Law Enforcement, Reproductive Health Information, and The HIPAA Privacy Rule

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Abstract: On April 26, 2024, the federal Department of Health and Human Services (HHS) promulgated a final rule (Final Rule) amending the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule. The Final Rule prohibits HIPAA covered entities and business associates from using and disclosing protected health information (PHI) to conduct criminal, civil, or administrative investigations into an individual for the mere act of seeking, obtaining, providing, or facilitating lawful reproductive health care. The Final Rule also prohibits HIPAA covered entities and business associates from using and disclosing PHI to impose criminal, civil, and administrative liability on any individual, or to identify any individual, for the same purposes. The Final Rule refers to each of these three prohibitions as a purpose-based use and disclosure prohibition.

Extraordinarily controversial, the Final Rule has been challenged on a number of administrative law grounds. According to its challengers, the Final Rule exceeds HHS's authority under the HIPAA statute, contravenes the HIPAA statute, and is arbitrary and capricious in violation of the Administrative Procedure Act (APA). This Article

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offers an additional, substantive criticism of the Final Rule that runs in the opposite direction. That is, the wording of the Final Rule suggests that the purpose-based use and disclosure prohibitions only apply when a covered entity or business associate has received a request for PHI, such as a request for PHI from law enforcement. If this suggestion is true, the Final Rule ignores the fact that many health industry disclosures of reproductive health information occur without a prior request for PHI. Indeed, many health care providers volunteer (that is, they initiate disclosures of) reproductive health information to alert law enforcement to the provision or receipt of health care that the provider (frequently incorrectly) believes evidences a crime. This Article argues that the Final Rule misses the mark by conditioning the confidentiality of reproductive health information on a covered entity's or business associate's receipt of a request for PHI. Allowing covered entities and business associates to volunteer PHI to law enforcement without prior patient authorization undermines the trust necessary for the proper functioning of provider-patient relationships, discourages individuals from seeking reproductive health care, and jeopardizes the health, safety, and welfare of individuals who need reproductive health care. To correct the Final Rule, this Article re-writes the purpose-based use and disclosure prohibitions so they apply to all uses and disclosures of PHI by covered entities and business associates that involve the: (i) conduct of a criminal, civil, or administrative investigation into any individual for the mere act of seeking, obtaining, providing, or facilitating lawful reproductive health care; (ii) imposition of criminal, civil, or administrative liability on any individual for the same mere acts; and (iii) identification of any individual involved in the same mere acts. If adopted by HHS, these re-writes will improve the confidentiality of reproductive health information, restore patient trust in the health care system, and protect the health, safety, and welfare of individuals needing reproductive health care.

Addendum: On June 18, 2025, after this Article went to press, a federal district court issued an order vacating most of the Final Rule. The proposals set forth in this Article remain helpful to the extent HHS successfully appeals this order or similar reproductive health privacy rules are promulgated in the future.

I. INTRODUCTION

Consider an individual who is in the second trimester of pregnancy. While staying at a motel with their[1] partner during the Thanksgiving holiday, the individual goes into spontaneous labor, delivering a stillborn fetus.[2] The

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[1] Individuals who are capable of becoming pregnant include women, transgender males, intersex persons, non-binary persons, and other persons who have a uterus. *See, e.g.*, Amber Leventry, *Here's What I Want People to Know About Trans and Nonbinary Pregnancies*, PARENTS (Oct. 15, 2023), https://www.parents.com/pregnancy/my-body/pregnancy-health/trans-and-non-binary-people-can-be-pregnant-too [https://perma.cc/L6AC-4HRG] ("When talking about reproduction, reproductive rights, and gynecological health, transgender people deserve the same inclusive and affirming care as cisgender folks. That starts with changing the language around transgender pregnancy."). To this end, this Article uses gender-neutral words and phrases as much as possible to honor all individuals who are capable of becoming pregnant.

[2] *See* Sarah C. M. Roberts et al., *Health Care Provider Reporting Practices Related to Self-Managed Abortion*, 23 BMC WOMEN'S HEALTH 137, *6 (2023) (investigating when and why health care providers report women who have had reproductive health care to law enforcement;

individual immediately calls 911 to obtain emergency assistance.[3] When emergency medical services (EMS) arrive at the scene, they see the stillborn fetus and call the police "out of an abundance of caution."[4]

Further consider an individual who, while at home, suffers an incomplete miscarriage.[5] Several days later, when the individual is still bleeding heavily, a family member brings the individual to the local hospital's emergency department.[6] A hospital worker calls the police, reporting the individual, even though the state does not have a law—and the hospital does not have a policy—requiring law enforcement reporting in this situation.[7]

Finally, consider an individual who obtains a legal abortion at an out-of-state hospital in an abortion-permissive state.[8] The individual returns home, to the abortion-restrictive state where they reside, and attempts to obtain

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describing a case involving a woman who, while in her second trimester of pregnancy and staying at a motel, went into spontaneous labor and delivered a stillborn fetus).

[3] *Id.*

[4] *Id.* at *7.

[5] *See generally* Cary Aspinwall, *Some States Are Turning Miscarriages and Stillbirths Into Criminal Cases Against Women*, MARSHALL PROJECT (Oct. 31, 2024), https://www.themarshallproject.org/2024/10/31/stillbirth-oklahoma-arkansas-women-investigated [https://perma.cc/E49B-AG2Q] (reporting that approximately one in five pregnancies end in miscarriage, spontaneous abortion, ectopic pregnancy, stillbirth, or fetal death [hereinafter pregnancy loss]; discussing state law enforcement scrutiny of pregnancy loss); Carter Sherman, *'I didn't know what I was supposed to do': U.S. Women Who Miscarry Are In Dangerous Legal Limbo Post-Roe*, GUARDIAN (Jan. 24, 2024), https://www.theguardian.com/society/2024/jan/24/us-miscarriage-laws-abortion-rights-options [https://perma.cc/29XH-YKN8] (reporting the case of Brittany Watts, an Ohio woman who was charged with abuse of a corpse after having a miscarriage).

[6] Sarah Prager, *Managing Miscarriage in the Emergency Department and Beyond*, MEDPAGE TODAY (Feb. 14, 2023), https://www.medpagetoday.com/opinion/second-opinions/103099 [https://perma.cc/X6NP-QY8F] (telling the story of Anna, a fictitious patient who presented to the emergency department after she started bleeding at eight weeks of pregnancy).

[7] *See, e.g.*, Sam Levin, *She Was Jailed for Losing a Pregnancy. Her Nightmare Could Become More Common*, GUARDIAN (June 4, 2022), https://www.theguardian.com/us-news/2022/jun/03/california-stillborn-prosecution-roe-v-wade [https://perma.cc/KFV8-PTSA] (reporting the story of Chelsea Becker, who was reported to law enforcement by a hospital worker after she suffered a pregnancy loss).

[8] *See generally* Kimya Forouzan et al., *The High Toll of U.S. Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care*, 26 GUTTMACHER POL'Y ANALYSIS (Dec. 27, 2023), https://www.guttmacher.org/2023/12/high-toll-us-abortion-bans-nearly-one-five-patients-now-traveling-out-state-abortion-care [https://perma.cc/L5BG-FVWZ] (finding that the number of patients traveling to other states to obtain abortion care has doubled in recent years, reaching nearly one in five in the first half of 2023 compared to one in ten in 2020); Mikaela H. Smith et al., *Abortion Travel Within the United States: An Observational Study of Cross-State Movement to Obtain Abortion Care*, 10 LANCET REG. HEALTH AM. 100214 (2022) (investigating the percentage of U.S. patients who left their state of residence for abortion care in 2017; concluding that, "Many patients travel across state lines for abortion care. While patients may leave for a range of reasons, restrictive state-level abortion policy and facility scarcity are associated with patients leaving their state of residence.").

follow-up care, including an ultrasound, at a local clinic.[9] The physician who runs the clinic calls the police, reporting the individual and the abortion they obtained out of state.[10]

These three hypotheticals illustrate just a few of the ways in which individuals who seek reproductive health care are reported to law enforcement.[11] Note that, in each of these hypotheticals, a provider reported a patient to law enforcement without a prior law enforcement request for patient information.[12] That is, a supposedly trusted provider volunteered patient information to the police without the permission of the patient to whom the provider owes a primary duty of care and loyalty.[13] In the first hypothetical, EMS placed the call to police. In the second hypothetical, a hospital worker volunteered the patient's information. In the third hypothetical, a local physician reported the patient.

Unfortunately, provider-volunteered information is a leading cause of the criminalization of individuals who seek reproductive health care.[14] Provider-volunteered information leads to reproductive health care-seeking

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[9] *See generally* WORLD HEALTH ORGANIZATION, ABORTION CARE GUIDELINES, CLINICAL SERVICES RECOMMENDATION 34: FOLLOW-UP CARE OR ADDITIONAL SERVICES AFTER ABORTION (3.5.1) (stating that routine, post-abortion follow-up care usually is unnecessary; further stating, however, that a follow-up visit one to two weeks after the procedure may be needed to manage medical concerns).

[10] *See generally* PHYSICIANS FOR REPRODUCTIVE HEALTH, TALKING TO HEALTH CARE PROVIDERS AFTER A FIRST TRIMESTER MISCARRIAGE OR ABORTION 2 (Apr. 23, 2023) (stating that some providers choose to call the police after they learn that an individual has had an abortion).

[11] Roberts et al., *supra* note 2, at *7 (identifying multiple pathways through which providers report individuals who need reproductive health care to government authorities); Laura Huss et al., *Self-Care, Criminalized: The Criminalization of Self-Managed Abortion from 2000 to 2020*, IF/WHEN/ HOW: LAWYERING FOR REPRODUCTIVE JUSTICE 30–34 (2023) (reviewing the many different ways in which individuals who need reproductive care are brought to the attention of law enforcement).

[12] *See* text accompanying *supra* notes 1–10.

[13] *Cf.* Huss et al., *supra* note 11, at 31 ("Individuals criminalized for self managed abortion were frequently reported to police by people they entrusted with information."). *See generally* Frances Miller, *Secondary Income from Recommended-Treatment: Should Fiduciary Principles Constrain Physician Behavior*, *in* THE NEW HEALTH CARE FOR PROFIT: DOCTORS AND HOSPITALS IN A COMPETITIVE ENVIRONMENT (1983) ("As fiduciaries, doctors owe a duty of loyalty to their patient's interests that requires them to elevate their conduct above that of commercial actors . . . . ").

[14] *See*, *e.g.*, Huss et al, *supra* note 11, at 30–34 (2023) (detailing dozens of cases in which individuals were criminally investigated or arrested for allegedly ending their own pregnancy; noting that the individuals' own health care providers were the most frequent source of law enforcement reporting).

individuals being arrested,[15] incarcerated,[16] and losing custody of children,[17] among other negative criminal and social consequences.[18] Fear of these adverse repercussions leads individuals who desperately need reproductive health care to delay seeking care, or to avoid care entirely.[19] As if these concerns were not enough, the criminalization and stigmatization of reproductive health care seeking behavior dramatically and disproportionately impacts racial and ethnic minorities, individuals with disabilities, and other marginalized populations,[20] increasing maternal morbidity and mortality[21] among

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[15] *See, e.g.*, Eleanor Klibanoff, *Texas Woman Charged with Murder for Self-Induced Abortion Sues Starr County District Attorney*, TEX. TRIBUNE (Mar. 30, 2024), https://www.texastribune.org/2024/03/30/texas-woman-sues-abotion-arrest-starr-county/?utm_campaign=trib-social-buttons&utm_source=copy&utm_medium=social [https://perma.cc/S2CV-V2X7] (reporting the story of Lizelle Herrera (now Gonzalez), who was arrested on April 7, 2022, by law enforcement in Starr County, Texas, after hospital workers reported her to law enforcement).

[16] *See, e.g.*, Carter Sherman, *Sixty-One People in U.S. Criminalized for Alleged Self-Managed Abortions, Report Finds*, GUARDIAN (Oct. 30, 2023), https://www.theguardian.com/world/2023/oct/30/self-managed-abortions-arrest-investiagtion-roe-v-wade [https://perma.cc/Q546-NYCW] (reporting the case of one woman who was unable to pay $200,000 bail and who was incarcerated for a year as a result).

[17] *See generally* Anna Claire Vollers, *200+ Women Faced Criminal Charges Over Pregnancy in Year After Dobbs, Report Finds*, MISSOURI INDEPENDENT (Oct. 1, 2024), https://missouriindependent.com/2024/10/01/200-women-faced-criminal-charges-over-pregnancy-in-year-after-dobbs-report-finds/ [https://perma.cc/8WJP-VNZ5] (reporting that the fear of losing child custody deters individuals from seeking needed reproductive health care).

[18] *See, e.g.*, Klibanoff, *supra* note 15, (reporting that the arrest and incarceration of a minority woman who was reported to police after she sought reproductive health care changed the woman's life and ruined her standing in the community).

[19] *See, e.g.*, GLOBAL JUSTICE CENTER ET AL., HUMAN RIGHTS CRISIS: ABORTION IN THE UNITED STATES AFTER *DOBBS* 14 (Apr. 2023) ("New abortion bans and criminalization can be expected to instill fear in pregnant patients and create confusion over potential criminal liability, further reducing access to healthcare for vulnerable populations while increasing punitive surveillance of marginalized women. Pregnant people — even those who wish to continue their pregnancies — may forgo prenatal care to which they are entitled altogether to avoid falling under surveillance.").

[20] *See generally* Latoya Hill et al., *What Are the Implications of the Dobbs Ruling for Racial Disparities*, KAISER FAMILY FOUNDATION (Apr. 24, 2024), https://www.kff.org/womens-health-policy/issue-brief/what-are-the-implications-of-the-dobbs-ruling-for-racial-disparities/ [https://perma.cc/5KDC-UGB7] ("A long history of racism in judicial policy in this country has led to disproportionately higher rates of criminalization among people of color and is likely to grow as abortion care is criminalized."); Zara Abrams, *Abortion Bans Cause Outsize Harm for People of Color*, 54 AM. PSYCH. ASS'N MONITOR ON PSYCHOLOGY 4 (Apr. 14, 2023), https://www.apa.org/monitor/2023/06/abortion-bans-harm-people-of-color [https://perma.cc/Z9XD-CEHP] ("Cultural stigma surrounding abortion may also increase mental harm for people of color . . . . Qualitative research suggests that certain marginalized groups, such as Latinx immigrant women, may face a complex web of stigmas, including pressure to keep abortions secret . . . . ").

[21] *See, e.g.*, GLOBAL JUSTICE CENTER ET AL., *supra* note 19, at 14 ("The consequences of the *Dobbs* decision are wide ranging. Restrictions on access to healthcare places women's lives and

people who already experience significantly and persistently worse health care outcomes.[22]

It is essential that health care providers protect patient privacy and health information confidentiality when called upon to provide reproductive health care.[23] This Article rewrites the Final Rule to ensure that the purpose-based use and disclosure prohibitions set forth therein apply not only to situations involving law enforcement requests for PHI but also situations that do not involve any request for PHI.

This Article carefully builds on two other articles written by the Author about patient privacy and health information confidentiality in the context of the changed abortion landscape following *Dobbs v. Jackson Women's Health Organization*.[24] The first article in this series untangled the complex web of confidentiality and privilege laws that are implicated by the collection, use, disclosure, and sale of reproductive health information post-*Dobbs*.[25] The second article focused on cases involving law enforcement requests for information, showing how the Final Rule continues to allow medically- and legally-untrained law enforcement officers to request and obtain patient information from HIPAA covered entities and business associates without patient authorization and without violating the HIPAA Privacy Rule.[26] This third Article

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health at risk, leading to increased maternal mortality and morbidity, a climate of fear among healthcare providers, and reduced access to all forms of care.").

[22] *See, e.g.*, Madeline Y. Sutton et al., *Racial and Ethnic Disparities in Reproductive Health Services and Outcomes*, 137 OBSTETRICS & GYNECOLOGY 225, 228–29 (2021) ("Persistently, women of color have been disproportionately affected by maternal mortality; Black women and American Indian or Alaska Native women are 3.3 and 2.5 times more likely to die from pregnancy-related causes than White women, respectively.").

[23] *See generally* U.S. Dep't Health & Human Servs., *HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care* (June 29, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html [https://perma.cc/Z8Z9-SYRS] ("Access to comprehensive reproductive health care services, including abortion care, is essential to individual health and well-being . . . [The HIPAA Privacy Rule] supports such access by giving individuals confidence that their protected health information . . . including information relating to abortion and other sexual and reproductive health care, will be kept private.").

[24] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231–32 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . . It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

[25] *See generally* Stacey A. Tovino, *Confidentiality Over Privacy*, 44 CARDOZO L. REV. 1243 (2023) (arguing that strong enforcement of certain confidentiality and privilege laws combined with straightforward amendments to others can create an effective constitutional stopgap post-*Dobbs*).

[26] Stacey A. Tovino, *Aborted Confidentiality*, 65 BOSTON COLLEGE L. REV. 1922, 1925–26 (2024) (posing a number of hypotheticals involving law enforcement requests for patient information; asking and examining whether a North Dakota patient's right to confidentiality is violated if a Minnesota abortion clinic discloses PHI in response to a demand from North Dakota law enforcement; asking and examining whether an Idaho patient's right to confidentiality is

focuses on cases in which providers volunteer information to law enforcement without a prior law enforcement request, arguing that the Final Rule improperly conditions patient privacy and health information confidentiality on such request.

This Article proceeds as follows. Part I provides background information regarding the HIPAA Privacy Rule, including six longstanding exceptions that, since December 28, 2000, have permitted covered entities and business associates to disclose PHI to law enforcement in certain situations without prior patient authorization.[27] Part II reviews HHS's April 26, 2024, Final Rule, which amends certain of these six exceptions—in theory to support reproductive health care privacy.[28] Although much academic, media, litigation, and other attention has been paid to the question of whether the Final Rule exceeds HHS's authority under the HIPAA statute, is contrary to the HIPAA statute, and is arbitrary and capricious in violation of the APA,[29] Part II of this Article focuses not on these important administrative law questions.[30] Instead, Part II examines language in the Final Rule substantively suggesting that covered entities and business associates' new confidentiality obligations only apply when there has been a request for PHI, such as a request for PHI

violated if an abortion clinic in Washington discloses PHI to Idaho law enforcement following a request for such information; asking and examining whether an Oklahoma patient's confidentiality is violated if the patient's physician discloses information to the Oklahoma Medical Board or Oklahoma law enforcement in response to a Medical Board or law enforcement demand; and asking and examining whether a Texas patient's confidentiality is violated if a provider discloses PHI to a Texas law enforcement officer who presents a court order that demands the disclosure of PHI).

[27] *See infra* Section I.

[28] The title of the Final Rule is "HIPAA Privacy Rule to Support Reproductive Health Care Privacy." *See* 89 Fed. Reg. 32976, 32976 (Apr. 26, 2024) [hereinafter Final Rule].

[29] *See, e.g.*, Texas' Original Complaint, State of Texas v. U.S. Dep't Health & Human Servs et al., Case No. 5:24-cv-00204-H (N.D. Tex., Sept. 4, 2024) (seeking declaratory and injunctive relief against enforcement of the Final Rule on the grounds that the Final Rule is contrary to the HIPAA statute, exceeds HHS's authority under the HIPAA statute, and is arbitrary and capricious); Complaint, Carmen Purl et al. v. U.S. Dep't Health & Human Servs., Case No. 2:24-cv-228-Z (N.D. Tex., Oct. 21, 2024) (seeking declaratory and injunctive relief against HHS's enforcement of the Final Rule on the ground that it lacks statutory authority and is arbitrary and capricious); Memorandum Opinion and Order, Carmen Purl et al. v. U.S. Dep't Health & Human Servs., Case No. 2:24-cv-228-Z (N.D. Tex., Dec. 22, 2024) (preliminarily enjoining HHS from enforcing the Final Rule against plaintiff (and Texas-licensed physician) Dr. Carmen Purl one day before the Final Rule's compliance date of December 22, 2024); Complaint for Injunctive and Declaratory Relief, States of Tennessee, Alabama, Arkansas, Georgia, Idaho, Indiana, Iowa, Louisiana, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, and West Virginia v. U.S. Dep't Health & Human Servs et al., Case No. 3:25-cv-00025 (E.D. Tenn., Jan. 17, 2025) (arguing that the Final Rule contravenes the HIPAA statute, is arbitrary and capricious, and is inflicting harm on states' ability to detect health care fraud and abuse through routine investigatory functions, and that the Final Rule should be enjoined, declared unlawful, and set aside).

[30] *See infra* Section II.

from law enforcement.[31] Part III of this Article documents the literature showing that covered health care providers frequently volunteer reproductive health information to law enforcement without a prior request and that such volunteered information is a leading cause of the criminalization and stigmatization of individuals who seek reproductive health care.[32] The conclusion re-writes the Final Rule to better protect patient privacy and health information confidentiality in the context of reproductive health care, to encourage patients needing reproductive health care to seek and obtain such care, and to restore patient trust in the health care system.[33]

II. HIPAA PRIVACY RULE: BACKGROUND

On April 26, 2024, the Department of Health and Human Services (HHS) published a final rule [hereinafter Final Rule][34] that amends the federal HIPAA Privacy Rule[35] to include certain purpose-based use and disclosure prohibitions that limit covered entities' and business associates' ability to disclose protected health information (PHI) to law enforcement in reproductive health care contexts.[36] A brief review of the HIPAA Privacy Rule is necessary to put the Final Rule's new prohibitions into context.

The HIPAA[37] Privacy Rule (hereinafter Privacy Rule) is a federal health information confidentiality regulation first promulgated by HHS on

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[31] *See infra* Section II.

[32] *See infra* Section III.

[33] *See infra* Section V.

[34] Final Rule, *supra* note 28; U.S. Dep't Health & Human Servs., *HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet* (Apr. 22, 2024), https://www.hhs.gov/hipaa/for-professionals/special-topics/reproductive-health/final-rule-fact-sheet/index.html [https://perma.cc/CBG2-MU5N] (announcing the Final Rule).

[35] The HIPAA Privacy Rule is codified at 45 C.F.R. Part 164, Subpart E ("Privacy of Individually Identifiable Health Information").

[36] *See supra* note 34.

[37] HIPAA is an acronym that stands for the Health Insurance Portability and Accountability Act of 1996. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (codified in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., 42 U.S.C.). Section 264(c)(1) of HIPAA directed HHS to promulgate privacy regulations if Congress failed to enact privacy legislation within three years of HIPAA's 1996 enactment. *Id.* at § 264(c)(1), 110 Stat. at 2033. When Congress failed to enact privacy legislation by 1999, HHS incurred the obligation to promulgate privacy regulations within six additional months. *See* INSTITUTE OF MEDICINE, BEYOND THE HIPAA PRIVACY RULE: ENHANCING PRIVACY, IMPROVING HEALTH THROUGH RESEARCH 156 (Sharyl J. Nass et al. eds., 2009) (explaining that despite the introduction of eight bills in 1999 alone, Congress was unable to pass privacy legislation within the timeframe mandated by HIPAA). HHS responded by promulgating regulations, which are referred to as the HIPAA Privacy Rule. *See* 45 C.F.R. pt. 164, subpt. E (2023) (promulgating the regulations in Subpart E, entitled "Privacy of Individually Identifiable Health Information"). With technical corrections, conforming amendments, and legal updates, the straightforward discussion of the HIPAA Privacy Rule, covered entities, protected health information, and the use and disclosure requirements set forth in the HIPAA Privacy Rule set

December 28, 2000, that strives to balance the interest of individuals in maintaining the confidentiality of their health information with the interest of society in obtaining, using, and disclosing health information.[38] As amended and strengthened over the last twenty-five years, the Privacy Rule now regulates covered entities and business associates when they internally use or externally disclose a class of information called protected health information (PHI).[39]

A "covered entity" is defined to include, among other individuals and institutions, a health care provider[40] that transmits health information in electronic form in connection with certain standard transactions, including the health insurance claim transaction.[41] A "health care provider" is defined to include any individual or institutional health care provider that furnishes, bills,

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forth in Part I of this Article is taken from the Author's many prior works addressing the HIPAA Privacy Rule. *See, e.g.*, Tovino, *supra* note 26 (showing how the Final Rule continues to allow confidential reproductive health information to be disclosed to law enforcement); Tovino, *supra* note 25 (analyzing the patchwork of federal and state health information confidentiality law in the context of reproductive health information); *see generally* Stacey A. Tovino, *Not So Private*, 71 DUKE L.J. 985 (2022) (analyzing the patchwork of federal and state health information confidentiality law generally); Stacey A. Tovino, *Going Rogue: Mobile Research Applications and the Right to Privacy*, 95 NOTRE DAME L. REV. 155, 157–58 (2019) (providing background information regarding the Privacy Rule); Stacey A. Tovino, *A Timely Right to Privacy*, 104 IOWA L. REV. 1361, 1367 (2019) (same).

[38] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82461, 82464 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164) ("The rule seeks to balance the needs of the individual with the needs of the society."); *id.* at 82468 ("The task of society and its government is to create a balance in which the individual's needs and rights are balanced against the needs and rights of society as a whole."); *id.* at 82472 ("The need to balance these competing interests—the necessity of protecting privacy and the public interest in using identifiable health information for vital public and private purposes—in a way that is also workable for the varied stakeholders causes much of the complexity in the rule.").

[39] 45 C.F.R. § 164.500(a) (applying the HIPAA Privacy Rule to covered entities); *id.* § 164.502–514 (setting forth the use and disclosure requirements that apply to covered entities). The HIPAA Privacy Rule also applies to business associates. *Id.* § 164.500(c). A business associate is a person who performs certain functions or activities for or on behalf of a covered entity other than as a workforce member of the covered entity, and who requires access to protected health information of the covered entity to perform such functions or activities. *Id.* § 160.103. Because business associates of covered entities are infrequently involved in the disclosure of reproductive health information to law enforcement, this Article focuses solely on disclosures by covered entities (not business associates) to law enforcement. *See* HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23543 (proposed Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164) (explaining that the proposed rule that preceded the Final Rule will have little effect on business associates because "the primary effect is on the covered entities" served by the business associates). Many statements made in this Article about covered entities (including what covered entities can and cannot do under the Final Rule) apply equally to business associates and should not be read as applying only to covered entities.

[40] 45 C.F.R. § 160.103 (defining health care provider).

[41] *Id.* (defining covered entity, noting that other covered entities include health plans and health care clearinghouses).

or gets paid for health care in the normal course of business.[42] This definition would include the EMS personnel, the hospital worker, and the clinic-owning physician referenced in the hypotheticals that opened this Article.[43] Because most health care providers transmit health information in electronic form in connection with health claims sent to health insurers, most providers will meet the definition of a covered entity and must comply with the HIPAA Privacy Rule when using or disclosing PHI.[44]

Once a covered entity is involved,[45] the Privacy Rule applies when the covered entity uses or discloses a class of information known as PHI.[46] With four exceptions, PHI is defined as individually identifiable health information (IIHI).[47] In relevant part, IIHI is defined as information created by a health care provider that relates to the past, present, or future health of an individual and that identifies the individual.[48] Paper and electronic medical records, as well as paper, electronic, verbal, and oral communications (including e-mails, telephone calls, and text messages) that reference an identifiable patient's pregnancy, birth, miscarriage, stillbirth, bleeding, or other reproductive health event, health status, or health symptoms would meet this definition and would need to be protected in accordance with the Privacy Rule.[49] The

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[42] *Id.* (defining health care provider).

[43] *Id.* (defining health care provider to include a "provider of medical or other health services" under Section 1861(s) of the Social Security Act); Social Security Act, 42 U.S.C. 1395x(s) (2022) (codifying section 1861(s) of the Social Security Act, which identifies a physician as a "provider of medical or other health services"); 45 C.F.R. § 160.103 (defining health care provider to include a "provider of services" under section 1861(u) of the Social Security Act); Social Security Act, 42 U.S.C. § 1395x(u) (2022) (codifying section 1861(u) of the Social Security Act and identifying a hospital as a "provider of services"); 45 C.F.R. § 160.103 (explaining that any other person or institution that furnishes, bills, or gets paid for providing health care in the normal course of business is a health care provider for purposes of the HIPAA Privacy Rule). Emergency medical services personnel furnish diagnostic and therapeutic health care.

[44] That said, not all providers transmit health information in electronic form in connection with insurance claims. Cash-only medical practices, for example, are not regulated by the HIPAA Privacy Rule because they do not transmit health information in connection with standard transactions. A more robust discussion of the limited application of the HIPAA Privacy Rule is set forth in Tovino, *Going Rogue, supra* note 37, at 174–77.

[45] Business associates also are regulated by the HIPAA Privacy Rule. *See supra* note 39.

[46] *See, e.g.*, 45 C.F.R. § 164.500(a) (2023) (explaining that the HIPAA Privacy Rule applies to covered entities "with respect to protected health information").

[47] 45 C.F.R. § 160.103. The four IIHI exceptions from PHI include: (1) education records protected by the Family Educational Rights and Privacy Act (FERPA); (2) student treatment records excepted from FERPA; (3) employment records held by a covered entity in its role as an employer; and (4) records regarding persons who have been dead for more than fifty years. *See id.* (defining PHI). The Author closely examined two of these exceptions (the exceptions for education records and student treatment records) in Stacey A. Tovino, *Privacy for Student-Patients: A Call to Action*, 73 EMORY L.J. 83 (2023). A discussion of these exceptions is not repeated here.

[48] 45 C.F.R. § 160.103 (defining IIHI).

[49] *See id.* (defining IIHI).

telephone calls and any written reports that were placed or made by the EMS personnel, the hospital worker, and the clinic-owning physician in the opening of this Article and that reported an identifiable patient's postpartum, miscarriage, and post-abortion status, respectively, would meet the definition of IIHI.[50]

Before using or disclosing an individual's PHI, the Privacy Rule requires a covered entity to obtain the prior written authorization of the individual who is the subject of the PHI on a HIPAA-compliant authorization form unless an exception applies.[51] If the patients described in the opening of this Article signed HIPAA-compliant forms authorizing the EMS personnel, the hospital workforce member, or the clinic-owning physician to report their PHI to law enforcement, then the providers would be legally permitted to make those reports under the Privacy Rule.[52] That said, most individuals who are postpartum, post-miscarriage, or post-abortion do not authorize the disclosure of their PHI to law enforcement. As a result, their providers generally must meet a law enforcement-related exception to the authorization requirement before disclosing their PHI to law enforcement.[53]

Since December 28, 2000, when HHS promulgated the original Privacy Rule, that Rule has contained six exceptions that permit a covered entity to disclose PHI to law enforcement without the patient's prior written authorization.[54] As discussed in more detail in Part II, the April 26, 2024, Final Rule limits the operation of some (but seemingly not all) of these exceptions. Each of these exceptions will be quickly introduced below.

The first exception—known as the "crime on premises" exception—permits a covered entity to disclose to law enforcement PHI "that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity."[55] This exception would permit, for example, a hospital workforce member who sees one patient attack another patient with a knife in a hospital room to call law enforcement and report the attack. The exception would permit the disclosure because the crime—the criminal battery—occurred on the hospital's premises and the hospital worker, who saw the attack, could have a good faith belief that the

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[50] *See id.*

[51] *Id.* § 164.508(a), (c)(1)(2) (setting forth the general rule that a covered entity may not use or disclose a patient's PHI without their prior written authorization and listing the core elements and required statements that must be included in a HIPAA-compliant authorization form).

[52] *See id.* (providing that a covered entity may disclose PHI pursuant to prior written authorization of the patient).

[53] *See* 45 C.F.R. § 164.512(f)(l)–(6) (setting out exceptions to the authorization requirement).

[54] *See id.* (listing the six exceptions). These six exceptions are discussed in a substantively logical, but not chronological, order. That is, they are discussed in the order of 45 C.F.R. § 164.512(f)(5), (6), (4), (1), (2), and (3).

[55] *Id.* § 164.512(f)(5).

attack constituted criminal conduct. Keys to applying this exception include the criminal conduct needing to occur on the premises of the covered entity (*i.e.*, on hospital property) and the workforce member needing to have a good faith belief that they were reporting evidence of criminal conduct. Note that none of the hypotheticals that opened this Article involved a crime that occurred on the premises of any HIPAA covered entity. (None of the hypotheticals that opened this Article involved a crime of any type, for that matter, but that is besides the point for purposes of analyzing the "on premises" part of this exception.) That said, non-legally trained providers are not always familiar with this exception. Many providers think that it applies when they suspect that a crime has occurred anywhere, including at the patient's home or at another field location, such as a motel, and therefore provider reports to law enforcement in violation of the Privacy Rule are not uncommon.[56]

The second exception—known as the "emergency care" exception—permits a covered entity "providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider," to disclose PHI to a law enforcement officer if the disclosure was necessary to notify law enforcement of the commission and details of a criminal act, its location or location of victims, or the "identity, description, and location of the perpetrator of the crime."[57] Keys to applying this exception include the provision of emergency (but not primary or urgent) care, the provision of emergency care off the premises of the covered entity, and the necessity of notifying law enforcement of the commission of a criminal act.[58] For example, EMS personnel that are dispatched to a motel located off the premises of the EMS company's ambulance base would be permitted to disclose PHI to law enforcement if the disclosure "appear[ed] necessary to alert law enforcement to . . . [t]he commission and nature of a crime; [t]he location of such crime or of the victim(s) of such crime; and [the identity, description, and location of the perpetrator of such crime."[59] Note that this exception (like the last exception) does not require a covered provider to disclose any information. The exception simply permits an information disclosure if the requirements of the exception are satisfied.

Note that the first hypothetical that opened this Article involved EMS personnel who called the police when they saw that an individual had

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[56] *See, e.g.*, Klibanoff, *supra* note 15 (discussing the Lizelle Herrera case out of Starr County, Texas, which involved a hospital worker who reported a woman who had ingested medication abortion pills off the premises of the hospital to which she presented seeking emergency care but was reported to law enforcement because a hospital worker believed that she had committed a crime).

[57] 45 C.F.R. § 164.512(f)(6).

[58] *See id.* (establishing that the exception applies only when "providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider").

[59] *Id.*

delivered a stillborn fetus in a motel room. However, the emergency care exception only applies if it was "necessary to alert law enforcement to . . . [t]he commission and nature of a crime . . ."[60] Delivering a stillborn fetus is not a crime. Moreover, the regulatory exception is missing language (for example, "had a good faith but incorrect belief that a crime occurred" or "had a suspicion that the emergency may have been caused by criminal conduct") that would have made the disclosure (possibly) permissible without the patient's prior authorization.

In addition to the crime on premises exception and the emergency care exception, the HIPAA Privacy Rule contains still other exceptions that permit a covered entity to disclose PHI to law enforcement without patient authorization and without violating the Privacy Rule.[61] A third exception—the "decedent exception"—permits a covered entity to disclose PHI "about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct."[62] In the hypotheticals that opened this Article, none of the patients were deceased. The first patient survived a stillbirth, the second patient survived a miscarriage, and the third patient survived an abortion. The decedent exception is irrelevant to our instant discussion.

A fourth exception—the "required by law" exception—permits a covered entity to disclose PHI as required by law, including in compliance with a court order, a grand jury subpoena, or an administrative requests.[63] For administrative requests, certain additional criteria must be satisfied, including: (1) the information that is sought must be "relevant and material to a legitimate law enforcement inquiry"; (2) the request must be "specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought"; and (3) "[d]e-identified information could not reasonably be used."[64] None of the hypotheticals that opened this article involved a court order, a grand jury subpoena, or an administrative request. Instead, EMS personnel, a hospital worker, and a clinic-owning physician simply called the police and volunteered information about the patients who had sought out and trusted the providers with their reproductive health care.

Three of the four exceptions described above permit a covered entity to voluntarily initiate a disclosure of PHI to law enforcement without a prior request from law enforcement, and the fourth exception permits a disclosure as required by law, such as upon receipt of a court order, grand jury

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[60] *Id.*

[61] *See id.* § 164.512(f) (setting forth other exceptions).

[62] *Id.* § 164.512(f)(4).

[63] *Id.* § 164.512(f)(1).

[64] *Id.* § 164.512(f)(1)(ii)(C)(1)–(3).

subpoena, or administrative request (if certain criteria are satisfied).[65] Two additional exceptions are potentially available for situations in which a law enforcement officer requests PHI from a covered entity. In the first additional exception—known as the "identification and location" exception—a covered entity is permitted to "disclose protected health information in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person."[66] Under this exception, the information that is permitted to be disclosed includes the patient's name, address, date of birth, place of birth, social security number, blood type and rh factor, type of injury, date and time of treatment, as well as a description of distinguishing physical characteristics such as height, weight, gender, race, hair color, eye color, facial hair, scars, and tattoos.[67] Because none of the hypotheticals that opened this Article involve a law enforcement request for PHI, however, this exception is not applicable to our discussion.

A final exception—the crime victim exception—permits a covered entity to disclose PHI "in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime" in certain, limited situations.[68] Again, however, none of the hypotheticals that opened this Article involved a law enforcement request for PHI. And, even if a law enforcement officer did request PHI (which an officer did not), there are qualifying criteria that must be satisfied. These include: (1) the patient being asked and agreeing to the disclosure of their PHI to law enforcement; or (2) the patient not being asked due to the patient's incapacity but the disclosure being in their best interests, among other requirements.[69] In this political climate, it would rarely be in a patient's best interests for her reproductive health information to be disclosed to law enforcement. As a result, this exception also is not applicable to our analysis.

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[65] *Id.* § 164.512(f)(1), (4)–(6) (setting out the exceptions previously discussed).

[66] *Id.* § 164.512(f)(2)(1).

[67] *Id.*

[68] *Id.* § 164.512(f)(3). The exception applies if either the individual agrees to the disclosure or the covered entity could not obtain the individual's agreement due to an emergency or patient incapacity, but only if: (1) the law enforcement officer represented that the information was needed to determine whether a violation of law by a person other than the victim had occurred and the information would not be used against the victim; (2) the law enforcement official represented that immediate law enforcement activity depended on the disclosure and would be materially and adversely affected by waiting until the individual could agree to the disclosure; and (3) the disclosure was in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

[69] *See id.* (requiring the patient to have been asked and to have agreed to the disclosure or the patient not being able to be asked and not being able to agree due to incapacity).

In summary, and before the December 23, 2024, compliance date for the Final Rule,[70] covered entities were permitted to disclose PHI, including reproductive health information, to law enforcement without patient authorization and without violating the Privacy Rule pursuant to a number of regulatory exceptions.[71] These exceptions included the crime on premises exception, the emergency exception, the decedent exception, the required by law exception, the identification and location exception, and the crime victim exception. Three of the six exceptions (including the crime on premises exception, the emergency exception, and the decedent exception) permit a covered entity to voluntarily initiate a disclosure of PHI to law enforcement without a prior request for information. The remaining three exceptions (the required by law exception, the identification and location exception, and the crime victim exception) require some type of prior request, subpoena, or order for the information. As discussed in more detail below, the Final Rule's purpose-based use and disclosure prohibitions appear to only restrict the latter three exceptions (and only in certain situations). As argued below, HHS should have written the Final Rule in a way that all six exceptions have the possibility of nullification.

III. THE FINAL RULE

On April 26, 2024, HHS published a final rule titled "HIPAA Privacy Rule to Support Reproductive Health Care Privacy" (Final Rule),[72] the stated goal of which is to better protect patient privacy and health information confidentiality in the context of reproductive health care.[73] This Part II carefully analyzes HHS's final rule with a focus on language that seems to condition the Final Rule's new confidentiality requirements on a request for PHI, including a request for PHI from law enforcement.

Among other requirements, the Final Rule establishes three purpose-based use and disclosure prohibitions.[74] These prohibitions restrict covered entities from using or disclosing PHI for certain investigation purposes, certain imposition of liability purposes, and certain identification purposes. In

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[70] One covered entity, a Texas-licensed physician named Dr. Carmen Purl, successfully obtained a court order preliminarily enjoining HHS from enforcing the Final Rule against her. Dr. Purl obtained the order on December 22, 2024, one day before the Final Rule's December 23, 2024, compliance. Memorandum Opinion and Order, Carmen Purl et al. v. U.S. Dep't Health & Human Servs., Case No. 2:24-cv-228-Z (N.D. Tex., Dec. 22, 2024).

[71] 45 C.F.R. § 164.512(f)(1)–(6) (detailing the disclosure exceptions).

[72] Final Rule, *supra* note 28.

[73] *See id.* at 32978 (stating that the Privacy Rule "must be modified to limit the circumstances in which provisions of the Privacy Rule permit the use or disclosure of an individual's PHI about reproductive health care for certain non-health care purposes, where such use or disclosure could be detrimental to privacy of the individual or another person or the individual's trust in their health care providers").

[74] *Id.* at 32983; *id.* at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(A)(1)–(3)).

particular, covered entities are now prohibited from using and disclosing PHI: (1) "To conduct a criminal, civil, or administrative investigation into any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care"[75]; (2) "To impose criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care"; or (3) "To identify any person for any purpose described in [the preceding two clauses]."[76] HHS calls each of these prohibitions a purpose-based use and disclosure prohibition.

These purpose-based use and disclosure prohibitions were designed to prohibit, for example, a covered provider located and licensed to practice medicine in Vermont, which has permissive abortion laws, from disclosing PHI about a patient who obtained a six-week medication abortion to any state's law enforcement if law enforcement is requesting the PHI for purposes of investigating or imposing liability on the patient for obtaining (or the provider for providing) the legal-in-Vermont abortion.[77] The purpose-based use and disclosure prohibitions would not, however, restrict the covered provider from disclosing PHI about the patient's abortion to a health care oversight agency, such as the federal Office of Inspector General or a state Medicaid Fraud Control Unit that is charged with investigating the provider for public or private insurance billing fraud, abuse, or waste for example.[78] These disclosures would not be prohibited under the Final Rule because the law enforcement officer is requesting PHI not to investigate the patient's mere act of obtaining reproductive health care or the provider's mere act of providing reproductive health care.[79] Instead, the law enforcement officer is

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[75] The Final Rule clarifies that "seeking, obtaining, providing, or facilitating reproductive health care" includes, but is not limited to, "expressing interest in, using, performing, furnishing, paying for, disseminating information about, arranging, insuring, administering, authorizing, providing coverage for, approving, counseling about, assisting, or otherwise taking action to engage in reproductive health care; or attempting any of the same." *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(D)).

[76] *Id.* (emphasis added).

[77] *See* 18 VT. STAT. § 9493 ("The State of Vermont recognizes the fundamental right of every individual who becomes pregnant to choose to carry a pregnancy to term, to give birth to a child, or to have an abortion.").

[78] *See* Final Rule, *supra* note 28, at 32994 ("For example . . . the [F]inal [R]ule does not prohibit the use or disclosure of PHI for investigating alleged violations of the Federal False Claims Act or a state equivalent; conducting an audit by an Inspector General aimed at protecting the integrity of the Medicare or Medicaid program where the audit is not inconsistent with this final rule; investigating alleged violations of Federal nondiscrimination laws or abusive conduct, such as sexual assault, that occur in connection with reproductive health care; or determining whether a person or entity violated [federal laws relating to freedom of access to clinic entrances . . . In each of these cases, the request is not made for the purpose of investigating or imposing liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care.").

[79] *See id.*

requesting the PHI to investigate and enforce a violation of federal or state insurance law.[80]

According to the terms of the Final Rule, the purpose-based prohibitions only apply when a "rule of applicability" has been satisfied.[81] Under the "rule of applicability," the relevant investigation or imposition of liability must be "in connection with any person seeking, obtaining, providing, or facilitating reproductive health care" (and the hypotheticals that opened this Article all involved persons seeking reproductive health care) and the covered entity "that received the request for protected health information" must have reasonably determined that at least one of three conditions exists.[82] In a prior article, the Author focused heavily on those three conditions, two of which involve lawfulness under federal or state law.[83]

In this Article, the Author wishes to turn from these three conditions, focusing instead on the underlined language: " . . . the covered entity . . . that received the request for protected health information. . . . "[84] Note how, due to the existence of the underlined language, the purpose-based use and disclosure prohibitions appear to be limited to situations involving a covered entity that has received a request for PHI. That is, the purpose-based use and disclosure prohibitions appear not to apply to situations in which a covered entity has not received such a request, including in a situation where a covered entity wishes to volunteer PHI to law enforcement.[85]

Recall that three of the six law enforcement exceptions do require some type of request (or demand) for PHI. One more time, the fourth exception—the "required by law" exception—requires a court order, a grand jury subpoena, or an administrative request for PHI.[86] When a court is ordering the disclosure of PHI, when a grand jury is subpoenaing PHI, and when an administrative agency is requesting PHI—there is a request (or demand or

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[80] *See id.*

[81] *Id.* at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)) (titled "Rule of applicability").

[82] *Id.* at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)) (underlined emphasis added). The first condition is that the reproductive health care must be lawful under the law of the state in which the care is provided and under the circumstances in which it is provided. *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)). The second condition is that the reproductive health care must be protected, required, or authorized by federal law, including the U.S. Constitution, under the circumstances in which it is provided, regardless of the state in which it is provided. *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(2)). The third condition is that the reproductive health care must have been provided by another person and is presumed lawful. *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(3)).

[83] *See* Tovino, *supra* note 26, at 1953–64.

[84] Final Rule, *supra* note 28, at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)) (underlined emphasis added).

[85] *See id.*

[86] 45 C.F.R. § 164.512(f)(1).

order) for PHI. The fifth exception—the "identification and location" exception—requires a "law enforcement official's request" for PHI for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person."[87] And, the sixth exception—the "crime victim" exception—also requires a "law enforcement official's request" for PHI about an individual who is or is suspected to be a victim of a crime.[88] In situations in which any one of these three exceptions is implicated, the Final Rule operates to restrict the covered entity from responding—thus nullifying the availability of the exception—if the reproductive health care was lawful under federal or state law under the circumstances in which it was provided or, if the responding covered entity did not provide the health care at issue, if a presumption of legality applies.[89] The Author agrees with the Final Rule's nullification of these three exceptions.

Although three of the six law enforcement exceptions do require some type of request (or demand or order) for PHI, recall that the remaining three exceptions do not require any type of request (or demand or order) for PHI. One more time, the first exception—the "crime on premises" exception—permits a covered entity to disclose to law enforcement PHI "that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity."[90] The problem is that legally untrained health care workers frequently volunteer information pursuant to this exception without understanding that it requires the perceived crime to have occurred on the premises of a covered entity. When an individual has a stillbirth in a motel, or when an individual miscarries at home, or when an individual obtains a legal abortion in an abortion-permissive state, not only has no crime occurred—but no crime has occurred on the premises of any covered entity. That is, no crime has occurred on the physical premises of the ambulance bay/garage, or on the physical premises of the hospital, or on the physical premises of the physician's clinic. Yet health care workers frequently report individuals in these cases to law enforcement in violation of the HIPAA Privacy Rule.[91] Moreover, the Final Rule—which requires a request for PHI from law enforcement to override the exception—does not apply because there has been no request for PHI from law enforcement.

Recall that the second exception (the "emergency care" exception) also does not require a request for PHI from law enforcement. Instead, the second exception permits a covered entity "providing emergency health care in response to a medical emergency, other than such emergency on the premises

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[87] *Id.* § 164.512(f)(2)(1).

[88] *Id.* § 164.512(f)(3).

[89] Final Rule, *supra* note 28, at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)-(3)).

[90] 45 C.F.R. § 164.512(f)(5).

[91] *See supra* notes 7, 11, 14–18.

of the covered health care provider," to disclose PHI to a law enforcement officer if the disclosure was necessary to notify law enforcement of the commission and details of a criminal act, its location or location of victims, or the "identity, description, and location of the perpetrator of the crime."[92] The problem with this exception is that legally untrained EMS personnel, such as the EMS personnel described in the first hypothetical that opened this Article, do not always know state abortion law and, therefore, do not know when a crime has occurred or when state law requires, versus just permits, the reporting of a crime. One result is that EMS personnel who are providing emergency care off their premises, like the EMS personnel in the opening of this Article who were providing care in a motel room, frequently volunteer information to police that they think constitutes evidence of the commission of crime when it does not. Going into spontaneous labor and delivering a stillborn fetus at a motel is not a crime. Moreover, the regulatory exception is missing language (for example, "had a good faith but incorrect belief that a crime occurred" or "had a suspicion that the emergency may have been caused by criminal conduct") that would have made the disclosure (possibly) permissible. But, most importantly for purposes of this Article, the Final Rule—which requires a request for PHI from law enforcement to override the (already problematic) exception—does not apply because there has been no request for PHI from law enforcement.

In addition to the crime on premises exception and the emergency exception, recall that the HIPAA Privacy Rule contains one final exception that permits a covered entity to disclose PHI to law enforcement without a prior request for such PHI.[93] In particular, remember that the "decedent exception" permits a covered entity to disclose PHI "about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct."[94] In the hypotheticals that opened this Article, none of the patients were deceased. That said, one can imagine a situation in which an individual dies in an ambulance, en route to a hospital, and a provider in the hospital's emergency department suspects that the death was associated with an illegal abortion. In this imaginary case, the Final Rule still would not override the exception because there has been no law enforcement request for PHI. That is, the provider could report the deceased woman's situation to the police even if the provider's suspicion is incorrect, or not in good faith.

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[92] 45 C.F.R. § 164.512(f)(5).

[93] *See id.* § 164.512(f) (setting forth other exceptions).

[94] *Id.* § 164.512(f)(4).

In summary, the Final Rule's purpose-based prohibitions only apply when a "rule of applicability" has been satisfied.[95] The way in which this rule of applicability is written suggests that a covered entity or business associate must have "received [a] request for protected health information."[96] If this suggestion was intended by HHS, then the Final Rule does not override three out of the six longstanding law enforcement exceptions that allow a covered entity to disclose PHI to law enforcement without the patient's authorization and without violating the Privacy Rule. The Author disagrees with this legal result. That is, and for reasons explained in more detail in Part III, below, the Author believes the Final Rule should override all six exceptions when reproductive health care is sought, obtained, provided, or facilitated and that care was lawful under the circumstances in which it was provided or the presumption of legality applies.[97]

IV. PROVIDER-VOLUNTEERED REPRODUCTIVE HEALTH INFORMATION

The Final Rule appears to hinge confidentiality on a covered entity's receipt of a request for PHI. However, health care providers frequently volunteer reproductive health information to law enforcement without a prior request. As discussed in more detail below, this volunteered information is a leading cause of the criminalization of individuals who seek and need reproductive health care.

Examples of providers who volunteer patient information to law enforcement without a prior request can be found in qualitative research studies investigating provider decision making relating to police reporting in the context of self-managed abortion and other pregnancy loss. In one illustrative case reported in such a study, EMS brought to the emergency department (ED) a patient with vaginal bleeding that continued several days after the patient reported passing a mid-second trimester fetus at home.[98] Hospital workers subsequently called child protective services and the police, even though

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[95] Final Rule, *supra* note 28, at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)) (titled "Rule of applicability") (underlined emphasis added).

[96] *Id.* at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)) (underlined emphasis added). The first condition is that the reproductive health care must be lawful under the law of the state in which the care was provided and under the circumstances in which it was provided. *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)). The second condition is that the reproductive health care must be protected, required, or authorized by federal law, including the U.S. Constitution, under the circumstances in which it was provided, regardless of the state in which it was provided. *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(2)). The third condition is that the reproductive health care must have been provided by another person and be presumed lawful. *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(3)).

[97] 45 C.F.R. § 164.502(a)(5)(iii)(B)–(C).

[98] *See* Roberts et al., *supra* note 2, at 6.

there was not a state law or hospital policy that required police reporting in this instance.[99]

Examples of providers who volunteer patient information to law enforcement also can be found in studies investigating the prevalence of the criminalization of reproductive health care seeking behavior.[100] One such study, published in 2023, describes several relevant cases, including a case involving a pregnant woman from Iowa who, after her boyfriend pushed her down the stairs, sought emergency care at the local hospital.[101] Health care workers at the hospital subsequently called the police, reporting that the woman intentionally threw herself down the stairs to end her pregnancy.[102] The woman was investigated and eventually arrested on charges of feticide.[103]

In addition to studies investigating the prevalence of the criminalization of reproductive health care seeking behavior, hundreds of examples of provider-volunteered information can be found in newspaper, television, and other media reports. In one illustrative case, an Ohio woman miscarried an already deceased, one-pound fetus at home, in her bathroom, in Fall 2023.[104] When she presented to the ED of a local hospital seeking emergency services for extended bleeding, a nurse in the ED contacted the hospital's risk management department and called the police.[105] The nurse incorrectly told the police that the woman had given birth to a baby at home, did not want the baby, and did not know if the baby was alive.[106] The woman was subsequently arrested for felony abuse of a corpse.[107]

In a second illustrative case reported in the media in early 2022, a Texas woman presented to her local hospital by ambulance, complaining of vaginal pain and bleeding.[108] After she was diagnosed with an incomplete spontaneous abortion, providers at the hospital delivered a stillborn child by cesarean section.[109] A hospital worker reported the woman directly to the local District

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[99] *Id.*

[100] *See* Huss et al., *supra* note 11, at 30–34.

[101] *Id.* at 32.

[102] *Id.*

[103] *Id.*

[104] Carter Sherman, *Ohio Woman Sues Hospital and Police After She Was Arrested Over Miscarriage*, GUARDIAN (Jan. 16, 2025) https://www.theguardian.com/us-news/2025/jan/16/brittany-watts-lawsuit-miscarriage-abuse-of-corpse [https://perma.cc/H8H2-7BGD].

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Klibanoff, *supra* note 15.

[109] *Id.*

Attorney, who then arrested the woman for murder in April 2022.[110] The woman was incarcerated at the local jail on a $500,000 bond and was released only after national advocacy groups arranged for her bail.[111] The DA later dropped the charges, apologizing for the arrest, calling the entire criminal investigation a mistake.[112]

In a final illustrative, but certainly not exhaustive, case involving provider-volunteered information, an Indiana woman presented to her local hospital's ED experiencing vaginal bleeding.[113] After discussions with the woman relating to her symptoms, a hospital worker reported the woman to the police.[114] She was investigated and charged with both feticide and felony child neglect.[115]

Again, the Final Rule appears to hinge confidentiality on a covered entity's receipt of a request for PHI. As the illustrative examples above show, however, health care providers frequently volunteer reproductive health information to law enforcement without a prior request. Many times, this volunteered information is factually inaccurate, leading to arrest and incarceration. Sometimes, the volunteered information is factually accurate, but the facts still do not trigger any state law or hospital policy requiring reporting. That said, reporting still occurs, leading to arrest and incarceration. The fact that some DAs and law enforcement officers have apologized after the fact, for their mistaken criminalization of innocent behavior,[116] does not change the life-altering experience of being treated as a criminal for experiencing pregnancy loss.[117]

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[110] *Id.*

[111] *Id.*

[112] *Id. See also* Lily Celeste, *Law Professor Discusses Impact of Starr County Abortion Lawsuit*, 5 NEWS-KRGV.COM (July 26, 2024), https://www.krgv.com/news/law-professor-discusses-impact-of-starr-county-abortion-lawsuit/ [https://perma.cc/R3DC-T9L6] (reporting that, "Starr County District Attorney Gocha Ramirez has apologized multiple times since he dropped the murder charge, and even called the initial arrest a 'mistake.'").

[113] Leon Neyfakh, *False Certainty: Why Did a Pathologist Use a Discredited Test to Show Purvi Patel's Fetus Was Born Alive?*, SLATE (Feb. 5, 2015), https://slate.com/news-and-politics/2015/02/purvi-patel-feticide-why-did-the-pathologist-use-the-discredited-lung-float-test.html [https://perma.cc/BAM8-U73Z].

[114] *Id.*

[115] *Id.*

[116] *See* Celeste, *supra* note 112 (reporting that a Texas DA apologized multiple times and called the arrest of a Texas woman a mistake).

[117] *See* Klibanoff, *supra* note 15 (noting that even though a Texas DA dropped charges against a Texas woman mistakenly accused of murder, "the fallout 'forever changed the [woman's] life[.]'").

V. CONCLUSION

Using three hypothetical fact patterns, this Article has carefully analyzed the Final Rule in the context of HIPAA covered entities that volunteer PHI to law enforcement without a prior law enforcement request for such PHI. Although the 2024 Final Rule – compared to the original 2000 HIPAA Privacy Rule – improves the confidentiality of some individuals who seek reproductive health care in some situations (*i.e.*, situations in which law enforcement requests PHI from a covered entity and the care that was provided or obtained was legal under the circumstances in which was it was provided or obtained), the Final Rule continues to subordinate health information confidentiality to law enforcement in other situations (*e.g.*, situations in which a provider initiates a disclosure of PHI to law enforcement). Patients who seek reproductive health care should not have to worry that the providers they trust with their emergency, urgent, or primary care will disclose their information to law enforcement. As discussed in a prior article, concerns about breaches of patient confidentiality undermine if not completely erode the trust that is necessary to proper functioning provider-patient relationships; delays or prevents individuals who need reproductive health care from seeking such care altogether; and disproportionately impacts racial and ethnic minorities, individuals with disabilities, and other vulnerable populations.[118] The Final Rule must be written in a way that supports providers' primary duty of care and loyalty to the patients, not to overzealous law enforcement who may be mistaken (or, worse, who may be acting in bad faith) with respect to the existence of a crime.

When the Author has given academic and professional presentations on the topic of this Article and has pointed out the language in the Final Rule suggesting that the Final Rule's confidentiality requirements are conditioned on the covered entity's receipt of a request for PHI, some members of the audience have told the Author that HHS made a mistake when drafting the Final Rule. These individuals believe that HHS was not aware that information comes to the attention of law enforcement via provider-initiated reports. According to these individuals, HHS would have drafted the purpose-base use and disclosure prohibitions to cover situations involving requests for PHI as well as situations that do not involve requests for PHI had HHS known about the latter category. According to these individuals, HHS intended the Final Rule to limit all six, longstanding, law enforcement exceptions set forth in the Privacy Rule but forgot (or didn't know) that some of the exceptions do not require a law enforcement officer to request information.

Other individuals have suggested to the Author that HHS *is* aware that providers volunteer information to law enforcement but HHS did not want the Final Rule to override this volunteerism and that is why the Final Rule

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[118] *See* Tovino, *supra* note 26, at Parts III(C)–(D).

contains the rule of applicability with the "receive[d] a request for protected health information" language. These individuals point to an attestation requirement in the Final Rule to support this interpretation. That is, the Final Rule requires a HIPAA covered entity to obtain a document from the person who is requesting the PHI attesting that that person will not use the PHI for a prohibited purpose.[119] The attestation requirement would be rendered superfluous if the purpose-based use and disclosure prohibition applied to situations that did not involve requests for PHI because no one (at least according to the way the Final Rule is currently written) would be responsible for executing and supplying the attestation to the covered provider.

If HHS is not aware that providers volunteer PHI to law enforcement without a request and intended to override all six law enforcement exceptions, HHS's mistake is easily corrected via amendments to 45 C.F.R. § 164.502(a)(5)(iii)(B) (setting forth the rule of applicability) and 45 C.F.R. § 164.509 (setting forth the attestation requirement). These amendments are shown below, with regulatory deletions indicated by ~~strikethrough~~ and regulatory additions indicated by <u>underlining</u>):

45 C.F.R. § 164.502(a)(5)(iii)(B). Rule of applicability**.** The prohibition at paragraph (a)(5)(iii)(A) of this section applies only where the relevant activity is in connection with any person seeking, obtaining, providing, or facilitating reproductive health care, and the covered entity or business associate ~~that received the request for protected health information~~ has reasonably determined that one or more of the following conditions exists . . ."

45 C.F.R. § 164.509. ~~Uses and disclosures for which attestation is required~~ <u>Attestation requirement</u>. (a)(1) A covered entity or business associate may not use or disclose protected health information potentially related to reproductive health care for purposes specified in § 164.512(d), (e), (f), or (g)(1) without <u>executing or</u> obtaining an attestation that is valid under paragraph (b)(1) of this section ~~from the person requesting the use or disclosure~~ and complying with all applicable conditions of this part. . . .

(c)(1) A valid attestation under this section must contain the following elements: (i) A description of the information requested<u>, used or disclosed</u> that identifies the information in a specific fashion, including one of the following: (A) The name of any individual(s) whose protected health information is sought<u>, or will be used or disclosed</u>, if practicable. (B) If including the name(s) of any individual(s) ~~whose protected health information is sought~~ is not practicable, a description of the class of individuals whose protected health information is sought. (ii) The name or other specific identification of the person(s), or class of persons, who are requested to make, <u>or who will be making,</u> the use or disclosure. (iii) The name or other specific

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[119] 45 C.F.R. § 164.509(a)(1) (prohibiting a covered entity from disclosing PHI potentially related to reproductive health care to law enforcement "without obtaining an attestation . . . from the person requesting the . . . disclosure . . .").

identification of the person(s), or class of persons, to whom the covered entity is to make the requested use or disclosure. (iv) A clear statement that the use or disclosure is not for a purpose prohibited under § 164.502(a)(5)(iii). (v) A statement that a person may be subject to criminal penalties pursuant to 42 U.S.C. 1320d-6 if that person knowingly and in violation of HIPAA uses, discloses, or obtains individually identifiable health information relating to an individual or discloses individually identifiable health information to another person. (vi) Signature of the person requesting, using, or disclosing the protected health information, which may be an electronic signature, and date. If the attestation is signed by a representative of the person requesting, using, or disclosing the information, a description of such representative's authority to act for the person must also be provided . . .

The legal result of these amendments is that: (1) the rule of applicability applies to situations involving law enforcement who request PHI from covered entities and situations involving providers who wish to volunteer PHI to law enforcement; and (2) the attestation requirement applies not only to law enforcement when requesting PHI from a covered entity but also to the covered entity when volunteering information to law enforcement. Now, as re-written, whoever initiates the request for the information or the disclosure of information must attest that the information use or disclosure does not violate the Final Rule's purpose-based use and disclosure prohibition. Moreover, HIPAA criminal penalties can be imposed on both law enforcement who falsify an attestation as well as covered entities who falsifies an attestation. Existing provisions in the Privacy Rule will continue to require the covered entity to maintain a copy of any attestation they create or receive.[120] Existing provisions in the Privacy Rule will continue to require the covered entity to account for any disclosure of PHI they make pursuant to an attestation.[121] Existing provisions in the Privacy Rule will continue to require the covered entity to comply with the minimum necessary rule when voluntarily disclosing PHI to law enforcement.[122] That is, the covered entity is permitted to disclose only the minimum amount of PHI that is necessary to accomplish the intended purpose of the disclosure.[123] Finally, in situations involving law enforcement requests for PHI, existing provisions in the Privacy Rule will continue to permit the covered entity to rely on the law enforcement officer's request as being the minimum amount of PHI needed only if the reliance is reasonable under the circumstances.[124] Regardless of whether HHS was mistaken (*i.e.*, was not aware that providers volunteer PHI to law enforcement) when it drafted the Final Rule or whether HHS intended the Final Rule only

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[120] 45 C.F.R. § 164.530(j)(1)(ii)–(iv).

[121] *Id.* § 164.528(a)(1).

[122] *Id.* § 164.502(b).

[123] *Id.*

[124] *Id.* § 164.514(d)(3)(iii)(A).

to restrict disclosures to law enforcement following a request for PHI, the redlines above, when combined with existing provisions in the HIPAA Privacy Rule, re-prioritize patient confidentiality over law enforcement.

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Although the 2024 Final Rule—compared to the original 2000 HIPAA Privacy Rule—improves the confidentiality of some individuals who seek reproductive health care in some situations, the Final Rule continues to subordinate health information confidentiality to law enforcement in situations where a provider initiates a disclosure of PHI to law enforcement. Patients who seek reproductive health care should not have to worry that the providers they trust with their care will disclose their information to law enforcement. In other situations, the concern about breaches of patient confidentiality undermines if not completely erodes the trust that is necessary to proper functioning provider-patient relationships, delays or prevents individuals who need reproductive health care from seeking such care altogether, and disproportionately impacts racial and ethnic minorities, individuals with disabilities, and other vulnerable populations. The Final Rule must be written in a way that supports providers' primary duty of care and loyalty to the patients, not to overzealous law enforcement officials who may be mistaken (or, worse, who are acting in bad faith) with respect to the existence of a crime. The Article offers amendments to the Final Rule's rule of applicability and attestation requirement that correctly balance the need of patients relating to health information confidentiality and the interests of law enforcement in investigating and imposing liability on individuals for behavior unrelated to the mere act of seeking, obtaining, providing, or facilitating reproductive health care. If adopted by HHS, the amendments proposed in this Article will improve the confidentiality of reproductive health information, restore patient trust in the health care system, and protect the health, safety, and welfare of individuals needing reproductive health care.