV. 37, 53 (1975). Equifax Services claims it can review the records of all but 1,200 of the 11,000 accredited hospitals in the United States and Canada. Once reviewed, the agency retains the information for future requests. *See* Baskin, *Confidential Medical Records: Insurers and the Threat to Informational Privacy*, 669 INS. L.J. 590, 595 (1978). For a current discussion of the impact of hospital computers on the confidentiality of records, *see* Note, *Electronic Data Processing in Private Hospitals: Patient Privacy, Confidentiality and Control*, 13 SUFFOLK L. REV. 1386 (1979).

The damage to individuals when medical information is indiscriminately released is a reality. Alan Westin, a leading authority in the privacy area, observed that disclosure of medical information "has enormous impact on people's lives. It effects 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 get nominated for and elected to political office." *See* A. WESTIN, COMPUTERS, HEALTH RECORDS AND CITIZEN'S RIGHTS 60 (1976).

8. J. WALTZ & F. INBAU, MEDICAL JURISPRUDENCE 234 (1971) (traditional hippocratic oath). The modern hippocratic oath states: "A physician may not reveal the confidences entrusted in him . . . 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." A.M.A. PRINCIPLES OF MEDICAL ETHICS art. 9.

9. FLA. STAT. §90.503 (1979). The statute includes within the term psychotherapist a licensed physician or one reasonably believed to be so by the patient, and a licensed psychologist, engaged primarily in diagnosis or treatment of a mental or emotional condition. For an excellent discussion of the psychotherapist-patient privilege *see generally* Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175 (1960). In addition to the psychotherapist-patient privilege, Florida provides the following other privileges: lawyer-client, husband-wife, clergymen-penitent, accountant-client, and trade secrets. FLA. STAT. §§90.502-.506 (1979). Florida is one of only a dozen states that maintain the common law position and deny any privilege to the physician-patient relationship. *See, e.g.*, Morrison v. Malmquist, 62 So. 2d 415, 416 (Fla. 1953) (no physician-patient privilege in Florida); Fidelity & Cas. Co. of New York v. Lopez, 375 So. 2d 59 (Fla. 4th D.C.A. 1975) (no doctor-patient

available against physicians for unwarranted out of court disclosure will be explored. Finally, the scope of the individual's constitutional protection from government compilation and dissemination of personal medical information will be analyzed.

THE TESTIMONIAL PRIVILEGE

Testimonial privileges protect the confidences of certain relationships from courtroom disclosure.[10] Common law courts recognized a testimonial privilege only in the lawyer-client and husband-wife relationships.[11] Although no privilege for communications between patient and physician was recognized at common law, two-thirds of the states have statutorily created such a privilege.[12] These statutory privileges vary among the states in scope and judicial interpretation.

All courts agree that the physician-patient privilege will only apply if a licensed physician is consulted for purposes of treatment in his professional capacity.[13] However, if the consultation is for unlawful purposes, such as illegally procurring drugs, the law will not allow the privilege to operate.[14]

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privilege in Florida). The other states are Alabama, Connecticut, Delaware, Georgia, Maryland, Massachusetts, Rhode Island, South Carolina, Tennessee, Texas and Vermont.

10. This protection is based on the consideration that the harm which would result to the relationship if no confidence was reposed, preponderates over the mischief produced and chance of failure to achieve justice resulting from exclusion of the evidence. *see* J. WIGMORE, *supra* note 5, §2285.

11. J. WIGMORE, *supra* note 5, §2285. The purpose of the attorney-client privilege is to foster frankness within the relationship. *Id.* §2291. The purpose of the husband-wife privilege is to protect and encourage domestic tranquility. *Id.* §2333.

At early common law there was no privilege of confidentiality. By the late 1600's, however, a general privilege emerged which was based upon the witness' conception of "honor among gentlemen." *See* DeWitt, *Privileged Communications Between Physician and Patient*, 10 W. RES. L. REV. 488, 489-90 (1959). This general privilege is best illustrated by the case of Lord Grey's Trial, 9 How. St. Tr. 127 (1682), *cited in* Baldwin, *Confidentiality Between Physician and Patient*, 22 MD. L. REV. 181, 183 (1962). In this English criminal trial the charge was abducting and debauching Lady Henrietta Berkeley. Testifying for the defendants, Lady Henrietta when asked who she was with replied, "I shall not give any account of that, for I will not betray anybody for their kindness to me." *Id.*

12. For a collection of the current statutes, *see* J. WIGMORE, *supra* note 5, §2380 (Supp. 1980). Despite the efforts of the English medical profession, England and most jurisdictions of the British Commonwealth still provide no physician-patient privilege. *See* C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 13 (1958). Additionally, the physician-patient privilege is not recognized in the United States federal courts. *See, e.g.*, United States v. Meagher, 531 F. 2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976) (admissibility of evidence governed by common law, unless changed by Congress). *See also* Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Divsion of Rule-Making Power*, 76 MICH. L. REV. 1177, 1178 n.15 (1978).

13. The state will usually specify "physician or surgeon" and will often require that he be licensed or authorized. Therefore, practitioners like pharmacists, dentists, and chiropractors will be excluded from the privilege unless specifically mentioned in the statute. *See* C. MCCORMICK, EVIDENCE 213-14 (Cleary ed. 2d 1972).

14. The Model Code of Evidence prohibits application of the physician-patient privilege if the services were obtained to enable or aid one to commit a crime. MODEL CODE OF EVIDENCE §222 (1942). Additionally, the Uniform Narcotic Drug Act provides that wrongfully

These statutory rules of privilege, should be distinguished from evidentiary rules of incompetency. Unlike a rule of incompetency, which is designed to eliminate untrustworthy evidence,[15] the purpose of a testimonial privilege is protection of the patient's extrinsic interests and promotion of effective medical care. Specifically, the privilege encourages the patient to make a full disclosure to the physician by removing the fear of embarrassment, shame, or other damage which could otherwise accompany in-court disclosure of such information.[16] As its recognized beneficiary, the patient is the sole holder of the privilege, and he alone may assert or waive it.[17]

Several state statutes designate "communications" between physician and patient as the privileged matter.[18] The courts, however, have broadened the scope of the privilege to encompass all information obtained by the physician through observations or examinations which are necessary to the doctor's treatment of the patient.[19] This expanded interpretation of communications is desirable because information obtained by these procedures may be as sensitive and personal as the patient's verbal communications.

A number of the physician-patient statutes fail to specify that only confidential communications will be protected.[20] The courts, however, have uniformly read the confidentiality requirement into the common law privilege.[21] Policy considerations support this judicial approach. The privilege must be constrained within reasonable parameters to avoid unduly restraining the courts' fact finding function.[22] Additionally, the goals of encouraging patient

procuring drugs from a physician shall not be deemed privilege communications. *See, e.g.*, MD. OCC. & PROF. CODE §§27-287 (1971) (information communicated to physician to wrongfully obtain controlled substance shall not be deemed privileged communications).

15. The rules of incompetency serve to facilitate the ascertainment of facts by eliminating evidence which is potentially unreliable, prejudicial or misleading. The most prominent rules of exclusion are: the hearsay rule, the opinion rule, the rule rejecting proof of bad character as a crime, and the rule excluding secondary evidence until the original document is shown to be unavailable. *See* C. MCCORMICK, *supra* note 13, at 151-52.

16. *See, e.g.*, Arkansas St. Med. Bd. v. Leonard, 267 Ark. 61, 63, 590 S.W.2d 849, 850 (1979) (privilege to encourage open communication between physician and patient); Department of Soc. & Health Servs. v. Partlow, 92 Wash. 2d 812, 819, 601 P.2d 520, 525 (1979) (privilege facilitates full disclosure by patient to physician).

17. If the privilege is not asserted by the patient, the physician must testify and refusal to do so may lead to contempt proceedings. *See* C. DEWITT, *supra* note 12, at 46-48.

18. *See, e.g.*, IND. CODE ANN. §34-1-14-5 (Burns 1980) (privilege applies to physicians concerning matters communicated to them); OHIO REV. CODE ANN. §2317.02 (Page 1979) (privilege applicable to physicians concerning communications made to them).

19. *See, e.g.*, Heuston v. Simpson, 115 Ind. 62, 63, 17 N.E. 261, 262 (1888) (physician-patient privilege applies to knowledge gained by communication or observation); Baker v. Industrial Comm'n of Ohio, 135 Ohio St. 491, 496, 21 N.E.2d 593, 595 (1939) (communicating not only words but information from observation and examination).

20. Examples of states with such statutes include Alabama, Arkansas, Georgia, Minnesota, Missouri, Nebraska, Ohio, Wisconsin and West Virginia. *See* J. WIGMORE, *supra* note 5, §2380.

21. *See* C. MCCORMICK, *supra* note 13, at 187. The lawyer-client, psychotherapist-patient, husband-wife, clergymen-penitent, and accountant-client privileges in Florida all require the communications to have been confidential for the privilege to apply. *See* FLA. STAT. §§90.502-.5055 (1979).

22. *See* C. MCCORMICK, *supra* note 13, at 316 (privileges to be held within reasonable bounds as they cut off access to the truth).

disclosure to physicians and safeguarding patient privacy will be adequately served by granting the privilege only to those communications which the patient expects to be confidential.[23] Where disclosure is made to the physician in private, confidentiality may be presumed. Where third parties are present, however, the privilege should apply only if the third party is either customarily present in such situations or is necessary to the consultation or diagnosis.[24]

The physician-patient privilege is further limited in that it is not self-executing. An adverse party may call the patient's doctor to testify or offer his medical records into evidence. Once such information is tendered, the responsibility is on the patient to assert the privilege.[25] Further, the effect of invoking the privilege may differ significantly depending upon the jurisdiction. Some jurisdictions permit the court to instruct the jury that they may draw a negative inference against the party asserting the statutory privilege.[26] The rationale behind this position is that a negative inference mitigates the harm that results from withholding pertinent information.[27] The majority view, however, is that invocation of the privilege can give rise to no negative inference.[28] This latter view is preferable because a party should not be penalized for invoking a legal right. The threat of a negative inference may deter the non-disclosure of private medical information by those who fear that the jury may speculate to their detriment.[29]

Courts also disagree over the effect of a patient's waiver of the privilege. The patient may expressly waive the privilege through a written or oral authorization.[30] The privilege may be waived by implication, if the patient

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23. *See* C. DEWITT, *supra* note 12, at 52; Note, *The Physician-Patient Privilege In Oklahoma*, 7 TULSA L.J. 157, 161 (1971) (privilege not applicable if circumstances demonstrate that revelations were not intended to be confidential).

24. Those individuals customarily present would include the physician's nurse or other agents necessary for the consultation. In these situations the privilege should operate to also preclude physician's aids from testifying. Some jurisdictions, however, have determined that privacy is not necessary and the physician may not testify regardless of the lack of confidentiality. *See* C. DEWITT, *supra* note 12, at 52-56.

25. *See* Sawyer, *The Physician-Patient Privilege: Some Reflections*, 14 DRAKE L. REV. 83, 86 (1965). The holder of the privilege must assert it before the question is answered. The failure to object and assert the privilege prior to the answer will be deemed a waiver of the privilege. C. DEWITT, *supra* note 12, at 401-02.

26. *See, e.g.*, Fordon v. Bender, 363 Mich. 124, 127, 108 N.W.2d 896, 897 (1961); Soukep v. Summer, 269 Minn. 472, 474, 181 N.W.2d 551, 552 (1964).

27. *See* Comment, *Patient-Physician Privilege in the Discovery Process*, 17 S.D.L. REV. 188, 193 (1972). The commentator opines that opposing counsel should be allowed to refer to the claiming of the privilege in the closing arguments or the trial judge should be permitted to instruct the jurors that they may draw whatever inference they want. *Id.* It is likely, however, that this would hinder the injured privilege-holding party from presenting only evidence that is favorable to his position.

28. *See* C. DEWITT, *supra* note 12, at 327.

29. One commentator advocates requiring the privilege to be asserted outside the hearing of the jury so that there will be no potential for prejudice regardless of the fact that no inference was given. *See* Sawyer, *supra* note 25, at 87.

30. *Id.* at 89. Another common type of express waiver is a contractual stipulation waiving the privilege, often found in contracts for life and health insurance.

takes the stand and testifies about his particular ailment, injury or treatment.[31] Similarly, the privilege is impliedly waived if a physician, as the patient's witness, testifies concerning the claimant's communications or treatment.[32] Courts disagree about the scope of the waiver's application in such situations. Of primary concern, is whether the waiver is restricted to the testifying physician's testimony, or instead, extends to other physicians who separately examined the claimant for the same injury.[33] The better view is to treat waiver for one physician as waiver for all. Otherwise the patient is permitted to "physician shop" for the testimony most favorable to his position.[34] Moreover, as the patient's condition has already been made public, the reason for the statutory privilege no longer exists.

Another significant difference among jurisdictions in regards to waiver concerns the effect of a patient's assertion of a personal injury claim. Some courts reason that because the patient has voluntarily placed his physical or mental condition[35] in issue, the privilege is waived upon the initial filing of suit.[36] This approach, however, disregards the possibility that the suit may never reach the trial stage. Additionally, because the issues may not be clearly framed in the initial complaint, there may be uncertainty over the nature of the medical information needed. Therefore, it is premature to allow defendants access to the patient's medical records at the initial filing of the complaint. Equally unworkable, however, is the position adopted by other states that waiver cannot

31. The majority of courts and commentators state that the mere taking of the stand will not waive the privilege. There is dispute as to the amount of testimony necessary for the privilege to be waived. Generally, if the patient merely testifies about his general physical condition without reference to testimony or communications with the physician, the privilege is not waived. Additionally, testimony as to the mere fact of treatment by a certain physician or that the physician gave the patient a prescription, will not constitute a waiver. However, where the patient gives testimony as to treatment or discussions with the physician the privilege will be waived. Stewart, *Waiver of the Physician-Patient Privilege Rule in Personal Injury Litigation*, 2 FORUM 16, 22 (1966). If the patient testifies about treatment on cross examination, this is generally not considered a waiver because the waiver must be voluntary. *See* C. MCCORMICK, *supra* note 13, at 220-21.

32. C. MCCORMICK, *supra* note 13, at 221. This waiver would also apply to jointly consulted physicians who participated in the consultation or course of treatment. A waiver as to one would be a waiver of all. *Id.* Additionally, the waiver in this situation should extend to all admissible facts learned by the physician over the course of treatment, not just to the facts relating to the particular claim. *See* J. WIGMORE, *supra* note 5, §2390.

33. *See* Sawyer, *supra* note 25, at 90.

34. This type of practice gives rise to the so called "plaintiffs doctor" who's testimony is always favorable to the claimant and correspondingly the "defendants" doctor who always testifies in favor of the defendant. For a description of this practice, *see* B. SHARTEL & M. PLANT, THE LAW OF MEDICAL PRACTICE, §§7-15 (1959).

35. *Compare* FLA. R. CIV. P. 1.29. (suggesting that waiver of the physician-patient privilege is unwarranted when suit is initially filed because other means of obtaining the information are available) *with* Note, *supra* note 23, at 176 (waiver is wararnted to determine what claimant's physician believes to be the cause of injury and whether it is attributable to a prior injury).

36. *See, e.g.*, Artic Motor Freight, Inc. v. Stover, 571 P.2d 1006, 1008 (Alaska 1977) (filing of personal injury litigation waives physician-patient privilege); State *ex. rel.* McCloud v. Seier, 567 S.W.2d 127, 128 (Mo. 1978) (bringing a personal injury suit waives the physician-patient privilege).

occur until trial.[37] If the patient waives the privilege at trial, the defendant, having been denied access to needed medical information during the discovery process, will be unprepared to present a competent defense.[38] A better approach would be to require the patient to assert or waive the privilege at the pre-trial conference when the nature of the claim and course of litigation can be more readily ascertained.[39] This would safeguard the patient from unnecessary disclosures of medical information and prevent undue interference with the discovery process.

Policies Behind the Privilege

The value of the physician-patient privilege has been vigorously contested. Its proponents contend that it advances the public policy of facilitating accurate diagnosis and treatment by encouraging confidence between patient and physician.[40] Opponents of the privilege rely upon three main arguments.[41] First, it is claimed that the privilege has no sound independent basis; instead it was enacted merely to guard against the appearance of legislative favoritism toward attorneys who already enjoyed a testimonial privilege.[42] The opponents contend that the distinction is warranted; while the attorney-client relationship

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37. *See, e.g.*, State *ex. rel.* Lambdin v. Brenton, 21 Ohio St. 2d 21, 23, 254 N.E. 2d 681, 682 (1970). The court refused to allow waiver upon filing of suit for two reasons. First, the court recognized that the plaintiff, preferring not to disclose his medical history, might prove his case without use of privileged testimony. Second, the court noted that the privilege was a legislative creation, and thus if it was to be waived upon the filing of suit, the legislature would have so provided. *Id.*

38. Commentators have noted the evils of waiting until trail to waive the physician-patient privilege in personal injury litigation. *See* Note, *supra* note 23, at 176 (waiving privilege at trial gives claimant a tactical advantage; he can prevent discovery and then present privileged evidence at trial); Comment, *Waiver of the Physician-Patient Privilege in Missouri*, 34 Mo. L. REV. 397, 404 (1969) (unfair to defendant where privilege not waived until trial because it allows claimant to use privilege as a shield and a sword). If early waiver is not permitted, it would be necessary to grant a continuance if the privilege is waived at trial so that the defendant could obtain information necessary to a competent defense. *See, e.g.*, State *ex. rel.* McNutt v. Keet, 432 S.W.2d 597, 601 (Mo. 1968).

39. *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 507 (1946); Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430, 434 (N.D. Ohio 1962); Eberle v. Savon Food Stores, Inc., 30 Mich. App. 496, 501, 186 N.W.2d 837, 839 (1971). For a good discussion of pre-trial waiver, *see* Comment, *supra* note 27, at 197.

40. *See, e.g.*, Sagmiller v. Carlsen, 219 N.W.2d 885, 894 (N.D. 1974) (statutory purpose is to make a full disclosure of symptoms and condition to physician); State v. Kupchun, 117 N.H. 412, 415, 373 A.2d 1325, 1327 (1977) (purpose behind statute is to encourage full disclosure for purpose of receiving complete medical care).

41. Wigmore developed a four-prong test to determine whether a confidential communication should be granted testimonial privilege status. First, the communication must originate in the confidence that it will not be disclosed. Second, confidentiality must be essential to the success of the relationship. Third, the relationship must be one which in the opinion of the community ought to be actively fostered. Fourth, the potential injury to the relationship must be greater than the benefit gained from the disposal of litigation. Wigmore's dissatisfaction with the physician-patient privilege lies in his contention that the second and fourth criteria are not satisfied. *See* J. WIGMORE, *supra* note 5, §2285.

42. *See* Note, *supra* note 23, at 171.

is often formed in anticipation of litigation, future courtroom battles are seldom contemplated by individuals obtaining medical treatment.[43] Another criticism of the physician-patient privilege is that a sick or injured person would not hesitate to confide in his physician merely because disclosures might be revealed in a courtroom.[44] The most serious criticism, however, is that the privilege is a procedural tool which dishonest litigants often abuse to exclude pertinent damaging evidence.[45]

Although the latter contention has merit regarding unqualified privileges, it is untrue today. Modern courts and legislatures have curtailed the application of the privilege[46] through statutory exceptions and waiver rules, thus striking a balance between protection of the physician-patient relationship and the promotion of justice. Furthermore, although criticisms of the privilege have existed for some time, the number of states endorsing the privilege has increased.[47] This trend is mainly a result of increased societal efforts to protect personal privacy.[48] Legislative recognition of the individual's interest in nondisclosure of sensitive, private medical information is sufficient to sustain a physician-patient privilege. Additionally, the privilege demonstrates legal deference to the medical profession's judgment that confidentiality promotes better health care by encouraging patient disclosure and protecting the integrity of the profession.[49]

At times the law must resolve conflicts between the interests of factfinding and personal privacy. A proper concern for both of these interests is demonstrated by North Carolina's discretionary privilege statute.[50] Under this statute,

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43. *See* C. MCCORMICK, *supra* note 13, at 225.

44. *See* Chafee, *Privileged Communications: Is Justice Served or Obstructed By Closing The Doctor's Mouth on the Witness Stand*, 52 YALE L.J. 607, 609 (1943). Chafee observed that medical treatment is so valuable that few individuals would forego it to prevent facts from surfacing during a trial. Moreover, the quality of medical care available in states without a privilege is as good as that found in those states with a privilege. *Id. But see* Note, *Legal Protection of the Confidential Nature of the Physician-Patient Relationship*, 52 COLUM. L. REV. 383, 398 (1952).

45. *See* DeWitt, *supra* note 11, at 496.

46. For a collection of state statutes *see* J. WIGMORE, *supra* note 5, §2380 (Supp. 1980).

47. Recently Illinois, Maine, New Hampshire, New Jersey, and Virginia enacted general physician-patient privilege statutes. *See* C. MCCORMICK, *supra* note 13, at 213 n.5.

48. McCormick notes that the privileges have largely survived the criticism of commentators and jurists who view them as suppressants of the truth. The reason for their survival is that society, legislatures, and lawyers view nondisclosure of confidential information as representing rights of privacy and security too important to relinquish for the convenience of litigants. *See* C. MCCORMICK, *supra* note 13, at 156-60. *See also* Stewart, *supra* note 31, at 30 (purpose of statute is protection of right of privacy). *But see* DeWitt, *supra* note 11, at 497 (questioning privacy as purpose of statute because people often discuss ailments and injuries with others).

49. *See* note 8 *supra*.

50. N.C. GEN. STAT. §§8-53 (1969) provides in relevant part: "No person, duly authorized to practice physic or surgery, shall be required to disclose any information . . . [p]rovided, that the court, either at the trial or prior thereto, may compel disclosure, if in his opinion the same is necessary to a proper administration of justice." This type of statute has been suggested by professors Wigmore and McCormick as well as the American Bar Association's Committee on Improvement in the Law of Evidence. *See* C. MCCORMICK, *supra* note 13, at

the judge has the authority to compel disclosure if he finds it necessary to the administration of justice.[51] This role is consistent with the judge's current discretionary power over the admissibility of evidence.[52] A discretionary privilege best strikes the sensitive balance between the accuracy of the factfinding process and the patient's interest in privacy.[53]

THEORIES OF CIVIL LIABILITY

Although extensive legal consideration has been given to the physician-patient testimonial privilege, there has been little inquiry into protection of the patient's medical confidences from the physician's out of court disclosures.[54] Recently, however, several jurisdictions employing differing theories have recognized various causes of action for the unauthorized disclosures of medical information.[55] This section will explore these theories, evaluate their application to unauthorized medical information disclosure and determine the probabiltiy of their success in Florida courts where this cause of action has yet to appear.

Invasion of Privacy

While individuals in our society may consider privacy an inherent right, early common law recognized no independent tort for invasion of privacy.[56]

227; 63 A.B.A. REP. 570, 590 (1938); J. WIGMORE, *supra* note 5, §2380(a). *But see* Note, *supra* note 23, at 180 (this type of privilege does not allow pre-trial discovery and grants too much discretion to the trial judge, thereby decreasing the likelihood of reversal on appeal).

51. This type of privilege would be compatible with Florida law which allows the courts, at its discretion, to dismiss claims or affirmative defenses when information necessary to an adverse party cannot be obtained because of a claim of privilege. *See* FLA. STAT. §90.510 (1979).

52. *See* K. HUGHES, FLORIDA EVIDENCE MANUAL ch. 13, at 7-7b (1980) (judge has discretion regarding admissibility of evidence based on concepts of relevancy, materiality, and competency).

53. This balancing test has been supported by the Supreme Court. *See* Davis v. Alaska, 415 U.S. 308, 319 (1974) (finding the need to confront witness outweighed juvenile offender's claim of privilege). For the effect of *Davis* on the medical privilege *see* Comment, *Constitutional Law:* Davis v. Alaska *Applied to Hold That Physician-Patient Privilege Must Give Way to Accused's Right to Confrontation*, 60 MINN. L. REV. 1086 (1976).

54. *See* B. SHARTEL & M. PLANT, *supra* note 34, at 49.

55. The application of computer technology to medical record keeping is an inevitable result of population growth and its concomitant increased volume of medical information. The mobility of our society gives rise to the need for centralized medical data banks. While such data banks may solve certain problems, they also threaten privacy because medical records can be traced to the individual. As there is probably no duty of confidentiality between the patient and the data bank, it may be difficult under conventional theories to find liability for a data bank's unlawful disclosure of an individual's personal medical information. However, one cause of action, interference with contractual relations, may serve as a basis for liability. A data system's independent exercise of the right to release medical information could interfere with the physician-patient relationship. Consequently, release by the data system may diminish the value of the physician-patient relationship. Such diminished value in the impled contract between the physician and patient is necessary to succeed on a cause of action for interference with contractual relations. *See generally* Note, *Medical Data Privacy: Automated Interference With Contractual Relations*, 25 BUFFALO L. REV. 491, 506-12 (1976).

56. The earliest indication of a legal right to privacy can be found in Jewish Law. The

The concept of privacy as a legal interest deserving an independent remedy was first enunciated in an article co-authored by Samuel Warren and Louis Brandeis in 1890,[57] which described it as the right to be let alone.[58] Few, if any, law review articles have had such an impact on American law.[59] Today, almost every jurisdiction, through either its common or statutory law, recognizes the tort of invasion of privacy.[60] Although initially the tort protected only against physical intrusion upon the person or property of another, the law now recognizes an interest in reputation, intangible property, and emotional tranquility.[61]

Florida provides a legally protectable right of privacy both through statutory law and judicial decree. Florida's privacy statute, however, like that of most states, is limited in its application.[62] While the tort of invasion of privacy is commonly regarded as protecting four distinct interests,[63] the statute encompasses only the interest known as appropriation.[64] Specifically, the statute

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Restatement of Jewish Law by Maimonides in 1180 declared specifically "the harm of being seen in privacy is a legal wrong." *See* S. HOFSTADTLER & G. HOROWITZ, THE RIGHT OF PRIVACY 9 (1964).

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

58. *Id.* The authors borrowed the phrase the right "to be let alone" from the eminent nineteenth century legal scholar and jurist, Thomas Cooley. *See* T. COOLEY, LAW OF TORTS 29 (2d ed. 1888) (right to be let alone is a personal immunity).

59. *See, e.g.*, H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 162 (3d ed. 1978) (best example of a law journal's influence on the development of the law); Davis, *What Do We Mean By "Right to Privacy"?*, 4 S.D.L. REV. 1, 3 (1959) (questionable whether any law review article has received as much recognition). However, the concept and the article have not gone without criticism. *See, e.g.*, Barron, *Warren & Brandeis, the Right To Privacy*, 4 HARV. L. REV. 193 (1890).

60. The right of privacy has been rejected today only in Rhode Island, Nebraska, and Wisconsin. The courts of these states insist the right must be recognized by the legislature because it did not exist at common law. *See* LeBlang, *Invasion of Privacy: Medical Practice and the Tort of Intrusion*, 18 WASHBURN L.J. 205, 211 (1979).

61. *See* Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941). The first court since the Warren and Brandeis article, see note 57 *supra*, which specifically recognized a protectible privacy right as a basis for a tort action was the Georgia supreme court. *See* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 197, 50 S.E. 68, 71 (1905) (privacy derives from natural law; its existence can be inferred from expressions of statutes, commentators and judges in decided cases).

62. *See* FLA. STAT. §540.08 (1979). *See also* CAL. CIVIL CODE ANN. §3344 (West Supp. 1980); UTAH CODE ANN. §76-9-405 (1978); VA. CODE §8.01-.40 (1977).

63. Professor Prosser has divided the tort right of privacy, into four interests capable of being invaded. The first interest, appropriation, is the use, usually in advertising, of a person's name or likeness. The second interest, intrusion, is the physical invasion of or eavesdropping on one's home or place of business. The third interest, public disclosure of private facts, concerns the dissemination of information about a person. The fourth interest, false light in the public eye, involves publication of facts, whether or not defamatory, which place a person publicly in a false light. *See generally* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). This definition of the right of privacy has been adopted by the Restatement of Torts. *See* RESTATEMENT (SECOND) OF TORTS §652B-652E (1977). Prosser's privacy division has been criticized. *See* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1000, 1003 (1964) (invasion of privacy is one distinct tort).

64. *See* FLA. STAT. §540.08(1) (1979).

prohibits publicizing an individual's name, photograph, or likeness for any commercial purpose without the person's express oral or written consent.[65] Thus, despite its restricted nature, this legislation would provide a remedy to a patient for wrongful disclosures of his personal medical information in situations like that found in *Barber v. Time, Inc.*[66] In that case, a magazine was held liable for publishing, without the patient's consent, an article which contained her picture and a description of her unusual sickness.[67]

If the element of commercial value is absent, however, the statutory remedy will be unavailable and the patient must resort to the common law for relief.[68] Since 1944, Florida courts have recognized invasion of privacy as a distinct actionable tort,[69] and the unauthorized disclosure of medical information falls within the category of common law privacy known as "public disclosure of private facts."[70] The common law right of privacy provides an effective remedy for disclosure of medical information because the disclosure will usually be true and, unlike libel, truth of the published matter is not a valid defense.[71] However, Florida courts have never considered whether the wide publication of articles by a physician revealing confidential information violates the patient's right to privacy.[72]

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65. *See* FLA. STAT. §540.08(1) (1979). The statute specifically exempts from its operation situations in which the material has a current and legitimate public interest. FLA. STAT. §540.08(3) (1979). Additionally, if the individual is not named or otherwise identified with the use of the material, the statute is inapplicable. *Id.* Broadcasters and publishers are exempted from liability if they had no knowledge that consent was not given. *See* FLA. STAT. §640.10 (1979).

66. 348 Mo. 1199, 159 S.W.2d 291 (1942).

67. *Id.* at 1202, 159 S.W.2d at 292. Other courts have also recognized that publication of an individual's medical condition provides a basis for liability under an invasion of privacy action. *See, e.g.*, Commonwealth v. Wiseman, 356 Mass. 251, 260, 249 N.E.2d 610, 617 (1969), *cert. denied*, 398 U.S. 60 (1970) (invasion of privacy for photographs and documentary prepared on patients in correctional institution who were unable to give consent); Griffin v. Medical Soc'y of New York, 7 Misc. 2d 549, 550, 11 N.Y.S.2d 109, 110 (Sup. Ct. 1939) (despite contention of scientific purpose, publication of journal article about patient's medical condition was sufficient to sustain invasion of privacy action).

68. The remedies provided for by the statutory right to privacy do not limit the rights or remedies of an individual under the common law invasion of privacy. *See* FLA. STAT. §540.08(6) (1979).

69. Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944).

70. Note, *supra* note 55, at 496. The leading case for Florida discussing public disclosure of private facts is Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962) (oral communication accompanied by sufficient publicity found ample to sustain privacy action in debtor harrassment case).

71. See Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U.L. REV. 671, 684 (1978) (neither truth nor absence of malice are defenses to actions for invasion of privacy and there is no need to prove special damages).

72. *See* note 67 *supra*. *See also* Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. 1977) (physician violated patient's right to privacy by publishing his case history in an article). In *Doe*, invasion of privacy was found although neither the patient's name nor photograph were used. It was determined, however, that the patient was readily identifiable in the article. *Id.* at 214, 400 N.Y.S.2d at 677. Generally, to succeed under a cause of action for invasion of privacy due to publication of medical records, it is necessary to use a photograph or otherwise identify the patient. If no identifying factor is used, the publication may

A more difficult situation occurs where the disclosure is to one or a small number of individuals. The common law right of privacy does not prohibit selective dissemination of confidential information. As the law of privacy developed, the public disclosure requirement generally has been construed to mean widespread publication of the disclosed information.[73] This construction has limited the assertion of invasion of privacy in many unauthorized disclosure of medical information cases. The Alabama supreme court, however, departed from this interpretation in *Horne v. Patton*.[74] In that case, a patient alleged that his loss of employment resulted from his physician's disclosure to his employer that he suffered from a long-standing nervous condition accompanied by anxiety and insecurity. Ruling on the patient's claim of invasion of privacy, the court concluded that the physician's unauthorized disclosure was actionable as an unwarranted publicity of one's private affairs.[75] Whether *Horne* marks the beginning of a new branch of common law privacy prohibiting dissemination of protected information to just one individual is unclear. [76] However, the application of the right of privacy to relationships of special confidence, like that of physician and patient, would be a reasonable extension. Maintenance of the confidentiality of intimate medical information, whether disclosed publicly or to just one individual, is a privacy interest worthy of legal protection.[77] Until the term "publicity," is understood to encompass disclosure to a relatively small population, however, this common law remedy will remain unavailable.[78]

Breach of Statutory Duty

Courts often find a private cause of action implicit in statutes which man-

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not be considered to be offensive to the ordinary sensibilities of a reasonable person. *See* Note, *Medical Practice and the Right to Privacy*, 43 MINN. L. REV. 943, 948 (1959).

73. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §117, at 810 (4th ed. 1971). *See also* Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962) (publication means communication to the public at large as distinguished from one or a few individuals); RESTATEMENT (SECOND) OF TORTS §652(D), Comment a (1977) (publication means communicating to the public at large; no invasion of privacy if communicated to a single person or small group).

74. 291 Ala. 701, 287 So. 2d 824 (1973). *See generally* Comment, *Torts—Confidential Communications—A Physician Is Under a General Duty Not to Disclose Information Obtained in the Course of a Doctor-Patient Relationship*, 26 ALA. L. REV. 485 (1974).

75. 291 Ala. at 708-09, 287 So. 2d at 829-30.

76. *Horne* has been cited for the proposition that disclosure by a physician to a third party of the medical information of a patient, will render a physician liable for damages on grounds of invasion of privacy. See Drake v. Covington County Bd. of Educ., 371 F. Supp. 974, 981, 984 (M.D. Ala. 1974); Wenninger v. Muesing, 307 Minn. 405, 411, 240 N.W.2d 333, 337 (1976).

77. *See* Note, *supra* note 55, at 496 (privacy is the primary interest damaged by unauthorized disclosures of medical information); Note, *supra* note 6, at 109 (privacy action should be recognized, absent the public disclosure criteria, in special relationships of confidence like that of physician and patient).

78. A physician may intrude upon a patient's privacy in ways other than dissemination of information. A patient has a right to bodily integrity and privacy from an unnecessarily intrusive examination. *See* LeBlang, *supra* note 60, at 219-23 (1978).

date or prohibit the doing of an act for another.[79] In Florida, and elsewhere, a cause of action in negligence will lie for improper deviation from a statutorily established standard of conduct.[80] Although there are no Florida cases dealing with the application of this remedy to the improper disclosure of medical information, other states have considered such actions. The South Dakota supreme court found implied in the testimonial privilege statute a cause of action against a psychiatrist for extrajudicial disclosure of medical information to a patient's former husband.[81] According to the court, the testimonial privilege imposed upon the psychiatrist a duty of confidentiality both within and outside the courtroom with respect to information gained in his professional capacity.[82] Reaching a contrary result in a similar case, the Nebraska supreme court refused to imply a tortious cause of action from the testimonal privilege when a physician disclosed confidential medical information to a patient's resident manager.[83] The court concluded that the privilege applied exclusively to courtroom testimony.[84] This approach is clearly more reasonable. It would be extrapolating to the point of judicial legislation to extract a general duty of confidentiality from an exclusionary rule of evidence.[85]

In addition to testimonial privilege statutes, state medical licensing statutes have provided a basis for judicially implied causes of action.[86] These statutes generally subject a physician to disciplinary action for betrayal of a profes-

79. *See* W. PROSSER, *supra* note 73, §36 at 190; RESTATEMENT (SECOND) OF TORTS §§285, 286 (1965). *See, e.g.*, Girard Trust Co. v. Tampashores Dev. Co., 95 Fla. 1010, 117 So. 786 (1928). This case sets the rule for Florida that where a statute requires an act to be done for the benefit of another, though no cause of action for omission is expressed in the statute, the general rule is that the party injured should have such an action. *Id.* at 1015-16, 117 So. at 788.

80. *See, e.g.*, DeJesus v. Seaboard Coastline R.R., 281 So. 2d 198, 201 (Fla. 1973) (violation of a statute which establishes a duty to protect a particular class of individuals from a particular harm is considered negligence per se). *See also* RESTATEMENT (SECOND) OF TORTS §285, Comment c (1965). This comment notes that even if a statute does not provide that its violation results in tort liability, courts, in certain cases, will adopt requirements of the statute as conduct necessary to avoid civil liability. *Id.*

81. Schaffer v. Spicer, 88 S.D. 36, 215 N.W.2d 134 (1974).

82. *Id.* at 38, 215 N.W.2d at 136. Other courts have also consented to the use of a testimonial privilege as the basis for a cause of action for out of court disclosures. *See, e.g.*, Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. 1977) (clear from legislative intent that privilege not limited to trial setting); Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960) (recognized policy of testimonial privilege as a basis for the existence of a cause of action for out of court disclosures); Berry v. Moench, 8 Utah 2d 191, 196, 331 P.2d 814, 817 (1958) (cause of action for wrongful out of court disclosure based on policy of non-disclosure evidence in privilege statute).

83. Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920).

84. *Id.* at 227, 177 N.W. at 832. *See also* Quarles v. Sutherland, 215 Tenn. 651, 657, 389 S.W.2d 249, 252 (1965) (statutory privileges as rules of evidence have no bearing on a cause of action for out of court disclosures).

85. *Accord*, Cooper, *The Physicians Dilemma: Protection of the Patient's Right to Privacy*, 22 ST. LOUIS U.L. REV. 397, 401 (1978) (testimonial privilege statutes relate solely to introduction of evidence); Note, *supra* note 55, at 497 n.25 (privilege intended only that evidence be excluded, not that a duty of confidentiality be imposed).

86. *See, e.g.*, ALA. CODE §34-24-90(7) (1975); CAL. BUS. & PROF. CODE §2263 (West Supp. 1981); NEB. REV. STAT. §71-148(7) (Supp. 1980); OHIO REV. CODE ANN. §4731.22(4) (Page Supp. 1980).

sional secret. In *Clark v. Geraci*,[87] a patient alleged that his loss of employment and inability to obtain subsequent permanent employment were due to the physician's improper disclosure to his employer of personal medical information. The New York court held that the patient had stated a cause of action under a state licensing statute which defined unprofessional conduct as the revelation of facts or data obtained in a professional capacity.[88] This result, the court reasoned, furthered the legislative policy of fostering confidentiality within the physician-patient relationship.[89]

Florida has a statute prohibiting disclosure by a physician without the patient's consent of medical reports of a physical or mental examination to anyone other than the patient or his legal representatives.[90] Unfortunately, the statute does not indicate whether the legislature in enacting the statute intended to protect the rights of patients. A recent Florida attorney general's opinion which held that the statute prohibited a physician from releasing a patient's name, as well as his medical reports,[91] judged the statutory purpose to be the protection of patients' privacy.[92] This is crucial because a necessary element of a cause of action for breach of statutory duty is a showing that the individual attempting to bring the action is one of the members of the class which the statute was specifically designed to protect.[93] Delineating patient privacy as the statutory purpose places the patient within the class of protected individuals. Thus, in Florida a physician's unauthorized disclosure of personal medical information in violation of statutory mandates would create a cause of action in the injured patient.

Breach of Fiduciary Duty

Florida recognizes that if a fiduciary relationship exists, a remedy exists for the breach or abuse of a resulting confidence.[94] Generally, a fiduciary relation-

87. 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960).

88. *Id.* at 793, 208 N.Y.S.2d at 567.

89. *Id.*, 208 N.Y.S. at 567. Other courts have found the licensing statutes sufficient to support a cause of action. *See, e.g.*, Horne v. Patton, 291 Ala. 701, 708, 287 So. 2d 824, 829 (1974); Doe v. Roe, 93 Misc. 2d 201, 210, 400 N.Y.S.2d 668, 676 (Sup. Ct. 1977); Munzer v. Blaisdell, 183 Misc. 773, 775, 49 N.Y.S.2d 915, 917 (Sup. Ct. 1944).

90. FLA. STAT. §455.241 (1979).

91. OP. ATT'Y GEN. FLA. 078-109 (1978).

92. *Id.* It was alleged that certain physicians acting under the authority of an investigation by the State Medical Society, had obtained patient records from other physicians, without the patients' consent and had disseminated the information to the press. In an effort to bring an action against these physicians the Medical Society wanted the names of the patients whose records were wrongfully taken. The opinion determined that releasing the names of the patients and their physician would violate the purpose of the statute, protection of patient privacy, because the patient's afflictions could be ascertained by such release. *Id.*

93. *See, e.g.*, DeJesus v. Seaboard Coastline R.R., 281 So. 2d 198, 201 (Fla. 1974). This case specified the elements necessary for a cause of action in negligence for breach of a statutory duty. The court held that the claimant must establish that he is of the class the statute was intended to protect, that he suffered the injury the statute was designed to protect, and that the violation of the statute was the proximate cause of the injury. *Id. See also* W. PROSSER, *supra* note 73, §36, at 194.

94. *See, e.g.*, Quinn v. Phipps, 93 Fla. 805, 811, 113 So. 419, 421 (1927); Botsikas v.

ship arises where a special confidence is reposed in one who, in equity and good conscience, is bound to act with due regard for the interests of the person who has given the confidence.[95] The physician-patient relationship has consistently been held to give rise to a fiduciary obligation.[96] The question arises whether the scope of physician's fiduciary duty includes the safeguarding of patient medical information.

The physician's fiduciary obligation to safeguard a patient's medical information would logically derive from the confidentiality the patient reasonably expects when he divulges personal information to facilitate proper treatment.[97] This relationship is analogous to the commonly recognized fiduciary relationship existing between a trustee and the settlor-beneficiary of a trust; instead of giving funds, the patient entrusts his confidences with the physician.[98] This analogy finds support in the Code of Medical Ethics: "[C]onfidences . . . should be held in trust and should never be revealed except when imperatively required by the law of the state."[99] At least one court has followed this rationale and extended the patient-physician fiduciary relationship to the protection of medical information.[100]

Breach of Contract

Breach of an implied contract provides another possible cause of action against a physician for improper disclosure of confidential medical information.[101] The request for medical treatment and subsequent rendition of medical services for payment provide the basis for a simple contract.[102] The key issue is whether confidentiality is an implied condition of that contract. The

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Yarmark, 172 So. 2d 277, 279 (Fla. 3d D.C.A. 1965); Traub v. Traub, 102 So. 2d 157, 159 (Fla. 2d D.C.A. 1958).

95. BLACK'S LAW DICTIONARY 753 (4th ed. rev. 1968). *See* RESTATEMENT (SECOND) OF AGENCY §13, Comment a (1958).

96. *See, e.g.*, Lilly v. Commissioner, 188 F.2d 269, 271 (4th Cir. 1951), *rev'd on other grounds*, 343 U.S. 90 (1952); Moore v. Webb, 345 S.W.2d 239, 243 (Mo. Dist. Ct. App. 1961); Stacey v. Pantano, 177 Neb. 694, 697, 131 N.W.2d 163, 165 (1964).

97. *See, e.g.*, Hammonds v. Aetna Cas. & Sur. Co., 237 F. Supp. 96, 102 (N.D. Ohio 1965).

98. *Id.* The court in *Hammonds* recognized that the confidences divulged by a patient to a physician should be treated like *res* in the hands of a trustee. Therefore, activities of physician with regard to information should be given close scrutiny. *Id.*

99. A.M.A. PRINCIPLES OF MEDICAL ETHICS, ch. II, §1 (1943), *quoted in* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 803 (N.D. Ohio 1965).

100. Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965); Hammonds v. Aetna Cas. & Sur. Co., 237 F. Supp. 96 (N.D. Ohio 1965).

101. A contract is express when the terms of the agreement are actually stated by the parties. The majority of physician-patient relationships do not involve the formulation of express contracts. The physician and patient do not usually arbitrate the terms of their relationship before it is undertaken. The expression "implied contract" defines an agreement where the terms are not expressly stated. The obligation arises from an implied mutual agreement and intent to contract. Implied contracts are true contracts, requiring the same elements for validity as express contracts and there is no difference between the two regarding legal effects. *See* 1 WILLISTON ON CONTRACTS §3 (3d ed. 1957).

102. *See, e.g.*, Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965). *See* Note, *supra* note 6, at 105 (courts and the medical profession generally consider a physician-patient relationship to be contractual in nature).

majority of cases involving the unauthorized disclosure of medical information have considered and approved the contract theory of recovery.[103]

In *Doe v. Roe*,[104] a recent New York case, a patient sued his psychiatrist for revealing verbatim the patient's thoughts and biography in a published book. The court reasoned that a physician who enters into an agreement to provide medical care impliedly convenants not to reveal patient's personal medical information. Accordingly, the court held that an unlawful disclosure provides the patient with an independent cause of action for breach of contract, enforceable by injunction and compensable by damages.[105] Similarly, the Alabama supreme court recently allowed a cause of action based upon a breach of contract when a physician disclosed confidential medical information to the patient's employer.[106] The court reasoned that public knowledge of the medical profession's pledge of confidentiality created a reasonable expectation that a physician's acceptance of a confidence was, in effect, a promise not to disclose.[107]

The judiciary's reception of the implied contract theory is based upon its apparent simplicity and logic. A physician is voluntarily committed to secrecy by medical ethics.[108] Therefore, it is unlikely that a physician would forcefully argue that there is no duty to maintain the patient's confidences. This duty provides a basis for patient reliance, thus creating an implied contract, the breach of which provides the patient with a cause of action for damages.

Civil Liability Summation

Although other causes of action have been alleged,[109] the above actions pro-

103. *See, e.g.*, Quarles v. Sutherland, 215 Tenn. 651, 657, 389 S.W.2d 249, 252 (1965). Outside the field of improper medical disclosures, there are other examples of actions based on breach of contractual obligation of silence. *See, e.g.*, United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). The court in *Marchetti* held that accepting employment with the CIA and signing a secrecy agreement not to disclose classified information acquired during service was sufficient to enjoin publication of a book because of matter reasonably deemed to be a violation of that contract. *Id.* at 1318.

104. 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. 1977). The plaintiff contended that the physician-patient relationship is contractual and that the contract contained an implied promise by the physician to obey the hippocratic oath of secrecy, and that a violation of the promise gave rise to a cause of action for breach of contract. *Id.* at 205, 400 N.Y.S.2d at 671.

105. *Id.* at 210-11, 400 N.Y.S.2d at 674-75.

106. Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973). The court stated that an implied contract arises where, according to the ordinary course of dealing and common understanding of men, a mutual intent to contract is apparent. *Id.* at 710, 287 So. 2d at 831. This definition is in accord with the Restatement of Contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS §5, comment a. (Tent. Drafts Nos. 1-7, 1973). The maintenance of confidentiality within the physician-patient relationship is a custom and within the ordinary course of dealing for that relationship. Therefore, confidentiality apparently statisfies the criteria necessary to qualify as an element of the implied contract.

107. 291 Ala. at 711, 287 So. 2d at 832. *See also* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) (almost every member of the public is aware of the physicians' oath of secrecy; the promise of secrecy is incorporated into the contract).

108. See note 8 *supra*.

109. Other causes of action that have been asserted include malpractice, libel, and conversion. In Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960), the patient

vide the principal means of redress for the unlawful disclosure of personal medical information. It is unclear whether Florida courts would imply a right of action for breach of statutory duty or enforce an invasion of privacy action without widespread publicity. Therefore, breach of fiduciary duty and breach of contract present the best chance of recovery in Florida.[110] Whichever theory is chosen when a worngful disclosure action confronts the Florida courts, its validity should be recognized under some form of action to accord with the legal maxim that the law provides a remedy for every substantial wrong.[111] Physicians' rights will be safeguarded by the affirmative defenses of legal requirement, public necessity and waiver.[112]

FEDERAL CONSTITUTIONAL PRIVACY

Governmental collection of information about private citizens is an area of

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asserted malpractice as the basis of an action against the physician for unlawful disclosure. Utilizing malpractice as a cause of action may pose a theoretical problem because malpractice is a negligence tort which involves the physician's competence in attending the patient rather than the safeguarding of personal information. *See also* Hammer v. Polsky, 36 Misc. 2d 482, 484, 233 N.Y.S.2d 110, 111 (Sup. Ct. 1962) (holding disclosure of medical information, though it may constitute unprofessional conduct, does not constitute malpractice).

The release of personal medical information may cause damage to a patient's reputation, thus, an action for libel may be conceivable. However, to use libel as a cause of action, the disclosure must have been false, because truth is a complete defense. Disclosure by a physician of a patient's medical information will likely be true. Even if false, however, the physician may have a qualified privilege, depending on who is receiving the information. *See* W. PROSSER, *supra* note 73, at 796.

A cause of action for conversion will lie where one wrongfully asserts control over another's property and such control is inconsistent with the owner's rights. This may not be a realistic cause of action for a physician's uncontested disclosure of a patient's medical information. While there are few cases on the issue, it appears that the medical records are owned by the physician. *See* Willy, *Right to Privacy in Personal Medical Information*, 24 MED. TRIAL TECH. Q. 164, 166 (1978).

110. As these theories are closely related, they would be most effectively used in conjunction.

111. *See, e.g.*, Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 802 (N.D. Ohio 1965); Smith v. Driscoll, 94 Wash. 441, 442, 162 P. 572, 572 (1917).

112. Legal requirement is a statutory or regulatory mandate requiring a physician to report certain illnesses. Reporting under these statutes would protect the physician from liability. *See, e.g.*, FLA. STAT. §§381.231, 390.002, 410.106, 790.24 (1979). These statutes require the physician to report communicable diseases, termination of pregnancy, abuse of elderly, and gunshot wounds to the state. Public necessity would shield a physician from liability if the disclosure was made to protect the patient or society. *See, e.g.*, Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920) (physician had a duty to public to inform innkeeper of patient's communicable disease); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958) (physician released information that patient unfit for marriage; court held protection of fiance was sufficient excuse for disclosure). The patient may also waive his right to confidential communications. *See, e.g.*, Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960) (where patient requested physician to provide medical excuse for absence from work, confidentiality waived when physician made a more complete disclosure at employer's request).

112. *See, e.g.*, Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 802 (N.D. Ohio 1965); Smith v. Driscoll, 94 Wash. 441, 442, 162 P. 572, 572 (1917).

increasing concern,[113] and personal medical data has not escaped the government's growing appetite for information. The first efforts at gathering medical data were statutes which required physicians to report to health authorities matters such as vital statistics and communicable diseases.[114] Gradually, these reporting requirements have expanded to include a variety of illnesses.[115] In addition to these narrowly drawn reporting requirements, there may be broad grants of information gathering authority to public health officials which would enable the government to collect private medical records in bulk.[116] Apart from collecting private information, the government is increasingly involved with the direct creation of medical records. Welfare programs and public clinics are the most common government generators of such information.[117]

One method to control government collection, handling, and dissemination of such sensitive personal information is through the development of constitutional restraints on government information practices. Although virtually any governmental action will interfere with privacy interests to some extent, not all interferences are of a constitutional magnitude.[118] The focal point for any discussion of the constitutional right of privacy is the seminal case of *Griswold v. Connecticut*.[119] *Griswold* was the first case[120] to definitively hold that the

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113. The amount of information the federal government has compiled on privae citizens is astronomical. "In September 1975 the federal government announced that it had amassed more than 8,000 separate systems of files about American citizens, totalling approximately 92 billion pages. The records keep track of the achievements and failure and hopes of virtually every person living in the United States and provide government with an extraordinary instrument of control over its citizens. The list of federal data banks alone filled 3,100 pages of small print." J. SHATTUCK, RIGHTS OF PRIVACY XIII (1977).

114. *See* J. WALTZ & F. INBAU, *supra* note 8, at 312-26.

115. A list of medical conditions commonly collected includes cancer, blindness, gunshot wounds, knife wounds, injuries inflicted with deadly weapons, child abuse cases, drugs and narcotic prescriptions, hearing impairments and job-related injuries. *See* Boyer, *supra* note 7, at 87.

116. *See* Curran, Stearns & Koplan, *Privacy, Confidentiality and Other Legal Considerations in the Establishment of a Centralized Health-Data System*, 281 NEW ENGLAND J. MED. 241 (1969). The authors demonstrated by example an actual statute that would allow courts and health officials unlimited access to a patient's medical records. The statute was vague enough to allow public officials to designate anyone to inspect patients' confidential records for any purpose the public official deemed proper. Once inspected, the health records could be copied and entered into a central health-data system, thereby becoming available for future inspection. *Id.* at 242-43.

117. *See* Boyer, *supra* note 7, at 88.

118. *See* Katz v. United States, 389 U.S. 347, 350 (1967). The *Katz* Court stated: "[v]irtually every governmental action interferes with personal privacy to some degree, the question in each case is whether that interference violates a command of the United States Constitution." *Id.*

119. 381 U.S. 479 (1965). For a good discussion of the *Griswold* case *see generally* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

120. *See, e.g.*, Olmstead v. United States, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (government conferred on individuals the right to be let alone; a comprehensive right and the right most valued by civilized man); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (liberty denotes ability to pursue goals according to one's conscience; it is essential to the pursuit of happiness by free men).

constitution protected an individual's right of privacy.[121] Members of the Court found a protectible privacy right emanating from the penumbral guarantees of the first, third, fourth, fifth, and ninth amendments.[122] Personal medical data is subsumed under the term "informational privacy"[123] which has found protection under the fourth amendment.[124]

The Expectation of Privacy

If informational privacy is protected by the fourth amendment then the scope of the right of informational privacy depends on established fourth amendment doctrine. Of principal importance is the requirement that a person have a legitimate expectation of privacy to qualify for constitutional protection. This rule originated in *Katz v. United States*.[125] In that case, the Supreme Court held that the government's electronic monitoring of the defendant's phone-booth conversations violated the privacy upon which he reasonably relied and thus constituted an unreasonable search.[126] To guide future decisions, the Court enunciated a two-part test to establish an expectation of privacy and thereby invoke fourth amendment protection. First, the person must have exhibited a subjective expectation of privacy.[127] Second, the expectation must be one which society is willing to recognize.[128] This test recognized that technological advancements threatened individual privacy interests irrespective of property rights, the traditional touchstone of the fourth amendment.

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121. 381 U.S. at 483 (the right of privacy is a legitimate constitutional guarantee).

122. *Id.* at 484. For a discussion of the penumbral theory and a critique of the various opinions of the justices, *see generally* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case*, 64 MICH. L. REV. 235 (1965).

123. *See* Note, *Informational Privacy: The Concept, Its Acceptance and Affect on State Informational Practices*, 15 WASHBURN L. REV. 273 (1976). The author concludes that informational privacy should be recognized as a fundamental right. He opines that privacy of information is necessary to promote unrestrained action and is "a necessary context for mental health, individuality and ethical self-development." *Id.* at 280.

124. U.S. CONST. amend. IV. The protection of personal information provided by the fourth amendment can be traced back to the Supreme Court case of Boyd v. United States, 116 U.S. 616 (1886). The Court in *Boyd* found it repugnant to the fourth amendment to compel a defendant to produce in court, his private books, invoices and papers. *Id.* at 630. Although the fourth amendment is usually invoked in connection with a criminal proceeding, the fact that government intrusion is non-criminal in nature does not render the fourth amendment inapplicable. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 430 n.28 (1977). *See generally* South Dakota v. Opperman, 428 U.S. 364 (1976).

125. 389 U.S. 347 (1967).

126. *Id.* at 360. Analyzing *Katz* one commentator noted: "The Court in *Katz* recognized that privacy is not secrecy. No one could function in modern society if the only form of privacy respected was seclusion." Comment, United States v. Miller: *Without a Right To Informational Privacy, Who Will Watch The Watchers?*, 10 J. MAR. J. PRAC. & PROC. 629, 640 (1977).

127. 389 U.S. at 361 (Harlan, J., concurring).

128. *Id.* These criteria have been interpreted to mean that the individual must have actually relied upon the privacy he believed was granted and the expectation must have some objective validity. *See* Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 982-84 (1968).

The case of *United States v. Miller*[129] presented the Supreme Court with the opportunity to extend *Katz* to include personal information held by third parties. In *Miller* the respondent claimed that the government violated his fourth amendment rights by obtaining bank copies of his cancelled checks without a personal subpoena.[130] The Court responded that, as the depositor could assert neither an ownership nor possessory interest in the documents, a right of privacy based on property interests was precluded.[131] Further, the Court stated that the fourth amendment does not prohibit the government from obtaining information revealed to third parties, even if conveyed for a limited purpose and in a confidential relationship.[132] Thus, no legitimate expectation of privacy exists in such a situation, according to the *Miller* Court, because if an individual can not prevent information which has been transferred to another from being revealed to the government, the transferor can have no subjective expectation of privacy.[133] Without a subjective expectation, it was unnecessary for the Court to determine whether an objective expectation of privacy was present. To have a protectable fourth amendment right a person must establish both types of expectations.[134]

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129. 425 U.S. 435 (1976).

130. *Id.* at 437-38. The records had been kept by the bank in compliance with the Bank Secrecy Act of 1970. 12 U.S.C. §1829(b)(d). In 1974 the Supreme Court upheld the constitutionality of the Act. California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974). The requirement that the bank maintain customer records was challenged in *Schultz*. The Court found no violation of the depositor's fourth amendment rights where the government had not yet tried to obtain the records. *Id.* at 54. However, the concurring opinion noted that extension of reporting requirements could pose constitutional problems because at some point government intrusion would implicate legitimate expectations of privacy. *Id.* at 78 (Powell, J., concurring). Additionally, the concurrence noted that the potential abuse was particularly acute because the legislative scheme permitted access to information without invocation of the judicial process. *Id.* at 79 (Powell, J., concurring).

As Professor Westin points out, the very existence of large centralized files of personal information raises privacy issues. *See* A. WESTIN, PRIVACY AND FREEDOM 167 (1970). The proponents of informational privacy saw *Schultz* as a setback to establishing a constitutional right of informational privacy. *See* ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOACACY IN THE UNITED STATES, PRIVACY IN A FREE SOCIETY 81-83 (1974).

131. 425 U.S. at 440.

132. *Id.* at 443. There appears to be an inconsistency in the *Miller* opinion. Although the Court expressly stated that even conveyance in confidence will not be protected, the Court also made an express note that the checks under review were negotiable instruments and not confidential communications. If the Court is willing to recognize an expectation of privacy in confidential relationships, this may provide protection for the physician-patient relationship and medical information.

133. 425 U.S. at 443 (citing United States v. White, 401 U.S. 745, 751-52 (1971)). In *White*, government agents had eavesdropped on conversations between informant and defendant. The Court affirmed the conviction on the grounds that White took the risk that the person he conveyed information to was an informant. 401 U.S. at 751-52. Application of *White* to the facts of *Miller* appears attenuated. An individual expects a certain degree of confidentiality when dealing with a bank, and a bank is not generally considered, nor reasonably anticipated to be acting as a government spy.

134. The Court's apparent determination to restrict the right of privacy has not been limited to the fourth amendment. *See* Fisher v. United States, 425 U.S. 391 (1976). In *Fisher*, the Court upheld the government's summons of the taxpayer's documents, in the hands of

A primary criticism of *Miller* is that consideration of whether to impose legal controls over personal data collection should focus on the nature of the information rather than on ownership or possession. Medical information, for example, must be disclosed to physicians, medical personnel, insurance companies and others[135] to obtain necessary services. To secure these necessities, the individual should not be required to concede all privacy interests in the information. Yet, under *Miller*, an individual loses all privacy rights in his medical records despite the fact that medical information is cloaked with both personal and societal expectations of privacy.[136] Thus, massive volumes of patient medical information computerized and filed, both in the public and private sector, are freely accessible to government inspection.[137]

Directly responding to *Miller*, Congress enacted the Right to Financial Privacy Act of 1978.[138] The purpose of the statute is to protect customers of financial institutions from unwarranted government intrusion into their records.[139] Apparently, the Act is a rejection of the *Miller* Court's determination that an individual has no protectible interest in information conveyed to third parties. In view of this legislative mandate, the Court should re-evaluate its restrictive definition of legitimate expectations of privacy.[140]

Privacy Embodied in the Concept of Ordered Liberty

Apart from the fourth amendment's expectation of privacy concept, there are other constitutional provisions that have the potential to protect the privacy of personal medical information. The fifth and fourteenth amendments prohibit denial of life, liberty, or property without due process of law.[141] In the

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his attorney, over the fifth amendment claims of the taxpayer. The Court took a firm stance in noting that the fifth amendment should not be misconstrued to protect a general right to privacy. *Id.* at 400.

135. Aside from medical care providers, medical information is used by private and governmental health plans, public health agencies, medical and social researchers, rehabilitation and social welfare programs, employers, federal, state and local health planning agencies, schools, courts, law enforcement agencies, credit investigation companies, licensing, accrediting and certifying agencies, and the press. *See* H.R. REP. No. 832, 96th Cong., 2d Sess. 19 (1980).

136. *See* Brief for Appellee at 26, Whalen v. Roe, 429 U.S. 589 (1977).

137. The fear of such a practice has best been described by one commentator as follows: "As the files are being quietly examined by those seeking not only evidence of crime, but also proof of deviance from social or political norms, or information for private purposes whether sinister or innocuous, we may well wonder who will watch the Watchers." Comment, *supra* note 126, at 650.

138. 12 U.S.C. §§3401-3422 (1979).

139. The intent of the statute was to protect the confidentiality of the records while at the same time permitting legitimate law enforcement activities. H.R. REP. No. 1383, 95th Cong., 2d Sess. 34, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9273, 9305-06.

140. This statement should not be interpreted to mean that the actions of the Court should be dictated by Congress. However, the expectation of privacy test is to protect those interests which society is willing to recognize. *See Katz*, 389 U.S. at 361. The Financial Privacy Act of 1978 is evidence that society is willing to protect personal information held by third parties from unreasonable government information searches. 12 U.S.C. §§3401-3422 (1979).

141. U.S. CONST. amends. V, XIV.

landmark decision of *Roe v. Wade*,[142] the Supreme Court recognized that the concept of liberty includes a right of privacy. The Court concluded that personal rights which could be demed "fundamental" or "implicit in the concept of ordered liberty" were included within this guarantee.[143] Without further delineating the scope of rights considered fundamental, the Court concluded the right of privacy was certainly broad enough to encompass a woman's decision to terminate her pregnancy.[144]

Although *Griswold*'s penumbral theory suggested a broad interpretation of the law of privacy, the *Roe* Court restricted protection to only fundamental personal rights.[145] The fundamental rights focus has confined the right of privacy primarily to activities or interests relating to marriage, procreation, contraception, child rearing, education, and family interests.[146] However, as sophisticated techniques for amassing and storing information become more commonplace, the Court is developing a body of law which examines the extent to which informational privacy, including medical information, is constitutionally protectible.[147]

The Supreme Court developed a foundation for a constitutional right of privacy in medical information in *Whalen v. Roe*.[148] In that case, patients and

142. 410 U.S. 113 (1973).

143. *Id.* at 153-55. The Court, however, noted that the right to privacy is not absolute but rather can be overridden by a sufficient compelling state interest. *Id.* at 155.

144. *Id.* at 153. Therefore, the state's anti-abortion statute was found constitutionally impermissible. *Id.* In a companion case, Doe v. Bolton, 410 U.S. 179 (1973), the Court struck down a Georgia statute requiring abortions to be conducted in accredited hospitals only after other physicians had been consulted in the decision making process. The Court found that the need for acquiescence by co-practitioners unduly infringed on the physician's right to practice. *Id.* at 199.

145. *Id.* The Court's adoption of the fourteenth amendment's concept of liberty as the foundation for privacy has been seen as an express rejection of *Griswold*'s penumbral theory. *See* Note, Roe v. Wade *and* Doe v. Bolton: *The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628, 633 (1973).

146. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (contraception) (dictum); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relations); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation) (dictum); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education).

147. *See, e.g.*, Detroit Edison Co. v. NLRB, 440 U.S. 301, 322-23 (1979) (Court took notice of sensitivity of individuals to disclosure of personal information relating to basic competency); Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (weighing public officials interest in privacy of financial information against policy of Florida's Sunshine Amendment); E.I. du Pont de Nemours & Co. v. Finklea, 442 F. Supp. 821, 824 (S.D.W.Va. 1977) (recognizing a right of privacy in employee medical records).

148. 429 U.S. 589 (1977). Prior to *Whalen* there were a few lower court cases attempting to challenge the extraction of medical information on constitutional grounds. The first case was Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973). Plaintiffs succeeded in preventing the use of a psychological testing program in schools to identify potential drug abuse. However, instead of focusing on the medical nature of the intimate data the court emphasized that the questions probed family relationships, a constitutionally protected area. *Id.* at 918.

Another case, In re Schulman v. New York City Health & Hosp. Corp., 44 A.D.2d 482, 355 N.Y.S.2d 781 (App. Div. 1974), demonstrates judicial deference to legislative justifications for collecting medical data. Doctors and patients failed in their attempt to strike a city ordinance that required the reporting of names and addresses of patients who had abortions. The court

physicians challenged the New York State Controlled Substance Act's requirement that the names and addresses of all recipients who had been prescribed certain drugs be recorded in a centralized computer file. The patients argued that the mere existence of the information in a readily available form violated their fourteenth amendment right of privacy[149] because the possibility that the information would become public made patients reluctant to use, and some doctors reluctant to prescribe the drugs.[150] As a basis for its decision, the lower court found the doctor-patient relationship to be within the zone of privacy afforded constitutional protection.[151] Additionally, the district court recognized that the highly personal nature of medical information created an expectation that the information would not be revealed to the government.[152] As the state asserted no compelling interest in the information, the court held that the Act's recordation requirements unconstitutionally interfered with patients' privacy rights.

The Supreme Court rejected the lower court's analysis. Although recognizing a constitutional right to privacy in personal information such as medical data, the Court determined that the statutory safeguards and sanctions in the Act sufficiently protected these rights.[153] Furthermore, the state was not required to demonstrate a compelling interest in the information because of the great latitude accorded states to experiment with possible solutions to problems of public concern.[154] Instead, the statute was upheld as rationally related to the legitimate state interest of regulating drug abuse.[155]

While *Whalen* recognized a protectible right of privacy in personal information, the degree of protection accorded the physician-patient relationship and individual medical information was left unsettled.[156] The cases protecting the right of privacy have developed into two separate branches, with each branch

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found the state interest in having this information to prepare statistical data, compelling enough to outweigh the patient's privacy interest. *Id.* at 485-86, 355 N.Y.S.2d at 785. One commentator has noted that if statistical functions like those found in *Schulman* are considered compelling interests which outweigh the patients' privacy, constitutional protections on government collection of medical information are minimal at best. See Boyer, *supra* note 7, at 91.

149. 429 U.S. at 598-600.

150. *Id.* Patients were concerned that disclosure would adversely affect their reputations. *Id.*

151. Roe v. Ingraham, 403 F. Supp. 931, 936 (S.D.N.Y. 1975). The lower court determined that *Roe v. Wade* held implicitly and *Doe v. Bolton* held explicitly, that the physician-patient relationship was one of the zones of privacy afforded constitutional protection. The court opined that it would be too narrow a reading of precedent to view the situation presented as not constitutionally protected because it did not involve medical advice or professional judgment. *Id.* at 937.

152. *Id.*

153. 429 U.S. at 605. The Court was also careful to point out that no first amendment rights were at issue by refusing to extend the right to privacy in one's associations beyond political, social and artistic affiliations created to advocate and support ideas. *Id.* at 604 n.32.

154. *Id.* at 597.

155. *Id.* The Court also determined that the New York drug law did not unconstitutionally interfere with the right of doctors to freely practice medicine. *Id.* at 604.

156. *See* Cope, *supra* note 71, at 709.

attempting to protect a distinct interest. The first branch is concerned with an individual's interest in making independent decisions and is commonly referred to as an interest in autonomy.[157] The second branch can be described as the interest in avoiding disclosure of personal matters; it protects the individual right to decide where and to what extent personal information will be communicated to others.[158] Privacy interests in medical information can involve both strands of this analysis.

The patients in *Whalen* alleged an invasion of their autonomy interest, arguing that the ability to make an independent decision about matters vital to their health care was affected by the statute.[159] Documented cases in which patients were reluctant or refused to pursue needed medical treatment for fear of stigmatism if the information became public, were presented as evidence.[160] The Court acknowledged the autonomy argument and recognized that individuals concerned with the privacy of medical information may avoid or postpone needed medical attention.[161] The Court determined, however, that the limited disclosure to state representatives responsible for the health of the community did not impermissibly invade the autonomy interest.[162]

Application of the autonomy right to medical information disclosures was analyzed again in a recent federal district court opinion.[163] At issue was a state statute which authorized inspection of offices and records of medicaid providers to obtain evidence of medicaid fraud. The court determined that the statute intruded unnecessarily into the patient's right to make medical decisions. Actual disclosure or the possibility of disclosure of such sensitive information would adversely affect the individual's freedom to choose and receive medical care.[164] Accordingly, the court enjoined enforcement of the statute. Unlike *Whalen*, the district court found the doctor-patient relationship to be within the cluster of fundamental personal decisions and relationships deserving constitutional protection.[165] Therefore, the court required the state to show the

157. *See, e.g.*, Whalen v. Roe, 429 U.S. at 599-600; Plante v. Gonzalez, 575 F.2d 1119, 1128 (5th Cir. 1978); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1037 (D. Hawaii 1979). *See* Gross, *supra* note 2, at 37-38 (1967). The author compares the two interests and concludes that the autonomy interest is weaker than the selective disclosure right.

158. *See, e.g.*, Note, Roe *and* Paris: *Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1163 (1974).

159. 429 U.S. at 600.

160. *Id.* at 595.

161. *Id.* at 602.

162. *Id.* This does not mean that disclosure of medical information can never qualify for private protection under the autonomy interest. Justice Brennan thought the right to privacy would be violated if collected information was widely disseminated without a compelling state interest. *Id.* at 606 (Brennan, J., concurring). Additionally, *Whalen* has been cited for the proposition that "the protection of the autonomy right could extend to decisions concerning medical care." Plante v. Gonzalez, 575 F.2d 1119, 1131 (5th Cir. 1978).

163. Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028 (D. Hawaii 1979).

164. *Id.* at 1038. The court reasoned that searching, copying, and maintaining medical records pursuant to the statute would inhibit candid disclosures between physician and patient. Further, the court determined that treatment and diagnosis would also be inhibited if the physician feared his notes and diagnosis would be reviewed by government officials. *Id.* at 1039.

165. The court recognized that the doctor-patient relationship was within the bounds of

statute furthered a compelling interest by use of the least restrictive means available. According to the court, this burden was not met.[166]

In the autonomy line of privacy cases, the courts have employed a traditional two-tiered equal protection analysis.[167] The lower level test merely requires that a legislative scheme be rationally related to a legitimate state interest.[168] Under this analysis, the legislative judgment will be upheld unless it is patently arbitrary. The upper tier of the analysis is activated when a statutory scheme infringes upon a fundamental right expressly or impliedly guaranteed under the Constitution. In such situations, a court will employ the strict scrutiny test which shifts the burden to the state to demonstrate a compelling interest, a hurdle so difficult to overcome that the selection of the test alone generally signals the demise of the legislation.[169]

Although Supreme Court justices have occasionally referred to the sanctity of the physician-patient relationship,[170] neither the relationship nor the privacy of medical information have been recognized by the Court as a fundamental right. The Court has granted fundamental privacy right status sparingly, usually in situations where an individual's freedom of choice has been entirely foreclosed.[171] The threat of potential disclosure of personal medical information does not foreclose the ability to obtain medical aid; rather, it affects the

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fundamental rights because such communications often involved problems in those areas already accepted as being within the protected zone. These previously protected zones recognized by the court included family, marriage, parenthood, human sexuality and physical problems. *Id.* at 1038.

166. *Id.* at 1043. *But see* Schacter v. Whalen, 581 F.2d 35 (2d Cir. 1978). *Schacter* gave no consideration to the confidential nature of the physician-patient relationship. Rather, the court looked to *Whalen* as deciding that as long as there were proper security precautions to guard against further dissemination of the material, the state need only demonstrate a rational basis justification for obtaining the information. *Id.* at 37.

167. For a discussion and application of dual level scrutiny, *see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). *See also* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969). The two-tiered standard of review was first enunciated in dictum in United States v. Carolene Products Co., 304 U.S. 144, 152 & n.4 (1938).

168. Minimum judicial scrutiny is exemplified in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (classification unconstitutional only if wholly irrelevant to conceivable state interest). *See also* Note, *supra* note 145, at 641.

169. Only one law has ever been held valid by the Court after being designated a fundamental right, subject to strict scrutiny. *See* Korematsu v. United States, 323 U.S. 214, 220 (1944) (federal law justified by compelling interest in preserving national security).

170. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 & n.13 (1973) (privacy not only concerned with a place but with intimate relationships and extends to doctor's office and hospital); Doe v. Bolton, 410 U.S. 179, 219-20 (1973) (Douglas, J., concurring). "The right to privacy has no more conspicious place than in the physician-patient relationship, unless it be in the priest-penitent relationship." *Id.*

171. *See, e.g.*, Roe v. Wade, 410 U.S. at 113 (prohibiting abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (prohibiting distribution of contraceptives to single individuals); Griswold v. Connecticut, 381 U.S. 479 (1965) (preventing use of contraceptives). For a comprehensive listing of fundamental rights, including privacy *see* Note, *Durational Residence Requirements from* Shapiro *Through* Sosna: *The Right to Travel Takes a New Turn*, 50 N.Y.U.L. REV. 622, 624-25 n.14 (1975).

decision of whether to seek treatment.[172] This distinction suggests a legitimate reason for denying fundamental right status to privacy interests in personal medical information. However, absent fundamental right qualification, the resulting application of the rational basis test will virtually guarantee the constitutionality of the legislation. This all-or-nothing approach to privacy protection neglects autonomy interests which, though properly not considered fundamental, do merit some degree of constitutional protection.[173] The optimum standard in medical information autonomy cases would be an intermediate level of scrutiny, similar to the emerging analysis used in equal protection cases[174] involving gender[175] and illegitimacy[176] discrimination. Under this standard, the constitutionality of the statute is not summarily accepted; the state must demonstrate that the challenged act serves an important government interest and is substantially related to the achivement of that interest.[177]

The second branch of the constitutional right of privacy focuses on avoiding disclosure of personal matters,[178] including information in medical records. This interest is a recent development in the law of privacy, having been expressly mentioned only in two Supreme Court cases.[179] The first case, *Whalen v. Roe*, provides little guidance because the Court found the possibility of disclosure unlikely and, therefore, refrained from discussing the nature of the interest and the applicable standard.[180] The nondisclosure interest was again asserted in *Nixon v. Administrator of General Services*.[181] *Nixon* involved an alleged violation of the President's privacy by a federal statute which permitted General Services Administration custody of Presidential papers and tapes. The Court held that a privacy interest in nondisclosure inhered in the President's private affairs, including communications with his physician.[182] Although an explicit standard of review was not enunciated, the Court balanced the President's interests against the interests of the government. In light of the minor

172. Brief for Appellant at 14, Whalen v. Roe, 429 U.S. 589 (1977). *But see* Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1039 (D. Hawaii 1979) (in decisions after *Roe* the Court has found that autonomy of choice need not be totally foreclosed to invoke constitutional protection).

173. *See* Note, *On Privacy: Constitutional Protection For Personal Liberty*, 48 N.Y.U.L. REV. 670, 703 (1973).

174. *See generally* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

175. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976).

176. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259, 271 (1978).

177. 429 U.S. at 204.

178. See note 5 and accompanying text, *supra*.

179. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977).

180. 429 U.S. at 605. Prior to *Whalen* it appeared that there was no right to informational privacy. *See, e.g.*, United States v. Miller, 425 U.S. 435 (1976); notes 129-132 and accompanying text, *supra*. Another important case was Paul v. Davis, 424 U.S. 693 (1976). Davis had been charged with shoplifting. Although the charges were later dropped, his name and photograph were included in a flyer circulated throughout the community listing active shoplifters. One of the plaintiff's claims was that he was deprived of his constitutional right to privacy. The Court dismissed the claim, concluding plaintiff failed to allege any government intrusion into a constitutionally protected sphere of privacy. *Id.* at 713.

181. 433 U.S. 425 (1977).

182. *Id.* at 459.

amount of personal information contained in the voluminous records, and because disclosure would be only to a small group of government archivists, the Court upheld the statute.[183]

Even though *Nixon* involved disclosure to archive employees, the release of information to government personnel was not the focus of the action. Instead, the central concern was the possibility of public disclosure. Moreover, the *Whalen* Court considered only the possible public disclosure, not the government's access to the information as the potential invasion of privacy. The privacy interest in nondisclosure, however, should also provide protection against government access to sensitive personal information, including medical data. This position was adopted by a federal district court in *McKenna v. Fargo*.[184] At issue in *Fargo* was a city's requirement that an applicant for a firefighters job submit a psychological profile as a prerequisite to consideration for employment. The court recognized that the revelation of sensitive personal information, even to the government, intrudes upon the privacy interest in nondisclosure of personal information.[185] Applying a balancing test, the court found the city's interest in screening out unsuitable applicants sufficient to justify the privacy intrusion, provided the city adopted regulations governing access to the information and limited the length of time the data could be retained.[186]

The balancing test, implied in *Nixon* and adopted in *McKenna* and other federal cases,[187] provides a standard of review which properly considers the interests of the government and the individual. A proper application of this balancing test would require the government to satisfy a higher burden to justify disclosure as the sensitivity of the medical information and scope of intrusion increases. *McKenna* illustrated that an important element of this burden is proof that the security precautions are adequate to prevent improper dissemination of the information.[188]

State Constitutional Right of Privacy

Since the Supreme Court's invitation to the states in *Katz* to actively participate in formulating the right of privacy,[189] nine states have enacted con-

183. *Id.* at 465.

184. 451 F. Supp. 1355 (D.N.J. 1978).

185. *Id.* at 1381. The Court in *McKenna* noted that absent the reasoning in *Whalen* there would be no basis to extend privacy protection beyond familial affairs and independence in intimate personal choice to disclosures of personal information to the government. *Id.* at 1380.

186. *Id.* at 1382. The court recognized that firefighting jobs involved life endangering situations and therefore the state's interest was of the highest order, outweighing claimant's allegation that disclosure infringed on his freedom of belief. *Id.*

187. *See, e.g.*, Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1043 (D. Hawaii).

188. The Court in *Whalen* stated that the degree of threat of public disclosure is a factor in determining the constitutionality of an intrusion upon informational privacy interests. 429 U.S. at 605.

189. The Court in *Katz* stated: "the protection of [a] person's general right to privacy — his right to be let alone by other people — is like the protection of his property and of his very life, left largely to the law of the individual states." 389 U.S. at 350.

stitutional privacy provisions.[190] Florida recently amended its constitution[191] to provide its citizens with a free standing right of privacy.[192] The amendment is a forceful expression of the public's demand for protection from undue state interference. The Florida courts, armed with an express provision through which to protect the fundamental right of privacy, now are freed from having to justify different privacy interests under the federal penumbral approach. Additionally, the scope of the state amendment is not limited to the federal definition of the right of privacy.[193] Therefore, the new provision can provide significant protection from the danger of government information collection and storage. In 1978, when formulating a privacy amendment, the Florida Constitutional Revision Commission expressly indicated that such a provision could provide additional protection for the doctor-patient relationship and the sensitive information which it generates.[194]

A few states with similar constitutional provisions have begun to assess informational privacy as a component of their state right of privacy. The California supreme court has stated that the California provision protects individuals from invasions of privacy caused by unreasonable information-gathering practices.[195] Recently, a California appellate court recognized that

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190. Seven other states expressly provide a right of privacy: ALASKA CONST. art. 1, §22; CALIF. CONST. art. 1, §1; HAWAII CONST. art. 1, §5; ILL. CONST. art. 1, §6; LA. CONST. art. 1, §5; MONT. CONST. art. 2, §10; S.C. CONST. art. 1, §10. Two states provide a right to freedom from intrusions into one's personal affairs: ARIZ. CONST. art. 2, §8; WASH. CONST. art. 1, §7.

191. The right of privacy was passed as a constitutional amendment by the voters of Florida on November 4, 1980. The proposition will become section 23 of Article 1 of the Florida Constitution and reads as follows: "Every natural person has the right to be let alone and free from government intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." *See* 1980 Fla. Laws p. 1788 (1980).

192. The other states are Alaska, Montana and California. A free standing right of privacy gives privacy the status of a separate right as opposed to mere inclusion of the right as part of the traditional ban against unreasonable searches and seizures. *See* Note, *Towards a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 631, 692 (1977).

193. *See, e.g.*, Raven v. State, 537 P.2d 494, 514 (Alaska 1975) (since it is a mandate by people of the state for privacy not found in United States Constitution it is a broader right than the federal right).

194. *See* Cope, *supra* note 71, at 733 & n.354. The 1978 Constitutional Revision Commission recommended the right of privacy to the Florida voters on November 7, 1978. At that time the amendment was defeated. The second sentence was added to the 1980 amendment and the first sentence is the same for both amendments. *Id.* at 673-75.

195. *See* White v. Davis, 13 Cal. 3d 757, 774, 120 Cal. Rptr. 94, 105, 533 P.2d 222, 233 (1975). The *White* court recognized that a principle aim of the constitutional privacy provision was to limit infringement upon personal privacy arising from government collection and retention of data relating to the person. This court acknowledged that the ability to control dissemination of personal information was fundamental to privacy. The immense growth of government records in the absence of individual control can affect the ability of an individual to control his own life. *Id.* at 774, 120 Cal. Rptr. at 106, 533 P.2d at 234.

Additionally, a lower court determined that the disclosure of an individual's confidential information by a private institution to a third party was actionable as an invasion of the state constitutional right to privacy. Porten v. University of San Francisco, 64 Cal. App. 3d 825, 832, 134 Cal. Rptr. 839, 843 (1976) (university disclosed, without authorization, transcript information of student to state scholarship and loan commission). This case demon-

a person's medical profile was infinitely more private than many areas currently recognized as protected under the concept of constitutional privacy.[196] On this basis, the court concluded that detailed records of individual physical and mental ills fell squarely within the protected realm of the state's privacy provision.[197] In agreement with the policies expressed by California courts, the Supreme Court of Alaska recently included medical information within the protection of its constitutional right of privacy.[198] The Alaska court equated intrusion into the physician-patient relationship with interference with an individual's right of privacy in his home.[199] Therefore, the court concluded that the desire to keep sensitive medical information private could be overridden only by a strong state interest.[200]

As Florida courts interpret and apply the express right of privacy, they should remain cognizant of the rationale of *Byron, Harless, Schaffer, Reed & Assoc., Inc. v. State*,[201] a case decided prior to the enactment of the privacy amendment. In *Byron, Harless*, the Florida First District Court of Appeal refused to allow public disclosure of the psychological profile of an applicant for a government position. The court found an informational right of privacy implicit in the due process clause of the Florida Constitution.[202] Florida's due process clause, according to the court, protected "privacies of personhood" which includes the power to control what, to whom, and for what purpose personal intimacies are revealed.[203] On appeal, the Florida supreme court re-

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strates that the California state privacy provision is self-executing and therefore applies to private, as well as, government intrusion. *Id.* at 829, 134 Cal. Rptr. at 842.

196. Board of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 156 Cal. Rptr. 55 (1979). In that case a hospital refused to surrender patient records to the Division of Medical Quality of the Board of Medical Quality Assurance which was allegedly conducting an investigation into complaints of negligence in the treatment of patients by certain physicians. The court stated that "a person's gastro-intestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library, or his membership in the NAACP." *Id.* at 679, 156 Cal. Rptr. at 61.

197. *Id.* The court determined the intervention into the individual's privacy could only be justified by a compelling interest. *Id.*

198. Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469 (Alaska 1977). In *Falcon*, the Alaska Supreme Court held that a conflict of interest law which required a physician, as a member of the school board, to disclose names of patients, violated the patients' state constitutional right of privacy.

199. *Id.* at 476. The court's analogy is significant because an individual's right of privacy is a strongly recognized right. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969).

200. The Alaska court employed a balancing of interests test, rather than the scrutiny test employed in the California case of *Gherardini*, stating that "to determine the validity of the disclosure provisions . . . we must consider both the nature and the extent of the privacy invasion and the strength of the state interest requiring disclosure." 570 P.2d at 476.

201. 360 So. 2d 83 (Fla. 1st D.C.A. 1978).

202. *Id.* at 93. The court also recognized that privacy protection arises from section 12 of the Florida Declaration of Rights which provides: "the right of the people to be secure . . . against the unreasonable interception of private communications by any means . . . ." *Id.*

203. *Id.* at 92. The court described the "privacies of personhood" as a conviction that integrity of persons in their worship, thoughts, speech, association, homes, and intimate personal relationships should not be violated by government without a compelling public interest. *Id.* at 90.

versed the decision, finding no state right of privacy.[204] Passage of the privacy amendment weakens the precedential value of the supreme court's opinion and supports a return to the "privacies of personhood" rationale employed by the lower court.

The extent to which this new Florida privacy right will restrict government access to personal information, including medical data, will depend upon the standard of review adopted by the courts.[205] If the courts employ a minimum standard the right will be meaningless. However, strict scrutiny, although warranted in some state invasions of privacy, would be too severe a standard for most informational privacy actions and would improperly impede legitimate government functions. The balancing of interests approach, proposed for federal constitutional analysis, would be equally appropriate for the state right of privacy.[206] This analysis would best insure a workable, yet meaningful, right of privacy in the area of informational privacy.

CONCLUSION

As society's sophistication increases rapidly, its most important resource remains the individual. To ensure a person's self identity, the law grants zones of privacy, territories over which the individual expects to maintain control. Although not yet firmly delineated, the boundaries must encompass an area greater than a person's body and the property in his possession. Massive amounts of personal data are compiled and stored which necessitate privacy protection. The autonomy necessary to promote mental health, ensure the development of individuality, and encourage positive interpersonal relations, exists only when informational privacy rights are respected.[207] Unrestrained access to medical information impairs the value of medical services by inhibiting patients' disclosure to physicians and by discouraging the physician from recording important information.[208] Privacy is not an absolute right, however.[209] Disclosure of medical information, in or out of court, should be permissible if there is a sufficient countervailing societal interest.

Increasing government collection of information has prompted the emergence of constitutional safeguards preventing disclosure of personal information. Nevertheless, the process is slow, developing on a case-by-case basis and dealing only with government intrusions. This institutional inertia suggests strongly that legislation would provide the most comprehensive and expedient solution. The federal legislature should continue its efforts towards enactment of a medical privacy act. A federal act, however, would provide only a partial solution.

Proposed federal legislation[210] may provide state legislatures with an effec-

204. Shevin v. Byron, Harless, Schaffer, Reid and Assoc., 379 So. 2d 633, 639 (Fla. 1980).

205. *See* Cope, *supra* note 71, at 761.

206. This level of review would be equivalent to that employed by Alaska. See note 200 *supra*. Also see Note, *supra* note 192, at 694.

207. *See* A. WESTIN, *supra* note 130, at 33-35.

208. H.R. REP. No. 832, 96th Cong., 2d Sess. 29 (1980).

209. *See* Roe v. Wade, 410 U.S. at 155.

210. Federal Medical Privacy Act, H.R. REP. No. 832, 96th Cong., 2d Sess. (1980).

tive model for comprehensive state legislation which would regulate the collection, maintenance, and dissemination of medical information by state and private institutions. Any legislation should incorporate the proposed federal bill's concept of informed patient consent.[211] This would provide a sense of security and control over personal medical information and promote the intergrity of the individual.

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211. This approach would be analogous to informed patient consent which is a condition precedent to medical treatment. It requires the physician to inform patients of risks, consequences and benefits of procedures, thereby allowing the patient to make an uncoerced decision as to whether or not to receive treatment. Requiring an individual's fully informed consent prior to the disclosure of personal medical information to third parties would provide a similar freedom of choice. *See generally*, Maldonado, *Strict Liability and Informed Consent "Don't Say I Didn't Tell You So!"* 9 AKRON L. REV. 609 (1976).