CASTING THE DISCOVERY NET TOO WIDE: DEFENSE ATTEMPTS TO DISCLOSE NONPARTY MEDICAL RECORDS IN A CIVIL ACTION

DANEL MICHELLE NICKELS*

INTRODUCTION

Imagine that you are a parent who has just filed a negligence suit on behalf of your child. Although not a party to the suit, the defense seeks the release of your personal medical, psychiatric, and school records to challenge your child's claims of causation. It is not unreasonable that your initial reaction would be surprise or even shock given that such practices threaten to invade your most intimate and personal information. Yet, these types of practices by civil defense teams are becoming widespread as a means to support alternative theories of causation.[1] For example, in *Bogues v. 354 E. 21st Street Realty Corp.*,[2] Ms. Thomasina Jones, mother of six-year-old Randy Bogues, Jr., found her own health to be the subject of inquiry after she filed suit on behalf of her son for injuries he allegedly suffered from lead poisoning.

Privacy considerations strike a deep chord within citizens given that privacy is deemed one of the most sacred and fundamental rights.[3] Although the word "privacy" cannot be found in the U.S. Constitution, most people firmly believe that they have an inherent, fundamental right to be left alone.[4] Yet, in areas ranging from abortion to the information highway, courts have defined the scope of privacy in non-absolute terms, especially when competing values are at stake.[5] In the context of discovery of nonparty medical records, the preservation of confidentiality has surfaced as a source of national concern.[6] Courts face an

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* J.D. Candidate, 2001, Indiana University School of Law—Indianapolis; B.A., 1998, Manchester College, North Manchester, Indiana. This Note won top honors in the Third Annual Health Law Writing Competition 2000-2001 sponsored by Epstein Becker & Green, P.C.

1. *See* Hope Viner Samborn, *Blame It on the Bloodline: Discovery of Nonparties' Medical and Psychiatric Records Is Latest Defense Tactic in Disputing Causation*, A.B.A. J., Sept. 1999, at 28-29 (discussing the controversy surrounding discovery of nonparties' medical information).

2. *See id.* at 28 (citing *Bogues*, No. 11394-96 (N.Y. Sup. Ct. Aug. 22, 1996)).

3. *See* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 475 (1991) ("Privacy [is] . . . among the most fundamental rights that we have as citizens of this country.").

4. *See* ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY, at xiii (Vintage Books 1997) (1995).

5. *See id.* at xiv.

6. *See id.* at 336-37.

> The erosion of medical confidentiality has also become a source of national concern. . . .
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> . . . The private sector can already link our financial, medical, telephone, cable, and computer information to create profiles of our habits, behavior, and interests, as well as

intense struggle between protecting the due process considerations of defendants who argue that the fair administration of justice demands disclosure of nonparties' medical records to pursue alternative causation theories and safeguarding the privacy interests of persons not party to a suit who seek to keep their medical information confidential.

Drawing on *Bogues* and other recent jurisprudence addressing the issue of discovery of nonparties' medical information,[7] Part I of this Note will briefly survey the competing interests of the defense's concern with due process, the ability to fully and fairly represent their client, and the nonparty's interest in preserving the privacy of his or her confidential medical information. In Part II, this Note explores the potential negative ramifications of defense attempts to disclose private medical information in civil proceedings. Part III of this Note examines measures designed to safeguard the privacy interests of nonparties, including in camera inspection of medical records, redaction of names and identifying numbers from the medical records, and granting of protective orders.

Part IV of this Note discusses the merits of treating medical information as a property right so as to limit disclosure of highly sensitive personal information. Part V of this Note explores the potential merits of recognizing a constitutionally-protected right to privacy as another way to insulate a nonparty from defense attempts to obtain private medical records. After weighing the relative strengths and weaknesses of the various approaches to safeguarding a nonparty's privacy interest in medical information confidentiality, Part VI recommends that a constitutional right to informational privacy, coupled with protective orders and in camera review, may be the most effective way to protect a nonparty's privacy interest while accommodating the defense's need to disclose as much information

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> diseases we have and those we are likely to get.
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> . . . [W]hen information is collected, particularly sensitive personal information, it is often abused.

Id.; *see also* Madison Powers, *Justice and Genetics: Privacy Protection and the Moral Basis of Public Policy*, *in* GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA 355 (Mark A. Rothstein ed., 1997) ("[T]his revitalized interest in privacy protection is the awareness that although an increase in health information available to medical researchers and caregivers can be used for great good, it can also have adverse economic and social consequences for individuals and groups.").

7. *See, e.g.*, Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. 1996) (denying release of nonparty's medical records where the relevancy threshold could not be met by the defense because of strong tendency to confuse the jurors and where privilege concerns could not be outweighed by other factors); Monica W. v. Milevoi, 685 N.Y.S.2d 231, 234 (App. Div. 1999) (rejecting defense request for disclosure of nonparty siblings' school records and for the parents' drug and pregnancy histories explaining that the defense suggestion that the plaintiff's problems were genetically- or environmentally-related was "speculative, at best"); Anderson v. Seigel, 680 N.Y.S.2d 587 (App. Div. 1998) (allowing disclosure of the academic records of the plaintiff's siblings and mother, the mother's employment records, and the mother's IQ tests, reasoning that these documents were relevant to the issue although some of the highly sensitive information should be reviewed in camera prior to release to protect privacy interests of nonparties).

as possible to fully and fairly represent its clients.

I. COMPETING INTERESTS AT STAKE IN DISCOVERY OF NONPARTY RECORDS

A. Defense Due Process Concerns

The U.S. Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."[8] In the context of discovery in civil proceedings, due process includes a defendant's right to investigate and construct alternative theories of causation in order to prevent civil liability from attaching to him or her. In the U.S. adversary system, the overarching goal of the courts in all civil suits is "to secure the just, speedy, and inexpensive determination of every action."[9] With this in mind, courts generally operate under a liberal policy of disclosure.[10] This policy tends to favor defense attempts to disclose medical and other records of nonparties, provided that the defense establishes the relevancy and materiality of such documents to the issue in dispute.[11]

Defense attorney Michael Bernstein of New York City explains that in order to fully and fairly represent a client in medical malpractice, medical products liability, and toxic tort cases, due process requires that nonparty medical and other records be disclosed so that defendants may pursue alternative causation theories of plaintiff's alleged cognitive defects and other behavioral and developmental deficiencies.[12] For example, in toxic tort and medical malpractice cases involving children, a common question is whether the act or product of the defendant injured the child's mental and intellectual development.[13] Child

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8. U.S. CONST. amend. XIV, § 1.

9. FED. R. CIV. P. 1. Most states pattern their rules of civil procedure on the FRCP. *See, e.g.*, Lee v. Elbaum, 887 P.2d 656 (Haw. Ct. App. 1993); Turgut v. Levine, 556 A.2d 720 (Md. Ct. Spec. App. 1989); Wilson v. Piper Aircraft Corp., 613 P.2d 104 (Or. Ct. App. 1980).

10. *See* Miller, *supra* note 3, at 466 ("The broad discovery procedures in the Federal Rules were designed solely to improve the dispute resolution system. The drafters had no intention of using these procedures to undermine privacy; nor were they expanding discovery in the name of promoting public access to information."); *see also* Terre Haute Reg'l Hosp., Inc. v. Trueblood, 600 N.E.2d 1358, 1361 (Ind. 1992) (Just "[a]s a doctor and patient need full disclosure in order for the doctor to 'best' diagnose his patient, the court seeks full disclosure to 'best' ascertain the truth."); Cynthia B. v. New Rochelle Hosp. Med. Ctr., 458 N.E.2d 363, 369 (N.Y. 1983).

11. *See Monica W.*, 685 N.Y.S.2d at 233 ("[T]he relevancy of the information sought must be established before discovery will be permitted to go forward . . . [and] non-medical records of academic and cognitive performance, though not within any privilege, 'are not discoverable unless the party seeking their production establishes their relevance and materiality for discovery purposes.'") (quoting McGuane v. M.C.A., Inc., 583 N.Y.S.2d 73, 74 (App. Div. 1999)); *see also* FED. R. CIV. P. 26(b)(1) ("The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

12. *See* Samborn, *supra* note 1, at 29.

13. *See* Ronald L. Hack & Jane E. Schilmoeller, *Production of Non-Parties' Medical and*

psychologists and pediatric neurologists recognize that in order to determine whether a causal relationship exists, factors such as parental intelligence and social environment must be considered based on review of medical and school records, interviews, and testing of parents, siblings, and close family members.[14]

Moreover, defendants argue that a plaintiff's privileged information or any right to privacy he or she may have with respect to medical records is not absolute, especially in light of a defendant's due process concerns and the judicial system's pursuit of truth.[15] Due to the strong presumption in favor of the truth-finding process, courts have recognized that, even when privileged information is at stake, the information sought may be discoverable upon the defense showing that the material is relevant to the issue in dispute.[16]

Generally, discovery is governed by Federal Rule of Civil Procedure 26, which provides in relevant part that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[17] Moreover, pursuant to a provision added in the 1970 amendments to the Federal Rules of Civil Procedure, Rule 34(c) contemplates discovery of "documents and things" from persons who are not parties to an action.[18]

Relevancy must be demonstrated by more than just a conclusory statement in an attorney's brief.[19] Defense attorneys must show some fit or nexus between

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Other Privileged or Private Records, 54 J. MO. B. 123, 126 (1998).

14. *See id.*

15. *See* Anne Bowen Poulin, *The Psychotherapist-Patient Privilege After* Jaffee v. Redmond*: Where Do We Go from Here?*, 76 WASH. U. L.Q. 1341, 1341-42 (1998); *see also* Todd v. S. Jersey Hosp. Sys., 152 F.R.D. 676, 684 (D.N.J. 1993) (quoting Wei v. Bodner, 127 F.R.D. 91, 97 (D.N.J. 1989) (explaining that the physician-patient privilege is not absolute and "must be subrogated to more important interests of society [like the search for truth]")).

16. *See* Terre Haute Reg'l Hosp., Inc. v. Trueblood, 600 N.E.2d 1358, 1362 (Ind. 1992); *see also* Palay v. Superior Court of L.A., 22 Cal. Rptr. 2d 839, 843-46 (Ct. App. 1993) (holding that the nonparty mother was prohibited from invoking a privilege against disclosure of her prenatal records because they are "inextricably intertwined" with the health of her infant son). The *Palay* court further explained that "[t]he patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too." *Id.* at 844 (quoting City & County of S.F. v. Superior Court, 231 P.2d 26, 28 (Cal. 1951)).

17. FED. R. CIV. P. 26(b)(1).

18. FED. R. CIV. P. 34(c) ("A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45."); *see also* FED. R. CIV. P. 45(b) (allowing such discovery against a nonparty through the issuance of a subpoena duces tecum). A subpoena duces tecum is "[a] subpoena ordering the witness to appear and to bring specified documents or records." BLACK'S LAW DICTIONARY 1440 (7th ed. 1999).

19. *See* Herbst v. Bruhn, 483 N.Y.S.2d 363, 366 (App. Div. 1984) ("[A]n attorney's affidavit in support of disclosure containing bare unsubstantiated conclusory statements as to relevance is insufficient to establish a factual predicate for the disclosure of the medical records of a nonparty whose personal physical condition is not in issue.").

the information sought from the nonparty's medical records and the issue in dispute. For example, in *Monica W. v. Milevoi*,[20] several landlords were sued by children who formerly resided in their buildings. The suit alleged lead paint poisoning caused by certain developmental impairments. The landlords moved to disclose the nonparty siblings' confidential medical and non-medical information to show possible alternative causes for the developmental impairments, such as heredity and environment.[21] The court held that the defendants' discovery demand swept too broadly and that they failed to establish the relevancy of the requested information, explaining that:

> Defendants have presented no affidavit by any expert to demonstrate that the extent to which the adverse affects [sic] of lead exposure contributed to the mental and physical condition of the infant plaintiffs cannot be ascertained by reference to objective clinical criteria and expert testimony. Nor have defendants shown how the information sought to be elicited at an examination before trial of the adult plaintiff pertains to any disability or developmental impairment experienced by the infant plaintiffs.
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> . . . Defendants' intimation that genetic and other environmental factors may have contributed to the infant plaintiffs' impairment is speculative, at best . . . .[22]

The standard procedure for a showing of relevancy requires the moving party seeking disclosure of the nonparty records to demonstrate "both substantial need and the unavailability of a substantial equivalent."[23] In addition to relevancy, defendants are also charged with demonstrating that the information sought is "material and necessary to their defense of the action, and that the information could not be obtained from another source."[24] Because it is unclear what is needed to establish a sufficient showing of relevancy, courts have resolved to make such determinations on an ad hoc basis.[25]

B. Nonparty's Privacy Interests

Although the judicial system's overarching goal is to discover the truth, which requires assembling all the testimony and documents that bear on the facts of the case from parties and nonparties alike, nonparties maintain a strong interest in preserving the privacy of their medical and other confidential information. This interest in protecting the privacy of one's medical information

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20. 685 N.Y.S.2d 231 (App. Div. 1999).

21. *See id.* at 233.

22. *Id.* at 234.

23. Hack & Schilmoeller, *supra* note 13, at 126.

24. Gilroy v. McCarthy, 678 N.Y.S.2d 644, 645 (App. Div. 1998) (citations omitted).

25. *See* Hack & Schilmoeller, *supra* note 13, at 126. *See, e.g.*, Amente v. Newman, 653 So. 2d 1030 (Fla. 1995); Terre Haute Reg'l Hosp., Inc. v. Trueblood, 600 N.E.2d 1358 (Ind. 1992); State *ex rel.* Wilfong v. Schaeperkoetter, 933 S.W.2d 407 (Mo. 1996) (en banc).

is embodied in privilege law, which takes shape mostly in state statutes,[26] because there is no federal law governing the physician-patient privilege.[27] In creating a physician-patient privilege, state legislatures have struck a balance between society's interest in preserving the confidential relationship of a patient and physician and society's interest in ascertaining the truth in civil litigation.[28]

The physician-patient privilege is a central, underlying concern in cases that deal with defense attempts to disclose nonparty medical records. Physicians are sworn to respect the private information that patients reveal to them in confidence.[29] Privilege law respects the realm of privacy that surrounds the physician's relationship with his or her patient.

The physician-patient privilege serves several compelling interests. First, the privilege encourages patients to fully disclose their personal information to physicians in order to obtain appropriate treatment.[30] Second, the privilege "prevents public disclosure of socially stigmatizing diseases."[31] Third, the privilege, in some circumstances, insulates patients from self-incrimination.[32] Finally, the privilege allows the public to rely upon the expectation that

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26. *See* Poulin, *supra* note 15, at 1341-42; *see also In re* Fink, 876 F.2d 84, 85 (11th Cir. 1989) (explaining that in diversity actions, state law governs privileged materials requested in discovery and Florida courts applying Florida privilege law have consistently denied discovery of nonparty medical records); Brown v. St. Joseph County, No. S90-221, 1992 WL 80806, at *4 (N.D. Ind. Apr. 3, 1992) (referring to Indiana physician-patient privilege law); Dierickx v. Cottage Hosp. Corp., 393 N.W.2d 564, 566 (Mich. Ct. App. 1986) ("The purpose of [Michigan's] physician-patient privilege is to enable persons to secure medical aid without betrayal of confidence."); David L. Woodard, Comment, *Shielding the Plaintiff and Physician: The Prohibition of Ex Parte Contacts with a Plaintiff's Treating Physician*, 13 CAMPBELL L. REV. 233, 236-37 (1991) (explaining that North Carolina's physician-patient privilege law extends not only to testimonial information but observational knowledge by the physician during the course of examination).

27. *See* Woodard, *supra* note 26, at 237; *see also* ALDERMAN & KENNEDY, *supra* note 4, at 336 ("Many people are surprised to find that there is a federal law protecting the confidentiality of the videos they rent, but that there is no federal law protecting the confidentiality of our medical records."); Chari J. Young, Note, *Telemedicine: Patient Privacy Rights of Electronic Medical Records*, 66 UMKC L. REV. 921, 933 (1998) ("Can state residents turn to federal privacy protections of their medical records? No, there is not much protection of medical records at the federal level—legal protections for health information are generally found at the state level.").

28. *See* Joseph S. Goode, Note, *Perspectives on Patient Confidentiality in the Age of AIDS*, 44 SYRACUSE L. REV. 967, 982-83 (1993) ("The physician-patient privilege derives from the general duty of confidentiality and assures that the sacrosanct concept of confidentiality is protected when a patient's medical information is required in legal proceedings.").

29. *See* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 769 (15th ed. 1985) (Oath of Hippocrates) ("[W]hatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge as reckoning that all such should be kept secret . . . .").

30. *See* Woodard, *supra* note 26, at 237.

31. *Id.* at 237-38.

32. *See id.* at 238.

physicians will not reveal their personal confidences.[33]

Importantly, "[a] plaintiff does not waive his or her physician-patient privilege with respect to his or her own medical history merely by acting in a representative capacity for the purpose of litigation in which the plaintiff's infant . . . is the real party in interest."[34] For example, in *Herbst v. Bruhn*,[35] a mother filed a medical malpractice action on behalf of her infant son against several physicians and a hospital. The defendants sought disclosure of the mother's medical and family history records to show that the alleged mental impairment of her infant son was inherited.[36] The court held that the mother did not waive her physician-patient privilege regarding her own medical history by simply acting as a representative for her infant son.[37]

However, courts have generally recognized an exception to this rule when defendants seek the medical records of the nonparty mother for the time period when the fetus was in utero.[38] For example, in *Palay v. Superior Court of Los Angeles*,[39] a mother, a nonparty in the action, filed a medical malpractice action on behalf of her sixteen-month-old child. She sought a writ of mandate to compel the Superior Court of Los Angeles to vacate an order requiring production of her prenatal medical records.[40] The court held that the prenatal medical records of the nonparty were discoverable and not subject to the physician-patient privilege because the medical histories of the mother and child while the child was in utero were inextricably related.[41] Because discovery of medical records of a nonparty mother constituted a matter of first impression in California, the court in *Palay* looked to other states, specifically New York, for guidance. Importantly, allowing discovery of nonparty mothers' prenatal records based on the theory of "impossibility of severance" does not allow defendants unlimited access to disclosure of a mother's entire medical history.[42]

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33. *See id.* at 248.

34. Martin B. Adams, *Medical Malpractice Case Management in Discovery: A Defense Perspective*, 421 PRACTICING L. INST. 43, 89 (1991); *see also* Herbst v. Bruhn, 483 N.Y.S.2d 363 (App. Div. 1984).

35. 483 N.Y.S.2d 363 (App. Div. 1984).

36. *See id.* at 364.

37. *See id.* at 365.

38. *See id.*

39. 22 Cal. Rptr. 2d 839 (Ct. App. 1993).

40. *See id.*

41. *See id.* at 846. The court stated:

> The history of events during pregnancy set forth in Mother's prenatal records are a source of relevant information about the crucial period of the infant's gestation, and therefore a proper subject for inquiry. Defendants have no other means by which to obtain this information. Therefore, . . . when we weigh Mother's privacy rights against defendants' legitimate interest in preparing their defense, we find that defendants' interest must prevail.

Id. at 848.

42. *In re* N.Y. County DES Litig., 570 N.Y.S.2d 804, 805 (App. Div. 1991) ("[A] mother's

II. POTENTIAL NEGATIVE RAMIFICATIONS OF DISCLOSURE

A. Discrimination

The cost of accommodating the defense's need for nonparty medical records in order to support alternative causation theories can be overwhelming to a nonparty in many respects.[43] There are three critical interests of the nonparty that may be sacrificed on the altar of discovery. They are a nonparty's 1) social and economic well-being, 2) psychological stability, and 3) autonomy.[44]

First, an important interest for a nonparty is the protection of his social and economic well-being.[45] A person's livelihood can depend on how much of his or her sensitive and personal information is accessible to others.[46] For instance, disclosure of private medical information may cause a profound wave of adverse social and economic consequences, including the loss of employment opportunities and insurability.[47]

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medical records pertaining to the period when the infant was in utero are discoverable on the ground that there can be no severance of the infant's prenatal history from the mother's medical history."); *see also* Scharlack v. Richmond Mem'l Hosp., 477 N.Y.S.2d 184, 187 (App. Div. 1984) (explaining that as the nominal representative of the infant plaintiff in a medical malpractice action, the nonparty mother "can be deemed to have waived the physician-patient privilege only with respect to the medical history and records pertaining to the period when the infant plaintiff was in utero, during which time there could be no severance of the infant's prenatal history from his mother's medical history"); Burgos v. Flower & Fifth Ave. Hosp., 437 N.Y.S.2d 218, 219 (Spec. Term1980).

> During [pregnancy] there could be no severance of a mother from child. Neither can we sever the infant's prenatal history from the mother's medical history during that period. As the infant's privilege has been waived we cannot allow the mother's privilege to be interposed to the defendants' right to all of the infant's medical history.

Id.

43. *See* Roger E. Harris, Note, *The Need to Know Versus the Right to Know: Privacy of Patient Medical Data in an Information-Based Society*, 30 SUFFOLK U. L. REV. 1183, 1185 (1997) ("[M]odern medical records not only contain diagnoses and treatment related data, but also contain personal information such as employment history, financial history, lifestyle choices, and HIV status.").

44. *See* Powers, *supra* note 6, at 357-59 (noting heightened concern for privacy when genetic information is involved).

45. *See id.* at 357.

46. *See id.*

47. *See id.*; *see also* Samborn, *supra* note 1, at 29 (suggesting that defendants, many of whom are insurance companies, might use the nonparties' medical and other records against them at a later date to deny coverage for a pre-existing condition); Natalie Anne Stepanuk, Comment, *Genetic Information and Third Party Access to Information: New Jersey's Pioneering Legislation as a Model for Federal Privacy Protection of Genetic Information*, 47 CATH. U. L. REV. 1105, 1117-20 (1998) (discussing the potential harm that may result from the disclosure of an individual's genetic

A second valuable interest for the nonparty is psychological stability. The dissemination of highly personal information to others may cause severe emotional distress if the nonparty senses a loss of dignity and respect from others.[48] Controlling the release of intimate information about oneself is central to an individual's self-concept and function in society, especially given the risk that others will wrongly perceive that individual as "lacking in intellectual abilities . . . [being] emotionally unstable, [and] pos[ing] an added risk to the physical safety of others."[49]

A third interest that a nonparty may have in limiting others' access to private information is autonomy, an individual's ability to make and act on his or her own choices.[50] For instance, with the amount of genetic information that may be found in medical records, an individual may be deterred from pursuing a change in employment for fear of an inability to obtain insurance coverage in the future.[51] Thus, disclosure of highly sensitive and personal information can severely impinge a person's life choices.

B. Intimidation

Jennifer Wriggins, a law professor at the University of Maine, states that defendants often use disclosure of nonparties' medical and other personal records to intimidate nonparties who fear the release of embarrassing medical information.[52] For instance, compelling privacy interests are at stake when dealing with the highly sensitive information that is obtainable from genetic tests. These tests can reveal current medical conditions or the risk of developing future diseases. Access to an individual's genetic information may prompt others to overreact or unjustifiably alter their interaction with the individual, whether or not the genetic information accurately predicts disease or physical or mental dysfunction.[53] In many instances, this type of reaction by others spells social stigma for the individual or even discrimination in the areas of employment and insurance.[54]

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information); Young, *supra* note 27, at 928-29 (explaining that once a case is litigated and then becomes public record, the inclusion of a nonparty's sensitive information may result in discrimination in the employment context, possibly ruining a private citizen's career or negatively affecting her ability to even secure employment).

48. *See* Powers, *supra* note 6, at 358.

49. *Id.*

50. *See id.* at 359; *see also* Young, *supra* note 27, at 929 ("Health care information can influence decisions about an individual's access to credit, admission to academic institutions, and his or her ability to secure employment and insurance. . . . [I]mproper disclosure [of this information] can deny an individual access to these basic necessities of life, and can threaten . . . personal and financial well-being.").

51. *See* Powers, *supra* note 6, at 359.

52. *See* Samborn, *supra* note 1, at 29.

53. *See* Powers, *supra* note 6, at 357-58.

54. *See id.* at 357-58.

Intimidation can cause profound psychological harm to an individual who fears the disclosure of highly sensitive information and may even destabilize his or her very self-concept and capacity for functioning in society.[55] Therefore, control over one's personal information is fundamentally important to individuals. Control over such information gives people confidence and assurance that they can avoid the shame and embarrassment of public disclosure of highly intimate and personal information.[56] Control over this information also gives people the freedom "to pursue their education, careers, friendships, romances, and medical care without the oversight, interference, or other unwelcome involvement of others."[57] Thus, confidentiality of medical information, especially genetic information, is of special importance when the disclosure of highly intimate information, such as one's predisposition to a certain disease or even one's sexual preference, can lead to unwelcome responses by others.[58]

C. "Chilling Effect" on Patient Communications

In addition to the social, economic, and psychological harms that may follow disclosure of a nonparty's private information, such disclosure can also cause a "chilling effect" upon the communication between patients and their physicians.[59] For example, the physician-patient privilege under Indiana law, "has been justified on the basis that its recognition encourages free communications and frank disclosure between patient and physician which, in turn, provide assistance in proper diagnosis and appropriate treatment."[60] Given the personal nature of

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55. *See id.*

> [A]lthough there is no inherent reason why someone should feel ashamed or embarrassed by the fact that he or she has a genetic risk of developing an inheritable psychiatric condition, others falsely may conclude that the individual is lacking in intellectual abilities, is emotionally unstable, or poses an added risk to the physical safety of others.

Id. at 358.

56. *See* David Orentlicher, *Genetic Privacy in the Patient-Physician Relationship*, *in* GENETIC SECRETS, *supra* note 6, at 77, 79.

57. *Id.*

58. *See id.* at 79-80. "Disclosure of medical information may also lead to stigmatization and discrimination. People with HIV infection may be shunned by family, friends, and others, evicted from housing, fired from employment, and denied insurance. Even when reactions are less extreme, people frequently are treated differently . . . ." *Id.* at 79.

59. *See* Harris, *supra* note 43, at 1197-98 ("[T]his chilling effect neutralizes the health benefits associated with medical information contained in the primary information sector and available to those providing direct patient care.").

60. Canfield v. Sandock, 563 N.E.2d 526, 529 (Ind. 1990) (quoting Collins v. Bair, 268 N.E.2d 95, 98 (Ind. 1971) (noting that if patients anticipate the possibility of disclosure of their private information, they may be reluctant, even inhibited, from sharing pertinent information of an embarrassing or otherwise confidential nature for fear of being publicly exposed)).

the nonparty's confidential medical records, even the threat of disclosure to the court via in camera inspection may discourage open and frank communication between patients and physicians and other care providers.[61]

The critical question that lies at the heart of the "chilling effect" on patient communications is whether people will in fact sacrifice their well-being if there is a lack of assurance of medical information confidentiality. One likely response is that many people fear ostracizism more than illness. Immediate concerns about gaining better health may bend to the fear of being shunned by society and denied opportunities to pursue personal and professional endeavors.[62] Thus, the salience of preserving medical information confidentiality is underscored by the destabilizing fear that many people experience at the threat of disclosure of intimate personal information.

III. PROCEDURAL SAFEGUARD MEASURES OF NONPARTY MEDICAL RECORDS

A. Redaction of Names and Other Identifying Information

Many courts in the United States have been willing to allow the discovery of nonparty medical records if the defense (or moving party) establishes the records' relevancy and sufficient safeguards to protect nonparty's rights.[63] For example, in *Terre Haute Regional Hospital, Inc. v. Trueblood*,[64] a patient brought suit against a hospital for negligence after it reappointed a supervising surgeon who allegedly performed two unnecessary surgeries. The patient sought disclosure of nonparty medical records from the hospital in order to show a pattern of negligent behavior by the performing surgeon.[65] The Indiana Supreme Court held that redaction of the names and other identifying information from the nonparties' medical records was an adequate safeguard to protect the privacy interests of the nonparty patient.[66]

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61. *See* Poulin, *supra* note 15, at 1405; *see also* Young, *supra* note 27, at 930 ("When patients cannot be sure that the confidentiality of their medical records will not be maintained, they are less likely to be completely open and frank with a health care provider. This could result in the improper diagnosis and treatment of important health conditions . . . .").

62. *See* Orentlicher, *supra* note 56, at 82 ("Just as people dying with cancer may choose a better quality of life over a longer life, so may other people accept diminished health to preserve their privacy.").

63. *See* Hack & Schilmoeller, *supra* note 13, at 123 ("In 1996, the Supreme Court of Missouri joined other states allowing the discovery of a non-party's medical records if the movant established the records' relevancy to the issues involved in the case and provision was made for sufficient safeguards to protect the rights of non-parties as far as possible."); *see also* Lewin v. Jackson, 492 P.2d 406, 408 (Ariz. 1972); Balt. City Dep't of Soc. Servs. v. Stein, 612 A.2d 880, 891 (Md. 1992); State *ex rel.* Wilfong v. Schaeperkoetter, 933 S.W.2d 407 (Mo. 1996) (en banc); Beckwith v. Beckwith, 355 A.2d 537, 545 (D.C. 1976).

64. 600 N.E.2d 1358 (Ind. 1992).

65. *See id.* at 1359.

66. *See id.* at 1362.

In light of the ever-increasing advances in science and technology, defendants are casting their discovery nets wider among parties and nonparties alike in the hopes of reeling in enough information to construct alternative theories of causation, like genetics, environment, and influences in society, to explain the alleged harm caused to plaintiffs.[67] These advances have forced courts to conduct additional hearings and in camera inspections of privileged records to determine their relevancy, with the trial judge redacting the names and other identifying information from the records to preserve the privacy of the nonparty before the records are disclosed to the attorneys in the case.[68]

B. In Camera Inspection

Courts have traditionally used in camera inspection to protect the privacy interests of a nonparty.[69] For example, in *Palay v. Superior Court of Los Angeles*,[70] a mother filed a medical malpractice suit on behalf of her sixteen-month-old child against physicians for birth defects allegedly caused by their negligence. The mother sought a writ of mandate to compel the Superior Court of Los Angeles to vacate the defense's order requiring production of her medical records pertaining to prenatal care.[71] The court found that in camera review of the mother's medical records by her counsel and the trial judge accommodated the nonparty mother's confidentiality interests.[72]

C. Protective Order

Courts use protective orders as another tool to safeguard the privacy interests of nonparties who fear disclosure of the personal information contained in their medical records.[73] Protective orders provide safe harbor for nonparties whose private information is sought through discovery attempts that may be merely "fishing expeditions."[74] A protective order is "a uniquely effective management tool to prevent the unbridled dissemination of litigation information when that

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67. *See* Hack & Schilmoeller, *supra* note 13, at 125.

68. *See id.*

69. *See id.* During in camera inspection, the trial judge reviews the nonparty medical and other private information in the privacy of his or her chambers without counsel present to rule on the relevancy and admissibility of such information. *See id.*

70. 22 Cal. Rptr. 2d 839 (Ct. App. 1993).

71. *See id.* at 840.

72. *See id.* at 849.

73. Protective order is defined as "[a] court order prohibiting or restricting a party from engaging in a legal procedure (esp. discovery) that unduly annoys or burdens the opposing party or a third-party witness." BLACK'S LAW DICTIONARY 1239 (7th ed. 1999).

74. Penelope Potter Palumbo, Note, *Balancing Competing Discovery Interests in the Context of the Attorney-Client Relationship: A Trilemma*, 56 S. CAL. L. REV. 1115, 1135 (1983) (citations omitted) ("The party requesting discovery must show that the information sought is necessary and material. While the party seeking discovery of confidential information may prevail, the party compelled to disclose is often entitled to a protective order to safeguard confidential information.").

dissemination might be abusive and might interfere with the court's ability to resolve the case before it promptly."[75] Under Federal Rule of Civil Procedure 26(c), which governs protective orders, courts may, "[u]pon motion by a party or by the person from whom discovery is sought, . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[76]

Upon granting a protective order, the court is obliged to define the terms of the release of confidential information with great precision, considering exactly who should have access to the data and for what purpose.[77] Essentially, a well-crafted protective order that "limits access to and the use and dissemination of the information is the most effective means of preserving an individual's privacy . . . while making [the information] available for legitimate litigation purposes."[78]

One significant fear that protective orders address is that, "[u]nlike tangible property, which can change hands without necessarily diminishing in value, information can never again be in the exclusive possession of its original owner once it is disclosed."[79] Protective orders are ideal mechanisms for minimizing the negative ramifications of modern discovery without eviscerating the value of the process.[80] For example, if trial judges could not exercise their discretion in issuing protective orders, the courts' only means of maintaining the privacy of the nonparty might be to deny discovery altogether, which would compromise the judicial process. Thus, the value of the protective order rests in its insulation of nonparties from the damaging consequences of discovery and continued facilitation of the discovery process.

IV. PROPERTY RIGHTS AS A POTENTIAL SAFEGUARD AGAINST DISCLOSURE

In the realm of informational privacy,[81] some scholars suggest that property

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75. Miller, *supra* note 3, at 463-64.

76. FED. R. CIV. P. 26(c). Types of protective measures include orders

> (1) that the disclosure or discovery not be had;
>
> (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking the discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters.

Id.

77. *See* Miller, *supra* note 3, at 495.

78. *Id.* at 476.

79. *Id.* at 475.

80. *See id.* at 476; *see also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984) (noting that litigants can abuse today's liberal discovery rules by "obtain[ing]—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy").

81. *See* Mark A. Rothstein, *Genetic Secrets: A Policy Framework, in* GENETIC SECRETS,

rights are the best means for safeguarding an individual's privacy interest and serving the courts' truth-finding need.[82] Information, such as one's genetic code, sexual preference, credit history, and income, is deemed property.[83] The question posed to courts is who owns the property rights to such information.[84]

The field of law and economics offers valuable insight into how some courts might answer the question of ownership of information. Efficiency lies at the heart of a property rights approach to analyzing disclosure of nonparty medical and other information.[85] For example, a proponent of the law and economics approach may argue that as more accurate information is made available and is cheaper to obtain, "more beneficial transactions will occur. In the market context, if disclosure of information is inhibited, the decision to transact will be made either with second-rate information or with information obtained at a higher cost."[86] When applying this argument in the context of discovery of nonparty information, defendants would argue that if disclosure of accurate information pertaining to the issue in dispute is inhibited, there will be an efficiency loss due to the foreclosure of alternative theories of causation necessary to adequately represent their client.

Moreover, Paul M. Schwartz and Joel R. Reidenberg, professors of law at Brooklyn Law School and Fordham Law School respectively, conducted polls to elicit the views of American citizens toward protection of personal information.[87] These polls indicate that an overwhelming majority of Americans feel that their privacy is vulnerable and that a disclosure of private information to others is "conditioned on an implied, if not explicit, pledge to use the data only for that purpose."[88]

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supra note 6, at 451, 453 ("The essence of informational privacy is controlling access to personal information."); *see also* Orentlicher, *supra* note 56, at 79.

> Informational privacy is not only about shielding facts that might be viewed negatively by others, it is also about shielding facts that are generally viewed positively by others. Most fundamentally, informational privacy is valuable regardless of whether the information it shields is viewed positively or negatively by others. Informational privacy allows people to pursue their education, careers, friendships, romances, and medical care without the oversight, interference, or other unwelcome involvement of others. By controlling personal information, individuals can control the extent to which other people can participate in their lives.

Id.

82. *See* Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2382 (1996).

83. *See id.* at 2383-84.

84. *See id.* at 2384.

85. *See id.* at 2385.

86. *Id.*

87. *See* PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION 155, 312-13 (1996).

88. Pamela Samuelson, *A New King of Privacy? Regulating Uses of Personal Data in the Global Information Economy*, 87 CAL. L. REV. 751, 768 (1999) (reviewing SCHWARTZ &

In response to concerns about the security of private information, economists have proposed granting individuals property rights in their personal information as a way to safeguard privacy interests.[89] Economists Carl Shapiro and Hal Varian understand concerns about privacy as "an externality problem: 'I may be adversely affected by the way people use information about me and there may be no way that I can easily convey my preferences to these parties.'"[90] Shapiro and Varian suggest that "[i]f individuals had property rights in information about themselves, they could convey their preferences to the market[,]" and this would give people some control, which they currently lack, over the disclosure of personal information.[91]

However, acknowledging property rights in medical information so as to protect the privacy interests of a nonparty has raised debate in the legal community.[92] Although little case law exists addressing this topic, *Moore v. Regents of the University of California*[93] prompted hot debate from the courtroom to the classroom. In *Moore*, medical researchers at the University of California at Los Angeles extracted spleen cells from Moore and later patented those cells for use in leukemia research.[94] Moore sued the university asserting a property right in his extracted cells in order to obtain a share of the potential profits from the patented cell line. The court held that Moore did not have property rights in his biological materials that were collected and used as part of the medical research and treatment.[95]

Protecting privacy of medical information through the creation of an ownership interest raises several problems in the context of discovery of nonparty medical information, including administrative burdens and, ironically, a surrender of confidentiality.[96] For instance, if property rights in medical information were recognized, there would be licensing and royalty implications if individuals were able to demand payment for the use of their private medical data.[97] If individuals had unlimited property rights in information about

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REIDENBERG, *supra* note 87; PETER P. SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE (1998)).

89. *See id.* at 770-71.

90. *Id.* at 770.

91. *Id.* at 770-71.

92. *See* David V. Foster & Erica Rose, *Protecting Medical Information: Complicated Legislative Challenges*, 8 EXPERIENCE 20, 47 (1998) ("A contentious issue included in some recent legislation is the creation of property rights in . . . medical information as a mechanism to protect privacy of medical information.").

93. 793 P.2d 479 (Cal. 1990).

94. *See id.* at 480-82.

95. *See id.* at 497.

96. *See* Foster & Rose, *supra* note 92, at 23.

97. *See id.*; *see also* Samuelson, *supra* note 88, at 772-73 ("There are also strong policy reasons for recognizing some spaces within which information should not be commodified. . . . First Amendment civil liberty and copyright policy values that favor certain kinds of free flows of information should be maintained . . . .").

themselves, they may become more resistant to defense attempts to discover such information, thereby impeding the truth-finding process.[98] Such action would arguably lead to impracticable administrative burdens on the courts in light of the increasing trend of requesting private medical and other records of nonparties in civil actions.

Furthermore, if nonparties attempt to exert property rights over their medical information, they would be forced to surrender their confidentiality.[99] For example, in order to track the use or disposition of particular medical information, the information would have to remain easily identifiable.[100] Clearly, it is difficult to reconcile this approach of vesting property rights in one's medical information to protect privacy with the inevitable loss of privacy that results from such an approach.[101]

The law and economics approach does not suggest that all limits on disclosure of private information are inefficient.[102] For instance, a nonparty's interest in avoiding embarrassment or some future disturbance from disclosure of personal information counts in the utility calculus that occurs under the law and economics approach.[103] Thus, limiting disclosure would be warranted whenever the nonparty's pure privacy interest outweighs the value of disclosure.[104] Moreover, an economic defense can be made for preserving personal privacy because people will likely be more willing to engage in activities that they would not have in the absence of anonymity if they feel secure that their private information will remain private.[105]

V. CONSTITUTIONALLY-PROTECTED PRIVACY RIGHT AS A POTENTIAL SAFEGUARD AGAINST DISCLOSURE

Aside from the law and economics perspective, a constitutionally-recognized right to privacy can also provide valuable insight into how nonparties may preserve their privacy interests. Although the word "privacy" is not found in the U.S. Constitution, privacy is deemed one of the most sacred and fundamental rights.[106] Notions of privacy can embody various forms, including individual autonomy, individual expectation of privacy as against third-party interests, and informational privacy.[107] Informational privacy lies at the heart of the issue of disclosure of nonparty medical and other private information. Professor Alan Westin, in his book *Privacy and Freedom*, defines privacy as "the claim of

98. *See* Samuelson, *supra* note 88, at 773.
99. *See* Foster & Rose, *supra* note 92, at 23.
100. *See id.*
101. *See id.*
102. *See* Murphy, *supra* note 82, at 2385-86.
103. *See id.* at 2386.
104. *See id.* at 2387.
105. *See id.* at 2415-16.
106. *See* ALDERMAN & KENNEDY, *supra* note 4, at xiii.
107. *See* Harris, *supra* note 43, at 1202.

individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[108]

Informational privacy is generally construed as a liberty interest.[109] The Fifth and Fourteenth Amendments' due process clauses protect liberty interests from unwarranted governmental intrusion.[110] The origin of U.S. Supreme Court jurisprudence on the right to privacy is *Griswold v. Connecticut*,[111] where the Court invalidated a state statute that criminalized the use of contraceptives.[112] The Court reached its decision by recognizing that certain constitutional "guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give [the guarantees] life and substance," and that strongly imply a right to privacy.[113]

While the Court in *Griswold* held there to be a constitutionally-protected right to privacy, the Court, later in the landmark case of *Roe v. Wade*,[114] explicitly located the right to privacy in the due process clauses of the Fifth and Fourteenth Amendments.[115] Furthermore, the Court in *Roe v. Wade* limited the right of privacy to "fundamental" rights, such as marriage, procreation, contraception, family relations, child rearing and education.[116]

Although *Griswold* and *Roe* involved issues concerning the marital relationship and a woman's intimate decision-making power, respectively, the broad rationales of each decision concerned aspects of intimacy in interpersonal relations, communications and individual autonomy.[117] These same aspects bear on the issue of disclosure of nonparty medical information in that informational privacy involves an individual's ability to control private information. Recognizing the fundamental nature of confidentiality of medical information, California has amended its constitution to include among the inalienable rights of all people the right to pursue and obtain privacy.[118]

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108. ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1970).

109. *See* Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 135 (1991).

110. *See id.*

111. 381 U.S. 479 (1965) (invalidating a state law that prohibited the use and dissemination of information about the use of contraceptives).

112. *See id.* at 485-86; *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 692-99 (1977) (invalidating a state-wide ban on the sale of nonmedical contraceptives to minors); Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972) (emphasizing the personal and individual right to privacy to invalidate a statute that made contraceptives less available to unmarried couples).

113. *Griswold*, 381 U.S. at 484.

114. 410 U.S. 113 (1973).

115. *See id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . as we feel it is, or, . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

116. *See id.* at 152-53.

117. *See* Palay v. Superior Court of L.A., 22 Cal. Rptr. 2d 839, 847 (Ct. App. 1993).

118. "All people are by nature free and independent and have inalienable rights. Among these

Although the U.S. Constitution has not been amended to protect a right to informational privacy, the U.S. Supreme Court did address the issue of whether a state's information collection and data bank storage scheme violated individual privacy interests in *Whalen v. Roe*.[119] The Court in *Whalen* held, on the record before it, that the state's recording system did not violate any right or liberty interest protected by the due process clause of the Fourteenth Amendment and was therefore constitutionally valid.[120] Importantly, the Court reserved for future deliberation the question of whether comparable statutes lacking the privacy protections in New York's data collection scheme would violate privacy interests protected by the due process clause of the Fourteenth Amendment.[121] The *Whalen* Court recognized that the "privacy" safeguarded by the due process clause includes two distinct interests: freedom from disclosure of personal information and independence in making certain kinds of fundamental decisions.[122]

Subsequent to the *Whalen* decision, several circuit courts have disagreed as to whether the Court's articulation of a right to privacy encompassed a general right to nondisclosure of personal information.[123] For example, the Third and Fifth Circuits, among others, have agreed that *Whalen* identified a constitutionally protected interest for which a balancing test affords the most appropriate level of judicial review.[124] However, the Sixth Circuit has narrowly construed the language of the Court in *Whalen*.[125] In *J.P. v. DeSanti*,[126] the Sixth Circuit held that, although the United States Supreme Court recognizes a right to privacy, this right does not include a general right to confidentiality.[127]

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are . . . pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1; *see also In re* Lifschutz, 467 P.2d 557 (Cal. 1970); *Palay*, 22 Cal. Rptr. 2d at 847.

> [T]he California Supreme Court held [in *In re* Lifschutz] that the confidentiality of the psychotherapeutic session falls within one such zone [of privacy]. Since that decision, the California Constitution has been amended to include among the inalienable rights of all people the right to pursue and obtain privacy . . . .

Jones v. Superior Court, 174 Cal. Rptr. 148, 157 (Cal. Ct. App. 1981). "The drive behind the constitutional amendment was an acknowledgment that '[f]undamental to our privacy is the ability to control circulation of information.'" *Id.* (quoting White v. Davis, 533 P.2d 222, 234 (Cal. 1975) (citing to statements made about the constitutional amendment)).

119. 429 U.S. 589 (1977).

120. *See id.* at 606.

121. *See id.* at 605-06.

122. *See id.* at 599-600 (The autonomy or decision-making strand of the Court's privacy formulation resembles the right to privacy discussions from *Griswold* and *Roe v. Wade*.).

123. *See* Chlapowski, *supra* note 109, at 146-49.

124. *See id.* at 147-48 (citing United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978)).

125. *See id.* at 148.

126. 653 F.2d 1080 (6th Cir. 1981).

127. *See id.* at 1090; *see also* McElrath V. Califano, 615 F.2d 434, 441 (7th Cir. 1980); United States v. Choate, 576 F.2d 165, 181 (9th Cir. 1976), *cert. denied*, 439 U.S. 953 (1978).

Despite the split, the majority of cases have interpreted *Whalen* as "supporting the proposition that the right to privacy includes the right to informational privacy."[128]

VI. RECOMMENDATIONS

Disclosure of nonparty medical and other personal information in civil proceedings raises provocative considerations of two compelling and competing interests: defendants' due process concerns and nonparties' privacy interests in medical information confidentiality. Courts must engage in the delicate balancing of the competing interests.[129] Factors that courts should consider in determining whether disclosure of a nonparty's medical information is justified include: 1) the type of record requested; 2) the information the record does or does not contain; 3) the potential for harm in any subsequent nonconsensual disclosure; 4) the injury from disclosure to the relationship in which the record was generated; 5) the adequacy of safeguards to prevent unauthorized disclosure; 6) the degree of need for access; and 7) whether a recognizable public interest exists militating in favor of access.[130] In light of the potential for discrimination in employment and insurance coverage,[131] intimidation,[132] and the "chilling effect" on patient communications, courts should take into account the potential negative ramifications that may result from disclosure of sensitive personal information.[133]

Although establishing property rights as a mechanism to protect privacy of medical information seems advantageous, there are several problems in the creation of ownership interests in medical information. These problems include administrative burdens and a surrender of confidentiality.[134] For example, if property rights in medical information were recognized, and individuals were able to demand payment for the use of their private data, there would be problems of holdouts from licensing and royalty implications.[135] Such action would arguably lead to impracticable administrative burdens on the courts. Moreover, if a nonparty attempted to exert a property right over his or her medical information, the nonparty ironically would be forced to relinquish his or

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128. Chlapowski, *supra* note 109, at 149.

129. *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3rd Cir. 1980) (holding that a minimal intrusion into the privacy surrounding employees' medical records was justified and the employer could not give a blanket refusal to the National Institute for Occupational Safety and Health in its attempts to disclose such records, but noting that since there might be highly sensitive information contained in particular files, the Institute was required to give prior notice to employees and to allow them to raise personal claims of privacy).

130. *See id.*

131. *See* Powers, *supra* note 6, at 357.

132. *See* Samborn, *supra* note 1, at 29.

133. *See* Harris, *supra* note 43, at 1197-98.

134. *See* Foster & Rose, *supra* note 92, at 23.

135. *See id.*

her confidentiality.[136] For instance, in order to track the use and disposition of certain medical data, the information would have to remain easily identifiable.[137] Thus, it would be virtually impossible to reconcile this approach of establishing property rights in one's medical information to protect privacy when such action would lead inevitably to a loss of privacy.[138]

A constitutionally recognized right to privacy provides more compelling insight into how the privacy interests of nonparties may be preserved. The landmark cases of *Griswold v. Connecticut*[139] and *Roe v. Wade*[140] are instructive on the issue of disclosure of nonparty medical information. The Court's broad rationales concerned similar aspects of intimacy in interpersonal relations, communications, and individual autonomy.[141] Moreover, they involve an individual's ability to control his or her private information, which is threatened by defense attempts to disclose that information in discovery proceedings.

Even though some uncertainty may exist regarding the protection afforded to a nonparty's medical information under a constitutional rights approach, such an approach coupled with traditional safeguards, such as protective orders and in camera review, offers the most protection to a nonparty's interest in medical information confidentiality. The seeds for a constitutional right to informational privacy have already been planted in U.S. Supreme Court jurisprudence by *Griswold v. Connecticut*,[142] *Roe v. Wade*,[143] and *Whalen v. Roe*.[144] In each case, the Supreme Court rested its decisions on the notion of individual autonomy,[145] which is closely related to an individual's ability to control his or her private information.

With a constitutional right to informational privacy, a nonparty may feel more secure in the preservation of privacy of his or her medical information because a defendant attempting to disclose the private information of a nonparty will have to overcome a high level of scrutiny. That is, a defendant will have to show that the information sought serves a compelling interest and that there are no less restrictive means to accomplish that interest.[146]

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136. *See id.*

137. *See id.*

138. *See id.*

139. 381 U.S. 479 (1965).

140. 410 U.S. 113 (1973).

141. *See* Palay v. Superior Court of L.A., 22 Cal. Rptr. 2d 839, 847 (Ct. App. 1993).

142. 381 U.S. at 479.

143. 410 U.S. at 113.

144. 429 U.S. 589 (1977).

145. *See Palay*, 22 Cal. Rptr. 2d at 847.

146. This high level of scrutiny is also encompassed in Federal Rule of Civil Procedure 26 governing disclosure, which states that:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule . . . only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

In conjunction with a constitutionally recognized right to informational privacy, courts should adopt a balancing approach that applies the various factors enunciated in *United States v. Westinghouse Electric Corp.*[147] on an ad hoc basis to determine whether nonparty medical records should be disclosed. A balancing approach would allow courts to determine whether "disclosure would cause the harm addressed by the privilege or whether the goals of the privilege can be served without frustrating litigation fairness."[148] In light of the compelling interests on both sides—the defense interests in due process on the one hand, and the nonparty's interest in protecting the privacy of his or her medical information on the other—a middle ground seems to serve both interests. Under a balancing approach, a court "can factor in the parties' intransigence and the availability of a solution that provides the essential information with the least loss of privacy."[149]

Moreover, courts employing the balancing approach may also utilize the traditional methods of safeguarding the privacy interests of a nonparty: redaction of names and other identifying information, in camera review, and protective orders. The value of a constitutional right to informational privacy, protective orders and in camera review rests upon their usefulness in insulating nonparties from the potential damaging consequences of discovery while still facilitating the truth-finding process. Within the sanctity of the judge's chambers, there is an assurance of protection of the privacy interests of the nonparty as well as the due process interests of the defense given that the court is the only neutral participant in the litigation proceedings.[150]

Trial judges may exercise their discretion in each case by weighing the relative threats to privacy against the relative threats to due process of the defendant. Judges may also draft with careful precision the terms of release of confidential information, identifying exactly who should have access to the data and for what purpose.[151] In addition to in camera proceedings and protective orders, courts should also exercise their injunctive powers to prevent the use of

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FED. R. CIV. P. 26(b)(3).

147. 638 F.2d 570, 578 (3d Cir. 1980) (Factors include "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 safeguards to prevent unauthorized disclosure, the degree of need for access, and whether" any recognizable public interest exists militating in favor of access.).

148. Poulin, *supra* note 15, at 1370.

149. *Id.*

150. *See* Miller, *supra* note 3, at 501.

> Courts should continue to use their discretion to protect parties' legitimate litigation, privacy, and property interest, and the parties should retain their rights to negotiate protective and sealing agreements voluntarily, subject to judicial veto in the exceptional case. This practice seems wise [since], . . . on the whole, judges appear to have exercised this authority appropriately in the past . . . .

Id.

151. *See id.* at 495.

any confidential information beyond litigation if nonparties still feel uneasy about the disclosure of their personal information.[152] Courts may further protect confidential information by ordering the omission of details from the published opinion.[153]

CONCLUSION

Thus, under the proposed approach, the next time a parent decides to file a civil suit on behalf of his or her child, the parent may rest more soundly knowing that his or her personal, intimate information will not be so easily swept up in the discovery net cast by defendants.[154] Yet, defendants may still take full advantage of the liberal rules governing disclosure within the constitutional bounds of informational privacy in order to fully and fairly represent their clients. Although these proposals for safeguarding the privacy interests of nonparties may not address all of the problems that can arise in discovery proceedings, they may constitute a substantial step toward adequately serving the privacy interests of nonparties while facilitating the truth-finding process.

152. *See* Palumbo, *supra* note 74, at 1138-39.

153. *See id.* at 1137.

154. *See id.* at 1139.