

HIPAA Hypocrisy and the Case for Enforcing Federal Privacy Standards Under State Law

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No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has a right to the protection of the law against such interference or attacks.¹

I. INTRODUCTION

In 1993, a Midwestern banker used his position on a county health board to gain access to the protected medical records of individuals in his community.² Using this data, he discerned which members of the community were suffering from various diseases.³ He then cross-referenced the information with records from his bank and subsequently called due the mortgages of anyone suffering from cancer.⁴

In 1995, the daughter of a hospital employee took a list of phone numbers of patients who had recently visited the emergency room.⁵ In what she later described as a “prank,” she used the information to call several of the patients to tell them they had contracted AIDS, when in

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1. Universal Declaration of Human Rights, G.A. Res. 217A, at 73–74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

2. Marianne LaVelle, *Health Plan Debate Turning to Privacy: Some Call for Safeguards on Medical Disclosure. Is Federal Law Necessary?* NAT'L L.J., May 30, 1994, at A1.

3. *Id.*

4. *Id.*

5. *Hospital Clerk's Child Allegedly Told Patients that they had AIDS*, WASH. POST, March 1, 1995, at A17.

fact they had not.⁶ Family members had to restrain one of the prankster's victims from killing herself when she heard the news.⁷

These stories underscore the increasing importance of personal information privacy as consumers, financial institutions, and healthcare providers confront the mounting problems associated with security breaches.⁸ Patients' fears are far from negligible, as sixty-seven percent of Americans report being concerned about the privacy of their personal health information.⁹ Another fifty-two percent were concerned that their health information might be used by an employer to limit job opportunities; this represents a forty-four percent increase from a similar survey only six years ago.¹⁰ In that survey, nearly twenty percent of respondents believed they had been victimized by an improper disclosure,¹¹ and approximately half of those individuals believed that the disclosure resulted in personal embarrassment.¹²

In 1996, responding to these outrageous stories and mounting public concern, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA, or the "Act").¹³ The Act creates national standards for the retention, storage, transmission, and exchange of personal healthcare information.¹⁴ The new law replaces a menagerie of state and federal laws which had been ineffectually cobbled together to protect healthcare information.¹⁵ The Act also delegates authority to the

6. *Id.*

7. *Id.*

8. In 2003, 9.91 million Americans were victimized by identity theft, resulting in \$47.6 billion in losses and 297 million lost hours of productivity. FEDERAL TRADE COMMISSION, IDENTITY THEFT SURVEY REPORT 7 (2003), available at <http://www.ftc.gov/os/2003/09/synovaterereport.pdf>. These figures do not include consumers' out-of-pocket expenses to fix these costly mistakes, nor do they include the non-economic damages that occur because of these security breaches. *Id.*

9. LYNNE BISHOP ET AL., CAL. HEALTH CARE FOUND., NATIONAL CONSUMER HEALTH PRIVACY SURVEY 2005, at 1 (2005), <http://www.chcf.org/documents/ihealth/ConsumerPrivacy2005ExecSum.pdf>.

10. *Id.*

11. PRINCETON SURVEY RESEARCH ASSOCIATES, MEDICAL PRIVACY AND CONFIDENTIALITY SURVEY 15 (1999), <http://www.chcf.org/documents/ihealth/topline.pdf>.

12. *Id.* at 16.

13. 42 U.S.C. § 1320d (2000).

14. Pub. L. No. 104-191, § 261, 110 Stat. 1936 (1996) (codified in 42 U.S.C. § 1320d (2000)). The relevant portion of the statute provides as follows: "It is the purpose of this subtitle to improve . . . the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information." *Id.*

15. See PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW § 6.5 (1996) ("As a result of this patchwork approach [to privacy protection], individuals face an often bewildering search through state legal code to determine the extent to which they have enforcement rights."); see also Robert J. Moses, *Privacy Actions and HIPAA: Using the Health Insurance Portability and Accountability Act to Protect Patient Privacy*, 1216 PRACTICING LAW INST., CORP. LAW & PRAC. HANDBOOK SERIES 513, 519-25 (2000) (discussing federal privacy regulations prior to enactment of

Secretary of Health and Human Services (HHS) to promulgate standards so that healthcare providers may transmit confidential health information electronically.¹⁶ However, the ease and efficiency of electronic transmission has only exacerbated concerns about the security of health information.¹⁷ To address these concerns, Congress included penalties in the Act for wrongful disclosure of protected health information.¹⁸

On its face, the statute seemingly provides powerful protections for individuals whose information is wrongfully disclosed.¹⁹ Potential penalties include fines of up to \$250,000 and ten years in prison.²⁰ However, judicial and administrative interpretations of the statute have all but gutted the privacy provision, making it essentially a dead letter.²¹ Courts have consistently denied a private right of action to consumers against individuals who wrongfully disclose or obtain their private information.²² Instead, courts force patients to rely on a complaint-investigation process administered by the Office of Civil Rights (OCR). However, OCR only investigates the actions of healthcare providers and does nothing to compensate patients injured by wrongful disclosures.²³ Consequently, individuals who have their HIPAA privacy rights violated have few, if any, options to seek a remedy.

This Comment argues that patients and privacy rights advocates should avoid direct litigation under the HIPAA statute. Instead, plaintiffs should focus their efforts on applying the standards mandated by the statute to the common law tort of intrusion upon seclusion. Protecting

HIPAA and comparing California and New Hampshire's approach to patient privacy rules); Paul M. Schwartz, *The Protection of Privacy in Health Care Reform*, 48 VAND. L. REV. 295, 310-24 (1995) (discussing the various state and federal laws protecting patient privacy prior to the enactment of HIPAA).

16. 42 U.S.C. § 1320d-2 (2000).

17. See Symposium, *Balancing Communal Goods and Personal Privacy Under a National Health Information Privacy Rule*, 46 ST. LOUIS U. L.J. 5, 8 (2002) ("One of the main reasons that Congress desired privacy protection was its concern about the proliferation of electronic health information."); see also Schwartz, *supra* note 15, at 300, who argues:

[A]ny changes in the health-delivery system are likely to increase the use and sharing of health care information. Medical data processing will be increasingly relied upon to help reduce waste and fraud, and to increase the efficiency of both the practice of medicine and the payment process. This data processing will raise new threats to the specific privacy interest of patients in informational autonomy.

Id. (citation omitted) See also William H. Minor, *Identity Cards and Databases in Health Care: The Need for Federal Privacy Protections*, 28 COLUM. J.L. & SOC. PROBS. 253, 257 (1995) ("[M]edical record databases pose a serious threat to the privacy rights of Americans.").

18. 42 U.S.C. § 1320d-6 (2000).

19. *Id.*

20. *Id.*

21. See discussion *infra* Part III, IV.A.

22. See sources cited *infra* note 118.

23. See discussion *infra* Part III.A.

personal health information has become too important for further delay. Until Congress fills the gaps in HIPAA's privacy protections by enacting uniform comprehensive privacy legislation, state courts should use their interpretive powers to apply the standards mandated by HIPAA to the common law tort of intrusion upon seclusion.

Part II of this Comment summarizes the background of the HIPAA statute as an attempted solution to the privacy problem described above, including its legislative history and HHS promulgation of administrative rules. Next, Part III addresses the agency-imposed limitations on the scope of the statute. The Secretary's decision to rely solely on an administrative complaint process, combined with the government's narrow interpretation of the statute granting third parties immunity from penalties, has undermined enforcement of the privacy provision. Accordingly, Part IV discusses previous attempts to circumvent the administrative limitations by creating a private right of action and the reasons these attempts have failed. Finally, Part V argues for a new approach, utilizing the common law tort of inclusion upon seclusion. This approach incorporates the benefits of a private right of action with the standards of the privacy provisions in the HIPAA statute.

II. CONGRESSIONAL AND ADMINISTRATIVE DEVELOPMENT OF HIPAA PRIVACY RULES

HIPAA is the congressional response to the need for a uniform national policy regarding the administration and distribution of healthcare information.²⁴ By creating uniform standards for the transmission and exchange of healthcare information, both physically and electronically, Congress sought to increase the quality of healthcare and the efficiency of the national healthcare system.²⁵ The Act was not a minor undertaking and industry experts estimated that the cost of developing the regulatory scheme would be quite substantial.²⁶ The privacy provision in the statute was included in response to concerns that the Act would substantially

24. See Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918, 59,920 (proposed Nov. 3, 1999) (to be codified at 45 C.F.R. pts. 160-64) [hereinafter SPIIHI]; see also *supra* note 14 and accompanying text.

25. SPIIHI, 64 Fed. Reg. at 59,920.

26. See Meredith Kapushion, Comment, *Hungry Hungry HIPAA: When Privacy Regulations Go too Far*, 31 FORDHAM URB. L.J. 1483 (2004). "HHS estimated that the HIPAA start up costs of compliance are \$3.5 billion with continued annual costs of \$1.6 billion." *Id.* Conservative estimates peg the long-term costs of implementation between \$25 and \$30 billion, not including hidden costs that always occur with the creation of a new regulatory scheme. *Id.* But see Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L.J. 617, 680 (2002) ("[H]igh cost estimates associated with the HIPAA Privacy Rules appear to be due simply to the exponential growth in the use of electronic health information by the healthcare industry without a concomitant investment in compliance with previously existing duties of confidentiality.").

increase the ease of access to confidential healthcare information.²⁷ Due to the complexity of the administration of healthcare information, and the potential for unintended consequences if the rules were overly broad, Congress created very general standards for accountability and punishment.²⁸ To address the lack of specificity in the Act, Congress requested recommendations for further changes from the Secretary of HHS.²⁹ When Congress did not act on those recommendations, HHS started over and created a new framework for the HIPAA privacy protections.³⁰ Pursuant to the congressional mandate, HHS spent three years accumulating public comments and other recommendations for the implementation of the final set of rules.³¹ The task pitted the business goal of efficient use of healthcare technology against the privacy concerns expressed by individuals and other advocacy groups.³² In response to the agency's request for public commentary on its proposed rules, more than 52,000 comments were received.³³ The resulting regulations promulgated by the agency purport to maintain strong protections for the privacy of

27. See sources cited *supra* note 17.

28. See 42 U.S.C. § 1320d-6 (2000). The statute provides in relevant part:

(a) Offense

A person who knowingly and in violation of this part—

- (1) Uses or causes to be used a unique health identifier;
 - (2) Obtains individually identifiable health information relating to an individual; or
 - (3) discloses individually identifiable health information to another person,
- Shall be punished as provided in subsection (b) of this section.

(b) Penalties

A person described in subsection (a) of this section shall—

- (1) be fined not more than \$50,000, imprisoned not more than 1 year, or both;
- (2) if the offense is committed under false pretenses, be fined not more than \$100,000, imprisoned not more than 5 years, or both; and
- (3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than \$250,000, imprisoned not more than 10 years, or both.

Id.

29. Pub. L. No. 104-191, § 264(a), 110 Stat. 1936 (1996) (codified in 42 U.S.C. § 1320d-2 (2000)). The relevant portion of the statute provides as follows: "(a) In general.—Not later than [August 21, 1997] the Secretary of Health and Human Services shall submit to [Congress] detailed recommendations on standards with respect to privacy of individually-identifiable health information." *Id.*

30. *Id.* § 264(c)(1).

31. SPIIHI, 67 Fed. Reg. 53,182 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160–64).

32. See Angela Stewart, *HIPAA—An Attempt to Protect Individually Identifiable Health Information*, 28-JUN WYO. LAW. 26 (2005) (citing SPIIHI, 67 Fed. Reg. at 51,182–83).

33. SPIIHI, 67 Fed. Reg. at 53,182.

individually identifiable health information.³⁴ However, the practical application of the rules has left much to be desired.³⁵

III. ADMINISTRATIVE LIMITATIONS HAVE UNREASONABLY DILUTED THE PRIVACY RULE BY NARROWLY CONSTRUING THE SCOPE OF THE STATUTE

Although the statute and regulations appear to contain some teeth, HHS curtailed any bite in the privacy rules by narrowly interpreting the scope of the statute in two ways. First, HHS limited enforcement of the privacy provision to an administrative complaint process in lieu of private citizen suits.³⁶ The Secretary decided to rely on administrative enforcement in order to emphasize voluntary compliance with the new regulatory scheme.³⁷ The deadline selected for complete compliance was April 14, 2003, nearly seven years after the enactment of the original HIPAA statute by Congress.³⁸ At that time, enforcement rules took effect and individuals could begin filing complaints.³⁹ Since implementation of the complaint process, the system has proved unworkable.⁴⁰ HHS delegated authority over investigations and sanctions to OCR,⁴¹ and although consumers filed 22,664 complaints between April 2003 and September 2006, OCR investigated only 5,400 complaints, and imposed no civil penalties.⁴² In addition, although OCR has referred over three hundred complaints to the Department of Justice (DOJ) for further investigation and potential criminal charges,⁴³ to date there have been no trials

34. See 45 C.F.R. §§ 164.500–34 (2004).

35. See *infra* Part III.

36. 45 C.F.R. § 160.306 (2004).

37. Stewart, *supra* note 32, at 29; see also HIPAA Administrative Simplification; Enforcement, 70 Fed. Reg. 20,224, 20,226 (Apr. 18, 2005) (“[HHS is] committed to promoting and encouraging voluntary compliance with the HIPAA rules . . .”).

38. SPIIHI, 66 Fed. Reg. 12,434 (Feb. 26, 2001) (to be codified at 45 C.F.R. pts. 160–64).

39. *Id.*

40. See *infra* note 42.

41. Office for Civil Rights; Statement of Delegation of Authority, 65 Fed. Reg. 82,381 (Dec. 28, 2000).

42. *Less than 25% of Medical Privacy Complaints Merit HHS Investigation, Melamedia Seminar Reveals*, BUS. WIRE, Dec. 13, 2006. In addition, of the 5,400 complaints investigated, OCR dismissed approximately 1,700, or 31%, finding no violation. HHS defends its lackluster record of enforcement by arguing that the agency has used informal means to correct complaints about privacy deficiencies. Bob Sullivan, *Health Care Privacy Law: All Bark, No Bite?*, RED TAPE CHRONICLES, Oct. 24, 2006, http://redtape.msnbc.com/2006/10/two_years_ago_w.html#posts. See also HIPAA Administrative Simplification; Enforcement, 70 Fed. Reg. 20,224, 20,228 (Apr. 15, 2005) (“[Section 160.312] provides that where noncompliance is indicated [by a complaint], the Secretary will attempt to resolve the matter by informal means . . .”) (emphasis added). However, this does not address the agency’s refusal to investigate nearly 75% of the complaints it receives.

43. Health Information Privacy/Security Alert, Melamedia L.L.C., http://melamedia.com/shopsite_sc/store/html/hipa_intro.html.

resulting in a conviction,⁴⁴ only two guilty pleas,⁴⁵ and two recent indictments.⁴⁶ Although the pleas may seem to be a step in the right direction, HHS's subsequent policy change, discussed below, has tempered the apparent victories.⁴⁷

Second, based on an opinion written by the Office of Legal Counsel (OLC), HHS limited penalties for improper disclosures to healthcare providers and their immediate business associates.⁴⁸ Had this policy change been in effect at the time of the first plea, the defendant would have been exempt from liability.⁴⁹ The OLC opinion addressed whether the criminal penalties described in 42 U.S.C. § 1320d-6 apply "only to covered entities (healthcare providers), or whether [they apply] to any person who does an act described in the provision, including, in particular, a person who obtains protected health information in a manner that causes a covered entity to violate the statute or regulations."⁵⁰ Ultimately, the opinion interpreted the statute narrowly.⁵¹ As a result, parties who are not healthcare providers, but who deceive such providers into

44. *Id.*

45. See Plea Agreement, *United States v. Gibson*, No. CR04-0374RSM, 2004 WL 2237585 (W.D. Wash. Aug. 19, 2004); Acceptance of Plea of Guilty, Adjudication of Guilt and Notice of Sentencing, *Gibson*, No. CR04-0374RSM, 2004 WL 2188280 (W.D. Wash. Aug. 19, 2004); see also Press Release, Chuck Rosenberg, United States Attorney for the Southern District of Texas, Alamo Woman Convicted of Selling FBI Agent's Medical Records (Mar. 7, 2006) (on file with the United States Department of Justice) (announcing the conviction by plea agreement of a woman charged with selling confidential medical information), available at <http://www.usdoj.gov/usao/txs/releases/March2006/060307-Ramirez.pdf>.

46. Indictment, *United States v. Ferrer*, No. 06-60281 (S.D. Fla. Sept. 7, 2006), available at <http://www.usdoj.gov/usao/fls/PressReleases/Attachments/060908-01-Indictment.pdf>.

47. See OFFICE OF LEGAL COUNSEL, DEPT. OF JUSTICE, SCOPE OF ENFORCEMENT UNDER 42 U.S.C. § 1320d-6 (2005), available at http://www.usdoj.gov/olc/hipaa_final.htm [hereinafter OLC OPINION]. The memorandum, authored by the Office of Legal Counsel (OLC) at the request of HHS, argues that the HIPAA rules apply solely to health care providers that improperly disclose protected health information and not to third parties that cause such improper disclosures. *Id.* Although the memorandum is not binding on courts, it is binding on federal prosecutors, thereby foreclosing any possibility that the government will bring criminal charges against third parties who cause a health-care provider to improperly disclose protected information. See discussion *infra* Part III.B; but see Peter A. Winn, *Criminal Prosecutions Under HIPAA*, 53 U.S. ATT'YS' BULL. 21 (2005) (arguing that although the memorandum prohibits federal prosecutors from enforcing the Act against anyone other than health care providers, other criminal statutes operating in conjunction with HIPAA may still provide an avenue for prosecution of third parties), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5305.pdf.

48. OLC OPINION, *supra* note 47 (distinguishing unrelated third parties from corporations affiliated with healthcare providers on "general principles of corporate criminal liability.").

49. Simone Handler-Hutchinson, *Is the Worst Yet to Come? HHS and the Courts are Finally Talking about HIPAA Enforcement*, 181 N.J. L.J. 1089, 1089 (2005) ("The [OLC] opinion appears to undercut the Gibson conviction."); see also Winn, *supra* note 47, at 23 ("As a practical matter, the OLC Opinion forecloses the use of Section 1320d-6, [HIPAA's criminal provision] for the prosecution of anyone other than a fairly narrow group of entities.").

50. OLC OPINION, *supra* note 47, at 4.

51. *Id.* at 13.

disclosing information, are not subject to the Act.⁵² Despite potentially egregious conduct by a third party, the OLC's interpretation of the statute leaves the government powerless to impose any penalties under HIPAA.⁵³

A. Limiting Enforcement to an Administrative Complaint Process in Lieu of a Private Right of Action has Undermined the Statute

There are two central problems arising out of the government's decision to limit enforcement of the privacy provision to an administrative complaint process. First, the government cannot be a zealous advocate for patient privacy rights because it lacks the requisite self-interest.⁵⁴ Second, the high cost of administrative enforcement limits effectiveness of the privacy provision because it promotes inefficient processes.⁵⁵

The first problem arises because the government lacks any discernable self-interest in prosecuting offenders. As a result, government prosecutions necessarily turn an adversarial issue into an investigatory matter.⁵⁶ Consequently, despite flagrant intrusions on personal privacy, an administrative agency does not have the same economic⁵⁷ or political⁵⁸ incentives as the victim to prosecute the offender. In a classical economics example, although those who fraudulently obtain protected information may reap immense gains, government regulators receive the same compensation regardless of the outcome.⁵⁹ Political pressures coming from within the government may also influence agency decision-

52. See *id.*; but cf. ATLANTIC INFORMATION SERVICES, CRIMINAL CASES AGAINST INDIVIDUALS PROCEED DESPITE DOJ MEMO (2006), http://www.aishealth.com/Compliance/Hipaa/RPP_HIPAA_Cases_Proceed.html (arguing that healthcare providers will be punished for the intentional misconduct of their employees, even when the provider has acted appropriately at all times and that any prosecution of a covered entity in these circumstances would be an injustice).

53. See OLC OPINION, *supra* note 47.

54. See sources cited *infra* notes 56–62.

55. See sources cited *infra* notes 63–68.

56. Historically, the American system of jurisprudence has shied away from an investigatory model of judicial oversight. See J.A. JOLOWITZ, ON CIVIL PROCEDURE 180 (2000) (“It is for the parties to allege in their pleadings the facts on which they rely, and this must continue to be the rule: No one wants the judge to have a completely uncontrolled roving commission of inquiry.”).

57. Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 3 (1974).

58. Environmental activists have long debated the disadvantages of government enforcement in lieu of private citizen suits. See, e.g., David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens*, 54 MD. L. REV. 1552, 1653 (1995) (“[C]itizen enforcement is not subject to the political pressures that might hinder state enforcement.”); see also ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 126 (2001) (arguing that private suits are a far more powerful deterrent to improper conduct than any governmental regulatory process).

59. Becker & Stigler, *supra* note 57, at 3–4.

making.⁶⁰ For example, since the creation of the final privacy rules, the Bush administration has de-emphasized the importance of protecting the privacy of personal information.⁶¹ Executive pressure deterring agency enforcement is particularly disturbing considering the substantial impact that decreased enforcement has on individual rights.⁶²

The second problem is the cost of the complaint process. This problem arises because administrative enforcement is subject to efficiency problems.⁶³ The government lacks adequate resources to detect and prosecute all the potential violations of the law.⁶⁴ By contrast, individuals are in the best possible position to discover when a violation occurs and are best able to balance the potential benefits and costs of filing suit.⁶⁵

60. Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 191 (2000) (“[P]olitical considerations and institutional structure may often lead agencies to ignore violations that are known and appropriate to prosecute.”).

61. See, e.g., HEALTH PRIVACY PROJECT, FIRST ANNUAL HIPAA PRIVACY CHECK-UP: BUSH ADMINISTRATION FAILS THE AMERICAN PUBLIC (2004), http://www.healthprivacy.org/usr_doc/HPP's_1st_Annual_HIPAA_Privacy_Check-Up.pdf (“The Department of Justice [DOJ] . . . recently issued subpoenas for women’s medical records as part of its enforcement of the Partial-Birth Abortion Ban Act passed by Congress in 2004. . . . [T]he DOJ argued that ‘individuals no longer possess a reasonable expectation that their histories will remain completely confidential.’”). See also COMMISSION ON SYSTEMIC INTEROPERABILITY, ENDING THE DOCUMENT GAME: CONNECTING AND TRANSFORMING YOUR HEALTHCARE THROUGH INFORMATION TECHNOLOGY 117 (2005) (recommending the creation of a Federal Privacy Standard that would, unlike the current version of the HIPAA statute, preempt all state privacy laws, including those offering greater privacy protections than the federal law). Cf. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (revealing an ongoing government program to wiretap phone calls entering or exiting the United States without a warrant); Eric Lichtblau, *White House Denies Switch in Mail Policy*, N.Y. TIMES, Jan. 5, 2007, at A6 (discussing a presidential statement that postal inspectors may open mail without a warrant).

62. See generally *Myers v. United States*, 272 U.S. 52 (1926) (holding that “there may be some duties of a quasi-judicial character imposed on executive tribunals whose decisions after hearing affect the interest of individuals, the discharge of which, the President cannot in a particular case properly influence or control.”).

63. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107 (2005); see also Steven D. Shermer, *The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement*, 14 J. ENVTL. L. & LITIG. 461, 463 (1999) (“Only by utilizing the resources and zeal of private citizens can federal regulators achieve a more efficient and effective balance . . .”).

64. Cf. Thompson, Jr., *supra* note 60 (arguing that the enforcement wing of federal and state environmental agencies are woefully understaffed and underfunded).

65. Stephenson, *supra* note 63, at 107. Stephenson argues the following:

Effective enforcement requires the detection of violations, and private parties—especially those who are directly affected by a potential defendant’s conduct—are often better positioned than the public agency to monitor compliance and uncover violations of the law. Affected private parties may also sometimes be better at weighing the costs and benefits of bringing an enforcement action.

Id. See also Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 189 (1985) (“A private enforcer, [as opposed to public enforcer], will have the correct incentives to enable the evolution of efficient rules governing the implementation of public policy,

Therefore, it is likely that the costs of administering the new regulations would decrease substantially if individuals could police each other.⁶⁶ Instead of public investment of large sums of money in a bureaucracy that is ill-equipped to detect and prosecute offenders, the costs of pursuing civil violations and claims should fall to private individuals who suffer direct injury. Some may argue that placing the burden on private citizens to protect their rights may make it too expensive for many to protect themselves.⁶⁷ However, by allowing private suits, the DOJ and OCR could devote more resources to prosecuting those violations where private citizens lack the necessary resources or incentives to protect their rights.⁶⁸

By allowing private citizen suits, the efficiency and effectiveness of HIPAA enforcement would likely increase. The cost of most of the litigation would be born by the party most interested in the outcome, and the sole remaining governmental task would be investigation and enforcement of those violations where the victims lack sufficient resources or incentives to defend their rights.

*B. Limiting Penalties to Healthcare Providers Is Contrary
to the Plain Language of the Act and Improperly
Immunizes Third Parties from Liability*

There are also two problems that arise from the government's decision to exempt third parties from liability and limit enforcement of the privacy provision to healthcare providers. First, the decision by HHS to limit enforcement is the result of the OLC's opinion, which contravenes the plain language of the Act. Second, limiting liability to healthcare providers frustrates key public policies such as identity theft prevention and proportional punishment.

1. The OLC Opinion Interprets § 1320d-6 Too Narrowly

The OLC's opinion argues that the language of § 1320d-6 exempts third parties from liability.⁶⁹ The authors of the opinion rely on a purportedly plain language interpretation of the statute.⁷⁰ However, a traditional plain language approach requires a balance of potential meanings

since its incentives are purely economic and are structured to reflect the social costs and benefits of implementation."); Thompson, *supra* note 60, at 190 (arguing that environmental violations are difficult and expensive for the government to detect).

66. Stephenson, *supra* note 63, at 109.

67. KAGAN, *supra* note 58, at 122–23.

68. Stephenson, *supra* note 63, at 109.

69. See OLC OPINION, *supra* note 47.

70. *Id.* at 5–6.

as they relate to the document as a whole, not the narrowest possible construction.⁷¹ According to Supreme Court Justice Antonin Scalia, a prominent advocate of plain language interpretation, the meaning of language should be “that which an ordinary speaker . . . would draw from the statutory text.”⁷² Justice Scalia also argues that the meaning of language must be “drawn from the context in which it is used.”⁷³ Applying Justice Scalia’s plain language approach⁷⁴ to four of the points raised in the OLC opinion weighs in favor of applying the privacy provision to third parties.

First, the opinion asserts that, because the standards for maintaining and transmitting protected health information apply only to healthcare providers,⁷⁵ only healthcare providers may directly violate those standards.⁷⁶ However, Congress did not use any language in § 1320d-6 that indicates that it was meant to apply only in the narrow circumstance of non-compliance with transmission standards.⁷⁷ Instead, the section focuses on the disclosure of individually identifiable health information, with no mention of transmission standards.⁷⁸ The context therefore suggests that § 1320d-6 is not about technical compliance with standards,

71. Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229, 234 (2004).

72. *Id.*; accord William N. Eskridge, Jr., *A Matter of Interpretation: Federal Courts and the Law by Antonin Scalia*, 96 MICH. L. REV. 1509, 1511 (1998).

73. *Deal v. United States*, 508 U.S. 129, 132 (1993) (holding, on principles of plain language interpretation, that the statute at issue in the case was unambiguous).

74. Although Justice Scalia’s approach to plain language analysis is not universal, it represents the most stringent methodology for statutory interpretation. Other approaches, such as that of prominent plain language advocate William Blackstone, would also support a reading of the statute that does not exempt third parties from liability. See Goodman, *supra* note 71, at 236 (“[Scalia and Blackstone] part ways dramatically, however, regarding the Court’s proper role in construing a statute. When words are dubious, Blackstone directed the judge to consider the ‘reason and spirit’ of the law . . . Justice Scalia staunchly disagrees”). The spirit and reason behind the HIPAA statute weigh in favor of applying the privacy provision to third parties.

75. 42 U.S.C. § 1320d-1(a) (2000). The statute provides in relevant part as follows:

(a) Applicability

Any Standard adopted under this part shall apply, in whole or in part, to the following persons:

- (1) A health plan.
- (2) A health plan clearinghouse.
- (3) A healthcare provider who transmits any health information in electronic form in connection with a transaction referred to in section 1320d-2(a)(1) of this title.

76. OLC OPINION, *supra* note 47, at 5. Specifically, the opinion posits that persons who are subject to punishment under 42 U.S.C. § 1320d-6 are only those who use, obtain, or disclose protected information in “violation of this part.” “This part” refers to the Act in its entirety and 42 U.S.C. § 1320d-1(a) makes the relevant standards applicable only to covered entities. Thus, the argument goes, only covered entities may directly violate those standards in “this part.”

77. See 42 U.S.C. § 1320d-6 (2000).

78. *Id.*

but about the wrongful use, obtainment, or disclosure of health information. Reading the provision in the context of the entire section suggests that focusing solely on compliance, at the expense of wrongful disclosure in general, is too narrow a construction.

Next, the opinion states that although the Act penalizes those who wrongfully obtain protected information, the inclusion of the word “obtain” does not suggest that administrators may penalize anyone who obtains protected information.⁷⁹ Instead, the opinion states that the language “merely reflects the fact that the statute and regulations limit the acquisition, as well as disclosure and use, of information by covered entities.”⁸⁰ This interpretation effectively limits penalties for obtaining information—only “covered entities” may be penalized.⁸¹ To reach this conclusion, one must necessarily assume the validity of the opinion’s first assertion (that is, only a covered entity may violate the Act). Again, there is no language in § 1320d-6 indicating that Congress intended to restrict and penalize healthcare providers only for illegally obtaining protected information.⁸²

The third issue addressed by the opinion is whether the different phrasing in § 1320d-5 (civil penalties) and § 1320d-6 (criminal penalties) supports a broader reading of § 1320d-6.⁸³ The civil penalty provision provides for penalties for a person “who violates a provision of this part.”⁸⁴ The criminal penalty provision makes it a crime to do certain acts “in violation of this part.”⁸⁵ The opinion states that the difference merely reflects a necessary “grammatical accommodation,” resulting from the interchange between present and past tense,⁸⁶ but concedes in a footnote that it could render the statute “ambiguous.”⁸⁷ However, an ambiguous result is not necessary. A broad reading of the language “in violation of” suggests that any person who causes a violation (that is, induces a healthcare provider to release information) is liable.⁸⁸ Conversely, the

79. OLC OPINION, *supra* note 47, at 6.

80. *Id.*

81. *Id.*

82. 42 U.S.C. § 1320d-6(1)(b) (2000) (penalizing a person who “obtains individually identifiable health information relating to another person.”).

83. OLC OPINION, *supra* note 47, at 6–7.

84. 42 U.S.C. § 1320d-5 (2000).

85. *Id.* § 1320d-6.

86. OLC OPINION, *supra* note 47, at 7.

87. *Id.* at 7 n.5.

88. This is because obtaining information without complying with the standards necessarily causes a violation of “this part.” If the third party is obtaining it wrongfully, then the covered entity is not in compliance with the standards. See Winn, *supra* note 47, at 23, who argues that, read more broadly, HIPAA’s criminal provision should

cover any person who “caused” a violation of “this part . . .” [including] any persons in or outside of the chain of trust who caused an improper disclosure of PHI. This broad read-

language “a person who violates” indicates that HHS may only impose a penalty on a person who directly violates a standard and not someone who merely causes a standard to be violated. The difference in phrasing is also reflected in the different titling of the sections. Section 1320d-5 is titled “General penalty for failure to comply with requirements and standards.”⁸⁹ In contrast, § 1320d-6 is titled “Wrongful disclosure of individually identifiable health information.”⁹⁰ By including a provision that provides penalties solely for failure to comply with standards and a separate provision with no such qualification, Congress likely intended the latter provision to have a broader interpretation.⁹¹ Accordingly, a reading of the two provisions in conjunction suggests that § 1320d-5 should apply solely to healthcare providers while § 1320d-6 should apply to anyone who wrongfully causes a disclosure to occur.

The final issue addressed by the opinion is the definition of the word “person” found in § 1320d-6.⁹² For clarity, the pertinent language of § 1320d-6 provides as follows:

(a) Offense

A person who knowingly and in violation of this part—

....

(3) discloses individually identifiable health information to another person;

shall be punished as provided in subsection (b) of this section.⁹³

The plain language of subpart (a) of the provision suggests that any “person” may be prosecuted if they act “knowingly and in violation of this part.”⁹⁴ Although the opinion ultimately concludes that only covered entities may violate the Act, the opinion concedes that “person” in subpart (a), cannot mean “covered entity” because such a reading would create a conflict with subpart (a)(3).⁹⁵ The conflict arises because subpart

ing of the statute is supported by the statutory prohibition on wrongfully “obtaining” PHI, language which would make little sense if Congress intended the law to be restricted to covered entities alone.

Id.

89. 42 U.S.C. § 1320d-5 (2000).

90. *Id.* § 1320d-6.

91. *See, e.g., State v. Roth*, 78 Wash. 2d 711, 715, 479 P.2d 55, 57–58 (1971) (“Where different language is used in the same connection in different parts of a statute, it is presumed that a different meaning was intended.”).

92. OLC OPINION, *supra* note 47, at 7.

93. 42 U.S.C. § 1320d-6(a) (2000).

94. *Id.*

95. OLC OPINION, *supra* note 47, at 7; *see also* Dictionary Act, 1 U.S.C. § 1 (2000) (setting forth a presumptively broad definition wherever the term is used in the United States Code).

(a)(3) prohibits unauthorized disclosures to a “person.”⁹⁶ The “person” in subpart (a)(3) describes the class of people to whom the “person” in subpart (a) is prohibited from disclosing information.⁹⁷ Therefore, if the Act defined “person” as synonymous with “covered entity,” the Act would only permit the government to punish covered entities that improperly disclose information to other covered entities. In the event a covered entity disclosed information to a private individual, it would be free from punishment because individuals would not be classified as a “person” under the Act.

To avoid this construction, the opinion argues that “person” is limited according to the context of its use.⁹⁸ In the context of the entire language of subpart (a), the opinion construes “person” narrowly to include only those persons that also meet the definition of “covered entities.”⁹⁹ Conversely, “person” defined in subpart (a)(3) is used broadly. Specifically, the opinion classifies this second person as “any person.”¹⁰⁰ Ultimately, the opinion’s grammatical maneuvering cannot conceal the fact that within the span of a few words, “person” has a specific definition (covered entity) and a general definition (person), with no indication by Congress that it intended such a construction.

The OLC’s construction of the statute also runs counter to the presumption that the same words used twice in the same statute have the same meaning.¹⁰¹ Furthermore, as Justice Scalia states, “judges should deviate from the plain language of the text only where textual reading leads to an absurd result.”¹⁰² In this instance, there is no need to reach the absurd result that Congress intended a plain word like “person” to have two completely different definitions in the span of a few intervening words. Accordingly, courts should reject the opinion’s construction of the wrongful disclosure provision because it creates unnecessary inconsistency.¹⁰³ A more practical and appropriate reading of the statute

96. 42 U.S.C. § 1320d-6(a)(3) (2000).

97. *Id.*

98. OLC OPINION, *supra* note 47, at 7.

99. *Id.* Specifically, the opinion argues that the statute’s use of the phrase “in violation of” following “person” in subpart (a) describes the subset of persons who may be held liable under the Act. This complex grammatical dissection explaining why Congress included this language in the Act directly contradicts the opinion’s assertion that the usage of the term “in violation of” is simply a “grammatical accommodation.” *Id.* at 8. If Congress intended to limit a patient’s privacy rights by creating this complex structure, it cannot also be a mere “grammatical accommodation.”

100. *Id.*

101. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992).

102. Goodman, *supra* note 71, at 234–35.

103. SINGER, *supra* note 101, at § 46.05 (“[E]ach part or section should be construed in connection with every other part or section so as to produce a harmonious whole.”).

is as follows: a person who, by his conduct, causes a violation of the statute to occur, is subject to the penalties in § 1320d-6.

Nothing in the plain language of the Act warrants the narrow interpretation offered in the OLC opinion. Instead, the complex grammatical deconstruction of the statute seems designed only to arrive at the desired result: third party immunity from prosecution. Accordingly, courts construing the statute should apply the simple, plain language of the Act.

2. Public Policy Considerations Weigh in Favor of Applying the Act to Third Parties

In addition to the OLC's unreasonable interpretation of the statute, the decision to exempt third parties from liability conflicts with the key public policies of protecting private information and proportionally punishing wrongdoers. First, the privacy provision was included as part of an effort to decrease misappropriation of private health information from identity theft and other fraudulent activity.¹⁰⁴ However, the narrow interpretation of the statute has left patients in the same position they were in prior to the enactment of HIPAA, when they relied solely on state causes of action in tort and breach of contract.¹⁰⁵ Unfortunately, as the available common law claims are not ideal methods for remedying misappropriation of health information,¹⁰⁶ many victims have no legitimate recourse. Although some states have enacted healthcare information legislation,¹⁰⁷ many rely on ill-fitting statutory schemes or outmoded common law alternatives for remedies against third parties who fraudulently obtain confidential information.¹⁰⁸ These alternatives have proven to be ineffective resources in combating the problem of improper health information disclosures.¹⁰⁹

Second, the OLC's narrow interpretation of the statute does not comport with general principles of proportionality. Doctors and medical providers bear a disproportionate share of fault for improper disclosures.

104. Symposium, *supra* note 17, at 8.

105. Stewart, *supra* note 32, at 29.

106. See generally Moses, *supra* note 15, at 526–31.

107. See generally Health Privacy Project, *The State of Health Privacy* (2002), http://www.healthprivacy.org/info-url_nocat2304/info-url_nocat_search.htm (containing a comprehensive guide to state privacy laws).

108. See WASH. REV. CODE § 42.17.255 (1987); see also Reid v. Pierce County, 136 Wash. 2d 195, 961 P.2d 333 (1998); Doe v. Gonzaga Univ., 143 Wash. 2d 687, 24 P.3d 390 (2001), *rev'd on other grounds*, 536 U.S. 273 (2002); SCHWARTZ & REIDENBERG, *supra* note 15, at § 7.3(b) (“A state-by-state

approach to regulation of medical information does not reflect the realities of modern health care finance and provision.”) (quoting Lawrence O. Gostin et al., *Privacy and Security of Personal Health Information in a New Health Care System*, 270 JAMA 2487, 2489–90 (1993)).

109. See discussion *infra* part IV.B.

Patients filing complaints with the OCR will be surprised to learn that only their physician is accountable.¹¹⁰ Americans trust their doctors and probably would not file a complaint and risk jeopardizing their doctor-patient relationship.¹¹¹ From the physician's perspective, the system heightens transaction costs because medical providers are not always in the best position to prevent illicit transfers.¹¹²

In addition, the system does not comport with this nation's legal framework of tortious and criminal liability. In general, tort and criminal law punishes unintentional, negligent conduct less harshly than intentional, purposeful conduct.¹¹³ In most cases where third parties fraudulently obtain medical records, either by misrepresentation or by deceit, the medical provider is an unwitting party to the transaction. By limiting penalties solely to medical providers, the system punishes the innocent or negligent actor while the purposeful actor escapes free of liability. The system punishes relatively minor offenses and effectively shields the true perpetrators from criminal prosecution.

Currently, due to the narrow interpretation of the wrongful disclosure provision, enforcement of the HIPAA privacy provision leaves patients and consumers without redress for the intentionally tortious conduct of third parties.¹¹⁴ Contrary to the position stated by the OLC, the plain language of the provision, when considered in the context of the entire Act, and in light of the relevant policy considerations, favors an interpretation that applies the provision to third parties.

A court confronted with the issue of whether an individual may maintain an action against a third party for wrongfully obtaining information, or causing such information to be disclosed, should keep in mind the universally accepted notion of judicial review expressed by Chief Justice John Marshall in *Marbury v. Madison*.¹¹⁵ Courts are not

110. It is unlikely that most Americans understand that third parties cannot be held liable for intrusions into patient medical histories. For example, at least one study has shown that most patients are unaware of their rights with respect to their medical records. See BISHOP ET AL., *supra* note 9, at 1 ("Although two thirds of national respondents say they are aware of federal protections for their personal medical records and 59 percent recall receiving a privacy notice, only 27 percent believe they have more rights than they had before receiving the notice.").

111. *Id.* at 2 (finding that ninety-eight percent of consumers are willing to share their personal information with a doctor to advance healthcare).

112. See Kapushion, *supra* note 26, at 1488 (stating that relaxing privacy standards would reduce transaction costs among privacy providers).

113. See RESTATEMENT (SECOND) OF TORTS § 901, cmt. c (1979); see also MODEL PENAL CODE AND COMMENTARIES § 2.02 cmts. 1-4 (1985).

114. See Winn, *supra* note 47, at 23.

115. 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

constrained by the administrative interpretation of the statute,¹¹⁶ and thus they should apply the provision to third parties despite the OLC's reluctance to do so. When contemplating such a change, courts should also remember that "[e]very right, when withheld, must have a remedy, and every injury its proper redress."¹¹⁷ Judicial open-mindedness into possible alternative enforcement mechanisms is critical to adopting a new strategy.

IV. LESSONS LEARNED FROM THE DIFFERENT FAILED METHODS FOR CIRCUMVENTING ADMINISTRATIVE LIMITATIONS BY PRIVATE LAWSUITS

Although beyond the scope of this Comment, it is important to understand the depth and variety of measures that individuals have utilized in seeking to secure a remedy for the improper disclosure of protected health information. The sheer magnitude of cases brought and alternative measures utilized indicates the ineffectiveness of the current system and the need for change. Analyzing the cases is also useful because they demonstrate which elements of the different causes of action are effective or not. Accordingly, the different cases in which plaintiffs seek redress for the wrongful disclosure of medical information have generally fallen into three distinct categories. First are cases brought under statutory law, most of which have been brought directly under the HIPAA statute.¹¹⁸ Second are cases in which patients have relied on traditional state common law tort principles.¹¹⁹ Finally, in some cases courts have used their inherent equitable powers to provide a remedy in the absence of explicit statutory provisions.

A. Plaintiffs Asserting a Cause of Action Directly Under the HIPAA Statute

Courts have soundly rejected all suits asserting a cause of action directly under HIPAA.¹²⁰ In *University of Colorado Hospital v. Denver*

116. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("The traditional deference courts pay to agency interpretation [of a statute] is not to be applied to alter the clearly expressed intent of Congress."); see also *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (holding that a court should not give deference to an agency's interpretation of a statute if it is in conflict with the plain language of the statute).

117. *Marbury*, 5 U.S. at 147.

118. See *O'Donnell v. Blue Cross Blue Shield of Wyo.*, 173 F. Supp. 2d 1176 (D. Wyo. 2001); *Brock v. Provident Am. Ins. Co.*, 144 F. Supp. 2d 652, 657 (N.D. Tex. 2001); *Means v. Ind. Life & Accident Ins. Co.*, 963 F. Supp. 1131, 1135 (M.D. Ala. 1997).

119. See *Winn*, *supra* note 26, at 652–65 (discussing cases in which Plaintiffs have utilized different causes of action); see also *Moses*, *supra* note 15, at 526–31 (discussing cases in which Plaintiffs have utilized different causes of action).

120. See cases cited *supra* note 118.

Publishing Co.,¹²¹ a hospital filed suit under HIPAA to enjoin a newspaper from publishing confidential patient information.¹²² The hospital argued that although the HIPAA statute contained no express authorization for a private right of action, the court should take a broader view and read the statute in light of the “contemporary legal context” existing at the time the statute was passed.¹²³ Using this context, the court, in accordance with Supreme Court precedent,¹²⁴ could imply a private right of action despite the lack of express congressional authorization.¹²⁵

However, the court rejected the hospital’s argument, relying on principles set forth in *Alexander v. Sandoval*.¹²⁶ In that case, the Supreme Court held that “private rights of action to enforce federal law must be created by Congress.”¹²⁷ *Sandoval* requires courts to first look at the statutory text for “rights-creating language.”¹²⁸ Language that explicitly confers a right on a specific class of persons indicates that Congress probably intended to include a right of action, while language customarily found in criminal statutes suggests the opposite.¹²⁹ In addition, where the statutory structure in question provides a discernable enforcement mechanism, courts should not imply a private right of action.¹³⁰ Based on this reasoning, the court in *University of Colorado Hospital* stated that the language in the HIPAA statute did not focus on the rights of individuals, but on regulating persons who might have access to the information, suggesting it should not imply a private right of action.¹³¹ Furthermore, the court reasoned that the civil fines and criminal penalties in the statute were a sufficient alternative enforcement mechanism to suggest Congress did not intend to create a private right of action.¹³²

121. 340 F. Supp. 2d 1142 (2004).

122. *Id.*

123. *Id.* at 1145.

124. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979).

125. *Denver Publ'g*, 340 F. Supp. 2d at 1143.

126. 532 U.S. 275 (2001). Suing under a federal statute prohibiting discrimination, Plaintiff alleged that Alabama’s Department of public safety unfairly discriminated when it administered its driver’s licensing tests in English only. The Supreme Court reversed, holding that Congress had not authorized a private right of action under the statute. *See id.*

127. *Id.* at 286.

128. *Id.* at 276.

129. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691 n.13 (1979) (“[T]he court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public.”) (citing *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977) (“unlawful” conduct); *Sec. Investor Prot. Corp. v. Barbour*, 421 U.S. 412 (1975) (duty of SIPC to “discharge its obligations”); *Nat’l R.R. Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453 (1974) (forbidding “action, practice, or policy inconsistent” with the Amtrak Act)).

130. *Alexander*, 532 U.S. at 289.

131. *Univ. of Colo. Hosp. v. Denver Publ'g Co.*, 340 F. Supp. 2d 1142, 1145 (2004).

132. *Id.*

Reliance on the *Sandoval* test has resulted in uniform rejection of private causes of action under HIPAA, with many cases citing the same problems as the court in *University of Colorado Hospital*.¹³³ To a lesser extent, a host of state and federal statutes have provided fodder for litigation as plaintiffs have sought redress for wrongful disclosures.¹³⁴

B. Plaintiffs Asserting a Cause of Action Under State Common Law

The second category of cases seeking redress for the wrongful disclosure of medical information are those in which patients have relied on traditional common law causes of action.¹³⁵ Although under the Supremacy Clause of the Constitution¹³⁶ the HIPAA statute preempts state law,¹³⁷ the Act contains an exception for state laws that impose higher standards than those contained in the regulations promulgated by HHS.¹³⁸ Ostensibly, this exception left open the possibility for private actions under state tort law.¹³⁹ Although the quantity of potential private actions is immense, this Comment discusses only those that have generated a significant amount of litigation and discourse: invasion of privacy, infliction of emotional distress, negligence, and breach of confidentiality.¹⁴⁰

133. See *O'Donnell v. Blue Cross Blue Shield of Wyo.*, 173 F. Supp. 2d 1176 (2001); *Brock v. Provident Am. Ins. Co.*, 144 F. Supp. 2d 652, 657 (N.D. Tex. 2001); *Means v. Ind. Life & Accident Ins. Co.*, 963 F. Supp. 1131, 1135 (M.D. Ala.1997).

134. See, e.g., WASH. REV. CODE § 70.24.084 (1999); WASH. REV. CODE § 70.02.170 (1991); WASH. REV. CODE § 42.17.255 (1987); *Jeckle v. Crotty*, 120 Wash. App. 374, 85 P.3d 931 (2004); *Fierstein v. DePaul Health Ctr.*, 949 S.W.2d 90 (Mo. Ct. App. 1997).

135. See *Winn*, *supra* note 26.

136. U.S. CONST. art. VI, cl. 2. The Supremacy Clause reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

137. 42 U.S.C. § 1320d-7(a)(1) (2000). The statute provides in relevant part, "Except as provided in paragraph (2), a provision or requirement under this part, or a standard or implementation specification adopted . . . shall supersede any contrary provision of State law." *Id.*

138. Pub. L. 104-191, § 264(c)(1), 110 Stat. 1936 (1996) (codified in 42 U.S.C. § 1320d-2 (2000)). The relevant portion of the statute provides as follows:

(c) Regulations.—

(2) Preemption.—A regulation promulgated [under this Act] shall not supersede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation.

Id.

139. HHS has acknowledge this possibility and refused to eliminate it. See OLC OPINION, *supra* note 47, at 10 n.12 ("We note that conduct punishable under section 1320d-6 may also be punishable under state law and render a person liable in tort.").

140. *Moses*, *supra* note 15, at 526-31.

Each cause of action has proved inadequate to the task of protecting medical privacy.

First, the tort of invasion of privacy makes a person liable for the damages caused by publicly disclosing information about the private life of another, which is not of legitimate concern to the public, and which would be highly offensive to a reasonable person.¹⁴¹ To satisfy the requirement of publicity, the defendant must communicate the information to the public at large, or to so many people that the matter is substantially certain to become public knowledge.¹⁴² In many improper medical disclosure cases, although the information disclosed is not generally available to the public, the disclosure itself is nonetheless extremely injurious.¹⁴³ In those cases, despite potentially significant harm, the victim will be unable to sue third parties who obtain their private information.

Second, infliction of emotional distress makes a person liable for intentionally or recklessly disclosing private information, by extreme and outrageous conduct, thereby causing severe emotional distress.¹⁴⁴ In cases of improper disclosure of medical information, this cause of action also provides a remedy against third parties who obtain information since the act of obtaining the information may cause emotional distress.¹⁴⁵ However, the burden of proving that the conduct was extreme and outrageous is often difficult to overcome.¹⁴⁶

Third, under principles of negligence, improper disclosure of medical records may lead to liability if the conduct resulting in the disclosure falls below the standard established by law for the protection of others against unreasonable risk of harm.¹⁴⁷ Legislative enactment or administrative regulation may establish standards of reasonable conduct.¹⁴⁸ Thus, in cases where patients sue based on a theory of negligence, the plaintiffs

141. RESTATEMENT (SECOND) OF TORTS § 652(D) (1979).

142. *Id.* § 652(D) cmt. a.

143. The two news stories discussed at the beginning of this article fall into this category. *See supra* notes 2–5

144. RESTATEMENT (SECOND) OF TORTS § 46 (1979).

145. *See supra* note 143 and accompanying text.

146. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (1979):

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

See also Moses, *supra* note 15 at 529–30 (citing Sanders v. Spector, 673 So. 2d 1176, 1180 (La. Ct. App. 1996) ("The premature disclosure of medical records herein does not constitute such extreme and outrageous conduct. Nor is it conduct calculated to cause and causing mental and physical harm.")).

147. RESTATEMENT (SECOND) OF TORTS § 282 (1979).

148. *Id.* § 285.

allege that the statute defines the standard of reasonable care, and the defendant did not meet that standard.¹⁴⁹ Unfortunately, negligence theory does not apply to the intentional conduct of third parties who obtain or facilitate the disclosure of information because only the healthcare provider owes a duty of care to the patient.¹⁵⁰ The third party therefore has no duty of care to the plaintiff and cannot be held accountable.

Finally, plaintiffs alleging breach of confidentiality must show that a confidential relationship exists between the parties, and that for reasons of public policy, the party receiving the information has a duty to maintain the privacy of such information.¹⁵¹ In this arena, courts have placed special emphasis on the doctor-patient relationship, citing the potential for abuse.¹⁵² Additionally, the administration of effective healthcare policy requires a trusting relationship between patients and physicians.¹⁵³ However, to sustain a claim of breach of confidentiality, courts require a direct confidential relationship between the parties.¹⁵⁴

At least one scholar has proposed that courts extend liability for breach of confidence claims to third parties.¹⁵⁵ Federal Prosecutor Peter Winn argues that courts have already embraced the idea that confidential relationships extend to third parties who lack a direct relationship with the patient.¹⁵⁶ Based on the holdings in several cases,¹⁵⁷ Winn articulated a rule for when a patient may maintain a cause of action against a third party who induces a physician to breach his fiduciary relationship. The patient has met his burden if the following elements are met:

- (1) the third party knew or reasonably should have known of the existence of the physician-patient relationship;
- (2) the third party

149. *Berger v. Sonneland*, 144 Wash. 2d 91, 26 P.3d 257 (2001) (holding that plaintiff could maintain a cause of action against her physician under Washington medical malpractice statute for the unauthorized disclosure of confidential information).

150. *See, e.g., Moses, supra* note 15, at 526–31. This seems to be the logical extension of HHS's reasoning in the OLC opinion. Under the OLC's analysis, Congress intended that the Act should only apply to covered entities. Although not explicitly stated, the fact that third parties owe no duty of care to a patient fits in well with this analysis. *See* OLC OPINION, *supra* note 47.

151. Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1451 (1982).

152. *See Roe v. Doe*, 400 N.Y.S.2d 668 (N.Y. Sup.Ct. 1977) (holding that patient could maintain a cause of action against her physician for breach of confidentiality when psychiatrist published a book containing descriptions of the patient's thoughts, emotions, intimate fantasies and biographical details).

153. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 307 (5th ed. 2001).

154. *See* Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451, 512 (1995).

155. *See* Winn, *supra* note 26.

156. Winn, *supra* note 26, at 664–65.

157. *See* *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793 (N.D. Ohio 1965); *Alberts v. Devine*, 479 N.E.2d 113 (Mass. 1985); *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518 (Ohio 1999).

intended to induce the physician to wrongfully disclose information about the patient, or the third party should have reasonably anticipated that his actions would induce the physician to wrongfully disclose such information; (3) the third party did not reasonably believe that the physician could disclose that information to the third party without violating the duty of confidentiality that the physician owed the patient; and (4) the physician wrongfully divulges confidential information to the third party.¹⁵⁸

Under this test, a third party inducing a healthcare provider to disclose confidential information is not immune from liability despite the lack of a direct confidential relationship. Winn also argues that state common law offers more protections than the HIPAA statute, and that federal law does not preempt any private cause of action.¹⁵⁹ Unfortunately, few courts have embraced breach of confidentiality as a theory of liability in medical records disclosure cases.¹⁶⁰ It is possible that courts have refused to adopt this line of reasoning because of their reluctance to make third parties liable for breach of confidentiality when there is no direct relationship between the parties.

C. Judicial Reluctance to Exercise Equitable Powers

Finally, courts have traditionally stepped in to provide remedies to individuals when statutory law leaves them without legitimate recourse.¹⁶¹ This trend has ancient roots in the English common law system of judicial power, adopted by American courts after the revolution.¹⁶² American courts have traditionally used their equitable powers to provide justice when the legislature or governing authority is slow to respond to changes in society.¹⁶³ Health information privacy is simply the most recent phenomenon requiring judicial intervention.

158. Winn, *supra* note 26, at 664–65.

159. *Id.* at 668.

160. *See* cases cited *supra* note 157.

161. *See generally* John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173, 208 (1999) (explaining the English tradition of substantive rights created through equity).

162. Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 373 (2003).

163. *See, e.g.*, Letter from Thomas Jefferson, President of the United States, to Samuel Kercheval (July 12, 1810):

I am not an advocate for frequent and untried changes in laws, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.

However, when the judicial branch applies its equitable powers, courts tend to be inconsistent in applying the law.¹⁶⁴ The resulting inconsistency is in direct contravention of one of the main policies behind enactment of the HIPAA statute—the creation of a uniform set of standards and rules to streamline the transfer of data.¹⁶⁵ In addition to the uniformity problem, the trend towards a more conservative judiciary in recent decades¹⁶⁶ has likely made courts reluctant to exercise their equitable powers in the area of medical privacy. For these reasons, no court has yet exercised its authority to protect the medical privacy rights of individuals.

D. Lessons Garnered from Unsuccessful Lawsuits

The different methods of creating a private cause of action for wrongful disclosure of health information have had varying degrees of success. Taken together, the claims based on common law causes of action have been significantly more successful than attempts to sue directly under statutory provisions or appeals to judicial equity.¹⁶⁷ One important lesson is that any viable solution for enforcing patient privacy rights must apply the uniform standards created by the HIPAA statute. The Secretary of HHS recognized this point and recommended that Congress create a federal private right of action.¹⁶⁸ In his recommendations, the Secretary acknowledged that the protection of health information was generally a matter of state law, but at the same time emphasized that the

164. THE SUPREME COURT OF GEORGIA, A HISTORY OF THE SUPREME COURT OF GEORGIA 6 (2006). In 1828, John Forsyth lamented,

[E]ight Judges of the Superior Court, each confined to the circuit for which he was elected, supreme in his authority, not bound by the decisions of his predecessors or contemporaries, and not always by his own, while these will be in their turn disregarded by his successor, there can neither be uniformity nor certainty in the laws for the security of the rights of persons or property.

Id., available at http://www.gasupreme.us/pdf/2006_brochure.pdf. Similarly, George W. Crawford, in 1845, stated, “Eleven Judges, each supreme in his authority and capable of being appealed from himself only to himself, cannot presume to decide with uniformity. Without uniformity law itself is a chance and has been aptly called a miserable servitude.” *Id.* at 7.

165. See SPIIHI, 64 Fed. Reg. 59,918, 59,920 (proposed Nov. 3, 1999) (to be codified at 45 C.F.R. pts. 160–164).

166. Cass R. Sunstein & David Schkade, *A Bench Tilting Right*, WASH. POST, Oct. 30, 2004, at A19 (“The federal judiciary has been moving steadily to the right.”).

167. See *supra* Part IV.

168. HEALTH AND HUMAN SERVS., RECOMMENDATIONS OF THE SECRETARY OF HEALTH AND HUMAN SERVICES, PURSUANT TO SECTION 264 OF THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 sec. H (1997), <http://aspe.hhs.gov/admsimp/pvcrec.htm>. “Only if we put the force of law behind our rhetoric can we expect people to have confidence that their healthcare information is protected, and ensure that those holding health information will take their responsibility seriously.” *Id.*

increasingly interstate nature of the problem, coupled with uneven protection offered by different states, required greater action.¹⁶⁹

With these considerations in mind, the approach taken by Winn is instructive because it embraces all of the necessary elements for a successful cause of action for wrongful disclosure.¹⁷⁰ First, it places a duty on the physician to maintain the confidential relationship.¹⁷¹ Second, an individual may maintain a cause of action against third parties who wrongfully obtain protected health information.¹⁷² Finally, the standard for breach of the confidential relationship incorporates the uniformity of the HIPAA regulations.¹⁷³ Although few courts have embraced Winn's approach, possibly because of the conceptual difficulties of extending the boundaries of confidential relationships, it provides an excellent starting point for creating a private cause of action.

V. A NEW METHOD: INCORPORATING THE FEDERAL HIPAA PRIVACY STANDARDS INTO THE STATE COMMON LAW CLAIM OF INTRUSION UPON SECLUSION

As Winn's approach successfully integrates the uniform standards of the HIPAA statute with a common law cause of action, it is the starting point for further analysis. This section will articulate an alternate cause of action and method of integration, which, although similar to Winn's, creates an alternate foundation upon which state courts may act. Specifically, Washington State courts should allow patients to sue third parties for violations of the HIPAA statute within the procedural framework of *Washington Mutual v. Superior Court*,¹⁷⁴ a California Court of Appeal case.

A. Washington Recognizes the Tort of Intrusion Upon Seclusion and Would Likely Apply it in Cases of Unauthorized Medical Disclosures

One significant problem with Winn's theory of liability for breach of confidentiality is that courts appear reluctant to extend the concept to third parties because there is no direct confidential relationship.¹⁷⁵ The best way to address this shortcoming is to eliminate the need for a confidential relationship and rely solely on the disclosure of confidential information. The tort of intrusion upon seclusion satisfies these

169. *Id.* The Secretary described the current state of the law as "a morass of erratic law, both statutory and judicial, defining confidentiality of healthcare information." *Id.*

170. Winn, *supra* note 26.

171. *Id.* at 654.

172. *Id.* at 664–65.

173. *Id.* at 668.

174. Wash. Mut. Bank v. Superior Court, 75 Cal. App. 4th 773 (1999).

175. See cases cited *supra* note 157.

requirements.¹⁷⁶ Under a claim for intrusion upon seclusion, a defendant is liable for intentional intrusions upon the private affairs of another when: 1) the plaintiff had a legitimate and reasonable expectation of privacy; and 2) the intrusion would be highly offensive to a reasonable person.¹⁷⁷ The tort is very similar to invasion of privacy, but without the additional requirement of publicity.¹⁷⁸ The commentators in the *Restatement (Second) of Torts* did not specifically discuss the application of intrusion upon seclusion to cases of improper disclosure of medical records, but the comments to the section indicate that such a disclosure would be actionable.¹⁷⁹ As an added benefit, the Washington supreme court has recognized the tort as a valid cause of action.¹⁸⁰

A court in Washington would likely consider the unauthorized disclosure of medical information sufficient grounds for a plaintiff to claim intrusion into her personal affairs. Patients have a legitimate expectation of privacy for their medical records, and most improper disclosures would be highly offensive to a reasonable person. As compared with prior applications of intrusion claims by Washington courts, the case for utilizing intrusion claims in medical disclosure cases is particularly strong.

For example, the supreme court recently addressed a claim for intrusion in *Doe v. Gonzaga University*.¹⁸¹ In that case, the school administration at Gonzaga University investigated a student accused of rape. After the investigation, the school denied the student an affidavit he needed to receive his teaching certificate.¹⁸² Thereafter, the student sued the University by claiming, among other things, an intrusion into his private affairs.¹⁸³ The court permitted the plaintiff to proceed when he provided evidence that the University “inquired into his personal relationships, habits, and even anatomy.”¹⁸⁴ Although the court acknowledged that the school had statutory authority to contact faculty regarding

176. RESTATEMENT (SECOND) OF TORTS § 652(B) (1979).

177. *Id.*

178. *Id.* at cmt. a.

179. *Id.* at cmt. b. Comment b states the following:

[The intrusion] may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns.

180. *Reid v. Pierce County*, 136 Wash. 2d 195, 206, 961 P.2d 333, 339–40 (1998).

181. *Doe v. Gonzaga Univ.*, 143 Wash. 2d 687, 693, 24 P.3d 390, 393 (2001), *rev'd on other grounds*, 536 U.S. 273 (2002).

182. *Id.* at 697, 24 P.3d at 395.

183. *Id.* at 698, 24 P.3d at 395–96.

184. *Id.* at 706, 24 P.3d at 399.

serious behavioral problems, the student had a reasonable expectation of privacy as to the “intimate details of [his] sex life.”¹⁸⁵

In the context of medical records disclosure cases, plaintiffs have an even stronger claim to an expectation of privacy. First, in *Gonzaga University*, state regulations authorized the University to investigate the student’s potential behavioral problems.¹⁸⁶ Conversely, Washington’s Uniform Health Care Information Act (UHCIA)¹⁸⁷ states that medical records are “personal and sensitive”¹⁸⁸ and expressly prohibits disclosure without patient authorization.¹⁸⁹ As such, parties who have wrongfully obtained confidential medical records are not relying on any express legal authorization.¹⁹⁰

Second, the University confined its investigation into the student’s behavioral problems to matters on the public record.¹⁹¹ Although the University was authorized to contact faculty under whom the student had studied,¹⁹² any behavioral problems cropping up in the course of the student’s studies would have been apparent to other students in the classroom. Consequently, the court permitted the student to make a claim for intrusion even though the student had a relatively weak expectation of privacy. Conversely, patients have high expectations for the privacy of their medical records.¹⁹³ Unlike the student-teacher relationship, the physician-patient relationship includes a certain measure of confidential-

185. *Id.* It is likely that a court would associate medical records with “intimate details” of a plaintiff’s personal life. For example, the details of an individual’s sex life reside with two people, the individual and his or her sexual partner. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the government may not intervene in private sexual conduct between consenting adults). Similarly, medical records are the product of a two-person relationship: doctor-patient.

186. *Gonzaga Univ.*, 143 Wash. 2d at 706, 24 P.3d at 399; *see also* WASH. ADMIN. CODE § 180-75-082 (1989) (repealed by WASH. REV. CODE § 97.04.088 on March 8, 1997).

187. WASH. REV. CODE § 70.02.005–.904 (1991).

188. *Id.* § 70.02.005.

189. The Act contains provisions for disclosure without express authorization in certain specified cases. *See id.* § 70.02.050.

190. *Id.*

191. *Gonzaga Univ.*, 143 Wash. 2d at 706, 24 P.3d at 399. *See also* *Mark v. Seattle Times*, 96 Wash. 2d 473, 497, 635 P.2d 1081, 1094 (1981).

It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there.

Id. (citing W. PROSSER, *TORTS* 808–09 (4th ed. 1971); *Lamon v. City of Westport*, 44 Wash. App. 664, 669, 723 P.2d 470, 474 (1986) (holding that plaintiffs could not maintain an action for an intrusion into their private affairs because the issue was a matter of public record).

192. *Gonzaga Univ.*, 143 Wash. 2d at 706, 24 P.3d at 399.

193. *See* BISHOP ET AL., *supra* note 9 (“Sixty-seven percent of national respondents [are] ‘somewhat’ or ‘very concerned’ about the privacy of their personal medical records.”).

ity.¹⁹⁴ Doctors do not disclose the content of their discussions with patients, nor do they conduct meetings with their patients in the presence of third parties, like teachers do in a classroom setting.¹⁹⁵ Doctors, like other professions that rely on this aspect of confidentiality,¹⁹⁶ meet with patients individually behind closed doors, and often discuss sensitive issues.¹⁹⁷

Doe v. Gonzaga University illustrates that prior intrusion claims considered by Washington courts have set a relatively low bar for plaintiffs when it comes to demonstrating an expectation of privacy. Accordingly, in a medical records disclosure case, it is unlikely that a court would reject a claim of intrusion upon seclusion on the grounds that the plaintiff did not have a reasonable expectation of privacy.

Finally, wrongful disclosure of medical records would be highly offensive to a reasonable person. Americans rate the privacy of their medical information as a serious concern.¹⁹⁸ In many cases, the potential for embarrassment resulting from the improper disclosure of medical records is high.¹⁹⁹ Patients may also face problems with their employers or others if their confidential information is disseminated.²⁰⁰ Even though some mistaken disclosures will be harmless, most disclosures that lead to litigation are probably those tending to be egregious or overly offensive to a reasonable person.²⁰¹

Although some critics have argued that the tort of intrusion is insufficient to protect medical privacy,²⁰² today patients can claim an

194. See generally Brett G. Scharffs & John W. Welch, *An Analytical Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L.J. 159, 179 (2005).

195. *Id.*

196. Attorneys, clergy, and counselors to name a few.

197. Scharffs & Welch, *supra* note 194.

198. See BISHOP ET AL., *supra* note 9.

199. Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 510 n.28 (2004). "Unauthorized disclosure of an individual's medical information can result in injury to that individual's reputation, embarrassment, loss of employment, loss of financial opportunities, including loans, harassment, and even violence." *Id.* (citing AMITAI ETZIONI, *THE LIMITS OF PRIVACY* ch. 5 (1999)).

200. *Id.*

201. For example, consider the facts of *Doe v. Gonzaga Univ.*, 143 Wash.2d 687, 24 P.3d 390 (2001), and the victims in the articles cited *supra* notes 2 & 5.

202. SCHWARTZ & REIDENBERG, *supra* note 15, at § 6.5. Other critics argue that intrusion claims are insufficient to protect patient privacy because the rule does not protect plaintiffs who take offense when a reasonable person would not. See Winn, *supra* note 26, at 658. However, the law has always distinguished individual sensibilities in favor of the general public concern:

Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life in which he is a part. Thus, he must expect the more or less casual observation of his neighbors as to what he does.

RESTATEMENT (SECOND) OF TORTS § 652(D) cmt. c (1979).

intrusion based on a privacy right derived from HIPAA. For example, in *Miller v. Motorola*, an Illinois court rejected a claim for intrusion in a medical records disclosure case because the plaintiff voluntarily provided the records to the defendant.²⁰³ The court reasoned that because the plaintiff had voluntarily disclosed the records to the defendant, there was no intrusion into her affairs when the defendant subsequently disseminated the information.²⁰⁴ However, *Motorola* was decided prior to the enactment of HIPAA in 1996.²⁰⁵ Today, the plaintiff in *Motorola* could claim an intrusion based on the defendant's disclosure of information without HIPAA authorization.²⁰⁶ In addition, as the cases above suggest, courts in Washington have interpreted intrusion upon seclusion more broadly than the court in *Motorola*.²⁰⁷

*B. Washington Mutual v. Superior Court Provides the
Framework for Incorporating Federal Privacy Standards
into a State Claim for Intrusion Upon Seclusion*

Although intrusion upon seclusion provides an excellent starting point, it lacks the uniformity embodied by the standards in HIPAA. Uniformity is important because plaintiffs and defendants need to know what the rules are for the system to function properly.²⁰⁸ This Part will discuss the method used by a California court to integrate the standards of the Real Estate Settlement Procedures Act (RESPA)²⁰⁹ with the protections of a state law cause of action.²¹⁰ Washington courts should use the California case to integrate the HIPAA standards into an action for intrusion upon seclusion.

In *Washington Mutual*, the California Court of Appeals addressed whether a violation of a standard contained in a federal statute could be the predicate for a private state law cause of action when the federal statute did not provide for a private right of action.²¹¹ The law in question was RESPA, which provided that lenders must make certain disclosures

203. 560 N.E.2d 900, 904 (Ill. App. Ct. 1990) (holding that there was no unauthorized intrusion into the plaintiff employee's affairs when the defendant employer disseminated her medical records to co-workers because she voluntarily provided the information to the defendant).

204. *Id.*

205. *Id.*

206. Similarly, a third party who causes a health care provider to improperly disclose information in violation of HIPAA would clearly be intruding on a patient's private affairs.

207. See cases cited *supra* note 191.

208. See generally Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 444 (2003) (discussing the necessity of uniform application of the law).

209. Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 (2000).

210. *Wash. Mut. Bank v. Superior Court*, 75 Cal. App. 4th 773 (1999).

211. *Id.*

regarding fees to borrowers prior to entering loan agreements.²¹² The plaintiffs sued Washington Mutual Bank for not disclosing certain additional fees that it assessed as part of some real estate transactions.²¹³ In its defense, Washington Mutual challenged the validity of the suit, arguing that the federal RESPA statute preempted any state law claims.²¹⁴ A provision of the statute preempted any state law that was “inconsistent” with the Act²¹⁵ and gave the Secretary authority to determine which state laws were inconsistent with the statute when promulgating regulations.²¹⁶ One final portion of that provision prohibited the preemption of state laws giving consumers greater protection than the federal statute.²¹⁷

The construction of the RESPA statute at issue in that case mirrors the HIPAA statute in many key respects. As with RESPA, HIPAA does not permit a private cause of action.²¹⁸ Also, HIPAA contains a provision that preempts contrary state law, and places discretion in the hands of the Secretary to decide whether the state law in question is contrary to federal law.²¹⁹ Finally, HIPAA does not preempt state laws giving greater protection to consumers.²²⁰

In analyzing the RESPA statute, the California court narrowly construed the language of the preemption clause in light of the strong presumption against preemption.²²¹ Washington Mutual argued that the lack of an express private federal action indicated Congress’ intention to preempt state causes of action.²²² The court stated that without congressional authorization for a private cause of action, preemption of state law would “have the perverse effect of granting complete immunity [from liability].”²²³ The court went further, stating, “[i]t is, to say the least, difficult to believe that Congress would, without comment, remove all means of

212. 12 U.S.C. § 2601 (2000).

213. *Wash. Mut. Bank*, 75 Cal. App. 4th at 776.

214. *Id.* at 775–76.

215. 12 U.S.C. § 2616 (2000).

216. *Id.*

217. *Id.*

218. See discussion *supra* Part IV.A.

219. 42 U.S.C. § 1320d-7(a)(1) (2000). While the differences between “inconsistent” and “contrary” open this comparison to debate, it is likely that a “contrary” provision is a harder standard to meet because the provision must be in stark contrast to the Act. An “inconsistent” provision may only be partially at odds with the federal statute. Such a construction lends support to the argument presented in this Comment.

220. Pub. L. No. 104-191, § 264(c)(1), 110 Stat. 1936 (1996) (codified as 42 U.S.C. § 1320d-2 (2000)).

221. *Wash. Mut. Bank v. Superior Court*, 75 Cal. App. 4th 773, 782 (1999). According to the court, “[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.” *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

222. *Id.* at 786–87 n.16.

223. *Id.* at 783 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996)).

judicial recourse for those injured by illegal conduct.”²²⁴ Accordingly, the court held that the “mere absence of a private right of action in a federal law” was an insufficient basis for preemption.²²⁵

Next, with respect to the express preemption provision in the RESPA statute, the court analyzed several federal court decisions addressing this point.²²⁶ The court held that when the state cause of action does not frustrate the purpose behind the federal law, the federal law does not preempt the state cause of action.²²⁷ The state law in question did not frustrate the purpose behind the federal law, but instead was complimentary because it tended to promote full compliance and disclosure in accordance with RESPA.²²⁸

Finally, the court briefly addressed the Secretary’s discretion in determining whether federal law preempts a state law because it is inconsistent.²²⁹ Although citing one case prohibiting application of state law without Secretary approval,²³⁰ the court noted that commentators had uniformly criticized the result²³¹ and instead presumed that state law was consistent with federal law until the Secretary determines that it is inconsistent.²³² Ultimately, the court held that RESPA did not preempt private actions under state laws for violations of RESPA because there was no express preemption and the state actions were consistent and complimentary with federal law.²³³

Applying the foregoing analysis to HIPAA, the result should be similar. The statute does not preempt private state actions because

224. *Id.*

225. *Id.*

226. *See generally* *Beffa v. Bank of W.*, 152 F.3d 1174 (9th Cir. 1998) (holding that an express preemption contained in the Expedited Funds Availability Act was “quite narrow” and that “Congress expressed no desire to preempt state laws or causes of action that supplement, rather than contradict” federal law); *Allarcom Pay Television v. Gen. Instrument Corp.*, 69 F.3d 381 (9th Cir. 1995) (holding that the express preemption provision contained in the Federal Communications Act did not prevent states from enacting laws that imposed additional, but not contrary, obligations to those included in the federal law); *Total TV v. Palmer Commc’ns, Inc.*, 69 F.3d 298 (9th Cir. 1995) *cert. denied*, 517 U.S. 1152 (1996) (holding that the express preemption provision in the Cable Communications Policy Act did not preempt a state law because the state law complimented rather than undermined the federal law).

227. *Wash. Mut. Bank*, 75 Cal. App. 4th at 785.

228. *Id.* at 787.

229. *Id.* at 785.

230. *Greenwald v. First Fed. Sav. & Loan Ass’n of Boston*, 446 F. Supp. 620 (D.Mass. 1978) (holding that the Secretary must determine that the state law in question gives greater protection before the law may be applied).

231. *See, e.g.*, BARRON & BERENSON, FEDERAL REGULATION OF REAL ESTATE AND MORTGAGE LENDING, § 2.03, p. 2–33 n.410 (4th ed. 1998).

232. *Wash. Mut. Bank*, 75 Cal. App. 4th at 773.

233. *Id.* at 785 n.14.

HIPAA is silent on the issue²³⁴ and preemption would place absolute immunity on third parties who wrongfully obtain protected health information. Although some courts and the OLC have argued that the administrative complaint process provides a sufficient alternative enforcement mechanism, the lack of tangible results suggests otherwise.²³⁵ In addition, providing individuals a forum to address their grievances would complement, not frustrate, the HIPAA statute. Medical providers would have added incentive to comply with the requirements of the statute out of fear of private lawsuits, and the threat of a lawsuit would deter third parties contemplating fraudulent activity.

VI. CONCLUSION

Administrative action to protect the privacy of health information has been extremely inadequate. The law currently allows medical providers to disclose confidential information without genuine fear of reprisals, and third parties may deceive, scam, connive, and weasel private medical information with impunity. It is shameful to admit, but over ten years after the enactment of HIPAA there have been no monetary penalties imposed,²³⁶ and only two guilty pleas have been entered.²³⁷ Without further congressional action, the task falls to the courts and to the states to provide remedies to patients injured by the conduct of others.

A state cause of action may incorporate the standards for protecting health information found in HIPAA. Applying the analytical framework in *Washington Mutual v. Superior Court*, a Washington court could conclude that HIPAA's express preemption provision does not prevent private causes of action under state law for violations of HIPAA. A state court may also exercise its power of judicial review to interpret the meaning of the statute more broadly. The interpretation offered by the Secretary is unnecessarily narrow and internally inconsistent with the Act viewed in its entirety. A broader interpretation of the privacy provision would be consistent with the plain language of the statute and would provide plaintiffs redress for the injuries they have suffered at the hands of third parties. A plaintiff passing these threshold tests may sue a medical provider or third party for violations of the common law tort doctrine of intrusion upon seclusion, which the Washington Supreme Court recognized in *Doe v. Gonzaga University*. The doctrine of intrusion upon seclusion eliminates the need to convince a court that a third party may breach a duty of confidentiality to a patient, and as the

234. See 42 U.S.C. § 1320d-7 (2000).

235. See *supra* Part III.

236. See sources cited *supra* note 42.

237. See sources cited *supra* notes 45–46.

doctrine is part of the *Restatement (Second) of Torts*, it is generally available to any state for adoption.

Problems with information privacy have become exponentially more pronounced in the last decade. The privacy protections in HIPAA have proven insufficient to protect patient's rights. The time for congressional action has come and gone and it is time for courts to exercise their equitable powers, giving plaintiffs a forum to seek redress for violation of their rights.