Notes

TAKING THE STING OUT OF REPORTING REQUIREMENTS: REPRODUCTIVE HEALTH CLINICS AND THE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY

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In the early summer of 2002, rumors began circulating on pro-life websites of a nationwide "sting" of reproductive health clinics.[1] Conservative media attention swiftly focused[2] on a report entitled "Child Predators: Exposing the Partnership Between Planned Parenthood, the National Abortion Federation and Men who Sexually Abuse Underage Girls."[3] The report claimed that clinics affiliated with Planned Parenthood and the National Abortion Federation[4] were knowingly violating state and federal statutory rape

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1. *See, e.g.*, Joseph Farah, *Planned Parenthood on the Run*, WORLDNETDAILY, May 30, 2002, http://wnd.com/news/article.asp?ARTICLE_ID=27780 (last visited Oct. 3, 2006) ("Thanks to some hard work by dedicated people, this detestable organization [Planned Parenthood] is finally on the run.").

2. *See Pro-Life Group Launches Undercover Sting*, FOXNEWS.COM, May 31, 2002, http://www.foxnews.com/story/0,2933,54079,00.html (last visited Oct. 23, 2006) (discussing Life Dynamics' campaign); *see also* Press Release, Life Dynamics, Investigation Shows Planned Parenthood, National Abortion Federation Caught Harboring Pedophiles (May 22, 2002) (on file with the *Duke Law Journal*).

3. MARK CRUTCHER, CHILD PREDATORS: EXPOSING THE PARTNERSHIP BETWEEN PLANNED PARENTHOOD, THE NATIONAL ABORTION FEDERATION AND MEN WHO SEXUALLY ABUSE UNDERAGE GIRLS (2002), *available at* http://www.childpredators.com/Forms/ChildPredators.pdf.

4. The *Child Predators* report and much of the Life Dynamics literature misleadingly refer to certain clinics as being "NAF facilities" or "NAF clinics." *See, e.g.*, Life Dynamics, *About Life Dynamics*, http://www.lifedynamics.com/Pro-life_Group/ (last visited Oct. 3, 2006) (referring to "America's two largest abortion providers, Planned Parenthood & the National Abortion Federation (NAF)"). The National Abortion Federation (NAF) is a membership association of reproductive health care providers. National Abortion Federation, *About NAF*, http://prochoice.org/about_naf/index.html (last visited Oct. 3, 2006). As NAF neither manages nor administers any clinics, it is likely that Life Dynamics is using the phrase as shorthand to

and child abuse reporting requirements by failing to report the sexual abuse of their minor patients.[5]

At least one state attorney general apparently agreed. In February 2005, Kansas Attorney General Phill Kline announced that he had subpoenaed the medical records of women who had obtained late-term abortions in Kansas during 2003.[6] Kline had been seeking the records for five months, claiming that they were necessary to fulfill his duty "to investigate and prosecute child rape and other crimes in order to protect Kansas children."[7] The clinics that were challenging Kline's expanded interpretation of the Kansas statutory-rape reporting requirements in court[8] were under a gag order; the women whose records had been subpoenaed did not know their medical records were being sought.[9] The news leaked only when the clinics sought relief from the subpoenas in the Kansas Supreme Court.[10]

Increasingly, statutory rape and child abuse reporting requirements are being used to threaten reproductive health clinics with legal prosecution. Life Dynamics president Mark Crutcher,

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refer to the independently owned (non-Planned-Parenthood-affiliated) clinics that are members of NAF.

5. Press release, Life Dynamics, *supra* note 2.

6. Jodi Wilgoren, *Kansas Prosecutor Demands Files on Late-Term Abortion Patients*, N.Y. TIMES, Feb. 25, 2005, at A1.

7. Press Release, Kansas Attorney General Phill Kline, Statement by Attorney General Phill Kline in Response to a Call for Investigation of the Rape of Kansas Children (Feb. 24, 2005), *available at* http://www.accesskansas.org/ksag/Press/2005/0224childrenrape_statement.htm.

8. The case is still ongoing. A federal district court in Kansas ultimately agreed with the clinics and issued a narrow preliminary injunction against the mandatory reporting of consensual sexual activity of minors under the informational privacy theory, *Aid for Women v. Foulston*, 327 F. Supp. 2d 1273, 1294 (D. Kan. 2004), but denied the clinics' motion for summary judgment under the decisional privacy theory, *Aid for Women v. Foulston*, Case No. 03-1353-JTM, 2005 U.S. Dist. LEXIS 33057, at *11 (D. Kan. Dec. 14, 2005). Informational privacy and decisional privacy are discussed *infra* Part II. The Tenth Circuit vacated the preliminary injunction in January, *Aid for Women v. Foulston*, 441 F.3d 1101, 1121 (10th Cir. 2006), but the District Court issued a permanent injunction in April of 2006, *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1116 (D. Kan. 2006). Both parties have appealed.

9. *See* Wilgoren, *supra* note 6 (stating that the court record containing the subpoena was sealed).

10. David Klepper & Laura Bauer, *Inquisition Grabs National Spotlight*, KANSAS CITY STAR, Feb. 26, 2005, at B1. The Kansas Supreme Court unanimously ruled that the order requiring disclosure of unredacted patient files be withdrawn pending review of the legal arguments undergirding the Attorney General's request. Alpha Med. Clinic v. Hon. Richard Anderson, 128 P.3d 364, 379 (Kan. 2006). Any further subpoenas would require a protective order redacting patient-identifying information before the files are delivered to the judge. *Id.*

author of the *Child Predators* report, claims that the attorneys general of at least ten states have requested information from his organization about prosecuting clinics for child sexual abuse.[11] Because only abortion providers (and not adoption agencies, crisis pregnancy centers or other reproductive health care providers whose client populations often include adolescents) are being threatened with prosecution, the motive seems to be to intimidate women—especially minors—from obtaining abortion services by threatening that the government might learn their names.

The promise of confidentiality is a cornerstone of the reproductive health services that Planned Parenthood and other clinics provide to their patients.[12] Conversely, threats of public exposure have long been used by the more virulent pro-life factions to dissuade women from seeking abortion services.[13] Equally intimidating to patients is the possibility of a government official poring over the details of their sexual histories.[14]

Providers and pro-choice advocates have challenged this threatened disclosure of reproductive health records in a number of cases.[15] These plaintiffs have utilized legal theories ranging from the

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11. Laura McPhee, *Mark Crutcher's Obsession*, Nuvo.net, Mar. 30, 2005, http://www.nuvo.net/archive/2005/03/30/mark_crutchers_obsession.html (last visited Sept. 13, 2006). The Indiana Attorney General is also seeking medical records from 73 adolescent patients who obtained reproductive health services at Planned Parenthood clinics in Indiana. Michele McNeil, *Planned Parenthood, State Spar Over Files*, INDIANAPOLIS STAR, Mar. 15, 2005, at 1A.

12. *See, e.g.*, Planned Parenthood, *This is Planned Parenthood*, http://www.plannedparenthood.org/about-us/who-we-are/this-is-planned-parenthood.htm (last visited Oct. 3, 2006) ("Committed, professional staff . . . take time to talk with clients, encouraging them to ask questions and discuss their feelings in a confidential setting."); *see also* Open Letter from Karen Pearl, Interim President, Planned Parenthood Federation of America, to Planned Parenthood Clients (Feb. 25, 2003) (on file with the *Duke Law Journal*) (reassuring patients that "everyone who counts on Planned Parenthood can trust in the confidential care [they] provide.").

13. *See, e.g.*, Doe v. Mills, 536 N.W.2d 824, 827–28 (Mich. Ct. App. 1995) (describing the behavior of two defendants who collected information about women seeking abortions and stood at the entrance to a clinic with signs bearing the women's names); *see also* Yochi J. Dreazen, *In the Shadows: Photos of Women Who Get Abortions Go up on Internet*, WALL ST. J., May 28, 2002, at A1.

14. *See* Seth F. Kreimer, *Sunlight, Secrets and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 6 (1991) ("Even if formal prosecution of abortions remains beyond the constitutionally permitted power of the state, a health department official who is able to obtain and publish the names of women seeking abortions can exercise a deterrent almost as effective as prosecution.").

15. *See, e.g.*, Aid for Women v. Foulston, 327 F. Supp. 2d 1273, 1294 (D. Kan. 2004) (challenging the constitutionality of a reporting statute); Planned Parenthood of Greater Iowa, Inc., v. Iowa Dist. Ct., Buena Vista Cty., No. 02-1191 (Sept. 22, 2002) (seeking to prevent release

Fourth Amendment's prohibition against unlawful searches and seizures[16] to the Supreme Court's undue burden jurisprudence;[17] others have proposed bringing challenges instead under state or federal law.[18] It is the informational privacy prong of the Constitution's right to privacy, however, that may provide the best protection for clinics seeking to defend against these mandatory reporting statutes.

This Note argues that the Constitution's right to informational privacy protects minor abortion patients from having their medical records disclosed to government agencies under broadly interpreted child abuse reporting requirements. Part I provides a brief overview of state statutory-rape reporting requirements and describes the increasing politicization of those requirements in the abortion context. Part II discusses the Constitution's right to informational privacy, highlights the different approaches taken by the circuit courts to informational privacy jurisprudence, and outlines the prevailing balancing test approach. Part III explains how the right applies to statutory-rape reporting requirements and concludes that the informational privacy right must be extended to protect adolescents from release of their medical records. Although courts have hesitated to expand informational privacy, the potentially catastrophic effect on minors' access to basic reproductive health care and the constitutional guarantee that mature minor women be able to obtain confidential abortion services weigh heavily against permitting release of the records.

I. ABORTION POLITICS AND STATUTORY-RAPE REPORTING

Pro-life groups, including Life Dynamics, have capitalized on the political popularity of strong statutory-rape reporting requirements to

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of the records of all patients with positive pregnancy test results, which county officials claimed were necessary to investigate the death of an abandoned newborn).

16. *See* Tucson Women's Clinic v. Eden, 371 F.3d 1173, 1193 (9th Cir. 2004) (holding that a state regulation that allowed warrantless searches of abortion clinics at times when patients could be present violated the Fourth Amendment).

17. *See* Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 786–89 (9th Cir. 2002) (rejecting argument that possible loopholes in state judicial bypass procedure, which could allow for public disclosure of minors' identities, violated due process).

18. Recent Case, *District Court Grants Preliminary Injunction Against Enforcement of State Law Requiring Reporting of All Sexual Activity by Minors*—Aid for Women v. Foulston, 118 HARV. L. REV. 778, 784–85 (2004).

encourage legal prosecution of abortion providers.[19] During the nine-month preparation of the *Child Predators* report, Life Dynamics volunteers phoned Planned Parenthood and NAF member clinics across the country posing as a thirteen-year-old girl seeking an abortion in order to cover up a sexual relationship with her twenty-two-year-old boyfriend.[20] According to Life Dynamics, the responses from clinic staff varied. Some warned the caller that her "boyfriend" was committing a crime and could be prosecuted for statutory rape; some allegedly instructed the caller, once she had disclosed the age of her boyfriend, to call back for an appointment and not mention the age of her older partner.[21] The *Child Predators* report claimed that clinics had not only violated state laws by failing to comply with statutory-rape reporting requirements, but were also "participating in an ongoing or future crime" involving "actual complicity" in child sexual abuse by providing patients that they knew were sexually active with birth control.[22]

Other pro-life groups rushed to laud Crutcher's work. Wendy Wright of Concerned Women for America cited the *Child Predators* report as "clear evidence that those in the abortion industry have [no] . . . respect for the law," and encouraged local prosecutors to

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19. Life Dynamics' president, Mark Crutcher, has a long history of similar attempts to expose "the abortion industry" to legal prosecution. *See generally* Life Dynamics, *Help Abortion Clinic Workers*, http://www.lifedynamics.com/Abortion_Prolife/Abortion_Info/ (last visited Oct. 23, 2006) (detailing a Clinic Worker project that warns clinic staff of possible legal exposure as accomplices to certain crimes); Life Dynamics, *Spies for Life*, http://lifedynamics.com/Anti-Abortion_Prolife/Anti-Abortion_Clinics/ (last visited Oct. 23, 2006) (encouraging volunteers to send in "any dirt that you can dig up about any abortionist, abortion clinic, [or] clinic employee"). His results have been mixed.

In 2000, former tissue company employee Lawrence Dean Alberty, Jr. claimed to ABC News that body parts harvested from aborted fetuses were being sold at a profit to stem-cell researchers, in violation of the law. *See 20/20 Wednesday: Parts for Sale; People Make Thousands of Dollars off the Sale of Fetal Body Parts* (ABC News television broadcast Mar. 8, 2000) (transcript on file with author). Alberty acknowledged that he had been paid $10,000 by Life Dynamics to produce the video that ran on the program. *Id.* At a congressional hearing on March 9, subcommittee members confronted Alberty with an affidavit in which he had previously admitted that he knew of no instances in which the tissue was sold for profit. He then recanted much of his congressional testimony. Stacey Zolt, *Fetal Tissue Hearing Thrown Into Chaos*, ROLL CALL, Mar. 13, 2000.

20. CRUTCHER, *supra* note 3, at 3.

21. *Id.*; *see also* Audio Recording: Phone Call from Life Dynamics to Clinic in Colorado, *available at* http://www.childpredators.com/Clip8.m3u ("So what you need to do is call back . . . .").

22. CRUTCHER, *supra* note 3, at 6.

investigate clinics for evidence of crime.[23] Conservative Internet news outlets swiftly picked up the story, linking the alleged cover-up to the pedophilia scandals then rocking the Catholic Church, and urging criminal prosecution of clinics.[24] Clinic protestors in Lubbock, Texas phoned local police to report a statutory rape after watching two teenage girls enter an abortion clinic with their mothers.[25] Officers questioned the girls about their sexual partners but no charges were ever filed.[26]

The events that followed the *Child Predators* report were not the first to subject reproductive health clinics to public scrutiny for potential violations of child abuse and statutory-rape reporting requirements. A 1984 California Attorney General opinion interpreted that state's child abuse reporting statute to require "[a] report . . . when a child under age 14 receives medical attention for a sexually transmitted disease, for pregnancy or for abortion," regardless of whether the sexual activity was consensual.[27] Planned Parenthood challenged the opinion on the ground that it had a strong interest in providing confidential reproductive health care to the state's minors.[28] A state appellate court rejected the opinion as contrary to the intent of the legislature, noting the inconsistency between the interpretation and a state law allowing confidential access to reproductive health care for minors.[29] The fact that

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23. Press Release, Concerned Women for America, CWA Blasts Abortion Providers for Helping Sex Offenders Cover Their Crime (May 24, 2002), http://www.cwfa.org/articledisplay.asp?id=1540&department=MEDIA&categoryid=life) (last visited Oct. 10, 2006).

24. *See* Rusty Pugh, *Abortionists Implicated in Alleged Rape Coverup*, AGAPEPRESS, May 24, 2003, http://headlines.agapepress.org/archive/5/242002a.asp (last visited Oct. 10, 2006); *see also* Jon Dougherty, *Planned Parenthood Concealing Crimes?*, WORLDNETDAILY, May 21, 2002, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=27687 (last visited Oct. 10, 2006).

25. David Pasztor, *Abortion Foes Involve Police in New Tactic: Group's Linking of Child Abuse to Teen Pregnancy Alarms Rights Advocates*, AUSTIN AMERICAN-STATESMAN, Dec. 29, 2002, at A1. In a guide written for clinic protestors, Crutcher encourages volunteers to call the police when they see young-looking women enter an abortion clinic—in part because "for the owner of an abortion [clinic], having the police come into your waiting room a couple of times a day can't be too good for business." Mark Crutcher, *Eyewitness: Child Sexual Abuse and Abortion Clinics, a Guide for Sidewalk Counselors*, http://www.myfaith.com/EYEWITNESS--BOOK.pdf (last visited Oct. 23, 2006).

26. Pasztor, *supra* note 25.

27. 67 Op. Att'y Gen. Cal. 235 (1984), 1984 Cal. AG LEXIS 54, at *15.

28. Planned Parenthood Affiliates of Cal. v. Van de Kamp, 226 Cal. Rptr. 361, 363–64 (Cal. Ct. App. 1986).

29. *Id.* at 373–74.

California's state constitutional privacy guarantee is much broader than the federal one played a significant role in that case.[30]

Currently, every state has laws that regulate sexual intercourse with a minor under a certain age.[31] The phrase "statutory rape" does not generally appear in the criminal code;[32] the relevant statutes instead prohibit unlawful rape,[33] unlawful sexual intercourse,[34] or sexual assault.[35] Statutory rape statutes vary widely in scope and method; some criminalize all sexual activity with a minor below a certain age,[36] while others condition criminal liability on the difference in ages between the victim and the perpetrator.[37] Some states employ several different methods.[38] Suspected statutory rape violations may mandate that certain persons report the incident to the proper government authorities,[39] but reporting requirements vary widely.[40] In one-third of the states, reporting is required only when the abuser has direct responsibility for the care of the child.[41] Some

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30. Stephanie Bornstein, *The Undue Burden: Parental Notification Requirements for Publicly Funded Contraception*, 15 BERKELEY WOMEN'S L.J. 40, 71–72 (2000).

31. NOY S. DAVIS & JENNIFER TWOMBLY, AM. BAR ASS'N CTR. ON CHILDREN & THE LAW, STATE LEGISLATORS' HANDBOOK FOR STATUTORY RAPE ISSUES 1 (2000).

32. Chinué Turner Richardson & Cynthia Dailard, *Politicizing Statutory Rape Reporting Requirements: A Mounting Campaign?*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 2005, at 1, *available at* http://www.guttmacher.org/pubs/tgr/08/3/gr080301.pdf.

33. *See, e.g.*, DEL. CODE ANN. tit. 11, § 773(a) (2000) ("A person is guilty of rape . . . when . . . the victim has not yet reached his twelfth birthday.").

34. *See, e.g.*, CAL. PENAL CODE § 261.5(a) (West 2001) ("Unlawful sexual intercourse is an act of sexual intercourse accomplished with a . . . minor.").

35. *See, e.g.*, COLO. REV. STAT. ANN. §§ 18-3-402-(1)(d), (1)(f) (West 2001) (describing crime as "sexual assault" when victim is less than fifteen years of age and actor is at least four years older, or when victim is between fifteen and seventeen years of age and actor is at least ten years older).

36. *See* S.C. CODE ANN. § 16-3-655 (2002) (defining criminal sexual conduct in the first degree as sexual battery with a victim less than eleven years old).

37. *See* PA. CONS. STAT. ANN. § 3122.1 (West 2001) (criminalizing sexual intercourse with a victim under the age of sixteen when the person is four or more years older than the victim).

38. *See* MO. REV. STAT. §§ 566.032, 566.034 (West 2002) (classifying statutory rape as occurring when the victim is less than fourteen years old or if the victim is younger than seventeen and the perpetrator is twenty-one or older).

39. All states include sexual abuse in the list of forms of abuse that must be reported, but not every state's definition includes statutory rape. Abigail English & Catherine Teare, *Statutory Rape Enforcement and Child Abuse Reporting: Effects on Health Care Access for Adolescents*, 50 DEPAUL L. REV. 827, 838–39 (2001).

40. ASAPH GLOSSER ET AL., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 10 (2004), *available at* http://www.lewin.com/Lewin_Publications/Human_Services/StateLawsReport.htm.

41. *Id.*

state statutes specify that the reporter must have evidence or suspicion that a child has been injured or harmed by the sexual activity, and others provide a measure of discretion to the health care provider.[42] Statutorily mandated reporters usually include educational officials, law enforcement officials, social workers, and child and health care providers.[43] The report is generally not made directly to law enforcement, but rather to Child Protective Services or a similar state agency.[44]

The 1990s brought increasing levels of legal and political attention to the criminalization of statutory rape.[45] In 1995, a study released in *Family Planning Perspectives* indicated that nearly two-thirds of teenage mothers had partners who were at least twenty years old.[46] The subsequent media attention attributed the supposed epidemic of teenage pregnancy to predatory older men;[47] policymakers rushed to action. Congress, for example, responded with provisions of the Personal Responsibility and Work Opportunity

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42. Connecticut takes the first approach; a 2002 Attorney General opinion does not require reporting of sexual activity of adolescents under the age of consent but older than thirteen unless some other evidence of abuse exists. Conn. Op. Att'y Gen., No. 2002-149, 2002 Conn. AG LEXIS 33, at *15 (Sept. 30, 2002), *cited in* GLOSSER, *supra* note 40, at 12; *see also* LA. CHILD. CODE ANN. art. 609(a)(1) (2001) (requiring report when mandatory reporter has reasonable cause to believe that the child's physical or mental health is endangered as a result of abuse or neglect), *cited in* English & Teare, *supra* note 39, at 851. One state, Wisconsin, includes statutory rape on the list of reportable forms of child abuse, but exempts certain providers of health care to adolescents from the requirements. *Id.* at 851–52.

43. Child Welfare Information Gateway, Mandatory Reporters of Child Abuse and Neglect, http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf (last visited Oct. 10, 2006).

44. *Id.*

45. *See generally* Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463 (2000). Ongoing debates over teen pregnancy and welfare reform, in concert with stricter societal attitudes towards crime, made the mid-1990s an especially fertile period for statutory rape reform and resurgence. English & Teare, *supra* note 39, at 828.

46. David Landry & Jacqueline Darroch Forrest, *How Old are U.S. Fathers?*, FAM. PLAN. PERSP., July–Aug. 1995, at 159, 160. Mark Crutcher cited this study and others in the *Child Predators* report as evidence for his argument that "men who prey on underage girls" are the "driving force behind this tragedy." CRUTCHER, *supra* note 3, at 1.

47. *See generally* Elizabeth Hollenberg, Note, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y. REV. 267 (1999) (arguing that the "new narrative" of teenage mother as sexual abuse victim led to a misplaced emphasis on statutory rape, as opposed to education or public health measures, as means of combating teen pregnancies).

Reconciliation Act of 1994;[48] that legislation called for additional prosecution of statutory rape on the state level, and mandated studies on the number of teen pregnancies that resulted from sexual activity with older partners.[49] Changes to the Child Abuse Prevention and Treatment Act, the federal law that sets the minimum standard for state definitions of child abuse,[50] amended the definition of sexual abuse to include certain types of statutory rape—notably, those involving family members or caretaker relationships.[51]

Significant state activity followed the federal lead. Tennessee, which had previously required reporting of statutory rape when the child was younger than thirteen, raised the mandatory reporting age to fifteen.[52] California amended its reporting requirements to include sexual acts between minors under age sixteen and adults over twenty-one.[53] A survey conducted by the American Bar Association's Center on Children and the Law noted that between 1995 and 1997, two other states—Tennessee and Virginia—considered, but did not enact, legislation that would have included statutory rape within the mandatory child abuse reporting laws.[54]

Studies show that stricter statutory rape laws and reporting requirements are not an effective weapon against increased teen pregnancy rates.[55] The method, however, continues to be politically popular. In 2004, the U.S. Department of Health and Human Services

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48. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in sections of 8 and 42 U.S.C.) (2000).

49. 42 U.S.C. § 14016(b)(1)-(2) (2000).

50. Child Welfare Information Gateway, What is Child Abuse and Neglect?, http://www.childwelfare.gov/pubs/factsheets/whatiscan.pdf (last visited Oct. 10, 2006).

51. English & Teare, *supra* note 39, at 837–38. The authors argue that the inclusion of only certain types of rape indicates that the federal government does not believe all forms of statutory rape constitute child abuse. *Id.*

52. DAVIS & TWOMBLY, *supra* note 31, at 3.

53. Assemb. B. 327, 1997-1998 Reg. Sess. (Cal. 1997), *cited in* Hollenberg, *supra* note 47, at 275.

54. DAVIS & TWOMBLY, *supra* note 31, at 4.

55. *See* Luisa Franzini, *Projected Economic Costs Due to Health Consequences of Teenagers' Loss of Confidentiality in Obtaining Reproductive Health Services in Texas*, 158 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 1140, 1141 (2004) (predicting that changes in Texas law that reduced confidentiality of care would actually result in an increase in teen births); *see also* Patricia Donovan, *Can Statutory Rape Laws be Effective in Preventing Adolescent Pregnancy?*, FAM. PLAN. PERSP., Jan.–Feb. 1997, at 34 (noting that older man-young girl relationships account for only a small fraction of teenage births).

sponsored a conference on the sexual exploitation of teenagers.[56] One panel focused exclusively on state responses to statutory rape,[57] and Kansas Attorney General Kline discussed his efforts to expand reporting requirements in his state.[58] In June 2003, Kline drafted an opinion letter reinterpreting the state's child abuse reporting statute.[59] Under Kline's letter, illegal sexual activity by or with an adolescent under age 16 was de facto injurious and had to be reported to government officials.[60] On behalf of several clinics, the Center for Reproductive Rights, a pro-choice legal organization, filed a lawsuit challenging the Attorney General's opinion as violating adolescents' right to informational privacy.[61]

Two years after the revised opinion, Kline announced that his office had requested the release of the medical records of ninety women who had received abortions in 2003;[62] Kline claimed that he needed the records to look for evidence of child abuse. In response to the news, Planned Parenthood Federation of America issued an open letter to Planned Parenthood clients, reassuring them of the organization's commitment to medical privacy.[63] Shortly after Kline's subpoenas came to light, Planned Parenthood of Indiana reported that an agent of the Indiana Medicaid Fraud Unit had entered three Planned Parenthood health centers in the state and seized the records of eight Medicaid patients.[64] Indiana Attorney General Steve Carter,

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56. Press Release, U.S. Dep't of Justice, OJJPD Announces Conference on Sexual Exploitation of Teens (Mar. 8, 2005) (on file with the *Duke Law Journal*).

57. Transcripts, State Laws and Legal Issues, Conference on Sexual Exploitation of Teens, U.S. Dept. of Health and Human Services (Mar. 23, 2005), http://www.cademedia.com/archives/mchb/owh/protectingteens/transcripts/3b.htm (last visited Oct. 10, 2006).

58. Transcript, Presentation of Kansas Attorney General Phill Kline on State Laws and Legal Strategies, Conference on Sexual Exploitation of Teens, U.S. Dept. of Health & Human Services (Mar. 23, 2005), http://www.cademedia.com/archives/mchb/owh/protectingteens/transcripts/3b.htm (last visited Oct. 10, 2006).

59. The Kansas statute requires state-mandated reporters, including persons "licensed to practice the healing arts," KAN. STAT. ANN. § 38-1522(a) (West 2005), to report to government officials whenever they have reason "to suspect that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse."

60. Kan. Atty. Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS at *2–3 (June 18, 2003).

61. Aid for Women v. Foulston, 427 F. Supp. 2d 1093, 1099 (D. Kan. 2006) (noting that the Attorney General's opinion was a departure from previous constructions of the reporting statute by former attorneys general, who had interpreted the law to mean that illegal sexual activity may be, but is not inherently, injurious).

62. Press Release, Statement of Attorney General Phill Kline, *supra* note 7.

63. *See* Open Letter from Karen Pearl, *supra* note 12 ("Planned Parenthood unequivocally stands in defense of the privacy of the medical records of our clients.").

64. McNeil, *supra* note 11.

claiming to be acting under his office's authority to investigate fraud, patient abuse and neglect, later requested the files of an additional seventy-three patients, all Medicaid recipients under the age of fourteen.[65] Planned Parenthood sued to block the release.[66]

II. INFORMATIONAL PRIVACY

The Supreme Court recognizes that the constitutional right to privacy encompasses a protection against the disclosure of the intimate details of private life. This protection extends naturally to medical records and may be retained even in the face of a state's attempt to obtain the information. Indeed, the first discussion of an informational privacy right occurred in the context of a state attempt, driven by public policy concerns about drug abuse, to collect private medical information. Most of the courts to examine the informational privacy right balance a number of factors, including the nature of the government interest in the information and the level of sensitivity of the private information.

It breaks no new ground to note that the United States Constitution does not contain an explicit right to privacy.[67] The existence of such a right was first discussed in a seminal article authored by Samuel Warren and Louis Brandeis.[68] The Court's first recognition of the constitutional right to privacy came in *Griswold v. Connecticut*,[69] striking down a Connecticut statute that prohibited the sale or use of contraceptives.[70] Justice William Douglas placed the marital relationship "within the zone of privacy created by several fundamental constitutional guarantees,"[71] among them the Fourth Amendment's prohibition on unreasonable searches and seizures, and the Fifth Amendment's protection against self-incrimination.[72] Seven

65. Monica Davey, *Planned Parenthood Sues Over Records Request in Indiana*, N.Y. TIMES, Mar. 17, 2005, at A27.

66. *Id.* Planned Parenthood's motion for a preliminary injunction was denied at the trial level but granted by the Court of Appeals. Planned Parenthood of Indiana v. Carter, 854 N.E.2d 853, 883 (Ind. Ct. App. 2006).

67. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 695 (2001).

68. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Brandeis later famously opined that the right to privacy was "the right to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting).

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

70. *Id.*

71. *Id.* at 485.

72. *Id.* at 484–85.

years later, the Court redefined the *Griswold* right—from preventing intrusion in the marital relationship to a much broader right to reproductive autonomy—in *Eisenstadt v. Baird*.[73] Reflecting but not explicitly recognizing the shift, Brennan wrote that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[74]

The constitutional right to privacy encompasses not only the right to freely make autonomous decisions regarding private matters, but also the right to keep the intimate details of those private matters—and decisions—confidential.[75] In *Whalen v. Roe*,[76] the Court upheld a New York law requiring physicians to record the names, ages, and addresses of all patients for whom prescriptions for certain drugs had been written.[77] The records were kept on file with the state Department of Health for five years and then destroyed, and the room in which they were held was secured by a locked fence and alarm system.[78] Public disclosure of a patient's identity was expressly prohibited by state statute.[79]

The doctors (and their patients) had argued that the threat of unwarranted disclosure of private information would dissuade some patients from seeking medical care.[80] The Court rebuffed the argument that this was sufficient to nullify the statute and, by extension, rejected the idea that the state law had deprived any patient of the right to make independent decisions.[81] The Court noted that the state had neither entirely prohibited the use of the drugs, nor conditioned access on third-party consent: "[T]he decision to prescribe, or to use, is left entirely to the physician and the patient."[82]

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73. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

74. *Id.*

75. The second form of the right involves the "right of an individual not to have his private affairs made public by the government." Whalen v. Roe, 429 U.S. 589, 599 n.24 (1977) (quoting Phillip Kurland, *The Private I*, U. CHI. MAG., Autumn 1976, at 7, 8).

76. Whalen v. Roe, 429 U.S. 589 (1977).

77. *Id.* at 591.

78. *Id.* at 593–94.

79. *Id.*

80. *Id.* at 600.

81. *Id.* at 602–03.

82. *Id.* at 603.

Writing for the majority, Justice Stevens seemed to agree that there was a second prong to the privacy right: the right of the patients to keep their medical information confidential. Noting that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests," Stevens went on to describe one of the interests as "the individual interest in avoiding disclosure of personal matters."[83] This right could conceivably have been implicated by the New York law, but no constitutional rights were violated by the factual circumstances presented in the case.[84] Stevens went on to write that the statute at issue and other state confidentiality provisions provided enough assurance that patient records would not be disclosed to the public.[85] The mere possibility of an unwarranted disclosure, either by the Department of Health or during the course of judicial or administrative proceedings against a doctor, was not enough to void the statute.[86] In a concurring opinion, Justice Brennan noted explicitly that a "[b]road dissemination" by state officials of private medical information would "clearly implicate constitutionally protected privacy rights," and argued that only a compelling state interest would justify such dissemination.[87]

The Court again examined the right to keep private information confidential later that same year, when it rejected a challenge by former president Richard Nixon to a federal statute requiring national archivists to examine presidential information.[88] The Court's decision was the culmination of a battle between the former president and Congress over the ownership of 42 million pages of documents and 880 tape recordings from Nixon's time in office.[89] The Presidential Recordings and Materials Preservation Act[90] specifically provided for the return of any communications of a purely personal nature.[91] Nixon did not deny the public interest inherent in the vast

83. *Id.* at 598–99.

84. *See id.* at 605 ("Recognizing that in some circumstances [the duty of the government to avoid unwarranted disclosures of private information] arguably has its roots in the Constitution . . . .").

85. *Id.* at 601–02.

86. *Id.*

87. *Id.* at 606 (Brennan, J., concurring).

88. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457–59 (1977).

89. *Id.* at 430–31.

90. Presidential Recordings and Materials Preservation Act of 1974, Pub. L. No. 93-526, 88 Stat. 1695 (codified as amended in scattered sections of 44 U.S.C.).

91. Presidential Recordings and Materials Preservation Act of 1974 § 104(a)(7).

majority of the documents, which he agreed were related to his government service. Rather, he argued that his privacy interests would be violated by the process of screening the "extremely private communications between him and . . . his wife, his daughters, his physician, lawyer, and clergyman, and his close friends"[92] from the majority of documents dealing with his government service.[93]

In upholding the Act, the Court recognized that the former president had a "legitimate expectation of privacy in [his personal communications]."[94] The Court, however, weighed that privacy interest against the government's interest in obtaining the materials, and found the privacy interest wanting. On the intrusion side, the Court considered the archivists' "unblemished" record for examining sensitive personal materials,[95] and the difficulty in separating the small number of potentially personal materials from the "42 million pages of documents and 880 tape recordings" that the statute would require the Administration to turn over.[96] The Court again cited the many specific statutory protections against unwarranted disclosure of the information contained in the Act; the Act provided for regulations to prevent dissemination and stipulated that any purely private information would be returned to the government official.[97] Perhaps not surprisingly, the Court held that the government interest in obtaining the information overwhelmed what was a minimal privacy intrusion.[98] Even the President conceded that many of the materials to be turned over had been prepared by his staff, and much of it he had not even seen.[99]

The Supreme Court has not always been clear, however, when determining the requisite level of confidentiality that should attend the provision of abortion services. In one pre-*Whalen* case upholding a state requirement that physicians compile information on the number of abortions they performed, the Court noted that recordkeeping provisions that were "reasonably directed to the

92. Nixon v. Adm'r of Gen. Servs., 408 F. Supp. 321, 359 (D.D.C. 1976).

93. *Nixon*, 433 U.S. at 456.

94. *Id.* at 458. The majority noted that "when Government intervention is at stake," even public officials retain constitutionally protected privacy rights in personal matters unrelated to their status as public figures. *Id.* at 457.

95. *Id.* at 452.

96. *Id.* at 449.

97. *Id.* at 450.

98. *Id.* at 465.

99. *Id.* at 459.

preservation of maternal health and that properly respect[ed] a patient's confidentiality and privacy" were permissible.[100] Under the then-prevailing strict scrutiny test articulated in *Roe v. Wade*,[101] the Court focused only on whether the state's compelling interest in the preservation of maternal health outweighed any negative impact on a woman's autonomous abortion decision or the physician-patient relationship.[102] Seeing no "legally significant" impact, the majority concluded that, though Missouri's statute "approach[ed] impermissible limits," it did not exceed them.[103]

The confidentiality prong of the privacy right explicitly entered the Court's abortion jurisprudence in a muddled fashion two years after *Whalen*. In a four-Justice concurrence, Justice Stevens articulated his belief that essential to the privacy right was the ability to exercise the right "without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."[104] Stevens seemed to conflate the autonomy and confidentiality prongs of the privacy right in exactly the manner that the *Whalen* majority had rejected. In other words, the fact that the informational privacy right had been violated (making the abortion decision a public one) made it more likely that the autonomy right would be violated (ensuing public pressure would make women less able to freely make the abortion decision).

A somewhat clearer picture emerged in 1986, when the Court struck down Pennsylvania's Abortion Control Act.[105] Section 3214 of the Act imposed certain reporting requirements on abortion providers: first, that they forward to the state a detailed individual report on each abortion they had performed, including the physician's name and the name of the facility where the abortion was performed, the woman's age, race, marital status and number of prior pregnancies, her political subdivision and state of residence, and method of payment;[106] second, the physician was required to sign the

100. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 80 (1976).

101. Roe v. Wade, 410 U.S. 113 (1973).

102. *Danforth*, 428 U.S. at 80.

103. *Id.* In so concluding, the Court relied heavily on the ability of Missouri to protect its citizens' private information. *See id.* at 81 ("The added requirements for confidentiality [contained in the statute] . . . assist and persuade us in our determination of the constitutional limits.").

104. Bellotti v. Baird, 443 U.S. 622, 655 (1979) (Stevens, J., concurring).

105. Thornburgh v. Am. Coll. Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

106. *Id.* at 765.

report.[107] After a "unique identifying number" was substituted for the physician's name (the name of the facility was left unredacted), the entire report was to be made available to the public[108] within fifteen days of receipt.[109]

The combination of the vast amount of information collected and that information's availability to the public was sufficient to overcome the state's assertion that it had a compelling interest in keeping the records.[110] It was of no consequence that the statute explicitly deemed the collected data not to be "public record[]."[111] Moreover, because the Pennsylvania law required such seemingly unrelated data as the method of payment and the woman's personal history, it went far beyond the statistical use condoned in *Danforth*.[112]

In reaching the decision, the Court seemed to rely on the reasoning rejected in *Whalen*, stating that the threat of public disclosure and the resultant "chilling" effect on a patient's behavior were enough to reject the statute:

> We note, as we reach this conclusion, that . . . Pennsylvania's reporting requirements raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy. Thus, they pose an unacceptable danger of deterring the exercise of that right, and must be invalidated.[113]

No explicit mention was made of the confidentiality prong of the right to privacy, however.

Any excitement advocates may have felt at this apparent acknowledgement that a threat of disclosure implicated the autonomy prong of the privacy right, however, was short lived. A later challenge, again to Pennsylvania's Abortion Control Act, replaced the strict scrutiny analysis established in *Roe* with the undue burden

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107. *Id.*

108. Brief for Planned Parenthood Federation of America, Inc., et al. as Amici Curiae Supporting Appellees at 19, *Thornburgh*, 476 U.S. 747 (No. 84-495).

109. *Thornburgh*, 476 U.S. at 765.

110. *Id.* at 766–68.

111. *Id.* at 766.

112. *Id.* at 765–66.

113. *Id.* at 767–68. The Court cited as precedent a long line of First Amendment cases that had "refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities." *Id.* at 767.

standard first propounded by Justice Sandra Day O'Connor.[114] *Planned Parenthood of Southeastern Pennsylvania v. Casey*[115] upheld Pennsylvania's narrow "medical emergency" definition, the requirement that a physician deliver a state-drafted speech acknowledging the alternatives to and risks of the abortion procedure, and a twenty-four-hour waiting period, but struck down the statute's requirement that married women notify their husbands before obtaining an abortion.[116] The relegation of the abortion right from a fundamental one requiring strict scrutiny to a much more tenuous right opened the floodgates to various state restrictions on abortion access.[117]

The circuit courts of appeal have split on whether the Constitution protects a constitutional right against the disclosure of private information, though the majority recognize some protection.[118] Most of those agree that the right is not one that provides extensive

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114. City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 464 (O'Connor, J., dissenting) (describing the proper test for invalidating abortion restrictions as involving "absolute obstacles or severe limitations on the abortion decision.").

115. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

116. *Id.*

117. *See generally* Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675 (2004).

118. The right is recognized in the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See In re* Crawford, 194 F.3d 954, 958 (9th Cir. 1999) ("We have observed that the relevant Supreme Court precedents delineate at least two distant kinds of constitutionally-protected privacy interests . . . ."); Anderson v. Romero, 72 F.3d 518, 522 (7th Cir. 1995) ("The existence of the [constitutional] right . . . has been expressly rejected by the Sixth Circuit . . . . [b]ut it is recognized by our court and was in 1992."); James v. City of Douglas, 941 F.2d 1539, 1543 (11th Cir. 1991) ("This court's predecessor, in a series of cases decided after *Whalen*, began to flesh out the parameters of the individual's interest in avoiding disclosure of personal matters."); Daury v. Smith, 842 F.2d 9, 13 (1st Cir. 1988) ("That a person has a constitutional right to privacy is now well established. Such right includes 'the individual interest in avoiding disclosure of personal matters . . . .'" (citations omitted)); Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983) ("Most courts considering the question . . . appear to agree that privacy of personal matters is a protected interest."); Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 435 (10th Cir. 1981) ("The Association defines this right to privacy as a right to confidentiality. It is, specifically, a right to prevent disclosure of *personal* matters."); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) ("The privacy interest asserted in this case falls within the first category referred to in *Whalen v. Roe*, the right not to have an individual's private affairs made public by the government."); Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. Unit B 1978) ("The first strand [of the privacy right], described by this circuit as 'the right to confidentiality,' is broader in some respects [than the autonomy strand]." (citation omitted)).

protection.[119] The three circuits[120] that have rejected attempts to infer a specific right to informational privacy cite the lack of a clear mandate from the Supreme Court.[121] Courts in these circuits generally examine the challenged regulations and statutes under rational basis review, upholding them unless the alleged privacy right implicates a fundamental interest.[122]

The circuits that recognize the informational privacy right have employed a similar balancing test to that described in *Nixon* to determine whether a state intrusion into personal information is warranted.[123] Balancing tests are notoriously difficult to administer in this context.[124] Generally, as in *Nixon*, courts give weight to the government's interest in obtaining the information and the protections the statute or regulation provides against unauthorized public disclosure. The type of personal information is given special

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119. *See* Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451, 497 (1995) (arguing that any articulated government interest, when combined with "reasonable" security measures, is enough to uphold information collection).

120. The Sixth, Eighth, and District of Columbia Circuits do not recognize a constitutional right to informational privacy.

121. *See* J.P. v. DeSanti, 653 F.2d 1080, 1089 (6th Cir. 1981) ("[W]e are unable to see how such a constitutional right of privacy can be restricted to anything less than the general 'right to be let alone.'" (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928))*; see also* Am. Fed'n Gov't Employees v. Dep't of Hous. & Urban Dev., 118 F.3d 786, 791 (D.C. Cir. 1997) ("The Supreme Court has addressed the issue in recurring dicta without, we believe, resolving it.").

122. *See, e.g.*, Jarvis v. Wellman, 52 F.3d 125, 126 (6th Cir. 1995) ("'[T]he Constitution does not encompass a general right to nondisclosure of private information.' . . . Only when 'fundamental' rights are implicated does a privacy concern take on constitutional dimensions."). In so holding, the Sixth Circuit relied upon language from a precursor case to *Whalen*. *See J.P.*, 653 F.2d at 1088 ("The Court recognized that 'zones of privacy may be created by more specific constitutional guarantees' . . . [but] 'personal rights found in the guarantee of personal privacy must be limited to those which are fundamental or implicit in the concept of ordered liberty.'" (quoting Paul v. Davis, 424 U.S. 693, 713 (1976) (internal quotation marks omitted))). Some commentators believe this reliance is misguided. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15–16, at 1398 (2d ed. 1988) (*cited in* Frances S. Chilapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 149 (1991).

123. *See, e.g.*, *Barry*, 712 F.2d at 1559 (noting that most courts agree that "some form of . . . balancing approach is appropriate as a standard of review. The Supreme Court itself appeared to use a balancing test . . . ." (citation omitted)). Some courts have prefaced the balancing with a discussion of whether the individual had a reasonable expectation of privacy; courts are generally unanimous that an individual has such an expectation about his sexual affairs and physical and mental health. Deborah A. Ausburn, *Circling the Wagons: Informational Privacy and Family Testimonial Privilege*, 20 GA. L. REV. 173, 203–04 (1985).

124. *See* Doe v. Att'y Gen. of the U.S., 941 F.2d 780, 797 (9th Cir. 1991) (noting that balancing the right to confidentiality against the need for disclosure was "difficult").

consideration; where the information is medical in nature, special considerations apply.[125]

Of the courts to approach this problem, the clearest elucidation of the factors to consider came from the Third Circuit shortly after the *Whalen* decision, in *United States v. Westinghouse Electric Corp.*[126] The case involved a union complaint to the National Institute for Occupational Safety and Health (NIOSH) that workers at the Westinghouse factory were having an allergic reaction to a chemical produced there.[127] NIOSH launched an investigation and issued a subpoena duces tecum of the medical records of "all employees presently employed" in the area of the factory where the chemical was being manufactured.[128]

In allowing NIOSH to proceed with the subpoena, the Third Circuit considered seven factors to be examined in determining whether to allow government access to individual records: the type of record requested; the information it contained; the potential for harm to the individual should an unauthorized disclosure occur; the injury that such disclosure would cause to the relationship in which the record was developed; the adequacy of safeguards to prevent unwarranted disclosure; the degree of need for access; and whether there was an "express statutory mandate, articulated public policy, or other recognizable public interest militating toward access."[129]

The *Westinghouse* factors delineate a clear framework for examining whether a government action constitutes a violation of informational privacy; several other circuits have either explicitly or implicitly discussed these factors when determining whether a government intrusion is warranted.[130]

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125. In processing a labor grievance, the National Labor Relations Board sought access to certain employees' scores in psychological aptitude tests. Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979). The Supreme Court denied the request, stating that the NLRB had cited "no principle of national labor policy" that would warrant the violation of the employees' interest in confidentiality. *Id.* at 315.

126. United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980). The framework introduced in this case has been incorporated into the informational privacy jurisprudence of other circuits. *See* Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 790 (9th Cir. 2002) (listing *Westinghouse* factors).

127. *Westinghouse*, 638 F.2d at 572.

128. *Id.*

129. *Id.* at 578.

130. *See, e.g.*, Denius v. Dunlap, 209 F.3d 944, 956 n.7 (7th Cir. 2000) (noting that a "number of our sister circuits have adopted a variation of the balancing test articulated by the Third Circuit [in *Westinghouse*]").

III. APPLICATION OF THE BALANCING TEST

The nature of the information being sought in the clinics' case, along with the potential for harm and increasing public pressure surrounding medical records, all weigh in favor of extending the informational privacy right to protect the reproductive health information of minors. Most crucially, seizure of the medical files of minor patients is unlikely to advance the state's interest in investigating potential child sexual abuse because the information contained therein would identify neither the nature of the sexual relationship nor the age of the minor's partner.

The circuit courts are divided over the level of state interest required to overcome a patient's confidentiality right. Some hold that a legitimate state interest is sufficient,[131] others require a compelling state interest,[132] and still others apply some form of intermediate scrutiny.[133] Regardless, broadly interpreted disclosure requirements for minors' sexual activity do not serve even a legitimate state interest, because obtaining abortion records is not likely to lead to state prosecution of statutory rapists, much less the protection of minor women from sexual abuse.

It is true that states have a compelling interest in investigating and reducing crime.[134] The information that the state purportedly seeks, however—the admission by a minor that her sexual partner is substantially older, the identity of the sexual partner, and the circumstances of the sexual relationship—is unlikely to be contained in her health record.[135] Moreover, in states where the definition of

131. *See, e.g.*, Daury v. Smith, 842 F.2d 9, 14 (1st Cir. 1988) (holding that there was a legitimate public interest in providing a safe and healthy educational environment, and that interest was sufficient to sustain school district's requirement that a teacher see a psychiatrist).

132. *See, e.g.*, Denver Policemen's Prot. Ass'n v. Lichtenstein, 660 F.2d 432, 436 (10th Cir. 1981) (holding that ascertainment of the truth and defendant's right to exculpatory material constituted compelling state interests sufficient to overcome police association's privacy interest in personnel files).

133. *See, e.g.*, Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983) ("[A]n intermediate standard of review seems in keeping both with the Supreme Court's reluctance to recognize new fundamental interests [that would require strict scrutiny review] . . . and the Court's recognition that some form of scrutiny beyond rational relation is necessary to safeguard the confidentiality interest.").

134. *See* Branzburg v. Hayes, 408 U.S. 665, 700–01 (1972) ("[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen. . . .").

135. *Cf. id.* (holding that the grand juries did not abuse their discretion because they did not "attempt to invade protected First Amendment rights by forcing wholesale disclosure of names

statutory rape depends on the disparity in ages between sexual partners, the information required to determine that a crime had even occurred—let alone sufficient information to identify the perpetrator—would not be contained in the minor's medical record.

It is also undisputed that the state has an interest in protecting minors from injury caused by sexual abuse, and that the state's compelling interest extends to the investigation of possible injury. To that end, the ability of the state to screen reports of abuse is helpful to determining whether a history of abuse exists.[136] Because the health services of most states decline to investigate consensual sex between two minors of similar age,[137] however, many patients whose records are disclosed to the government agency will not ultimately be the subject of investigations. Where there is no reason to suspect abuse, as in the case of consensual sexual activity between age-mates, disclosure of the minor's medical information will come for no reason.

Several factors hint that public policies on the state and federal level may actually argue against access. First, public concern over the accessibility of health records has led to increasing efforts on the federal and state level to protect medical information.[138] The Health Insurance Portability and Accountability Act protects the privacy of personally identifying medical information retained by health care providers.[139] Nearly every state provides some protection for data which the state collects for public health purposes, and most states—though not all—have enshrined the provider-patient privilege in statute.[140] The Third Circuit examined the then-nascent privacy movement in elucidating its *Westinghouse* test, citing the 1974 Privacy

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and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed . . . .").

136. Aid for Women v. Foulston, 327 F. Supp. 2d 1273, 1287 (D. Kan. 2004).

137. For example, Kansas Social and Rehabilitation Services states that it does not pursue reports of "[m]utual sexual exploration of age-mates (no force, power differential, or incest issues)," because such "[r]eport[s] concern[] 'lifestyle' issues that do not directly harm a child." KAN. SOC. & REHABILITATION SERVS., CHILDREN AND FAMILY SERVICES POLICY AND PROCEDURE MANUAL § 1361(B) (2006), *available at* http://www.srskansas.org/CFS/cfp_manuals/ppmepmanuals/ppm_manual/PPM%20Sections%20Jan%2006/SECTION%201000.htm.

138. Lawrence O. Gostin et al., *The Nationalization of Health Information Privacy Protections*, 37 TORT TRIAL & INS. PRAC. L.J. 1113, 1113 (2002).

139. Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of U.S.C.).

140. Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL'Y L. & ETHICS 327, 335–36 (2002).

Act, a specific exemption in the Freedom of Information Act for medical files, and the requirement in the Federal Rules of Civil Procedures that movants requesting discovery of medical records or reports face a higher burden of need than those requesting other records.[141]

Other federal and state statutes specifically recognize the importance of confidentiality in the provision of health care to adolescents. Title X of the Public Health Service Act and the federal Medicaid statute both authorize confidential access to family planning services for minors.[142] Currently, every state allows minors to consent on their own to testing of, and treatment for, sexually transmitted diseases.[143] Some states have similar laws regarding mental health services and substance abuse treatment, and more than twenty currently allow minors to consent to contraceptive services.[144]

Though the "right to privacy in connection with decisions affecting procreation extends to minors as well as to adults,"[145] states may go further in regulating access to abortion for minors—and most do.[146] Indeed, legislators and courts have been restricting the decisional-privacy rights of minors for nearly as long as the right has been recognized.[147] In the context of the judicial bypass process, however, the Supreme Court has repeatedly stressed the importance of confidentiality.[148] Some courts have recognized that minors have a right to informational privacy similar to, if not entirely coextensive with, that of adults.[149] Although complete anonymity is not required, when adolescents seek abortion services the state must at least

141. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980).

142. Cynthia Dailard & Chinué Turner Richardson, *Teenagers' Access to Confidential Reproductive Health Services*, GUTTMACHER REP. ON PUB. POL'Y 7–8 (2003), *available at* http://www.guttmacher.org/pubs/tgr/08/4/gr080406.pdf.

143. *Id.*

144. *Id.*

145. Carey v. Population Serv. Int'l, 431 U.S. 678, 693 (1977).

146. As of June 2006, forty-four states had enacted laws mandating some sort of parental involvement (either consent or notice) before a minor can obtain abortion services, though several of those statutes are either permanently enjoined or currently being challenged. Center for Reproductive Rights, Restrictions on Young Women's Access to Abortion Services, http://www.crlp.org/pub_fac_restrictions.html (last visited Oct. 25, 2006).

147. *See* Bellotti v. Baird, 443 U.S. 622, 638 (1979) ("[P]arental authority is not inconsistent with our tradition of individual liberty.").

148. *Id.* at 643–44 ("The [judicial bypass process] must assure that a resolution of the issue, and any appeals that follow, will be completed with anonymity. . . .").

149. Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 789–90 (9th Cir. 2002).

employ "reasonable steps to prevent the public from learning of the minor's identity."[150]

The Supreme Court has noted that patients have a heightened expectation of privacy over their medical information,[151] and that patients may be protected from disclosure of the results of medical tests even if those tests might reveal illegal activity.[152] Society accepts medical matters as private issues to which the informational privacy right applies,[153] and the type of personal information contained in a medical record may affect the level of privacy protection it receives.[154] The medical records of abortion patients contain some of the most private, intimate details of patients' lives, such as medical history, number of previous abortions, and the type of procedure the patient is obtaining;[155] medical records link this information to a patient's name, address, and date of birth. Patients have a very strong expectation of privacy in those records—an expectation that the medical information contained therein will be withheld not only from the public at large but also from the government.[156]

Certainly the medical field in general has a long "history of respect towards the recognized need for privacy in the doctor-patient relationship."[157] The doctor-patient relationship is built on trust; patients feel free to confide in their doctors because they know that their doctor will not reveal medical information to a third party. The breakdown of that implicit promise would undoubtedly cause adolescents to withhold relevant medical information from their

150. Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 513 (1990).

151. Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001).

152. *Id.* at 68.

153. *See* Denius v. Dunlap, 209 F.3d 944, 956 (7th Cir. 2000) (declaring that in the Seventh Circuit the right to confidentiality "clearly covers medical records and communications" (citations omitted)); *see also* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (noting that medical records "are well within the ambit of materials entitled to privacy protection").

154. For example, information deemed "sensitive" may merit higher protection. *See* Bloch v. Ribar, 156 F.3d 673, 685–87 (6th Cir. 1998) (holding that details of a rape are sensitive and a rape victim should be accorded broader confidentiality right). Other courts have explicitly included sexual information within the realm of sensitive personal information to which the privacy right applies. *See* Eastwood v. Dep't of Corr., 846 F.2d 627, 631 (10th Cir. 1988) (allowing constitutional protection for "facts about [plaintiff's] sexual history"); Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) (holding that details about a plaintiff's sexual history and a prior miscarriage were protected information).

155. Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 789–90 (9th Cir. 2002).

156. *Id.*

157. Margaret S. v. Edwards, 488 F. Supp. 181, 216 (E.D. La. 1980).

physicians, causing harm to the physician-patient relationship and risking real injury to their health.[158] Recognizing this, many medical organizations have articulated policy statements that discourage the enactment of broad and inflexible reporting requirements.[159] Additionally, no clear evidence shows that mandatory reporting of statutory rape benefits the supposed victim—especially where the sexual activity was consensual.[160]

Perhaps unique among medical patients, abortion patients have an urgent need for confidentiality because the public revelation that a woman is seeking an abortion can lead to threats of violence, harassment, and ostracism from the community.[161] Language from the Second Circuit explaining why an individual with HIV was entitled to constitutional confidentiality protection is equally applicable in the abortion context:

> Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control

158. *See generally* Carol A. Ford et al., *Influence of Physician Confidentiality Assurances on Adolescents' Willingness to Disclose Information and Seek Future Health Care: A Randomized Controlled Trial*, 278 JAMA 1029 (1997) (finding that assurances of unconditional confidentiality increased the number of adolescents willing to return to seek further health care by 10 percent); Jonathan D. Klein et al., *Access to Medical Care for Adolescents: Results from the 1997 Commonwealth Fund Survey of the Health of Adolescent Girls*, 25 J. ADOLESCENT HEALTH 120 (1999) (finding that nearly a third of the adolescents surveyed had missed needed care; the most common reason was not wanting a parent to know); Diane M. Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710 (2002) (finding that 59 percent of girls younger than eighteen seeking services at Planned Parenthood clinic indicated they would stop using all sexual health care services or delay treatment or testing for STDs if their parents were informed that they were seeking contraceptives).

159. *See, e.g.*, American Academy of Family Physicians et al., *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse*, 35 J. Adolescent Health 420, 423 (2004) ("Federal and state laws should allow physicians and other health care professionals to exercise appropriate clinical judgment in reporting cases of sexual activity. . . .").

160. English and Teare suggest that adolescents may feel they are being used as "pawns" by law enforcement, noting an ABA report that described a strategy of arresting suspected gang members for statutory rape when other charges were unavailable. English & Teare, *supra* note 39, at 841 (discussing Sally Small Inada, *Improving the Criminal Justice Response to Statutory Rape*, 17 CHILD L. PRAC. 157, 157 (1998)).

161. Alice Clapman, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545, 1545–47 (2003) (describing actions of a clinic protestor who phoned an abortion patient repeatedly, left anti-abortion literature and a plastic fetus on her doorstep, and attempted to tell the patient's parents that the woman had received an abortion).

> over. . . . An individual revealing that she is HIV []positive potentially exposes herself . . . to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information.[162]

A privacy violation can occur not only because of an unauthorized disclosure to the public, but also when a large enough number of government employees can access the records;[163] privacy safeguards must therefore place strict limits on which state employees may view and use the records, and for what purpose.

As courts have been willing to uphold statutes giving only the barest minimum of safeguards, however,[164] privacy advocates may have difficulty securing these strict controls. For example, on the ground that other state statutes provided adequate protection against disclosure, the Fourth Circuit dismissed an informational privacy claim against a South Carolina regulation that allowed the state health department to retain copies of abortion patients' unredacted medical records.[165] Similarly, in upholding the constitutionality of Arizona's judicial bypass procedure, the Ninth Circuit noted the presence of a blanket statement in the statute commanding that all judicial bypass proceedings remain confidential.[166] Moreover, the judicial officer was instructed to order that all records be confidentially maintained, and state statutes limited the state personnel who could access the information.[167] Courts have noted approvingly the presence of state statutes protecting privacy and providing for criminal penalties for unauthorized disclosure.[168]

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162. Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994).

163. Tucson Woman's Clinic v. Eden, 379 F.3d 531, 552 (9th Cir. 2004) ("If information that a woman has had an abortion is made available to all DHS employees, the fact that they are government employees is no solace to the numerous neighbors, relatives and friends of DHS employees, as well as to the employees themselves.").

164. *See* Gostin, *supra* note 119, at 497 ("Provided the government . . . employs reasonable security measures, courts have not interfered. . . .").

165. Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health, 317 F.3d 357, 370 (4th Cir. 2002), *cert. denied*, 538 U.S. 1008 (2003). As the dissent notes, other state statutes appear to create loopholes in the confidentiality provisions; for example, the public disclosure of patient identifying information is authorized during licensing proceedings. *Id.* at 375 (King, J., dissenting).

166. Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 788 (9th Cir. 2002).

167. *Id.*

168. *Compare* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 513 (1990) (discussing a state provision criminalizing disclosure of confidential documents and upholding a reporting statute's constitutionality), *with Tucson Woman's Clinic*, 379 F.3d at 552 (noting the lack of

The willingness of courts to accept these measures as adequate strains credulity. Evidence introduced in the Greenville Women's Clinic case showed that clinic protestors had obtained from the health department the medical records of a fifteen-year-old patient, and were distributing photocopies.[169] Just a few years before the Ninth Circuit upheld the constitutionality of Arizona's judicial bypass procedure (citing the criminal penalties that would supposedly deter unauthorized disclosure),[170] news of a court order allowing a young woman to travel out of Arizona for an abortion was leaked to the media, presumably by a court employee.[171] A similar disclosure occurred in Florida, where a state employee publicly revealed names from a statewide registry of HIV patients.[172]

The existence of state statutes barring the release of medical records did little to help an abortion patient in Illinois, who was shocked to find her photograph and a copy of her medical records posted on the Internet.[173] A clinic protestor had obtained them from a source at the hospital to which the patient had been transferred during her procedure.[174] Because abortion protestors are so eager to "out" women who have had abortions, very few regulations or penalties would adequately safeguard such sensitive medical information.

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clear civil and criminal penalties for public release by government employees while striking down a reporting statute).

169. *Greenville Women's Clinic*, 317 F.3d at 376 (King, J., dissenting).

170. *Lawall*, 307 F.3d at 787.

171. Chris Moeser & Karina Bland, *Abortion Fury Grows: Hull Defends Move to Send Teen Out of State*, ARIZ. REPUBLIC, Aug. 26, 1999, at A1.

172. Lawrence O. Gostin et al., *National HIV Case Reporting for the United States—A Defining Moment in the History of the Epidemic*, 337 NEW ENG. J. MED. 1162, 1163 (1997).

173. Jo Mannies, *Activist Admits Role in Acquiring Medical Records of Abortion Patient*, ST. LOUIS POST-DISPATCH, Aug. 23, 2001, at A1.

174. Lorna Collier, *Patient Photos on Internet Test the Courts*, CHI. TRIB., May 15, 2002, at C1. Personal details about the woman, including her hometown and information about her 9-year-old child, were posted on the site "Missionaries to the Unborn" next to a photograph of Adolf Hitler. *Id.* Other websites, including the sporadically available abortioncams.com, feature pictures of women entering abortion clinics and encourage volunteers to submit personally identifying information. *Fox Hannity & Colmes*: *Does the First Amendment Protect a Website That Posts the Names of Abortion Doctors?* (Fox News Network television broadcast Apr. 5, 2001).

CONCLUSION

Given the increasing eagerness of state attorneys general and pro-life groups to use the possibility of public exposure as a means to intimidate abortion patients and dissuade them from seeking abortions, reproductive health advocates need to develop a strong legal theory under which to challenge these threats. The constitutional right to informational privacy, though limited, must protect adolescent abortion patients from the unauthorized release of their medical records when state statutory-rape reporting requirements are broadly interpreted.