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Ohio's Patient-Physician Privilege: Whether Planned Parenthood Is a Protected Party

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OHIO’S PATIENT-PHYSICIAN PRIVILEGE: WHETHER
PLANNED PARENTHOOD IS A PROTECTED PARTY

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I. INTRODUCTION

May 30, 2002, a horrible tragedy struck the small, rural town of Storm Lake, Iowa.¹ It was on that dark day that the dead and dismembered body of a two-day-old baby was found in a dumpster at a Buena Vista County recycling plant.² As expected, the quiet community was stricken with grief and anger over the tragedy.³ Immediately the Buena Vista County authorities began their search for the killer of the infant.⁴ The investigation's main focus turned to finding the baby's mother, as she was the prime murder suspect.⁵ However, after an extensive investigation, police still had no clue as to the identity of the infant's mother.⁶

The problem faced by Buena Vista County authorities is not a unique one.⁷ The problem of abandoned babies has surfaced in Ohio as well.⁸ When a high school senior⁹ in Columbus, Ohio, became pregnant, she was too scared to do anything

¹Wayne Loewe, *Iowa High Court to Hear Planned Parenthood Appeal in Slain Baby Case*, (Sept. 5, 2002), at <http://www.cnn.com/2002/LAW/09/05/tv.planned.parenthood/ndex.html>.

²*Id.*

³*Id.*

⁴*Id.*

⁵*Id.*

⁶Wayne Loewe, *Iowa High Court to Hear Planned Parenthood Appeal in Slain Baby Case*, (Sept. 5, 2002), at <http://www.cnn.com/2002/LAW/09/05/ctv.planned.parenthood/ndex.html>.

⁷Rick Hampson, *Saving Babies Left to Die*, USA TODAY, Feb. 9, 2002 at 1A. This article cites numerous examples of situations where babies were abandoned. Specifically, a newborn was found in debris on the railroad tracks in Patterson, New Jersey. In Denver, Colorado, a supermarket clerk found a baby on shelf behind some diapers. In Monroe, Louisiana, a newborn infant was found abandoned in a carport. A newborn baby boy was found in a trash dumpster in Shelbyville, Kentucky. In Queens, New York, the police found an infant girl dead outside of a public housing project. The police were unable to ascertain the identity of the mother. In Minneapolis, Minnesota, a young boy witnessed his teenage sister discard her baby into a neighbor's trash. In Allentown, Pennsylvania, a woman who originally claimed that she had found a newborn in the trash of her family's home was later charged with actually leaving the child there herself. A baby was "found alive in a diaper bag in a thrift store parking lot" in Santa Cruz, California. A week-old baby boy was also found alive "in an unheated laundry room of an apartment complex" in Fort Worth, Texas. The identity of both the child and the mother were unknown. In Germantown, Maryland, "[a] newborn girl [was] found in a trash bin outside an apartment complex in freezing temperatures." Likewise, "[a] boy, about 5 days old, [was] found frozen to death in a snow bank outside a hospital" in Indianapolis, Indiana. The identity of the child was unknown. Perhaps more striking than these stories themselves, is the fact that these horrific discoveries were all made within less than a one-month period of time. Specifically, these children were found from January 1, 2000 - January 26, 2000.

⁸*Id.*

⁹*Id.* Tywana Davis was a high school senior, living with her grandparents when she found out she was pregnant. She feared that her grandparents would send her back to live with her mother if they found out she was pregnant. So she kept her pregnancy a secret. Eventually she gave birth to her child and after abandoning the child outside her college dorm room, she

about it, so she just concealed her pregnancy and secretly hoped for a miscarriage.¹⁰ She even went off to college, where she gave birth to a baby girl on the floor of her dorm room.¹¹ She wrapped the baby girl in clothes, put her in a grocery bag and laid her inside of a trashcan outside the dorm.¹² The young woman could not handle the guilt of abandoning her child though, and thus placed an anonymous phone call to campus security, complaining of noise coming from outside the dorm room.¹³ As the young mother watched from the window of her dorm room, the baby was found alive by campus security in the garbage can.¹⁴ Eventually, investigators were able to determine the identity of the mother of the abandoned child and the young girl was subsequently convicted of Child Endangerment.¹⁵

Police in Bedford, Ohio, a suburb of Cleveland, Ohio, faced a similar problem as the authorities in Columbus, Ohio, but unlike the Columbus police, they were unable to find the mother of an abandoned child.¹⁶ The situation the Bedford police faced was much more similar to the one in Buena Vista County.¹⁷ Police detectives in Bedford made the gruesome discovery of a dead body of a baby girl that was found buried in a wooded area.¹⁸ The body was found wrapped in plastic bags and buried inside a "5-pound potato chip can."¹⁹ "About 1-2 inches of concrete was poured over the top, then the potato chip can was buried in the ground."²⁰ Police were only able to ascertain that the baby was white and was born approximately eight months into the pregnancy.²¹ Authorities had originally kept the discovery quiet, thinking that too much publicity would have resulted in the mother, or anyone with information, being too scared to come forward.²² After waiting for someone to come forward, the police decided to go public with the discovery, hoping that someone would come forward

was convicted of Child Endangerment. She was sentenced to house arrest for one year as her punishment. Her grandparents decided to let Tywana finish college, while they raised the child. Today, Tywana counsels teenagers who are pregnant.

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶Mike Lesko, News of Body Discovery Brings New Information, (Feb. 13, 2002), at <http://www.sunnews.com/news/suburbs/east/1998/babyinfo.htm>.

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹Lesko, *News of Body Discovery Brings New Information*, <http://www.sunnews.com/news/suburbs/east/1998/babyinfo.htm>.

²²*Id.*

with information.²³ As a result they received some information, but “no solid leads.”²⁴

While the Bedford police department’s investigation stalled, as they had no leads to go on, law enforcement authorities in Buena Vista County, Iowa, tried more than just asking for information in their investigation.²⁵ Specifically, the authorities in Buena Vista County compiled a list of the health clinics and hospitals in the area where the baby’s mother may have sought care.²⁶ The Buena Vista County Attorney subpoenaed the records of these health facilities in an attempt to locate the baby’s mother.²⁷ However, he did this without a specific suspect or any clues to go on.²⁸ Included among the health facilities subpoenaed was the Planned Parenthood of Greater Iowa’s (PPGI) Storm Lake Clinic.²⁹ Specifically, Buena Vista County authorities sought to obtain: “[a]ny and all documents or files containing information of females who requested and received pregnancy testing at PPGI’s Storm Lake Clinic . . . on or between the dates of August 15, 2001 and May 30, 2002.”³⁰ PPGI vehemently refused to turn-over these records, as it estimated that nearly 1,000 women were seen at the Storm Lake facility over the requested time period.³¹

PPGI’s argument in opposition to the subpoena was that “[t]he subpoena requires disclosure of confidential and protected health information”³² PPGI argued further that “[t]he privilege belongs to each and every female patient who has requested and/or received a pregnancy test at PPGI’s Storm Lake Clinic on or between the dates August 15, 2001 and May 30, 2002 and, to the best of PPGI’s knowledge, not any of these female patients have waived such a privilege.”³³ Specifically, PPGI argued that, “[t]he requested information and materials are protected by the physician-patient privilege and therefore, are not subject to inspection.”³⁴ Iowa’s patient-physician privilege specifically states that: “[a]

²³*Id.* The police in Bedford chose to only urge those with information to come forward, as opposed to subpoenaing any local hospitals for records, despite believing that the child was buried by someone in the area based on the fact that the “gravesite” was marked by several headstones.

²⁴*Id.*

²⁵*See* Loewe, *supra* note 1.

²⁶George Sanchez, *Planned Parenthood’s Iowa Predicament*, (Aug. 7, 2002), at http://www.motherjones.com...xclusives/features/news/iowa_pphood.html.

²⁷*Id.*

²⁸*Id.*

²⁹PPGI’s Motion to Quash Subpoena Duces Tecum, In the Matter of the Issuance of the Prosecuting Attorney’s Subpoena (hereinafter PPGI Motion to Quash). [On file with the author.]

³⁰*Id.* at 1

³¹Rekha Basu, *Iowa D.A. Seeks Data on 100s of Prenatal Patients*, (July 8, 2002), at <http://www.womensnews.org/article.cfm/dyn/aid/965/context/archives.html>.

³²*See* PPGI Motion to Quash *supra* note 29 at 1.

³³*Id.*

³⁴*Id.*

practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline."³⁵

The Iowa District Court of Buena Vista County heard PPGI's arguments, however, the Court overruled PPGI's Motion to Quash the Subpoena.³⁶ In overruling the Motion, the Court held that "the names, addresses, and birth dates of all women who submitted themselves to a pregnancy test, and tested positive for pregnancy, during the period of time from August 15, 2001 to May 30, 2002,"³⁷ had to be turned-over. The Court further held that the patient-physician privilege does not apply to Planned Parenthood because the staff members who work at Planned Parenthood are not necessarily medical professionals and administer pregnancy tests.³⁸ What ensued was a tremendous legal battle that made its way to the Iowa Supreme Court in regard to whether PPGI should have turned-over the requested pregnancy test results.³⁹ However, Buena Vista County was forced to drop the suit because the county did not have the financial resources to pursue what assuredly would have been an endless process of litigation.⁴⁰

As a result of cases like the recent attempt made by Iowa authorities to solve the murder of an infant and similar cases in Ohio, the question can be asked as to whether law enforcement officials in Ohio can legally subpoena the pregnancy test results of local hospitals, specifically Planned Parenthood clinics, in an investigation of a dead or even an abandoned baby. Ohio does specifically have a patient-physician privilege, similar to the one in Iowa.⁴¹ The statute does specifically prohibit a physician from testifying in regard to a "communication made to the physician . . . by a patient in that relation or the physician's . . . advice to a patient."⁴² Thus, the question becomes whether Ohio's patient-physician privilege would extend to clinics such as Planned Parenthood.

This article will suggest that under Ohio's patient-physician privilege, the results of pregnancy tests that are administered at Planned Parenthood clinics will not be considered privileged or confidential information, unless the test is administered by a physician and is later used by a physician in treatment of the woman. In particular, this article will briefly examine the history of a right to medical privacy, the development of the patient-physician privilege and the origin of Planned Parenthood

³⁵IOWA CODE §622.10(1) (2002).

³⁶Ruling on Motion to Quash, In the Matter of the Issuance of a Prosecuting Attorney's Subpoena. [On file with the author.]

³⁷*Id.*

³⁸*Id.*

³⁹See Loewe, *supra* note 1.

⁴⁰County Attorney Drops Cases Against Planned Parenthood, (October 9, 2002), at <http://www.theiowachannel.com/ames/1711888/detail.html>.

⁴¹OHIO REV. CODE ANN. § 2317.02(B)(1) (Anderson 2002).

⁴²*Id.*

clinics. Primarily, this article will address whether Ohio's patient-physician privilege would consider the results of a pregnancy test administered to a woman at a clinic such as Planned Parenthood, privileged communication. In doing so, this article will examine precisely what relationships are protected under the statute. This article will then briefly examine the effect of federal laws on the issue, in particular, the Health Insurance Portability and Accountability Act of 1996 (HIPPA). Finally, this article will advocate for change in current Ohio law or new legislation that will keep the results of pregnancy tests administered at clinics such as Planned Parenthood confidential and provide a model of existing legislation where such information would currently be deemed confidential.

II. HISTORY

A. *Where the Right to Medical Privacy Originated*

The notion of very intimate details of a person's health, including diseases, conditions, diagnoses and prognoses being readily available to whoever would like to know the information, is not only absurd, but is also probably revolting to most people. Likewise, most people are likely aware that such information is considered private and cannot be disclosed to just anyone requesting knowledge of the information. Where then does this notion of medical privacy come from?

In a landmark decision on the issue of a "right to privacy," *Griswold v. Connecticut*,⁴³ the United States Supreme Court addressed the constitutionality of a Connecticut statute that imposed fines on people who used contraception or assisted others in the use of contraception.⁴⁴ In striking down the statute the Court found there to be "penumbras" in the Bill of Rights that created "zones of privacy."⁴⁵ As such, the Court found that the use of contraceptives within a marriage falls within a zone of privacy and cannot be regulated by the government.⁴⁶

In another landmark decision, the United States Supreme Court, in *Roe v. Wade*,⁴⁷ addressed the constitutionality of a Texas statute that criminalized abortion.⁴⁸ The Court found there to be a "right to privacy" in the Constitution, which was "broad enough to encompass a women's decision whether or not to terminate her pregnancy."⁴⁹ As such, the Court struck down the Texas statute that criminalized abortion.⁵⁰ The Court went on to say that "[w]e therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."⁵¹

⁴³381 U.S. 479 (1965).

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷410 U.S. 113 (1973).

⁴⁸*Id.*

⁴⁹*Id.* at 153.

⁵⁰*Id.*

⁵¹*Id.* at 154.

In *United States v. Westinghouse Electric Corp.*,⁵² the Third Circuit Court of Appeals dealt with the issue of whether it was constitutional for an employer to disclose an employee's medical records to a third-party in an attempt to improve the safety and health of every employee.⁵³ The Court held that the medical records requested fell "within one of the zones of privacy entitled to protection."⁵⁴ The Court also noted, "[t]here can be no question that . . . medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."⁵⁵ Nonetheless, the Court found that a strong "public interest in facilitating the research and investigations . . . justif[ied] this minimal intrusion into the privacy which surrounds employee's medical records . . ."⁵⁶

In *Ferguson v. City of Charlestown*⁵⁷ the United States Supreme Court addressed the issue of "whether a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure."⁵⁸ Specifically, the Court asked "whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant."⁵⁹ The Court then went on to hold that a state hospital's testing of pregnant women's urine for cocaine without their consent was unconstitutional.⁶⁰ The Court noted that "[w]hile the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for *law enforcement purposes* in order to reach that goal."⁶¹ (emphasis added)

B. *The Origin of the Patient-Physician Privilege*

A patient-physician privilege is generally defined as, "[t]he right to exclude from evidence in a legal proceeding any confidential communication that a patient makes to a physician for the purpose of diagnosis or treatment unless the patient consents to disclosure."⁶² Confidential communication has been vaguely defined as "information which is transmitted to a lawyer, physician, nurse or clergyman in confidence of the relation between him or her and the party making it, and under circumstances which imply that it shall remain undisclosed by the confidant. The communication may be

⁵²638 F.2d 570, 577 (3rd Cir.1980).

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.* at 578.

⁵⁶*Id.* at 580.

⁵⁷532 U.S. 67 (2001).

⁵⁸*Id.* at 70.

⁵⁹*Id.*

⁶⁰*Id.* at 85-86.

⁶¹*Id.* at 82-83.

⁶²BLACK'S LAW DICTIONARY 1216 (7th ed. 1999).

the result of examination, treatment, observation or conversation relating to the confider.”⁶³ Physicians have a “clear obligation” to keep information regarding the condition of the patient secret.⁶⁴

The purpose of the patient-physician privilege has been “to encourage the utmost confidence between the patient and his physician so that the patient will frankly reveal to his physician all of the facts, circumstances and symptoms to enable proper diagnosis and treatment, without the fear that such information would be embarrassing if given general circulation.”⁶⁵ Other justifications for the privilege include, prevention of humiliation and disgrace and in some cases, the avoidance of protection.⁶⁶

At common law, there was no patient-physician privilege.⁶⁷ However, the privilege has arisen out of the justifications articulated above and in particular out of three theories.⁶⁸ One of those theories is the Privacy Theory, which suggests that, “patients should have control over access to personal information regarding oneself.”⁶⁹ The Privacy Theory is in part rooted in the “constitutional right of privacy.”⁷⁰ Other than the Privacy Theory, there are also two other theories that justify the patient-physician privilege.⁷¹ The second theory, the Utilitarian Theory, suggests that the benefits of the privilege outweigh the burdens of it.⁷² Also, the Professional Honor Theory suggests the patient-physician privilege is rooted in the notion that a professional, such a doctor, should honor his promise to a patient to keep what is told to him, confidential.⁷³

C. What is Planned Parenthood?

Planned Parenthood Federation of America (Planned Parenthood) is a non-profit organization that generally is responsible for operating reproductive health care facilities.⁷⁴ In fact, it is “the world’s oldest, largest, and most trusted volunteer, not-

⁶³Emmanuel Hayt & John Hyat, *Legal Aspects of Medical Records* 73 (3rd ed. 1974).

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸David B. Canning, *Privileged Communications in Ohio and What’s New on the Horizon: House Bill 52 Accountant-Client Privilege*, 31 *AKRON L. REV.* 505 (1998).

⁶⁹*Id.* at 525. (citing Steven R. Smith, *Article, Medical and Psychotherapy Privileges and Confidentiality: On Giving With One Hand and Removing With the Other*, 75 *KY. L. J.* 437, 476 (1986)).

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.*

⁷³*See Canning supra* note 68 at 517.

⁷⁴Appellant’s Brief for Petition for Writ of Certiorari, Application for Discretionary Review and Application for Interlocutory Appeal. [On file with the author.]

for-profit health care organization.”⁷⁵ However, one may be surprised to uncover Planned Parenthood’s roots. Planned Parenthood is actually the offspring of what was once known as the American Birth Control League (ABCL), founded by Margaret Sanger in 1922.⁷⁶ The ABCL was an organization that once warned of the “dangers” posed by the African American and Asian races.⁷⁷ In fact, Sanger and her colleagues suggested that a “Federal Birth Control Commission” be created to rid society of those who were seen as “worthless unfits.”⁷⁸ Colleagues of Sanger have also been identified as the inspiration for the National Socialist Party’s (NAZI) “compulsory sterilization” project, which resulted in the forced sterilization of nearly two million people from 1933-1945.⁷⁹

Although the roots of Planned Parenthood are somewhat suspect, the organization that was once “routinely castigated by religious and government leaders” is now “an established, high-profile, well-funded organization with ample organizational and ideological support in high places of American society and government.”⁸⁰ In fact, today there are little or no remnants of Planned Parenthood’s inauspicious beginning. Planned Parenthood is now a large-scale organization that serves 5 million men, women, and teenagers.⁸¹ Specifically, there are 875 Planned Parenthood clinics in 49 different states.⁸² Further, Planned Parenthood has 126 affiliates nationwide.⁸³ There are 10 affiliate Planned Parenthood centers in Ohio.⁸⁴ Specifically, there are 32 community-based Planned Parenthood clinics throughout Ohio.⁸⁵ A majority of the 32 clinics throughout the state of Ohio provide a full range of medical services to potential patients ranging from pregnancy detection to

⁷⁵*Planned Parenthood Federation of America*, (lasted visited on Jan. 34, 2003), at <http://www.plannedparenthood.org/library/BIRTHCONTROL/Services.html>.

⁷⁶Robert G. Marshall & Charles A. Donovan, *Blessed Are The Barren: The Social Policy of Planned Parenthood* 1, 22 (1991).

⁷⁷*Id.* at 1. Dr. S. Adolphus Knopf, who was a member of the ABCL, gave a speech in New York City, NY, in March of 1992, in which he “warned of the menace posed by the ‘black’ and ‘yellow’ peril.

⁷⁸*Id.*

⁷⁹*Id.* at 2.

⁸⁰*Id.*

⁸¹*Planned Parenthood Federation of America*, (Jan. 24, 2003), at <http://www.plannedparenthood.org/zip.htm>.

⁸²*Id.*

⁸³*Id.*

⁸⁴*Planned Parenthood Federation of America*, (Jan. 24, 2003), at <http://www.plannedparenthood.org/affiliateinfo/stateinformation.asp?state=OH>.

⁸⁵*Planned Parenthood Federation of America*, (Jan. 24, 2003), at <http://www.ppinfo.org/>; <http://www.ppseo.com/id29.htm>; <http://www.plannedparenthood.org/pscl/>; <http://www.plannedparenthood.org/cinci/>; <http://www.plannedparenthood.org/cleveland/>; <http://www.plannedparenthoodcentralohio.org/snailmail.html>; <http://www.ppgmv.org/>; <http://www.plannedparenthood.org/ppnco/>; <http://www.plannedparenthood.org/affiliateinfo/healthcarelocations.asp?id=091340>; <http://www.plannedparenthood.org/affiliateinfo/healthcarelocations.asp?id=091350>.

abortion services and these clinics provide these services under the promise of confidentiality.⁸⁶ As an example of the type of services provided by a Planned Parenthood clinic, in 1998, "Planned Parenthood of Central Ohio performed 603 first-trimester abortions; 2,933 pregnancy tests; 6,398 Pap tests for cervical and uterine cancer; 6,354 breast exams; 9,101 gynecological exams; and 16,046 screenings for sexually transmitted infections."⁸⁷

Planned Parenthood's mission statement indicates that it believes in certain reproductive choices and privacy in regard to those choices.⁸⁸ Furthermore, Planned Parenthood provides reproductive health services to those people who cannot afford health care at a hospital or private office of a physician.⁸⁹ Approximately 75% of Planned Parenthood's clients have an "income at or below 150 percent of the federal poverty level."⁹⁰ Planned Parenthood's policy statements indicate that the organization believes that "reproductive freedom encompasses: the right to privacy, especially in human relationships . . . and the right to nondiscriminatory access to confidential, comprehensive reproductive health care services."⁹¹ In addition to a

⁸⁶*Id.*

⁸⁷Nancy J. Smeltzer, *Talented Fund-Raiser Chosen to Lead Planned Parenthood*, THE COLUMBUS DISPATCH, Dec. 3, 1999, at 3C.

⁸⁸Planned Parenthood Federation of America Mission and Policy Statements. Mission Statement:

A Reason for Being.

Planned Parenthood believed in the fundamental right of each individual, throughout the world, to manage his or her fertility, regardless of the individual's income, marital status, race, ethnicity, sexual orientation, age, national origin, or residence. We believe that respect and values for diversity in all aspects of our organization are essential to our well-being. We believe that reproductive self-determination must be voluntary and preserve the individual's right to privacy. We further believe that such self-determination will contribute to an enhancement of the quality of life, strong family relationships, and population stability.

Based on these beliefs, and reflecting the diverse communities within which we operate, the mission of Planned Parenthood is:

to provide comprehensive reproductive and complementary health care services in settings which preserve and protect the essential privacy and rights of each individual; to advocate public policies which guarantee these rights and ensure access to such services; to provide educational programs which enhance understanding of individual and societal implications of human sexuality; to promote research and the advancement of technology in reproductive health care and encourage understanding of their inherent bioethical, behavioral, and social implications. [Adopted 1984; Revised 1995]

Planned Parenthood Federations of America Mission and Policy Statement, (last visited on Jan. 24, 2003), at www.plannedparenthood.org/about/thisispp/mission.html.

⁸⁹*Id.*

⁹⁰*Planned Parenthood Federation of America*, (Jan. 24, 2003), at <http://www.plannedparenthood.org/library/BIRTHCONTROL/Services.html>.

⁹¹Planned Parenthood Federation of America Mission and Policy Statements. Policy Statement:

Reproductive Freedom.

number of services provided by Planned Parenthood, “early pregnancy detection” is an important service provided by Planned Parenthood.⁹² A large part of Planned Parenthood’s functions involve providing women access to safe, informed and confidential abortions.⁹³ Finally, Planned Parenthood believes in and assures its clients a number of “patient’s rights” including the right to privacy.⁹⁴

It is the policy of Planned Parenthood Federation of America to assure that all individuals have the freedom to make reproductive decisions. In order to enable the individual to make and implement a responsible decision, there should be access to information and services related to sexuality, reproduction, methods of contraception, fertility control, and parenthood. Furthermore, Planned Parenthood asserts that both parenthood and nonparenthood are valid personal decisions. [Adopted 1984] Reproductive freedom- the fundamental right of every individual to decide freely and responsibly when and whether to have a child- is a reaffirmation of the principle of individual liberty cherished by most people worldwide. It helps ensure that children will be wanted and loved, that families will be strong and secure, and that the choice rather than chance will guide the future of humanity.

Reasonable people everywhere agree that no woman should be forced to bear children; no family should be threatened with economic ruin as a result unintended pregnancy; and no person should ignore the consequences of unwanted pregnancies.

Reproductive freedom encompasses:

the right to privacy, especially in human relationships; the right to education and information that empower individuals to make informed decisions about sexuality and reproduction; and the right to nondiscriminatory access to confidential, comprehensive reproductive health care services.

A supportive public climate is necessary to ensure these rights for all individuals worldwide. Public policies and the manner in which they are implemented should enhance these rights. Planned Parenthood recognizes its responsibilities to encourage such a supportive public climate. [Adopted 1989]

Planned Parenthood Federations of America Mission and Policy Statement, (last visited on Jan. 24, 2003), at www.plannedparenthood.org/about/thisispp/mission.html.

⁹²Planned Parenthood Federation of America Mission and Policy Statements. Policy Statement:

Early Pregnancy Detection.

It is the policy of Planned Parenthood Federation of America to encourage early pregnancy detection and to ensure its broad availability to women without regard to age of marital or economic status. Planned Parenthood recognizes:

the need to assure women sufficient time for reasoned deliberation of their fertility options; the importance of the relationship of early prenatal care to improved maternal and neonatal outcomes for women who elect to carry their pregnancies to term; and the minimal health risks associated with early abortion procedures for women who elect termination.

Planned Parenthood assumes the responsibility to assure access to high quality, confidential, free or low-cost pregnancy diagnosis, including pregnancy testing, and to make known the availability of such services. [Adopted 1987]

Planned Parenthood Federations of America Mission and Policy Statement, (last visited on Dec. 14, 2002), at www.plannedparenthood.org/about/thisispp/mission.html.

⁹³Planned Parenthood Federation of America Mission and Policy Statements. Policy Statement:

Abortion.

It is the policy of Planned Parenthood Federation of America to ensure that women have the right to seek and obtain medically safe, legal abortions under dignified conditions at a reasonable cost.

III. OHIO LAW: THE PATIENT-PHYSICIAN PRIVILEGE

The main issue to be addressed by this paper is whether the result of a pregnancy test administered to a woman at a Planned Parenthood clinic in Ohio would be considered confidential or privileged medical information. In Iowa, PPGI specifically argued that such a test should be considered privileged information.⁹⁵ Further, PPGI argued that a subpoena requesting the production of pregnancy test results of all women tested at the Storm Lake facility over a nine-month period

Abortion services must include information on the nature, consequences, and risks of the procedure, and counseling on the alternatives available to the woman, so as to assure an informed and responsible decision concerning the continuation or termination of pregnancy.

Abortion must always be a matter of personal choice. Planned Parenthood recognizes its responsibility to guard equally against coercion or denial of services in connection with a patient's decision about continuing a pregnancy. No one should be denied abortion services solely because of age, or economic or social circumstances. Public funds should be made available to subsidize the cost of abortion services for those who chose abortion but cannot afford it.

Planned Parenthood has the responsibility to provide access to high quality, confidential abortion services directly through the affiliates' own medical facilities and/or indirectly through referral to other competent medical facilities in the community, especially in areas of unmet need for abortion services. [Adopted 1984]

Planned Parenthood Federation of America Mission and Policy Statements, (last visited on Jan. 24, 2003), at www.plannedparenthood.org/about/thisispp/mission.html.

⁹⁴Planned Parenthood Federation of America Mission and Policy Statements. Policy Statement:

Patient's Rights:

It is the policy of Planned Parenthood Federation of America to afford all patients the right:

to obtain fertility related services of high quality, delivered in a manner respecting personal privacy and individual dignity and, whenever possible, offered at a time and setting designed for their comfort and convenience, and at a cost commensurate with the ability to pay; to receive in understandable terms, balanced information essential for an informed choice among fertility-related services; to accept or reject fertility-related services after receiving such balanced information; to receive accurate answers to questions about their health care and medical treatment; to receive and explanation of service fees, if any, before services are provided, to receive explanation of the purpose, meaning and results of test and procedures performed for them; to expect that information from their records will not be released without their prior written consent, except in medical emergencies and as otherwise validly provided by law; to receive instruction in self-care for the intervals between visits; to be advised of the name of a person to whom their comments on services can be directed; to receive, in understandable terms, information concerning the procedures of Planned Parenthood research projects, service alternatives, and possible results (including all known benefits and material risks) of participation, before consenting in writing to such participation; refusal to participate shall be without prejudice to their treatment by Planned Parenthood agencies.

Planned Parenthood Federations of America Mission and Policy Statement, (last visited on Jan. 24, 2003), at www.plannedparenthood.org/about/thisispp/mission.html.

⁹⁵See PPGI Motion to Quash *Supra* note 29 at 1-2.

violated this privilege.⁹⁶ Thus, in a situation such as the Bedford, Ohio example, where the authorities were attempting to locate a mother of a dead, abandoned child, would the patient-physician privilege bar authorities from obtaining these records if they subpoenaed them?

In Ohio, a physician cannot testify in regard to a "communication made to the physician . . . by a patient in that relation or the physician's . . . advice to a patient."⁹⁷ "Communication" between a physician and patient has been defined as "acquiring, recording, or transmitting any information in any manner, concerning any facts, opinions, or statements necessary to enable a physician . . . to diagnose, treat, prescribe or act for a patient."⁹⁸ "A communication may include, but is not limited to "any medical . . . office, or hospital communications, such as a record . . . laboratory test and results . . . diagnosis or prognosis."⁹⁹

Thus, there are three terms that must be defined in order to determine whether an entity, specifically a clinic such as Planned Parenthood, is protected under Ohio's patient-physician privilege. Specifically the scope of the words "physician," "patient" and "communication" must be determined in order to analyze who is protected under the statute.¹⁰⁰

A. *The Scope of the Word "Physician"*

A physician in the context of Ohio's patient-physician privilege statute has been defined as "one who has been duly authorized and licensed by the state medical board to engage in the general practice of medicine."¹⁰¹ The rule in Ohio has long been that the patient-physician privilege is to be "strictly construed."¹⁰² Generally, this has meant that only licensed physicians are specifically seen as a privileged party.¹⁰³ Thus, nurses and other such parties are excluded from the patient-physician privilege.¹⁰⁴ Therefore, practically speaking, a nurse can be compelled to testify as to communication between his or herself and a patient.¹⁰⁵ Further, in *In re Polen*,¹⁰⁶ the Court held that there was no privilege between a chiropractor and his patient. Likewise, courts in Ohio have held that this privilege does not exist between a medical technician and a patient.¹⁰⁷

⁹⁶*Id.*

⁹⁷OHIO REV. CODE ANN. § 2317.02(B)(1).

⁹⁸*Id.* at §2317.02(B)(5)(a).

⁹⁹*Id.*

¹⁰⁰*Doe v. University of Cincinnati*, 538 N.E.2d 419 (Ohio Ct. App. 1988).

¹⁰¹*Belichick v. Belichick*, 307 N.E.2d 270 (Ohio Ct. App. 1973).

¹⁰²*Weis v. Weis*, 72 N.E.2d 245 (Ohio 1947).

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶670 N.E.2d 572 (Ohio Ct. App. 1996).

¹⁰⁷*In re Washburn*, 590 N.E.2d 855 (Ohio Ct. App. 1990); *State v. McKinnon*, 525 N.E.2d 821 (Ohio Ct. App. 1987).

An interesting realm of the medical field where the patient-physician privilege has applied is the field of psychotherapy. In fact, the psychotherapist-patient relationship is privileged in Ohio.¹⁰⁸ Cases have held that a patient's psychiatric or psychological records are privileged communications and thus are not subject to disclosure under Ohio's patient-physician privilege statute.¹⁰⁹ However, it seems fairly clear that non-physicians (or non-psychotherapists) are not prohibited by the patient-physician privilege from testifying as to communications between them and patients.¹¹⁰ Thus, a staff member at a clinic such as Planned Parenthood, who is not actually a doctor, would not be considered a physician under the scope of the term.

B. The Scope of the Term "Patient"

Like the term "physician" there is no statutory definition for the term "patient." Further, few cases have interpreted the meaning of the word patient in relation to Ohio's patient-physician privilege. One case that has addressed the scope of the term "patient" is *Doe v. University of Cincinnati*,¹¹¹ in which the Court addressed the issue of whether a blood donor was a patient under the patient-physician privilege.

The Court held that "[a] blood donor is not a 'patient' for the purposes of the physician-patient privilege. . . ." ¹¹² In reaching its conclusion, the Court noted that a patient is "a person under medical or psychiatric treatment and care."¹¹³ The Court defined treatment as "all the steps taken to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies."¹¹⁴ The Court then held that a blood donor was not actually someone under medical treatment or care, noting that a blood donor is not seeking treatment.¹¹⁵ The Court also noted the meaning of the term "patient" is to be strictly construed.¹¹⁶ Thus, it seems as though the degree to which a person is considered a patient under Ohio's patient-physician privilege, depends in large part on the extent to which that person receives treatment.¹¹⁷ Further, whether a person qualifies as a patient seems to depend on whether they are actually receiving treatment from an actual physician.¹¹⁸ Therefore, the results of a pregnancy test administered at Planned Parenthood would have to qualify as treatment in order for the woman receiving the test to be

¹⁰⁸OHIO REV. CODE ANN. § 4723.19 (Anderson 2002).

¹⁰⁹*McCoy v. Maxwell*, 743 N.E.2d 974 (Ohio Ct. App. 2000).

¹¹⁰*See* cases cited *infra* note 126. Even though nurses and other non-physicians are not protected under the scope of the term "physician," communications between patients and other medical personnel may be protected under the scope of "communications."

¹¹¹538 N.E.2d 419 (Ohio Ct. App. 1988).

¹¹²*Id.* at syllabus 2.

¹¹³*Id.* at 423. (quoting BLACK'S LAW DICTIONARY, 1014 (5th ed. 1979)).

¹¹⁴*Id.* (quoting BLACK'S LAW DICTIONARY, 1346 (5th ed. 1979)).

¹¹⁵*Id.*

¹¹⁶538 N.E.2d 419.

¹¹⁷*Id.*

¹¹⁸*Id.*

considered a patient.¹¹⁹ Hence, its worth noting that Planned Parenthood's mission and policy statements¹²⁰ which expressly use the term "patient" may be at odds with a judicial interpretation of the term.

C. The Scope of the Term "Communication"

As stated earlier, the term "communication" in relation to Ohio's patient-physician privilege has been broadly defined as "acquiring, recording, or transmitting any information in any manner, concerning any facts, opinions, or statements necessary to enable a physician . . . to diagnose, treat, prescribe or act for a patient."¹²¹ A communication may include, but is not limited to any medical . . . office, or hospital communications, such as a record . . . laboratory test and results . . . diagnosis or prognosis."¹²² Subsequently, cases in Ohio have also defined communication broadly. The Ohio Supreme Court has said, "[w]e hold that a communication by the patient to the physician may be not only by word of mouth but also by exhibiting the body or any part thereof . . . for . . . opinion, examination or diagnosis" ¹²³ Furthermore, a patient-physician privilege applies to "all communications between a physician and patient unless it is waived."¹²⁴

Although nurses are not considered a privileged party under the scope of the term "physician,"¹²⁵ modern cases have held that the privilege does indeed extend to protect communications between nurses and patients.¹²⁶ Privileged communications in Ohio "cover the acquisition by the physician of any facts, opinions, or statements found in a hospital record necessary to enable a physician to diagnose, treat, proscribe, or act for a patient."¹²⁷ This includes "notations made by a nurse in the 'nurses' notes' portions of a hospital record."¹²⁸ Likewise, in *State v. Napier* the Court held:

The term 'communication' as defined in R. C. 2317.02(B)(4)(a) in relation to the physician-patient privilege is sufficiently broad to encompass a patient's communication with a nurse performing duties to assist a physician in the diagnosis and treatment of a patient. Consequently, the defendant's hospital records containing the nurse's notes and observations were privileged and, therefore, the trial court erred

¹¹⁹*Id.*

¹²⁰*See* Planned Parenthood Mission Statement *supra* note 88.

¹²¹OHIO REV. CODE ANN. §2317.02(B)(5)(a).

¹²²*Id.*

¹²³*Ausdenmoore v. Holzback*, 106 N.E.2d 41 (Ohio 1914).

¹²⁴*In re Miller*, 585 N.E.2d 396, 404 (Ohio 1992).

¹²⁵*Belichick*, 307 N.E. 2d 270

¹²⁶*State v. Napier*, No 970383 (Ohio Ct. App. August 28, 1998), *Johnston v. Miami Valley Hospital*, 572 N.E.2d 169 (Ohio Ct. App. 1989).

¹²⁷*Johnston*, 572 N.E.2d at 171.

¹²⁸*Id.* (citing the example of a nurse noting "bizarre or violent behavior" of a psychiatric patient and concluding that these nurses notes would be privileged).

in admitting them, as well as the nurse's testimony regarding the defendant's statement.¹²⁹

In regard to medical technicians (parties outside the scope of the term "physician"), at least one Ohio Appellate Court has held that laboratory tests and the results of those tests are to be considered privileged communication under Ohio's patient-physician privilege.¹³⁰ However, while the results of the tests are privileged, the testimony from a medical technician administering such a test is not privileged.¹³¹

In an instructive Ohio Attorney General Opinion,¹³² an Emergency Medical Service (EMS) diagnostic sheet was determined to be privileged communication under O.R.C. § 2317.02(B). While EMS crews were not considered a privileged party under the scope of the term "physician" the reason that the privilege was extended to EMS crews was due to the relationship between EMS workers and physicians.¹³³ Physicians rely significantly on the diagnoses made originally by EMS crews for treatment and services originally provided by EMS crews.¹³⁴ This determination would seem to be a significant factor as to whether the patient-physician should exist. Therefore, a woman attempting to keep the result of a pregnancy test administered at Planned Parenthood privileged, will have to show that a physician will later use the test result in some manner to assist in the treatment or care of her.

*D. Definitions of Physician, Patient, and Communication Applied to
Planned Parenthood Staff Members*

In order for a patient-physician privilege to exist a communication must be made between a patient and an actual physician.¹³⁵ This may be a difficult hurdle for Planned Parenthood to clear in light of the fact that its staff members are not necessarily doctors. The requirement that the communication involve an actual physician may be a difficult hurdle for Planned Parenthood to clear in light of the fact that its staff members are not necessarily physicians. It may also be difficult for Planned Parenthood to show that a woman who received a pregnancy test at one of its clinics was actually a patient in that generally a patient is one who receives treatment.¹³⁶ Likewise, for a test result to be deemed a communication, Planned Parenthood or its client would have to show that the test was administered by a medical professional, such as a nurse, and a physician later used the test in the treatment of the client.¹³⁷ However, even if the results of a test may be deemed

¹²⁹*Napier*, No 970383, at 1, syllabus (Ohio Ct. App. August 28, 1998).

¹³⁰*Washburn*, 590 N.E.2d at 858.

¹³¹*Id.*

¹³²2001 Ohio Op. Atty. Gen 249 (2001).

¹³³*Id.*

¹³⁴*Id.*

¹³⁵*Belichick*, 307 N.E.2d at 270; *Weis*, 72 N.E.2d at 245.

¹³⁶*University of Cincinnati*, 538 N.E.3d at 422.

¹³⁷*Washburn*, 590 N.E.2d at 858.

privileged, testimony from the party administering the test will not be privileged unless an actual doctor was the administering party.

E. Exceptions to the Patient-Physician Privilege

Although statutory exceptions do exist which override a patient-physician privilege¹³⁸ in some situations, they do not apply to the issue at hand and will therefore not be discussed. However, there is case law that seems to create another exception to the privilege. It is important to remember the exception is a moot point, however, if the privilege is not initially satisfied.

In *Biddle v. Warren General Hospital*,¹³⁹ the Ohio Supreme Court created an exception to the patient-physician privilege. The Court held:

In the absence of prior authorization, a physician or hospital is privileged to disclosure otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality.¹⁴⁰

Subsequently, the Second District Appellate Court in *Fair v. Elizabeth Medical Center*,¹⁴¹ considered the issue of whether a victim's serious injuries were so "highly compelling" as to create an exception to the patient-physician privilege allowing the suspected attacker's medical records to be turned over to the plaintiffs who were suing the hospital for negligence. The Court relied on *Biddle*,¹⁴² holding that in such a situation where the victim's injuries were so serious, the situation warranted disclosure.¹⁴³

Importantly though, the Court's decision in large part was based on the fact that the party attempting to maintain the privilege was the defendant-hospital, in a civil suit, where one patient attacked another.¹⁴⁴ As such, there was no way to establish that the defendant-hospital was negligent in breaching its duty of care to the victim-patient, without the alleged attacker-patient's record being admitted into evidence to prove that the alleged attacker was indeed a patient at the hospital.¹⁴⁵ The Court called the relationship between the alleged attacker and the defendant-hospital a "special relationship" and went on to say that the relationship could not be

¹³⁸OHIO REV. CODE ANN. § 2317.02(B)(2)(a) and (b) (providing an exception to the patient-physician privilege where there is a question as to alcohol or drug use/abuse in question at the time of a criminal offense).

¹³⁹*Biddle v. Warren General Hospital*, 715 N.E.2d 518 (Ohio 1999).

¹⁴⁰*Id.* at syllabus.

¹⁴¹737 N.E.2d 106, 108 (Ohio Ct. App. 2000).

¹⁴²*Biddle*, 715 N.E.2d at 518

¹⁴³737 N.E.2d at 108.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

established without the releasing of the records, which ordinarily would have been privileged.¹⁴⁶

Despite finding disclosure appropriate in this situation, the Court, in what was truly a privacy protecting maneuver, held that although the records were releasable, all information on the record that identified the alleged attacker had to be removed.¹⁴⁷ The Court reasoned that this fairly and adequately allowed the plaintiffs to determine whether a cause of action existed against the defendant-hospital and at the same time protected the purpose of the patient-physician privilege.¹⁴⁸ The purpose, the Court said, was to “create an atmosphere of confidentiality, encouraging the patient to be completely candid and open with his or her physician, thereby enabling more complete treatment.”¹⁴⁹

IV. OUTSIDE THE REALM OF OHIO STATUTE: PRIVILEGED COMMUNICATIONS AT A FEDERAL LEVEL

The Ohio state court decisions seem to suggest that it would be difficult for staff members at Planned Parenthood to prove that they qualify as a physician, or for a client to prove that she is a patient.¹⁵⁰ However, there is a recent United States Supreme Court case, *Jaffee v. Redmond*,¹⁵¹ which held “that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists.”¹⁵² The Court went on to say, “[w]e have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy.”¹⁵³ Perhaps in rationale even more instructive than the holding, the Court reasoned “that the psychotherapist-patient privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.”¹⁵⁴ Additionally, the privilege extends to social workers because social workers often “provide a significant amount of mental health treatment.”¹⁵⁵ Further, clients of social workers “often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist . . . but those counseling sessions serve the same public goals.”¹⁵⁶ This rationale may be a justification on which Planned Parenthood could rely in arguing that a privilege should exist between its staff members and clients, in that Planned Parenthood often

¹⁴⁶*Id.*

¹⁴⁷*Id.*

¹⁴⁸737 N.E. 2d at 108.

¹⁴⁹*Id.*

¹⁵⁰*See* § II(D).

¹⁵¹*Jaffee v. Redmond*, 518 U.S. 1 (1996).

¹⁵²*Id.* at 15.

¹⁵³*Id.*

¹⁵⁴*Id.* at 12.

¹⁵⁵*Id.* at 15-16.

¹⁵⁶*Jaffee*, 518 U.S. at 16.

provide the same types of services that hospitals and doctors offices provide, but generally it provides more services to the poor and those of modest means.¹⁵⁷

V. FEDERAL REGULATIONS: THE ROLE OF THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

In 1996 Congress enacted the Health Insurance Portability and Accountability Act (HIPAA)¹⁵⁸ requiring certain regulations to be implemented by the United States Department of Health and Human Services (HHS) to assure health information privacy. In response, the HHS articulated the “Standards for Privacy of Individually Identifiable Health Information.”¹⁵⁹ It is important to address these regulations because federal law preempts any state law in regard to compliance with these standards.¹⁶⁰ Specifically, the regulations apply to “covered entities: health plans, health care clearinghouses, and health care providers who transmit health information in electronic form”¹⁶¹ Disclosures of health information are severely limited under these regulations, but are permitted for law enforcement.¹⁶² Specifically, a court-ordered subpoena may require a covered entity to disclose information for a law enforcement purpose.¹⁶³ Disclosure is appropriate when “[t]he information sought is relevant and material to a legitimate law enforcement inquiry.”¹⁶⁴ Further, disclosure is only appropriate when “[t]he request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and [d]e-identified information could not reasonably be used.”¹⁶⁵

Thus, it would appear that there are several issues that needed to be resolved to determine the applicability of HHS’s regulations to Planned Parenthood. First, would a clinic such as Planned Parenthood qualify as a health care provider? Second, would a pregnancy test be considered protected “health information?” Finally, would the permitted disclosures for law enforcement purposes subject the clinic to disclosure of the information anyway? To answer these questions a more in-depth look at the HHS’ regulations is required.

A. *Is Planned Parenthood a Health Care Provider?*

A health care provider is defined as “a provider of services (as defined in section 1861(u) of the Act, 42 U.S.C. 1395x(u)), a provider of medical or health services (as

¹⁵⁷See §V(B).

¹⁵⁸Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

¹⁵⁹Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. §160-164 (2002).

¹⁶⁰*Id.* at § 160.203.

¹⁶¹*Id.* at § 164.104.

¹⁶²*Id.* at § 164.512(f).

¹⁶³*Id.* at § 164.512(f)(1)(ii)(A).

¹⁶⁴*Id.* at § 164.512(f)(1)(ii)(A)(1) (2002).

¹⁶⁵*Id.* at § 164.512(f)(1)(ii)(A)(2-3).

defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s)), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.”¹⁶⁶ Thus, a provider of services is defined as “a hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program”¹⁶⁷ Medical or health services are defined as “physicians services.”¹⁶⁸ More specifically, medical or health services are defined as:

[S]ervices and supplies (including drugs and biologicals which are not usually self-administered by the patient) furnished as an incident to a physician’s professional service, or kinds which are commonly furnished in physician’s offices and are commonly either rendered without charge or included in the physicians’ bills; hospital services (including drugs and biologicals which are not usually self-administered by the patient) incident to physician’s services rendered to outpatients and partial hospitalization services incident to such services; diagnostic services which are—furnished to an individual as an outpatient by a hospital or by others under arrangements with them made by a hospital, and ordinarily furnished by such hospital (or by others under such arrangements) to its outpatients for the purpose of diagnostic study¹⁶⁹

Thus, it is unlikely that Planned Parenthood would fall within the ambit of a provider of services in that there is no evidence that it is actually a “hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, [or] hospice program.”¹⁷⁰ Similarly, Planned Parenthood would have difficulty meeting the requirements of a medical or health care provider with regard to pregnancy testing because again, similar to the problem faced with regard to Ohio’s patient-physician privilege, a pregnancy test would have to be administered incident to an actual physician’s care.¹⁷¹ However, the above definition does seem to indicate that if a facility provides services that are ordinarily the type of services provided at a physician’s office, then the facility providing them would be considered as a medical or health care provider.¹⁷²

The above definition also indicates, however, that these services would have to be of such a nature that they are not normally administered by the patient to herself and that they are incident to a physician’s care.¹⁷³ Certainly the argument can be made that a pregnancy test can be self-administered, as there are many home pregnancy tests. Further, one could easily argue that a pregnancy test administered

¹⁶⁶*Id.* at §164.103.

¹⁶⁷42 U.S.C.S. § 1395x (2002).

¹⁶⁸*Id.* at § 1395(s)(1).

¹⁶⁹*Id.* at § 1395s(2)(A)-(C).

¹⁷⁰C.F.R. § 164.103.

¹⁷¹42 U.S.C.S. § 1395s(2)(A)-(C).

¹⁷²*Id.*

¹⁷³*Id.*

at a Planned Parenthood clinic is in no way incident to a physician's care, unless a physician clearly orders or administers the test. Therefore, it seems as though with respect to pregnancy testing, Planned Parenthood may not be considered a health care provider. Nonetheless, it is important to determine whether a pregnancy test would be considered health information in the event Planned Parenthood were able to show compliance with the health care provider requirements.

B. What is Health Information?

Health information under HIPPA is oral or recorded information that “[i]s created or received by a health care provider . . . and [r]elates to 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.”¹⁷⁴ Furthermore, “individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual.”¹⁷⁵ To be considered “individually identifiable health information,” the qualifications of “health information” must be met and the information must identify the individual or possess a “reasonable basis to believe the information can be used to identify the individual.”¹⁷⁶

As such, to the extent that being pregnant or not pregnant is considered a condition of a woman, it would appear that pregnancy tests fall within the realm of “health information.” Further, because the test can be used to identify the woman taking it, then the information is “individually identifiable health information.”

C. Does the Law Enforcement Disclosure Provision Apply to Records Such as Pregnancy Tests?

Whether pregnancy tests performed at a clinic such as Planned Parenthood are subject to disclosure pursuant the HHS regulations, depends on the degree to which § 164.512(f)(1)(ii)(A)(1)-(3) is satisfied. Thus, the pregnancy test must be “relevant and material to a legitimate law enforcement purpose.”¹⁷⁷

It would appear, that to the extent a pregnancy test sought by law enforcement would be used to find a murder suspect, that there would be a “relevant and material” purpose. A subpoena requesting the pregnancy tests, however, must be “specific and limited in scope to the extent reasonably practicable”¹⁷⁸ Authorities requesting the pregnancy tests may run into a problem in regard to this requirement. If pregnancy tests were requested on the large and broad scale that Buena Vista County authorities requested them, then the search would not be specific or limited in scope. There is no specific request in such a situation. Further, the scope of the search is extremely broad. Therefore, it is not likely that under the law enforcement disclosure provision, a blanket order subpoena requesting the pregnancy test results of many women would be subject to disclosure. If there was a way to limit the scope of the subpoena, by naming a specific suspect, then authorities would also have to

¹⁷⁴45 C.F.R. § 164.103.

¹⁷⁵*Id.*

¹⁷⁶*Id.*

¹⁷⁷*Id.* at § 164.512(f)(1)(ii)(A)(1).

¹⁷⁸*Id.* at § 164.512(f)(1)(ii)(A)(2).

show that “[d]e-identified information could not reasonably be used.”¹⁷⁹ At least to the extent that authorities had no other way of determining who the mother of a dead baby is, then this provision would likely be met, where a subpoena was limited in scope.

D. Conclusion as to HIPAA

Thus, under HIPAA it is not entirely clear that Planned Parenthood would be qualified as a medical or health care provider. Overall, it is unlikely that Planned Parenthood would meet the requirements.¹⁸⁰ Specifically, it is not certain that a test, such as a pregnancy test, would be viewed as a service that a patient cannot ordinarily administer to herself.¹⁸¹ In addition, a client of Planned Parenthood would have to show that a pregnancy test was administered incident to a physician's care or administered by a physician.¹⁸² Thus, it would be difficult for Planned Parenthood to clear this hurdle with respect to pregnancy testing. Secondly, only to the extent that a pregnancy is viewed as being a condition of a woman, would a pregnancy test likely be considered health information.¹⁸³ Finally, only if Planned Parenthood were able to prove that it is a health care provider and that a pregnancy test is health information, then it would be protected under HIPAA. The law enforcement exception to HIPAA would not apply in a case like the situation in Iowa where authorities issued a broad subpoena without any specific target because the law enforcement exception only applies where it is “specific and limited in scope.”¹⁸⁴

VI. SHOULD PLANNED PARENTHOOD BE PROTECTED BY STATUTE?

It is apparent from the foregoing that Planned Parenthood would not fall within the scope of Ohio's patient-physician privilege.¹⁸⁵ Furthermore, it would be difficult for Planned Parenthood to argue that federal privacy regulations protect it from having to disclose information regarding patients.¹⁸⁶ However, the question remains whether Planned Parenthood should be forced to turn-over patient information, specifically a pregnancy test result, for a law enforcement purpose.

A. Legislation Protecting Planned Parenthood and its Clients is Appropriate

Ohio should adopt legislation that would protect healthcare clinics, such as Planned Parenthood, from being required to divulge patient information, specifically pregnancy test results, when subpoenaed by law enforcement, unless there is a specific suspect or target of the subpoena. A blanket-order subpoena such as the one issued in Buena Vista County, subjects many woman (or even men) to legal scrutiny

¹⁷⁹*Id.* at § 164.512(f)(1)(ii)(A)(3).

¹⁸⁰*See* § V(A)-(C).

¹⁸¹*See* § V(A).

¹⁸²*Id.*

¹⁸³§ 164.103.

¹⁸⁴§ 164.512(f)(1)(ii)(A)(1)-(3).

¹⁸⁵*See* § II(D).

¹⁸⁶*See* § IV(D).

where there is no reasonable basis to believe they have been involved in criminal wrongdoing.¹⁸⁷ A subpoena could be justified when it is targeting a specific suspect or person, in that it would not invade the privacy of many, but rather would only subject a person to legal scrutiny when there is a reasonable basis to believe that person has been or is involved in criminal wrongdoing.¹⁸⁸ Furthermore, there is no evidence that a broad and vague subpoena asking Planned Parenthood, or any hospital for that matter, to turn-over a large number of pregnancy test results over a long period of time, is an effective way to ascertain the identity of a mother of an abandoned or dead child.¹⁸⁹

B. Justifications for Adopting Legislation that Specifically Extends a Privilege to Planned Parenthood and its Patients.

There are several justifications for adopting legislation (or amending current law) to specifically protect the communication between a Planned Parenthood client and the clinic as privileged. First, Planned Parenthood's purpose is to provide medical care and services, in particular reproductive healthcare, to all people regardless of income status.¹⁹⁰ Planned Parenthood provides services to these people under the presumption of confidentiality.¹⁹¹ If that confidentiality can be easily discarded, the effects for Planned Parenthood could be catastrophic. For example, after Buena Vista County authorities subpoenaed the Storm Lake clinic's pregnancy test results,

¹⁸⁷Janice Roe, the Iowa Civil Liberties Union Foundation, Inc, and the Reproductive Freedom Project of the American Civil Liberties Union Foundation, Inc., Memorandum of Amici in support of Petition for Certiorari and Continuation of Stay at: i-ii, Planned Parenthood of Greater Iowa, Inc., v. The Iowa District Court in and for Buena Vista County (No. 02-1191). [On file with the author.] For example, consider the story of Ms. Janice Roe and her husband. Ms. Roe received a pregnancy test at a "private medical clinic in the Storm Lake Area." The couple found out that they were pregnant. Six weeks into the pregnancy, it was discovered that Ms. Roe had miscarried. "Ms. Roe and her husband were devastated by the loss of the pregnancy. She felt empty and found it extremely difficult to discuss her grief even with those close family members who knew of her pregnancy." During Buena Vista County's attempt to find the mother of the slain infant, Ms. Roe's "name, telephone number, work address and the fact of her pregnancy" were revealed to law enforcement. "Ms. Roe had no notice of the subpoena and no opportunity to object to her name and private information being disclosed to law enforcement; indeed, her doctor was not even consulted before her personal records were divulged." As a result, Ms. Roe "lives in dread of the information that might have been or could still be disclosed, and the questions about her pregnancy that may be posed to herself and others in the small community where she lives...For the first time she has begun to wonder if she should answer candidly to sensitive health questions or whether it is really necessary to visit medical providers."

¹⁸⁸See Sanchez *supra* note 26. Consider for example, the Buena Vista County situation again. "Planned Parenthood officials say they have worked with local authorities on criminal investigations in the past...'It's always a named individual and then we work with the individual's attorney and get their permission to turn over the records,' says Kendall Dillon, director of communications of Planned of Greater Iowa." However, Planned Parenthood believed that request by the Buena Vista County authorities this time was simply "too broad."

¹⁸⁹*Id.*

¹⁹⁰See Planned Parenthood Mission Statement *supra* note 88.

¹⁹¹See Planned Parenthood Policy Statement: Patients Rights *supra* note 94.

the clinic saw a drop of approximately 70-80% in women seeking pregnancy testing.¹⁹² Such a decline substantially hinders Planned Parenthood's ability to provide necessary medical services.¹⁹³ Thus, if Planned Parenthood is rendered unable to effectively provide its services to those that need them, society could be forced to bear the consequences. Specifically the clients that Planned Parenthood helps may be forced to turn to government benefits to obtain the services Planned Parenthood provides for nominal fees. This effect is especially evident when one considers the fact that Planned Parenthood estimates that it prevents approximately a half-million unwanted or unintended pregnancies per year.¹⁹⁴

Secondly, the cases that extend a patient-physician privilege generally do so based on the character of the relationship between the parties involved or the communication to be protected.¹⁹⁵ Consider for example, the Court's justification in *Jaffee*¹⁹⁶ for extending a privilege to psychotherapists and social workers. The Court based its creation of psychotherapist-patient privilege on the significant public interest in treating those with mental health problems.¹⁹⁷ The Court further justified the extension of a privilege to social workers based on the "significant amount of mental health treatment" they provide.¹⁹⁸ The Court went on to say, clients of social workers "often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist . . . but those counseling sessions serve the same public goals."¹⁹⁹

Significant parallels can be drawn to staff members at Planned Parenthood and social workers. Obviously the *Jaffee*²⁰⁰ Court felt that the psychotherapist-patient and social worker privileges were justified because of the importance of the work each profession provides to society.²⁰¹ The Court made note of the fact that social workers generally provide in essence the same services that psychotherapists provide to their patients; the only difference being social workers generally help those people who are unable to afford the more expensive care of psychotherapists.²⁰²

Planned Parenthood's mission statement reveals that its staff members provide people who are unable to afford more expensive health care treatment with the same or similar treatment that doctors at hospitals or private offices provide to those more

¹⁹²Planned Parenthood Federation of America. *Press Release: Iowa Supreme Court Agrees to Review Medical Privacy Case*, (date last visited Dec. 18, 2002), at http://www.plannedparenthood.org/about/pr/02/08/30_medicalprivacy.html.

¹⁹³*Id.* (http://www.plannedparenthood.org/about/pr/02/08/30_medicalprivacy.html.)

¹⁹⁴See Planned Parenthood Federation of America *supra* note 90.

¹⁹⁵See cases cited *Supra* note 130-132, 151.

¹⁹⁶*Jaffee*, 518 U.S. 1

¹⁹⁷*Id.* at 12.

¹⁹⁸*Id.* at 15-16.

¹⁹⁹*Id.* at 16.

²⁰⁰*Id.*

²⁰¹*Jaffee*, 518 U.S. at 16.

²⁰²*Id.*

financially secure patients.²⁰³ In particular, as mentioned before, 75% of Planned Parenthood's clients are 150% below the poverty line or lower.²⁰⁴ Therefore, a strong argument can be made that because clinics such as Planned Parenthood provide those with lower incomes and less financial resources with the same and necessary medical treatment as doctors in hospitals and private offices provide to those who are able to afford such services, a patient privilege should apply as well to these clinics. In essence, a clinic such as Planned Parenthood is analogous to a social worker in that each provides important services to people who generally would otherwise be unable to afford these medical services.

Finally, there should be a privilege extended to Planned Parenthood and its clients, because there is no other statutory protection currently available in Ohio. One may argue that R.C. 149.43, Ohio's Public Record Act, would protect the result of a pregnancy test as privileged communication. However, such an argument would fail. R.C. 149.43(A)(1)(a) protects "medical records" from public disclosure.²⁰⁵ The statute defines a "medical record" as "any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment."²⁰⁶ While there is certainly some question as to whether the result of a pregnancy test administered at a Planned Parenthood clinic would qualify as a medical record at all, such an analysis is unnecessary because even if such a result does fall within the realm of a medical record, this particular statute would only protect that test result from being a public record.²⁰⁷ The statute does nothing to protect such a test result from being subjected to disclosure when subpoenaed by a court in the process of a criminal investigation.

*C. A Model of Legislation that Extends a Privilege to Planned Parenthood
and its Patients*

Therefore, it appears that Ohio would be justified in adopting legislation that specifically protects against law enforcement subpoenaing pregnancy test results from a Planned Parenthood clinic. The question is how should this be done.

Arizona is an example of a state with legislation that appears to protect communication between Planned Parenthood staff and its patients.²⁰⁸ Although, Arizona's patient-physician privilege statute²⁰⁹ does not expressly protect communications between Planned Parenthood and its patients, it does appear that such communication would be protected as confidential under Arizona's Confidentiality of Medical Records Statute.²¹⁰ Specifically, in Arizona, "all medical

²⁰³See Planned Parenthood Mission Statement *supra* note 88.

²⁰⁴See Planned Parenthood Federation of America *supra* note 90.

²⁰⁵OHIO REV. CODE ANN. § 149.43(A)(1)(a) (Anderson 2002).

²⁰⁶*Id.* at § 149.43(A)(3).

²⁰⁷*Id.* at § 149.43(A)(1)(a).

²⁰⁸ARIZ. REV. STAT. § 12-2291-§ 12-2292 (2002).

²⁰⁹ARIZ. REV. STAT. § 12-2235 (2002).

²¹⁰*Id.* at § 12-2292.

records and the information contained in medical records are privileged and confidential. A health care provider may only disclose that part of or all of a patient's medical record that is authorized pursuant to law or the patient's written authorization."²¹¹ "Medical records" are defined as,

[A]ll communications that are recorded . . . and that are maintained for purposes of patient treatment, including reports, notes and orders, test results, diagnoses, treatments, photographs, videotapes, X-rays, billing records and the results of independent medical examinations that describe patient care. Medical records include psychological records and all medical records held by a health care provider, including medical records that are prepared by other providers.²¹²

Further, a "health care provider" includes "every place, institution, building or agency, whether organized for profit or not, which provides facilities with medical services, nursing services, health screening services, other health-related services or directed care services . . ."²¹³

Thus, there are several differences between Arizona law and Ohio law that results in Arizona law considering pregnancy tests administered at Planned Parenthood clinics confidential. Under Arizona law, a pregnancy test result would qualify as a communication, because the statute expressly provides that test results do qualify as communication.²¹⁴ However, in Arizona, unlike current Ohio law, for a test result to qualify as privileged communication, a physician would not have to administer the test.²¹⁵ Rather, it appears that the test would have to have been administered by a health care provider.²¹⁶

As such, it also appears that Arizona's definition of health care provider is broad enough to include Planned Parenthood.²¹⁷ The difference between Arizona's law and Ohio's statute is that Arizona's statute expressly protects parties that provide medical services and nursing services, rather than protecting only physicians, as Ohio's law does.²¹⁸ Also, the express provision that extends the privilege to "every place, building or agency, whether organized for profit or not"²¹⁹ makes Arizona law different from Ohio law in that again the privilege is not restricted to physicians.²²⁰ Further, this is exactly the type of language that would seem to indicate that a privilege exists for a non-profit clinic, like Planned Parenthood. In addition because

²¹¹*Id.*

²¹²*Id.* at § 12-2291(4).

²¹³*Id.* at § 12-2291(3)(b) (referring to § 36-401(A)(22)).

²¹⁴*Id.* at § 12-2291(4).

²¹⁵OHIO REV. CODE ANN. § 2317.02(B)(5)(A).

²¹⁶ARIZ. REV. STAT. § 12-2292.

²¹⁷*Id.* at § 12-2291(3)(b) (referring to § 36-401).

²¹⁸*Id.* at *See* § 12-2292; § 2317.02(B)(5)(a).

²¹⁹*Id.* at § 12-2291(3)(b) (referring to § 36-401).

²²⁰*Id.*

Planned Parenthood expressly provides medical services, it would fall within the ambit of a health care provider in Arizona. However, in Ohio, even if Planned Parenthood is considered a facility that provides medical services, that alone is not enough to extend the patient-physician privilege to pregnancy test results administered at such clinics.

Finally, under Ohio law, it appears that a patient is only a person receiving care from a physician.²²¹ However, under Arizona law, it is likely that a woman seeking a pregnancy test and care from a Planned Parenthood clinic would be viewed as a patient, given the fact that Arizona law seems to suggest a patient is someone seeking care from a health care provider and Planned Parenthood would qualify as a health care provider.²²² Likewise, because Planned Parenthood maintains a pregnancy test result in part for the purpose of providing treatment and care to a woman during her pregnancy,²²³ it is likely that a pregnancy test result would meet Arizona's requirement that it is "maintained for the purposes of patient treatment."²²⁴

Therefore, under Arizona law, it appears that the result of a pregnancy test administered at a Planned Parenthood clinic, would be privileged and confidential medical information. As such, Arizona's broad statutory provision could serve as a model for changes to current Ohio law.

VII. CONCLUSION

This article has cited several examples of situations where law enforcement officials have been unable to locate the mother of either an abandoned or dead baby.²²⁵ Specifically, this article examined a situation in Iowa where authorities attempted to locate the mother of a dead and abandoned baby by subpoenaing the pregnancy test results of all local hospitals and clinics including a local Planned Parenthood clinic.²²⁶ In response to the subpoena, the local Planned Parenthood clinic refused to turn-over the requested pregnancy test results, citing the patient-physician privilege.²²⁷ This article went on to discuss the problem of unidentified, abandoned babies in the state of Ohio.²²⁸ In light of similar situations in Ohio, where unidentified babies were abandoned, this article examined whether Ohio's patient-physician would protect the results of pregnancy tests administered at Planned

²²¹See § III(B).

²²²ARIZ. REV. STAT. § 12-2291; § 12-2292(3)(b) (referring to § 36-401) and (4).

²²³See Planned Parenthood Policy Statement: Early Pregnancy Detection *supra* note 92.

²²⁴ARIZ. REV. STAT. § 12-2292(4). It is also important to note that this statute expressly requires that for a pregnancy test result to be considered a medical record, it must be "maintained for the purposes of patient treatment." *Id.* It is not necessary under the statute for the test itself, to be considered treatment. This may be an important distinction between Ohio law and Arizona.

²²⁵See § I.

²²⁶*Id.*

²²⁷*Id.*

²²⁸*Id.*

Parenthood clinics as confidential information.²²⁹ In doing so, this article did several things.

In particular, this article examined the history of a “right” to privacy, specifically, medical privacy.²³⁰ This article addressed three theories out of which the statutory patient-physician privilege originated.²³¹ Primarily, this article focused on Ohio’s patient-physician privilege in regard to Planned Parenthood clinics. A thorough examination of the services provided by Planned Parenthood clinics in Ohio was done, as well as an examination of how these clinics function.²³² Further, an analysis of Ohio’s patient-physician privilege was done, in particular focusing on what information the statute protects and what parties are to be protected.²³³ This article then concluded that a pregnancy test administered at a Planned Parenthood clinic would not likely be considered privileged or confidential information.²³⁴

After examining Ohio’s patient-physician privilege and concluding that results of pregnancy tests administered at Planned Parenthood would likely not be considered privileged information, this article examined the effect of federal law on the issue.²³⁵ Specifically, the role of HIPAA was discussed and it was concluded that that the results of a pregnancy test administered Planned Parenthood would likely not be considered confidential under federal regulations either.²³⁶

Therefore, this article analyzed whether legislation specifically protecting information such as a pregnancy test result possessed by a clinic such as Planned Parenthood would be appropriate.²³⁷ This article concluded that legislation that would make results of pregnancy tests administered at Planned Parenthood clinics in Ohio confidential, would be justified based on three reasons. First, in light of the purpose and function of Planned Parenthood clinics, it is important to assure patients of such clinics privacy and confidentiality.²³⁸ Secondly, the cases in which a privilege has been extended beyond the patient-physician relationship seem to suggest that the extension of a privilege is justified where a significant public interest is served by the extension.²³⁹ Finally, there is no other statute in Ohio which protects this sensitive medical information as confidential.²⁴⁰

In conclusion, this article suggested that Arizona’s medical records confidentiality statute is an appropriate model on which to base new legislation or

²²⁹See § III(A)-(d).

²³⁰See § II(A).

²³¹See § II(B).

²³²See § II(C).

²³³See § III(A)-(C).

²³⁴See § III(D).

²³⁵See § IV-V.

²³⁶See § V(D).

²³⁷See § VI(a)-(B).

²³⁸See § VI(B).

²³⁹*Id.*

²⁴⁰*Id.*

changes in current law.²⁴¹ Arizona's law seems to be broad enough to encompass any health care provider, including clinics such as Planned Parenthood and also seems to view pregnancy test results as privileged information.²⁴² The strict wording and interpretation of Ohio's statute fails to allow for such parties and information to be privileged, despite significant justifications to keep such information and parties confidential.²⁴³

One suggestion on how to accomplish the protection of the pregnancy test results administered at Planned Parenthood would be to simply amend the current patient-physician privilege. Specifically, the wording of the statute could be changed so as to make it clear that the privilege extends to all health care facilities. A broad definition of "health care facility" would be required so as to avoid the debate as to whether Planned Parenthood qualifies as such. The language used in Arizona's statute²⁴⁴ is suggested as a model definition of health care provider. Such language is broad enough to encompass clinics such as Planned Parenthood and even seems to suggest that a Planned Parenthood clinic is explicitly one of the health care providers the statute has set out to protect.

Ohio's patient-physician privilege²⁴⁵ already seems to suggest that pregnancy test results would be seen as a communication under the statute. However, such communication is not protected under the statute currently, because a doctor may not be responsible for administering the test.²⁴⁶ If the language of the statute is changed to eliminate the strict requirement that a doctor administer the test, and rather just that the test be administered at a health care facility, then it seems that Ohio's current definition of communication to be protected would already encompass a pregnancy test result.

Thus, the only other change that would be recommended in Ohio law is a provision that would make it clear that a patient is someone seeking the medical services, provided by a health care provider, as defined by the statute. Again, Arizona law is suggested as a model.

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²⁴¹See § VI(C).

²⁴²*Id.*

²⁴³*Id.*

²⁴⁴ARIZ. REV. STAT. § 12-2235.

²⁴⁵OHIO REV. CODE ANN. § 2317.02(B)(1).

²⁴⁶*Id.*