Santa Clara University School of Law

Santa Clara Law Review

Volume 64 | Number 1 Article 5

2024

PROTECTING ELECTRONIC HEALTH RECORDS AFTER DOBBS

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PROTECTING ELECTRONIC HEALTH RECORDS AFTER *DOBBS*

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In the aftermath of Dobbs, states are taking dueling approaches to abortion prohibitions. Some states are enacting draconian criminal penalties for abortion providers or those helping patients seeking abortion services. Other states are doing all they can to protect patients receiving services within their borders and those who help them. Medical records are at the heart of these conflicts as they provide the best evidence of the patient's condition and care provided. This article assesses the likely efficacy of state efforts to protect information in electronic health records from use in prosecutions or suits for damages in abortion restrictive states. It concludes that despite both the federal HIPAA privacy rule and state law shields, protection of patient confidentiality remains uncertain.

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TABLE OF CONTENTS

I. INTRODUCTION

Confidentiality is a cornerstone of the relationship between health care providers and their patients. The criminalization of abortion, or the availability of punitive damage remedies in many states after *Dobbs*,[1] presents serious threats to patient confidentiality. Other scholars have raised alarms about the landscape of the Internet, where vast amounts of data about individual searches for information, location, remote communication, and use of health-related apps may be available.[2] This article is the first to concentrate

1. Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022).

2. Aziz Huq and Rebecca Wexler, *Digital Privacy for Reproductive Choice in the Post-Roe Era*, 98 N.Y.U. L. REV. 555, 569-70 (2023); Leah R. Fowler and

specifically on threats to information generated in the provider-patient relationship, in particular, the individually identifiable reproductive information found in electronic health records (EHRs). These records are likely targets of abortion-restrictive states, as they may provide the most reliable information about patient preferences, patient conditions, provider knowledge or intent, and treatment offered or received. Protecting these records is critical for patients, for care access and quality, and for health care providers. Yet protections are inadequate in the wake of *Dobbs*.

Patients have extremely strong expectations of privacy in health records. When expectations of confidentiality are undermined—as they may be if information gained in the relationship is used in damage suits or criminal prosecutions after *Dobbs*—patients may not share information critical to their care or may avoid care altogether. Although patients are central, it should not be forgotten that the protection of records matters to providers as well. If providers know that records may be used against them or their patients, they may record information less fully or may conceal what actually occurred.[3] Inadequate records may harm patients seeking ongoing care but may also harm physicians who are vulnerable to suits for malpractice or to disciplinary actions. Providers also may become less willing to offer controversial forms of care, thus diminishing access even in states where the care is protected.

Federal law in the form of the Health Insurance Portability and Accountability Act (HIPAA), along with accompanying regulations, provides significant protection for the privacy and security of electronic health records. Some abortion-protective states have made special efforts to shield information about reproductive care received within their borders. This article argues that these protections are likely to be of limited efficacy. Protecting the integrity of the provider-patient relationship requires further action to address threats to health records in the wake of *Dobbs*. However, given the

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Michael R. Ulrich, *Femtechnodystopia*, 75 STAN. L. REV. 1233, 1256-57(2023) (addressing period and fertility tracking apps).

3. HIPAA Privacy Rule To Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23508-23509 (April 17, 2023) (to be codified at 45 CFR 160, 164), https://www.federalregister.gov/documents/2023/04/17/2023-07517/hipaa-privacy-rule-to-support-reproductive-health-care-privacy#h-1.

current landscape of available options, the most protective option of all may be decisions by providers and patients to maintain separate records for controversial reproductive care where it remains legally available. A reversion to local storage of records that are not interoperable—or even a retreat to paper records—may be the safest option when patients seek sensitive reproductive care. This result will forego the advantages of interoperable medical records, with potentially damaging consequences for continuity of patient care.

The article begins with illustrations of relevant state laws criminalizing or providing damage remedies for abortions, along with how patient EHRs might be used in these actions. Next, the article lays out the contemporary structure of EHRs and federal protections currently in place for them, particularly the HIPAA privacy rule, arguing that these protections have critical gaps. Then, it describes the variety of newly enacted state laws specifically shielding information about legally performed abortions from investigations in states with abortion prohibitions and explains why their potential for success is limited. Finally, it considers the strengths and limits of additional regulatory and statutory protections that have been proposed at the federal level. It concludes that the most prudent option for patients and providers may be reversion to local storage of records, or even to paper records. The result may be deleterious for continuity of care, even more so if states reach beyond abortion to threaten forms of care such as gender-affirming care, prophylaxis against sexually transmitted diseases such as HIV, or even vaccination.

II. STATE COURT ABORTION ACTIONS AND THE NEED FOR EVIDENCE

Since the Supreme Court's decision in *Dobbs*, many states have criminalized early abortion. Some states have also created specific crimes for aiding and abetting abortions. States have also established a variety of damage remedies against people for performing or helping with abortions. Although some states have suggested they will act against abortions occurring out of state, my discussion here will focus on intra-state actions relevant to abortion. Domestic

extraterritorial crimes raise serious problems of federalism[4] and states can do a great deal to erect barriers to abortions for their residents without resorting to criminalizing extraterritorially. In addition to abortions taking place within the state, prohibited in-state activities might include referring for abortion elsewhere, providing information about abortions elsewhere, abetting receipt of an abortion elsewhere, helping with travel for an abortion elsewhere, remotely prescribing medication abortion to a patient located within the state, shipping medication abortion into the state, or prescribing medication abortion to a patient who returns to the state to complete the abortion. No statutes directly related to abortion allow action to be taken against pregnant people themselves for the abortion itself. However, pregnant women have been threatened with prosecution for actions taken during pregnancy considered to place their fetus at risk, including efforts at medication abortions.[5] Because this situation is changing rapidly, this section presents examples of each of these kinds of laws, rather than attempting a comprehensive account.

A. Criminalizing Early Abortion

One state criminalizing early abortion is Georgia, which defines criminal abortion as administering "any medicine, drugs, or other substance whatever to any woman or . . . uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion."[6] Once

4. For discussions of such U.S. domestic extraterritoriality, *see e.g.*, William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020); Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97 (2019); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine;(II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987); *See also* Glenn I. Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309 (2012) (arguing that states with domestic prohibitions should in many cases apply its proscriptions to the conduct of its citizens traveling abroad, but applying this argument only in the international context).

5. David Dayen, *The Inevitable Prosecutions of Women Who Obtain Abortions*, THE AMERICAN PROSPECT (Jan. 16, 2023), https://prospect.org/health/2023-01-16-prosecution-women-mifepristone-abortion-alabama/.

6. GA. CODE ANN. § 16-12-140(a).

cardiac electrical activity can be detected, at about six weeks after the patient's last menstrual period, abortion is only permissible for medical emergencies or if the pregnancy is deemed futile because the condition of the fetus precludes sustaining life.[7] Excluded from abortion are ectopic pregnancies or cases of fetal demise.[8] Health records are to be made available to the district attorney of the judicial circuit in which the abortion occurs or the patient resides.[9] Criminal abortion in Georgia carries a penalty of one to ten years in prison.[10] Georgia requires a physician located out of state to hold a Georgia telemedicine license to treat a patient located in Georgia, so it presumably would consider any remote care as occurring at the location of the patient rather than at the location of the provider.[11]

Information in the patient's EHR may be critical to establishing several aspects of Georgia's definition of criminal abortion. The statute requires intent to produce a miscarriage or abortion; the patient's record may reveal whether the provider followed the standard of care in treating the patient for a different condition or whether abortion was the treatment goal. The record may also reveal the date of the patient's reported last menstrual period or the results of tests for the presence of fetal cardiac activity. It may also indicate whether the patient's situation was a medical emergency or whether anomalies had been diagnosed in the fetus sufficient to meet the exceptions in the Georgia law.

Another example of abortion criminalization is the South Dakota law which makes procurement of an abortion a felony unless it is necessary to save the life of the patient.[12] "Procurement" is not a defined term in the state's abortion statute, but it presumably requires some effort to seek an abortion; evidence of a referral in the patient's record might be construed as procurement. The South Dakota Attorney General has publicly stated the belief that the statute extends to abortion medication acquired outside of the state.[13] This

7. GA. CODE ANN. § 16-12-141(a)(2), (3), (4).
8. GA. CODE ANN. § 16-12-141(a)(1)(A), (B).
9. GA. CODE ANN. § 16-12-141(f).
10. GA. CODE ANN. § 16-12-140(b).
11. *Id.* at §43-34-31.1(a), (c).
12. S.D. CODIFIED LAWS § 22-17-5.1
13. Stu Whitney, *South Dakota women evade abortion ban by accessing medication in neighboring states*, SOUTH DAKOTA NEWS NOW (Feb. 11, 2023)

assertion is particularly telling because "Just the Pill" offers telehealth abortion services immediately over the border from South Dakota in Minnesota. South Dakota also defines attempting to perform an abortion as constituting a substantial step in a course of conduct planned to culminate in an abortion, under the circumstances as the actor believed them to be.[14] Evidence of planning also might be found in the patient's record, such as a notation of a referral or scheduling of a later appointment to assure that a medication abortion has been complete.

B. Criminalizing Aiding and Abetting Abortion

Idaho has perhaps the most far-reaching prohibition of "facilitating" abortion. In Idaho, it is a felony to offer services "by any notice, advertisement, or otherwise assist in the accomplishment of . . . " facilitating a miscarriage or abortion.[15] Evidence of referrals or of abortions in the patient's medical record might be used to prove elements of these offenses. In addition, Idaho has created a separate crime of "abortion trafficking," which is procuring an abortion (including medication abortion) for a minor without parental consent.[16] This crime can only be committed by an adult and requires intent to conceal the abortion.[17] That the abortion provider or drug provider is located out of state is not a defense to this prohibition.[18]

C. Prohibiting Shipping Abortion Medication

States also prohibit shipping abortion medication. Missouri, for example, requires any drug used for the purpose of an abortion to be administered in the same room and in the physical presence of the physician who provided the drug.[19] Proof that this requirement was not violated would need to include the purpose of the administration of the drug, evidence that could be found in the patient's medical record. Missouri

https://www.dakotanewsnow.com/2023/02/11/south-dakota-women-getting-abortion-meds-other-states/.

14. S.D. CODIFIED LAWS § 34-23A-1.1
15. IDAHO CODE § 18-603.
16. IDAHO CODE § 18-623(1).
17. IDAHO CODE § 18-623(1).
18. IDAHO CODE § 18-623 (3).
19. MO. REV. STAT. § 188.021(1).

also believes that the federal Comstock law,[20] adopted in 1873, prohibits shipment of any abortifacient through the mails without proof of intent to use the substance for an illegal abortion.[21] This view was shared by a federal district court judge in Texas in concluding that the Food and Drug Administration had acted inappropriately in removing the requirement for in person distribution of mifepristone.[22] The Fifth Circuit did not discuss the Comstock Act in upholding the district court's determination that the FDA had acted inappropriately.[23] The Fifth Circuit decision is before the Supreme Court with oral argument scheduled for March 2024.[24]

D. Causes of Action for Damages

Texas's civil damages statute permits recovery of up to $10,000 in damages for an abortion after detection of fetal cardiac activity.[25] The damage remedy also applies to aiding and abetting an abortion.[26] Proof of these causes of action could use evidence in the patient's EHR of the performance of an abortion or of results of tests of fetal cardiac activity. The statute does not specify whether it applies to abortions performed outside of the state of Texas,[27] although one court has interpreted Texas law not to permit extraterritorial crimes.[28] On the other hand, the Texas Attorney General send a civil investigative demand to Seattle Children's Hospital seeking information about Texas resident minors who may have received gender-affirming care in Washington State. When Seattle Children's petitioned to set aside the

20. *See generally* 18 U.S.C. § 1461.

21. Letter from Andrew Bailey, Attorney General of Missouri, to Danielle Gray, Executive Vice President Walgreens Boots Alliance, Inc. (Feb. 1, 2023), https://ago.mo.gov/wp-content/uploads/attachments/2023-02-01-fda-rule—-walgreens-letter-danielle-gray.pdf?sfvrsn=ff1e6652_2.

22. Alliance for Hippocratic Medicine v. U.S. Food & Drug Administration, 668 F. Supp. 3d 507, 539-542 (N.D. Texas 2023).

23. Alliance for Hippocratic Medicine v. U.S. Food & Drug Administration, 78 F.4th 210, 251 n.8 (5th Cir. 2023).

24. Food and Drug Administration v. Alliance for Hippocratic Medicine, no. 23-235, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-235.html.

25. TEX. CIV. CODE § 171.208(b)(2).

26. *Id.*

27. TEX. HEALTH & SAFETY CODE §§ 245.002(1), 171.002(1).

28. Fund Texas Choice v. Paxton, 2023 WL 2558143 at 1 (W.D. Tx. 2023).

investigative demand,[29] the Texas Attorney General responded that the state had a valid investigatory interest in seeing whether Seattle Children's had made misrepresentations in violation of the Texas Deceptive Trade Practices Act.[30] Texas also contended that the Washington state shield law "represents an impermissible attempt to supersede the laws of Texas and otherwise constitutes an unconstitutional infringement on the principles of federalism and the structure of federal constitutional system."[31]

Other states have followed Texas in adopting statutory damage remedies. For example, Oklahoma, following Texas, permits private civil actions against anyone who performs or aids or abets an abortion[32] in violation of Oklahoma's prohibition of all abortions, except to save the life of the patient in an emergency or when the pregnancy resulted from a reported rape.[33] "Abortion" is defined in Oklahoma as terminating a pregnancy without regard to the location in which the termination occurred.[34] Similarly, Idaho has created a statutory damages remedy of $20,000 that may be brought by the person on whom the abortion was performed, the father, grandparents, siblings, or aunts or uncles against medical professionals who knowingly or recklessly attempted or induced the abortion.[35] Family members may sue even when the pregnancy resulted from an admitted rape. As in Oklahoma, the definition of abortion in Idaho does not specify a location.[36]

E. Summary

This section has provided examples of states are moving aggressively to criminalize or create damage remedies for abortions. Patient health records, today most likely maintained in electronic form, may provide critical evidence in

29. Seattle Children's Hospital v. Attorney General of the State of Texas, No. D-1-GN-23-008855 (Travis County District Court Dec. 7, 2023).

30. Answer, Seattle Children's Hospital v. Attorney General of the State of Texas, No. D-1-GN-23-008855 (Travis County District Court Feb. 12, 2024), at 3. *See infra* Section V for fuller discussion of this issue.

31. *Id.* at 4.

32. OKLA. STAT. § 1-745.55.

33. OKLA. STAT. § 1-745.52.

34. TEX. HEALTH & SAFETY CODE § 245.002(1); OKLA. STAT. § 1-745.51(1).

35. IDAHO CODE § 18-8807.

36. IDAHO CODE § 18-604(1).

cases brought under these state laws. The next section describes these electronic health records and federal laws protecting the information in them.

III. ELECTRONIC HEALTH RECORDS AND FEDERAL PROTECTIONS FOR THEM

Health information appears in many formats today, from paper records still maintained in some providers' offices to posts on widely shared social media networks. My focus in this article is the electronic health record maintained by health care providers and ubiquitous in health care today. This section presents a brief overview of EHRs and outlines federal protections for them, especially the HIPAA privacy rule.[37] It also discusses federal protections for medical records in research, which may or may not come under HIPAA. Significant gaps exist in these protections.

A. From Electronic Medical Records to Electronic Health Records

Health care organizations have been developing and using electronic record systems since the 1960s.[38] Initially used for billing and scheduling, these systems present critical advantages over paper records for patients, care providers, health care organizations, and public health. Electronic records require far less space for storage and backup copies can be created easily. They can be accessed remotely through the internet and by different providers with interoperability (which is the ability of different record systems to share information). Their availability allows patients to be treated with knowledge of their care history and without redundant testing or examination when they go on vacation, flee natural disasters, or have to be away from home for any reason. They are searchable and analyzable and reveal changes in a

37. 45 C.F.R. parts 160 and 164. HIPAA uses the term "privacy" rather than "confidentiality." To avoid confusion, I'll use privacy in what follows, although confidentiality is the more accurate term to describe protection of information from inappropriate disclosure. *See, e.g.*, Nicholas P. Terry and Leslie P. Francis, *Ensuring the Privacy and Confidentiality of Electronic Health Records*, 2007 U. ILL. L. REV. 681, 701 (2007).

38. *Electronic Health Records: A Comprehensive History of the EHR*, NET HEALTH (Sept. 16, 2021), https://www.nethealth.com/blog/the-history-of-electronic-health-records-ehrs/.

patient's condition over time far more readily than paper records. They can increase patient safety by incorporating alerts, sending reminders, or avoiding prescription errors.[39] They can be used to identify medical errors or patterns of care given by particular providers and can be combined into large data sets to analyze care quality and costs. They enable syndromic surveillance that may provide early warning of infectious disease outbreaks or the impact of toxic exposures. Their integrity is central to the provider-patient relationship and to health more generally.[40]

Initially, these electronic records were primarily digitized versions of paper medical records—electronic medical records, or EMRs. Their design allowed for structured entry of information and electronic billing or prescribing. With the growth of information technology, the Internet, data analytics, and artificial intelligence, EMR design evolved into EHR systems with far greater capabilities. As this process continued, EHR design responded to competing pressures such as accommodating provider workflow, increasing efficiency, and enabling more holistic patient management.[41] EHRs incorporate electronic prescribing, digital communication with patients, decision support, electronic reporting to public health, and electronic communication with data bases for prescriptions. They can be accessed from wherever the patient needs care, as long as the location has internet access. They can also be downloaded by patients into devices using applications such as smart phone apps that allow for easy access. EHRs can also be combined into large data sets that allow for the identification of population health trends, patterns in care, or differences among providers in the costs or quality of care. Remote access and interoperability are critical to these advantages but present enhanced risks to data security and privacy. Responding to these risks, the National Committee on Vital and Health Statistics recommended

39. *See generally,* NATIONAL ACADEMY OF SCIENCES, HEALTH IT AND PATIENT SAFETY: BUILDING SAFER SYSTEMS FOR BETTER CARE (2012).

40. *See generally*, Leslie P. Francis, *The Physician-Patient Relationship and a National Health Information Network*, J.L. MED. & ETHICS 38: 36-46 (2010).

41. *See generally,* EHR *Design Transformation: From Records and Transactions to Plans and Artificial Intelligence*, MIT MANAGEMENT, https://mitsloan.mit.edu/centers-initiatives/health-systems-initiative/ehr-design-transformation-records-and-transactions-to-plans-and-artificial-intelligence (last visited May 17, 2023).

exploring design possibilities to enable segregation of sensitive categories of health information such as reproductive information.[42] This design capability has not evolved in EHRs despite the impressive advancements in natural language processing, however, so it may be difficult to separate out reproductive information from other information in contemporary EHRs.[43]

Initial versions of electronic medical records were stored locally.[44] However, maintaining onsite data storage takes space and requires extensive cooling for servers. Remote storage and cloud storage are primary options for the massive volumes of data generated in contemporary health care.[45] To take one example of remote hosting by a widely-used EHR system, Oracle Cerner hosts data on servers located in Kansas City, Missouri, a state that prohibits abortions except in the case of emergencies.[46] Updox, a smaller company marketing EHR systems to office-based physicians, stores information on its own servers located in Ohio[47] where voters enacted a state constitutional right to abortion in the fall of 2023. To give another kind of example, AllScripts (now Veradigm) partners with Microsoft to offer cloud storage.[48] Microsoft also offers data residency options including storage in the local region or elsewhere in the United States.[49] Importantly, data storage

42. NATIONAL COMMITTEE ON VITAL AND HEALTH STATISTICS, LETTER TO THE SECRETARY RE RECOMMENDATIONS REGARDING SENSITIVE HEALTH INFORMATION (Nov. 10, 2010), https://ncvhs.hhs.gov/wp-content/uploads/2014/05/101110lt.pdf.

43. HIPAA Privacy Rule To Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23508 (Apr. 17, 2023) (to be codified at 45 CFR 160, 164). ("many types of PHI may not initially appear to be related to an individual's reproductive health but may in fact reveal information about an individual's reproductive health or reproductive health care an individual has received.")

44. Peter Garrett and Joshua Seidman, *EMR vs. HER—What is the Difference?,* HEALTHITBUZZ (Jan. 4, 2011), https://www.healthit.gov/buzz-blog/electronic-health-and-medical-records/emr-vs-ehr-difference.

45. Healthcare Data Storage Options: On-Prem, Cloud, Hybrid or Multi-Cloud, FACTION (March 3, 2021), https://www.factioninc.com/blog/hybrid-multi-cloud/healthcare-data-storage-options-on-prem-cloud-or-hybrid/.

46. MO. REV. STAT. § 188.017.

47. *Security Statement*, UPDOX, https://www.updox.com/security-statement/ (last visited May 10, 2023).

48. *A cloud-infrastructure platform: Reimagining remote hosting services*, VERADIGM https://www.allscripts.com/service/allscripts-cloud/ (last visited May 10, 2023).

49. *Where your data is located*, MICROSOFT, https://www.microsoft.com/en-us/trust-center/privacy/data-location?rtc=1 (last visited May 10, 2023).

may be opaque to patients, who may be completely unaware of whether data generated in their EHR is stored locally, remotely, or using cloud storage.

The federal government has encouraged the development and use of EHRs. HIPAA was enacted in 1996, largely to facilitate electronic billing.[50] The HIPAA privacy rule was first published in final form in 2000,[51] and modified in 2002.[52] President Bush established the Office of the National Coordinator for Health Information Technology in 2004 to promote adoption of health information technology and facilitate data sharing.[53] The Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009, which was part of the legislation designed to help the nation recover from the recession of 2008, set standards for EHRs, gave incentives for EHR adoption, and implemented penalties for Medicare providers not becoming meaningful users of EHRs.[54] "Meaningful use" standards required forms of interoperability such as "electronic prescribing," "submission of clinical quality measures," and "capability for electronic exchange of health information."[55] Most recently, the Twenty-first Century Cures Act imposed further requirements for EHR interoperability and patient electronic access to records.[56] Developments such as easy downloading for patients in mobile apps came with the recognition of augmented risks to health information privacy.[57]

50. Health Insurance Portability and Accountability Act of 1996, Pub. L 104-191, 100 Stat. 2548 (1996).

51. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82461-82829 (Dec. 28, 2000) (to be codified at 45 CFR 160, 164).

52. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53181-53273 (Aug. 14, 2002) (to be codified at 45 CFR 160, 164).

53. *About ONC*, HEALTHIT.GOV, https://www.healthit.gov/topic/about-onc#:~:text=The%20position%20of%20National%20Coordinator,(HITECH%20Act)%20of%202009 (last visited May 10, 2023).

54. HITECH Act, Pub. L. 111-5, 123 Stat. 115 (2009).

55. Medicare & Medicaid EHR Incentive Program, CENTERS FOR MEDICARE AND MEDICAID SERVICES, https://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/downloads/mu_stage1_reqoverview.pdf.

56. 21st Century Cures Act, Pub. L. 114-255, 130 Stat. 1033 (Dec. 13, 2016).

57. Rachel Hendricks-Sturrup, *21st Century Cures Act Final Rule: Key Health Data Privacy Considerations*, FUTURE OF PRIVACY FORUM (Nov. 2, 2020), https://fpf.org/blog/21st-century-cures-act-final-rule-key-health-data-privacy-considerations/.

B. HIPAA Protections

Patients have legitimate expectations of confidentiality in EHRs, bolstered by the HIPAA privacy rule. However, the privacy rule was drafted over twenty years ago and attempted to implement privacy protections consistent with needs recognized at the time such as for public health or law enforcement. Important limitations to HIPAA protections may loom large as anti-abortion states criminalize or provide damage remedies for actions related to reproductive care that is legal in other states.

With HIPAA, Congress explicitly charged the Secretary of Health and Human Services with the responsibility to adopt rules protecting the privacy of individually identifiable health information.[58] Congress also provided that these regulations would preempt any state laws which are less stringent.[59] The resulting HIPAA privacy and security rules apply to health care providers who transmit any health information in electronic form in a transaction that comes under the federal Social Security Act.[60] HIPAA also applies to any health insurance companies or employer-sponsored health plans and to the business associates of any covered entities.[61] "Business associates" is a HIPAA technical term that applies to entities providing services to covered entities that require access to individually identifiable health information, such as data analytics or billing services.[62] It is quite unusual to be a health care provider in the United States today and not be a HIPAA-covered entity. A Planned Parenthood clinic, for example, would be HIPAA covered if it takes any reimbursements from Medicaid. Some free clinics would be outside of HIPAA, however, if all their transactions are in paper form, including any billing or prescribing.[63]

58. Pub. L. 104-101 § 264, 110 Stat. 2033 (Aug. 21, 1996) (codified at 42 U.S.C. § 1320d-2 note).

59. Pub. L. 104-101 § 264(c)(2), 110 Stat 2034 (Aug. 21, 1996) (codified at 42 U.S.C. § 1320d-2 note).

60. 45 C.F.R. §160.102(a).

61. "Are You a Covered Entity?", CMS.GOV, https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/AreYouaCoveredEntity (last updated May 26, 2022).

62. 45 C.F.R. § 160.103.

63. "AmeriCares: HIPAA Frequently Asked Questions Free & Charitable Clinic HIPAA Toolbox", NATIONAL ASSOCIATION OF FREE & CHARITABLE CLINICS

As a general matter, the HIPAA privacy rule prohibits the disclosure of protected health information except as permitted or required.[64] Nondisclosure is thus the default position. However, several types of permitted disclosures are particularly relevant to abortion care. These include disclosures pursuant to patient authorization (the HIPAA term for patient consent to the disclosure), disclosures for treatment or payment, disclosures to the patient's personal representative, disclosures to public health, and disclosures in connection with various legal proceedings.[65] Some disclosures are limited to the minimum necessary information, but this limit does not apply to disclosures pursuant to an authorization, for treatment, or required by law.[66] Also, "minimum necessary" is a reasonableness standard under which providers are expected to make "reasonable efforts" to limit uses and disclosures to what is needed to accomplish the intended purpose of the use or disclosure.[67]

Although unlikely, patient authorization might permit disclosure of abortion-related health information. Valid HIPAA authorizations must include a specific and meaningful description of the information to be shared, the identification of the entity to which the disclosure may be made, a description of the purpose of the disclosure, an expiration date, and a signature of the individual.[68] "At the request of the individual" suffices for a statement of the purpose of the disclosure.[69] "[E]nd of the research study" is sufficient when information is shared for research.[70] The requirement of a meaningful description of the information to be shared will likely alert patients whose sole visit to a particular provider was for abortion care. However, patients may be less likely to recognize that abortion information has become part of their complete

(May 2014), https://www.americares.org/wp-content/uploads/globalassets/_snc/eduresources/practicefacility/hipaa/2.-hipaa-faqs-may-2014.pdf.

64. 45 C.F.R. § 164.502(a)(1).

65. 45 C.F.R. § 164.502(a)(1)(ii), (iv), (vi).

66. 45 C.F.R. § 164.502(b)(2).

67. *How are covered entities expected to determine what is the minimum necessary information that can be used, disclosed, or requested for a particular purpose?*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/hipaa/for-professionals/faq/207/how-are-covered-entities-to-determine-what-is-minimum-necessary/index.html (last updated July 26, 2013).

68. 45 C.F.R. § 164.508(c)(1).

69. 45 C.F.R. § 164.508(c)(1)(iv).

70. 45 C.F.R. § 164.508(c)(1)(v).

EHR if the abortion care was given by a provider or health care system with which they have a continuing relationship, if a prescription for medication abortion became part of their record, or if discussions about other care such as contraception methods included mention of the previous abortion. While patients desirous of protecting information about their abortions are unlikely to grant authorization for record disclosure, some situations of authorized disclosures may occur. Patients may be threatened or otherwise pressured by people seeking damage remedies against their abortion providers. It is not hard to imagine an abusive partner seeking this authorization, especially if the partner believes he was the father and hopes to recover damages against the provider or otherwise see the provider punished. Nor is it hard to imagine parents who are opposed to abortion putting pressure on their adult children for whom they are continuing to provide economic support. Even though authorized, disclosures under these circumstances may be harmful to patients, those who help them, or their providers.

Although studies pre-dating *Dobbs* suggest that patients are highly unlikely to change their minds after abortions,[71] the HIPAA structure does not fully protect providers against this risk. Disclosures pursuant to patient authorization are permitted, not required, but providers may not be alert to the reason the disclosure is requested. Moreover, when patients themselves request a copy of their records, the disclosure is required except for cases not relevant in the abortion context.[72] Protecting patient privacy is the primary goal of HIPAA, but it is also important to recognize that introducing uncertainty for providers in abortion-protective states may adversely affect access to needed reproductive care.

Authorization also is not required for disclosures in connection with health care payment.[73] Billing a health plan for abortion services, or abortion related services, would not require authorization. Reasonable efforts must be made to

71. Corinne H. Rocca, et al., *Decision Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study*, PLOS ONE (July 8, 2015) https://doi.org/10.1371/journal.pone.0128832. *See generally* DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION (2020).

72. 45 C.F.R. § §164.502(a)(1)(i), 164.524(a).

73. 45 C.F.R. § 164.506.

assure that disclosures for payment are limited to the minimum necessary to the purpose of reimbursement.[74] Patients may request that disclosures for payment be restricted but the covered entity is not required to accede to this request.[75] There is an exception for payments made in cash: if patients request that these services not be disclosed to health plans and if the information pertains only to a service paid for in full in cash, the covered entity must honor this request.[76] However, this provision only applies to disclosures to health plans; the information will still be in the patient's medical record and could be disclosed in response to other requests. And if any part of the service was not paid for in cash—for example, a blood test sent to an outside vendor—the exception does not apply.

Disclosures for health care treatment also do not require authorization.[77] So, if a patient seeks treatment after having an abortion, and the provider accesses the patient's medical record, the record of an abortion might be revealed. Because disclosures for treatment are not limited to the minimum necessary, it is possible that the information might be revealed in connection with treatment wholly unrelated to the abortion. Suppose, for example, that a college student in a state that prohibits nearly all abortions goes for abortion care in a non-restrictive state. Later, when back at college in the restrictive state, the student seeks treatment for a different condition—say, a urinary tract infection. If the abortion is documented in the EHR, it could be revealed to the provider without the patient's authorization or even knowledge. If the patient is a minor, the information could also be revealed to the patient's parent, depending on the state's rules about parental access to records. The patient could have requested that the information about the abortion not be revealed, but the health care entity providing the abortion is not required to accede to this request, at least as far as HIPAA is concerned.[78] Even if the entity does agree to the request, the information may still be disclosed if it is required to provide emergency treatment to

74. 45 C.F.R. § 164.502(b).
75. 45 C.F.R. § 164.522(a)(i)(A), (ii).
76. 45 C.F.R. § 164.522(a)(1)(vi); 45. C.F.R. § 164.512.
77. *Id.* at § 164.506.
78. 45 C.F.R. § 164.522(a)(1)(ii).

the patient.[79] So if the patient were to experience post-abortion complications requiring emergency treatment, the information could be disclosed, although the disclosure would need to include a request to limit further uses or disclosures of the information beyond the emergency.[80] This issue is not academic. To take just one example, over a quarter of the students at Boise State University in Idaho come from California (19.5%), Washington (9.1%) and Oregon (3.1%) combined.[81] These are all states that would allow students to return home for abortions not permitted in Idaho. Moreover, if they are minors, people helping them get home could be charged by Idaho with abortion trafficking if they do not have parental consent for the abortion.[82]

Under HIPAA, patients' personal representatives are for the most part to be treated as the patients themselves.[83] In the abortion context, the involvement of a personal representative is most likely to occur when the patient seeking the abortion is an unemancipated minor. State laws govern whether a parent, guardian, or other representative has the authority to act on behalf of an unemancipated minor.[84] Even before *Dobbs*, many states had statutes requiring parental notification of or consent to an abortion.[85] However, states were constitutionally required to provide an alternative path of a judicial bypass for

79. 45 C.F.R. § 164.522(a)(1)(iii).

80. 45 C.F.R. § 164.522(a)(1)(iv).

81. *Where are Boise State Students From?,* COLLEGE FACTUAL, https://www.collegefactual.com/colleges/boise-state-university/student-life/diversity/chart-geographic-breakdown.html#:~:text=The%20majority%20of%20the%20Boise,diversity%20is%20higher%20than%20average.

82. IDAHO CODE § 18-623(1). Presumably Idaho could do this even though their parents would not be required to give the consent in the state where the abortion occurred. California, for example, permits minors to receive abortions without parental consent, American Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997) (holding Calif. requirement for parental consent in violation of the California constitutional right to privacy). Washington also does not require parental consent, RCW § 9.02.100(1), State v. Koome, 84 Wn.2d 901 (1975). In Oregon, minors aged 15 or over have the right to consent to their own health care, including abortions. OR. REV. STAT. § 109.640(2).

83. 45 C.F.R. § 164.502(g)(1).

84. 45 C.F.R. § 164.502(g)(2).

85. *State Health Facts: Parental Consent/Notification Requirements for Minors Seeking Abortions*, KFF, https://www.kff.org/womens-health-policy/state-indicator/parental-consentnotification/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last updated March 1, 2023).

minors fearing parental abuse.[86] With the right to reproductive liberty overruled, states now may prohibit anyone, minors or otherwise, from seeking abortions, so long as the prohibition meets the rational basis test.[87] By inference, states may also require parental notification or consent, so long as these requirements meet the rational basis test and do not violate other constitutional rights. Federal reproductive rights, therefore, do not present a constitutional barrier to parents in accessing abortion information in minor's medical records, although state laws may impose limits. And as far as HIPAA is concerned, if state laws recognize parents as personal representatives, they may access these records.[88]

Many disclosures required by law also have only limited HIPAA protections. Like disclosures for treatment, these disclosures are not subject to the minimum necessary requirement,[89] although they are subject to other more particularized limits as to scope as described below in this section. These disclosures are permissive, not obligatory; therefore, covered entities may choose to refuse the disclosures as far as HIPAA is concerned. Moreover, the Department of Health and Human Services (HHS) has issued guidance to providers that emphasize these disclosures are only permitted to the extent that they fall within legal requirements strictly construed.[90] Nonetheless, the disclosures are permitted. States opposed to abortion may require a broad range of these disclosures, and providers in these states may comply with specific state requirements without violating HIPAA.

One important set of disclosures are those required by public health. Disclosures may be made to public health authorities authorized by law for the purpose of controlling disease, injury, or disability.[91] Disclosures may also be made to appropriate agencies to prevent child abuse or neglect;[92]

86. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 899 (1992).

87. Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2284 (2022).

88. 45 C.F.R. § 164.502(g)(3)(i).

89. 45 C.F.R. § 164.502(b)(2)(v).

90. *HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html (last updated June 29, 2022).

91. 45 C.F.R. § 164.512(b)(1)(i).

92. 45 C.F.R. § 164.512(b)(1)(ii).

therefore, this provision could be called into play by law enforcement in states that regard abortions as child abuse. Given the controversies about medication abortion, it is also worth noting that disclosures may be made to the FDA to monitor quality, safety, or efficacy.[93] These disclosures are subject to the minimum necessary requirement.[94]

Another set of permitted disclosures may occur during judicial or administrative proceedings. Suppose, for example, that a relative in a restrictive state brings a suit for damages in the restrictive state against an out of state provider for performing an abortion on a patient who is also a resident of the restrictive state, claiming as damages the loss of consortium with the aborted fetus. This lawsuit would parallel lawsuits involving in-state harms stemming from out-of-state occurrences, such as automobile accidents, so would not raise the difficulties raised by extraterritorial crimes. Information about the abortion in the patient's medical record would surely be relevant to this cause of action. HIPAA provides that during the litigation, disclosures may occur if the court so orders, but must be limited to the express terms of the order.[95] Disclosures may also occur pursuant to a subpoena or discovery request, if assurances have been given to the covered entity that there have been reasonable efforts to give notice to the patient.[96] Likely, but not always, the patient in such circumstances could be expected to object to the subpoena or discovery request. If so, the ruling on the objection could be subject to an interlocutory appeal.[97] The legal question would then be whether the ruling on appeal is a final judgment subject to the Full Faith and Credit Clause, or whether resolution of the objection to acquisition of the information must await resolution of the underlying case, as discussed further in section V of this article.[98]

Yet another set of permissive disclosures applies to search warrants for law enforcement purposes.[99] Law enforcement in

93. 45 C.F.R. § 164.512(b)(1)(iii).
94. 45 C.F.R. § 164.502(b).
95. 45 C.F.R. § 164.512(e)(1)(i).
96. *Id.* at § 164.512(e)(1)(ii).
97. *See, e.g.*, Bogar v. Esparza, 257 S.W.3d 354 (Tx. App. 2008) (interlocutory appeal from denial of motion to dismiss based on claim that expert's report failed to satisfy statutory requirements).
98. *See infra* Section V.
99. 45 C.F.R. § 164.512(f).

a restrictive state might be expected to seek search warrants for the medical records of out-of-state providers believed to have performed abortions on state residents. State courts could issue warrants and grand juries could issue subpoenas.[100] Disclosures would then be permissible in compliance with and subject to the limits of these orders.[101] Given the structure of EHRs, it is unclear where the warrant would need to be served. If the out-of-state provider participates in a system with a presence in-state, it is possible that the warrant would not need to be served outside of the state.[102] Otherwise, the warrant or subpoena most likely would need to be served out-of-state at the location of the provider or the location of the record storage. Out-of-state laws might prohibit the service; if so, the issue would be between the state court issuing the warrant and the state prohibiting the service. This issue is discussed below;[103] however, for purposes of this section, HIPAA would permit but not require the provider to disclose the information within the limitations of the warrant or grand jury subpoena. Disclosures are also permissible in response to administrative requests, including subpoenas, summons, or authorized investigative demands, if the information is relevant and material to a legitimate law enforcement inquiry and the request is specific and limited in scope to what is reasonably practicable.[104]

Several initiatives at the federal level have begun to address these HIPAA gaps. In response to *Dobbs*, President Biden directed the Office for Civil Rights (OCR) within HHS to take steps to ensure patient privacy with respect to reproductive health information.[105] In April 2023, OCR issued a notice of proposed rulemaking to strengthen HIPAA privacy protections. The proposed rule would establish a purpose-based prohibition on uses or disclosures of protected health

100. 45 C.F.R. § 164.512(f)(1)(ii)(A), (B).

101. *Id.*

102. *See infra* Section V for fuller discussion of this issue.

103. *See infra* Section V.

104. 45 C.F.R. § 164.512(f)(1)(ii)(C).

105. THE WHITE HOUSE, FACT SHEET: PRESIDENT BIDEN ISSUES EXECUTIVE ORDER AT THE FIRST MEETING OF THE TASK FORCE ON REPRODUCTIVE HEALTHCARE ACCESS, (Aug, 3, 2022) https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/03/fact-sheet-president-biden-issues-executive-order-at-the-first-meeting-of-the-task-force-on-reproductive-healthcare-access-2/.

information in connection with civil, criminal, or administrative investigations against individuals, health care providers, or others in connection with reproductive health care that is (1) provided outside the state of the investigation in a state where the care is legal; (2) protected, authorized, or required by federal law, wherever provided; or (3) provided in the state of the investigation and legal in that state.[106] When disclosures are sought, the proposed rule would require signed attestations that the protected information is not for a prohibited purpose.[107] Legislatively, Congresswomen Anna Eshoo and Sara Jacobs, Democrats from California, have introduced a bill to require HIPAA authorization for any release of information relating to pregnancy termination or loss.[108] These initiatives are discussed in full in the final section of this article.[109]

C. Federal Certificates of Confidentiality for Research

Federal certificates of confidentiality may provide another source of protection for patient medical information at least if it is used in research. EHRs may be a highly valuable source of information for medical research. They can be used for retrospective analyses, for identifying patients who may meet inclusion criteria for study participation, or for following patients longitudinally, sometimes for years after an intervention. Data drawn from EHRs may become part of research records. Reproductive information also may enter research records directly without being initially part of patient care. Patients may be given pregnancy tests to determine whether they should be excluded from a study that might risk fetal harm, or to study the impact on future pregnancies. Some research involves contraception, pregnancy, and even abortion itself. For example, the "Turnaway" study collected data from a thousand women over ten years to compare the consequences of having—or not being able to have—an abortion; the study revealed that people who gained abortion access fared far

106. 88 Fed. Reg. 23522 (Apr. 17, 2023).

107. 88 Fed. Reg. 23516 (Apr. 17, 2023).

108. Congresswoman Anna G. Eshoo, Press Release: On 50th Anniversary of Roe, Eshoo and Jacobs Introduce Legislation to Protect Reproductive Healthcare (Jan. 25, 2023), https://eshoo.house.gov/media/press-releases/50th-anniversary-roe-eshoo-and-jacobs-introduce-legislation-protect.

109. *See infra* Section V.A.

better than those who did not.[110] Information collected in research may be part of the HIPAA covered entity and subject to HIPAA protections. Researchers may in addition seek the protection of federal certificates of confidentiality for participant information.

HIPAA requires patient authorization for use of identifiable data in research but allows this requirement to be waived for research involving no more than minimal risk to individual privacy based on an adequate plan to prevent disclosure.[111] Given the uncertainties about privacy protection discussed in this article, it seems unlikely that waivers should be granted for the use of medical records containing reproductive information. HIPAA also permits deidentified data to be used in research.[112] The presumption is that if the data are deidentified to HIPAA standards, the risk of reidentification should be small.[113] In addition, HIPAA permits use of what is called a "limited data set," which is a data set from which direct identifiers such as names or addresses have been removed but which contains sufficient information to be useful in linking records.[114] Covered entities allowing the use of limited data sets must obtain satisfactory assurance from a data use agreement that the data will be used only for the limited purposes specified.[115]

Federal help in protecting confidentiality for participants in research may be available from Certificates of Confidentiality. With certain other exceptions, certificates prohibit disclosure of information to anyone not connected to the research without the consent of subjects.[116] This includes compelled disclosures in response to court proceedings; thus, certificates add protections that are not given by HIPAA. Certificates are issued automatically by NIH for NIH-funded

110. DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION (2020).

111. 45 C.F.R. § 164.512(i)(2)(ii)(A).

112. 45 C.F.R. § 164.514(I)(2)(ii)(A)(2).

113. *Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html#datause (last updated October 25, 2022).

114. 45 C.F.R. § 164.514(e)(2).

115. 45 C.F.R. § 164.514(e)(4).

116. 42 U.S.C. § 241(d)(1)(C).

researchers whose institutions determine that the research involves collecting or using identifiable, sensitive information about patients.[117] NIH-funded studies that collect or use reproductive data clearly fall within this provision. Other researchers not funded by NIH may also apply for a Certificate of Confidentiality, but this process is not automatic.[118]

Whether Certificates would protect research records sought in connection with actions against abortion remains unknown. Exceptions to the Certificates' protection include reports of child abuse required by law.[119] Certificates thus might not protect research participants from reports in states that consider abortion to be abuse. Moreover, whether Certificates preempt state law efforts has not been resolved by the courts.

D. Summary

Electronic health records have evolved to become interactive and comprehensive sources of information about patients. Federal laws incentivize providers to use EHRs. However, HIPAA confidentiality protections were drafted over twenty years ago, well before a decision such as *Dobbs* seemed imminent. These protections include capacious exceptions of relevance to the use of information in EHRs in abortion restrictive states. An NPRM issued in April 2023 may close some of these gaps, but not all. Federal protections for sensitive reproductive information in EHRs therefore remain incomplete.

IV. STATE SHIELD LAWS

HIPAA preempts conflicting state laws that grant more limited protection to EHRs but does not preclude states from adopting stronger protections for health information.[120] An

117. For a description of certificates of confidentiality, *see* NIH Grants and Funding, "What is a Certificate of Confidentiality?", NIH GRANTS & FUNDING (Jan. 15, 2019), https://grants.nih.gov/policy/humansubjects/coc/what-is.htm#:~:text=Certificates%20of%20Confidentiality%20(CoCs)%20protect,a%20few%20other%20specific%20situations.

118. *Certificates of Confidentiality (CoC),* NIH GRANTS & FUNDING, https://grants.nih.gov/policy/humansubjects/coc.htm (last updated Dec. 2, 2021).

119. Leslie E. Wolf and Laura M. Beskow, *Certificates of Confidentiality: Mind the Gap*, 2021 UTAH L. REV. 937, 945 (2021).

120. Pub. L. 104-101 § 264(c)(2), 110 Stat 2034 (Aug. 21, 1996) (codified at 42 U.S.C. § 1320d-2 note).

increasing group of states—ten as of May 2023—have enacted broader statutory protections for patient health information related to reproductive health care.[121] These protections may be coupled with other protections for reproductive information, such as the refusal to enforce foreign judgments relating to abortions that would be legal in the state[122] or the creation of damage remedies for abusive litigation elsewhere relating to abortion.[123] These statutes may also extend to other forms of care coming under fire in restrictive states, such as gender-affirming care,[124] but my focus here is the protection of reproduction-related health information in patients' records. States are continuing to enact and revise these statutes, so my portrait here is a snapshot of different approaches rather than a comprehensive compilation.

A. Problems for Shield Laws

These efforts to develop state-level protection for reproductive information must address common issues. These include defining the information to be protected, defining the entities to which the protections apply, drawing lines between shielded uses and permissible uses, developing enforcement mechanisms, and avoiding unintended gaps among shields.

Defining the information to be protected is one significant problem for shield laws. Connecticut, enacting the first of these statutes several months before *Dobbs*,[125] defined the scope of protected information as, "'reproductive health care services' include[ing] all medical, surgical, counseling or referral services relating to the human reproductive system, including,

121. The states are California, Colorado, Connecticut, Delaware, Illinois, Minnesota, New Jersey, New Mexico, New York, and Washington. For a very helpful summary and criticism of some of these laws as of May 2023, *see* Jake Laperruque, *Momentum Builds Against Abortion Surveillance as New States Enact Shield Laws*, CENTER FOR DEMOCRACY AND TECHNOLOGY (May 10, 2023), https://cdt.org/insights/momentum-builds-against-abortion-surveillance-as-new-states-enact-shield-laws/. *See also* David S. Cohen, Greer Donley, and Rachel Rebouché, *Abortion Shield Laws*, 2 NEW ENG. J. MED. EVID. (2023). Shields may also be imposed by executive actions in some states; this discussion focuses on shields that have been enacted by state legislatures to avoid any issues about whether the shield is within the scope of executive authority in the state.

122. *E.g.* CAL. HEALTH & SAFETY CODE § 123467.5(b)(2); MASS. GEN. LAWS ch. 12 § 11I 1/2(c).

123. *E.g.* MASS. GEN. LAWS ch. 12 § 11I 1/2(d).

124. *E.g.* WASH. REV. CODE § 7.115.010(3).

125. 2022 Conn. Pub. Acts no. 22-19.

but not limited to, services relating to pregnancy, contraception, or the termination of a pregnancy."[126] Unless "medical" includes pharmacies, this definition risks omitting prescriptions for medication abortion. It includes, however, reproductive services outside of pregnancy termination, such as fertility treatments. Washington's statute, enacted a year later, is more clearly encompassing:

> "Reproductive health care services" means all services, care, or products of a medical, surgical, psychiatric, therapeutic, mental health, behavioral health, diagnostic, preventative, rehabilitative, supportive, counseling, referral, prescribing, or dispensing nature relating to the human reproductive system including, but not limited to, all services, care, and products relating to pregnancy, assisted reproduction, contraception, miscarriage management, or the termination of a pregnancy, including self-managed terminations.[127]

Delaware's statute, by contrast, may be more narrowly limited to abortion, pregnancy termination, emergency contraception, or services related to pregnancy, including medical, surgical, counseling, or referral services.[128] On the other hand, New Mexico's definition explicitly goes beyond pregnancy prevention and abortion to include managing pregnancy loss, managing postpartum health, managing menopause, treating reproductive cancers, and preventing sexually transmitted infections.[129] These definitional differences are symptomatic of the underlying problem of deciding what information is "reproductive," or whether there may be a sense in which all information in the EHR about physical or mental health could in some way be related to reproductive health.

A related difficulty with applying shields such as these is whether the information selected for coverage can be effectively segregated within EHRs as they are currently structured.[130] For example, a discussion with a primary care

126. CONN. GEN. STAT. ANN. § 52-571m(a)(1).
127. WASH. REV. CODE § 7.002.002(4).
128. DEL. CODE. ANN. tit. 24, § 1702.
129. S.B. 13 § 2 (B), S. Reg. Sess. (N.M. 2023).
130. HIPAA Privacy Rule To Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23508 (Apr. 17, 2023) (to be codified at 45 CFR 160, 164).; see also Mark Rothstein and Stacey Tovino, *Privacy Risks of Interoperable Electronic Health Records*, 47 J.L. MED. & ETHICS 771, 774 (2019); Letter to the Secretary

provider about depression due to an unplanned pregnancy or about experiences of failure with a particular birth control method might be part of the provider's notes about a primary care visit for renewal of unrelated prescriptions but would surely be reproductive health information relevant to a prosecution in a state criminalizing abortion.

A second problem in creating a shield law is defining the entities with the obligation not to disclose the information. Connecticut's statute explicitly defines "covered entities" by reference to HIPAA,[131] so the requirement functions as a limited extension of HIPAA protections in Connecticut[132] rather than as a shield that applies to any electronic information services. California has adopted a more complicated structure, applying different shields to different sets of entities. The shield protecting information from disclosure without patient agreement, approved by Governor Newsom in September 2022, broadens the state statute protecting confidentiality of medical information by HIPAA-covered entities.[133] This statute also applies to businesses organized to maintain medical information.[134] These include businesses making medical information available to individuals and providers or enabling individuals to manage their own medical information, such as personal medical record vendors or apps.[135] The statute thus addresses the increased potential for interoperability favored by the Twenty-First Century Cures Act.[136] California also protects any corporation headquartered or incorporated in California that

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Re Recommendations Regarding Sensitive Health Information (Nov. 10, 2010), https://www.ncvhs.hhs.gov/wp-content/uploads/2014/05/101110lt.pdf.

131. 45 C.F.R. § 160.103.

132. Office of Legislative Research, Public Act Summary, PA 22-19-sHB 5414, 4, https://www.cga.ct.gov/2022/SUM/PDF/2022SUM00019-R02HB-05414-SUM.PDF. Of note, however, the protection uses the language of "consent" rather than the HIPAA technical term of "patient authorization." *See* 45 C.F.R. § 164.508(b).

133. CAL. CIV. CODE § 56.10.

134. CAL. CIV. CODE § 56.06.

135. CAL. CIV. CODE § 56.06(a), (b).

136. *Interoperability and Patient Access Fact Sheet*, CMS.GOV (Mar. 20, 2020), https://www.cms.gov/newsroom/fact-sheets/interoperability-and-patient-access-fact-sheet#:~:text=The%20Interoperability%20and%20Patient%20Access,they%20can%20best%20use%20it; *21st Century Cures Act and interoperability in health care: Where are we now?*, ORACLE, https://www.cerner.com/perspectives/21st-century-cures-act-and-interoperability-in-health-care-where-are-we-now#:~:text=Part%20of%20the%20legislation%20focuses,the%20part%20of%20the%20user.%E2%80%9D (last visited May 5, 2023).

provides electronic communication services from investigations pursuant to legal processes such as subpoenas or search warrants.[137] Washington's statute even more broadly permits anyone within the state to refuse to comply with criminal process from another state related to protected reproductive services that are lawful in Washington.[138] New Mexico's information shield statute, signed by the governor in April 2023, also prohibits requests to or disclosures of information by "third parties" that transmit protected reproductive health care information in electronic form,[139] which are explicitly not HIPAA covered entities or their business associates

Still another problem is drawing lines between uses of reproduction-related information that the state wishes to bar and uses it finds permissible. A patient from an abortion-restrictive state who has received an abortion in a protective state may want to sue the provider for malpractice if the standard of care was not met. Conversely, the provider might want to use the record in defending against the litigation. Licensing processes would surely want to consider whether the provider sexually harassed or assaulted the patient during care. Evidence about the care might be relevant to breach of contract actions in which the provider contends that the patient (or the patient's insurer) refused to pay for the care. Evidence might also be relevant to whether the provider complied with statutory obligations such as the federal Emergency Medical Treatment and Active Labor Act. To take one example of a state effort to delineate permissible and impermissible uses in litigation, Washington permits subpoenas to be issued for out-of-state actions founded in tort, contract, or statute that would exist under the laws of Washington and that are brought by the patient or the

137. CAL. PENAL CODE § 629.51. (In enacting this legislation, the California legislature found and declared that "it is the public policy of the State of California that a corporation that is headquartered or incorporated in California that provides electronic communications services shall not provide records, information, facilities, or assistance in response to legal process . . . to investigate or enforce any violation, the investigation or enforcement of which would implicate the fundamental right of privacy with respect to personal reproductive decisions." 2022 Cal. Stat. c. 627 § 1(b)).

138. WASH. REV. CODE §10.96.040(2).

139. S.B. 13 § 6(A), S. Reg. Sess. (N.M. 2023).

patient's representative.[140] In seeking information about gender-affirming care provided to Texas residents in the state of Washington, the Texas attorney general is claiming to enforce state consumer protection laws by investigating whether misinformation was given to Texas residents about the risks and benefits of care.[141] States also want to allow information in health records to be shared for otherwise legitimate purposes, including patient care and public health. These exceptions, however, may open the door to forms of record sharing that create risks of their later use in abortion-restrictive states.

States also approach enforcement of shield laws in different ways. For example, California has significant damage remedies for denials of protected reproductive rights, including actual damages, punitive damages, or civil penalties of $25,000.[142]

States also may enact multiple shields, for example against disclosure, subpoenas, or search warrants. There may be differences in the scope of these shields or the strategies they employ. A problem for states is whether these shields fit together seamlessly or whether there are potential gaps that could leave information vulnerable. Another problem is whether they are sufficiently comprehensive and do not fail to cover some ways of gathering information, such as the execution of warrantless searches by out-of-state actors from states seeking to enforce abortion prohibitions. Other protections exist as well, such as the protection of witnesses from summons, rights of providers to recover damages from defending against litigation in restrictive states, or refusals to enforce foreign judgments from restrictive states, but my focus here is the protection of information in health records.

B. Consent Requirements for Release of Information

Some shield statutes specify conditions under which information may be disclosed. Agreement of the patient is one such exception. Unfortunately, even if the information can be

140. WASH. REV. CODE §5.51.020(b)(4). Connecticut's law is similar, CONN. GEN. STAT. § 52-571m(c).

141. Answer, Seattle Children's Hospital v. Attorney General of the State of Texas, No. D-1-GN-23-008855 (Travis County District Court Feb. 12, 2024), at 3-4.

142. CAL. HEALTH & SAFETY CODE § 123469(b).

segregated successfully, some of these statutes either are unclear or contain additional exceptions that may still permit the release of information the patient may want to protect.

Connecticut was the initial example of a shield with an exception for patient consent. Connecticut's information shield statute allows covered entities to disclose information about reproductive healthcare that is legal in Connecticut if they obtain specific written consent from the patient or the patient's personal representative.[143] Consent must be obtained before information may be disclosed in connection with civil actions; proceedings preliminary to civil actions; or any probate, legislative or administrative proceedings.[144] This list of proceedings shielded does not include criminal proceedings in other states, but would cover civil damages provisions such as the ones in Texas or Idaho.[145] The provisions of the bill regarding subpoenas and search warrants were expected to cover criminal prosecutions out of Connecticut, about which more below.[146] The shield law also prohibits public agencies or officials from providing any help or information in furtherance of investigations seeking to impose criminal or civil liability for reproductive care that would be legal in Connecticut. This prohibition even extends to information about inquiries[147]; an example of this is a patient asking whether an appointment for abortion care might be available. It also covers information given to the patient; an example of this is the clinic's availability of appointments for abortion care. It also encompasses information obtained by examining the patient. This information might be the number of weeks of a pregnancy,

143. CONN. GEN. STAT. § 52-146w(b).

144. CONN. GEN. STAT. § 52-146w(a).

145. Public testimony before the Judiciary Committee of the Connecticut legislature referred to Texas S.B. 8, the civil damages statute. *E.g.*, Testimony of Liz Gustafson, State Director, Pro-Choice Connecticut (March 21, 2022), https://www.cga.ct.gov/2022/juddata/TMY/2022HB-05414-R000321-Gustafson,%20MSW,%20Liz,%20State%20Director-Pro-Choice%20Connecticut-TMY.PDF; Testimony of Gretchen Raffa, Planned Parenthood of Southern New England (March 21, 2022), https://www.cga.ct.gov/2022/juddata/TMY/2022HB-05414-R000321-Raffa,%20MSW,%20Gretchen,%20Vice%20Pesident-Public%20Policy%20,Advocacy%20-%20Organizing-TMY.PDF; Testimony of David S. Cohen, Greer Donley, and Rachel Rebouché (March 21, 2022), https://www.cga.ct.gov/2022/juddata/TMY/2022HB-05414-R000321-Cohen,%20David%20S.,%20Professor%20of%20Law-Drexel%20Kline%20School%20of%20Law-TMY.PDF.

146. *See* note 174 and accompanying text.

147. CONN. GEN. STAT. § 540-155a.

health conditions of the patient, or identification of a fetal anomaly. Some of this information, such as a telephone call about the availability of an appointment, might not have been entered into the EHR but could be sought from clinic staff or other clinic records and the shield would bar its disclosure.

Connecticut tailors its disclosure shield to be consistent with provisions regarding provider-patient privileges recognized in Connecticut.[148] In addition, despite the shield, Connecticut does not require consent for disclosures pursuant to Connecticut law; by covered entities against which claims have been made to liability insurers; to the Connecticut Commissioner of Public Health for investigation of a complaint; or in situations where child abuse, elder abuse, or disability abuse is known or suspected in good faith.[149] The statute does not specify whether the standard for suspected abuse must be Connecticut's, but Connecticut would surely disagree with states viewing abortions as child or disability abuse. Finally, the Connecticut statute "shall not be construed to impede" lawful sharing of medical records as permitted by state or federal law, except in the case of a subpoena commanding records relating to reproductive health services.[150] This last provision would allow all other disclosures permitted by HIPAA, including disclosures for treatment, for payment, and for public health.[151] But allowing any HIPAA-permitted disclosures except in response to subpoenas potentially opens the door to disclosures that could significantly reduce the protections given by the statute, such as disclosures to another state's public health department or to the parent of a minor patient.

New Jersey's shield law, like Connecticut's, permits disclosure after specific consent from the patient or the patient's representative concerning information from HIPAA covered entities regarding reproductive health services that

148. CONN. GEN. STAT. §§ 52-146c-52-146k, 52-146o, 52-146p, 52-146q, and 52-146s.

149. CONN. GEN. STAT. § 52-146w(b).

150. CONN. GEN. STAT. § 52-146w(c).

151. The Connecticut Hospital Association had submitted testimony recommending an amended bill providing only that disclosures in response to subpoenas must state the relevant HIPAA permission and comply with HIPAA requirements for a subpoena. Testimony of Connecticut Hospital Association, March 21, 2022, https://www.cga.ct.gov/2022/juddata/TMY/2022HB-05414-R000321-The%20Connecticut%20Hospital%20Association-TMY.PDF.

are legal in New Jersey.[152] This law parallels Connecticut's about the information protected but with adjustments for the privileges available under New Jersey law.[153] It separately references HIPAA preemption and provisions for the use of data in research as remaining in effect.[154] It also clarifies that provision of material support for reproductive health care that is legal in New Jersey cannot constitute child abuse.[155] Finally, the statute is not to be construed to impede the lawful sharing of medical records as permitted by state law, federal law, or rules of court; the New Jersey version of the statute does not, however, specify whether this includes all lawful sharing except in the presence of a subpoena or a search warrant.[156]

Delaware likewise shields patient reproductive health services records from disclosure in civil actions or proceedings without authorization by the patient or the patient's legal representative.[157] In Delaware, the shield does not apply to records if the patient is a plaintiff alleging health care malpractice and the request for records has been served on the defendant, if the records are requested by a licensing board in connection with investigation of a complaint, or if the records are requested by a law enforcement agency investigating abuse.[158] Delaware's statute also clarifies that it is not intended to impede "the lawful sharing of medical records amongst health care providers" as permitted by law.[159] This provision clarifies that sharing records for treatment purposes as permitted by HIPAA is not affected by the shield but leaves open the status of other forms of sharing permitted by HIPAA, such as for public health.

All these statutes allow disclosures when the patient authorizes them. This approach seems to comport with the commitment to allowing patients access to their records and control over who may access them. However, patient agreement is a problematic strategy for full protection of information. Although patient consent to disclosure has been lauded as recognizing autonomy, it has also been strongly

152. N.J. REV. STAT. § 2A: 84A-22.18.
153. N.J. REV. STAT. § 2A: 84A-22.3 to 22.7.
154. N.J. REV. STAT. § 2A: 84A-22.18(b).
155. N.J. REV. STAT. § 2A: 84A-22.18(b)(4).
156. N.J. REV. STAT. § 2A: 84A-22.18(c).
157. DEL. CODE ANN. tit. 10 § 3926A.
158. DEL. CODE ANN. tit. 10 § 3926A(c).
159. DEL. CODE ANN. tit. 10 § 3926A(d).

criticized for potential inadequacies. A standard problem with notice and consent privacy policies on web sites is consumers' lack of understanding.[160] While patients are likely to be especially vigilant about reproductive-related health information, they may not always fully realize the significance of what they are being asked to reveal, especially if the records are being shared for further treatment and then become vulnerable to discovery in the abortion-restrictive state. Moreover, reliance on patient agreement does not account for the very real possibility that patients may be pressured by investigators, partners, or family members to agree to reveal information in their records. Nor does it account for the actions of patient representatives, for example, parents opposed to abortion care received by their teenaged children. Although provider interests should not generally override patient interests, the interests of providers in abortion-protective states are not negligible. They may be subject to prosecution, damage remedies in other states, or be drawn into litigation as necessary sources of evidence even when they themselves are not the defendants. Agreement-based approaches to disclosure, therefore, may not be fully protective of the delivery of needed reproductive care.[161]

Other statutes avoid this difficulty by prohibiting requests for reproductive information or responses to these requests. For example, California prohibits covered entities from releasing information relating to a person seeking or obtaining an abortion in response to a subpoena or other request based on another state's law that interferes with reproductive rights as recognized in California.[162] This prohibition also extends to foreign penal civil actions, that is, civil actions intended to punish an offense against public justice, such as the civil action for damages adopted in Texas.[163] Providers also may not release information to law enforcement for any enforcement of another state's law that would interfere with reproductive rights as recognized in California or for foreign penal civil

160. *E.g.*, Daniel Susser, *Notice After Notice-and-Consent: Why Privacy Disclosures Are Valuable Even If Consent Frameworks Aren't*, 9 JOURNAL OF INFORMATION POLICY 148 (2019).

161. Notice and choice has been extensively criticized in the realm of internet privacy. *See, e.g.,* Joel Reidenberg, et al., *Privacy Harms and the Effectiveness of the Notice and Choice Framework,* 11 I/S: J.L. & POL'Y FOR INFO. SOC'Y 485 (2013).

162. CAL. CIV. CODE § § 56-56.108(a).

163. *See supra* note 25.

actions unless that release is pursuant to a subpoena and is not prohibited by the disclosure shield.[164] California also has a general statute that no person may be compelled in any criminal, administrative, legislative, or other proceeding to identify, provide information that could identify, or that is related to anyone who has sought or obtained an abortion when the information is requested based on another state's laws or penal civil actions that interfere with abortion rights as understood in California.[165] This statute does not prevent people from responding voluntarily to these requests for information, however.

New Mexico's information shield prohibits any requests for information from third parties about protected reproductive information, or any transmission of this information by third parties, with the intent to harass, humiliate, or intimidate the individual who is the subject of the information or incite others to do so.[166] Other prohibited purposes include causing the individual to fear for their own safety or their family's safety, causing the individual to suffer unwanted physical contact or emotional distress, or deterring the individual from engaging in protected health care activity. [167] The prohibition does not apply to lawsuits or judgments in other states for which a cause of action also exists in New Mexico.[168] It is enforceable both by suits brought by state attorneys or by private rights of action and relief may include civil penalties or statutory compensatory damages at a minimum of $10,000.[169]

C. Prohibition of Issuance or Service of Subpoenas

It is common for investigations or litigation occurring in one state to require evidence about events that occurred elsewhere, testimony from out of state witnesses, or information stored out of state. The Interstate Depositions and Discovery Act (IDDA), enacted in every state but Massachusetts, Missouri, and Texas,[170] creates a uniform and

164. CAL. CIV. CODE § § 56.108(b).
165. CAL. HEALTH & SAFETY CODE § 123466(b).
166. S.B. 13 § 2 (A)-(B), S. Reg. Sess. (N.M. 2023).
167. *Id*. at § 6(B).
168. *Id*. at § 6(C).
169. *Id*. at §§ 7, 8.
170. Interstate Depositions and Discovery Act Enactment History, UNIFORM LAW COMMISSION, https://my.uniformlaws.org/committees/community-

efficient process for litigants seeking out of state information.[171] The process requires the party seeking a witness or information to have a subpoena issued in the home jurisdiction and then submit the subpoena to the clerk of the court in the jurisdiction where discovery is sought.[172] The clerk is then directed to issue an identical subpoena in the foreign jurisdiction.[173] Following this process, courts in abortion-restrictive states may issue subpoenas for information about out-of-state occurrences concerning abortions. These subpoenas may be for evidence in support of allegations of crimes or torts considered to have occurred within the restrictive state, for example helping someone leave the state for an abortion, providing abortion pills that are taken within the state, or being damaged as a family member anticipating the birth of a child conceived with a state resident. The subpoenas would then be taken to the clerk of the court for issuance in the jurisdiction where discovery is sought, so the directly applicable subpoena is not extraterritorial but is issued by the state where the information is found. Importantly, the jurisdiction where discovery is sought might be where the health records are stored, rather than the jurisdiction in which the care occurred and the records were originally generated.

All states currently with shield laws except Massachusetts have adopted the IDDA, some by statute and others by court rule. Some of these states have incorporated specific reference to protections for reproductive health information into their IDDA, thus blocking issuance of the second subpoena. For example, Connecticut has specifically amended its version of the IDDA to specify that no subpoenas may violate the shield.[174] Massachusetts also provides specifically that subpoenas may not be issued by Massachusetts courts for proceedings outside of the state concerning protected reproductive health care within Massachusetts.[175] New York's civil practice rules also prohibit the issuance of subpoenas in

home?CommunityKey=181202a2-172d-46a1-8dcc-cdb495621d35 (last updated May 6, 2023).

171. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT, (2007).

172. *Id.* at Section 3(a).

173. *Id.* at Section 3(b).

174. CONN. GEN. STAT. § 52-658.

175. MASS. GEN. LAWS ch. 223A, § 11.

connection with out-of-state proceedings relating to abortion services or procedures that were legally performed in New York, unless the out-of-state proceeding is in tort law, contract law, or based on a statute, and is brought by the patient or the patient's legal representative.[176] A parallel provision governs orders for discovery in actions pending in other jurisdictions.[177] Illinois's shield law, effective as of January 2023, also amended its IDDA, to provide that a foreign subpoena is unenforceable if it seeks documents in connection with any cause of action that interferes with lawful reproductive health care.[178] There must be a signed attestation that an exemption applies, with $10,000 fines for a violation; exemptions include an action in tort law, contract law or a statute for damages that would exist under the laws of Illinois.[179] Individuals who believe they have been served a subpoena in violation of this section are not required to move to modify or quash the subpoena and courts may not order them to comply with it.[180]

There are some differences in how states have incorporated subpoena shields in their state IDDA. Colorado's abortion shield law provides that officers of the courts, including attorneys, may not issue subpoenas in connection with a proceeding in another state concerning an individual engaging in a legally protected health care activity, including abortions or gender-affirming care.[181] Colorado's IDDA states that subpoenas must comply with any other applicable state statutes, but does not explicitly reference the abortion shield law.[182] Delaware has not changed its statutory IDDA to refer to subpoenas for protected information concerning reproduction,[183] nor has California.[184] New Jersey and New Mexico have adopted the IDDA by court rule, but neither rule references the shield.[185] Unless court personnel are well educated about the shield, inadvertent gaps in protections may occur in some of these states.

176. N.Y. CIVIL PRACTICE LAW AND RULES § 3119(g) (McKinney).
177. *Id.* at § 3102(e).
178. 735 ILL. COMP. STAT. 35/3.5(a).
179. 735 ILL. COMP. STAT. 35/3.5(a), (c).
180. 735 ILL. COMP. STAT. 35/3.5(e), (f).
181. COLO. REV. STAT. § 13-1-140(1).
182. COLO. REV. STAT. § 13-90.5-104.
183. DEL. CODE ANN. tit. 10, § 4311.
184. CAL. CIV. CODE §§ 2029.100 to 2029.900.
185. N.J. Courts Rule 4:11-4; N.M State Court Rule 1-045.1.

These shields would function to block the IDDA process in an abortion protective state. That is, the shields would prevent a subpoena identical to that issued in an abortion-restrictive state from being issued in a protective state. However, a further complication for the efficacy of these state information shields is that information generated within the state may not be stored solely within the state. Information entered into EHRs may be stored remotely or may utilize cloud storage rather than being hosted on local servers. Take several examples from Connecticut. Epic, a large EHR vendor headquartered in Wisconsin and used by many major medical centers including the Yale New Haven Health system in Connecticut,[186] uses cloud storage for its data warehouse system.[187] Oracle Cerner, another major EHR vendor, that serves Western Connecticut Health Network, has its primary data center for storage in Kansas City, Missouri, a state which prohibits all abortions except in the case of a medical emergency.[188] Whether a subpoena originating in Idaho for medical records generated in Connecticut but stored in Missouri could be served in Missouri despite the Connecticut shield is uncharted legal territory.

D. Search Warrants

One way for an abortion-restrictive state to seek information about an abortion outside of its borders would be to issue an extraterritorial search warrant. Purely extraterritorial search warrants assert the authority to search persons or property outside of the jurisdiction issuing the warrant. For example, an Idaho investigation of abortion trafficking—taking a minor out of the state for an abortion without parental permission[189]—might seek a warrant from an Idaho court to search the records of a physician in Oregon where the abortion is alleged to have taken place. Such an extraterritorial warrant raises questions of both federal and state law about the scope of

186. Bill Siwicki, *Yale New Haven health integrates systems and saves $2.6 million annually*, HEALTHCARE IT NEWS (July 2, 2019 1:51 PM), https://www.healthcareitnews.com/news/yale-new-haven-health-integrates-systems-and-saves-26-million-annually.

187. *See* Kate Kelly, *Willy Wonka and the Medical Software Factory*, THE NEW YORK TIMES (Dec. 20, 2018), https://www.nytimes.com/2018/12/20/business/epic-systems-campus-verona-wisconsin.html.

188. MO. REV. STAT. tit. 12 § 188.017.

189. IDAHO CODE § 18-623(1).

investigative authority, which may be different from questions about extraterritorial criminalization.[190] Questions about the scope of extraterritorial investigative authority would be avoided, however, if the Idaho investigation instead took the Idaho warrant to Oregon and requested the Oregon court to issue a similar warrant for the search.

The primary federal constitutional question raised about extraterritorial warrants is whether they are unreasonable under the Fourth Amendment. Patients' arguably strong expectation of privacy[191] in records about them generated by their health care providers is central to this Fourth Amendment analysis, discussed further below.[192] Federal rules of criminal procedure permit judges with authority in the jurisdictional district of the search, or judges of a state court of record in the district, to issue warrants to search a person or property within the district.[193] Warrants may also be issued for property outside the jurisdiction but within the United States, if the activities related to the crime may have occurred within the jurisdiction issuing the warrant. For example, if the supposed crime is Medicaid fraud within Utah, a judge in Utah could issue a warrant for relevant medical records stored outside of Utah. With abortion, the alleged crime would be a state rather than a federal offense, raising questions under state law in addition to the federal constitutional questions.

For abortion-related activity, the state law questions from the originating state are whether that state's statutes or rules permit extraterritorial search warrants and whether admission of evidence gathered through these warrants is permitted under the state constitution or other state laws. States may also address the admissibility of evidence gleaned without a warrant. Abortion-restrictive states, that is, may have rules of criminal procedure or doctrines about evidence that would preclude their issuance of extraterritorial warrants or their use of information gleaned from these warrants. On the other side, the state where the information is stored may

190. *See generally,* In re Search Warrant for Recs. from AT&T, 165 A.3d 711 (N.H. 2017).

191. In this, EHRs differ from the vast amount of information about individuals available over the internet, where the expectations of privacy may be lower. Fowler & Ulrich, *supra* note 2, at 1286-87.

192. *See infra* Section V. C.

193. FED. R. CRIM. P. 41(b).

either have a general shield for information stored within the state from warrants issued elsewhere or prohibit issuance of warrants within the state in connection with evidence that is material to the prosecution of crimes in other states involving legally protected health care.[194]

Consider Idaho. Rule 41 of the Idaho Rules of Criminal Procedure allows a district judge within Idaho to issue a search warrant within the county where venue is proper for the search.[195] Moreover, if the property or person to be searched is not currently within Idaho, the Rule clarifies that: "the warrant may still be issued; however, the fact that the warrant is issued is not deemed as granting authority to serve the warrant outside the territorial boundaries of the State."[196] Still, Idaho has allowed evidence to be admitted that was obtained by a warrant issued in Idaho and served outside of the state, in a case involving evidence stored outside of the state by the defendant's Kansas cell phone provider.[197] The search warrant was obtained in Idaho from an Idaho magistrate and faxed by the police to the Kansas cell phone provider (Sprint), which provided the records to the Idaho police.[198] The defendant claimed that the evidence should be suppressed because the Idaho judge did not have authority under either the Idaho constitution or Rule 41 to issue the warrant.[199] The court held that "[n]o constitutional provision or statute imposes territorial limits on the power of Idaho courts to issue warrants."[200] Even if Rule 41 was violated, the court also held the jurisdictional issue did not warrant suppression of the evidence because it was not a constitutional violation.[201] So although Idaho detaches the question of the authority to issue the warrant from the question of the admissibility of the evidence, it has allowed the evidence to be admitted.

The states most likely to be destinations for Idaho residents seeking abortion care are California, Oregon, and Washington, as these are the closest states where abortion is

194. COLO. REV. STAT. § 16-3-301(4).
195. IDAHO R. CRIM. P. 41.
196. *Id*.
197. State v. Branigh, 313 P.3d 732 (Idaho App. 2013).
198. *Id.* at 736.
199. *Id.* at 737.
200. *Id.* at 740.
201. *Id.*

permitted. California recognizes extraterritorial search warrants for electronically stored information within the state[202] but it specifically excludes reproductive information from this reach. California corporations providing remote computing or electronic communication services are prohibited from producing information in response to extraterritorial warrants when they know or should know that the warrant relates to investigations arising out of providing, facilitating, or obtaining an abortion that is legal under California law; or intending or attempting to provide, facilitate, or obtain an abortion that is legal under California law.[203] Warrants must be accompanied by an attestation that the evidence is not being sought for a prohibited purpose.[204]

Abortion clinics in Oregon are a short drive away from Idaho's largest metropolitan area, the Boise metropolis.[205] Oregon enacted an abortion shield law in 2023.[206] That law stipulates that civil or criminal actions in other states for receiving, providing, or aiding and abetting the receipt of reproductive health care legal in Oregon is against the public policy of Oregon.[207] It also provides that Oregon courts may not issue subpoenas in connection with civil or criminal action regarding reproductive health care legal in the state of Oregon, unless the person seeking the subpoena asserts that it is in connection with a tort or contract action that could be brought within the state.[208] The shield law does not contain a specific provision regarding search warrants, although warrants issued in other states seeking information about care legal in Oregon would be against the public policy of Oregon. Oregon provides that a search warrant may only be issued by a judge. For lower court judges, the warrant may only be issued within the jurisdictional scope of the judge's authority.[209] The search warrant statute does not clarify whether an out of state judge would be able to issue a warrant for records stored in Oregon,

202. CAL. PENAL CODE § 1524.2(c)(1).
203. CAL. PENAL CODE §§ 1524,2(c)(1), 629.51(5).
204. CAL. PENAL CODE § 1524.2(c)(2).
205. For example, it is just over an hour's drive from the campus of Boise State University to the Planned Parenthood Clinic in Ontario, Oregon.
206. Or. H.B. 2002, https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB2002/Enrolled.
207. OR. REV. STAT. ch. 228 § 48(2).
208. OR. REV. STAT. ch. 228 § 48(3).
209. OR. REV. STAT. § 133.545(1).

or whether an Oregon judge could issue a warrant for reproductive information needed for out of state proceedings. Oregon does, however, allow its courts to issue warrants for information stored remotely outside of the state.[210] For example, an Oregon state court issued a search warrant for a defendant's emails stored in his Yahoo account in California.[211] Yahoo disclosed the emails to Oregon police and the evidence was used to convict the defendant of using a child in a display of sexually explicit conduct.[212] The defendant challenged the conviction, arguing that the Oregon court did not have authority to issue the warrant.[213] The Oregon Court of Appeals held that the court of jurisdiction where the alleged offense occurred had authority to issue the warrant because the crime was triable in Oregon and the exercise of jurisdiction was not inconsistent with either the state or federal constitution.[214] Although an Idaho warrant for information in Oregon could be analogizes to an Oregon warrant for information in California, if the warrant is in regard to criminal prosecution for reproductive care legal in Oregon it would be against the public policy of the state.[215]

The University of Idaho has issued a memo to employees indicating that state laws prohibit providing referrals for abortions or even some contraceptives.[216] Washington is the closest destination for University of Idaho students needing services they cannot receive in the state. It is about a 15-minute drive from the University of Idaho to the Planned Parenthood clinic in Pullman, Washington, and about an hour and a half drive to the clinic in Spokane. Both clinics offer birth control and abortions. Washington has declared its state public policy is to protect health care services that are lawful in Washington against civil or criminal penalties imposed in other states.[217] Washington will not allow state judicial officers

210. *See generally*, State v. Rose, 330 P.3d 680 (Or. App. 2014).
211. *Id.* at 682-683.
212. *Id.* at 683.
213. *Id*.
214. *Id.* at 686.
215. OR. REV. STAT. ch. 228 § 48(2).
216. Kelcie Moseley-Morris, *University of Idaho releases memo warning employees that promoting abortion is against state law*, IDAHO CAPITAL SUN (Sept. 26, 2022), https://idahocapitalsun.com/2022/09/26/university-of-idaho-releases-memo-warning-employees-that-promoting-abortion-is-against-state-law/.
217. WASH. STAT. § 7.002.013(1), (2).

to issue subpoenas or warrants related to provision or receipt of protected health care services.[218] Business entities incorporated in or with their principal place of business in Washington—such as Microsoft, which provides cloud services to Epic—may not comply with a subpoena or warrant for information related to protected health care services unless there is an attestation that it does not seek information for use in civil or criminal processes against health care services that are legal in Washington.[219] In addition, Washington will not allow a search warrant to be issued in connection with criminal liability for reproductive activities protected in Washington, including warrants for records that are stored outside of the state.[220] Washington also does not require any recipients in the state to comply with service of process from another state that is related to criminal liability related to health care services protected in Washington.[221] However, this last provision, which is sufficiently broad to apply to any individual within the state, only permits but does not require the refusal.[222]

For their part, states with stringent abortion bans may differ on whether they allow the issuance of extraterritorial search warrants or the admissibility of evidence gleaned from these warrants. To take one of these states, Texas allows search warrants to be issued for electronic customer data held in electronic storage, without specification as to the location of the storage.[223] If this provision allows warrants for electronic information stored outside of Texas and the alleged crime occurred within the relevant district—say, a physician referral for an abortion, considered to be an attempted violation of Texas's abortion ban[224]—a search warrant could be issued by a judge in the district for remotely stored health records. As another example, Missouri provides that a search warrant may be issued by any judge of a court having original jurisdiction of criminal offenses within the territorial jurisdiction where the

218. WASH. STAT. § 7.002.013(2)(c).
219. WASH. STAT. § 7.002.013(d)(i)(B).
220. WASH. STAT. § 10.96.020(5).
221. WASH. STAT. § 10.96.040(2).
222. *See* Jake Laperruque, *Momentum Builds Against Abortion Surveillance as New States Enact Shield Laws*, CENTER FOR DEMOCRACY AND TECHNOLOGY (May 10, 2023), https://cdt.org/insights/momentum-builds-against-abortion-surveillance-as-new-states-enact-shield-laws/.
223. TEX. CODE CRIM. PROC. §18.02(13).
224. TEX. CODE HEALTH & SAFETY § 170A.002.

person, place, or movable or immovable thing to be searched is located.[225] If the medical information is stored in Missouri, it would seem that an investigating officer from an abortion-restrictive state could go to a judge with jurisdiction over the data stored in Kansas City to issue a search warrant for the records. Missouri also has a recent decision involving admissibility of evidence from a Yahoo Flickr account.[226] Yahoo had determined that the IP address of the account downloading child pornography was in Missouri and made a report to the National Center for Missing and Exploited Children.[227] The NCMEC then reported the information to Missouri law enforcement, which traced the IP address to the defendant's home and obtained a search warrant.[228] This case involved files cached on the defendant's computer, not a search for files stored remotely from Missouri[229]; the extraterritorial aspect was the Yahoo report to NCMEC. The defendant's claim was that this fact pattern was a Fourth Amendment violation because Yahoo and NCMEC were acting as agents of the government,[230] so they were subject to a federal statute[231] requiring reporting. The court ultimately rejected this claim.[232]

Some restrictive states also have rules with strict venue requirements for the issuance of warrants within the state. These rules may or may not have implications for the admissibility of evidence. For example, in Ohio, a state in which the voters adopted a constitutional amendment protecting abortion rights after the legislature had enacted a ban after six weeks,[233] a search warrant issued in one county for a blood draw in another was improper.[234] The Ohio court denied the motion to suppress, however, because the violation was "technical," not constitutional.[235] The warrant was issued

225. MO. REV. STAT. § 542.266.
226. State v. Ingram, 662 S.W.3d 212 (Mo. App. 2023).
227. *Id.* at 218.
228. *Id.*
229. *Id.* at 219.
230. *Id.* at 228.
231. 18 U.S.C. § 2258A(a).
232. *Ingram*, 662 S.W.3d at 230.
233. *See* note 47 and accompanying text.
234. State v. Ridenour, 2010 WL 2807926 (Ohio App. 2010) (applying OHIO R. CRIM. P. 41). Of note, the Ohio version of Rule 41 does not contain the distinction in the Idaho version of Rule 41 between issuance of the warrant and authorization of extraterritorial service.
235. *Ridenour*, 2010 WL 2807926 at 7.

by a neutral and detached magistrate and supported by probable cause.[236] Tennessee, an abortion-restrictive state,[237] has reached a different conclusion about the admissibility of search warrants where the venue is improper.[238] Law enforcement had obtained authorization for wiretaps across middle Tennessee from a 23rd district judge in connection with an investigation of a conspiracy to distribute methamphetamine.[239] Based on evidence from the wiretaps, the officers went back to the same judge for search warrants in both the 23rd and the 19th judicial districts, because the judge was familiar with the investigation.[240] Granting a motion to suppress, the court held that the warrants were unconstitutional because of the violation of Rule 41.[241]

E. Prohibition of State Cooperation in Acquiring Information

Some state shield laws bar state officials from cooperating with out-of-state efforts to gather information about reproductive care lawful in the state. These shields are independent of patient consent. Connecticut prohibits any public agency from providing any information or expending any time, money, or resources in furtherance of any proceeding seeking to impose civil or criminal liability for seeking, receiving, or assisting another in receiving protected reproductive health services, unless the proceeding could be brought under Connecticut law.[242] This would prohibit public officials from issuing subpoenas or search warrants in Connecticut. New York's shield law, effective in June 2022, provides that no New York law enforcement agency shall cooperate with or give information to any individual or out of state agency investigating an abortion performed in accord with New York law.[243] This restriction includes information not only about the abortion itself but also about procuring or aiding in the procurement of an abortion. It specifically does not preclude New York investigations of criminal activity in

236. *Id.* at 1.
237. TENN. CODE ANN. § 39-15-213.
238. State v. Frazier, 558 S.W.3d 145 (Tenn. 2018).
239. *Id.* at 147.
240. *Id.*
241. *Id.* at 154-155.
242. CONN. GEN. STAT. § 54-155a.
243. N.Y. EXECUTIVE LAW § 837-w (McKinney).

the state that may include abortions, provided that no information may be shared out-of-state.

Massachusetts's shield law, approved in July 2022, prohibits law enforcement from providing information or assistance to federal or other state agencies, private citizens, or quasi-law enforcement agents in relation to legally protected health care activity if the services are legal in Massachusetts.[244] There is an exception for disclosures required by federal law. Parallel provisions apply to the summons of a material witness for discovery.[245] New Jersey also prohibits any public entities from providing information or expending resources to further proceedings in another state seeking to impose criminal or civil liability for performing, responding to an inquiry about, or aiding abortions that are legal in New Jersey.[246] There are exceptions for conduct that would be subject to liability in New Jersey, for actions required to comply with valid court orders, and for compliance with applicable New Jersey or federal law.[247]

Prohibitions on the use of any state resources would block the issuance of subpoenas within the state for protected information. They also would prohibit in-state issuance of search warrants and may impede out-of-state searches in connection with suspected violations of criminal laws in abortion-restrictive jurisdictions. They will do so if the state refuses to recognize extraterritorial search warrants, including warrants for remotely stored information, and instead requires any warrants for searches within the state to be issued by the state. They will also do so if the abortion-protective state carves out an exception to its recognition of extraterritorial warrants for searches related to protected reproductive activities, as does California.[248] However, it remains possible that extraterritorial warrants might be executed in some abortion-protective states without the use of any resources from the protective state. Or restrictive states may at least try to conduct searches based solely on the extrajudicial warrant,

244. MASS. GEN. LAWS ch. 147, § 63.
245. MASS. GEN. LAWS ch. 233, § 13A.
246. N.J. REV. STAT. § 2A: 84A-22.19.
247. *Id.*
248. CAL. PENAL CODE § 1524.2(c).

or to obtain relevant information without a warrant at all.[249] In sum, these restrictions will stop the use of state resources to obtain protected information but will not stop efforts to gain the information that do not depend on any resources of the protective state.

F. Summary

To summarize, as of the spring of 2023, at least ten states had some kind of provision affecting disclosure of information in EHRs, subpoenas for such information, search warrants for such information, or state cooperation in investigations. These provisions varied in their strategies and scope. But perhaps their most serious limitation is that they only exist in about a fifth of the states. They thus likely will not protect information that is held elsewhere in the United States or that can be accessed from locations elsewhere. More fully effective protection will therefore need action at the national level.

V. STRATEGIES FOR MORE EFFECTIVE PROTECTION

This section explores strategies at the federal level for addressing significant gaps in protections for reproductive information in EHRs. These include statutory proposals, changes in the HIPAA privacy rule, and constitutional protections. Although they are federal, each has significant drawbacks.

A. Legislation

With a divided and polarized Congress, any legislation affecting abortion rights is unlikely to be enacted. Congress has also repeatedly tried and failed to enact legislation to protect information privacy.[250] HIPAA was one of these

249. For example, Texas has issued a civil investigative demand to Seattle Children's Hospital for information about Texas minors receiving gender-affirming care in Washington state, where the care is legal. Texas alleges that it is investigating a possible violation of its consumer protection laws. *See* note 141 *supra* and accompanying text.

250. *See, e.g.*, Jessica Rich, *After 20 years of debate, it's time for Congress to finally pass a baseline privacy law*, BROOKINGS INSTITUTION (Jan. 14, 2021), https://www.brookings.edu/blog/techtank/2021/01/14/after-20-years-of-debate-its-time-for-congress-to-finally-pass-a-baseline-privacy-law/; *Opinion: Enough failures. We need a federal privacy law*, THE WASHINGTON POST (March 30, 2022), https://www.washingtonpost.com/opinions/2022/03/30/congress-must-pass-federal-privacy-law/; Alfred ng, *The raucous battle over Americans' online privacy*

failures. Congress recognized the need for privacy protection but also doubted its own possibility for action and directed the agency to promulgate final rules not later than forty-two months after HIPAA's enactment.[251]

Nonetheless, two women representatives from California did introduce the "Ensuring Women's Right to Reproductive Freedom Act" in February 2023. This proposal would prohibit interference with interstate abortion services but does not contain any specific protection for information related to reproductive services.[252] The bill was referred to the subcommittee on health of the House Committee on Energy and Commerce, but no further action has been taken on it as of June 2023.[253] Its introduction thus would appear largely symbolic.

Whether there is a constitutionally protected right to travel, and whether that right extends to travel for abortion, would appear to be questions reopened by *Dobbs*.[254] Under its Commerce Clause power, Congress has the authority to enact statutes protecting the ability of people to cross state lines, including for health care.[255] Protecting patients from disclosure of information about the care received, or shielding that information from use in investigations against them for the care, would seem reasonable means to protect that travel. If patients know that information about the purpose of their trip could be turned against them, travel will be chilled. Second, travel will be chilled if information about its purpose can be turned against people who help them on their journey.

Less clear constitutionally is whether a federal statute protecting health care providers giving care in abortion-protective states could be enacted under the Commerce Clause as supporting patients' movement across state lines for care. Arguably, if providers in protective states can be threatened

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is landing on states, POLITICO (Feb. 22, 2023), https://www.politico.com/news/2023/02/22/statehouses-privacy-law-cybersecurity-00083775.

251. Pub. L. 104-191, 110 STAT. 1938, § 264(c) (Aug. 21, 1996); 42 U.S.C. § 1320d-2.

252. H.R. 782, 118th Cong, (2023).

253. *Id.*

254. Justice Kavanaugh, but only Justice Kavanaugh among the *Dobbs* majority, stated that the right to travel remained untouched by *Dobbs.* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2309 (Kavanaugh, J., concurring).

255. U.S. v. Morrison, 529 U.S. 598, 609 (2000).

with investigations or civil or criminal liability in restrictive states, they will be less likely to be willing to offer the services. If so, there will be less reason for patients to undertake the travel, as the care they seek will be unavailable. The question would be whether protecting the reason for travel can be invoked as support for the travel.

B. Rulemaking

In April 2023, the Office for Civil Rights at HHS (OCR) issued a notice of proposed rulemaking (NPRM) to add protections for information related to reproductive health care.[256] The impetus for the NPRM is the concern that, after *Dobbs*, reproductive information will be sought for criminal, civil, or administrative liability proceedings that will discourage access to legal reproductive care and full communication between providers and patients.[257] A further concern is that threats of prosecution will lead health care providers to omit information about care that patients have received or record information inaccurately.[258] Providers may also fail to offer options to patients of care that is legal where it occurs but that might expose them to liability elsewhere.[259] The results, according to the NPRM, will be poorer communication between providers and patients, increased mistrust, reduced access to care, or care based on incomplete or inadequate information.[260] If patients increasingly withhold information from providers, including information such as possible exposures to sexually transmitted diseases, adverse consequences for public health may also ensue.[261] The balance initially struck by the privacy rule between the need for information for judicial and administrative proceedings and for law enforcement and protection of privacy has thus been upended by *Dobbs*.

The strategy proposed in the NPRM is to prohibit uses or disclosures for a specified purpose: for criminal, civil, or administrative investigations or proceedings against

256. HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, (Apr. 17, 2023) (to be codified at 45 CFR 160,164).
257. 88 FR 23506, 23507.
258. 88 FR 23506, 23508.
259. 88 FR 23506, 23508.
260. 88 FR 23506, 23508.
261. 88 FR 23506, 23508.

individuals or regulated entities for seeking, obtaining, providing, or facilitating reproductive care.[262] The prohibited purpose would also extend to the identification of anyone for the purpose of initiating an investigation or proceeding.[263] The prohibition would hold when the reproductive care is lawfully provided outside of the state of the investigations or proceedings; is protected, required, or authorized by federal law; or is lawfully provided in the state of the investigations or proceedings.[264] Examples of care protected by federal law would be contraception, as *Griswold*[265] was not overruled by *Dobbs*. Examples of care required by federal law would be emergency care.[266] This proposal, if adopted, would not be the only deployment in HIPAA of the strategy of prohibiting a use or disclosure; HIPAA also prohibits the use of genetic information for underwriting[267] and the sale of patient information.[268]

This proposed new prohibited purpose cannot be overridden by patient authorization and thus protects both the patient and others from coerced authorizations.[269] However, there is a way around it: the prohibition does not extend to disclosures to the patient pursuant to an authorization.[270] Once the patient has received the information, the NPRM strategy does nothing to stop them from allowing the information to be used in litigation against or prosecution of people who helped them with an abortion or providers who performed the abortion. Personal representatives may also give the authorization; the NPRM's addition about personal representatives is that the covered entity may not refuse to recognize as a personal representative someone who makes reproductive decisions on behalf of the individual because it disagrees with the decision being made.[271] Perhaps this structure is the best that can be achieved without impeding direct access to records by patients or their representatives.

262. 88 FR 23506, 23516.
263. *Id.*
264. *Id.*
265. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
266. 88 FR 23206, 23531.
267. 45 C.F.R. § 164.502(a)(5)(i).
268. 45 C.F.R. § 164.502(a)(5)(ii).
269. 88 FR 23506, 23528.
270. 88 FR 23506, 23533.
271. 88 FR 23506, 23516.

On the other hand, the NPRM could have included an attestation by patients or their representatives that they will not permit the information to be used for the forbidden purposes.

Another problem with the NPRM is that it may allow disclosures to law enforcement in restrictive states for investigations of whether reproductive care was illegal. Suppose that there is a question whether a provider in a restrictive state is offering care that does not come within an exception permitted under state law, such as the exception in Florida for serious risk of substantial and irreversible impairment of a major bodily function of the pregnant patient when certified by two physicians.[272] Law enforcement is concerned that physicians may be granting certification when the patient is not in fact so seriously threatened and seeks patient records to evaluate whether this might be the case. Law enforcement would attest that it is not seeking the information for a forbidden purpose, but for the purpose of investigating conduct that is illegal under the law of the restrictive state. Similar problems might appear with state exceptions for fatal fetal anomalies, where care providers and law enforcement might disagree about the interpretation of the statutory language and hence whether the provider is interpreting it appropriately. Notably, many of the state exceptions contain problematic language such that make them difficult to apply, thus exacerbating the problem.[273]

Rulemaking does have an advantage that legislation does not: it can be accomplished administratively rather than relying on Congress to act. Moreover, HIPAA expressly charges the agency with the responsibility for rulemaking to protect the privacy of information in EHRs. [274] Given this express allocation of responsibility from Congress, it is at least arguable that the OCR rulemaking protecting patient privacy will not be struck down by the courts as overreaching the

272. *E.g.*, FLA. STAT. §390.0111(1)(a).

273. *See* Mabel Fox, Laurie Sobel, and Alina Salganicoff, *A Review of Exceptions in State Abortions Bans: Implications for the Provision of Abortion Services*, KAISER FAMILY FOUNDATION (May 18, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/.

274. 42 U.S.C. § 1320d-3.

agency's authority.[275] Also, HIPAA preemption of less protective state statutes is express.[276]

On the other hand, HIPAA rulemaking must be dictated by the scope of the HIPAA statute. The privacy rule is authorized pursuant to the administrative simplification section of HIPAA.[277] Information protected under this section is individually identifiable information in the possession of a health care provider, health plan, employer, or health care clearinghouse.[278] The HIPAA privacy rule's scope of governance is thus limited to these entities and those with which they deal; it is not a general privacy statute. It would be within this scope to forbid these entities from making disclosures for specified purposes, or to require them to receive attestations before disclosure that the disclosure is not to use the information for the forbidden purpose. But directly prohibiting law enforcement from using the information would not be within the scope of HIPAA administrative simplification. Nor would general privacy protection for reproductive health information, wherever held. In short, HIPAA rulemaking can only go as far as HIPAA.

Moreover, rulemaking can be undone by a new administration. The process is not easy; changing or rescinding a rule requires a new rule-making process, including notice, a comment period, and final agency action with explanations and responses to comments.[279] The process may take several years, but nonetheless is certainly possible unless Congress intervenes to amend or repeal the statute.

C. Constitutional Approaches

The Fourth Amendment to the Constitution prohibits unreasonable searches and seizures.[280] Given the very strong expectations of privacy that patients have in health

275. West Virginia v. Environmental Protection Agency, 142 S.Ct. 2587, 2614 (2022) (when major questions are involved, government must point to clear congressional authorization for the rulemaking).

276. 42 U.S.C. § 1320d-7(a)(1).

277. Pub. L. 104-191 §§ 262, 264 (1996).

278. 42 U.S.C. § 1320d(6).

279. MaryBeth Musumeci, *How Can Trump Administration Regulations Be Reversed?,* KAISER FAMILY FOUNDATION, (Jan. 29, 2021), https://www.kff.org/medicaid/issue-brief/how-can-trump-administration-regulations-be-reversed/.

280. U.S. CONST. amend. IV.

information,[281] it is unlikely that warrantless searches of EHRs would be constitutionally permissible. The more likely problems involve the admissibility of evidence either from responses alleged to have violated HIPAA or from searches with warrants argued to be invalid.

A threshold problem with efforts to use federal constitutional protections against illegal searches is that it is the patient whose reasonable expectation of privacy would be violated by the search.[282] If prosecutions are not against patients, but against providers or people who assist patients in obtaining abortions, the expectation of privacy will not apply to them. Expectations of privacy in the record would be even weaker for persons who are not involved in the patient's care, for example, people who pay for abortion travel out-of-state and who thus might be prosecuted for aiding and abetting a prohibited abortion in a restrictive state. As of this writing, no state has included the pregnant patient within the scope of either criminal punishment or damage remedies for abortions.

However, health care providers generate medical records and arguably possess something quite like, if not exactly, a property interest in them.[283] Arguably, they might have expectations of their own in protections against searches. These expectations would be more like the expectations that people have in records they create, such as their financial records, than expectations people have in sensitive medical information about themselves. Based on these expectations, the provider might object to the warrant. However, others who might be charged in the restrictive state—for example, people helping to pay for abortion travel—would not be able to assert even this kind of interest in the record.

There are importantly different possibilities about where the warrant might be served which could affect how the provider mounts objections and their success. Here are some of these possibilities:

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281. *See generally,* Matthew Tokson, *The Emerging Principles of Fourth Amendment Privacy*, 88 GEO. WASH. L. REV. 1, 14 (2020) (discussing the importance of intimacy to Fourth Amendment protection).

282. Alderman v. U.S., 394 U.S. 165, 173 (1969).

283. *E.g.,* Amy L. McGuire, Jessica Roberts, Sean Aas, and Barbara J. Evans, *Who Owns the Data in a Medical Information Commons?*, 47 J.L. MED. & ETHICS 62 (2019).

—the warrant is issued by a court with jurisdiction in the restrictive state and served on the provider in the restrictive state whose conduct is under investigation;

—the warrant is issued by a court with jurisdiction in the restrictive state and served on another provider in the restrictive state who has been seen by the patient and has access to the patient's interoperable EHR;

—the warrant is issued by a court with jurisdiction in the restrictive state and served extraterritorially on the provider in the location where the abortion occurred or the location where the records are stored;

—investigators in the restrictive state go directly to a court with jurisdiction over the location where the abortion occurred; the warrant is issued and served on the provider in that location;

— investigators in the restrictive state go directly to a court with jurisdiction over the location where the EHR service provider's data storage occurs and the warrant is issued and served on the EHR service provider in the storage location;

—the warrant is issued in accord with the laws of the restrictive state governing warrants and served on the EHR service provider under federal law governing remote storage of electronic communications.[284]

The complexities of what might happen do not stop with this list. Indeed, the complexities are so acute that Susan Frelich Appleton has observed that this "coming train wreck . . . is not how states in our federal system are supposed to behave."[285] One complexity is where the objection to the warrant might be brought. Possible answers to this complexity are the state where the abortion occurred, in hopes of taking advantage of a shield law; the state where the information is stored, which might or might not have a shield law; the restrictive state where the information is sought for investigation of a possible crime; or the state where the EHR service provider is located, which might or might not have a shield law. Presumably any objection to admissibility would be heard in the court of the restrictive state if the provider is ultimately prosecuted.

284. 18 U.S.C. § 2703(a).

285. Susan Frelich Appleton, *Out of Bounds?: Abortion, Choice of Law, and a Modest Role For Congress*, 35 J. AM. ACAD. MATRIM. LAW. 461, 464 (2023).

Another complexity is which law the court would apply. The possibilities once again include the law of the restrictive state seeking to investigate what it regards as a possible crime, the law of the protective state where the abortion occurred, the law of the state where the information is stored, or the law of the state where the EHR service provider is located. At this point, we enter the "dismal swamp" of conflicts of law which has been notoriously murky for at least a century.[286] An intuitive approach to conflicts of law is that courts should apply the law where the events most central to the issue at hand occurred. As the myriad possibilities above indicate, however, it is not at all clear where the relevant events occurred. In the view of the restrictive state, the harms that are its concern occurred within its borders; in the view of the protective state, the critical action of needed reproductive care occurred within its borders; and in the view of the EHR service provider state, the data management and storage occurred within its borders. Cloud storage presents a further possibility: location of the information in the EHR is a fiction to be managed by federal law. Yet as Appleton recounts, analysis of governmental interests has entered into choice of law analysis.[287] In the abortion context, restrictive states and protective states are likely to believe that they have very strong public policies at stake: protection of unborn life and protection of patients' reproductive rights and providers' ability to deliver needed medical care safely and appropriately. Abortion law scholar Mary Ziegler has argued that the law to be applied would be the law of the state where the abortion occurred,[288] but the state where the harm occurred might also claim pride of place.

Yet another complexity is presented by the Constitution's Full Faith and Credit Clause: "Full faith and credit shall be given in each state to the public acts, records, and judicial

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286. *Id.* at 466 n. 15 (2023) (quoting William Prosser: "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it." William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).)

287. *Id.* at 469-70.

288. Mary Ziegler, *A California animal welfare case may be a loss for reproductive rights*, BOSTON GLOBE (May 12, 2023), https://www.bostonglobe.com/2023/05/12/opinion/scotus-ross-pork-abortion-ramifications/.

proceedings of every other state."[289] Conceivably, courts of more than one state might get in the fray about search warrants; for example, a provider in an abortion protective state might go to court to block a warrant while investigators in a restrictive state seek the warrant in the state where prosecution is contemplated. There could be a rush to which state issues a judgment first, including interlocutory appeals or emergency actions in the state's highest court. One influential commentary on the legal landscape after *Dobbs* assumes that the Full Faith and Credit Clause would not apply to out of state subpoenas and discovery requests because these are not final judgments of a state court.[290] Whether issuance of a search warrant, or a state high court ruling on the validity of a warrant or the admissibility of evidence gleaned from the warrant would be entitled to full faith and credit in the courts of another state is unclear. What is clear is that the Full Faith and Credit Clause refers to "public acts" and Justice Kavanaugh has suggested that the Court rethink narrow interpretations of the Clause.[291]

The first section of the Full Faith and Credit Clause has a second sentence that might invite a solution from Congress. It reads: "And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[292] Were Congress as a practical matter not deadlocked on abortion-related matters, it would appear to have the constitutional authority to resolve battles between states about access to patient information located outside of the state or in cloud storage.[293]

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289. U.S. CONST. art. IV § 1.

290. David S. Cohen, Greer Donley, and Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 46 n. 251 (citing 16B Am. Jr. 2d Constitutional Law § 1024)).

291. National Pork Producers Council v. Ross, 598 U.S. 356, 143 S.Ct. 1142, 1175-76, Kavanaugh, J., concurring ("*Third*, the Full Faith and Credit Clause requires each State to afford "Full Faith and Credit" to the "public Acts" of "every other State." Art. IV, § 1. That Clause prevents States from "adopting any policy of hostility to the public Acts" of another State… A State's effort to regulate farming, manufacturing, and production practices in another State (in a manner different from how that other State's laws regulate those practices) could in some circumstances raise questions under that Clause.").

292. U.S. CONST. art. IV § 1.

293. For further discussion of these possibilities, *see* Appleton, *supra* note 285 at 501-502.

In short, courts will have much to do in resolving federalism questions in the wake of *Dobbs*. How these questions will be resolved for patients seeking reproductive care and providers who give it to them remains uncertain. With a Court rejecting reproductive rights and ready to reevaluate long-standing doctrines, constitutional law cannot be relied on for protection of information in EHRs.

VI. SUMMARY

In the wake of *Dobbs*, abortion restrictive states have launched multiple efforts to make it difficult for people to seek reproductive care out of state. These efforts include criminalizing or providing punitive damage remedies for actions within the jurisdiction that can help people seeking care elsewhere, from providing patients with referrals to helping people to travel outside of the state. As these efforts go to court, patient medical records both for in-state care and out-of-state care will be essential sources of evidence about the patient's condition, communications between provider and patient, and any treatment provided. Neither the federal HIPAA privacy rule nor shields enacted by abortion protective states are likely to provide adequate protection for remotely accessible and interoperable EHRs. Changes to the privacy rule may help to some extent. Any constitutional protections remain uncertain. The only certainties for providers and patients are that EHRs will be targets of interest and the extent of their protection may remain unknown for years to come.

As a result, patients seeking reproductive care will need to be aware that protection cannot be assured for information in their EHRs. This lack of protection presents risks for providers, too, who may be subject to prosecution or damage remedies based on information they record about their patients. Responses may be that providers exclude information from medical records or dissemble in what they record. Neither strategy is good for patient care or for providers who may face litigation for malpractice, questions about reimbursement, or challenges to their licenses. Perhaps the most protective strategy in this problematic context will be a reversion to local storage or paper records for reproductive care that is likely to become targeted by abortion restrictive states. In states with shields, these records will not be readily

obtainable but will provide a record of the care that occurred in case there is need for later documentation.

This reversion to locally stored records is far from ideal. It threatens continuity of care. For episodic medical events—as abortions may be in many cases—the consequences for patients' future health may not be significant. However, abortion care is not the only threat to patient care on the current horizon. If states continue down the path of deterring other forms of care, from gender-affirming care to prophylaxis against HIV prevention, to vaccinations against sexually transmitted diseases, the disruptions for patients, providers, and public health may be severe.

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