

PROTECTING PRIVACY ABSENT A CONSTITUTIONAL RIGHT: A PLAUSIBLE SOLUTION TO SAFEGUARDING MEDICAL RECORDS

I. INTRODUCTION

Diabetes is no longer just a disease; it is now an epidemic.¹ Diabetes, a noninfectious, chronic disease that inhibits the body's ability to produce and use insulin,² affects around twenty-one million Americans.³ In an effort to study and control the growing number of diabetes cases in America, the New York City Department of Health and Mental Hygiene (DOHMH) recently implemented a revolutionary program to monitor and evaluate diabetes in conjunction with patient care.⁴ The unprecedented program, which took effect in January of 2006, is unique because it monitors a noninfectious disease.⁵ Historically, governments have implemented such programs only for infectious, communicable diseases, such as HIV and tuberculosis, which pose a public health threat of spreading among the population.⁶ By including diabetes in its public

1. New York City officials now identify diabetes as an epidemic because more than one in eight New Yorkers suffers from the disease. "Diabetes is the only major disease in the city that is growing, both in the number of new cases and the number of people it kills." N. R. Kleinfeld, *Diabetes and Its Awful Toll Quietly Emerge as a Crisis*, N.Y. TIMES, Jan. 9, 2006, at A1.

2. There are multiple types of diabetes; however, Types I and II are the most common. Type I diabetes occurs when the body destroys the cells that produce insulin in the pancreas. *Id.* Without insulin, the body cannot control its blood sugar levels. Type I diabetes is very serious and is typically diagnosed at a young age. American Diabetes Association, Type I Diabetes, <http://www.diabetes.org/type-1-diabetes.jsp> (last visited Nov. 8, 2007). Type II diabetes occurs when the body develops a resistance to insulin. American Diabetes Association, Type 2 Diabetes, <http://www.diabetes.org/type-2-diabetes.jsp> (last visited Nov. 8, 2007). Typically, Type II diabetes occurs later in life and may be prevented by changes in diet and exercise. Kleinfeld, *supra* note 1. Type II diabetes accounts for ninety to ninety-five percent of all diabetes cases. *Id.*

3. American Diabetes Association, All About Diabetes, <http://www.diabetes.org/about-diabetes.jsp> (last visited Nov. 8, 2007).

4. See Rob Stein, *New York City Starts to Monitor Diabetics*, WASH. POST, Jan. 11, 2006, at A3.

5. *Id.* DOHMH's purported goals of the two-part program are surveillance and evaluation, environmental modification, policy development and regulation, direct provision and monitoring of clinical care, and health education. LYNN D. SILVER & DIANA K. BERGER, IMPROVING DIABETES CARE FOR ALL NEW YORKERS 19, <http://www.nyc.gov/html/doh/downloads/pdf/diabetes/diabetes-presentation-a1c-registry.pdf>. For a detailed discussion of DOHMH's program, see Amy L. Fairchild & Ava Alkon, *Back to the Future? Diabetes, HIV, and the Boundaries of Public Health*, 32 J. HEALTH POL. POL'Y & L. 561 (2007).

6. Stein, *supra* note 4. See also Harold Edgar & Hazel Sandomire, *Medical Privacy Issues in the Age of AIDS: Legislative Options*, 16 AM. J.L. & MED. 155, 164 (1990).

health programs, DOHMH has expanded its notion of public health and the government's role in disease monitoring and control.

New York City's diabetes program has two components: a registry and a pilot intervention program.⁷ The registry component, known as the New York City A1C Registry (NYCAR), requires all 120 of New York City's medical testing laboratories to report the results of A1C blood tests⁸ to DOHMH.⁹ Diabetic patients undergo A1C blood tests every three to six months during regularly scheduled medical appointments.¹⁰ Along with each patient's A1C blood test results, medical laboratories report to DOHMH each patient's full name, date of birth, the name and address of the patient's physician, the address where the A1C test was conducted, and the date the test results became available.¹¹ DOHMH officials use this information to survey, map, and describe the emerging diabetes epidemic.¹² Individual patients with poor A1C blood test results¹³ receive a letter notifying them of their test results along with resource material about diabetes.¹⁴

The second component of the program utilizes the NYCAR registry to proactively influence the treatment of diabetes patients.¹⁵ In a pilot intervention program¹⁶ restricted solely to the South Bronx, city officials use the confidential information obtained through the registry to directly contact diabetes patients and their physicians.¹⁷ In addition to receiving a nonconsensual initial letter sent by the registry, individual patients are also contacted periodically by telephone to discuss their A1C blood test results and how to manage their diabetes.¹⁸ The caller contacting them is not a

7. See The New York City Department of Health and Mental Hygiene (DOHMH), Diabetes Prevention and Control, <http://www.nyc.gov/html/doh/html/diabetes/diabetes-nycar.shtml> (last visited Nov. 8, 2007).

8. A1C blood tests provide long-term measurements of a patient's blood sugar levels by indexing blood glucose levels over the past ninety days. *Id.*

9. N.Y., N.Y., HEALTH CODE tit. 24, § 13.04 (2006). See also Diabetes Prevention and Control, *supra* note 7; Stein, *supra* note 4.

10. Robert Steinbrook, *Facing the Diabetes Epidemic—Mandatory Reporting of Glycosylated Hemoglobin Values in New York City*, 354 NEW ENG. J. MED. 545, 546 (2006).

11. N.Y., N.Y., HEALTH CODE tit. 24, § 13.03 (2006). Accord Steinbrook, *supra* note 10.

12. SILVER & BERGER, *supra* note 5, at 25.

13. The DOHMH defines poor A1C blood tests as >8.0%. The optimal A1C blood test result is 7.0%. *Id.* at 27.

14. *Id.*

15. Diabetes Prevention and Control, *supra* note 7.

16. The program began in July 2007 and it is unclear how long it will last. Steinbrook, *supra* note 10, at 546.

17. Stein, *supra* note 4.

18. SILVER & BERGER, *supra* note 5, at 27. A patient is contacted when his A1C test results exceed 8.0%. *Id.* The initial letter to the patient includes educational resource material about diabetes

physician, but rather a government official.¹⁹ Patients may opt out of the program after the initial contact by filling out a “Do Not Contact” form.²⁰ A separate government caller also contacts the patients’ physicians to discuss the patients’ A1C blood test results and suggest recommendations for treatment.²¹ If the South Bronx program proves successful,²² then DOHMH hopes to extend the program to all of New York City.²³

New York City’s revolutionary diabetes program, and in particular the pilot intervention program, raises serious privacy concerns.²⁴ These privacy concerns include the government’s access to and accumulation of personal information, the ability of the government caller to influence a patient’s decision to seek medical treatment without first speaking with his physician, the potential impact on the patient’s health insurance and employment should the information be released, the government’s infiltration of the physician’s traditional role as caregiver, and the general concern that the government may seek more regulation in this area over time.²⁵ Furthermore, many of the policy concerns traditionally used to justify public health surveillance and control programs, such as transmission prevention,²⁶ are inapplicable to this program because diabetes is not communicable and therefore poses a different type of

and the opt-out “Do Not Contact” form, which must be completed and returned by the patient in order to take full effect. *Id.* Accord Diabetes Prevention and Control, *supra* note 7.

19. SILVER & BERGER, *supra* note 5.

20. Diabetes Prevention and Control, *supra* note 7. The “Do Not Contact” consent form has been criticized because most patients are not made aware of it, nor do they have access to the technology necessary to complete the form online. Elizabeth M. Whelan, *Big Brother Will See You Now*, NAT’L REV. ONLINE, Apr. 25, 2006, <http://nationalreview.com/comment/whelan200604250655.asp>.

21. SILVER & BERGER, *supra* note 5, at 27. DOHMH provides each physician with a quarterly report illustrating the A1C test results of their patients. *Id.* This report indicates when a patient’s A1C blood test results reach over 8.0%. The report also makes best practice recommendations that the physician is encouraged to follow. *Id.*

22. DOHMH has yet to explain what factors will be considered in determining whether the program is a success.

23. Stein, *supra* note 4.

24. *Id.*

25. See Anita L. Allen-Castellitto, *Understanding Privacy: The Basics*, in 1 SEVENTH ANNUAL INSTITUTE ON PRIVACY LAW: EVOLVING LAWS AND PRACTICES IN A SECURITY DRIVEN WORLD, at 23 (PLI Intellectual Property, Course Handbook Series No. G-865, 2006); Alison M. Jean, Note, *Personal Health and Medical Information: The Need for More Stringent Constitutional Privacy Protection*, 37 SUFFOLK U. L. REV. 1151, 1161–63 (2004).

26. These policy reasons include preventing the risk of harm to others, protecting incompetent persons, and preventing risk to self. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 88–93 (2000). The only legitimate policy rationale for regulating diabetes is preventing risk to self because, as a noncommunicable disease, diabetes cannot directly harm others. Preventing risk to self, however, is a very controversial policy justification firmly rooted in paternalism. *Id.* at 90. For this reason, the diabetes program differs greatly from AIDS and tuberculosis programs, which target preventing transmission.

public health threat.²⁷ For all of these reasons, the constitutionality of New York City's diabetes program may be called into question under privacy protections guaranteed by the Fourteenth Amendment's due process clause.²⁸

Constitutional privacy protection in its current state, however, is ill-equipped to deal with innovative privacy invasions,²⁹ such as those created by New York City's diabetes program. This Note proposes a different way to think about privacy protection in the context of increased government access to, and use of, medical records.³⁰ Part II of this Note describes the history and current state of privacy protection provided by the Fourteenth Amendment. It explains the Supreme Court's recognition and treatment of a constitutional right to confidentiality under the Fourteenth Amendment and the subsequent interpretations of that right by the courts of appeals. Part III offers an analysis of the split among the courts of appeals over how to interpret and apply the constitutional right to confidentiality. Finally, Part IV proposes that because the right to confidentiality offers inconsistent and inadequate privacy protection, privacy tort law offers a better solution for protecting medical records from improper government invasion.

II. HISTORY

Protecting privacy rights has been a concern of the American legal system since its creation.³¹ The Bill of Rights was created to protect, among other things, the privacy of American homes, private papers, and freedom of association from government intrusion.³² Despite the common belief that privacy is something the United States Constitution and our form of government are meant to protect, no clear definition of privacy exists in American law.³³ In fact, a legal concept of privacy was not formally introduced into American law until 1928, when Supreme Court Justice Louis Brandeis asserted the existence of "the right to be let alone"

27. Because Type II diabetes can result from obesity and inactivity, New York City's program has the added effect of largely targeting obese populations. Kleinfield, *supra* note 1.

28. *See infra* Parts II & III. The Fourteenth Amendment states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

29. *See infra* Part III.

30. *See infra* Part IV.

31. Allen-Castellitto, *supra* note 25, at 27.

32. *Id.*

33. *Id.* at 28. The word "privacy" does not appear in the Constitution and no legal definition of privacy is universally accepted. *Id.*

in his famous dissent in *Olmstead v. United States*.³⁴ It would take another thirty-seven years for the Supreme Court to expound a theory of constitutional privacy protection.³⁵ The Court found that protection in the Fourteenth Amendment's guarantee of substantive due process.³⁶

A. *Whalen v. Roe: Recognizing a Constitutional Right to Confidentiality*

Following a series of cases in which the Supreme Court held that the Fourteenth Amendment's substantive due process clause protects a fundamental right to privacy in certain specific situations,³⁷ the Court was soon presented with the question of just how far it would extend that fundamental right. In *Whalen v. Roe*,³⁸ the Supreme Court considered whether the State of New York could record and keep the names and addresses of all persons who obtained legal prescriptions for Schedule II drugs.³⁹ The lawsuit, brought by several patients and their physicians, alleged that the New York Controlled Substances Act of 1972 violated both patients' privacy and the doctor-patient relationship. The patients and doctors argued that the Act would cause persons in need of Schedule II

34. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing that wiretapping of telephone conversations does amount to an unwarranted search and seizure protected by the Fourth Amendment). Much earlier in his career, Justice Brandeis espoused the concept of "the right to be let alone" in an article titled "The Right to Privacy," which he coauthored with Samuel D. Warren. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See also Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1099–1102 (2002) (describing the conceptual development of "the right to be let alone").

35. The Supreme Court did so in *Griswold v. Connecticut*, wherein the Court concluded that a fundamental right to privacy prohibits laws criminalizing birth control. 381 U.S. 479 (1965). *Griswold v. Connecticut* was the first in a series of cases in which the Supreme Court asserted a substantive due process right to privacy. Allen-Castellitto, *supra* note 25, at 30–31. In 1967, the Supreme Court established a privacy right and equality interests in interracial marriage in *Loving v. Virginia*. 388 U.S. 1 (1967); see also Allen-Castellitto, *supra* note 25, at 31. In 1969, the Supreme Court acknowledged a privacy right to personal use of pornography in the home. *Stanley v. Georgia*, 394 U.S. 557 (1969); see also Allen-Castellitto, *supra* note 25, at 31. In 1973, the Supreme Court held that the fundamental right to privacy prohibits categorical bans against abortion. *Roe v. Wade*, 410 U.S. 113 (1973); see also Allen-Castellitto, *supra* note 25, at 31. Today, these fundamental rights have come to encompass the autonomy branch of the right to privacy. See *infra* note 70.

36. See *Griswold*, 381 U.S. at 482–86 (recognizing constitutional protection afforded to certain zones of privacy concerning fundamental rights); Allen-Castellitto, *supra* note 25, at 30.

37. See *supra* note 35.

38. 429 U.S. 589 (1977).

39. *Id.* at 591. Schedule II drugs are a class of drugs that includes opium, opium derivatives, cocaine, methadone, amphetamines, and methaqualone. *Id.* at 593 n.8 (citing N.Y. Pub. Health Law § 3306 (McKinney, Supp. 1976–77)). These drugs have acceptable uses for certain diseases and conditions, such as epilepsy, narcolepsy, and severe pain. *Id.* Schedule II drugs are considered the most dangerous of all legitimate drugs. *Id.* at 593.

drugs to decline treatment, fearing misuse of the information and the potential stigmatization of being identified and labeled as “drug addicts.”⁴⁰

The New York Controlled Substances Act of 1972 required physicians to prepare Schedule II drug prescriptions on an official triplicate form.⁴¹ One copy of the form was kept by the physician, one went to the dispensing pharmacist, and the third copy was sent to the New York Department of Health.⁴² Completed forms identified “the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address, and age of the patient.”⁴³

In its analysis of the case, the Supreme Court recognized two privacy interests: “the individual interest in avoiding disclosure of personal matters” and “the interest in independence in making certain kinds of important decisions.”⁴⁴ The latter interest was well recognized by previous Supreme Court precedent; the former interest was not.⁴⁵ Nonetheless, the Court found both interests guaranteed by the Constitution.⁴⁶ After announcing this general principle, the Court next considered whether either privacy interest was violated in the present case.⁴⁷

The Supreme Court described the interest in nondisclosure of personal matters as “a genuine concern that the information will become publicly known and that it will adversely affect [patients’] reputations.”⁴⁸ The Court acknowledged that, out of fear of disclosure, some patients might be reluctant to seek medical treatment or use the Schedule II drugs prescribed

40. *Id.* at 595.

41. *Id.* at 593.

42. *Id.*

43. *Id.*

44. *Id.* at 599–600.

45. *See infra* notes 59–62 and accompanying text.

46. In its opinion, the Court “[r]ecogniz[ed] that in some circumstances [the duty to avoid unwarranted disclosures] arguably has its roots in the Constitution” *Whalen*, 429 U.S. at 605. In support of its assertion of an individual interest in avoiding disclosure of personal matters, the Supreme Court cited to Justice Brandeis’s dissent in *Olmstead v. United States*, 227 U.S. 438, 478 (1928), *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), *Stanley v. Georgia*, 394 U.S. 557 (1969), and *California Bankers Ass’n v. Schultz*, 416 U.S. 21, 79 (1974) (Douglas, J., dissenting), *id.* at 78 (Powell, J., concurring). *Whalen*, 429 U.S. at 599 n.25. Each of these cases found constitutional protection under the Fourteenth Amendment’s due process clause. In support of its assertion of an interest in independence in making certain kinds of important decisions, the Supreme Court cited to *Roe v. Wade*, 410 U.S. 113 (1973), *Loving v. Virginia*, 388 U.S. 1 (1967), and a string of other similar cases guaranteeing privacy protection under the Fourteenth Amendment. *Whalen*, 429 U.S. at 600 n.26.

47. *Whalen*, 429 U.S. at 600.

48. *Id.*

for them.⁴⁹ Indeed, the patients argued that this fear adversely impacted vital decisions they made about their health.⁵⁰

Despite recognizing that the Health Department's privacy invasion may lead some patients not to seek treatment,⁵¹ the Supreme Court held that the New York Controlled Substances Act violated neither "the individual interest in avoiding disclosure of personal matters" nor "the interest in independence in making certain kinds of important decisions."⁵² Because the record did not support a finding that the information sent to the New York Department of Health would be disclosed,⁵³ the Court saw no immediate or potential impact on the reputation of the patients.⁵⁴ Furthermore, the Court declined to find a violation of the patients' liberty interest because the State had not entirely prohibited the use of Schedule II drugs.⁵⁵ The Court also rejected the argument that the Act violated the doctor-patient relationship because the doctors' actions were not altered in any way.⁵⁶

Recognizing the gravity of its decision, the Court closed with a final thought:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files

49. *Id.*

50. *Id.*

51. *Id.* at 602.

52. *Id.* at 599–600.

53. As part of its analysis of the potential threat of disclosure, the Supreme Court identified three ways in which public disclosure of patient information could come about: 1) failure of the Department of Health to maintain security, 2) the information could be made available as evidence in a judicial proceeding, or 3) a doctor, pharmacist, or the patient may voluntarily reveal information on the prescription form. *Id.* at 600. The Court found sufficient evidence in the record to dispose of these concerns. *Id.* at 601. For example, the Act provided for security measures to be taken by the Department of Health. *Id.* at 593–94. Such security measures included locking the forms in a receiving room surrounded by a locked wire fence and protecting them with an alarm system. *Id.* As an aside, regarding the third option, it is interesting to note that the Supreme Court did not include in its analysis the possibility that an official or employee of the Department of Health may voluntarily reveal the information on a patient's prescription form.

54. The Court relied on two portions of the record to reach this conclusion. *Id.* at 602–03. One, the Court noted that the disclosures required by the Act were not meaningfully distinguishable from other disclosures of private medical information already pervasive in society. *Id.* at 602. Two, prior to the district court's issuance of an injunction against the Act, around 100,000 Schedule II prescriptions were being filled per month. *Id.* at 603. This indicated to the Court that "the statute did not deprive the public of access to the drugs." *Id.*

55. The Court went so far as to suggest that the State could prohibit use of all Schedule II drugs. *Id.* at 603.

56. Absent the statute, the physicians still had to fill out a written prescription identifying the name and address of the patient. *Id.* at 604.

Recognizing that in some circumstances that duty [of nondisclosure] arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy.⁵⁷

B. Post-Whalen: The Supreme Court's Limited Treatment of the Right to Confidentiality

Whalen v. Roe provided little guidance for lower courts dealing with medical privacy issues. Regarding the first of the Court's dual privacy interests, "the individual interest in avoiding disclosure of personal matters," *Whalen* left unclear what constituted a violation of the right, and failed to establish what type of constitutional treatment the courts were to use when assessing it.⁵⁸ Unlike the Court's second privacy interest in "independence in making certain kinds of important decisions," which had been fleshed out by several previous Supreme Court decisions⁵⁹ including *Roe v. Wade*⁶⁰ and *Paul v. Davis*,⁶¹ there was no clear legal precedent for a privacy interest in nondisclosure of personal matters.⁶²

57. *Id.* at 605.

58. *See, e.g.,* *Borucki v. Ryan*, 827 F.2d 836, 841 (1st Cir. 1987) ("*Whalen* provides little guidance regarding the nature of the confidentiality branch of the right of privacy."); *Plante v. Gonzalez*, 575 F.2d 1119, 1133 (5th Cir. 1978) ("Because it determined that *public* disclosure was unlikely, the Court [in *Whalen*] did not address the standard to be applied to such public disclosure.")

59. Courts were not confused by *Whalen's* privacy interest in independence in making certain kinds of important decisions because the right encompassed other fundamental rights already guaranteed within the "zone of privacy." *See Borucki*, 827 F.2d at 839; *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980); *J.P. v. DeSanti*, 653 F.2d 1080, 1087 (6th Cir. 1981). These fundamental rights included "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Borucki*, 827 F.2d at 839 (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976)). The Fourteenth Amendment's protection of fundamental rights is considerably more developed than the right to nondisclosure of personal matters. *Borucki*, 827 F.2d at 839.

60. 410 U.S. 113, 154 (1973) ("[T]he right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation.")

61. 424 U.S. 693, 712 (1976) (holding that reputation alone does not implicate any liberty or property interest sufficient to invoke the protection of due process). In *Paul v. Davis*, Paul, a police officer, distributed flyers to local merchants warning against shoplifters in the area. *Id.* at 694-95. Davis was one of the "active shoplifters" identified on the flyer. *Id.* at 695. Davis sought relief against Paul's alleged defamation under the protection of the Fourteenth Amendment, claiming that the flyer, which included his name and photograph, impermissibly violated his "liberty." *Id.* at 697. The Supreme Court resoundingly rejected Davis's argument. *Id.* at 698-99. In several of its previous decisions, the Supreme Court had recognized certain privacy protections guaranteed by the Fourteenth Amendment, including "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 713. Here, however, Davis's claim was "based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,'

Nonetheless, the Supreme Court, within the same year, again acknowledged the existence of a constitutional right to nondisclosure of personal matters in *Nixon v. Administrator of General Services*.⁶³ Former President Nixon, seeking to maintain the privacy of communications he made as President, challenged the constitutionality of a public law that granted access to his presidential communications in order to review and document them.⁶⁴ The Supreme Court acknowledged that Nixon had a legitimate expectation of privacy in his personal materials;⁶⁵ however, it found the intrusion justified by the greater public interest in archival screening.⁶⁶ With little explanation, but citing *Whalen v. Roe*, the Court noted, “We may agree with [Nixon] that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.”⁶⁷ Multiple lower courts have since latched on to this language as further proof that the Supreme Court recognizes a constitutional right to nondisclosure of personal matters.⁶⁸

The constitutional right to nondisclosure of personal matters has not been addressed by the Supreme Court since its limited treatment in *Nixon*. As a result, the courts of appeals retain broad discretion in interpreting the right. Their decisions refer to *Whalen*’s “individual interest in avoiding disclosure of personal matters” as the right to confidentiality.⁶⁹ *Whalen*’s

but instead on a claim that the State may not publicize a record of an official act such as an arrest.” *Id.* The Court concluded that “[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.” *Id.* *Paul v. Davis* was decided a year before *Whalen*.

62. In *Whalen*, the Court cited to four previous court opinions, two of which were dissents, as support for its determination that the nondisclosure of personal matters had legal precedent as a privacy interest. *See supra* note 46. Two courts of appeals, however, have questioned the relevance and precedential value of these cases. *See J.P. v. DeSanti*, 653 F.2d 1080, 1089 (6th Cir. 1981); *Am. Fed’n of Gov’t Employees, AFL-CIO v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786, 791–92 (D.C. Cir. 1997). *But see* Bruce E. Falby, Comment, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in J.P. v. DeSanti*, 71 *GEO. L.J.* 219, 232–34 (1982) (arguing that the cases cited by the Supreme Court in *Whalen* protect against nondisclosure of use).

63. 433 U.S. 425 (1977).

64. *Id.* at 429–36.

65. The Court found that Nixon’s privacy claim was legitimate only in regard to the “extremely private communications between [Nixon] and, among others, his wife, his daughters, his physician, lawyer, and clergyman.” *Id.* at 459 (quoting the district court’s opinion, 408 F. Supp. 321, 359). These “extremely private communications” were commingled with, and amounted to only a very small fraction of, the massive volume of materials obtained by the archivists. *Id.*

66. *Id.* at 458.

67. *Id.* at 457 (emphasis added).

68. *See, e.g., Plante v. Gonzalez*, 575 F.2d 1119, 1133 (5th Cir. 1978); *Borucki v. Ryan*, 827 F.2d 836, 843–44 (1st Cir. 1987).

69. *See, e.g., Borucki*, 827 F.2d at 840 (identifying the individual interest in nondisclosure of

dual privacy interest, “independence in making certain kinds of decisions,” has been termed the right to autonomy.⁷⁰

C. Debate Over the Existence of the Right to Confidentiality Among the Courts of Appeals

The courts of appeals have split over whether *Whalen v. Roe* created a constitutional right to confidentiality. Nine courts of appeals have affirmed the existence of the right;⁷¹ two courts of appeals have practically denied it.⁷² In addition, the constitutional treatments used to assess the right contrast greatly among all the courts of appeals.⁷³

The seminal circuit court case affirming the constitutional right to confidentiality is the Third Circuit’s decision in *United States v. Westinghouse Electric Corp.*⁷⁴ In 1978, the National Institute for Occupational Safety and Health (NIOSH), a federal agency, investigated complaints that Westinghouse’s Pennsylvania plant was infested with epoxy mold.⁷⁵ As part of its investigation, NIOSH requested employee medical records from Westinghouse.⁷⁶ After Westinghouse repeatedly refused to comply with NIOSH’s request, NIOSH sought legal action in district court.⁷⁷ The district court, ruling in favor of NIOSH, rejected Westinghouse’s claim that its employee medical records were the type of information constitutionally protected from disclosure.⁷⁸ On appeal, the Third Circuit applied a balancing test to assess Westinghouse’s nondisclosure claim.⁷⁹

personal matters as the “confidentiality” branch of the constitutional right to privacy).

70. *Id.* (identifying the individual interest in independence in making certain kinds of important decisions as the “autonomy” branch of the constitutional right to privacy). The autonomy branch of privacy includes those rights identified by the Supreme Court in *Paul v. Davis*: “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.” *Id.* at 839 (citing *Paul v. Davis*, 424 U.S. 693, 713 (1976)). *See also supra* note 61.

71. *See infra* note 85 and accompanying text.

72. *See infra* notes 102, 117 and accompanying text.

73. *See infra* notes 85–88 and accompanying text.

74. 638 F.2d 570 (3d Cir. 1980).

75. *Id.* at 572–74.

76. *Id.* at 573.

77. *Id.*

78. *Id.* Relying on *Whalen v. Roe*, the district court held that NIOSH had authority to view the employees’ medical records given the public interest stake involved. *Id.* Westinghouse had not demonstrated that the government would improperly disclose the medical information. *Id.* Furthermore, the court found that NIOSH’s procedures for safeguarding the records were sufficiently adequate to ensure nondisclosure. *Id.*

79. *Id.* at 578. The Third Circuit had no problem identifying medical records as the type of information protected by the right to confidentiality and instead focused primarily on the issue of how to assess each party’s interest. *Id.* at 577–78 (“There can be no question that an employee’s medical

The Third Circuit recognized that, while the Supreme Court has allowed some intrusion into the right to privacy, “it has usually done so only after finding that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case.”⁸⁰ The court identified seven factors to consider in balancing the societal benefit of disclosing the medical records to NIOSH against the employees’ interest in privacy:⁸¹ 1) the type of record requested, 2) the information the record does or might contain, 3) the potential for harm in any subsequent nonconsensual disclosure, 4) the injury from disclosure in relation to the way in which the record was generated, 5) the adequacy of safeguards to prevent an unauthorized disclosure, 6) the degree of need for the information, and finally, 7) whether an express statutory mandate, articulated public policy, or other recognizable public interest militates in favor of access.⁸² Applying these seven factors to the case at hand,⁸³ the court concluded that the strong public interest in facilitating the research and investigations of NIOSH justified the minimal intrusion into Westinghouse’s employee medical records.⁸⁴

In addition to the Third Circuit, eight circuit courts have affirmed the constitutional right to confidentiality.⁸⁵ Two of these courts did so specifically in the context of protecting medical records.⁸⁶ Several of these courts have also adopted a balancing test similar to that used by the court

records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.”)

80. *Id.* at 578. In reaching this conclusion, the Third Circuit cited *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), wherein the Supreme Court held that the NLRB had improperly compelled disclosure of employees’ scores from psychological aptitude tests. *Westinghouse*, 638 F.2d at 578. To reach this conclusion, the Supreme Court weighed the NLRB’s need for revealing the information against the strong interest of the company and its employees. *Id.* (citing *Detroit Edison*, 440 U.S. at 315).

81. *Westinghouse*, 638 F.2d at 578.

82. *Id.*

83. *Id.* at 579–80. The court took particular note of the fact that Westinghouse failed to produce any evidence that the employee medical records contained information so highly sensitive that, if disclosed, employees would surely suffer adverse effects. *Id.* at 579.

84. *Id.* at 580.

85. See *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978); *Kimberlin v. U.S. Dep’t of Justice*, 788 F.2d 434 (7th Cir. 1986); *Eagle v. Morgan*, 88 F.3d 620 (8th Cir. 1996); *In re Crawford*, 194 F.3d 954 (9th Cir. 1999); *Anderson v. Blake*, 469 F.3d 910 (10th Cir. 2006); *James v. City of Douglas*, 941 F.2d 1539 (11th Cir. 1991).

86. *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (“[T]he right to confidentiality includes the right to protection regarding information about the state of one’s health.”); *Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir. 1996) (recognizing a constitutional protection of privacy for HIV test results).

in *Westinghouse* to assess the right.⁸⁷ However, there remains variability among the factors balanced by these courts.⁸⁸

A few circuit courts use dramatically different tests to assess the right to confidentiality. For example, the Fourth Circuit in *Walls v. City of Petersburg*⁸⁹ used a strict scrutiny test⁹⁰ to conclude that Walls's city employer had not violated her constitutional right to privacy when it required her to fill out a questionnaire asking about her sexual orientation, marital status, family history, and financial status.⁹¹ According to the Eighth Circuit, only "inherently private" information is entitled to constitutional confidentiality protection.⁹² This unique standard requires that the information disclosed be either a "shocking degradation or an

87. *Barry v. City of New York*, 712 F.2d 1554, 1559–60 (2d Cir. 1983) (citing *Westinghouse* and holding that "some form of intermediate scrutiny or balancing approach is appropriate as a standard of review"); *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981) ("In deciding upon the merits of Fadjo's case, the district court must balance the invasion of privacy alleged by Fadjo against any legitimate interests proven by the state."); *Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir. 1996) (holding that "[t]he government may obtain and use medical information if its interest in obtaining the information outweighs a person's interest in privacy") (citing *Doe v. Att'y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991)).

88. *See, e.g.*, *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (balancing seven factors); *Plante v. Gonzalez*, 575 F.2d 1119, 1134–35 (5th Cir. 1978) (balancing four state concerns against the senators' interests); *Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir. 1996) (balancing four of the factors identified in *Westinghouse*).

89. 895 F.2d 188 (4th Cir. 1990).

90. "If the information is protected by a person's right to privacy, then the defendant has the burden to prove that a compelling governmental interest in disclosure outweighs the individual's privacy interest." *Id.* at 192.

91. *Id.* at 190–93. Walls brought a Title VII action against her city employer for firing her after she refused to complete a background questionnaire. *Id.* at 190. Walls specifically objected to four questions that asked about her family members' criminal histories, her marriage status, whether or not she had ever had sexual relations with someone of the same sex, and asked her to list all her outstanding debts. *Id.* In assessing Walls's privacy claim, the Fourth Circuit acknowledged that *Whalen* protects two types of privacy interests. Despite this acknowledgment, it gave both interests identical strict scrutiny treatment, as if they encompassed one general right to privacy. *Id.* at 192. Applying strict scrutiny, the court held that the city had a compelling interest in obtaining Walls's information and had exercised sufficient caution in order to protect her information from potential disclosure. *Id.* at 195. Therefore, the city had not violated Walls's constitutional right to privacy. *Id.*

92. *See Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996). In *Eagle v. Morgan*, David Eagle accepted a plea agreement stating that after serving minimal jail time and a six-year probation, his felony theft of property charge would be expunged. *Id.* at 622. Upon full compliance with the plea agreement, Eagle was released and became a city auditor. *Id.* When Eagle drew the displeasure of the local police department he was auditing, several police officers abused their access to city databases and, discovering Eagle's past criminal record, divulged it to the public. *Id.* at 623. In assessing whether Eagle's criminal record was the type of "inherently private" information entitled to protection, the Eighth Circuit considered the types of information to which other courts of appeals had extended protection. *Id.* at 625–26. Agreeing with three other courts of appeals, it concluded that because prior guilty pleas "are by their very nature matters within the public domain," they are not inherently private. *Id.* at 625. Therefore, Eagle possessed no legitimate expectation of privacy and was not entitled to constitutional protection. *Id.* at 625–27.

egregious humiliation”⁹³ Furthermore, there is an ongoing debate among many of the courts over whether the right to confidentiality is limited to only those fundamental matters guaranteed protection by the right to autonomy.⁹⁴

A First Circuit decision illustrates the complexity that results from the inconsistent approaches to the right of confidentiality. In *Borucki v. Ryan*,⁹⁵ the First Circuit considered whether a prosecutor’s disclosures to the press concerning the contents of Borucki’s psychiatric report constituted a violation of Borucki’s right to privacy.⁹⁶ Choosing to wash its hands of the conflict over the existence of a right to confidentiality,⁹⁷ the First Circuit held that because it was not “clearly established” that psychiatric reports are the type of thing protected by the right to privacy, the right to confidentiality did not apply.⁹⁸ The court failed to explain what criteria were necessary to trigger a “clearly established” constitutional right to privacy.⁹⁹ Rather, it deferred to the fact that none of the other

93. *Id.* at 625 (quoting *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993)). “[T]o violate [a person’s] constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information.” *Eagle*, 88 F.3d at 625 (quoting *Alexander*, 993 F.2d at 1350).

94. *See, e.g., Doe v. SEPTA*, 72 F.3d 1133, 1137 (3d Cir. 1995) (“When the underlying claim is one of invasion of privacy, the complaint must be ‘limited to those [rights of privacy] which are “fundamental” or “implicit in the concept of ordered liberty”’”) (citing *Paul v. Davis*, 424 U.S. 693, 713 (1976)). *But compare Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000) (“[I]t is not clear whether the right of confidentiality covers all confidential information or only confidential information relating to certain matters.”). *See also* discussion *infra* note 112.

95. 827 F.2d 836 (1st Cir. 1987).

96. *Id.* at 837. Borucki had been charged with damaging twenty-three aircraft at a Massachusetts airport. *Id.* Although Borucki had not offered a defense of insanity, the state district court ordered that Borucki be examined to determine whether he was competent to stand trial. *Id.* The criminal charges against Borucki were ultimately dismissed. *Id.* Following the dismissal of the charges, Ryan, the prosecutor, held a press conference during which he disclosed the information contained in Borucki’s psychiatric examination. *Id.*

97. The court offers a lengthy discussion of the differences of opinion among the courts of appeals regarding a constitutional right to confidentiality. *Id.* at 841–49.

98. *Id.*

99. In its analysis, the First Circuit gave substantial consideration to concerns over whether the right to confidentiality pertains only to those fundamental rights protected by the autonomy branch of the right to privacy, or whether the right to confidentiality is itself an independent right. *Id.* at 841–44. Ultimately, the court chose to refrain from reaching a conclusion concerning these two positions. Instead, it relied on the uncertainty of all the relevant areas of possible protection to conclude that psychiatric records do not fall with the privacy protection of the confidentiality branch. *Id.* at 845.

The court’s end result leaves its position with respect to the right of confidentiality unclear. Specifically, it is unclear whether it believes that no right to confidentiality exists because the right protects only those fundamental rights guaranteed by the autonomy branch of privacy, or because its fellow courts of appeals have yet to recognize the confidentiality of psychiatric records as a legitimate right to be protected. If the First Circuit meant to endorse the latter proposition, then it is interesting

courts of appeals recognized a similar privacy protection for psychiatric records.¹⁰⁰ Furthermore, the court explicitly stated that it had no opinion as to whether the use of a balancing test is appropriate to assess whether the government possesses a valid public interest in disclosure.¹⁰¹ Thus, the First Circuit's decision postponed a conclusive evaluation of the right to confidentiality, leaving such an analysis for a time when the parameters of the right are more clearly fleshed out.

While the First Circuit appears hesitant to cast doubt on the existence of a right to confidentiality, the Sixth and D.C. Circuits are clearly not afraid to do so. In *J.P. v. DeSanti*,¹⁰² the Sixth Circuit considered the claims of juveniles who asserted that their probation officers violated their constitutional right to privacy when the officers compiled social histories about the juveniles.¹⁰³ Among other things, the social histories contained information on and from complaining parties, the juveniles, their parents, school records, and the juveniles' past records in court.¹⁰⁴ The social histories were compiled nonconsensually by the court's probation officers, and the juveniles and their families were denied access to them.¹⁰⁵ Post-adjudication, however, the social histories were made available to fifty-five governmental, social, and religious agencies.¹⁰⁶

The juveniles claimed that the court's uses of the social histories were unconstitutional and sought to enjoin access to them by anyone other than juvenile court personnel.¹⁰⁷ While the district court found that the juvenile court's post-adjudication dissemination of the social histories violated the juveniles' constitutional right to privacy,¹⁰⁸ the Sixth Circuit did not.¹⁰⁹ In

that it did not consider psychiatric records to fall within the general category of medical records, which have been protected by other courts of appeals. *See supra* note 86 and accompanying text.

100. *Borucki*, 837 F.2d at 847–49.

101. *Id.* at 848 n.21.

102. 653 F.2d 1080 (6th Cir. 1981).

103. *Id.* at 1081.

104. *Id.* at 1082.

105. *Id.*

106. *Id.* at 1085.

107. *Id.*

108. *Id.* at 1082. The district court held that the dissemination of the juveniles' social histories amounted to an impermissible violation for two reasons. *Id.* at 1085–86. First, the disclosure violated the Ohio Code, which provided that “the reports and records of the probation department shall be considered confidential information and shall not be made public.” *Id.* (citing Ohio Rev. Code § 2151.14). Second, the disclosure violated the “right of juveniles and their family members ‘to have intimate biographical details protected from exposure to the government.’” *Id.* at 1086. This second violation was unconstitutional. *Id.*

109. *Id.* at 1087.

particular, the Sixth Circuit chided the district court for failing to tie its analysis to any direct provision of the Constitution.¹¹⁰

The Sixth Circuit rejected the notion that *Whalen v. Roe* created a right to confidentiality to be assessed according to a balancing test. The court explicitly stated, “We do not view the discussion of confidentiality in *Whalen v. Roe* as . . . creating a constitutional right to have all government action weighed against the resulting breach of confidentiality.”¹¹¹ Rather, the court considered the Supreme Court’s analysis in *Whalen v. Roe* as an isolated statement extending from the Supreme Court’s previous substantive due process decisions that conferred several specific fundamental privacy protections and *only* those protections.¹¹² To allow otherwise would potentially require the courts to balance every government action against any intrusion of individual privacy.¹¹³ Such a task, the court argued, was better left to the states or the legislative process.¹¹⁴ Indeed, the court asserted that “[i]nferring very broad ‘constitutional’ rights where the Constitution itself does not express them is an activity not appropriate to the judiciary.”¹¹⁵ Given the Sixth Circuit’s finding that protection of the juveniles’ social histories was not tantamount to a fundamental right, it is not surprising that the court held the disclosure constitutional.¹¹⁶

110. *Id.* at 1087. “The District Court made no attempt to tie the constitutional right ‘to have any intimate biographical details protected from exposure by the government’ to any particular provision of the Constitution.” *Id.*

111. *DeSanti*, 653 F.2d at 1088–89.

112. *Id.* at 1088–89. The Sixth Circuit believed that to conclude that *Whalen v. Roe* conferred constitutional protection to the juveniles’ records would require overruling *Paul v. Davis*. *Id.* In *Paul v. Davis*, the Supreme Court limited substantive due process protection as extending to only certain fundamental rights (“matters relating to marriage, procreation, contraception, family relationships, and child rearing and education”). 424 U.S. 693, 713 (1976). The problem the Sixth Circuit identified was that many of the protections provided by other courts of appeals asserting the right to confidentiality, including the Third Circuit’s protection of medical records in *United States v. Westinghouse Electric Corp.*, did not fall within the parameters of the fundamental rights recognized in *Paul v. Davis*. *DeSanti*, 653 F.2d at 1088. In reaching its ultimate conclusion, the Sixth Circuit relied on Justice Stewart’s concurrence in *Whalen v. Roe*. *Id.* at 1089. In his concurrence, Justice Stewart expressed his belief that the Supreme Court’s opinion did not establish a general right to nondisclosure of private information. *Id.* at 1089 (citing *Whalen v. Roe*, 433 U.S. 589, 608–09 (1977) (Stewart, J., concurring)). Given the assurances of Justice Stewart that no right to confidentiality was created in *Whalen v. Roe*, the Sixth Circuit was able to reconcile the decision with *Paul v. Davis* by construing the privacy interest in nondisclosure of personal matters as narrowly as possible. *DeSanti*, 653 F.2d at 1089.

113. *Id.* at 1090.

114. *Id.* at 1091.

115. *Id.* at 1090.

116. *Id.* at 1091.

The D.C. Circuit joined the Sixth Circuit's critical analysis of the right to confidentiality in *American Federation of Government Employees, AFL-CIO v. Department of Housing and Urban Development*.¹¹⁷ The D.C. Circuit began its analysis by "expressing [its] grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information."¹¹⁸ The right to confidentiality, it believed, amounted to little more than unresolved, "recurring dicta."¹¹⁹

Joined as two companion cases, *AFL-CIO* involved long-term employees of the Department of Housing and Urban Development (HUD) and the Department of Defense (DOD) who sought to enjoin HUD and DOD from subjecting them to periodic reinvestigation of private concerns, such as illegal drug use, mental health, and financial history, information about which both departments had previously acquired pre-employment.¹²⁰ Because the employees held sensitive or public trust positions, both HUD and DOD believed that it was necessary to continually investigate their fitness for employment.¹²¹ The D.C. Circuit agreed with the agencies.¹²² According to the court, the "numerous uncertainties" that surrounded the right to confidentiality made its constitutional protection unhelpful in this case.¹²³ Because there was no indication that the results of the departments' additional investigations would be revealed to the public,¹²⁴ the court concluded that the individual interest in protecting the privacy of the information gathered was significantly less important than the departments' interest in having the information.¹²⁵

117. 118 F.3d 786 (D.C. Cir. 1997).

118. *Id.* at 791. The court then stated that were it the first to confront the issue of a right to nondisclosure of personal matters, it would have found "with little difficulty" that no right exists. *Id.*

119. *Id.* "The Supreme Court has addressed [the right to confidentiality] in recurring dicta without, we believe, resolving it." *Id.*

120. *Id.* at 788–89.

121. *Id.* at 788.

122. *Id.* at 794.

123. *Id.* at 793.

124. *Id.* Security measures against disclosure included a policy prohibiting public dissemination, maintaining the records under secure conditions, and requiring background checks for those officials who had access to the records. *Id.* The court believed that these measures, designed to protect the confidentiality of the information, "substantially reduce[d] the employees' privacy interests." *Id.*

125. *Id.* at 794. The court concluded that HUD adequately defended its need for the employees' information. *Id.* at 793. For example, HUD presented evidence that an employee who used illegal drugs would be more likely to make a negligent error on the job. *Id.* at 794. Because HUD's employees have access to confidential information, it is important that they remain trustworthy. *Id.* In order to ensure that the employees possessed the level of trust necessary to perform their jobs, HUD had a legitimate interest in discovering which of its employees were illegal drug users or were in financial trouble. *Id.*

Like the Sixth Circuit in *DeSanti*, the D.C. Circuit expressed in *AFL-CIO* its concern that none of the circuit courts upholding the right to confidentiality cited a particular provision of the Constitution in doing so.¹²⁶ Finding that no such provision existed,¹²⁷ the court thought it improper to extend the privacy right unless there was proof that the government would publicly disseminate the information it collected.¹²⁸ Because HUD and DOD presented sufficient evidence to indicate that the information collected would not be disseminated,¹²⁹ the court concluded that their intrusions were permissible.¹³⁰

III. ANALYSIS

On the surface, there appear to be two contrasting interpretations of *Whalen v. Roe* among the courts of appeals: one that affirms the existence of a constitutional right to confidentiality and one that questions it.¹³¹ Grouping the various interpretations of *Whalen v. Roe* into one of these two overarching, opposing viewpoints, however, oversimplifies the opinions of the circuit courts. For example, among those courts that affirm the existence of a right to confidentiality, numerous divisions exist over the type and amount of constitutional treatment the right should receive.¹³² Among those courts that question the right, there is division over the primary reason to reject it.¹³³ Rather than two dichotomous interpretations of *Whalen v. Roe*, in reality a spectrum of twelve different interpretations exists. As a result, the privacy protection afforded by the right to confidentiality remains questionable, at best.

Of all the courts of appeals, the D.C. Circuit's analysis in *AFL-CIO* is the most persuasive interpretation of the right to confidentiality. The D.C.

126. *Id.* at 793.

127. *Id.* at 791. "The Court [in *Whalen v. Roe*] cited two dissents [in asserting a right to nondisclosure of information], *Olmstead v. United States* and *California Bankers Assn. v. Shultz*, neither of which argued for a general constitutional right to privacy in the nondisclosure of information." *Id.* at 791-92 (citations omitted).

128. *Id.* at 793.

129. *See supra* note 124.

130. *AFL-CIO*, 118 F.3d at 795.

131. *See supra* Part III.

132. *See, e.g.*, *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980) (using a balancing approach to assess the right to confidentiality). *But see* *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990) (applying a strict scrutiny test).

133. *See* *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981) (failing to recognize the right to confidentiality, among other reasons, because doing so would conflict with the Supreme Court's decision in *Paul v. Davis*). *But see* *Am. Fed'n of Gov't Employees, AFL-CIO v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786 (D.C. Cir. 1997) (relying primarily on lack of a well-established right to conclude that a right to confidentiality does not exist).

Circuit correctly points out that in both *Whalen v. Roe* and *Nixon v. Administrator of General Services*, the Supreme Court gave little more than a passing glance to the right to confidentiality.¹³⁴ In *Whalen v. Roe*, the Supreme Court asserted that the right to confidentiality “arguably has its roots in the Constitution,” but it failed to identify where.¹³⁵ Indeed, none of the precedent cited by the Supreme Court in reference to the right to confidentiality affords constitutional protection against the nondisclosure of personal matters.¹³⁶ Instead, the cases protect various privacy concerns emanating from other clearly defined rights, such as illegal search and seizure under the Fourth Amendment.¹³⁷ Justice Stewart acknowledged this problem with the Supreme Court’s analysis in his concurrence in *Whalen v. Roe*.¹³⁸

In *Nixon v. Administrator of General Services*, the Supreme Court only suggested that it “may agree” with the protection of privacy rights in matters of personal life.¹³⁹ Furthermore, in neither *Whalen* nor *Nixon* did the Supreme Court offer any analytical framework for interpreting the

134. *AFL-CIO*, 118 F.3d at 791.

135. *Whalen v. Roe*, 429 U.S. 589, 605 (1977) (emphasis added).

136. See *infra* note 137; *Whalen*, 429 U.S. at 608–09 (Stewart, J., concurring).

137. *Whalen*, 429 U.S. at 608–09. For example, in support of the right to confidentiality, the Supreme Court cites to Justice Brandeis’s dissent in *Olmstead v. United States*, 277 U.S. 438 (1928). *Whalen*, 429 U.S. at 599 n.25. In *Olmstead*, Justice Brandeis argued that federal officers violated Olmstead’s Fourth Amendment protection against unwarranted searches and seizures when they wiretapped his telephone conversations. *Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting). Invoking the Founding Fathers in support of his assertion, Justice Brandeis wrote:

They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478.

Without question, this powerful language evokes the American sentiment that privacy is a value. The Supreme Court certainly seemed to believe as much since it quoted part of Brandeis’s text in reference to the right to confidentiality. *Whalen*, 429 U.S. at 599 n.25. The problem with *Olmstead*, however, is that its lengthy opinion says nothing about protecting the nondisclosure of personal matters. Rather, Olmstead’s “right to be let alone,” Justice Brandeis argues, grows out of a clear constitutional guarantee: the Fourth Amendment. *Olmstead*, 277 U.S. at 478. This is unlike the right to confidentiality, which does not have a clear constitutional guarantee from which it can be recognized. For this reason, it seems far-reaching for the Supreme Court in *Whalen* to cite *Olmstead* in support of a constitutional right to confidentiality.

138. In his concurrence in *Whalen v. Roe*, Justice Stewart concludes that the right to confidentiality is not a constitutionally protected right based on past Supreme Court precedent. *Whalen*, 429 U.S. at 608–09 (Stewart, J., concurring). Specifically, he analyzed the two opinions cited by the majority in support of the right to confidentiality, *Griswold v. Connecticut* and *Stanley v. Georgia*, and concluded that neither recognizes a privacy interest in nondisclosure of personal matters. *Id.*

139. See *supra* note 67 and accompanying text.

right to confidentiality.¹⁴⁰ This suggests that the Supreme Court itself was unsure how much protection the right should receive.

The Sixth Circuit's rationale for doubting the existence of a right to confidentiality is less persuasive than the D.C. Circuit's because it conflates the right to confidentiality with the right to autonomy. According to the Sixth Circuit's decision in *DeSanti*, the existence of a right to confidentiality is doubtful not only because the right lacks textual support from the Constitution and Supreme Court precedent, but also because it is irreconcilable with the Supreme Court's earlier decision in *Paul v. Davis* concerning the right to autonomy.¹⁴¹ Several authors, however, have explained why this analysis is mistaken.¹⁴² The right to confidentiality is a privacy right distinct and separate from the right to autonomy.¹⁴³ The Supreme Court made this clear in *Whalen v. Roe* when it failed to cite to *Paul v. Davis* in reference to the right to confidentiality, yet explicitly did so in reference to the right to autonomy.¹⁴⁴ Absent its mistaken conflation of the two privacy interests, the Sixth Circuit offers no other plausible reason to narrowly construe the right to confidentiality so as to practically deny it.

Least persuasive of all are the opinions of the courts of appeals that affirm the right to confidentiality. Their analyses are unconvincing for four reasons. First, the constitutional treatment they apply is inconsistent. Every court of appeals that affirms the right to confidentiality relies on a different test to reach its determination.¹⁴⁵ Even among the majority of

140. Bruce W. Clark, Note, *The Constitutional Right to Confidentiality*, 51 GEO. WASH. L. REV. 133, 135 (1982); Falby, *supra* note 62, at 237. In his concurrence in *Whalen v. Roe*, Justice Brennan suggests that requiring a compelling state interest may be appropriate in assessing the right to confidentiality. *Whalen*, 429 U.S. at 606 (Brennan, J., concurring) ("Broad dissemination by state officials of [private] information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests."). Indeed, a few of the courts of appeals have adopted such a test. *See, e.g.*, *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) ("Disclosure of [constitutionally] protected information must 'advance a compelling state interest which, in addition, must be accomplished in the least intrusive manner.'") (citing *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986)). Justice Stewart rejects Justice Brennan's compelling interest test in his own concurrence. *See Whalen*, 429 U.S. at 607-09 (Stewart, J., concurring).

141. *See supra* note 112.

142. *See Clark, supra* note 140, at 142 ("Reliance on *Paul v. Davis* in determining the application of the right to confidentiality is inappropriate."); Falby, *supra* note 62, at 223 ("[The Sixth Circuit in *DeSanti*] erred in ruling the disclosure of the histories 'indistinguishable' from the disclosure of the fact of arrest in *Paul [v. Davis]*.").

143. "Although it characterizes interests in avoiding publication of personal information and in autonomous decision making as facets of the right to privacy, the *Whalen* opinion clearly differentiates the two interests and treats each as giving rise to an independent constitutional claim." Clark, *supra* note 140, at 142.

144. *See supra* note 46.

145. *See supra* note 88. *See also Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990)

courts that support the use of a balancing test, the factors they rely on differ.¹⁴⁶ This division of treatment highlights one of the major practical problems for litigants bringing claims under the right to confidentiality.¹⁴⁷ Because there is neither consensus as to which level of treatment the right should be afforded, nor consensus over which factors should apply when a balancing test is used, the right is inconsistently recognized and applied.¹⁴⁸ This results in confusion for both the government and private litigants who must endure different constitutional treatment depending on the circuit in which they bring their cases.

Second, despite the differing constitutional treatments that pervade the courts, only under the most egregious factual circumstances will the individual litigant likely prevail, regardless of the court in which the case is brought.¹⁴⁹ This outcome seems contrary to the ideals espoused in the courts' opinions, which often strongly assert the importance of preserving nondisclosure of personal matters and the need for confidential material to be constitutionally protected.¹⁵⁰ The fact that so few private litigants prevail makes the practice of recognizing the right to confidentiality inadequate, since it subverts the very purpose of recognizing the right in the first place. There is little reason behind recognizing a right that, in practice, no court will uphold.

One explanation for this inadequacy is that, in the majority of courts using a balancing test, little weight is given to the private litigant's

(applying a test of strict scrutiny in reaching its determination); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (providing protection only to disclosure of "inherently private" information); *Anderson v. Blake*, 469 U.S. F.3d 910, 914 (10th Cir. 2006) (holding that the state must demonstrate that it had a compelling interest for disclosure and that it used the least intrusive means of disclosing the information).

146. *See supra* note 88.

147. For example, in a case concerning a surgeon diagnosed with AIDS who sued the hospital where he worked for requiring his patients to sign an "unusual consent form" notifying them of the surgeon's AIDS status before undergoing surgery, the trial judge admitted that he "has been unable to elicit a standard against which to gauge the hospital's actions." Joseph F. Sullivan, *Should a Hospital Tell Patients if a Surgeon Has AIDS?*, N.Y. TIMES, Dec. 12, 1989, at B1. The judge was also "concern[ed] about the line he may be asked to draw between a patient's right to know and a physician's right to confidentiality about his own health." *Id.*

148. *See supra* notes 88, 145.

149. "[C]ourts have been willing to uphold statutes giving only the barest minimum of safeguards . . ." Jessica Ansley Bodger, Note, *Taking the Sting Out of Reporting Requirements: Reproductive Health Clinics and the Constitutional Right to Informational Privacy*, 56 DUKE L.J. 583, 607 (2006).

150. *Bartnicki v. Vopper*, 200 F.3d 109, 122 (3d Cir. 1999) ("Th[e] right [to confidentiality] is a venerable one whose constitutional significance we have recognized . . ."); *Walls v. City of Petersburg*, 895 F.2d 188, 194-95 (4th Cir. 1990) ("Although some of this information can be useful and even necessary to maintain order and provide communication and convenience in a complex society, we need to be ever diligent to guard against misuse. Some information still needs to be private, disclosed to the public only if the person voluntarily chooses to disclose it.").

individual interest in privacy.¹⁵¹ For example, despite its lengthy seven-factor test, the seminal balancing test used by the Third Circuit in *United States v. Westinghouse Electric Corp.* provides no distinct factor representing the private litigant's individual reasons for seeking confidentiality.¹⁵² In fact, the Third Circuit only considers the individual's privacy interest *in relation to* the public need for access.¹⁵³ This standard necessarily results in unfavorable treatment for the private litigant whose reasons for desiring confidentiality are not even considered a distinct, viable factor worthy of balancing. It also renders the balancing test inherently tilted in favor of the government since all the factors take into consideration the government's interest and none independently represent the private litigant's individual interest. While this tilt is not necessarily improper,¹⁵⁴ it certainly accounts for the private litigant's lack of privacy protection.

Third, like the Sixth Circuit in *DeSanti*, the First and Eighth Circuits only extend constitutional confidentiality protection to those certain matters protected under the Fourteenth Amendment's right to autonomy.¹⁵⁵ Under this type of treatment, the confidentiality of medical records is not constitutionally protected.¹⁵⁶ Furthermore, this type of treatment reduces the significance of the right to confidentiality, since arguably every breach of confidentiality also necessarily triggers the privacy protection of the right to autonomy.¹⁵⁷

151. The Fifth Circuit is the only court of appeals using a balancing test recognizing that "[p]rivacy of personal matters is an interest in and of itself." *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978).

152. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980).

153. *Id.*

154. The Supreme Court has always held that the right to privacy is not absolute. *Roe v. Wade*, 410 U.S. 113, 154 (1973). There are legitimate reasons for the government to acquire and retain information concerning private citizens. *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

155. *O'Brien v. DiGrazia*, 544 F.2d 543, 545-46 (1st Cir. 1976); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996).

156. In addition to a lack of protection for medical records, other confidential matters, such as financial records and one's sexual orientation, are also unprotected. Such an outcome is in direct conflict with other courts that have already recognized constitutional protection for these matters. *See Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (sexual orientation); *Plante v. Gonzalez*, 575 F.2d 1119, 1136 (5th Cir. 1978) (financial records).

157. It would seem remiss for the Supreme Court in *Whalen v. Roe* to take the time to distinguish between the right to confidentiality and the right to autonomy only to provide that they are, in fact, the same type of right and thus, afforded the same constitutional protection. Indeed, the Supreme Court could not have intended such a result because it refrained from applying strict scrutiny in *Whalen v. Roe*, which it would have done had the New York State Controlled Substances Act implicated a fundamental right. *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest . . .'").

Finally, the confidentiality protection provided by these courts of appeals guarantees only a reasonable expectation of privacy, rather than allowing individuals to protect their privacy in accordance with their own personal preferences. Balancing tests limit privacy protection to whatever courts deem should be private, since the weighing of interests necessarily assumes there are legitimate instances in which the public interest outweighs an individual's interest and vice versa.¹⁵⁸ This protection is limiting because it disregards the fact that what some individuals would regard as private information, others would not.¹⁵⁹ If privacy is something that stems from an individual's sense of values—and the Supreme Court seems to say so in its final thought in *Whalen v. Roe*¹⁶⁰—then privacy protection needs to be based on a system that protects an individual's personal assessment of his privacy interests, rather than a system that imposes societal notions of privacy on every individual.¹⁶¹

The inconsistent and inadequate privacy protection that pervades the constitutional analysis applied by courts that affirm the right to confidentiality lends further support to the D.C. Circuit's belief that the right to confidentiality suffers from too "numerous uncertainties" to be helpful.¹⁶² In total, these uncertainties amount to a privacy protection that lacks the value that the Supreme Court sensed was important and attempted to preserve in *Whalen v. Roe*.¹⁶³ Given the questionable state of the right to confidentiality and the Supreme Court's disinclination to address the issue further, confidential materials require an alternative legal doctrine to ensure their protection.

IV. PROTECTING PRIVACY

The Supreme Court made some attempt to protect the nondisclosure of personal matters in *Whalen v. Roe*.¹⁶⁴ Yet the Court clearly did not want to give nondisclosure of personal matters the same level of protection as other fundamental rights.¹⁶⁵ Given the questionable state of the right to

158. Edgar & Sandomire, *supra* note 6, at 162–63.

159. Allen-Castellitto, *supra* note 25, at 29.

160. *See supra* note 57 and accompanying text.

161. *See generally* Amy Peikoff, *No Corn on This Cobb: Why Reductionists Should Be All Ears for Pavesich*, 42 BRANDEIS L.J. 751, 784–88 (2004) (arguing that the right to privacy, as originally conceived, is based on moral and political first principles meant to protect an individual's private information from being surrendered to society).

162. *See supra* note 123 and accompanying text.

163. *See supra* note 57 and accompanying text.

164. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

165. *Id.*

confidentiality and the inconsistent and inadequate privacy protection provided currently by the courts of appeals, how can confidentiality be protected? This Note proposes that the answer to that question lies not in constitutional law but in privacy tort law.¹⁶⁶ In the context of medical records, tort law provides the best protection against those who, without authorization, seek to acquire information from confidential health records.¹⁶⁷

Privacy tort law protects against breaches of confidential medical records in one of two ways: via a theory of implied contract or via a theory of fiduciary duty.¹⁶⁸ A theory of implied contract arises when a patient and physician fail to sign a contract barring the physician from disclosing certain confidential information, yet such a contract is implied based on the particular nature of the patient-physician relationship.¹⁶⁹ A theory of fiduciary duty arises when a patient enters a relationship with a physician under the expectation that the physician will act with good will to care for the patient's health.¹⁷⁰ The legal purpose for recognizing a breach of implied contract or fiduciary duty is the same as that underlying the

166. A similar suggestion was presented by Bruce Watson as a solution for protecting privacy in the face of increased use of computerized healthcare information. Bruce L. Watson, *Disclosure of Computerized Health Care Information: Provider Privacy Rights Under Supply Side Competition*, 7 AM. J.L. & MED. 265, 285–99 (1981). More recently, Eugene Volokh has suggested an analogous solution for privacy protections involving free speech and the internet. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000). In his article, Volokh asserts that existing contract law is “eminently defensible under existing free speech doctrine.” *Id.* at 1057. He argues that implied contracts, which promise confidentiality, allow for speakers to contract not to speak. *Id.* at 1058. The freedom of the individual to contract his own speech restrictions, he argues, is a preferable option to expanding speech restrictions already in force, such as commercial speech and speech on matters of private concern. *Id.* at 1080–1106.

167. See Richard C. Turkington, *Legal Protection for the Confidentiality of Health Care Information in Pennsylvania: Patient and Client Access; Testimonial Privileges; Damage Recovery for Unauthorized Extra-Legal Disclosure*, 32 VILL. L. REV. 259, 375–86 (1987). See generally William J. Winslade & Judith Wilson Ross, *Privacy, Confidentiality, and Autonomy in Psychotherapy*, 64 NEB. L. REV. 578, 584–606 (1985) (describing privacy tort law protections for medical patients).

168. Turkington, *supra* note 167, at 383–85. Other common law torts provide protection against privacy invasions. These torts include “disclosure of private facts, appropriation of name or likeness for personal advantage, intrusion of one’s physical solitude or seclusion, and publicity that places one in a false light in the public eye.” Scott L. Fast, Comment, *Breach of Employee Confidentiality: Moving Toward a Common-Law Tort Remedy*, 142 U. PA. L. REV. 431, 434 (1993) (citing RESTATEMENT (SECOND) OF TORTS § 652A (1977)). Some of these torts lend well to the context of the physician-patient relationship, while others do not. See Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1428–48 (1982) (discussing the merits of the various common law privacy torts). This Note relies on an analysis of the two privacy torts identified by Richard Turkington in his article, both of which Turkington believes the most suitable for protection of medical records. See Turkington, *supra* note 167, at 383–86.

169. Turkington, *supra* note 167, at 383.

170. BLACK’S LAW DICTIONARY 545 (8th ed. 2004).

concern for constitutional protection: privacy is needed to foster a relationship of trust between physician and patient; otherwise individuals may be deterred from seeking medical attention or may not fully disclose their medical history to their physician, thereby resulting in diminished or inadequate medical care.¹⁷¹ A third party that induces the breach of either an implied contract or fiduciary duty is liable to the patient for that breach.¹⁷² Thus, both theories create a cause of action against government officials who, acting as third parties, attempt to breach the patient-physician relationship in order to gain access to private medical records.

Both a theory of implied contract and a theory of fiduciary duty provide more protection to the nondisclosure of personal matters than any current constitutional protection. Unlike the current constitutional tests used by the circuit courts, which are inconsistently applied and often result in confusion, theories of implied contract and fiduciary duty are well recognized by courts and are applied consistently.¹⁷³ Thus, they are more predictable for litigants. Also, unlike balancing tests, both theories protect a patient's confidentiality by presuming a guarantee of confidentiality upfront. Any party that attempts to breach an implied contract or fiduciary duty can be enjoined from doing so, as opposed to current constitutional balancing tests, which only recognize a violation after the breach of privacy has already occurred.¹⁷⁴ Privacy tort law also avoids the confusion and conflation of the two privacy interests expressed in *Whalen v. Roe*.¹⁷⁵ Through tort law, confidential privacy protection can extend to include, among other things, medical records, financial records, and psychiatric records.¹⁷⁶ Thus, confidential privacy protection cannot be limited to only those rights that fall under the right to autonomy.

171. These were the very concerns that the Supreme Court acknowledged in *Whalen v. Roe* in asserting a constitutional right to confidentiality. See *supra* notes 48–49 and accompanying text. But see Winslade & Ross, *supra* note 167, at 584–85 (explaining how constitutional law protects only restrictions against individual privacy and tort law protects invasions of individual privacy).

172. Turkington, *supra* note 167, at 384.

173. *Id.* at 384–85 n.408 (citing the following states as recognizing causes of action for privacy torts: Alabama, Massachusetts, Minnesota, Nebraska, New Jersey, New York, and Utah).

174. In *Whalen v. Roe*, the Supreme Court did not decide the result of an unwarranted disclosure of privacy, intentional or not. *Whalen*, 429 U.S. 589, 605–06 (1977). The Court's holding pertained only to whether the Fourteenth Amendment was violated. *Id.* at 606. As a result, it is unclear whether constitutional protection for the right of constitutionality extends to potential privacy invasions. If the government can show that it has taken sufficient precautions to avoid disclosure, the right likely does not extend to potential privacy invasions. *Whalen v. Roe* suggests such an outcome since the Supreme Court relied on the fact that New York had taken multiple steps to avoid disclosure of the information it collected. See discussion *supra* note 53.

175. See *supra* note 94 and accompanying text.

176. See *supra* note 156.

Theories of implied contract and fiduciary duty protect an individual's privacy at a level commensurate with his personal views about privacy, as opposed to a societal expectation of privacy.¹⁷⁷ Each patient has the freedom to assess his personal sense of privacy and decide whether or not to make his medical information available to third parties. If he does not want his medical information shared, then he can enjoin a third party from gaining access to it. If he would like to share his medical information, then he can consent to a third party's acquisition of his records. This freedom is not available under current constitutional tests, which permit a third party to violate a patient's confidentiality absent consent whenever a court determines that the third party's interest is more important than the individual's interest.¹⁷⁸

Furthermore, like constitutional privacy principles,¹⁷⁹ a theory of implied contract or fiduciary duty does not make privacy protection absolute.¹⁸⁰ Both can be limited in two important instances: when a patient consents to disclosure, or when the disclosure furthers an overriding, legislatively mandated public interest.¹⁸¹ In the second instance, the government may still be able to gain access to confidential patient information; however, it may do so only when the legislature explicitly directs such disclosure—an outcome that may prove difficult to achieve as constituents become increasingly wary of privacy invasions by the government.

177. Edgar and Sandomire argue that “[r]estricting protection to medical records rather than protecting broad categories of information may lead to anomalous results.” Edgar & Sandimire, *supra* note 6, at 163. They cite as an example the fact that HIV laws restrict HIV test disclosures, but do not similarly limit clinical diagnoses of AIDS. *Id.* at 163. This concern can be ameliorated under a theory of implied contract or fiduciary duty, because individual litigants can decide for themselves which breaches of confidentiality they do not wish to permit. Using the above example, the disclosure of clinical diagnoses of AIDS is significant only if an individual litigant believes such a disclosure is inappropriate. Anomalous results are not a bad thing. Rather, they are an illustration of what certain people consider an impermissible invasion of their privacy, and what others simply do not.

178. *See, e.g.*, *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 580 (3d Cir. 1980) (concluding that the strong public interest in facilitating the research and investigations of NIOSH justified the minimal intrusion into Westinghouse's employee medical records).

179. *See* discussion *supra* note 154.

180. Turkington, *supra* note 167, at 385.

181. *Id.* Express consent is an absolute defense to privacy torts. RESTATEMENT (SECOND) OF TORTS § 583 (1965). Public interest in disclosure is a conditional defense to privacy torts. *Id.* § 652G. It requires legislative authority expressly authorizing nonconsensual disclosure.

However, there remain many potential problems with privacy tort protections.¹⁸² One potentially significant problem is that the government may retain sovereign immunity¹⁸³ against third-party implied contract or fiduciary duty causes of action. Protecting confidentiality through the tortious breach of the physician-patient relationship would be futile in the face of a government body that can intrude as a third party, obtain confidential medical records, and avoid being sued. Indeed, one of the definite advantages of having a constitutional right to confidentiality is that the problem of sovereign immunity is avoided.¹⁸⁴ The problem of sovereign immunity, however, may be averted in certain contexts, such as against municipalities, which are excluded from sovereign immunity specifically to ensure that they remain accountable for impinging on the rights of their citizens.¹⁸⁵ If privacy tort protection proves insufficient due to sovereign immunity problems, then legislation may be needed to ensure that this protection is given full force.¹⁸⁶

Theories of implied contract and fiduciary duty, while themselves incontrovertible common law principles, are relatively new in their application to confidentiality protection.¹⁸⁷ For this reason and those mentioned above, this area of privacy law still requires more development. What is clear, however, is that both theories offer more consistent and

182. Potential problems include: What sort of protection is there for communications in which there is no social convention of confidentiality? See Volokh, *supra* note 166, at 1058. In a similar vein, what happens when a patient seeking group medical care desires confidentiality? See Winslade & Ross, *supra* note 167, at 610. Another limiting factor may be privileges extended by state governments requiring certain types of individuals, such as physicians or newsmen, to make disclosures. Edgar & Sandomire, *supra* note 6, at 162. See generally Vickery, *supra* note 168, at 1437–48 (discussing the inadequacies of current privacy tort laws).

183. Sovereign immunity is guaranteed by the Eleventh Amendment, which states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. The Supreme Court has devised three methods to circumvent the Eleventh Amendment, thereby allowing federal courts limited means to ensure that states comply with federal law. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 395 (4th ed. 2003). These three methods include allowing state officers to be sued individually, permitting states to waive their sovereign immunity, and sanctioning “litigation against the states pursuant to statutes adopted under the Fourteenth Amendment.” *Id.*

184. In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456–57 (1976), the Supreme Court held that citizens may sue states for claims arising under the Fourteenth Amendment. CHERMERINSKY, *supra* note 183, at 446–47 (discussing how Congress can authorize suits against the states pursuant to section 5 of the Fourteenth Amendment).

185. CHERMERINSKY, *supra* note 183, at 413. The exception for municipalities would allow diabetes patients to sue New York City’s DOHMH to seek an injunction preventing DOHMH from enrolling them in the pilot intervention program.

186. Watson, *supra* note 166, at 298–99 (suggesting the need for the federal government and state legislatures to provide quality controls through legislation to facilitate actions for tortious breaches).

187. Vickery, *supra* note 168, at 1454–55.

adequate privacy protection than that afforded by the constitutional right to confidentiality. Indeed, legal scholarship is increasingly recognizing the value of these theories as viable alternatives for privacy protection.¹⁸⁸ In the face of increased privacy violations of medical records, theories of implied contract and fiduciary duty offer a compelling alternative to the questionable right to confidentiality.

V. CONCLUSION

Given the current inconsistent and inadequate privacy protection offered by the right to confidentiality, New York City's diabetes program, if challenged, would likely be held constitutional.¹⁸⁹ Nonetheless, this outcome would seem to run counter to the Supreme Court's general belief expressed in *Whalen v. Roe* that privacy is something that is rooted in the Constitution and should be protected.¹⁹⁰ Privacy values are violated when the government directly intrudes on the physician-patient relationship, which New York City clearly does with its pilot intervention program in the South Bronx.

New York City's Department of Health and Mental Hygiene violates patients' privacy rights when it seizes confidential medical records in order to offer unsolicited medical advice. This seems especially egregious when the government caller who contacts the patient and physician possesses no medical expertise.¹⁹¹ However, patients cannot solve this problem by asserting a constitutional right to privacy, since any individual patient's interest in privacy would likely succumb to the government's putative public health interest.

As an unauthorized third party, New York City's DOHMH breaches the confidence of the patient-physician relationship when it induces medical laboratories to provide it with patients' A1C blood test results.¹⁹² DOHMH does the same when it nonconsensually contacts patients to inform them about their blood test results.¹⁹³ These intrusive acts give rise to a cause of action under both a theory of implied contract and a theory of fiduciary duty. Accordingly, patients who are injured by New York City's

188. See, e.g., Fast, *supra* note 168; Vickery, *supra* note 168.

189. "Conventional public health reporting statutes . . . will pass constitutional muster even if *Whalen* is used to limit government power to collect health information about named individuals." Edgar & Sandomire, *supra* note 6, at 165.

190. See *supra* note 57 and accompanying text.

191. See *supra* note 18.

192. See *supra* note 9 and accompanying text.

193. See *supra* note 14 and accompanying text.

breach of their patient-physician relationships should file suit and demonstrate that the theories of implied contract and fiduciary duty offer a plausible solution to privacy protection absent a constitutional right.

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