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Everyone Bleeds Guilty: Blood Draws for Law Enforcement Purposes in Light of the HIPAA Privacy Rule and Recent Supreme Court Decisions, 52 UIC J. Marshall L. Rev. 489 (2019)

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**EVERYONE BLEEDS GUILTY: BLOOD
DRAWS FOR LAW ENFORCEMENT
PURPOSES IN LIGHT OF THE HIPAA
PRIVACY RULE AND RECENT SUPREME
COURT DECISIONS**

BIANCA VALDEZ

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Abstract

Intoxicated driving claims more than 10,000 lives per year. In efforts to combat this devastating statistic, states have enacted laws that permit law enforcement officers to order warrantless blood draws from suspects of driving under the influence. In doing so, law enforcement officers seek the assistance of medical personnel to carry out the phlebotomy process. While medical personnel are obliged to assist law enforcement with their investigations, they also have an ethical duty to their patient and a legal duty to comply with the Health Insurance Portability and Accountability Act of 1996. What are the legal implications when the suspect becomes the patient? Oftentimes, medical personnel are left struggling to determine how to appropriately respond to law enforcement officers’ requests for blood draws where there is no court order or warrant. Such requests can trigger a wide range of compliance issues. What is the interest that prevails? Is it the privacy interests of the individual as a patient; the interests of healthcare providers in protecting the privacy of patients in their health records; or the interests of the state to deter intoxicated driving? This comment surveys current federal regulation, recent Supreme Court Jurisprudence and state law as it relates to this nexus of patient care and law enforcement.

I. INTRODUCTION

A. “Stop!” “I’ve done nothing wrong!”¹

On a warm summer day in Salt Lake City, Utah, the head nurse at the University of Utah Hospital’s burn unit, Alex Wubbles, was approached by a police officer who demanded she draw blood on an unconscious patient without the officer first presenting a warrant.² She calmly printed the hospital’s policy on providing law

1. See Derek Hawkins & Amy B. Wang, *A Utah Nurse’s Violent Arrest Puts Patient-Consent Law — and Police Conduct — in the Spotlight*, WASH. POST (Sept. 03, 2017), www.washingtonpost.com/news/morning-mix/wp/2017/09/03/a-utah-nurses-violent-arrest-puts-patient-consent-law-and-police-conduct-in-the-spotlight/?utm_term=.dc5dcb5c0783 (commenting on the videotaped arrest of a nurse at a Salt Lake City hospital after she told police that they weren’t allowed to draw blood from an unconscious patient).

2. *Id.*

enforcement with blood test results for patients suspected to be under the influence.³ She informed the officer that his request could not be fulfilled without an electronic warrant, patient consent or court order.⁴ When the officer continued to demand the blood draw, she refused.⁵ She stated that because the patient was unconscious, she could not give consent on his behalf.⁶ The officer then violently moved toward her and dragged her out of the hospital while putting cuffs on her and placing her under arrest.⁷

The Fourth Amendment protects individuals against unreasonable searches.⁸ The Health Insurance Portability and Accountability Act of 1996 (hereinafter “HIPAA” or “the act”) protects the privacy of patient information as it is maintained and disclosed by covered health care entities.⁹ Implied-consent laws are statutes imposed by state legislatures to combat the detrimental effects of drunk driving.¹⁰ But what happens when the suspect of intoxicated driving is taken to the hospital and becomes the patient of a healthcare entity? Oftentimes, medical entities are left struggling to determine how to appropriately respond to law enforcement officers’ requests for blood draws where there is no court order or warrant. Such requests can trigger a wide range of compliance issues, such as patient privacy and consent requirements, particularly when a medical entity’s compliance with HIPAA provisions directly conflicts with law enforcement needs and goals.¹¹ What is the interest that prevails? Is it the privacy interests of the individual as a patient; the interests of healthcare providers in protecting the privacy of patients in their health records; or the interests of the state to deter intoxicated driving?

This comment surveys three areas of law that are implicated when law enforcement requests medical personnel to conduct blood draws and disclose blood alcohol results: Fourth Amendment jurisprudence, state statutes and implied-consent laws, and

3. Fred Barbash & Derek Hawkins, *Utah Hospital Imposes New Policy in Response to Nurse’s Manhandling and Arrest*, WASH. POST (Sept. 05, 2017), www.chicagotribune.com/news/nationworld/ct-utah-nurse-arrest-policy-change-20170905-story.html.

4. *Id.*

5. Hawkins & Wang, *supra* note 1.

6. *Id.*

7. *Id.*

8. U.S. CONST. amend. IV.

9. 64 Fed. Reg. 59918, 59919 (1999).

10. *See generally* JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA (STUDIES IN CRIME AND JUSTICE) (Sanford H. Kadish et al. eds., 1st ed. 2013) (providing a comprehensive review and analysis of America’s drunk driving problem and of America’s anti-drunk driving policies and jurisprudence).

11. Anne M. Brendel & Suzanne Cate Jones, *Law Enforcement and Healthcare: When Consent, Privacy, and Safety Collide*, Lexology (Feb. 1, 2018), www.lexology.com/library/detail.aspx?g=b5bf9438-9898-4b61-9435-14c139097581.

HIPAA. It will explore the ethical and legal issues that medical personnel and law officers alike are confronted with in the matter of blood draws authorized for law enforcement purposes.

Section I will first discuss Supreme Court jurisprudence on warrantless blood draws. Next, it will survey state laws implemented to deter intoxicated driving as a result of the Supreme Court's findings. Finally, it will discuss HIPAA and its purposes in protecting the privacy of individually identifiable health information and how its provisions affect state law. Section II will address the issues that arise when applying HIPAA's preemption provision to state law. Section III will offer several proposals on this nexus of patient care and law enforcement by recommending how HIPAA should be construed and implemented in order to sufficiently satisfy the interests of law enforcement in their public duty to deter drunk driving, patients in their privacy, and medical personnel in their ethical duty.

II. BACKGROUND

A. *Supreme Court Jurisprudence on Warrantless Bodily Extractions*

The Fourth Amendment expressly provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."¹²

The Supreme Court has established through Fourth Amendment jurisprudence that it is the role of the judiciary to "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."¹³ Initially, the Fourth Amendment was interpreted to encompass a concern for government trespass upon property or tangible persons, papers, and effects of the individual.¹⁴ However in *Katz v. United States*, the Supreme Court expressly extended the reach of Fourth Amendment protections by rejecting the argument that a "search" can occur only when there has been a "physical intrusion" into a "constitutionally protected area," noting that the Fourth Amendment "protects people, not places."¹⁵ There, the Court articulated a two-part

12. U.S. CONST. amend. IV.

13. *United States v. Jones*, 565 U.S. 400, 406 (2012) (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001)) (internal citations omitted).

14. *See Olmstead v. United States*, 227 U.S. 438, 466 (1928) (holding that warrantless wiretapping of an individual's home phone did not amount to a Fourth Amendment violation because there was no physical trespass into the home of the individual).

15. *See Katz v. United States*, 389 U.S. 347, 351-53 (1967) (holding that a search was unconstitutional where government agents attached an electronic

standard to evaluate whether an individual has a reasonable expectation of privacy in the object of the search.¹⁶ First, the individual asserting it must manifest “a subjective expectation of privacy in the object of the challenged search,” and second, “society must be willing to recognize that expectation as reasonable.”¹⁷ As such, “[w]hen an expectation of privacy [satisfies] both of these requirements, government action that ‘invade[s]’ the expectation normally counts as a search.”¹⁸ Following this line of reasoning, the Supreme Court has recognized, “that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search.”¹⁹

Supreme Court case law governing searches involving the extraction of evidence from within the body is rather scarce and the standards for evaluating such extractions have changed significantly over the past seventy years. Prior to 1961, the Fourth Amendment was not incorporated against the states.²⁰ As such, defendants challenged bodily extractions authorized by law enforcement under the Due Process Clause of the Fourteenth Amendment.²¹ Supreme Court cases governing bodily extractions prior to the incorporation of the Fourth Amendment against the states are derived from *Rochin v. California*²² and *Breithaupt v. Abram*.²³ After the Fourth Amendment was incorporated, the Supreme Court addressed blood draws for drivers suspected of intoxicated driving in *California v. Schmerber*²⁴ and carved out a *per se* exception to the Fourth Amendment warrant requirement based on the dissipation of alcohol in the blood stream. After the decision in *Schmerber*, states began enacting implied consent statutes for drivers in order to compel drivers to submit to blood alcohol concentration (hereinafter “BAC”) testing.²⁵ In 2013,

listening device to the outside of a public phone booth to listen in on the private telephone conversations of the defendant).

16. *Kyllo*, 533 U.S. at 33.

17. *Id.*

18. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

19. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616 (1989).

20. *See Mapp v. Ohio*, 367 U.S. 643, 654 (1961) (concluding “[s]ince the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government”).

21. *See generally Rochin v. California*, 342 U.S. 165 (1952) (challenging the extraction of evidence from within suspects’ body by law enforcement as a violation of the Due Process Clause of the Fourth Amendment); *Breithaupt v. Abram*, 352 U.S. 432, 433 (1957) (same).

22. *Rochin*, 342 U.S. 165 (1952).

23. *Breithaupt*, 352 U.S. at 433.

24. *California v. Schmerber*, 384 U.S. 757 (1966).

25. *See Michael A. Correll, Is There a Doctor in the (Station) House?: Reassessing the Constitutionality of Compelled DWI Blood Draws Forty-Five Years After Schmerber*, 113 W. VA. L. REV., 381, 400-01 (2011) (recognizing that the Supreme Court’s decision in *Schmerber* on forcible blood draws has resulted

however, the Supreme Court did away with the *per se* exception in *Missouri v. McNeely*.²⁶ Finally, in 2016, the Supreme Court addressed whether the search-incident-to-arrest doctrine could provide a categorical exception to the warrant requirement for blood draws in *Birchfield v. North Dakota*.²⁷ In line with the decision in *McNeely*, the Court again refused to adopt a categorical *per se* exception to the warrant requirement.²⁸

1. *Regulation of Blood Extractions Directed by Law Enforcement Under the U.S. Constitution Prior to Incorporation of the Fourth Amendment Against the States*

a. *Rochin v. California* (1952)

The seminal case in regards to involuntary invasions of bodily integrity is *Rochin v. California*.²⁹ There, three deputy sheriffs entered the home of the defendant, Rochin, after receiving information that he was selling narcotics.³⁰ Upon the officers' entry, Rochin swallowed two capsules of morphine located on a night stand next to his bed.³¹ Rochin was handcuffed and taken to a local hospital where law enforcement ordered medical personnel to pump his stomach in order to recover the morphine.³² The issue was whether the conduct on behalf of law enforcement under those circumstances offended the Due Process Clause of the Fourteenth Amendment.³³ The Supreme Court concluded that the conduct of the police "shock[ed] the conscience" and was so "brutal" and "offensive" that it did not comport with traditional ideas of fair play and decency.³⁴ The Court concluded that the conduct of illegally breaking into the privacy of Rochin's home, struggling to open his mouth and remove what was there, and forcibly extracting his stomach's contents in order obtain evidence, was "bound to offend even hardened sensibilities."³⁵

in states adopting statutory responses to limit their use by law enforcement).

26. *Missouri v. McNeely*, 569 U.S. 141 (2013).

27. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2179 (2016).

28. *Birchfield*, 136 S. Ct. at 2185 ("We conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.").

29. *See Rochin*, 342 U.S. at 166 (concluding that such conduct on behalf of law enforcement where officers forcefully obtained evidence from a suspect's body offended the Due Process Clause of the Fourteenth Amendment).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 172.

35. *Id.* The Court expressed that "this is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's

b. *Breithaupt v. Abram* (1957)

Five years later, a criminal defendant challenged a forcible blood draw authorized by law enforcement.³⁶ Like *Rochin*, the Court's assessment in *Breithaupt* was limited to Fourteenth Amendment Due Process concerns.³⁷ There, law enforcement ordered a physician to withdraw a blood sample from Breithaupt while he was unconscious in order to procure evidence of his intoxication after he was involved in a fatal automobile collision which ultimately led to his conviction.³⁸

The Court distinguished the facts of the case from *Rochin* by stating there “[was] nothing ‘brutal’ or ‘offensive’ in the taking of a sample of blood when done . . . under the protective eye of a physician.”³⁹ The Court noted that while the blood draw was administered while Breithaupt was unconscious, “absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right.”⁴⁰ The Court further recognized that the state interest in deterring “the increasing slaughter” that results from individuals driving under the influence can be furthered by this method of blood alcohol testing, and therefore concluded that public interest outweighs the individual's right to immunity from such invasion of the body.⁴¹ Hence, *Breithaupt* stood for the proposition that, in the context of drunk driving, the state's interest in deterring intoxicated driving outweighed an individual's privacy interest.⁴²

contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.” *Id.* Justice Black also reasoned that the Fifth Amendment's protection against compelled self-incrimination applied to the states and that “a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science.” *Id.* at 174.

36. *Breithaupt*, 352 U.S. at 432.

37. *See id.* at 434 (stating “[p]etitioner contends that his conviction, based on the result of the involuntary blood test, deprived him of his liberty without that due process of law guaranteed him by the Fourteenth Amendment to the Constitution”).

38. *Id.* at 433 (“This sample was delivered to the patrolman and subsequent laboratory analysis showed this blood to contain about .17% alcohol.”).

39. *Id.* at 435.

40. *Id.* at 435-36 (“The driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly, the test as administered here would not be considered offensive by even the most delicate.”).

41. *Id.* at 439-40.

42. *See id.* at 439 (concluding that the administration of a safeguarded blood test to drivers suspected to be under the influence has a deterrent effect on the public issue of drunk driving which far outweighs the concern of the suspect's

2. *Regulation of Blood Extractions Directed by Law Enforcement Under the U.S. Constitution After the Incorporation of the Fourth Amendment Against the States*

a. *Schmerber v. California* (1966)

In 1966, the Supreme Court again confronted the issue of forcible blood draws authorized by law enforcement suspects in *Schmerber v. California*.⁴³ The Court did away with the “shocks the conscious” standard articulated in *Rochin* and adopted the “reasonableness” standard as seen within the language of the Fourth Amendment.⁴⁴ There, Schmerber was arrested for driving while intoxicated and a blood sample was extracted against his will by a physician at a hospital under the direction of an arresting officer.⁴⁵ The Court rejected Schmerber’s argument against the admissibility of the blood draw evidence under *Breithaupt* and *Rochin*.⁴⁶

The Court recognized that blood draws authorized by law enforcement constitute searches of persons, and depend antecedently upon seizures of persons, within the meaning of the Fourteenth Amendment.⁴⁷ Justice Brennan’s majority opinion stated the “Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper

individual right to immunity from such invasion).

43. See *Schmerber*, 384 U.S. at 758 (stating petitioner objected to the admission of blood draw evidence on the ground that the blood had been withdrawn despite his refusal to consent to the test and that he contended that in that circumstance the withdrawal of the blood and the admission of the analysis in evidence denied him his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment).

44. *Id.* at 767 (holding that there was no violation of petitioner’s right to be free of unreasonable searches and seizures when a police officer ordered a blood draw without a warrant or consent because the arresting officer could have reasonably concluded that the delay in obtaining a warrant could result in the destruction or disappearance of evidence and because the test was conducted in a reasonable manner).

45. *Id.*

46. *Id.* at 760 (noting that the Court affirmed the conviction in *Breithaupt* resulting from the use of a blood test in evidence, holding that under such circumstances the withdrawal did not offend that “sense of justice” of which the Court spoke in *Rochin*). The Court stated that “*Breithaupt* thus requires the rejection of petitioner’s due process argument, and nothing in the circumstances of this case to the text of the note or in supervening events persuades us that this aspect of *Breithaupt* should be overruled.” *Id.*

47. *Id.* at 767-68. (“In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.”).

manner.”⁴⁸

First, the Court deliberated whether the arresting officer needed a warrant to order the blood draw⁴⁹ and concluded that, given the circumstances, there was probable cause for the officer to arrest Schmerber and charge him with driving under the influence because the officer smelled liquor on his breath and Schmerber demonstrated physical signs of intoxication.⁵⁰ The Court allowed for the blood draw without a warrant under the exigent circumstances doctrine on the grounds that the officer “. . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened ‘the destruction of evidence.’”⁵¹ This is because alcohol dissipation in blood varies considerably with individual’s metabolism and with time.⁵² Hence, the Court in Schmerber determined that the dissipation of alcohol in the blood created a “exigent circumstance” *per se*, constituting an exception to the Fourth Amendment warrant requirement.⁵³

Second, the Court in *Schmerber* addressed the reasonableness of the blood draw.⁵⁴ The Court considered the extent to which the procedure may threaten the individual’s safety or health and the extent of intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity.⁵⁵ The Court concluded that the blood test was reasonable in that “[s]uch tests are commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.”⁵⁶ Further, the Court noted that the test was performed in a reasonable manner because it was performed by a

48. *Id.*

49. *Id.* at 768 (“In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant.”).

50. *Id.* at 768-69 (“The police officer who arrived at the scene shortly after the accident smelled liquor on petitioner’s breath, and testified that petitioner’s eyes were “bloodshot, watery, sort of a glassy appearance.”).

51. *Id.* at 770 (quoting *Preston v. United States* 376 U.S. 364, 367 (1964)).

52. See Arthur I. Cederbaum, *Alcohol Metabolism*, U.S. NAT’L LIBR. OF MED. NAT’L INSTS. OF HEALTH, 667–85 (2012), www.ncbi.nlm.nih.gov/pmc/articles/PMC3484320/ (studying alcohol metabolism) (“The same dose of alcohol per unit of body weight can produce very different blood alcohol concentrations in different individuals because of the large variations in proportions of fat and water in their bodies, and the low lipid: water partition coefficient of ethanol”).

53. *Schmerber*, 384 U.S. at 771 (stating that “where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant” and concluding “that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner’s arrest”).

54. *Id.*

55. *Id.*

56. *Id.*

physician, in a hospital environment under accepted medical practice.⁵⁷ The Court then reiterated society's interest in deterring individuals from driving under the influence stating that blood tests do not constitute an unduly extensive imposition on an individual's right to privacy and bodily integrity.⁵⁸

3. *Blood Draws Under State Implied-Consent Laws*

The Supreme Court's decisions in *Rochin* and its progeny (specifically, *Schmerber*), allow state and local jurisdictions to implement a variety of statutory legislation under state police powers nationwide relating to intoxicated driving.⁵⁹ The issue of intoxicated driving arose almost as soon as motor vehicles came about and law enforcement has struggled to deter the public from engaging in such conduct since.⁶⁰ In 2017, the National Highway Traffic Safety Administration recorded 10,874 fatalities involving drivers with blood alcohol levels above 0.08 g/dL.⁶¹ Annually, drunk driving costs Americans more than \$44 billion.⁶² Thus, state and federal governments "have a compelling interest in creating 'deterrent[s] to drunken driving,' a leading cause of traffic fatalities and injuries."⁶³ In order to combat alcohol-impaired driving, state and local governments have taken a range of measures to deter drinking and driving, namely, by way of implied consent laws.⁶⁴ If a law enforcement officer obtains consent to an unreasonable search, the consent exception to the warrant requirement applies.⁶⁵

57. *Id.* at 772.

58. *Id.*; see also *Breithaupt* 352 U.S. at 439 (concluding that the administration of a safeguarded blood test to drivers suspected to be under the influence has a deterrent effect on the public issue of drunk driving which far outweighs the concern of the suspect's individual right to immunity from such invasion); *Winston v. Lee*, 470 U.S. 753, 761 (1985).

59. See Michael A. Correll, *supra* note 25, at 400-01 (recognizing that the Supreme Court's decision in *Schmerber* on forcible blood draws has resulted in states adopting statutory responses to limit their use by law enforcement).

60. JACOBS, *supra* note 10.

61. Nat'l Highway Traffic Safety Admin., Pub. No. DOT HS 812 630, *Alcohol-Impaired Driving*, (Nov. 2018), crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630.

62. Alina Comoreanu, *Strictest and Most Lenient States on DUI*, WALLETHUB (Aug. 10, 2017), wallethub.com/edu/dui-penalties-by-state/13549/.

63. *Birchfield*, 136 S. Ct. at 2179.

64. See generally JACOBS, *supra* note 10 (providing a comprehensive review and analysis of America's drunk driving problem and of America's anti-drunk driving policies and jurisprudence).

65. See *Fernandez v. California*, 571 U.S. 292, 298 (2014) (concluding that in the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirements, including the exception for searches conducted pursuant to voluntarily given consent); see also Christopher M. Peterson, *Irrevocable Implied Consent: The "Roach Motel" In Consent Search Jurisprudence*, 51 AM. CRIM. L. REV. 773, 779 (2014) ("Consent searches may be an unusual exception to the Fourth Amendment, but they certainly are popular:

After pegging a specific blood alcohol level, states enacted “implied consent” laws to induce motorists to submit to blood alcohol testing.⁶⁶

The laws vary from state to state.⁶⁷ Essentially, the laws provide that individuals who drive upon the public highways of the given state, or are licensed to drive within a given state, are deemed to have given consent to one or more tests of his or her breath, blood or urine.⁶⁸ As such, the statutes “imply” that individuals provide “consent” to otherwise unreasonable searches by driving while intoxicated. Whether these statutes actually provide constitutional “consent” that satisfies Fourth Amendment jurisprudence is highly contested among the states.⁶⁹

Originally, the consequences for refusal to submit to blood alcohol testing would result in the loss of driving privileges and the refusal would serve as evidence in a drunk-driving prosecution.⁷⁰ However, in recent years, some states have adopted criminal penalties for refusal.⁷¹

over ninety percent of warrantless searches are conducted based on consent of the suspect searched.”).

66. See *Birchfield*, 136 S. Ct. at 2179 (stating “[a]fter pegging inebriation to a specific level of blood alcohol, States passed implied consent laws to induce motorists to submit to BAC testing”).

67. See generally Jacob M. Appel, *Nonconsensual Blood Draws and Dual Loyalty: When Bodily Integrity Conflicts with The Public Health*, 17 J. HEALTH CARE L. POL’Y 129 (2014) (analyzing state laws regarding blood draws for law enforcement purposes).

68. See Debra T. Landis, *Driving While Intoxicated: Duty of Law Enforcement Officer to Offer Suspect Chemical Sobriety Test Under Implied Consent Law*, 95 A.L.R.3d 710, 1 (1979) (stating that

“[i]mplied consent laws generally declare that driving is a privilege subject to state licensing, with one of the conditions for obtaining a license being that the driver submit to a test for intoxication whenever he is arrested or taken into custody for any offense involving operating a motor vehicle while intoxicated or under the influence of intoxicating liquor and the arresting officer has reasonable grounds to believe that prior to his arrest the person was driving in an intoxicated condition or under the influence of alcohol.”)

69. See *State v. Fierro*, 853 N.W.2d 235, 241 (S.D. 2014) (finding an implied-consent law unconstitutional because it authorized “consent” to Fourth Amendment searches where actual, “free and voluntary consent” was absent); *State v. Pettijohn*, 899 N.W.2d 1, 26-27 (Iowa 2017) (“[T]he clear implication of the McNeely decision is that statutorily implied consent to submit to a warrantless blood test under threat of civil penalties for refusal to submit does not constitute consent for purposes of the Fourth Amendment.”); *State v. Romano*, 800 S.E.2d 644, 652 (N.C. 2017) (“Treating [the statute] as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances”).

70. *Birchfield*, 136 S. Ct. at 2162.

71. *Birchfield*, 136 S. Ct. at 2179 (stating that “[w]hile these laws originally provided that refusal to submit could result in the loss of the privilege of driving

4. End of the Per Se Exception

a. Missouri v. McNeely (2013)

In *Missouri v. McNeely*, forty-seven years after *Schmerber*, the Court again addressed the police authorization of blood draws without a warrant.⁷² There, McNeely was observed driving recklessly and was apprehended by a law enforcement officer.⁷³ He refused to consent to a blood draw and in response, the officer forced a blood draw relying on the exigent circumstances exception delineated in *Schmerber*.⁷⁴

The question presented to the Court was “whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases.”⁷⁵ Justice Sotomayor’s majority opinion stated that it does not, holding that exigency in this context “must be determined case-by-case based on the totality of the circumstances.”⁷⁶

Justice Sotomayor further explained that “[e]xigency applies when ‘the needs of law enforcement [are] so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.’”⁷⁷ The Court recognized that “officers may . . . conduct a warrantless search when they have probable cause to believe that failure to act would result in ‘imminent destruction of evidence.’”⁷⁸ However, the Court reasoned that asserting the *per se* rule established in *Schmerber* “fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence

and the use of evidence of refusal in a drunk-driving prosecution, more recently States and the Federal Government have concluded that these consequences are insufficient” and “[s]anctions for refusing to take a BAC test were increased because consequences like license suspension were no longer adequate to persuade the most dangerous offenders to agree to a test that could lead to severe criminal sanctions”).

72. See generally *McNeely*, 569 U.S. 141 (analyzing whether the dissipation of alcohol in the blood establishes a *per se* exigency and exception to the Fourth Amendment warrant requirement).

73. *Id.* at 145-46.

74. *Id.*

75. *Id.* at 144.

76. Benjamin W. Perry, *Recent Development: Fourth Amendment--Warrantless, Nonconsensual Seizures of a DWI Suspect's Blood: What Happens if You Say no to the Breathalyzer? - Missouri V. Mcneely*, 133 S. Ct. 1552 (2013), 37 AM. J. TRIAL ADVOC. 231, 232 (2013).

77. *McNeely*, 569 U.S. at 176 (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011) and *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)).

78. *Id.* at 177 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

offered to establish probable cause is simple.”⁷⁹ The Court stated that there are undoubtedly circumstances where exigent circumstances will serve as an exception to the warrant requirement, but those cases should be analyzed by the facts on a case-by-case basis.⁸⁰ Hence, the *McNeely* Court narrowed the application of the exigent circumstances exception holding “that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.”⁸¹ The Court stated “[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.”⁸²

b. *Birchfield v. North Dakota* (2016)

In *Birchfield v. North Dakota*, the Supreme Court again declined to allow a categorical exception to the warrant requirement in analyzing how the search-incident-to-arrest doctrine applies to breath and blood tests.⁸³ Specifically, the Court addressed whether motorists arrested for driving while intoxicated could be criminally penalized for refusing to submit to warrantless BAC testing.⁸⁴ There the state implied consent law penalized BAC refusal with criminal penalty.⁸⁵

The Court concluded that a breath test may be administered as a search incident to a lawful arrest for drunk driving without a warrant, but a blood test may not.⁸⁶ The Court reiterated that the

79. *Id.* at 154.

80. *Id.* at 153 (stating that:

“[w]e do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts . . . not to accept the considerable overgeneralization that a per se rule would reflect”)

(internal quotation marks and citation omitted).

81. *Id.* at 165.

82. *Id.* at 158.

83. *Birchfield*, 136 S. Ct. at 2183-85; Sara Jane Schlafstein, *Birchfield v. North Dakota: Warrantless Breath Tests and the Fourth Amendment*, 12 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR, 189, 200 (2017).

84. *Birchfield*, 136 S. Ct. at 2172.

85. *Id.* at 2170.

86. *Id.*; see also *id.* at 2185 (stating in regards to warrantless breathalyzers, the Court lacks “even the pretense of attempting to situate breath searches within the narrow and weighty law enforcement needs that have historically justified the limited use of warrantless searches” and fearing “that if the Court continues down this road, the Fourth Amendment’s warrant requirement will become nothing more than a suggestion”). The Court also stated that it “conclude[s] that a breath test, but not a blood test, may be administered as a

touchstone of the Fourth Amendment is reasonableness and adopted the analysis of its recent decision in *Riley v. California*⁸⁷ which assesses the degree to which a search intrudes upon an individual's privacy and, the degree to which it is needed for the promotion of legitimate governmental interests.⁸⁸ The Court considered the impact of blood testing on individual privacy interests, concluding that "blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test."⁸⁹ Further, the Court noted that where a suspect is unconscious, and thus incapable of compliance with a breathalyzer, "police may apply for a warrant if need be."⁹⁰ The Court noted that implied consent laws are favorable in that they function to induce motorists to submit to BAC testing.⁹¹ However, the scope of this consent must be limited.⁹² The Court held that motorists could only be "deemed to have consented" to conditions that are reasonably connected to driving and the penalties must be proportional to the violation.⁹³ Applying this reasonableness standard, the Court further concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."⁹⁴

Hence, *Birchfield* and *McNeely* stand for the proposition that there is no *per se* exception to the warrant requirement for blood draws and as a general rule, law enforcement must obtain a warrant to compel a blood draw unless an exception applies.⁹⁵ While

search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation." *Id.*; *but see id.* at 2187 (Sotomayor, J., concurring).

87. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Brigham City*, 547 U.S. at 403).

88. *Birchfield*, 136 S. Ct. at 2176-84.

89. *Id.* at 2184.

90. *See id.* at 2178. (stating that "it is true that a blood test . . . may be administered to a person who is unconscious . . . [b]ut we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be")(alteration in original).

91. *Id.* at 2179.

92. *Id.* at 2186.

93. *Id.* at 2186 (stating "motorists could be deemed to have consented to only those conditions that are 'reasonable' in that they have a 'nexus' to the privilege of driving and entail penalties that are proportional to severity of the violation").

94.

It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Id.

95. *Compare McNeely*, 569 U.S. at 157 (stating that "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically") *with Birchfield*, 136

there may be exceptions to the warrant requirement, these exceptions must be analyzed on a case-by-case basis.⁹⁶ But, does this mean that law enforcement can compel medical personnel to administer blood draws on patients without a warrant?

B. The Health Insurance Portability and Accountability Act

In obtaining blood draws, law enforcement officials are required to conduct police investigations within the boundaries of the Fourth Amendment and Supreme Court jurisprudence. However, medical entities are required to disclose medical information in compliance with HIPAA.

Congress passed HIPAA in 1996.⁹⁷ The act was introduced in response to a need for privacy standards within the health care field.⁹⁸ As technology developed and expanded into the health care realm, patients required assurance that their personal information would be protected during the course of treatment and also in the future as that information is maintained or transmitted within and outside of the health care system.⁹⁹ The act serves to protect the disclosure of “individually identifiable health information” (hereinafter “IIHI”), or information which “identifies the individual or allows a reasonable basis to believe the information can be used to identify the individual.”¹⁰⁰ Medical records of a patient’s blood alcohol concentration are IIHI under HIPAA and as such, the disclosure of such information should fall within HIPAA privacy standards.¹⁰¹

S. Ct. at 2185 (concluding that the search-incident-to-arrest doctrine does not justify the warrantless taking of a blood sample).

96. *McNeely*, 569 U.S. 141; *see also Birchfield*, 136 S. Ct. at 2179 (“These searches may nevertheless be exempt from the warrant requirement if they fall within, as relevant here, the exception for searches conducted incident to a lawful arrest. This exception applies categorically, rather than on a case-by-case basis”).

97. Deborah F. Buckman, *Validity, Construction, and Application of Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Regulations Promulgated Thereunder*, 194 A.L.R. Fed. 133 (2004).

98. 64 Fed. Reg. 59918, 59919 (1999).

99. *Id.*

100. 45 C.F.R. § 164.501 (2019);

Any information, including genetic information, whether oral or recorded any form or medium, that (1) Is created or received by a health care provider . . . [or a broad range of other entities]; and (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

45 C.F.R. § 160.103 (2019).

101. 45 C.F.R. § 164.501 (2019);

Prior to the enactment of HIPAA, efforts to provide legal protection against the inappropriate disclosure of individually identifiable health information was undertaken primarily by the states.¹⁰² States adopted a number of laws designed to protect patients against the inappropriate use of health information.¹⁰³ However, the framework was seriously deficient because protections varied and the narrow focus on physician obligations left large portions of the health care system without effective or consistent constraints on the disclosure of medical information.¹⁰⁴ Lawmakers concluded “[t]he establishment of a consistent foundation of privacy standards would . . . encourage the increased and proper use of electronic information while also protecting the very real needs of patients to safeguard their privacy.”¹⁰⁵

HIPAA contains remedies for violations including civil penalties for the knowing and wrongful disclosure of IHI. The Office of Civil Rights under the Department of Health and Human Services handles HIPAA complaints and can impose civil penalties for failure to comply.¹⁰⁶ The maximum civil penalty for violations, whether knowing or due to willful neglect, is \$1.5 million.¹⁰⁷

As for the victim of an improper disclosure, HIPAA does not authorize a private right of action.¹⁰⁸ Where a request for a blood

Health information means any information, whether oral or recorded in any form or medium, that . . . is created or received by a health care provider . . . and . . . relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

45 C.F.R. § 160.103 (2019)(alteration in original).

102. 64 Fed. Reg. 59918, 59920.

103. *Id.*

104. *See id.* (stating that while many medical entities “have taken steps to safeguard the privacy of individually-identifiable health information . . . they must currently rely on a patchwork of [s]tate laws and regulations that are incomplete and, at times, inconsistent.”)

105.

These protections would begin to address growing public concerns that advances in electronic technology in the health care industry are resulting, or may result, in a substantial erosion of the privacy surrounding individually identifiable health information maintained by health care providers, health plans and their administrative contractors. This rule would implement the privacy requirements of the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996.

Id.

106. Jessica Jardine Wilkes, *The Creation of HIPAA Culture: Prioritizing Privacy Paranoia over Patient Care*, 2014 B.Y.U.L. REV. 1213, 1227 (2014); 45 C.F.R. §160.404 (2019).

107. *Id.* at 1228; 45 C.F.R. § 160.404 (2019).

108. *See Stewart v. City of Fort Wayne*, 2019 U.S. Dist. LEXIS 61222, at *17-18 (N.D. Ind. Apr. 8, 2019) (stating that:

draw violates HIPAA, neither exclusion of the records from evidence nor suppression of evidence obtained by law enforcement's use of the records is among the remedies listed in HIPAA.¹⁰⁹ Rather, patients who fall victim to unlawfully obtained blood evidence are left to seek remedy in court under a motion to suppress the evidence on Fourth Amendment grounds.¹¹⁰

This section surveys the provisions of HIPAA as it relates to the disclosure of IIHI. First, Section 1 discusses the Privacy Rule which establishes a federal floor of privacy protection for the disclosure of protected patient information.¹¹¹ Next, Section 2 discusses how and when HIPAA preempts state law as it relates to disclosures of IIHI. Finally, Section 3 outlines when disclosures of IIHI are permitted under HIPAA provisions.

1. *The Privacy Rule*

In general, the federal privacy regulations (the "Privacy Rule") under HIPAA require covered entities to maintain the confidentiality of IIHI.¹¹² This is a strict baseline rule of confidentiality, prohibiting any use or disclosure of individually identifiable health information, unless the provisions of HIPAA

It is well-settled that HIPAA does not furnish a private right of action. HIPAA provides civil and criminal penalties for improper disclosures of medical information, but it does not create a private cause of action, leaving enforcement to the Department of Health and Human Services alone. Every court to have considered the issue has concluded that HIPAA does not authorize a private right of action.)

(internal citations omitted).

109. *Matter of Miguel M. (Barron)*, 950 N.E.2d 107, 112 (N.Y. 2011).

110. See Thomas S. Stukes, Anthony H. Brett, & Jenny McKellar, *North Carolina Law Requires Nurses to Comply with Police Demand for Blood Draw*, WOMBLE BOND DICKINSON (US) LLP, (Sept. 6, 2017), www.lexology.com/library/detail.aspx?g=ee3e0ce5-6346-4ddb-8267-d641f7c839e7 ("If the courts later determine that the withdrawal was unjustified or illegal, the results of the blood draw may be excluded from evidence.")

111. *Id.*

112. See Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59918, 59927 (1999). (stating that these standards will be set forth in new subchapter C to Title 45 of the Code of Federal Regulations as parts 160 and 164. Citations are given to the Federal Register and the proposed cite to the Code of Federal Regulations);

The Secretary presented to the Congress her Recommendations for protecting the 'Confidentiality of Individually-Identifiable Health Information' as required by section 264 (a) of HIPAA. In those Recommendations, the Secretary called for new federal legislation to create a national floor of standards that provide fundamental privacy rights for patients, and that define responsibilities for those who use and disclose identifiable health information.

Id. at 59923.

allow such disclosure.¹¹³

Under HIPAA, “covered entities” include health insurers, claims-processing clearinghouses, and healthcare providers.¹¹⁴ All covered entities must formulate policies that comply with the provisions outlined within HIPAA or face strict criminal or civil penalties.¹¹⁵ Any disclosure of IHI that does not comply with HIPAA is a violation of the law, even if inadvertent or resulting in no actual harm to the patient.¹¹⁶

It would appear that under a reasonable expectation of privacy theory, patient health records are protected under the Fourth Amendment as well. However, the Supreme Court has not directly held that the Fourth Amendment extends its protections to health information.¹¹⁷

113. *Id.*

114. See 64 Fed. Reg. 59918, 60049 (1999) (stating that “[e]xcept as otherwise provided, the standards, requirements, and implementation specifications adopted or designated under the parts of this subchapter apply to any entity that is: (a) A health plan; (b) A health care clearinghouse; and (c) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter”); see also LISA BOYLE & PAUL KNAG, *HIPAA: A GUIDE TO HEALTHCARE PRIVACY AND SECURITY LAW* (2002) (explaining that covered entities include, but are not limited to, hospitals, nursing homes, HMOs, mental health and addictions facilities, pharmaceutical companies, employers, accrediting organizations, research universities, public health agencies, third-party administrators, auditors, banks, and attorneys).

115. See generally, 45 C.F.R. § 164.522(a)(1) (2019) (stating provisions on compliance and enforcement.); see also Jonathan P. Tomes & Alice M. McCart, *Law Enforcement and HIPAA: Everything a Law Enforcement Officer Needs to Know: HIPAA & HITECH Act Blog*, VETERANS PRESS (Sept. 25, 2016), www.veteranspress.com/law-enforcement-hipaa (commenting that covered entities under HIPAA fear HIPAA’s criminal penalties, which include up to ten years’ imprisonment and a \$250,000 fine and civil money penalties, the largest of which to date has been \$4.8 million.).

116. MARK A. HALL, MARY ANNE BOBINSKI & DAVID ORENTLICHER, *MEDICAL LIABILITY AND TREATMENT RELATIONSHIPS* 174 (Vicki Been et al. eds., 3d ed. 2013) (“Enforcement of the privacy Rule initially appeared lax to some critics, until passage of the HITECH Act in 2009 required the imposition of penalties for all violations.”); see also 45 C.F.R. § 164.402(a) (2019) (identifying that under the regulations of the HITECH act of 2009, the Department of Health and Human Services “will impose a civil money penalty upon a covered entity” for violations).

117. Mark A. Rothstein, *Column: Currents in Contemporary Bioethics: Constitutional Right to Informational Health Privacy in Critical Condition*, 39 J.L. MED. & ETHICS 280, 283 (2011); *Nasa v. Nelson*, 562 U.S. 134, 138 (2011) (“assum[ing], without deciding, that the Constitution protects a privacy right” in medical information); *Whalen v. Roe*, 429 U.S. 589, 605-06 (1977) (stating that the state’s ability to collect medical information typically is accompanied by a statutory or regulatory duty to avoid unwarranted disclosures which “arguably has its roots in the Constitution,” but finding it need not determine that issue on the facts before it).

2. *Preemption Under the Privacy Rule*

HIPAA provides as a general rule that “[a] standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law.”¹¹⁸ However, the rule is subject to certain exceptions.¹¹⁹ The most controversial exception states that where HIPAA provisions are “contrary” to state law, HIPAA provisions control and will preempt state law unless the provision of state law “relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or

118. 45 C.F.R. § 160.203 (2019)

119.

This general rule applies, except if one or more of the following conditions is met:

(a) A determination is made by the Secretary under § 160.204 that the provision of State law:

(1) Is necessary:

(i) To prevent fraud and abuse related to the provision of or payment for health care;

(ii) To ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation;

(iii) For State reporting on health care delivery or costs; or

(iv) For purposes of serving a compelling need related to public health, safety, or welfare, and, if a standard, requirement, or implementation specification under part 164 of this subchapter is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served; or

(2) Has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. 802), or that is deemed a controlled substance by State law.

(b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.

(c) The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.

(d) The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.

45 C.F.R. § 160.203 (2019).

implementation specification adopted” under the act.¹²⁰ This preemption provision establishes an analytical framework for medical entities to determine whether HIPAA preempts state law.

In efforts to clarify this rule, HIPAA further provides certain definitions. The term “state law” is broadly defined as encompassing any “constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.”¹²¹ A state law is “contrary” when a covered entity “would find it impossible to comply with both the State and federal requirements” or “the provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of the act.¹²² A state law is “more stringent” if it meets at least one of six enumerated criteria: (1) it prohibits use or disclosure of IIHI under circumstances where HIPAA would permit it; (2) it provides patients of IIHI with “greater rights of access or amendment” to their information; (3) it provides a “greater amount of information” to patients about use, disclosure, rights, or remedies; (4) it provides requirements that narrow the scope or duration, increase the privacy protections afforded, or reduce the coercive effect of the circumstances surrounding the need for express legal permission with respect to the form, substance, or need for legal permission prior to a use or disclosure; (5) it provides for more detailed recordkeeping or accounting of disclosures; or (6) “with respect to any other matter, [it] provides greater privacy protection” for the subject of the information.¹²³

In order to decide issues of preemption, HIPAA demands that individual provisions of HIPAA and state laws be compared.¹²⁴ Essentially, this is a three-part analysis. First, the state law must “relate to” the privacy of IIHI. Second, the state law must be analyzed to determine whether it is “contrary” to HIPAA. Finally, if the state law is “contrary” to HIPAA provisions, then it must be analyzed to determine whether it is “more stringent.” If the state law is “more stringent,” then the state laws are complementary, and

120. Grace Ko, *Partial Preemption Under the Health Insurance Portability and Accountability Act*, 79 S. CAL. L. REV. 497, 504 (2006); 45 C.F.R. § 160.203.

121. 45 C.F.R. § 160.202 (2019).

122. 45 C.F.R. § 160.202(1)-(2) (2019).

123. Ko, *supra* note 120, at 504-505; 45 C.F.R. § 160.202 (2019).

124.

A covered entity would begin by identifying all state law provisions that affect its privacy policies and practices, decide which of those provisions specifically “relate to” the privacy of individually identifiable health information, and then determine whether they are “contrary” to the corresponding federal standard and, if so, whether they are “more stringent.”).

Ko, *supra* note 120 at 505.

both the state law and HIPAA provisions apply. If not, then HIPAA preempts the state law and is controlling. This is a partial preemption provision because HIPAA preempts only state laws that provide weaker privacy protections; therefore, states remain free to adopt and enforce more protective regimes.¹²⁵

3. Permitted Disclosures Under the Privacy Rule

Generally, HIPAA prohibits the use and disclosure of IHI without patient authorization.¹²⁶ However, the rule is subject to certain exceptions.¹²⁷ The Privacy Rule carves out twelve “permitted disclosure” standards for the use and disclosure of protected IHI by covered entities.¹²⁸ Under these standards, a covered entity may use or disclose protected health information without the written authorization or consent of the patient.¹²⁹ Four of these standards

125.

[W]e intend this provision [(sec 164.512(a)] to preserve access to information considered important enough by state or federal authorities to require its disclosure by law. The importance of these required uses or disclosures is evidenced by the legislative or other public process necessary for the government to create a legally binding obligation on a covered entity. . . . It is not possible, or appropriate, for HHS to reassess the legitimacy of or the need for each of these mandates in each of their specialized contexts. . . . [J]urisdictions have determined that public policy purposes cannot be achieved absent the use of certain protected health information, and we have chosen in general not to disturb their judgments.

Standards for Privacy of Individually Identifiable Health Information, 65 FR 82462-01, 2000 WL 1875566 (Dec. 28, 2000); 45 C.F.R. § 160.201-.205 (2019).

126.

Generally, HIPPA prohibits the use and disclosure of an individual's protected health information unless the individual has authorized its use and disclosure. HIPPA provides, however, that a covered entity may use or disclose protected health information without the written authorization of the individual or the opportunity for the individual to agree or object in certain limited circumstances.

United States v. Elliot, 676 F. Supp. 2d 431, 437 (D. Md. 2009).

127. *Id.*

128. *See* 45 C.F.R. § 164.512 (2019) (stating that the standards include uses and disclosures of IHI: (1) required by law; (2) for public health activities; (3) about victims of abuse, neglect or domestic violence; (4) for health oversight activities; (5) for judicial and administrative proceedings; (6) for law enforcement purposes; (7) about decedents; (8) for cadaveric organ, eye or tissue donation purposes; (9) for research purposes; (10) to avert a serious threat to health or safety; (11) for specialized government functions; and (12) for workers' compensation).

129. *See* 45 C.F.R. § 164.512 (2019) (stating that a covered entity may “use or disclose protected health information without the written authorization of

provide exceptions to the Privacy Rule where disclosures are “required by law.”¹³⁰ The first standard, 45 C.F.R. § 164.512(a): “Uses and disclosures required by law,” has two subparts:¹³¹

(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.¹³²

Subsection (1), standing alone, suggests that protected IIHI can be disclosed to the extent that the use or disclosure is *required by law*.¹³³ Because “law” is not further defined within the text of the “permitted disclosure” provision, the reasonable implication is that the term “law” is defined by the definition provided in the preemption provision, which defines “state law” as encompassing any constitution, statute, regulation, rule, common law, or other state action having the force and effect of law, as previously defined under the act.¹³⁴ At first glance, the phrase “as required by law” implies that any law can mandate the disclosure of IIHI.

However, a careful reading of subsection (2) limits the scope of this provision by expressly providing which “law” the provision refers to. Subsection (2) identifies three situations (“paragraphs (c), (e), or (f)”¹³⁵) in which particular requirements must be met in order to disclose protected information as “required by law.”¹³⁶ These

the individual, as described in § 164.508 (2019), or the opportunity for the individual to agree or object as described in § 164.510 (2019), in the situations covered by this section, subject to the applicable requirements of this section”).

130. See 45 C.F.R. § 164.512(a) (2019) (stating that “[a] covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law”); see also 45 C.F.R. § 164.512(c) (2019) (describing the standard for disclosures about victims of abuse, neglect or domestic violence.); see also 45 C.F.R. § 164.512(e) (2019) (describing the standard for disclosures for judicial and administrative proceedings); see also 45 C.F.R. § 164.512(f) (2019) (describing the standard for disclosures for law enforcement purposes).

131. 45 C.F.R. § 164.512(a) (2019).

132. 45 C.F.R. § 164.512(a)(2) (2019); see also 45 C.F.R. § 164.512(c) (2019) (addressing disclosures about victims of abuse, neglect or domestic violence); 45 C.F.R. § 164.512(e) (2019) (discussing disclosures for judicial and administrative proceedings); 45 C.F.R. § 164.512(f) (2019) (discussing disclosures for law enforcement purposes).

133. 45 C.F.R. § 164.512(a)(1) (2019).

134. See Ko, *supra* note 120, at 503 (recognizing that under HIPAA “state law” is broadly defined to encompass any ‘constitution, statute, regulation, rule, common law, or other State action having the force and effect of law’”).

135. 45 C.F.R. § 164.512(a)(2) (2019).

136. *Id.*; see generally 45 C.F.R. § 164.512 (stating that 45 C.F.R. § 164.512(c) is the standard for disclosures about victims of abuse, neglect or domestic violence, 45 C.F.R. § 164.512(e) is the standard for disclosures for judicial and

subsections establish requirements for the disclosure of IHI about victims of abuse, disclosures for judicial and administrative proceedings, and disclosures for law enforcement purposes.¹³⁷

For the purposes of this comment, 45 C.F.R. § 164.512 (f), the standard for disclosures “for law enforcement purposes,” is most applicable to blood draws conducted by medical personnel at the direction of law enforcement.¹³⁸ Pursuant to this provision, a covered entity may disclose IHI for a law enforcement purpose to a law enforcement official under six scenarios.¹³⁹ Disclosures are permitted: (1) if pursuant to process and as otherwise required by law;¹⁴⁰ (2) for the limited purpose of identification and location;¹⁴¹ (3) for an individual who is or suspected to be the victim of a crime;¹⁴² (4) for decedents for the purpose of alerting law enforcement of the death of the individual;¹⁴³ (5) for crimes on the premises of the covered entity;¹⁴⁴ and (6) for the purpose of reporting crime in emergencies.¹⁴⁵

When police officers order medical personnel to extract patient’s blood for the purposes of creating a medical record of blood alcohol content to be used as evidence, only the first standard (pursuant to process and as otherwise required by law)¹⁴⁶ and third standard (an individual who is or suspected to be the victim of a crime)¹⁴⁷ are applicable.

- a. 45 C.F.R. § 164.512(f)(1): Disclosures are permitted if pursuant to process and as otherwise required by law.

This provision outlines when disclosures are permitted if pursuant to process and as otherwise “required by law.”¹⁴⁸ There are two ways disclosures are permitted under this provision. The first section¹⁴⁹ states that a covered entity may disclose protected health information “*as required by law* including laws that require the

administrative proceedings, and 45 C.F.R. § 164.512(f) is the standard for disclosures for law enforcement purposes).

137. 45 C.F.R. § 164.512(a)(2) (2019); 45 C.F.R. § 164.512(c) (2019); 45 C.F.R. § 164.512(e) (2019); 45 C.F.R. § 164.512(f) (2019).

138. 45 C.F.R. § 164.512(f) (2019).

139. *Id.*

140. 45 C.F.R. § 164.512(f)(1) (2019).

141. 45 C.F.R. § 164.512(f)(2)(i) (2019).

142. 45 C.F.R. § 164.512(f)(3) (2019).

143. 45 C.F.R. § 164.512(f)(4) (2019).

144. *See* 45 C.F.R. § 164.512(f)(5) (2019) (stating a covered entity may disclose protected health information only if the entity believes in good faith that such information constitutes evidence of criminal conduct that occurred on the premises of the covered entity).

145. 45 C.F.R. § 164.512(f)(6) (2019).

146. 45 C.F.R. § 164.512(f)(1) (2019).

147. 45 C.F.R. § 164.512(f)(3) (2019).

148. 45 C.F.R. § 164.512(f)(1) (2019).

149. 45 C.F.R. § 164.512(f)(1)(i) (2019).

reporting of certain types of wounds or other physical injuries.”¹⁵⁰ However, as noted in the previous provision, the term “as required by law” is not defined within the text. Because the preemption provision defines “state law” as any “constitution, statute, regulation, rule, common law, or other State action having the force and effect of law,”¹⁵¹ a broad interpretation would infer that the text refers to any state law as this disclosure provision is unclear what “law” the text refers to. The provision clearly distinguishes laws that require reporting of certain types of wounds, such as gun-shot wounds. However, where the patient is suspected of driving while intoxicated or is the victim of an accident resulting from intoxicated driving, laws that require reporting of “certain types of wounds” may not apply. Thus, because “as required by law” is not defined further, it is unclear whether any state law can require the disclosure of IIHI where HIPAA would otherwise prohibit it.

The second section¹⁵² indicates that a covered entity may disclose protected health information in compliance with a court order or warrant, or a subpoena or summons issued by a judicial officer; as grand jury subpoena; or¹⁵³ an administrative request, including an administrative subpoena or summons, a civil investigative demand, or similar process authorized under law.¹⁵⁴

Hence, this provision provides that a warrant or form of judicial order is required for police to direct medical personnel to extract patients’ blood.¹⁵⁵ However, it does not address whether the legislature can mandate disclosure where HIPAA would otherwise prohibit it.

- b. 45 C.F.R. § 164.512(f)(3): Disclosures are permitted for an individual who is or suspected to be the victim of a crime.

Under this provision, if the individual is or suspected to be the victim of a crime, he must agree or otherwise consent to the disclosure of IIHI.¹⁵⁶ Therefore, law enforcement cannot authorize disclosure of the results of a blood extraction if individual does not consent to the disclosure.¹⁵⁷ The provision further states, however, that if the individual cannot agree due to incapacity or other emergency circumstances, then the information can be disclosed only if the three following conditions are met:¹⁵⁸

150. 45 C.F.R. § 164.512(f)(1)(i) (2019) (emphasis added).

151. 45 C.F.R. § 160.202 (2019).

152. 45 C.F.R. § 164.512(f)(1)(ii) (2019).

153. 45 C.F.R. § 164.512(f)(1)(ii)(B) (2019).

154. 45 C.F.R. § 164.512(f)(1)(ii) (2019).

155. 45 C.F.R. § 164.512(f)(1)(ii) (2019).

156. 45 C.F.R. § 164.512(f)(3)(i) (2019).

157. 45 C.F.R. § 164.512(f)(3)(i) (2019).

158. 45 C.F.R. § 164.512(f)(3)(ii) (2019).

(A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person *other than the victim has occurred*, and such information is not intended to be used against the victim;¹⁵⁹

(B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and¹⁶⁰

(C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.¹⁶¹

Hence, individuals who can consent, must do so.¹⁶² However, if the individual cannot consent, there are three conditions that must be met prior to disclosure.¹⁶³

Thus, the provisions of HIPAA, when carefully read together, outline the very narrow circumstances where law enforcement can compel medical personnel to disclose IIHI without the patient's consent for law enforcement purposes. Ignoring the ambiguity created by the phrase, "as required by law," HIPAA provides that a covered entity may disclose IIHI if state laws require the reporting of certain types of wounds or other physical injuries¹⁶⁴ or it may disclose IIHI in compliance with a warrant or other judicial order.¹⁶⁵

Where the patient is someone who is or suspected to be the

159. 45 C.F.R. § 164.512(f)(3)(ii)(A) (2019).

160. 45 C.F.R. § 164.512(f)(3)(ii)(B) (2019).

161. 45 C.F.R. § 164.512(f)(3)(ii)(C) (2019).

162. 45 C.F.R. § 164.512(f)(3)(i) (2019).

163. 45 C.F.R. § 164.512(f)(3) (2019).

164. 45 C.F.R. § 164.512(f)(1)(i) (2019).

165. 45 C.F.R. § 164.512(f)(1)(ii) (2019).

victim of a crime, law enforcement and medical personnel must obtain his consent.¹⁶⁶ If the patient is incapable of consenting, law enforcement must establish three requirements: (1) that the information is needed to determine whether someone other than the victim has violated the law and that the information is not intended to be used against the victim;¹⁶⁷ (2) that waiting for the individual to consent would materially and adversely affect law enforcement activity;¹⁶⁸ and (3) that disclosure is in the best interests of the individual as determined by the covered entity.¹⁶⁹

III. ANALYSIS

As currently drafted and applied, HIPAA fails to accomplish the goals Congress sought in its enactment. This is because, as applied to blood draw requests for law enforcement purposes, the provisions of the act are difficult to apply and even more difficult to enforce. This section analyzes where HIPAA falls short in its application. Section A will address issues with the HIPAA preemption analysis. Section B will discuss recent developments in implied-consent law and how they frustrate the preemption analysis. Section C will discuss state laws that are contrary to HIPAA in that they compel medical personnel to conduct blood draws upon requests made by law enforcement without consideration of preemption. Section D will discuss how the difference between “state law” and “state action” in the blood draw context affects the preemption analysis. Finally, Section E will tie these issues together by providing an analysis of what happened in the Utah case with nurse Wubbles.

A. *The Problem With the Preemption Analysis*

The language used in HIPAA’s “permitted disclosure” and the preemption provision undercuts the authority and purpose of the act because it proposes an analytical framework that is not clear and not easily applied.

The burden is on the covered entity to apply this analytical framework and formulate corresponding policies.¹⁷⁰ A covered entity must (1) identify all state law provisions that “relate to” IIHI and its privacy policies; (2) evaluate whether they are “contrary” to HIPAA; and (3) determine whether the state law provisions are “more stringent” than the provisions of HIPAA.¹⁷¹ Much of the language of HIPAA’s preemption provision is ambiguous, indefinite

166. 45 C.F.R. § 164.512(f)(3)(i) (2019).

167. 45 C.F.R. § 164.512(f)(3)(ii)(A) (2019).

168. 45 C.F.R. § 164.512(f)(3)(ii)(B) (2019).

169. 45 C.F.R. § 164.512(f)(3)(ii)(C).

170. Ko, *supra* note 120, at 502.

171. *Id.* at 505.

and unworkable. Compliance with the preemption provisions is further complicated by definitional uncertainties in the act that make it very difficult for both covered entities and courts to determine when state law is in fact preempted.¹⁷² The preemption analysis requires a series of potentially subjective determinations of whether the state law “relates to” the disclosure of IIHI, whether it is “contrary” and whether it is “more stringent.”

Further, the mere determination of whether a state law “relates to” IIHI privacy is daunting alone as relevant provisions can be found in a variety of laws such as insurance, worker’s compensation, public health, birth and death records, adoptions, criminal law, education, and welfare.¹⁷³ This comment will narrow its focus on criminal law, implied consent laws and statutes relating to implied consent laws.

B. Recent Developments in Implied-Consent Law

Implied consent laws imply that motorists have consented to some form of blood-alcohol testing upon suspicion of drunk driving.¹⁷⁴ As such, law enforcement, acting under the authority of these implied consent laws, may compel medical personnel to conduct blood draws on patients under circumstances where HIPAA would otherwise not permit, namely, those requested in the absence of a warrant or court order. While medical entities can put forth best efforts in maintaining policies based on a preemption analysis, the law is not static and as states pass new implied consent statutes, among the abundance of other state laws “related to” IIHI, covered entities are unable to confidently rely on previous preemption assessments.¹⁷⁵ Implied consent laws are a prime example.

The scope of implied consent laws has recently been subject to Supreme Court scrutiny as demonstrated by *Birchfield* and is still being evaluated. Further, many courts have struggled with the application of *McNeely* and *Birchfield* to implied consent statutes when applying their holdings to unconscious suspects and have

172. *Id.*

173.

Preemption analysis may require covered entities to cultivate a greater depth and breadth of knowledge about state law than they needed prior to HIPAA. The task of identifying every applicable state law provision is extremely burdensome on its own. And HIPAA adds yet another layer of analysis, not only by imposing its own set of regulations, but also by forcing covered entities to examine the interactions between the preexisting state laws and the new federal standards.

Id. at 506-08.

174. Landis, *supra* note 68, at 1.

175. Ko, *supra* note 120, at 510.

reached differing conclusions.¹⁷⁶ Some courts have found warrantless blood draws from an unconscious suspect to be constitutional, reasoning that statutory implied consent satisfies the consent exception to the Fourth Amendment warrant requirement.¹⁷⁷ Others have held that implied consent of an unconscious suspect is insufficient to satisfy the Fourth Amendment.¹⁷⁸

While HIPAA outlines the conditions that must be met for the disclosure of IIHI in the event that the patient is unconscious,¹⁷⁹ it has not prevented states from enacting and enforcing contrary laws. For example, twenty-nine states have laws sanctioning warrantless blood draws from intoxicated driving suspects who are unconscious.¹⁸⁰

Recently, the U.S. Supreme Court heard oral arguments in the case of *Mitchell v. Wisconsin*.¹⁸¹ There, a suspect was arrested for operating a vehicle while intoxicated.¹⁸² The suspect fell unconscious while police transported him to a hospital and was therefore unable to consent to a blood draw.¹⁸³ The arresting officer requested a blood draw despite his inability to consent pursuant to

176. Compare *People v. Hyde*, 2017 CO 24, ¶ 32 (holding that blood draw from an unconscious suspect was constitutional because statutory implied consent satisfies the consent exception to the Fourth Amendment warrant requirement), with *State v. Havatone*, 241 Ariz. 506 (2017) (holding that the "unconscious clause" of the implied-consent statute was unconstitutional as applied to the defendant and further determining that the "unconscious clause" can be constitutionally applied only when exigent circumstances prevent law enforcement from obtaining a warrant); see also *Bailey v. State*, 338 Ga. App. 428, 434 (2016) ("[I]mplied consent of an unconscious suspect is insufficient to satisfy the Fourth Amendment.").

177. *Hyde*, 2017 CO 24 at ¶ 32.

178. *Bailey*, 338 Ga. App. at 434.

179. 45 C.F.R. § 164.512(f)(3)(ii)(C) (2019).

180. Ala. Code § 32-5-192(b) (2019); Alaska Stat. § 28.35.035(b) (2018); Ariz. Rev. Stat. Ann. § 28-1321(C) (2019); Ark. Code Ann. § 5-65-202(b) (2019); Cal. Veh. Code § 23612(a)(5) (2019); Colo. Rev. Stat. § 42-4-1301.1(8) (2018); Fla. Stat. § 316.1932(1)(c) (2018); Ga. Code Ann. § 40-5-55(b) (2018); 625 ILCS 5/11-501.1(b) (2019); Iowa Code § 321J.7 (2018); Ky. Rev. Stat. Ann. § 189A.103(2) (2019); La. Rev. Stat. Ann. § 32:661(B) (2018); Md. Code Ann., Cts. & Jud. Proc. § 10-305 (c) (2019); Mo. Rev. Stat. § 577.033 (LexisNexis, Lexis Advance through 100th General Assembly, HB 14, HB 77, & HB 448); Mont. Code Ann. 61-8-402(3) (2019); Nev. Rev. Stat. § 484C.160 (2019); N.H. Rev. Stat. Ann. § 265-A:13 (2019); N.M. Stat. Ann. § 66-8-108 (2019); N.C. Gen. Stat. § 20-16.2(b) (2019); Ohio Rev. Code Ann. § 4511.191(4) (Page, Lexis Advance through file 3 (SB 23)); Okla. Stat. Tit. 47, § 751 (LexisNexis, Lexis Advance through the 57th Legislature act chapter 78, with the exception of chapters 11, 25, 38, 45, 55, & 68); Ore. Rev. Stat. § 813.140 (2019); S.C. Code Ann. § 56-5-2950(H); Tex. Transp. Code Ann. § 724.014 (2017); Utah Code Ann. § 41-6a-522 (2018); 23 Vt. Stat. Ann. § 1202(a)(2) (2018); W. Va. Code, § 17C-5-7(a) (2019); Wis. Stat. § 343.305(3)(b) (2018); Wyo. Stat. Ann. § 31-6-102(c) (2019).

181. *Mitchell v. Wisconsin*, OYEZ, www.oyez.org/cases/2018/18-6210 (last visited Apr 27, 2019).

182. *State v. Mitchell*, 2018 WI 84, ¶¶6-7 (2018).

183. *Mitchell*, 2018 WI at ¶¶8-10.

a Wisconsin implied consent statute authorizing the blood draw of an unconscious motorist suspected of driving while intoxicated.¹⁸⁴ In its decision, the Court will determine whether a statute that authorizes a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.¹⁸⁵ Pending the outcome of the case, the aforementioned twenty-nine states with similar implied-consent provisions may be forced to strike these provisions.

Further, states have recently taken on the challenge of evaluating the constitutionality of these statutes individually. In *North Carolina v. Romano*, the Supreme Court of North Carolina declared a provision of North Carolina's implied consent statute unconstitutional.¹⁸⁶ The statute authorized law enforcement to obtain blood samples from unconscious patients suspected of driving while intoxicated without a search warrant.¹⁸⁷ The court held that the statute was unconstitutionally applied to the patient/defendant where there was no warrant or consent and no exigent circumstances were present.¹⁸⁸ As such, the court struck down the law as unconstitutional.¹⁸⁹ Thus, it suffices to say that the state of implied consent laws is in flux.

Court decisions that directly analyze laws relating to the disclosure of patient IIHI undoubtedly assist medical entities in conducting their preemption analysis because they provide guidance where HIPAA is not clear. However, the language of HIPAA still leaves entities struggling to find a balance under circumstances where there is no judicial advocacy and where it is unclear whether HIPAA preempts a law authorizing an otherwise prohibited disclosure under the act. Medical entities should not be burdened with keeping up with the rapidly changing state laws. Nor should they be limited by statutory provisions regarding disclosure of IIHI where HIPAA provides guidance.

184. *Id.* at ¶12; *see also* Wis. Stat. Ann. § 343.305(3)(b) (stating “[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent”).

185. OYEZ, *supra* note 181.

186. *Romano*, 800 S.E.2d at 646.

187. N.C. Gen. Stat. § 20-16.2(b) (2019) (“If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed.”).

188. *Id.*

189. *See id.* at 691 (stating that “[t]reating N.C.G.S. § 655.2(b) as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances”).

C. Statutes Directly Compelling Medical Personnel to Draw Blood

Even where courts evaluate the constitutionality of implied consent laws, medical entities are still subject to confusion as to whether law enforcement can compel them to draw blood.

The decision in *North Carolina v. Romano* is instructive. While the North Carolina Supreme Court struck down the unconstitutional provision of its implied consent statute, this was not the statute that required medical personnel to comply with law enforcement's requests. Rather, North Carolina's general statute 20-139.1 on procedures governing chemical analyses requires medical personnel to comply with law enforcement requests.¹⁹⁰ This statute provides that "when a blood test is specified as the type of chemical analysis by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample, and no further authorization or approval is required."¹⁹¹ The statute further provides:

[a] person requested to withdraw blood . . . pursuant to this subsection may refuse to do so only if it reasonably appears that the procedure cannot be performed without endangering the safety of the person collecting the sample or the safety of the person from whom the sample is being collected.¹⁹²

Hence, in North Carolina, medical personnel cannot refuse to conduct blood draws directed by law enforcement officers unless the draw will endanger the safety of either medical personnel or the patient.¹⁹³ The rule applies even when the patient is conscious and actively refusing to submit to a blood draw.¹⁹⁴ This statute focuses not on the suspect, but on medical personnel required to draw blood under the direction of law enforcement.¹⁹⁵

Further, the statute does not provide enough information to employ HIPAA's preemption analysis. The statute is clearly "contrary" to HIPAA because it states that medical personnel are required to withdraw the blood sample with no further authorization or approval.¹⁹⁶ However, while the statute implies that it "relates to" IHII privacy, it does not discuss that actual disclosure to law enforcement. As such, it is unclear whether the

190. See N.C. Gen. Stat. § 20-139.1(c) (providing that medical personnel cannot refuse blood draws directed by law enforcement officers unless it is determined that the withdrawal will endanger the safety of either the medical personnel or the patient).

191. N.C. Gen. Stat. § 20-139.1(c) (2019).

192. *Id.*

193. *Id.*

194. N.C. Gen. Stat. § 20-139.1(d)(2) (2019).

195. N.C. Gen. Stat. § 20-139.1(c) (2019).

196. *Id.*

preemption analysis applies. Therefore, despite the disposition of the court on the constitutionality of the implied consent law provision, medical entities are still bound to oblige with an officer's mere request under this statute.

Similarly, in Arizona, law enforcement officials are required to obtain a warrant to authorize blood draws on suspects of driving under the influence; however, the statute further states:

. . . if a law enforcement officer has probable cause to believe that a person has violated § 28-1381¹⁹⁷ and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes.¹⁹⁸

Therefore, in Arizona, medical personnel are required to draw blood under the direction of a law enforcement official.¹⁹⁹

D. State Action

The preemption analysis outlined in HIPAA also falls short when considering state action. Where a law enforcement officer requests a blood draw without patient consent or a warrant, at least three parties are involved: the patient, medical personnel, and the law enforcement officer.

The preemption provision states that HIPAA preempts state law that is "contrary" to HIPAA,²⁰⁰ yet it also defines "state law" as

197. A.R.S. § 28-1381 (2019).

198. A.R.S. § 28-1388 (2019).

199. *Id.*

200. *See* 45 C.F.R. § 160.203 (2019) (stating that:

This general rule applies, except if one or more of the following conditions is met:

(a) A determination is made by the Secretary under § 160.204 that the provision of State law:

(1) Is necessary:

(i) To prevent fraud and abuse related to the provision of or payment for health care;

(ii) To ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation;

(iii) For State reporting on health care delivery or costs; or

(iv) For purposes of serving a compelling need related to public health, safety, or welfare, and, if a standard, requirement, or implementation specification under part 164 of this subchapter is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served; or

(2) Has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. 802), or that is deemed a controlled

encompassing statutes and “[s]tate action having the force and effect of law.”²⁰¹ Thus, upon a request for a blood draw, the medical entity would first have to establish whether a police officer is acting under the authority of a statute or his authority as a law enforcement officer engaging in state action.

If the authority is state law, the medical entity would have to refer to its policy and determine whether the most recent implied consent law provisions have been analyzed. If not, the medical entity and its personnel are forced to conduct a preemption analysis on the spot to determine: (1) whether the statute is “related to” the privacy of IIHI; (2) whether the statute is “contrary” to HIPAA; and (3) whether the statutory provisions are “more stringent” than the provisions of HIPAA.²⁰²

However, if the law enforcement officer is engaging in state action, the lines are blurred and the preemption analysis is essentially unusable because the evaluation turns on the conduct of the law enforcement officer, and not statutory provision. Because medical personnel are subject to the laws of the state, they have a legal duty to serve the public and adhere to state law or state action.²⁰³ Common practice results in medical entities having dual loyalties.²⁰⁴ While they have an ethical duty to individual patients, providers also have an ethical duty to serve the public and adhere to state law.²⁰⁵ Because the “permitted disclosure” provisions are unclear as to what “as required by law” means, medical personnel may reasonably believe they have no other choice but to comply with

substance by State law.

(b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.

(c) The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.

(d) The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals).

201. 45 C.F.R. § 160.202 (2019).

202. Ko, *supra* note 120, at 505.

203. Appel, *supra* note 67, at 150 (stating:

[p]hysicians who forcibly provide such care over a patient's objections will risk civil liability and may be guilty of battery. At the same time, government and professional authorities have long accepted that medical providers, as licensees of the state and possessors of a state-sanctioned monopoly in the healing arts, have dual loyalties).

204. *Id.*

205. *Id.*

the request.²⁰⁶ The officer's request for blood records "relates to" the privacy of IIHI. The request may also be "contrary" to HIPAA if the surrounding circumstances do not fall into the "permitted disclosure" provisions of HIPAA. However, determining whether the officer's conduct is "more stringent"²⁰⁷ than the provisions of HIPAA calls for a speculative and subjective analysis based on the facts and circumstances surrounding the scenario which cannot reasonably be made by medical personnel or law enforcement.²⁰⁸

E. What Happened in Utah?

The Utah case involving Alex Wubbles ties all of these issues together. There, the patient was unconscious as a result of an auto accident and the University of Utah Hospital's policy stated that law enforcement could obtain blood samples for patients suspected to be under the influence only with an electronic warrant, patient consent, or court order, which complies with HIPAA.²⁰⁹ The Utah implied consent law states:

a person licensed to drive in the state of Utah is considered to have given the person's consent to a chemical test or tests of the person's breath, blood, urine, or oral fluids for the purpose of determining whether the person was operating or in actual physical control of a motor vehicle while . . . having a blood or breath alcohol content statutorily prohibited.²¹⁰

The police officer who arrested nurse Wubbles mistakenly believed he was acting under the authority of this statute.²¹¹ The officer requested the blood draw in order to establish that the patient was *not* under the influence at the time of the accident.²¹² However, the Utah implied consent statute permits a warrantless blood draw only on the person suspected of driving under the influence.²¹³ Thus, the implied consent law did not authorize the

206. *See id.* at 150 (discussing the need for standards justifying health care providers' participation in blood draws requested by law enforcement).

207. *Ko*, *supra* note 120, at 505.

208. *See Ko*, *supra* note 120, at 510 (stating that many covered entities lack the time, personnel, and technical expertise required to conduct their own analyses).

209. Barbash & Hawkins, *supra* note 3 and accompanying text.

210. Utah Code Ann. § 41-6a-520 (2019).

211. *See* Paul Cassell, *Cop Who Arrested Nurse Was Wrong, But the Law Is Complicated*, THE SALT LAKE TRIBUNE (Sept. 01, 2017), www.sltrib.com/opinion/commentary/2017/09/01/paul-cassell-cop-who-arrested-nurse-was-wrong-but-the-law-is-complicated (stating "[a]ccording to the police reports connected with the incident, the detective and his supervisor thought they had consent relying on Utah's 'implied consent' law found at Utah Code § 41-6a-520").

212. *See* Hawkins & Wang, *supra* note 1 (noting that the unconscious patient was the victim of a car accident and the officer who demanded his blood requested it to prove that the victim's blood had no alcohol content).

213. *Id.*

blood draw under these circumstances.²¹⁴ However, had the unconscious patient been suspected of driving under the influence, the nurse would have been wrong in refusing the blood draw because the Utah implied consent law would have circumvented the hospital's policy.²¹⁵ The arresting officer was wrong because he mistakenly believed the Utah implied consent law granted him authority to obtain the blood sample.²¹⁶

However, the circumstances would have been different if the implied consent statute was not the authority for which the officer based his request. The circumstances might have established a "permitted disclosure" under the HIPAA as it applies to unconscious patients suspected to be victims of a crime.²¹⁷ Thus, the law enforcement officer could have based his request on HIPAA rather than state law to obtain the blood draw and been successful. This case demonstrates how the language of HIPAA and the preemption provision can create confusion for both law enforcement and medical personnel alike.

IV. PROPOSAL

The issue that arose in Utah, and the potential issues that will transpire in North Carolina and Arizona under the aforementioned statutes, exist because HIPAA as it is currently written is ambiguous and implies that a state law or state action having the force and effect of law action will preempt HIPAA.²¹⁸

214. *Id.*

215. Compare Utah Code Ann. § 41-6a-520 (2019) (stating an officer may direct medical personnel to administer blood draws where the officer has reasonable grounds to believe that a person from whom blood is to be taken was driving while having a blood alcohol content that was statutorily prohibited), with Barbash & Hawkins, *supra* note 3 (stating that the University of Utah Hospital's policy stated police enforcement could obtain blood samples for patients suspected to be under the influence only with an electronic warrant, patient consent, or court order).

216. See Cassell, *supra* note 211 (concluding "Nurse Wubbels was ultimately right – but for the wrong reasons. And the Salt Lake Police were ultimately wrong – but could rightly point to an implied consent law as potentially being in play").

217. 45 C.F.R. § 164.512(f)(3)(i) (2019). Where the patient is someone who is or suspected to be the victim of a crime, law enforcement and medical personnel must obtain his consent. *Id.* If the patient is incapable of consenting, law enforcement must establish three requirements: (1) that the information is needed to determine whether someone other than the victim has violated the law and that the information is not intended to be used against the victim; (2) that waiting for the individual to consent would materially and adversely affect law enforcement activity; and (3) that disclosure is in the best interests of the individual as determined by the covered entity. *Id.*

218. See Peter H.W. Van Der Goes, Jr., *Opportunity Lost: Why and How to Improve the HHS-Proposed Legislation Governing Law Enforcement Access to Medical Records*, 147 U. PA. L. REV. 1009, 1048 (1999) (stating that "[e]xisting legal protections afforded to individuals seeking to assert a privacy interest in

This section will recommend several proposals as to how to resolve this issue. Section A will discuss why the preemption provision should remain partial. Section B will discuss why Congress should further define the “more stringent” standard in preemption analysis. Section C will propose how the phrase “as required by law,” as stated in HIPAA, should be construed. Section D will propose amendments to the language of the “permitted disclosures.” Section E will address how the proposals will affect state police power. Finally, Section F will describe that the exigent circumstances exception to the Fourth Amendment will not be affected by the proposed amendments.

A. HIPAA’s Partial Preemption Provision Should Remain Partial

HIPAA should not completely preempt state law. Advocates for complete preemption argue that HIPAA regulations should adopt complete preemption of state law and constitute a single, comprehensive source of law that supersedes all state laws affecting the disclosure of protected health information.²¹⁹ They contend that complete preemption would provide administrative ease and efficiency, clarity, practicality, predictability, and uniformity.²²⁰

However, complete preemption would permit the federal government to completely usurp the traditional regulatory role of the states because the enactment of HIPAA “inject[ed] the federal government into an arena that had previously been primarily occupied by the states.”²²¹ Instead, a clearly delineated partial

their health records and prevent law enforcement intrusion are more disparate than standardized, more ambiguous than defined, more conflicted than robust, and more incomplete than comprehensive”); *see also* Sarah Beatty Ratner, *Articles: HIPAA’S Preemption Provision: Doomed Cooperative Federalism*, Vol. 35, No. 4, *J. HEALTH & LIFE SCI. L.*, 485, 523 (2002) (recognizing, “[t]he statutory provisions of HIPAA provide little guidance as to the application and scope of its preemption provision”).

219. *See* Rebecca H. Bishop, *The Final Patient Privacy Regulations Under the Health Insurance Portability and Accountability Act - Promoting Patient Privacy or Public Confusion?*, 37 *GA. L. REV.* 723, 729 (2003) (asserting that the “need for uniformity, efficiency, and protection of patients’ medical records serves as evidence that the best solution to the present HIPAA confusion is one set of federal regulations that fully supplant state law”).

220. *See* Standards for Privacy of Individually Identifiable Health Information, 65 *Fed. Reg.* 82462, 82579 (2000) (stating that “numerous” public comments rejected the partial preemption framework as burdensome, ineffective, or insufficient, and called instead for complete preemption of “patchwork” state laws); *see also* Cf. Sharon J. Hussong, *Medical Records and Your Privacy: Developing Federal Legislation to Protect Patient Privacy Rights*, 26 *AM. J.L. & MED.* 453, 469 (2000) (noting “insurance companies claim that federal preemption would ensure that they would not have to increase costs for consumers”).

221. Joy L. Pritts, *Developments and Trends in the Law: Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Laws and*

framework should be implemented. A partial preemption framework instead “attempts to balance the autonomy of the states against the need for uniform national standards on medical privacy” as partial preemption preserves the rights of the states to legislate in this area by either changing existing laws or passing new, more protective provisions.²²² As such, the current partial preemption framework should establish a clear, uniform, and streamlined analytical framework for deciding which state laws preempt HIPAA.

B. Congress Should Clarify the Term “More Stringent”

Congress should clarify the term “more stringent” as used in 45 C.F.R. § 160.202 because the standard does not provide covered entities with concrete examples of what the term means. Under HIPAA, a state law is “more stringent” if it meets at least one of six enumerated criteria: (1) it prohibits use or disclosure of IIHI under circumstances where HIPAA would permit it; (2) it provides patients of IIHI with “greater rights of access or amendment” to their information; (3) it provides a “greater amount of information” to patients about use, disclosure, rights, or remedies; (4) it provides requirements that narrow the scope or duration, increase the privacy protections afforded, or reduce the coercive effect of the circumstances surrounding the need for express legal permission with respect to the form, substance, or need for legal permission prior to a use or disclosure; (5) it provides for more detailed recordkeeping or accounting of disclosures; or (6) “with respect to any other matter, [it] provides greater privacy protection” for the subject of the information.²²³

This standard creates a subjective and confusing framework for medical entities to employ when evaluating preemption. Congress should provide clarity as to the meaning of “greater rights of access or amendment,” “greater amount of information” and “greater privacy protection” by providing specific examples of each. Doing so would provide medical entities with concrete examples which they can refer to in evaluating relevant statutory provisions that are “contrary” to HIPAA provisions.

C. Statutory Construction of “As Required by Law”

The phrase “as required by law” within the HIPAA “permitted disclosures” should be narrowly construed. HIPAA provision 45 C.F.R. § 164.512(f)(1) delineates when disclosures are permitted

the Impact of the Federal Health Privacy Rule, 2 YALE J. HEALTH POL'Y L. & ETHICS 325, 340 (2002).

²²² Ko, *supra* note 120, at 523.

²²³ Ko, *supra* note 120, at 504-05; 45 C.F.R. § 160.202 (2019).

pursuant to process or otherwise “required by law.”²²⁴ The first subsection²²⁵ states that a covered entity may disclose protected health information “*as required by law* including laws that require the reporting of certain types of wounds or other physical injuries.”²²⁶ However, the term “as required by law” is not defined within the text of the provision. The preemption provision defines “state law” as any “constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.”²²⁷ Thus, a broad interpretation of 45 C.F.R. § 164.512(f)(1) would infer that the text refers to *any* state law. Under this interpretation, any state law, including an implied consent law, which mandates the disclosure of IHII would fall within this provision and medical personnel would be required to oblige.

However, given that HIPAA was enacted in response to the states’ inconsistent and incomplete regulations in relation to IHII, it would seem that such a broad interpretation would directly undermine the goals of the act.²²⁸ Moreover, if this broad interpretation was correct, then the provision would suffice by merely stating, “as required by law,” because the first clause would encompass the second clause which refers to laws that mandate reporting of specific injuries.

A more precise construction of the statute should interpret the provision in the context of its surrounding language, which is a method employed by the Supreme Court in statutory construction cases.²²⁹ The phrase, “*as required by law* including laws that require the reporting of certain types of wounds or other physical injuries,”²³⁰ should be construed as merely referring to laws that require the reporting of certain types of wounds or injuries. This is because the preemption provision expressly provides the framework for preemption analysis and as a preliminary determination, the state law must “relate to” the privacy of IHII.²³¹ If the provision was to be interpreted as encompassing any state law, there would be no need to employ the preemption analysis. Rather, any state law that requires medical entities to disclose IHII would fall into this “permitted disclosure” provision of the Privacy Rule.

Instead, all state laws “relating to” the disclosure of IHII that do not fall within the very limited “permitted disclosure” provisions

224. 45 C.F.R. § 164.512(f)(1) (2019).

225. 45 C.F.R. § 164.512(f)(1)(i) (2019).

226. *Id.* (emphasis added).

227. 45 C.F.R. § 160.202 (2019).

228. *E.g.*, 64 Fed. Reg. 59919 (1999).

229. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (stating that “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear”).

230. 45 C.F.R. § 164.512(f)(1)(i) (2019) (emphasis added).

231. *Ko*, *supra* note 120, at 504; 45 C.F.R. § 160.203 (2019).

of HIPAA must be analyzed to determine whether HIPAA preempts the state law.

D. Proposed Text for 45 C.F.R. § 164.512.

HIPAA should be amended to remove the ambiguity²³² regarding the legislature's authority to permit disclosures of protected health information outside of the disclosures described and outlined in HIPAA provision 45 C.F.R. § 164.512.²³³ The preemption language found in 45 C.F.R. § 160.202 should be restated in the "permitted disclosures" section of the act in order to clarify which "laws" should be considered in the preemption analysis. The first standard 45 C.F.R. § 164.512(a): Uses and disclosures required by law,²³⁴ should include a definition for the phrase "required by law." The definition should read:

"required by law" as defined by this provision requires that the state law permitting disclosure of individually identifiable health information without patient authorization or patient opportunity to consent or object to disclosure applies only to state laws that provide more protection of privacy of patient's individually identifiable health information than the protection afforded within HIPAA regulation.²³⁵

Doing so would remove any confusion as to what "required by law" means within the provision. As a result, 45 C.F.R. § 164.512(a)(2) would logically follow: "(2) [a] covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law."²³⁶

Making this subtle change would establish that the "laws" referred to in the "permitted disclosure" provisions are only those listed in paragraph (c), (e), or (f) and would not allow for the misinterpretation that "any" state law or action could mandate disclosures otherwise prohibited under HIPAA. Instead, any state action or statute would have to survive a proper preemption analysis.

Further, 45 C.F.R. § 164.512(f)(1)(i), the "permitted disclosure" stating that a covered entity may disclose protected health information "*as required by law* including laws that require the reporting of certain types of wounds or other physical injuries,"²³⁷ should be amended to state, "as required by laws which require the reporting of certain types of wounds or other physical injuries."²³⁸

232. See Ko, *supra* note 120, at 513 (stating "[a] major obstacle to interpreting and applying HIPAA's preemption provision is that much of its language is ambiguous and indefinite").

233. 45 C.F.R. § 164.512 (2019).

234. 45 C.F.R. § 164.512(a) (2019).

235. 45 C.F.R. § 160.201-05 (2019).

236. 45 C.F.R. § 164.512(a)(2) (2019).

237. 45 C.F.R. § 164.512(f)(1)(i) (2019) (emphasis added).

238. 45 C.F.R. § 164.512(f)(1)(i) (2019).

In addition, the text should provide general examples of the types of laws the provision refers to such as laws requiring disclosure of gun-shot wounds. This would limit the statutes that do not preempt HIPAA as a matter of law and allow for a proper preemption analysis.

These changes would adequately inform medical entities and law enforcement of the circumstances when HIPAA allows for the disclosure of IHII for law enforcement purposes because the “permitted disclosures” would be clearly articulated in the HIPAA provisions.²³⁹ As such, the burden medical entities face in preemption analysis when drafting policies or responding to law enforcement’s requests for blood draws would be substantially decreased because there would be no question as to whether the state action or statute falls clearly within a “permitted disclosure.” Finally, medical entities would not be uncertain as to whether they are violating HIPAA where compliance conflicts with law enforcement needs and goals.

E. Amending HIPAA Will Not Take Power Away from State Law

In enacting HIPAA, Congress mandated the establishment of federal standards for the security of protected health information.²⁴⁰ The purpose of the Privacy Rule is to ensure that every covered entity has implemented safeguards to protect the confidentiality, integrity, and availability of protected health information.²⁴¹ HIPAA compliance is very serious for covered entities, and oftentimes, medical personnel are hesitant to disclose information to law enforcement because of the threat of a HIPAA violation.²⁴² Leaving the disclosures to the discretion of HIPAA would grant

239. See 45 C.F.R. § 164.512 (2019) (stating that under HIPAA, such disclosures are permitted for victims of abuse, neglect, or domestic violence, disclosures for judicial and administrative proceedings, and disclosures for law enforcement purposes). Law enforcement purposes include disclosures pursuant to process, disclosures that are limited for identification and location purposes, disclosures for victims of a crime, disclosures of decedents in the event that their death may have resulted from criminal conduct, disclosures for crime on the premises of the covered entity and disclosures for reporting crime in emergencies. *Id.*

240. 45 C.F.R. § 164.501 (2019).

241. *Id.*

242. Tomes & McCart, *supra* note 115 (stating that:

[w]hat makes HIPAA difficult for law enforcement are these HIPAA criminal and civil penalties, which scare the you-know-what out of those in the health care industry, thinking that, if they disclose PHI in violation of HIPAA’s somewhat incomprehensible rules, they are going straight to HIPAA jail or will be hit with a seven-figure HIPAA civil money penalty, what DHHS calls a fine).

medical personnel peace of mind and deter resistance against law enforcement when requests for blood draws arise.

The states' police power will not be infringed upon in making these proposed amendments. This is because the proposed language already exists within the HIPAA and does not impact the state's ability to legislate or exercise its police powers. Rather, the burden placed on law enforcement to obtain the medical records of blood alcohol content through blood draws would become less perplexing because HIPAA clearly states the twelve permitted disclosures where law enforcement can obtain the information without a warrant in compliance with both the hospital policy and recent Supreme Court decisions. Put another way, law enforcement will no longer have to analyze applicable state law and present it alongside a compelling argument to hospital personnel in order to obtain the blood sample because there would be a uniform set of guidelines that both sides would be fully aware of.

F. Overcoming the Exigent Circumstance Exception

This proposal would be in compliance with case law as it stands in regard to the exigent circumstance exception to the warrant requirement. After the Supreme Court's ruling in *McNeely*, it is clear that the dissipation of alcohol in the bloodstream alone cannot create a categorical exigent circumstances exception.²⁴³

However, there is still concern over the "exigent circumstances" exception. The Supreme Court in *Birchfield* noted that in addition to consent, there are still two kinds of exceptions to the warrant requirement: "(1) case-by-case exceptions, where the particularities of an individual case justify a warrantless search in that instance, but not others; and (2) categorical exceptions, where the commonalities among a class of cases justify dispensing with the warrant requirement for all of those cases, regardless of their individual circumstances."²⁴⁴ The argument against amending HIPAA is that such exceptions would no longer be grounds upon which law enforcement could base warrantless disclosure requests. However, the aforementioned HIPAA provisions for "permitted

243. *McNeely*, 569 U.S. at 158 ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake.").

244. *Compare Birchfield*, 136 S. Ct. 2160 at 2188 (stating that "the Court allows warrantless searches on a case-by-case basis where the exigencies of the particular case make the needs of law enforcement so compelling that a warrantless search is objectively reasonable" in that instance) (internal quotations omitted), *with McNeely*, 569 U.S. 141 at 168 (stating that "[t]he defining feature of the exigent circumstances exception is that the need for the search becomes clear only after all of the facts and circumstances of the particular case have been considered in light of the totality of the circumstances"); *and* 45 C.F.R. § 164.512 (2019).

disclosures” are detailed and provide multiple scenarios where law enforcement can bypass the need for a warrant.²⁴⁵

V. CONCLUSION

The issue regarding blood draws and disclosure of protected information affects both the legal field and the medical field in substantial ways. Medical personnel must protect patient privacy while law enforcement must deter drunk driving. The Supreme Court has attempted for nearly sixty-six years since *Rochin* to draw the line between the public interests being served by the state police power and the individual rights afforded to every citizen by the United States Constitution.

HIPAA provides detailed standards that fulfill exceptions to the warrant requirement which assist law enforcement interests in deterring drunk driving and comply with recent case law.²⁴⁶

It is clear that HIPAA, as currently drafted, lacks the necessary language to carry out its policy; however, it should be amended in order to do so. Medical personnel in states such as North Carolina and Arizona should not be compelled to draw blood on a patient for law enforcement purposes simply because a law officer directs them to.²⁴⁷ Nor should a nurse be arrested in the emergency room of a hospital for refusing to draw blood for a police officer who is unsure of the state’s laws on implied consent.²⁴⁸ State governments, whether through implied consent laws, or other statutes, should not be able to permit law enforcement to circumvent the requirements of HIPAA by enacting contradictory or confusing state law. Nor should the provisions of HIPAA be loosely construed to afford state legislatures more power than the act permits.

245. See generally 45 C.F.R. § 164.512 (2019) (stating that “disclosures are permitted: (1) if pursuant to process and as otherwise required by law; (2) for the limited purpose of identification and location; (3) for an individual who is or suspected to be the victim of a crime; (4) for decedents for the purpose of alerting law enforcement of the death of the individual; (5) for crimes on the premises of the covered entity; and (6) for the purpose of reporting crime in emergencies”).

246. 45 C.F.R. § 164.512(a) (2019); 45 C.F.R. § 164.512(f) (2019).

247. North Carolina General Statute § 20-139.1(c).

248. See Hawkins and Wang, *supra* note 1 (commenting on the videotaped arrest of a nurse at a Salt Lake City hospital after she told police that they weren’t allowed to draw blood from an unconscious patient).

