REDACTION IS NOT THE ANSWER: THE NEED TO KEEP THIRD PARTY MINORS' ABORTION CLINIC MEDICAL RECORDS SAFE FROM DISCOVERY

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I. INTRODUCTION

Swear to God you won't tell. This is a phrase used frequently by teens.[1] If the listener refuses to "swear to God," many times the teen would rather swallow their secret than take the chance of others finding out.[2] This is especially true when dealing with private decisions surrounding pregnancy or abortion.[3] That is why it is essential teens receive great assurances that their privacy will be protected when seeking an abortion.

It may seem that confidentiality for teens who have had an abortion is obviously important and universally provided. Unfortunately, state actors across America have taken strong actions in the past couple of years that have threatened minors' privacy in their reproductive decisions.[4] These actions include attempting to obtain teen patient medical records in lawsuits involving abortion clinics.[5] This comment explores the effect that allowing discovery of medical records would have on a teen's trust in confidentiality. Also, it discusses the states' interest in these minor patient records and determines when such discovery should not be allowed.

This comment begins by looking at a series of cases that took place right after the passage of the Partial Birth Abortion Act of 2003. In these cases, U.S. Attorney General Ashcroft attempted to obtain unredacted medical records of adult women who had partial birth abortions in an effort to discredit the physician who performed the abortions. Next, attention turns to minors' privacy interest in their sexual decisions and various state

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[1] *See, e.g.*, SABRINA WEILL, THE REAL TRUTH ABOUT TEENS AND SEX 11 (2005).

[2] *See infra* notes 232–40 and accompanying text.

[3] *See infra* notes 232–40 and accompanying text.

[4] *See infra* Part II.

[5] *See* Planned Parenthood of Ind. v. Carter, 854 N.E.2d 853, 856 (Ind. Ct. App. 2006); Alpha Med. Clinic v. Anderson, 128 P.3d 364, 369 (Kan. 2006).

actors' attempts to invade that privacy. The issue becomes complicated when dealing with minors because they do not have the full constitutional right to privacy enjoyed by adults, but confidentiality is incredibly important to teens. Thus, this comment shows how courts have addressed this issue and then leads into a recent Ohio case dealing with privacy for minors' abortion clinic medical records.

After reviewing recent court actions, this comment explores minors' constitutional right to privacy in their decisions involving procreation and the reason why the medical records reflecting those decisions need adequate protection. Next, this comment discusses various studies that show how essential privacy and confidentiality are to teens and just how damaging the threat of a confidentiality violation can be to a teen who is deciding whether to access medical care. Because of the importance teens place on confidentiality, this comment argues that allowing for redaction of medical records will not provide adequate protection and that such an allowance will place a large burden on a teen's reproductive decisions. In the end, this comment shows that in private litigation involving abortion clinics, it is essential medical records of third party minors receive protection from discovery attempts.

II. BACKGROUND

The issue of privacy in abortion clinic records came to the forefront in 2003. The National Abortion Federation filed suit against the United States Attorney General challenging the constitutionality of the Partial Birth Abortion Act of 2003,[6] which imposed "criminal and civil sanctions on physicians who performed certain abortion procedures."[7] Many of the plaintiffs were physicians who performed abortion procedures that would become illegal under the new law.[8] During discovery, Attorney General Ashcroft issued a number of subpoenas across the country attempting to obtain medical records of women who had abortions performed by the plaintiff physicians.[9]

One of the plaintiffs in the suit, Dr. Hammond, stated during discovery that he performed the kind of procedure that the new law would ban.[10]

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[6] 18 U.S.C. § 1531 (2006).

[7] Nat'l Abortion Fed'n v. Ashcroft, No. 03 Civ. 8695, 2004 U.S. Dist. LEXIS 4530, at *2 (S.D.N.Y. Mar. 19, 2004).

[8] *Id.* at *2–3.

[9] *Id.* at *2.

[10] Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 WL 292079, at *1 (N.D. Ill. Feb. 6, 2004).

Ashcroft sent a subpoena to Northwestern Memorial Hospital in Chicago, Illinois, attempting to obtain the medical records of Dr. Hammond's patients.[11] The Attorney General wanted these records "on the *possibility* that it may find something therein which would affect the testimony of Dr. Hammond adversely, that is, for its potential value in impeaching his credibility as a witness."[12] Northwestern filed a motion to quash the subpoena in the U.S. District Court, Northern District of Illinois.[13] The district court agreed with Northwestern that the government should not be able to obtain these medical records, even if redacted, because of the incredibly sensitive nature of the material.[14] The court refused to allow such discovery and stated:

> American history discloses that the abortion decision is one of the most controversial decisions in modern life, with opprobrium ready to be visited by many upon the woman who so decides and the doctor who engages in the medical procedure. An emotionally charged decision will be rendered more so if the confidential medical records are released to the public, however redacted, for use in public litigation in which the patient is not even a party. Patients would rightly view such disclosure as a significant intrusion on their privacy.[15]

The Seventh Circuit Court of Appeals upheld this decision.[16] There, Judge Posner explained the importance of patient confidentiality. He stated, "If Northwestern Memorial Hospital cannot shield the medical records of its abortion patients from disclosure in judicial proceedings, moreover, the hospital will lose the confidence of its patients, and persons with sensitive medical conditions may be inclined to turn elsewhere for medical treatment."[17] Judge Posner also discussed how, in the context of abortions, medical records are especially sensitive.[18] He stated that redacting the medical records to remove patient identifying information would not be adequate to protect the patient's right to privacy.[19]

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[11] *Id.* at *2.
[12] *Id.* at *6.
[13] *Id.* at *2.
[14] *Id.* at *6.
[15] *Id.*
[16] Nw. Mem'l Hosp. v. Aschcroft, 362 F.3d 923, 932–33 (7th Cir. 2004).
[17] *Id.* at 929.
[18] *Id.*
[19] *Id.*

Planned Parenthood Federation of America filed a similar suit in the Northern District of California challenging the constitutionality of the Partial Birth Abortion Ban Act of 2003.[20] There again, Attorney General Ashcroft attempted to obtain confidential patient medical records of a plaintiff physician.[21] For reasons similar to those discussed by the district court in Illinois in *National Abortion Federation v. Ashcroft*,[22] the district court in California denied the government's motion to compel production of the patient's records.[23] The court also focused on the importance of patient confidentiality and discussed the harm that could come from allowing this kind of discovery.[24] The court stated, "[T]he potential for injury to the relationship between patient and provider is significant given the providers' pledge of confidentiality. . . . Allowing disclosure of the records will have a chilling effect on communications between patients and providers."[25]

Therefore, Attorney General Ashcroft's attempt to obtain patient medical records in these civil suits was largely a failure.[26] Most of the lower federal courts refused to allow for discovery of confidential patient records through subpoenas.[27] The courts recognized how essential confidentiality and privacy are for patients, especially when the medical procedure is an abortion.[28] They saw the chilling effect that allowing such disclosure would have on the patient-client relationship and also the undue

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[20] Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 959–60 (N.D. Cal. 2004); *see also* Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

[21] Planned Parenthood Fed'n of Am. v. Ashcroft, No. C03-4872 PJH, 2004 WL 432222, at *1 (N.D. Cal. Mar. 5, 2004).

[22] *See supra* text accompanying notes 14–15.

[23] *Planned Parenthood Fed'n of Am.*, 2004 WL 432222, at *2.

[24] *Id.*

[25] *Id.*

[26] Molly Silfen, Note, *I Want My Information Back: Evidentiary Privilege Following the Partial Birth Abortion Cases*, 38 J. HEALTH L. 121, 122–23 (2005) ("The Attorney General's office later withdrew all of its requests for abortion records after the majority of the courts refused to compel discovery.").

[27] *Id.* at 128–30 (discussing three U.S. district court cases). Although the government's motions for production were denied in two of the cases discussed by Silfen, Judge Casey from the District Court for the Southern District of New York did grant the Attorney General's motion to enforce a subpoena, but the subpoena was never followed through because the government eventually dropped it. *See* Nat'l Abortion Fed'n v. Ashcroft, No. 03 Civ. 8695, 2004 U.S. Dist. LEXIS 4530, at *23 (S.D.N.Y. Mar. 19, 2004).

[28] *See, e.g.*, Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 WL 292079, at *6 (N.D. Ill. Feb. 6, 2004); *see also* Silfen, *supra* note 26, at 128–29.

burden it would place upon a woman making an already difficult life decision.[29] When weighing the value of the medical records to the Attorney General's case against the effect that allowing discovery would have on a woman's sense of privacy, the lower courts mostly found that the effect was too large to allow such a discovery.[30]

In the *Ashcroft* cases, it is important to note that the value of the medical records was very low, and the privacy interest of the third party patients was very high. The records only had the possibility of discrediting the plaintiff doctors,[31] and the procedure involved—dilation and extraction—was potentially illegal under the new law.[32] Thus, when the courts had to balance the interests, it was easy for them to find that privacy should win. Also, the *Ashcroft* cases dealt with adults,[33] and the United States Supreme Court has provided more privacy to adults than to minors.[34]

The *Ashcroft* cases are important because they deal with privacy in medical records, but they do not address a minor's privacy interest in sexual and reproductive decisions.[35] This issue arose two years later when a Kansas law sparked a lawsuit regarding minors' privacy interest in their sexual decisions.[36]

Kansas had a mandatory reporting statute, which required certain professionals to make a report to the appropriate state agency if they had reason to believe a child was being abused.[37] This type of statute is not unusual, but Kansas's definition of abuse was unique in that it defined sexual abuse as "all sexual activity . . . —whether voluntary or

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[29] *See, e.g.*, Planned Parenthood Fed'n of Am. v. Ashcroft, No. C03-4872 PJH, 2004 WL 432222, at *2 (N.D. Cal. Mar. 5, 2004); *see also* Silfen, *supra* note 26, at 128–29.

[30] *See, e.g.*, *Nat'l Abortion Fed'n*, 2004 WL 292079, at *6; *see also* Silfen, *supra* note 26, at 128.

[31] *Nat'l Abortion Fed'n*, 2004 WL 292079, at *6.

[32] Nw. Mem'l Hosp. v. Aschcroft, 362 F.3d 923, at 928–29 (7th Cir. 2004) ("The natural sensitivity that people feel about the disclosure of their medical records . . . is amplified when the records are of a procedure that Congress has now declared to be a crime.").

[33] *See id.* at 924; Nat'l Abortion Fed'n v. Ashcroft, No. 03 Civ. 8695, 2004 U.S. Dist. LEXIS 4530, at *2–3 (S.D.N.Y. Mar. 19, 2004); *Planned Parenthood Fed'n of Am.*, 2004 WL 432222, at *1.

[34] Carey v. Population Serv. Int'l, 431 U.S. 678, 692 (1977).

[35] *See Nw. Mem'l Hosp.*, 362 F.3d at 924; *Nat'l Abortion Fed'n*, 2004 U.S. Dist. LEXIS 4530, at *2–3; *Planned Parenthood Fed'n of Am.*, 2004 WL 432222, at *1.

[36] Aid for Women v. Foulston, 441 F.3d 1101, 1106 (10th Cir. 2006).

[37] *Id.*

involuntary—that involves participants younger than 16 years old."[38] In 2003, Kansas Attorney General Kline issued an opinion on the meaning of this statute.[39] Kline stated that *anytime* there was sexual intercourse with a minor, it constituted abuse.[40] Thus, instead of providing discretion to mandatory reporters, Attorney General Kline wanted reporting to be done anytime sexual activity occurred with a minor.[41] A group of individuals who fell into the category of "mandatory reporters" thought this law was unconstitutional as applied to consensual sexual activity between minors of a similar age; and therefore, they filed suit.[42]

The District Court for the District of Kansas granted the mandatory reporters' request for a preliminary injunction, and the District Attorney appealed to the Tenth Circuit Court of Appeals.[43] There, the Tenth Circuit determined that minors do have a right to informational privacy,[44] but that "'the state has somewhat broader authority to regulate the conduct of children than that of adults.'"[45] Because Kansas enacted a law making consensual sexual activity between like-aged minors a crime, the court found "that Plaintiffs' minor patients and clients have no right to privacy in their illegal sexual activity—even though information about that activity is 'sensitive in nature' and may stigmatize those minors if disclosed."[46]

Beyond just a lack of privacy in illegal sexual activity, the court in *Aid for Women v. Foulston*[47] also focused on the balance between the privacy interests of the minor and the government's interest in requiring reporting. Because the court was dealing with minors instead of adults, it emphasized that "the state has a strong *parens patriae* interest in protecting the best

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[38] *Compare id.* at 1107, *with* ALA. CODE § 12-15-301(12) (Supp. 2009) (defining sexual abuse to include "rape, molestation, prostitution or other forms of sexual exploitation or abuse of children, or incest with children"), *and* CAL. PENAL CODE § 11165.1 (Supp. 2010) (defining sexual abuse as sexual assault or sexual exploitation, which includes but is not limited to rape, incest, sodomy and child molestation).

[39] *Foulston*, 441 F.3d at 1108.

[40] *Id.* ("'*[I]njury* as a result of sexual abuse should be inferred as a matter of law whenever sexual intercourse, whether voluntary or involuntary, has occurred with a child under the age of 16.'" (citation omitted)).

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1106.

[44] *Id.*

[45] *Id.* at 1117 (quoting Doe v. Irwin, 615 F.2d 1162, 1166 (6th Cir. 1980)).

[46] *Id.* at 1118.

[47] 441 F.3d 1101, 1106 (10th Cir. 2006).

interests of minors."[48] When dealing with adults who have an expectation of privacy, the government needs a compelling state interest and must use the least intrusive manner possible if it is going to violate that privacy.[49] This is not the case for minors.[50] "Rather, the question is whether the reporting statute 'serve[s] "any significant state interest . . . that is not present in the case of an adult."' Answering that question requires balancing the minors' privacy rights at issue with the countervailing state interests."[51] Therefore, because Kansas outlawed consensual sexual activity between minors, and states have a strong parental interest in the well-being of minors, the court found that the plaintiffs would not likely be successful on their claim that the statute violated a minor's constitutional right to privacy; and thus, the court vacated the preliminary injunction.[52]

After the Tenth Circuit vacated the preliminary injunction, the case returned to the United States District Court for the District of Kansas.[53] There, the district court decided that the statute was *indeed* unconstitutional as applied to consensual sexual relationships between minors, and it issued a permanent injunction.[54] This injunction stopped Attorney General Kline from imposing "a 'zero tolerance' reporting rule," which could eliminate "all discretion on the part of the reporter."[55] The court looked at the legislative history and decided that the statute was created to identify true victims of abuse and was not meant to make mandatory reporters report every consensual sexual relationship, as the Attorney General claimed.[56]

This case is significant because the court recognized that "[m]inors have a legitimate expectation of privacy in their intimate sexual and confidential medical information"[57] and that requiring this kind of overbroad reporting would seriously deter minors from seeking medical assistance in their reproductive decisions.[58]

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[48] *Id.* at 1119.

[49] *Id.*; *see also* Sheets v. Salt Lake Cnty., 45 F.3d 1383, 1387 (10th Cir. 1995).

[50] *Foulston*, 441 F.3d at 1119.

[51] *Id.* (quoting Carey v. Population Servs., Int'l, 431 U.S. 678, 693 (1977) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976))).

[52] *Id.* at 1120.

[53] Aid for Women v. Foulston, 427 F. Supp. 2d 1093 (D. Kan. 2006).

[54] *Id.* at 1116.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 1114 (citing Eastwood v. Dept. of Corr. of Okl., 846 F.2d 627, 631 (10th Cir. 1988)).

[58] *Id.* at 1108.

The district court cited many studies showing that when parental involvement is required for minors to obtain contraceptives, minors are much less likely to seek those services.[59] In light of these studies, the court stated, "Mandatory reporting of all sexual activity to a state agency can be more frightening [than parental notification] given the potential for criminal liability."[60] The court concluded that if requiring parental involvement resulted in such a decrease in a minor's willingness to seek medical assistance, it is likely mandatory reporting that would result in potential criminal liability would also have a drastic negative effect on a minor's willingness to seek medical assistance.[61] The district court recognized the importance of privacy between a minor and her physician.[62] The court found that interpreting the mandatory reporting law in such a way as to require reporting of all consensual sexual relationships would be inappropriate.[63]

The *Foulston* cases took place in Kansas in the beginning of 2006.[64] While the debate continued as to whether minors had privacy rights in their sexual choices, Attorney General Phil Kline also attempted during a criminal investigation to subpoena entire unredacted patient files of women and girls who obtained abortions from two medical clinics.[65]

Kline claimed that the clinics were violating two different Kansas laws: (1) a criminal abortion statute and (2) the mandatory reporting statute

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[59] *Id.* at 1107–08. As described by the court:

> [T]here is a substantial decline in seeking medical care when service providers require parental involvement. For example, a Connecticut study found that the requirement of parental involvement in a minor's decision to seek HIV testing decreased the number of young people seeking testing. Without parental involvement, twice as many minors were willing to seek HIV testing. A United Kingdom study found that requiring parental involvement decreased by thirty percent the number of young people seeking contraception. In a survey . . . published in the *Journal of the American Medical Association*, about half of minors under the age of eighteen reported that they would stop using a clinic if parental involvement was required. *Id.*

[60] *Id.* at 1108.

[61] *Id.*

[62] *Id.* at 1115–16.

[63] *Id.* at 1109.

[64] *Id.* at 1093; Aid for Women v. Foulston, 441 F.3d 1101 (10th Cir. 2006).

[65] Alpha Med. Clinic v. Anderson, 128 P.3d 364, 369 (Kan. 2006).

for suspected child abuse at issue in *Foulston*.[66] In an attempt to investigate these crimes, Kline tried to subpoena unredacted medical records.[67] The court concluded that three constitutional privacy rights were jeopardized by this subpoena.[68] Those rights included (1) the right to informational privacy, (2) the right to obtain confidential medical care, and (3) "the fundamental right of a pregnant woman to obtain a lawful abortion without government imposition of an undue burden on that right."[69]

The court pointed out that if this subpoena was not handled correctly, "the fundamental rights of women who may seek abortions in the future could be substantially impaired or the assertion of those rights prevented."[70] At the same time though, the court also recognized the state's compelling interest in investigating potential crimes.[71]

In weighing both the privacy and abortion rights of the women against the state's interest in investigating crimes, the court came to a compromise. It determined that the case would be remanded.[72] If the lower court decided the Attorney General had firm grounds for these subpoenas, the subpoenas could stay in effect, but procedural safeguards had to be put in place to protect the privacy of the patients.[73] Thus, even if the state could show that it truly needed the information, the court would still require procedural safeguards to protect the identity of the patients.[74]

The Kansas cases helped establish a minor's privacy interest in her sexual decisions. This issue was raised again in *Planned Parenthood of Indiana v. Carter*,[75] where the Indiana Medical Fraud Control Unit (IMFCU) attempted to force abortion clinics in Indiana to hand over the

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[66] *Id.* at 374.

[67] *Id.* at 369.

[68] *Id.* at 376.

[69] *Id.* at 376–77.

[70] *Id.* at 377.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 379. Those safeguards included:

> (1) Petitioners' counsel must redact patient-identifying information from the files before they are delivered to the judge under seal; (2) the documents should be reviewed initially in camera by a lawyer and a physician . . . appointed by the court, who can then advise the court if further redactions should be made to eliminate information unrelated to the legitimate purposes of the inquisition. *Id.*

[74] *Id.*

[75] 854 N.E.2d 853 (Ind. Ct. App. 2006).

medical records of minor patients.[76] Like Attorney General Kline in *Alpha Med. Clinic v. Anderson*, IMFCU claimed to need the medical records to investigate whether the clinics were complying with mandatory reporting of suspected sexual abuse among their patients.[77] Planned Parenthood asked for a preliminary injunction.[78]

To decide whether IMFCU could obtain these records, the Court of Appeals of Indiana had to first determine if a minor has a privacy interest in her medical records. The court determined there is such a privacy interest.[79] It stated:

> [A] minor has a strong interest in maintaining a confidential relationship with his or her healthcare provider and not having the threat of disclosure of confidential information impede that relationship or serve as a deterrent to obtaining healthcare in the first place. Moreover, the privacy interest is even greater when it is viewed from the perspective of minors who are victims, and not perpetrators, of the criminalized conduct, because victims of criminal activity have a heightened expectation of privacy.[80]

While recognizing this privacy interest, the court also acknowledged that the interest must be weighed against the state's interest in investigating potential violations of mandatory reporting requirements.[81] Because "the U.S. Supreme Court has thus far not applied a compelling interest analysis in addressing informational privacy claims,"[82] the court chose to apply "a flexible balancing test"[83] that was developed by the Third Circuit Court of Appeals.[84]

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[76] *Id.* at 856.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 877.

[80] *Id.* at 877–78.

[81] *Id.* at 878.

[82] *Id.* at 879.

[83] *Id.*

[84] *Id.* The Third Circuit developed this "balancing test" in U.S. v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980). *Id.* ("The *Westinghouse* court framed the test as follows: 'The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of

First, the court looked at the burden IMFCU's request would have upon patients.[85] IMFCU was asking for unredacted medical records.[86] This was found to be a burdensome request.[87] The court stated, "[W]e believe that there is significant potential for harm in a subsequent nonconsensual disclosure, given the sensitive nature of the records at issue"[88] and acknowledged "the chilling effect that disclosure of the records would have upon [Planned Parenthood of Indiana's] patients, who might be reluctant to continue their relationship with [Planned Parenthood of Indiana] if they believed that their unredacted medical records were subject to disclosure."[89] Next, the court considered IMFCU's need for these unredacted records and found that it was not sufficient to justify the kind of privacy intrusion at risk here.[90]

Thus, the court concluded that Planned Parenthood would likely succeed on their claim that IMFCU's request for unredacted minor medical records was a violation of minors' privacy interest, and therefore, granted the request for a preliminary injunction.[91]

III. RECENT DEVELOPMENTS

Up to this point, the cases have focused on a governmental actor, like an Attorney General or a state agency, trying to obtain medical records or forcing reporting that had serious consequences for a minor's privacy in their reproductive decisions.[92] In all of the cases, the court looked at the privacy interest at play and weighed that against the government's interest in either enforcing a criminal statute or making sure mandatory reporters were complying with their obligations.[93] The debate over privacy in

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safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.'" (citation omitted)).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 879–80.

[89] *Id.* at 880.

[90] *Id.* at 880–81.

[91] *Id.* at 883.

[92] *See* Aid for Women v. Foulston, 441 F.3d 1101, 1108 (10th Cir. 2006); Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 WL 292079, at *1 (N.D. Ill. Feb. 6, 2004); Planned Parenthood of Ind. v. Carter, 854 N.E.2d 853, 883 (Ind. Ct. App. 2006); Alpha Med. Clinic v. Anderson, 128 P.3d 364, 369 (Kan. 2006).

[93] *Foulston*, 441 F.3d at 1017; *Nat'l Abortion Fed'n*, 2004 WL 292079 at *2; *Planned Parenthood of Ind.*, 854 N.E.2d at 570; *Alpha Med. Clinic*, 128 P.3d at 376.

abortion clinic medical records took a new direction in a 2009 Ohio case because it involved a private litigant attempting to obtain medical records of third party minors from an abortion clinic.[94] This most recent case was *Roe v. Planned Parenthood of Southwest Ohio*.[95]

The *Roe* case came to fruition after a thirteen-year-old pregnant girl, Jane Roe, sought medical assistance from Planned Parenthood.[96] Jane was having a sexual relationship with her twenty-one-year-old soccer coach, Haller.[97] Jane told the clinic employees that her parents knew about the abortion and provided Haller's phone number instead of her father's phone number.[98] Records indicate that the doctor called the telephone number provided for Jane's father to notify him of the abortion, but instead actually spoke to Haller.[99] Haller accompanied Jane to the clinic on the day of the abortion. Jane's parents did not know what was happening until after the abortion took place.[100]

Upon learning what occurred, Jane's parents sued Planned Parenthood.[101] They claimed that Planned Parenthood, among other things, breached its duty as a mandatory reporter to report suspected child abuse in violation of former Ohio Revised Code section 2151.421.[102] They also claimed, "as a matter of policy and/or pattern and practice, Planned Parenthood does not report known or suspected child abuse with respect to the minors to whom it provides medical services."[103]

During the suit, the plaintiffs tried to compel discovery of any abuse reports made by Planned Parenthood and the medical records of nonparty minors who were patients of Planned Parenthood in the past ten years.[104] Planned Parenthood provided Jane's medical records but refused to provide the medical records of nonparties to the suit.[105] The trial court ordered the production of these documents, but said that all patient identifying information needed to be redacted from the medical records

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[94] Roe v. Planned Parenthood S.W. Ohio Region, 912 N.E.2d 61, 64 (Ohio 2009).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 65.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 64.
[102] *Id.*
[103] *Id.* at 67.
[104] *Id.*
[105] *Id.* at 65.

before production.[106] The trial court stated that "the Roes had a 'tremendous interest' in the requested documents and that their need for the information outweighed the nonparty patients' interest in maintaining the confidentiality of their records."[107] The Court of Appeals of Ohio disagreed and reversed the holding.[108] It stated, "[T]he confidential abuse reports and medical records of nonparties were not necessary to the Roes' case and, even if tenuously necessary, the potential invasion of the privacy rights of the nonparties outweighed the probative value of the records to this case."[109]

The facts of this case attracted the attention of the Ohio Legislature.[110] Specifically, pro-life Republican Representative Michelle Schneider saw this as an opportunity to introduce new legislation that would allow a citizen to sue an abortion clinic if they felt the clinic did not comply with mandatory reporting statutes.[111] Up until this point, the mandatory reporting statute did not provide for punitive damages if a mandatory reporter did not comply with reporting requirements.[112] Given the amount of media attention this case received,[113] it was easy for pro-life Representative Schneider[114] to pass an amendment to Ohio's reporting

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[106] *Id.* at 66.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *See Ohio Law Requires Notices in Abortion Clinics, Mandates Penalty for Assault on Pregnant Women*, MEDICAL NEWS TODAY (Apr. 9, 2009, 1:00 PM), http://www.medicalnewstoday.com/articles/145650.php.

[111] *Id.*

[112] *Roe*, 912 N.E.2d at 66.

[113] *See* Sharon Coolidge, *Abortion Record Case Reviewed: Planned Parenthood Initially Defeated Parents' Request*, CINCINNATI ENQUIRER, Mar. 27, 2008, at B2; James Nash, *Parents Demand Abortion Clinic's Patient Records*, COLUMBUS DISPATCH, Oct. 8, 2008, at B4; Bill Sloat, *A Teen's Abortion Gets Legal Scrutiny: Planned Parenthood Probed in Cincinnati*, PLAIN DEALER, Apr. 15, 2005, at B1.

[114] *See* DENNIS M. PAPP, OHIO LEGISLATIVE SERVICE COMMISSION, BILL ANALYSIS OF SUB. H.B. 280, 127th Gen. Assemb., Reg. Sess., at 39 (Ohio 2008), *available at* http://www.lsc.state.oh.us/analyses127/h0280-rs-127.pdf (reporting passage by the House in a vote of 89 to 7). This was not Representative Schneider's first attempt to pass legislation which would have a negative effect on women's reproductive choices in Ohio. Susan Page, *The Divided States of America*, USA TODAY, Apr. 17, 2006, at A1. In May of 2005, Schneider introduced a bill which would have banned "abortions in state-funded hospitals and by public employees except those needed to save the life of the mother or mandated by the federal Medicaid program." *Id.* She was quoted saying, "My bill would take the state of Ohio out of the abortion business." *Id.*; *see also Ohio Bill Will Limit Abortions in Public*

statute, which became known as the "Protecting Pregnant Women from Coercion & Violence Bill."[115]

This bill (H.B. 280), which amended Ohio Revised Code section 2151.421, became law on April 7, 2009.[116] This act made two major changes to the reporting law. First, it added section (M), which now allows a citizen to sue a mandatory reporter for failing to report and makes the mandatory reporter liable for both compensatory and punitive damages.[117] Second, it supplemented section (H) to allow for the use of abuse reports in a civil action brought under section (M) of the statute as long as "any information in a report that would identify the child who is the subject of the report . . . has been redacted."[118]

Obviously, this statute would have a large impact on the case that inspired the legislature to pass it.[119] This law went into effect in April of 2009.[120] The suit between the Roes and Planned Parenthood was well underway by that time, and on April 3, 2009, the court ordered the parties to provide briefs stating whether this new law should apply to the case, and if so, how it should apply.[121] After hearing both sides, the court addressed what it found to be the four issues presented.

First, the court had to determine whether the amendments to the statute should apply retroactively.[122] They determined that even though the legislature intended for it to apply to cases pending at the time the law was

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Hospitals, 35 RIGHT TO LIFE OF GREATER CINCINNATI 6 (2005) ("Ohio Representative Michelle Schneider introduced a bill in the Ohio House of Representatives in May to limit surgical or RU-486 abortions in public hospitals. The bill incorporates an initiative of Ohio Right to Life by including policy language stating that Ohio prefers childbirth over abortion.").

[115] *See* Steven Ertelt, *Ohio Law to Stop Pressuring Women into Having Abortion Goes into Effect Today*, LIFENEWS.COM (Apr. 7, 2009), http://www.lifenews.com/state40 39.html.

[116] Brief for Amici Curiae Ohio State Medical Ass'n et al. at 1, Roe v. Planned Parenthood SW Ohio Region, 912 N.E.2d 61 (Ohio 2009) (No. 07-1832).

[117] OHIO REV. CODE ANN. § 2151.421(M) (West 2009) ("Whoever violates division (A) of this section is liable for compensatory and exemplary damages to the child who would have been the subject that was not made.").

[118] *Id.* § 2151.421(H).

[119] Roe v. Planned Parenthood S.W. Ohio Region, 912 N.E.2d 61, 68 (Ohio 2009).

[120] *Id.*

[121] *Id.* at 66.

[122] *Id.* at 68.

enacted,[123] the law was substantive in nature because it added punitive damages that did not exist before, and thus, could not be applied retroactively.[124]

Next, because the law did not apply retroactively, the court had to apply the former Ohio Revised Code section 2151.421 to decide whether punitive damages were available[125] and whether the Roes could discover child abuse reports.[126] Under the former law, it was clear that neither were allowed.[127] Thus, the court did not allow punitive damages or the discovery of child abuse reports here.[128]

Lastly, and most important to this discussion, the Roes attempted to obtain medical records of nonparties to the suit.[129] In general, medical records are considered confidential and cannot be obtained through discovery.[130] The Roes attempted to get around this however by relying on an Ohio tort case, *Biddle v. Warren General Hospital*.[131]

Biddle involved a hospital that was giving out confidential patient information to a law firm so that the law firm could contact patients and solicit business.[132] The court found that the hospital had committed the tort of unauthorized disclosure to a third party.[133] The court stated that a possible *defense* to that tort would be if the hospital disclosed the information "where disclosure is necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality."[134]

The Roes tried to use this language to say that there was a *right* to the confidential medical records of nonparties to the suit.[135] The Ohio

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[123] *Id.* ("[T]he General Assembly expressly provided that the amendments were intended to apply retroactively to civil actions pending on the effective date of the act, April 7, 2009.").

[124] *Id.* at 69.

[125] *Id.*

[126] *Id.* at 70.

[127] *Id.* ("[W]e hold that in the absence of statutory authority, punitive damages are not available under former R.C. 2151.421 . . . . [W]e look at former R.C. 2151.421(H), which makes no exception for discovery of abuse reports for this kind of civil action.").

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] 715 N.E.2d 518 (Ohio 1999).

[132] *Id.* at 520.

[133] *Id.* at 528.

[134] *Id.* at 524.

[135] *Roe*, 912 N.E.2d at 71.

Supreme Court expressly disagreed.[136] It stated, "*Biddle* did not create a litigant's right to discover the confidential medical records of non-parties in a private lawsuit"; instead, it only created a defense to the tort of unauthorized disclosure.[137] Thus, in rejecting the Roes' argument for disclosure of third parties' confidential medical records, the Ohio Supreme Court recognized the importance of privacy for minors in this setting.

The Roes tried to argue that any concern the court may have about privacy could be abated through redaction.[138] The court also rejected this contention and stated, "Redaction of personal information, however, does not divest the privileged status of confidential records. Redaction is merely a tool that a court may use to safeguard the personal, identifying information within confidential records that have become subject to disclosure either by waiver or by an exception."[139]

This statement by the Ohio Supreme Court—that redaction cannot be used to obtain otherwise privileged information—was a huge victory for minors' privacy rights. The court recognized that simple redaction "does not divest the privileged status of confidential records."[140] The court heard the argument that these medical records were necessary to further the public policy of protecting minors from abuse and refused to disturb the nonparty patient's confidentiality.[141] The court stated, "[W]hether such public policy issues are sufficient to overcome a nonparty patient's right to the confidentiality of medical information should likewise be addressed by the General Assembly, not the judiciary."[142]

IV. ANALYSIS

Currently in Ohio, civil litigants cannot access minors' medical records in a suit against a mandatory reporter.[143] However, the Ohio Supreme Court expressly left this question for the legislature. The Court ended their analysis in *Roe* by stating that if a nonparty patient's privacy interest in their medical records is going to be invaded, it should be done through the legislature, not through judicial action.[144] It is clear that the Ohio legislature was eager to respond when this case came to light because it

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[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] OHIO REV. CODE ANN. § 2151.421(H) (West 2009).
[144] *Roe*, 912 N.E.2d at 71.

quickly amended the mandatory reporting statute allowing a private citizen to sue a mandatory reporter.[145]

Legislatures and judges should not allow nonparty minors' medical records to be discoverable in civil litigation involving an abortion clinic because minors have a constitutional privacy interest in their reproductive decisions;[146] and thus, the medical records reflecting those decisions must be adequately protected.[147] In providing such protection, courts and legislatures should be mindful that allowing redacted medical records to be obtained will not provide adequate protection[148] because of the vital importance that minors place on privacy.[149]

A. Minors' Constitutional Privacy Interest

There are two separate issues involved in a minor's privacy interest in their abortion clinic medical records. First, minors have a constitutionally protected right to privacy in sexual or procreation decisions.[150] Second, in order to fully exercise that right to privacy, the medical records that reflect those decisions need to remain confidential.[151] This second issue deals more with what the Supreme Court has described as an "individual interest in avoiding disclosure of personal matters."[152] Even though the Supreme Court has not directly addressed whether minors have a constitutional right to privacy in their medical records in this kind of setting, lower courts that have addressed the issue have found minors do possess such a right to informational privacy.[153] Each of these two issues will be taken in turn.

1. Minors Have a Constitutional Right to Privacy in Sexual and Procreation Decisions

"Although '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.'"[154] Over the years, the Court has consistently recognized that decisions

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[145] *See supra* text accompanying notes 110–18.

[146] *See infra* Part IV.A.1.

[147] *See infra* Part IV.A.2.

[148] *See infra* Part IV.B.

[149] *See infra* Part IV.C.

[150] Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977).

[151] *See infra* Part IV.A.2.

[152] Whalen v. Roe, 429 U.S. 589, 599 (1977).

[153] *See infra* note 172.

[154] *Carey*, 431 U.S. at 684 (quoting Roe v. Wade, 410 U.S. 113, 152 (1973)).

affecting procreation were fundamental and need great protection, typically in the form of heightened judicial scrutiny of laws affecting these decisions.[155]

A fundamental right to privacy in procreation decisions was first established in *Skinner v. Oklahoma*, where the Court held that an Oklahoma law allowing for sterilization of persons convicted of certain crimes was unconstitutional.[156] The Court stated, "Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring."[157] This was expanded in *Eisenstadt v. Baird* when the Court recognized a privacy right in decisions regarding the use of contraceptives.[158] The Court stated, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[159]

The kind of protection given to adults makes perfect sense, because of the assumption that adults should have the freedom to decide what to do with their own bodies and should receive the utmost privacy in such decisions.[160] The question becomes a little less clear when a minor is claiming the privacy right. Minors are not given the kind of full protection that adults receive.[161]

In *Carey v. Population Services*, the Supreme Court had to determine whether the right of privacy in procreation decisions afforded to adults should extend to minors.[162] There, the court was faced with a state law

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[155] *See* Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942); Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972); *Roe*, 410 U.S. at 152.

[156] *Skinner*, 316 U.S. at 541–42.

[157] *Id.* at 536.

[158] *Eisenstadt*, 405 U.S. at 453–54.

[159] *Id.* at 453.

[160] *See Roe*, 410 U.S. at 152.

[161] Carey v. Population Servs. Int'l, 431 U.S. 678, 693 n.15 (1977).

> This test is apparently less rigorous than the "compelling state interest" test applied to restrictions on the privacy rights of adults. Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children, and because the right of privacy here is "the interest in independence in making certain kinds of important decisions," and the law has generally regarded minors as having a lesser capability for making important decisions.

Id. (citations omitted).

[162] *Id.* at 693.

that, among other things, prohibited distribution of contraceptives to minors under the age of sixteen.[163] The court discussed the difficult questions that arise when dealing with constitutional rights of minors:

> The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer. We have been reluctant to attempt to define "the totality of the relationship of the juvenile and the state." Certain principals, however, have been recognized. "Minors, as well as adults, are protected by the Constitution and possess constitutional rights" . . . . On the other hand, we have held in a variety of contexts that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[164]

After evaluating this dichotomy, the Court determined that "the right to privacy in connection to decisions affecting procreation extends to minors as well as to adults."[165] The Court recognized that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices" and saw that this decision should be no less protected simply because the citizen is below the age of eighteen.[166] Thus, the Supreme Court recognized that minors have a constitutional right to privacy in decisions affecting procreation.

Although it is true that the Supreme Court recognized the right of minors to make private decisions regarding procreation, it would not be accurate to say that minors receive the same level of privacy in that decision as adults.[167] This lower level of constitutional protection for minors is evident when one examines how the Supreme Court has addressed a woman's right to obtain an abortion.

In *Planned Parenthood v. Casey*,[168] the Supreme Court established that a state may create regulations affecting a woman's ability to obtain an abortion pre-viability as long as those regulations do not place an undue

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[163] *Id.* at 678.

[164] *Id.* at 692 (citations omitted).

[165] *Id.* at 693.

[166] *Id.* at 685; *see also* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

[167] *See infra* notes 168–71 and accompanying text.

[168] 505 U.S. 833 (1992).

burden on the woman's decision to obtain the abortion.[169] One way that the state can regulate which affects minors is "that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."[170] Thus, minors do have a constitutional right to obtain an abortion, but the state can require either parental or judicial approval before the minor can receive the abortion.[171]

The fact that minors must first obtain permission before receiving an abortion demonstrates the Court's desire to give minors privacy in their abortion decision while still allowing a state to regulate that decision to a certain extent. One can see from the Supreme Court's decisions that minors possess a constitutional right to privacy in many of their procreation decisions but do not possess as robust a constitutional right to privacy as do adults.

2. Because Minors Have a Constitutional Right to Privacy in Decisions Regarding Sexual and Procreation Decisions, the Medical Records That Reflect Those Decisions Should Also Be Protected

Even though the Supreme Court has not yet addressed whether minors have a constitutional right to privacy in the medical records which reflect their sexual or procreation decisions, lower courts have addressed the issue and have found that minors do possess such a privacy right.[172] The Tenth Circuit addressed this issue in *Aid for Women v. Foulston*.[173] There, the plaintiffs were doctors, teachers, and other mandatory reporters who were required to report all consensual sexual activities between minors of a similar age and felt that such a requirement was unconstitutional as applied

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[169] *Id.* at 876.

[170] *Id.* at 899 ("If neither a parent nor a guardian provides consent, a court may authorize [by means of a judicial bypass] the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent, or that the abortion would be in her best interests.").

[171] *Id.*

[172] *See* Aid for Women v. Foulston, 441 F.3d 1101, 1116 (10th Cir. 2006); Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 789–90 (9th Cir. 2002); Planned Parenthood of Ind. v. Carter, 854 N.E.2d 853, 875 (Ct. App. Ind. 2006); Alpha Med. Clinic v. Anderson, 128 P.3d 364, 376 (Kan. 2006) (recognizing that the Attorney General's attempt to obtain unredacted patient files of ninety women and girls who obtained abortions at two medical clinics had the "possibility of infringement of three federal constitutional privacy rights. The first is the right to maintain the privacy of certain information.").

[173] 441 F.3d at 1116.

to minors engaging in consensual sex.[174] To answer this question, the court first had to determine whether minors even enjoy a constitutional right to informational privacy.[175] The court looked to the other circuits but also relied upon language found in Supreme Court cases.[176] The court looked at *Carey v. Population Services, International*, where "a plurality of the Supreme Court opined that 'the right to privacy in connection with decisions affecting procreation extends to minors as well as adults.'"[177] Also, in *Planned Parenthood of Central Missouri v. Danforth*,[178] a case involving a challenge to the state's abortion law, the Supreme Court stated, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[179] After reviewing other circuit courts who addressed whether minors have a right to informational privacy and important Supreme Court cases dealing with privacy interests involving procreation, the *Foulston* court concluded "that minors do have a right to informational privacy."[180]

The Tenth Circuit is not alone in recognizing a minor's right to informational privacy. In *Planned Parenthood of South Arizona v. Lawall*,[181] the Ninth Circuit Court of Appeals considered whether Arizona's parental consent abortion statute violated a minor's "privacy interest in avoiding disclosure of sensitive personal information."[182] The court stated, "This interest, often referred to as the right to informational privacy, applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public."[183] Also, the Seventh Circuit, while recognizing that the minor's right "is not unqualified," still acknowledged that "a minor possesses the right of privacy, defined as 'the right of the individual . . . to be free of unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.'"[184]

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[174] *Id.* at 1106.

[175] *Id.* at 1116–17.

[176] *Id.* at 1117.

[177] *Id.* at 1116–17 (quoting Carey v. Population Servs., Int'l, 431 U.S. 678, 693 (1977)).

[178] 428 U.S. 52 (1976).

[179] *Id.* at 74.

[180] *Foulston*, 441 F.3d at 1117.

[181] 307 F.3d 783 (9th Cir. 2002).

[182] *Id.* at 789.

[183] *Id.* at 789–90.

[184] Wynn v. Carey, 582 F.2d 1375, 1384 (7th Cir. 1978) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

Beyond the federal courts, a state court has also addressed the issue of minors' right to informational privacy in abortion clinic medical records. In *Planned Parenthood of Indiana v. Carter*,[185] the Court of Appeals of Indiana addressed whether a state agency's attempt to obtain access to minors' medical records violated their right to informational privacy.[186] The court stated that "[a] number of cases in the lower federal courts . . . recognize a qualified constitutional right to the confidentiality of medical records and medical communications."[187] After reviewing those federal court decisions, the court held that "a federal constitutional right of privacy in medical information exists."[188]

Although a state court, lower federal courts, and the Supreme Court have recognized the importance of privacy surrounding a minor's procreation decisions, this right to privacy is not absolute. The Supreme Court in *Casey* discussed a recordkeeping provision of a state statute that affected state-funded institutions that performed abortions.[189] This statute required that any such institute keep records of each abortion performed, along with other medical information, and file a report with the state.[190] The Supreme Court found that this kind of requirement was "directed to the preservation of maternal health," and thus, was constitutional.[191] The Court required, however, that "[i]n all events, the identity of each woman who has had an abortion remains confidential."[192] Thus, based on *Casey*, states are allowed to have provisions that require recordkeeping to maintain maternal health, as long as the identities of the women are protected.[193]

The Supreme Court's ruling in *Casey* should not be read to say that abortion clinic patients do not have a right to informational privacy. Instead, the Court was saying that the state's interest in maternal health was important enough to allow for an intrusion into a patient's right to informational privacy.[194] Note, however, that the Court required that "[i]n all events, the identity of each woman who has had an abortion remains

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[185] 854 N.E.2d 853 (Ind. Ct. App. 2006).

[186] *Id.* at 857.

[187] *Id.* at 872.

[188] *Id.* at 873.

[189] Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833, 900 (1992).

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

confidential."[195] Thus, if a state can come up with a compelling enough reason, such as maternal health of their citizens, then the Supreme Court will likely allow for a minor invasion into informational privacy to pursue that interest.

The interest in investigating an abortion clinic to see if they are complying with mandatory reporting statutes is quite different from a state interest in preserving the maternal health of its citizens. Also, the role that medical records play in each of these interests is different. The Court ruled in *Casey* that "[t]he collection of information with respect to actual patients is a vital element of medical research."[196] To make sure that a state-funded institute is complying with correct medical procedures requires that the medical records be obtainable.[197] In contrast, to make sure a mandatory reporter is complying with reporting requirements does not necessarily require review of medical records.[198] This type of inquiry involves policing mandatory reporters and does not have a direct connection to medical research. Thus, even though the Supreme Court saw a state's need for medical records in assuring compliance with correct medical procedures as an appropriate reason to invade privacy interests of patients, it does not follow that such an invasion should be allowed in an investigation of mandatory reporter compliance.

In the end, the question of obtaining medical records for the purpose of showing whether an agency is in compliance with mandatory reporting requirements has never come before the Supreme Court. Because of this, it is better to look to state courts and lower federal courts that have addressed that exact issue and have found that a right to informational privacy does exist.[199] The ruling in *Casey* with regard to state required record keeping shows that states can obtain medical records if they have a compelling enough reason but also shows the Court's desire to preserve confidentiality in that the records were only obtainable if the patient's identity was

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[195] *Id.*

[196] *Id.* at 900–01.

[197] *See id.*

[198] *See, e.g.*, Roe v. Planned Parenthood S.W. Ohio, 912 N.E.2d 61, 66 (Ohio 2009). The plaintiff claimed to need nonparty minor medical records to show the abortion clinic was not complying with mandatory reporting requirements. *Id.* at 64. The court of appeals stated "that the confidential abuse reports and medical reports on nonparties were not necessary to the Roes' case and, even if tenuously necessary, the potential invasion of the privacy rights of the nonparties outweighed the probative value of the records in this case." *Id.* at 66.

[199] *See supra* note 172.

protected.[200] Thus, although the Supreme Court has not directly addressed whether minors have a constitutional right to informational privacy, it can be seen from looking at lower court opinions and from how the Supreme Court has protected women's privacy interest in procreation decisions that the medical record, which reflect a minor's abortion decision, should receive great protection.

B. Redacting Minor's Medical Records Will Not Provide Adequate Protection

Because minors have a constitutional right to privacy in their sexual and procreation decisions, and the medical records that reflect those decisions should be given great protection,[201] it is important that courts and legislatures not impair a minor's privacy. One way that a minor's right to privacy can be impaired is by allowing civil litigants to obtain third party minors' abortion clinic records through discovery. Often times, the party seeking the records will argue that redacting the records will provide adequate privacy for the minor.[202] Simple redaction of medical records will not provide the kind of privacy needed for a minor who is making an already difficult reproductive decision.

The issue of releasing minor's medical records was raised in the recent Ohio case, *Roe v. Planned Parenthood*.[203] There, the court had to determine whether a civil litigant's desire to use nonparty minors' medical records should trump nonparty minors' right to privacy.[204] The plaintiffs argued that if the patients' identifying information was removed, then privacy would be protected; and thus, the plaintiffs should have access to nonparty medical records for their civil suit.[205]

The court did not go along with that argument. The court found that "[i]n general, medical records are confidential and not subject to disclosure."[206] The court held that "[r]edaction of personal information, however, does not divest the privileged status of confidential records."[207]

The Ohio Supreme Court recognized that simply redacting medical records would not be an adequate safeguard.[208] It also recognized that

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[200] *Casey*, 505 U.S. at 900.

[201] *See* discussion *supra* Part IV.A.2.

[202] *See, e.g.*, *Roe*, 912 N.E.2d at 67.

[203] *Id.*

[204] *Id.* at 70.

[205] *Id.* at 71.

[206] *Id.* at 70.

[207] *Id.* at 71.

[208] *Id.*

redaction does not remove the privileged status of information.[209] Instead, redaction should only be used when medical records have already become subject to disclosure.[210]

The idea that redaction does not adequately protect a patient's privacy interest was also expressed in 2004 when U.S. Attorney General John Ashcroft attempted to access medical records of abortion patients.[211] The court refused to allow this kind of discovery and explained why redaction would not be enough to protect the privacy of the patients:

> Although the government has agreed to the redaction of names, addresses, birthdates, and other objectively identifying information, the records nevertheless contain other potentially identifying information of an extremely personal and intimate nature, including, among others, types of contraception, sexual abuse or rape, marital status, and the presence or absence of sexually transmitted diseases.[212]

Thus, even if "patient identifying" information is removed, that does not guarantee that a patient's identity will actually be protected.[213] The court recognized that plenty of information that would stay in the record after redaction could be used to identify the patient.[214]

Also, the Seventh Circuit went one-step further in *Northwestern Memorial Hospital v. Ashcroft*[215] to say that, even if a patient's identity could be protected, there would still be a privacy violation if her redacted medical records were discoverable.[216] The court explained:

> Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures

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[209] *Id.*

[210] *Id.*

[211] Planned Parenthood Fed'n of Am. v. Ashcroft, No. C03-4872 PJH, 2004 WL 432222, at *2 (N.D. Cal. Mar. 5, 2004).

[212] *Id.* at *2.

[213] Parkson v. Cent. DuPage Hosp., 435 N.E.2d 140, 144 (Ill. App. Ct. 1982) ("Whether the patients' identities would remain confidential by the exclusion of their names and identifying numbers is questionable at best. . . . As the patients disclosed this information with an expectation of privacy, their rights to confidentiality should be protected.").

[214] *See supra* text accompanying note 212.

[215] 362 F.3d 923 (7th Cir. 2004).

[216] *Id.* at 929.

> of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded. The revelation of the intimate details contained in the record of a late-term abortion may inflict a similar wound.[217]

The court in *Northwestern* saw how sensitive the issues of pregnancy and abortion are for women.[218] It knew that allowing redacted medical records of women who obtained late-term abortions to be discoverable would cause irreparable damage to women's sense of privacy.[219] It found that, even if privacy could be guaranteed, the woman would feel violated simply because of the incredibly private nature of the records.[220]

Simple redaction is not enough to sufficiently protect a patient's right to privacy, especially when dealing with a decision as sensitive as whether or not to continue a pregnancy. This issue is compounded when a minor is involved because the desire for privacy and confidentiality is so much greater in a minor.[221]

Thus, when dealing with litigation involving abortion clinics, it is essential that courts and legislatures recognize how inadequate redaction is in protecting a minor's privacy interest. As the Ohio Supreme Court stated in *Roe*, "Redaction is merely a tool that a court may use to safeguard the personal, identifying information within confidential records that have become subject to disclosure either by waiver or exception."[222] Redaction is not to be used to access medical records that are not already legally accessible.

C. Allowing for Discovery of Redacted Medical Records Would Place a Large Burden on the Teen's Abortion Decision

Even if redaction could adequately protect the identity of patients, third-party minor medical records should still not be discoverable in a civil lawsuit. If minors are told that their medical records could be subpoenaed in a civil lawsuit that has nothing to do with them, they will surely be even

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[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *See infra* Part IV.C.

[222] Roe v. Planned Parenthood S.W. Ohio, 912 N.E.2d 61, 71 (Ohio 2009).

more hesitant than they already are to seek medical assistance.[223] The last message legislatures and judges should send to teens is that the state cares more about a litigant's rights in a civil lawsuit than a minor's right to privacy in their personal procreation decisions.

Judge Posner in the Seventh Circuit recognized the negative message allowing the use of redacted medical records in a lawsuit would send to women.[224] He refused to allow Attorney General Ashcroft to subpoena medical records of women who had obtained an abortion in *Northwestern Memorial Hospital v. Ashcroft*.[225] He stated:

> Even if all the women whose records the government seeks know what "redacted" means, they are bound to be skeptical that redaction will conceal their identity from the world. . . . Some of these women will be afraid that when their redacted records are made a part of the trial record in New York, persons of their acquaintance, or skillful "Googlers," sifting the information contained in the medical records concerning each patient's medical and sexual history, will put two and two together, "out" the 45 women, and thereby expose them to threats, humiliation, and obloquy.[226]

In that case, Posner was talking about the reaction of adult women to the news that their redacted records were being used in a lawsuit.[227] One can easily imagine how much more devastating this news would be to a pregnant teenager.

Beyond the courts recognizing the effect allowing such disclosure would have on women, many studies show that the threat of breaching a minor's confidentiality can have a strong negative effect on that minor accessing medical care.[228] These studies show that minors have serious

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[223] *Cf. Nw. Mem'l Hosp.*, 362 F.3d at 929 (noting the chilling effect on patients' willingness to seek treatment if health care providers cannot protect records from "disclosure in judicial proceedings").

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *See generally* Tina L. Cheng et al., *Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes Among High School Students*, 269 J. AM. MED. ASS'N 1404 (1993); Rachel K. Jones & Heather Boonstra, *Confidential Reproductive Health Services for Minors: The Potential Impact of Mandated Parental Involvement for Contraception*, 36 PERSP. ON SEXUAL & REPROD. HEALTH 182 (2004); Rachel K. Jones, et

concerns about confidentiality and often times would rather forego medical care than even risk the chance of their confidentiality being broken.[229]

In *Foulston*, the court looked at a number of studies, which demonstrated the importance confidentiality was to a minor.[230] One study "found that the requirement of parental involvement in a minor's decision to seek HIV testing decreased the number of young people seeking testing. Without parental involvement, twice as many minors were willing to seek HIV testing."[231] Also, a study done by at the University of Massachusetts found that "[a] majority of adolescents have concerns they wish to keep confidential and a striking percentage report they would not seek health services because of these concerns."[232] Lastly, the California Center for Civic Participation and Youth Development found confidentiality to be the most important factor to teens and "[n]early two-thirds of teens claimed they would be more likely to visit a clinic if they were guaranteed it would be confidential."[233]

The studies show how important confidentiality is to teens. The American Academy of Pediatrics recognized the necessity of confidentiality for teens when it released a statement reaffirming "its position that the rights of adolescents to confidential care when considering abortion should be protected."[234] This statement focused on the impact that mandatory parental involvement would have on a minor.[235] The Academy stated, "Adolescents are often confused about their right to confidential care, and even a *perceived lack of confidentiality* in health care regarding sexual issues deters them from seeking services."[236] If a perceived lack of confidentiality would deter minors from seeking medical services, then clearly telling a minor that their medical records could become part of the

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al., *Adolescents' Reports of Parental Knowledge of Adolescents' Use of Sexual Health Services and Their Reactions to Mandated Parental Notification for Prescription Contraception*, 293 J. AM. MED. ASS'N 340 (2005).

[229] *See supra* note 228.

[230] Aid for Women v. Foulston, 427 F. Supp. 2d 1093, 1107–08 (D. Kan. 2006).

[231] *Id.*

[232] Cheng et al., *supra* note 228, at 1404.

[233] Center for Health Improvement, *Maintaining Confidentiality for Teens in Obtaining Reproductive Health Services*, HEALTH POLICY GUIDE, http://www.healthpolicyguide.org/doc.asp?id=6569 (last visited Dec. 1, 2010).

[234] American Academy of Pediatrics, *The Adolescent's Right to Confidential Care when Considering Abortion*, 97 PEDIATRICS 746, 746 (1996).

[235] *Id.* at 749–50.

[236] *Id.* at 749 (emphasis added).

public record, even if redacted, will have a negative effect on their desire to seek assistance.

These studies demonstrate the obvious: teenagers would go to great lengths to protect their privacy regarding intimate sexual decisions. While a number of the studies looked at the effect that requiring parental involvement would have on a teen's decision, those studies show the kind of effect allowing discovery of confidential medical records would have upon a teen.[237] If requiring parental involvement in reproductive decisions results in many teens refusing to even seek medical care, then surely those teens would also likely refuse to seek that care if they knew their medical records would become part of a public record in a court case. Parental involvement only requires one other person finding out that the teen is seeking an abortion.[238] Allowing medical records into a court case, redacted or not, would create the fear that not only the parents, but the whole world would find out about their abortion. As Judge Posner stated, "[W]omen will be afraid that when their redacted records are made a part of the trial record in New York, persons of their acquaintance, or skillful 'Googlers,' sifting the information contained in the medical records concerning each patient's medical and sex history, will put two and two together."[239]

This fear of a confidentiality breach is likely stronger in a teen than in an adult woman. For that reason, it is even more important that a pregnant teenager be given the utmost assurance of confidentiality and have no reason to think that her trust would be violated by a court or a legislature allowing a private litigant access to her medical records in a case she is not even a party to.

V. CONCLUSION

When weighing the interests of private parties in a lawsuit against the privacy interests of minors' in their medical records, minors' privacy interest should win the day. Minors have a constitutionally protected right to privacy in their reproductive decisions[240] and should have an equal right to privacy in the medical records which reflect those decisions.[241] Because of the importance teens place on confidentiality, simple redaction of

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[237] *See* Cheng et al., *supra* note 228, at 1407; American Academy of Pediatrics, *supra* note 234, at 749–50.

[238] *See generally* OHIO REV. CODE ANN. § 2919.12(B)(1)(a) (West 2010).

[239] Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 929 (7th Cir. 2004).

[240] *See supra* Part IV.A.1.

[241] *See supra* Part IV.A.2.

medical records will not provide adequate protection of those privacy rights.[242]

When the court is faced with whether to allow certain private information into a lawsuit, it weighs the privacy interests of one party against the importance of the evidence to the other party.[243] In some cases, the medical records go straight to the heart of the issue,[244] and sometimes the records are just requested to speak to the credibility of a party's testimony.[245] The courts look at the nature of the evidence, the expectation of privacy a party may have had, and the effect that allowing the records into the case would have upon the litigant.[246] Through all of this, it can be seen that sometimes the court is open to allowing the private information in if it is redacted, [247] and sometimes they find that the interest in privacy is too great to subject the party to disclosure.[248]

When taking all of this into consideration, it is clear that legislatures and judges should not allow a party in a private suit to obtain the medical records of third party minors when suing an abortion clinic. This is a private suit between two private actors. This is not a situation where a state entity is investigating a clinic for noncompliance with mandatory reporting laws. Instead, as seen in *Roe*, this is a situation where the plaintiffs are parents who feel that the clinic did not comply with mandatory reporting rules and will try to get to private records of minors who had nothing to do with the suit.[249] The studies show just how important confidentiality is for teens.[250] When we are weighing the interests, a plaintiff's desire to obtain damages from a clinic should not be superior to a minor's desire to obtain confidential, secure medical assistance without the threat of her records being subpoenaed in a lawsuit. Although it is true that minors do not enjoy the kind of constitutional right to privacy that adults receive, that does not mean that minors have no

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[242] *See supra* Part IV.B.

[243] *See, e.g.*, *supra* text accompanying notes 83–91.

[244] *See, e.g.*, Roe v. Planned Parenthood S.W. Ohio Region, 912 N.E.2d 61, 66–68 (Ohio 2009).

[245] *See, e.g.*, Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 WL 292079, at *6 (N.D. Ill. Feb. 6, 2004).

[246] *See supra* text accompanying notes 84–90.

[247] *See, e.g.*, Alpha Med. Clinic v. Anderson, 128 P.3d 364, 379 (Kan. 2006).

[248] *See, e.g.*, *Roe*, 912 N.E.2d at 71–72.

[249] *Id.* at 66–67.

[250] *See supra* Part IV.C.

interest in privacy.[251] Even a lesser right to privacy should receive more weight than a private litigant's desire to sue a clinic.

Thus, when considering whether to allow the medical records of third party minors into a private suit, as was the case in *Roe*,[252] the court should always err on the side of protecting the privacy of minors. This is the only way to insure that minors feel safe enough to access the help and assistance of medical professionals when they face the difficult decision of whether to continue a pregnancy.

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[251] *See supra* Part IV.A.2.

[252] *Roe*, 912 N.E.2d at 64.