Do Doctors Have a Constitutional Right to Violate Their Patient's Privacy: Ohio's Physician Disclosure Tort and the First Amendment

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I. INTRODUCTION

Physicians today are encountering an unprecedented level of public expectation that responsibility for preventing disclosures of intimate patient medical information rests with them. Nevertheless, the American public's attempts to constrain health care providers' disclosure of their private medical information have been only minimally effective. Both state and federal courts have struggled for decades to fashion an appropriate remedy for a breach of physician-patient confidentiality. Unfortunately, as the legal basis of a disclosure-related tort focuses on preventing the undesired communicative conduct of the physician, the tort becomes subject to constitutional challenge as a state action that encroaches on a physician's First Amendment rights.


2. See Schwartz, supra note 1, at 310 (explaining that unsatisfactory protection for private medical information results from lack of uniformity in legislation across states and federal government as well as less than comprehensive coverage within existing laws). Injuries to patients resulting from disclosure of their private medical information are serious. See id. (discussing reports stating that threats and harms from disclosures are neither trivial nor imaginary).

3. See Biddle, 715 N.E.2d at 522-23 ("Since [1917] courts in Ohio and elsewhere have faced common metamorphic disturbances in attempting to provide a legal identity for an actionable breach of patient confidentiality.").

4. See Susan M. Gilles, Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy, 43 Buff. L. Rev. 1, 84 (1995) (concluding that same characteristic of breach of confidence tort that makes it appropriate for plaintiff recovery-its focus on speech as source of harm-also subjects it to First Amendment challenge).
Although physicians have been bound to confidentiality by ethics codes since the dawn of the medical profession, they have largely escaped accountability for violations of confidentiality beyond mere professional sanctions. In recent decades, the proliferation of complex health care delivery systems has broadened disclosure of medical records far beyond that necessary for treatment and has greatly increased the risk of breaching patient confidences. Commentators have remarked that medical records privacy, given the complexity of today's health care delivery infrastructure, is severely undermined. Neither state nor federal laws protecting patients' privacy in government-held medical records reach the

5. See Bernard Friedland, Physician-Patient Confidentiality: Time to Re-Examine a Venerable Concept in Light of Contemporary Society and Advances in Medicine, 15 J. LEGAL MED. 249, 255 (1994) (discussing roots of ethics in medical profession). The medical profession developed and applied its own ethical framework from its inception over 2500 years ago. See id. at 255 n.33 (quoting medical journal articles on professional ethics). The Hippocratic Oath, originating around 400 B.C., states: "What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about." Id. at 256. Despite professional admonitions to keep patient confidences, physicians were not subject to civil liability for unauthorized disclosures until 1917. See id. at 252 (citing Smith v. Driscoll, 162 P. 572 (Wash. 1917), as first case in United States to permit civil action against physician for unauthorized medical records disclosure).

6. See Gostin, supra note 1, at 485-86 (listing authorized users of patient records as including those who "provide, manage, review, or reimburse patient care services; conduct clinical or health services research; educate health care professionals or patients; develop or regulate health care technologies; accredit health care professionals or provider institutions; and make health care policy decisions"); Schwartz, supra note 1, at 514 (discussing use of private medical information for purposes beyond that necessary when collected, including examples of companies marketing lists of elderly incontinent women, allergy sufferers, people with bleeding gums and people with epilepsy).

When life insurance companies request medical records for policy approval, they may share that information with other companies. See How Private Is My Medical Information, Privacy Rights Clearinghouse, at http://www.privacyrights.org/fs/fs8-med.htm (last modified Aug. 31, 2000) (describing role of Medical Information Bureau, Inc.). Medical Information Bureau, Inc. is a medical insurance reporting agency, similar to a credit reporting agency, which provides 750 member life insurance companies coded medical information on 15,000,000 individuals. See id. (describing scope of company operation). Medical information reported by the company includes weight, blood pressure and electrocardiogram results. See Consumer Information, Medical Information Bureau, Inc., at http://www.mib.com/consumer/about-general.html (last visited Oct. 2, 2000) (explaining scope of reported medical data). The company also reports non-medical information, including an individual's adverse driving record and their participation in hazardous sports. See id. (explaining scope of reported non-medical data).

7. See Gostin, supra note 1, at 512-13 (arguing that today's electronic health care system can no longer rely on provider-patient confidentiality to protect records-rather, protection must be attached to record itself instead of associated with particular institutions which happen to have possession); Karen Timmons, When It Comes to Medical Privacy, Your File Could Be an Open Book, L.A. TIMES, Dec. 2, 1990, at A35, A38 ("Anything you tell anybody in a hospital is available to anybody who is interested enough to go and get it . . . . The patients [have] become a database.").
majority of medical records that exist in the private sector.\textsuperscript{8} State laws that do reach private sector records usually protect only extra sensitive categories of medical data.\textsuperscript{9} Legislation protecting general medical records privacy has been adopted by too few states.\textsuperscript{10}

Patients seeking redress for disclosure of intimate facts regarding their medical treatment can turn to tort remedies.\textsuperscript{11} Physicians often assert the affirmative defense of justified disclosure, which is continually

\textsuperscript{8} See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a (1994) (protecting only medical records held by federal government agencies). Although the Privacy Act protects federally held health records from disclosure without authorization by the patients whom the records describe, exceptions are provided for "routine uses" of health records. See Gostin, supra note 1, at 501 (discussing frequent release of federally held medical records to researchers with identification of patients in record intact); see also N.Y. Pub. Off. Law § 96 (McKinney 1991) (protecting state-held medical records).

The United States Supreme Court has recognized a constitutional right to informational privacy. See Richard C. Turkington, Medical Record Confidentiality Law, Scientific Research, and Data Collection in the Information Age, 25 J.L. Med. & Ethics 113, 115 (1997) (noting constitutional rights to privacy in both personal decision-making and private information). This constitutional right to privacy only protects persons from access by the government and its agencies and does not apply to access by parties in the private sector. See id. (describing limitations of constitutional privacy protections).

\textsuperscript{9} See Gostin, supra note 1, at 508 (discussing variety of state laws prohibiting disclosure without patient consent of health records that indicate "mental illness, HIV infection or AIDS, and sexually transmitted diseases," as well as special protections of records containing genetic information). Protections for sensitive health problems can be undermined, however, by exceptions in state laws. See id. (describing provision in Connecticut statute that permits HIV status disclosure to so many individuals, it essentially "swallow[s] the privacy rule").


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  \item[(a)] A person aggrieved by a violation of this [Act] may maintain an action for relief as provided in this section.
  \item[(b)] The court may order the health-care provider or other person to comply with this [Act] and may order any other appropriate relief.
  \item[(c)] If the court determines that there is a violation of this [Act], the aggrieved person is entitled to recover damages for pecuniary losses sustained as a result of the violation; and, in addition, if the violation results from willful or grossly negligent conduct, the aggrieved person may recover not in excess of $5,000, exclusive of any pecuniary loss.
\end{itemize}


\textsuperscript{11} For a complete discussion of tort remedies available to patients distressed by unauthorized disclosure of their private medical information, see infra notes 34-66 and accompanying text.
strengthened by the increase in laws that compel or permit physician disclosure of patient medical records in service of public policy. When the disclosure is not justified, traditional theories underlying medical records disclosure actions have proven largely inappropriate for circumscribing the egregious conduct of health care providers or compensating patients for actual harm.

One development in medical privacy protection shows promise in reversing the trend of diminished public control over medical records disclosure. The Supreme Court of Ohio, in Biddle v. Warren General Hospital, upheld, on an independent basis, a patient's right to sue her health care provider for disclosing medical records to a third party without authorization. The decision in Biddle makes Ohio the first state to abandon traditional bases of disclosure liability by creating an independent tort for the unauthorized disclosure to a third party of private patient medical data. As a specific and narrowly tailored remedy, this new tort has the potential to directly address the wrong of disclosure, while either avoiding or surviving a First Amendment challenge.

For examples of when a physician is legally justified to disclose private patient medical information, see infra notes 25-27 and accompanying text.

See Gostin, supra note 1, at 490 (describing harms incurred by patients whose medical confidentiality has been breached). As a result of medical records disclosure, patients can experience both intrinsic harms, such as mere fact of unwanted disclosure and insults to dignity, and extrinsic harms, such as economic losses and stigmatization causing embarrassment and lowered self-esteem. See id. (outlining range of harms incurred by disclosures).

For a brief discussion of recent developments in health records control, see infra notes 29-33 and accompanying text. For a broader discussion of the development regarding creation of an independent physician disclosure tort, see infra notes 88-111 and accompanying text.

715 N.E.2d 518 (Ohio 1999).

See generally id. (establishing independent tort for unauthorized physician disclosure of confidential patient data and abandoning inadequate traditional theories of recovery). For a full discussion of Biddle, see infra notes 88-107 and accompanying text.

See Alexander J. Brittin et al., Understanding HHS's Proposed Health Information Privacy Standard, H.C.P.R., Dec. 6, 1999, at § VIII (emphasizing Biddle case as example of how state law may provide answer to problem of gap in HIPAA regulations for patient private right of action).

See generally Gilles, supra note 4, at 65-84 (discussing likely survival of breach of confidence actions grounded in contract or fiduciary trust doctrine under First Amendment, but arguing that even most limited formulation of independent breach of confidence tort is still too general, and therefore implicates too much speech to survive strict First Amendment scrutiny). But see G. Michael Harvey, Confidentiality: A Measured Response to the Failure of Privacy, 140 U. Pa. L. Rev. 2385, 2449-69 (1992) (arguing that because interests protected by breach of confidence are narrower than interests protected by invasion of privacy, tort can surmount constitutional obstacles). Free speech challenges to a state-defined tort are brought via the Fourteenth Amendment, which applies the protections of the First Amendment to the several states. See Wallace v. Jaffree, 472 U.S. 38, 49-50 (1985) (discussing application of First Amendment protections to states before and after passage of Fourteenth Amendment). For a complete discussion of the viability of
This Note discusses the need for an appropriately fashioned civil remedy against physicians for unauthorized medical records disclosures and whether such a remedy would be constitutional under the First Amendment. Part II discusses how courts balance patient privacy and public policy, and the problems patients face when they attempt to use traditional theories of recovery for unauthorized disclosures. Part III discusses Ohio's struggle to find an appropriate patient remedy and the emergence of a new and independent tort in Biddle. Part IV examines the viability of Ohio's new tort under First Amendment doctrine.

II. THE NEED FOR AN APPROPRIATE TORT TO REMEDY BREACh OF PATIENT CONFIDENTIALITY

A. Balancing Public Policy and Patient Privacy

Judicial recognition of patients' interests in confidentiality, as well as the responsibility of physicians to maintain confidentiality, is well established. Courts have stated that the need to provide patients with a safe environment where they can divulge their most intimate bodily information is paramount to their acquisition of adequate health care. Courts also recognize that respect for patients' privacy must be balanced against

the tort created in Biddle under the First Amendment, see infra notes 112-73 and accompanying text.

19. For a discussion of the balance struck between public policy and patient privacy, see infra notes 22-33 and accompanying text.

20. For a discussion of Ohio's application of traditional tort theories and its creation of an independent tort, see infra notes 68-111 and accompanying text.

21. For a discussion of the new Ohio tort in light of First Amendment jurisprudence, see infra notes 112-73 and accompanying text.

22. See Branzburg v. Hayes, 408 U.S. 665, 726 n.2 (1972) (Stewart, J., dissenting) (distinguishing physician-patient relationship from reporter-source relationship at issue in case as one which serves society's interest when it creates zone of privacy, based on "strong assurances of confidentiality," which individual communicating sensitive information can control); Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801-02 (N.D. Ohio 1965) ("We are of the opinion that the preservation of the patient's privacy is no mere ethical duty upon the part of the doctor; there is a legal duty as well.").

23. See, e.g., Hammonds, 243 F. Supp. at 797 ("To foster the best interest of the patient and to insure a climate most favorable to a complete recovery, . . . medicine [has] urged that patients be totally frank in their discussions with their physicians."); Hague v. Williams, 181 A.2d 345, 349 (N.J. 1962) ("A patient should be entitled to freely disclose his symptoms and condition to his doctor in order to receive proper treatment without fear that those facts may become public property. Only thus can the purpose of the relationship be fulfilled."); Berger v. Sonneland, 1 P.3d 1187, 1192-93 (Wash. Ct. App. 2000) ("[P]hysicians cannot administer effective treatment if patients avoid treatment or withhold information based on a fear that their physician might disclose information obtained as part of the treatment . . . "); see also Gostin, supra note 1, at 490-91 (noting that unless patients can be assured that their confidences will be kept, their reluctance to share sensitive information may result in inadequate medical treatment).
the public's need for both protection against community hazards and a prudent administration of justice.\textsuperscript{24}

For public policy reasons, courts find legal justification for a physician's disclosure of a patient's medical condition to government authorities or third parties under certain circumstances.\textsuperscript{25} For example, physicians are generally immune from liability if they breach confidentiality to report a violent crime to the police, a public health hazard to disease control centers, or evidence of child abuse to family services.\textsuperscript{26} In addition, rules of civil procedure permit physicians to disclose the results of patients' exams when their medical conditions are at issue in litigation.\textsuperscript{27}

Despite these exceptions, patients expect that their physicians are their confidants, and patients are generally appalled to learn of any breach of their confidences, whether legally justified or not.\textsuperscript{28} Pursuant to the Health Insurance Portability and Accountability Act ("HIPAA") of 1996, the United States Department of Health and Human Services has promulgated regulations requiring all health care organizations to adopt

\textsuperscript{24} See, e.g., Biddle v. Warren Gen. Hosp., 715 N.E.2d 518, 524 (Ohio 1999) (noting that physician is immune from liability for disclosure when statutory or common law duty mandates disclosure). Concerns for public safety, the safety of a third person or even the health of the patient can outweigh the patient's interest in confidentiality. \textit{See id.} (describing scope of physician's immunity). \textit{See generally} Barefoot, \textit{supra} note 1, at 326-51 (examining recent debates regarding level of protection to be afforded health records in light of necessary goals of treatment and payment, research, preservation of public health, health care quality oversight, law enforcement and employer self-insurance).

\textsuperscript{25} See, e.g., Howe v. United States, 887 F.2d 729, 733 (6th Cir. 1989) (permitting disclosure of Air Force intelligence officer's drug abuse to superiors to protect military security); \textit{Hague}, 181 A.2d at 349 (finding no liability for disclosure of infant patient's heart condition to insurer upon application by parents for life insurance on child); Simonsen v. Swenson, 177 N.W. 831, 832-33 (Neb. 1920) (finding no liability in physician disclosure of patient's syphilis condition on reasonable belief that disease was contagious and disclosure was necessary to prevent spread to others); \textit{see also} Turkington, \textit{supra} note 8, at 114-15 (describing breadth of physician disclosures mandated by state statutes, including evidence of "communicable disease, elder abuse, domestic violence, injuries caused by deadly weapons, abortions, and birth defects").

\textsuperscript{26} See Biddle, 715 N.E.2d at 524 (describing conditions permitting physician disclosure without liability for breach of patient confidentiality).

\textsuperscript{27} See \textit{Fed. R. Civ. P. 35(a)} (permitting discovery of plaintiff's medical records when plaintiff's condition is central to litigated issue). The term "privilege" is used in discussions of tort law as a concept that immunizes physicians from liability for disclosure. \textit{See, e.g., Biddle}, 715 N.E.2d at 524 (discussing physician privilege to disclose for public policy reasons). In judicial proceedings, privilege refers to the right of the client/patient to prevent disclosure of attorney-client or physician-patient communications absent a waiver. \textit{See Fed. R. Civ. P. 26(b)(1)} (permitting discovery of information so long as not privileged). When referring to liability-free disclosure by a physician, this Note uses the term "legal justification" instead of privilege to avoid confusion.

\textsuperscript{28} See Schwartz, \textit{supra} note 1, at 312 (discussing use by employers of employees' health care data to oppose claims for worker's compensation, to increase insurance premiums for employees with unhealthy habits and to discourage suits by employees about to be fired, despite employee belief in confidentiality).
procedures to protect the confidentiality of patient medical records.\textsuperscript{29} These regulations impose wide restrictions on access to patient records and require health care institutions to promptly account for disclosures upon patient request.\textsuperscript{30}

Although HIPAA regulations focus health care providers' attention on protecting patient privacy, the regulations are only prophylactic.\textsuperscript{31} Remedies for patients injured by disclosures resulting from regulatory violations are not provided, so patients remain dependent on common law methods of recovery.\textsuperscript{32}

Courts frequently find express or implied duties of physicians to protect their patients' confidences, and they permit causes of action by patients against their physicians or hospitals to proceed.\textsuperscript{33}

\begin{footnotesize}
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\item\textsuperscript{29} See Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918 (proposed Nov. 3, 1999) (to be codified at 45 C.F.R. pt. 160) (imposing wide array of regulations on health care providers of all types, requiring implementation of programs and procedures to restrict access to health records and account for disclosures). HIPAA authorized the Department of Health and Human Services to promulgate regulations if Congress failed to pass legislation protecting health records privacy by August 21, 1999. See Pub. L. No. 104-191 § 264, 110 Stat. 1936 (1996) (setting legislation deadline); Turkington, supra note 8, at 122 (describing timetable for promulgation of regulations).
\item\textsuperscript{30} See Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. at 59,922-27 (summarizing effect and purpose of regulations). A general principle underlying the regulations is replacing the need to obtain individual patient authorization for disclosure with a clearly delineated scope of users to whom access is restricted. See id. at 59,924 (explaining that regulatory intent is to create "sphere of privacy").
\item\textsuperscript{31} See id. at 59,923 (stating authors' concern that regulations do not provide private right of action for patients harmed by violations). The regulations, however, do provide criminal penalties for especially wrongful disclosures, such as disclosures for monetary gain. See id. at 59,926 (summarizing criminal sanctions). The regulations also permit the Secretary of the Department of Health and Human Services ("HHS") to impose civil fines on health care providers for failure to comply with the rules. See id. (noting cap of $25,000 per year per provision violated). As a further remedial measure for individuals harmed, the regulations call for a complaint system to be created within health care provider organizations and the HHS itself. See id. (noting intent to promote voluntary compliance by providers). The only direct recourse against physicians required by the regulations are provider-determined sanctions, which can range from a warning to termination. See id. at 60,035 (summarizing sanction requirements).
\item\textsuperscript{32} See id. at 59,923 (noting absence of private right of action for individuals harmed).
\item\textsuperscript{33} See, e.g., Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) (finding that relationship between physician and patient is contract containing implied covenant of confidentiality); MacDonald v. Clinger, 446 N.Y.S.2d 801, 805 (App. Div. 1982) (holding that psychiatrist's duty of confidentiality "sprang" from relationship itself, which is "one of trust").
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B. Problems Recovering for Breach of Patient Confidentiality Under Traditional Tort Theories

Patients sufficiently distressed by a disclosure of their private medical information and seeking justice through a common law cause of action encounter a number of difficulties. Legal theories upon which patients traditionally have brought suit include invasion of privacy, negligence/malpractice, implied breach of contract, breach of fiduciary trust and intentional or negligent infliction of emotional distress. Assuming no legal justification immunizes a physician from liability, a patient must successfully establish a prima facie case and win a judgment that fits the injury incurred. Traditional legal actions typically frustrate patients in one or both of these areas. An examination of four commonly applied theories of recovery will highlight the problems patients face.

Actions for invasion of privacy are brought under the “private facts” branch of this heterogeneous tort. Plaintiffs are required to show that the defendant publicized private information about the plaintiff that


35. For a discussion of the adequacy of these theories for claims alleging unauthorized physician disclosure, see infra notes 36-66 and accompanying text.

36. See generally Gilles, supra note 4, at 4-55 (describing requirements for bringing common law claims and what types of damages are recoverable).

37. See generally id. (examining reasons why recoveries afforded by common law actions generally do not fit harm of unauthorized breach of confidential relationship).

38. For a discussion of the application of these tort theories, see infra notes 39-66 and accompanying text.

39. See RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining branch of invasion of privacy tort where “Publicity [Is] Given to Private Life”). The Restatement defines the four branches of the invasion of privacy tort as follows:

   § 652B Intrusion Upon Seclusion
One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

   § 652C Appropriation of Name or Likeness
One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

   § 652D Publicity Given to Private Life
One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
   (a) would be highly offensive to a reasonable person, and
   (b) is not of legitimate concern to the public.

   § 652E Publicity Placing Person in False Light
would highly offend the reasonable person and is not of legitimate public concern. Additionally, the information publicized cannot have already been made public. Medical records are arguably private information, the publicity of which certainly would offend most patients. The publicity requirement of this tort, however, limits its application to those cases where the information is widely disseminated. A physician's disclosure of a patient's medical condition to an individual or small group would therefore not meet the plaintiff's prima facie burden.

When patients sue their physicians for malpractice, they sue under theories of battery, negligence in performing a procedure to which the patient has consented, or negligence in obtaining informed consent. Because medical records disclosure does not involve any physical touching of a patient's body, and the premise of the wrong is that the patient did not consent to the disclosure, malpractice actions based on battery or neg-

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and
(b) the actor had knowledge or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

*Id.* at §§ 652B-E.


40. See Restatement (Second) of Torts § 652D (listing requirements for cause of action).


42. See Gostin, supra note 1, at 453 (underscoring "high value" placed by society on "protection of the private sphere from governmental or other intrusion").

43. See Restatement (Second) of Torts § 652D, cmt. a (explaining that satisfying "publicity" requirement of tort requires dissemination of information to large audience, not just single person or small group). The Restatement comment suggests that instruments of mass communication, such as newspapers and television stations, are the likely vehicles through which an invasion of privacy claim will manifest. See id. (describing situations where tort is applicable).

44. See id. at cmt. h (describing prima facie burden for "private facts" claim).

ligence in performing a procedure, respectively, are inapplicable.\textsuperscript{46} The remaining malpractice theory, lack of informed consent, applies directly to the wrong of unauthorized physician disclosure.\textsuperscript{47} Most courts limit recovery under this theory, however, to physical injuries resulting from the manifestation of a risk of which the patient was unaware.\textsuperscript{48} A patient who is able to present a prima facie case will not be compensated solely for mental distress resulting from a physician's disclosure when that distress is unaccompanied by physical injury.\textsuperscript{49}

Some courts have upheld disclosure claims on the theory that a contract exists between a physician and patient, and that the contract includes an implied covenant of confidentiality.\textsuperscript{50} This significantly eases a patient's prima facie burden, because the physician-patient interaction evidences the contract, and the unauthorized disclosure proves the breach.\textsuperscript{51} Most contract remedies, however, focus on injuries related to the contract breach and are inadequate to address a patient's disclosure-induced distress.\textsuperscript{52} Contract damages must be calculable with reasonable certainty, leaving unearned income from a revelation-related job loss as the only compensable harm.\textsuperscript{53} Generally, emotional distress is not recoverable in

\textsuperscript{46} See id. at 666-71 (describing elements of tort theories plaintiff must prove to sustain cause of action).


\textsuperscript{48} See Miller v. Kennedy, 522 P.2d 852, 864 (Wash. Ct. App. 1974) (adopting general rule that patient can only recover for "injuries proximately resulting from the treatment"). But see Fairfax Hosp. v. Curtis, 492 S.E.2d 642, 647 (Va. 1997) (waiving general rule requiring physical injury to recover for emotional distress in malpractice action against hospital for prematurely releasing medical records in connection with separate litigation initiated by plaintiff). The Virginia Supreme Court stated that when a separate cause of action exists distinct from causing emotional distress, physical injury is not required for recovery. \textit{See id.} (creating exception to general rule).

\textsuperscript{49} See Miller, 522 P.2d at 864 (requiring physical injury to recover).

\textsuperscript{50} See, e.g., Hammonds, 243 F. Supp. at 801 (finding implied condition of contract between physician and patient that private information obtained during treatment would not be revealed without patient's consent).

\textsuperscript{51} See Anderson v. Strong Mem'l Hosp., 531 N.Y.S.2d 735, 739 (Sup. Ct. 1988) ("[T]he physician-patient relationship itself gives rise to an implied covenant of confidence and trust which is actionable when breached.").

\textsuperscript{52} See Gilles, supra note 4, at 25-32 (examining applicability of recovery theories under contract law to injuries resulting from breach of confidence). One reason why breach of confidence plaintiffs generally do not recover high awards is that contract law does not seek to punish a defendant for breaching an agreement. \textit{See id.} at 27 n.117 (describing purpose of contract law as to compensate injured party for economic expectation contemplated in the contract). A patient's injuries from an unauthorized physician disclosure can include loss of income, loss of reputation and mental distress. \textit{See id.} at 25 (noting typical injuries resulting from disclosure).

\textsuperscript{53} See \textit{Restatement (Second) of Contracts} \S 352 (1981) (requiring reasonable certainty in calculation of loss to be recovered). \textit{Hadley v. Baxendale} established the rule requiring the claimed injury to be foreseeable to the parties as
contract actions unless special circumstances exist and are spelled out beforehand in the contract.\textsuperscript{54}

Courts have also recognized causes of action for a physician's disclosure premised on a breach of the physician's fiduciary duty to a patient.\textsuperscript{55} Courts reach this position by analogizing the physician-patient relationship to other relationships that carry fiduciary obligations and by grounding the implied duty in public policy and the ethics codes of the medical profession.\textsuperscript{56} Analogous to implied contract theory problems, patient remedies focus on restoration of the "trust" breached or return of the benefit received by the fiduciary.\textsuperscript{57} Except where a physician's disclosure results in a calculable benefit, liability is avoided for a patient's mental distress over the breach.\textsuperscript{58}

In addition to these theories, actions for unauthorized medical records disclosure have been based on intentional or negligent infliction

resulting from a contract breach. See 156 Eng. Rep. 145, 151 (1854) (establishing injury foreseeability rule). Plaintiffs who show that a job loss was a foreseeable consequence of a physician's disclosure may be able to recover lost income. See Gilles, supra note 4, at 27-30 (outlining special circumstances under which contract plaintiff can recover special damages). Contract relief does encompass injunctive remedies, which plaintiffs can pursue to protect themselves from future breaches if the disclosures are planned or ongoing. See id. at 31 n.131 (noting willingness of courts to award equitable relief to prevent repeated breaches).

\textsuperscript{54} See Gilles, supra note 4, at 27-28 (noting rare circumstances in which breach of confidence plaintiff can recover special damages under contract theory as result of Basendale requirement).


\textsuperscript{56} See, e.g., Home, 287 So. 2d at 828 ("[M]embers of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients." (quoting Alexander v. Knight, 177 A.2d 142, 146 (Pa. Super. Ct. 1962))). A formal fiduciary duty is recognized only in particular relationships: beneficiary-trustee, guardian-ward, agent-principal, attorney-client, director-shareholder and partnership. See Gilles, supra note 4, at 40 (noting legally recognized legal fiduciary relationships). Beyond formal fiduciary relationships, "confidential relationships," such as doctor-patient and priest-parishioner, have been recognized as carrying a duty to maintain confidentiality. See id. at 41 & n.172 (discussing confidential relationship characteristics as including "great intimacy, disclosure of secrets, entrusting of power, and superiority of position").

\textsuperscript{57} See, e.g., Snepp v. United States, 444 U.S. 507, 508-16 (1980) (holding that former CIA employee who published book was in violation of fiduciary duty of confidence to his employer, creating constructive trust to hold profits from book sales); Gilles, supra note 4, at 48-51 (describing available remedies to plaintiff as injunctive, as in contract law, and return of economic benefit received by fiduciary as result of breach).

\textsuperscript{58} See Kohler v. Fletcher, 442 N.W.2d 169, 172-73 (Minn. Ct. App. 1989) (holding that plaintiff can only seek equitable remedy for breach of fiduciary duty (restoration of trust), and that recovery for emotional damages is prohibited); see also RESTATEMENT (SECOND) OF TRUSTS § 197 (1959) (permitting only equitable remedies).
of emotional distress and fraudulent misrepresentation. Patients have encountered comparable difficulties applying these theories. Courts faced with unauthorized medical records disclosure claims have unanimously declared a breach of the physician’s duty of confidentiality “so palpable a wrong” that it deserves a remedy. Nevertheless, courts have been largely unsuccessful in finding an appropriate remedy to compensate for the harm incurred and to precisely define the wrongful conduct they wish to deter.

A few courts have flirted with upholding physician liability on a breach of confidence theory, which correctly compensates for the distress incurred by the disclosure. Proposed formulations grounded indepen-

59. See Gilles, supra note 4, at 4 n.15 (noting plaintiff’s attempts to bring claims on theories of intentional/negligent infliction of emotional distress, violation of civil rights, fraudulent misrepresentation and appropriation of property). See generally Jessica Litman, Information Privacy/Information Property, 52 STAN. L. REV. 1283 (2000) (arguing that tort model is superior to property model for protection of personal information).

60. See Gilles, supra note 4, at 4 n.15 (noting failure of novel claims).

61. See Smith v. Driscoll, 162 P. 572, 572 (Wash. 1917) (holding for first time in United States that unauthorized extra-judicial disclosure of patient records is actionable, regardless of label given claim). The plaintiff in Driscoll brought a claim for slander against his physician for revealing confidential information on the witness stand. See id. The claim was dismissed for failure to state a cause of action because the plaintiff failed to allege facts that the physician’s statements in court were irrelevant to the proceedings. See id. at 573-74. The court did not dismiss the action because it might have been improperly designated as slander. See id. at 572. Instead, the court stated:

[1]t is wholly immaterial by what name the action is called. Neither is it necessary to pursue at length the inquiry of whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say it will be assumed that, for so palpable a wrong, the law provides a remedy.


62. See Biddle, 715 N.E.2d at 522-23 (remarking that courts’ attempts to create viable remedy for patient injuries from disclosure have “stretch[ed] . . . traditional theories beyond their reasonable bounds, or ignore[d] or circumvent[ed] otherwise sound doctrinal limitations”).

63. See, e.g., Doe, 400 N.Y.S.2d at 674 (recognizing breach of confidence cause of action against psychiatrist while grounding tort in contract and fiduciary concepts). Among the states, New York and California are closest to establishing an independent breach of confidence tort. See Gilles, supra note 4, at 53-56 (arguing that two states recognizing breach of confidence as distinct cause of action have done so in limited fashion). The Supreme Court of South Dakota upheld a breach of confidence action on the theory that a private right of action was implied by the state’s statute conferring a duty on physicians to maintain their patients’ confiden-
dently in breach of confidence vary according to which relationships are subject to confidential expectations. The various theories attach liability in exclusively nonpersonal relationships where a reasonable person would expect a confidence to be kept, in any recognized fiduciary relationship that carries an implied obligation of confidentiality, and when the parties have voluntarily agreed to maintain a confidence. Scholars disagree on whether even the most limited breach of confidence tort can survive a First Amendment challenge because the tort by nature is a generalized remedy infringing on too broad a category of speech.

III. THE EVOLUTION OF AN INDEPENDENT PHYSICIAN DISCLOSURE TORT IN OHIO

A. Ohio's Attempts to Remedy Patient Harms from Unauthorized Medical Records Disclosures

Ohio's experience in attempting to provide patients a remedy for unauthorized disclosures of confidential medical information is representative of the difficulty encountered in other states. An aggregate of statutory provisions and medical ethics codes delineates the scope of a physician's legally justified disclosure of patient information without consent, but fails to define the basis upon which a physician can be held liable for an unjustified disclosure. Courts interpreting Ohio law have applied common law tort remedies to unauthorized disclosure actions, but have done so inconsistently as to legal theory.


65. See Gilles, supra note 4, at 2 n.11 (listing scholars proposing various formulations of breach of confidence tort).

66. Compare Harvey, supra note 18, at 2469-70 (arguing that proposed breach of confidence tort will meet United States Supreme Court First Amendment requirements), with Gilles, supra note 4, at 80-84 (arguing that breach of confidence torts are too broad and chill too much speech to survive First Amendment scrutiny).

67. See Craig E. Johnston, Breach of Medical Confidence in Ohio, 19 AKRON L. REV. 373, 375-78 (1986) (describing cases decided in New York, Michigan, Utah and Nebraska where, similar to Ohio, courts have tried to reconcile breach of confidence action with traditional recovery theories).

68. See id. at 383 (arguing that patient rights of action are "implied" by two Ohio statutes governing medical records disclosure that explicitly immunize physicians for disclosure to cancer registries and hospital utilization committees).

69. For a comparison of remedies applied by Ohio courts, see infra notes 70-87 and accompanying text.
Hammonds v. Aetna Casualty & Surety Co. was the watershed medical records disclosure case in Ohio. In Hammonds, the United States District Court for the Northern District of Ohio upheld a patient's cause of action against his insurance company, which had induced the patient's physician to discuss his medical condition on the premise that the patient was contemplating a lawsuit. Finding no legal justification for a physician to disclose for merely contemplated litigation, the court found support for a patient cause of action in the medical profession's own ethics codes and a trend in other jurisdictions towards upholding claims for unauthorized medical records disclosure. The Hammonds court relied upon both the implied contract and the fiduciary duty theories to hold that the patient's action could proceed.

Two subsequent cases decided by Ohio state appellate courts upheld a patient's right to sue a physician for unauthorized disclosure. In Prince v. St. Francis-St. George Hospitals, Inc., the Ohio Court of Appeals reversed a summary judgment against the patient, finding a genuine issue of fact as to whether a "publication" of the patient's private facts occurred to establish a prima facie case of invasion of privacy. The patient's doctor sent her medical bill, prominently stating her diagnosis as "Acute & Chronic Alcoholism Detoxification," to her husband's employer. The court rejected the physician's argument that only intentional invasions of privacy

71. See Johnston, supra note 67, at 378 (noting that Hammonds was first case in Ohio to uphold cause of action for unauthorized medical records disclosure).
72. See Hammonds, 243 F. Supp. at 795 (stating facts). The patient's insurance company engaged in an unsupervised discussion with his doctor, exceeding the supervised testimonial access they would have had if the patient had waived his right to confidentiality by bringing a malpractice claim. See id. at 805 (noting that patient waiver does not permit "private conference" between plaintiff's physician and defendant's lawyer).
73. See id. at 801-03 (establishing support for new cause of action). The court also echoed the proposition that "a physician . . . wrongfully divulging confidential communications . . . [is] so palpable a wrong, the law provides a remedy." Id. at 801 (quoting Smith v. Driscoll, 162 P. 572, 573 (Wash. 1917)).
74. See id. (finding implied covenant of confidentiality when doctor treats patient, as well as fiduciary obligation of trust in treatment relationship).
76. 484 N.E.2d 265 (Ohio Ct. App. 1985).
77. See id. at 267-68 (stating that facts show letter sent to patient's husband's employer was open and read).
78. See id. at 267. The records were also labeled with the phrase "Restricted Code—Not to Publish." See id.
should be actionable and expanded the tort's boundary to include negligence. Although the court's holding on invasion of privacy grounds differed from the *Hammonds* decision on contract and fiduciary theories, the court's opinion was not clear as to whether the cause of action lay in the "private facts" or "intrusion" categories of the tort. The court's discussion of the publicity requirement of the private facts category further confused the outcome because it intimated that mere communication to a third party, as opposed to wide dissemination, would be sufficient for liability to attach.

The Ohio Court of Appeals was similarly unclear as to the application of invasion of privacy to medical records disclosure in *Levias v. United Airlines*. In *Levias*, a flight attendant sought a waiver from her "appearance supervisor" of the airline's weight requirement on medical grounds and directed her personal physician to disclose her records to the airline's medical examiner. The medical examiner, without the patient's consent, disclosed her medical condition to her supervisor. As in *Prince*, the Ohio Court of Appeals in *Levias* was unclear as to which category of the privacy tort was being applied to affirm the patient's compensatory award and as to the meaning of publicity in the private facts category. The court noted in its opinion that a physician's legally justified disclosure extends to those with "a real need to know," and concluded that the patient's supervisor only required a waiver recommendation from the medical examiner, not the medical details of her condition. The court did not

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79. See id. at 268-69 (stating that Ohio precedent did not limit actions for invasion of privacy to only intentional conduct).

80. See id. (referring to "intrusion" branch of tort in discussion of its application to negligent as opposed to intentional conduct).

81. See id. at 267-69 (reversing summary judgment against patient on grounds that publication to one person may constitute publicity under invasion of privacy claim). The court assumed in its opinion that the publicity requirement of the invasion of privacy tort would be satisfied by communication to a single individual, contrary to the Restatement's specification that publication to a large audience is necessary to sustain a claim. See *Restatement (Second) of Torts* § 652D, cmt. a (1977) (explaining publicity as dissemination to wide audience).


83. See id. at 373-74. The patient in *Levias* suffered from an iron deficiency anemia for which her doctor suggested not to diet and to take an oral contraceptive which caused her to retain fluids. See id. at 373.

84. See id. at 373 (noting flight attendant's belief, based on past practices and union contract with airline, that medical examiner was subject to same duty of confidentiality as her own physician).

85. See id. at 375-76 (quoting plaintiff's complaint alleging both publication of private information and intrusion into private affairs, but upholding compensatory damages overall without reference to particular branch of tort).

86. See id. at 374 (replacing jury charge of "legitimate interest in the patient's health" with broader "real need to know, not mere curiosity" requirement for legally justified physician disclosure).
qualify the need to know requirement as necessarily being treatment related.  

B. Ohio's Independent Physician Disclosure Tort


Biddle was the first case in which the Ohio Supreme Court addressed whether a patient in that state has a private right of action against a health care provider for a breach of medical confidentiality. In Biddle, a hospital agreed to its attorneys' suggested review of its patient registration forms for the purpose of identifying patients as candidates for supplemental security income to satisfy unpaid medical expenses. The hospital disclosed the registration forms to the law firm without obtaining any consent from the patients, nor having screened or sorted the forms in any manner. Throughout a two and one-half year period, the attorneys and their staff reviewed approximately 12,000 registration forms, each containing the patient's name, age, medical condition and telephone number. During the review period, the law firm contacted approximately 100 hospital patients, and subsequently met with five patients regarding representation for benefits application.

The Biddle patients brought a class action suit against the hospital and the law firm, alleging invasion of privacy, intentional infliction of emotional distress and negligence. The trial court granted summary judgment.

87. See id. at 375 (rejecting proposition that plaintiff's supervisor had "real need to know" because she lacked capacity to act on data).

88. See Biddle v. Warren Gen. Hosp., 715 N.E.2d 518, 522 (Ohio 1999) (citing lower state court cases and federal cases interpreting Ohio law which have upheld unauthorized disclosure of medical records).

89. See id. at 520 (describing agreement between hospital and law firm that attorneys would receive contingency fee upon payment from federal program).

90. See id. at 520 (stating that hospital made no effort to identify eligible candidates for federal benefits before turning over forms to law firm).

91. See id. (stating additionally that registration forms were reviewed by law firm partner and his legal assistant, whereupon forms of ineligible patients were placed in storage).

92. See id. (noting testimony of legal assistant).

93. See id. at 521 (stating that class action law suit was brought by two patients on behalf of all patients whose registration forms were released by the hospital). The plaintiffs sued under traditional theories of recovery, not the independent tort ultimately defined by the Ohio Supreme Court. See id. (noting that plaintiffs' claims on traditional theories derived from premise that hospital's agreement with law firm was breach of their confidentiality). Many courts uphold claims for breach of patient confidentiality, but ground the claim in a traditional tort recovery theory such as breach of implied contract or breach of a fiduciary trust. See, e.g., Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801-03 (N.D. Ohio 1965) (applying Ohio law and upholding patient cause of action against insurance company for inducing breach of physician disclosure on both contractual and fiduciary grounds); Horne v. Patton, 287 So. 2d 824, 830-32 (Ala. 1974) (preserving patient suit against doctor and noting that either privacy, contract or fiduciary theories can ground claim). See generally Gilles, supra note 4, at 4-62 (discussing court decisions upholding patient confidentiality claims on theories of invasion of privacy, breach of contract or fiduciary trust or breach of confidence).
ment for the defendants on all claims. Although agreeing with the trial court's determination that the patients' alleged claims were nonviable, the appeals court reversed the decision, basing a viable cause of action by the patients on a breach of a physician-patient confidence. The appeals court rejected the defendants' argument that because the law firm owed a duty of confidentiality to its hospital client, the patients' confidences, held by the hospital, transitively remained protected. On review, the Ohio Supreme Court affirmed and expounded on the basis and contours of the newly established cause of action.

The Ohio Supreme Court in *Biddle* first determined that state precedent clearly permitted a physician or hospital to be held liable for extra-judicial disclosure of confidential patient information. The court was reluctant, however, to recognize the cause of action under traditional theories of recovery because they "prove[d] ill-suited for the purpose, and their application contrived, as... designed to protect diverse interests that only coincidentally overlap that of preserving patient confidentiality." Recognizing that a disclosure tort based on breach of confidence was the natural evolution of an appropriate remedy, the *Biddle* court established an independent tort. The tort permitted a patient claim for the "unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship." This Note will refer to *Biddle*'s formulation as a "physician disclosure tort."

94. *See Biddle*, 715 N.E.2d at 521 (noting that trial court denied patients' motion for class certification as moot upon dismissal of claims for breach of confidentiality).

95. *See id.* at 521-22 (noting appeals court reversal). The appeals court's decision established an independent tort, but its formulation was too generalized for the Ohio Supreme Court. *See id.* at 521 (stating that appeals court tort definition as "an unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship").

96. *See id.* at 521-22 (stating appeals court rationale that duty of confidentiality applies to disclosure to any third party, including law firm, and that consent from patients was necessary for hospital action).

97. *See id.* at 522-29 (tailoring tort definition to physician-patient relationship).

98. *See id.* at 522 (citing Ohio precedent that physicians have been and should continue to be disciplined for unauthorized, extra-judicial disclosures of their patients' private medical information). The court cited both federal cases interpreting Ohio law and state lower court cases to underscore that the attachment of liability for breaches of patient confidentiality, albeit under traditional recovery theories, is not a novel concept. *See id.* (identifying clear basis for holding physicians liable).

99. *Id.* at 523. The court also characterized the application of traditional recovery theories to physician disclosure claims as "trying to fit a round peg into a square hole." *Id.*

100. *See id.* (highlighting decisions of courts in various United States jurisdictions which have recognized to some degree breach of confidence tort).

101. *Id.* The court delineated the tort's limitations clearly in this definition. *See id.* (defining tort). "Unauthorized" indicates that patients can waive their rights
The court in *Biddle* was careful to recognize that where a physician's statutory or common-law duty mandated or permitted disclosure, liability would not attach.\(^{102}\) The court intimated that, in Ohio, a health care provider has a limited legal justification to disclose information "necessary to collect [a] debt"; however, the hospital's disclosure of every patient's registration form without screening clearly violated this standard.\(^{103}\) Alternatively, patient consent would act as a waiver of the duty of confidentiality, but the court held that the general release form signed by patients allowing disclosure "for completion of . . . hospitalization claims" did not authorize disclosure to the hospital's attorneys for application of federal benefits.\(^{104}\)

Echoing the result in *Hammonds*, the *Biddle* court also upheld the plaintiffs' claim that the law firm knowingly induced the hospital to breach its duty of confidentiality to its patients.\(^{105}\) Underscoring the importance to confidentiality, provided that the release form specifies who will be receiving the information. *See id.* at 527-28 (citing *Mrozinski v. Fogue*, 423 S.E.2d 405, 410 (1992), which interpreted Georgia statute authorizing psychiatrists to release clinical records to patient's attorney with patient consent as not authorizing release to patient's mother's attorney). "Unprivileged" recognizes that a physician has statutory and common law duties that legally justify disclosure without a patient's consent, and that a physician should not be caught in the dilemma where a decision between violating state law or being subject to patient tort claims is required. *See id.* at 524 ("[T]he physician would be placed in the untenable position . . . [of] breaching one of two opposing common-law duties."). "Nonpublic" underscores that if information obtained from a patient is already public knowledge, a physician will not be liable for disclosing it to a third party. *Cf.* RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977) (interpreting publicity requirement for "private facts" branch of invasion of privacy tort as immunizing defendant from liability if facts are public record). For the complete text of the Restatement's definition of the invasion of privacy tort, see *supra* note 39. "Medical" information is not as clearly defined because health records can contain demographic and financial information; notes regarding sexual history, lifestyle choices, and family status; records of perpetrating or being victimized by sexual or violent crimes; as well as information describing disease histories, medical treatments, and drug or alcohol dependencies. *See Gostin, supra* note 1, at 489-90 (describing sensitive nature of health records); *see also id.* at 491 (noting that individual's genetic code can reveal medical information about biological ancestors, descendants and siblings).

102. *See Biddle*, 715 N.E.2d at 524 (stating that statutory mandates to report occupational or infectious diseases, indications of child abuse and injuries suggesting criminal activity, as well as common law duties to disclose to protect safety of third persons, immunize physician from liability).

103. *See id.* at 527 (rejecting defendants' argument that hospital's disclosure of patient registration forms was legally justified as debt collection effort). Not only did the court imply that review of all patient forms regardless of owing debt exceeded that which would be necessary to collect, the court also indicated that the agreement between the hospital and law firm was not the type of debt collection contemplated by those courts permitting a qualified legal justification for such a purpose. *See id.* at 527 n.1 (characterizing hospital action as egregious in circumstances).

104. *See id.* at 527 (discussing ineffectiveness of general release signed by patients for authorization to disclose beyond insurance company or third party payer).

105. *See id.* at 528 (defining requirements for third party liability).
of protecting patient privacy, the court stated that a third party's need for private patient medical information may sometimes give rise to a legal justification to disclose, but it is strictly limited to disclosure to individuals with a "legitimate interest" in a patient's health and medical treatment.\textsuperscript{106} The law firm may have been acting in its own interest or in the hospital's interest by attempting to obtain federal benefits for unpaid medical expenses; however, the patients' health or medical treatment was not an implicated concern.\textsuperscript{107}

Although Ohio's new tort is an important step toward addressing a serious harm, it punishes physicians for their communication to third parties.\textsuperscript{108} Because the tort deters a category of speech, this positive step risks erasure unless it can prevail against a First Amendment challenge.\textsuperscript{109} As a remedy narrowly circumscribed by the Ohio Supreme Court to the physician-patient circumstance, the tort will likely avoid the First Amendment hurdles believed to plague the broader tort of breach of confidence.\textsuperscript{110}

To establish liability the plaintiff must prove that: (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship; (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information; and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.\textsuperscript{106}

\textit{Id.} (quoting \textit{Alberts v. Devine,} 479 N.E.2d 113, 121 (Mass. 1985)). The dissent in \textit{Biddle} felt that the issue did not concern patient confidentiality, but rather the hospital's need to function through its agents. \textit{See id.} at 531-32 (Lundberg Stratton, J., dissenting) (emphasizing that even if breach of confidentiality is assumed, cursory review of registration form and contact by law firm regarding federal benefits creates negligible patient trauma).

\textsuperscript{106} \textit{See id.} at 528 (limiting legal justification for disclosure to third parties). In a concurring opinion, Justice Cook noted that the court's decision did not attach liability for disclosure for risk management and quality assurance activities engaged in by health care providers. \textit{See id.} at 529 (Cook, J., concurring) (agreeing with majority's creation of new tort and characterizing it as "appropriately narrow"). A legitimate interest in a patient's health is a stricter requirement than the "real need to know" standard suggested as the legal boundary of a justified disclosure in \textit{Levias. See Levias v. United Airlines,} 500 N.E.2d 370, 374 (Ohio Ct. App. 1985) (attempting to limit scope of legal justification of physician disclosure).

\textsuperscript{107} \textit{See Biddle,} 715 N.E.2d at 528 (agreeing with defendants that attorney needed patients' information to determine federal program eligibility, but rejecting argument equating attorney need with patients' health interest).

\textsuperscript{108} For a discussion of the specific circumstances under which a physician is punished under the new Ohio tort, see \textit{supra} note 101 and accompanying text.

\textsuperscript{109} \textit{See Jurata, supra} note 39, at 498 (arguing that any cause of action which has potential to restrict speech will "inevitabl[y] . . . clash with the First Amendment").

\textsuperscript{110} \textit{See generally} Gilles, \textit{supra} note 4, at 80-84 (arguing that breach of confidence torts are too broad and chill too much speech to survive First Amendment scrutiny).
The Biddle court, however, did not address the implications of the new tort under the First Amendment in its opinion. 111

IV. FIRST AMENDMENT CHALLENGES TO A PHYSICIAN DISCLOSURE TORT

The United States has a long history of protecting an individual's right to speak under the First Amendment, even when another individual is injured by that speech. 112 Allowances have been made, however, for the redress of particular injuries incurred by conduct in the form of speech. 113 When a state enforces laws that are content-neutral though incidentally infringing on speech, those laws are subject to an intermediate level of scrutiny under the First Amendment. 114 Because judiciary enforcement of common law torts is considered state action, a state-defined tort deterring conduct must be content-neutral to be subject to intermedium scrutiny.


112. See, e.g., Texas v. Johnson, 491 U.S. 397, 414 (1989) (permitting flag burning demonstration on "bedrock principle underlying the First Amendment ... that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); B.J.F. v. Florida Star, 491 U.S. 524, 536, 541 (1989) (dismissing claim against newspaper by rape victim whose name was published after having been lawfully obtained); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496-97 (1975) (dismissing invasion of privacy claim against television news station for publication of plaintiff's daughter's name as homicide and rape victim on grounds that information was already public as contained in court documents).

113. See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 669-70 (1991) (finding claim for breach of confidence against newspaper for publishing name of source valid on principle that media is subject to generally applicable laws of contract); Snepp v. United States, 444 U.S. 507, 509 (1980) (upholding breach of confidentiality claim by CIA against former employee on "national security" grounds); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (reviewing racist speech against "principle that the ... [First Amendment] ... do[es] not permit a State to forbid ... advocacy of the use of force ... except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 43-44 (Cal. 1971) (upholding invasion of privacy claim against newspaper for publishing plaintiff's name in article about crime because plaintiff's offense was eleven years old and therefore no longer newsworthy).

114. See Cohen, 501 U.S. at 669 (applying intermediate scrutiny and holding that incidental effects on speech through enforcement of laws of general applicability "do not offend the First Amendment"). The United States Supreme Court has applied intermediate scrutiny to uphold laws that affirmatively compel conduct on a private party which incidentally effects that party's right not to speak. See, e.g., Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641, 667-68 (1994) (upholding "must-carry" provisions of Cable Television Consumer Protection Act of 1992, which mandated that cable operators carry local broadcast stations). The Court in Turner stated that the interests served by the "must-carry" provisions—"(1) preserving the benefits of free over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming"—were not related to "the suppression of free expression." Turner, 512 U.S. at 662.
ate scrutiny under a constitutional challenge.\textsuperscript{115} If a common law tort is not content-neutral, the state action is presumed unconstitutional and is subject to strict scrutiny under the First Amendment.\textsuperscript{116}

Patient remedies for unauthorized medical record disclosure predicated on breach of contract or fiduciary duty result from a state's enforcement of content-neutral laws.\textsuperscript{117} Despite the tort's infringement on a physician's right to communicate, they are generally applicable and therefore constitutional.\textsuperscript{118} Ohio's physician disclosure tort impacts physicians' freedom to communicate confidential facts about their patients.\textsuperscript{119} If this tort that punishes physician conduct is construed as a content-neutral state action, the tort will avoid strict scrutiny under the First Amendment.\textsuperscript{120} If the tort is held to implicate speech directly, constitutionality becomes contingent on surviving strict scrutiny.\textsuperscript{121}

A. Physician Disclosure Tort as Content-Neutral State Action

In Cohen v. Cowles Media Co.,\textsuperscript{122} the United States Supreme Court set the criteria for evaluating whether a state action is content-neutral.\textsuperscript{123} The defendant newspaper had promised its source, a political campaign worker, that in exchange for information about the opposing candidate, his name would not be revealed.\textsuperscript{124} After the source conveyed the information, the newspaper broke its promise and printed his name.\textsuperscript{125} Al-

\begin{itemize}
  \item \textsuperscript{115} See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (establishing long-standing principle that enforcement in state courts of state laws that infringe on speech constitute state action requiring analysis under First Amendment doctrine).
  \item \textsuperscript{116} See Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified.").
  \item \textsuperscript{117} See Gilles, supra note 4, at 64 (discussing contract and fiduciary laws as being generally applicable).
  \item \textsuperscript{118} See id. at 63-65 (discussing likely avoidance of First Amendment challenge by breach of confidence actions brought under contract or fiduciary duty theories of recovery).
  \item \textsuperscript{119} See id. at 73 (noting that unlike contract-based and fiduciary duty-based actions, independent breach of confidence tort punishes communication and not "breach" of promise or duty).
  \item \textsuperscript{120} See Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991) (stating that content-neutral state action has "constitutionally insignificant" impact).
  \item \textsuperscript{121} See Hepps, 475 U.S. at 777 (requiring governmental justification for laws infringing on speech in order to survive constitutional challenge).
  \item \textsuperscript{122} 501 U.S. 663 (1991).
  \item \textsuperscript{123} See generally id., 501 U.S. 663 (upholding breach of confidence claim as neutral state action); see also Snepp v. United States, 444 U.S. 507, 509 (1980) (upholding breach of confidence claim).
  \item \textsuperscript{124} See Cohen, 501 U.S. at 665-66 (noting that plaintiff had provided information about opposing candidate to two separate newspapers in exchange for anonymity, and both independently chose to print his name regardless).
  \item \textsuperscript{125} See id. at 666 (stating repercussion from newspaper article was immediate dismissal by employer).
\end{itemize}
though the newspaper was being punished for publishing true information, the Court held that the action did not violate the newspaper's First Amendment rights because an action for breach of contract is a generally applicable law and therefore neutral in regard to speech.\textsuperscript{126} 

Cohen declares that a content-neutral law cannot (1) target the press, (2) target the message embodied in speech, or (3) target speech itself.\textsuperscript{127}

The physician disclosure tort established in \textit{Biddle} is arguably content-neutral.\textsuperscript{128} First, the tort aims to circumscribe the conduct of health care providers, not the press.\textsuperscript{129} Second, although physicians learn about a patient's bodily condition for the purpose of providing medical care, the duty of confidentiality extends to whatever subject matter is necessarily acquired by the physician to advance that purpose.\textsuperscript{130} Therefore, a physician disclosure tort does not target any particular message.\textsuperscript{131} Whether the tort violates the third criterion, targeting speech itself, requires a closer examination of how speech can be distinguished from conduct.\textsuperscript{132}

The United States Supreme Court has upheld the constitutionality of content-neutral laws that prohibit conduct which overlaps with speech.\textsuperscript{133} The Court has also invalidated laws targeting expressive conduct, finding that their purpose was to infringe the speech represented by the conduct

\textsuperscript{126} See \textit{id.} at 669-72 (highlighting that press, in effort to publish story, is not immune from generally applicable laws protecting against copyright infringement, discrimination, anti-trust violations and criminal violence).

\textsuperscript{127} See Gilles, \textit{supra} note 4, at 70 (synthesizing Cohen ruling into criteria for content-neutral determination).

\textsuperscript{128} For a discussion of the content-neutrality of the physician disclosure tort created in \textit{Biddle}, see \textit{infra} notes 129-51 and accompanying text.

\textsuperscript{129} See \textit{Biddle v. Warren Gen. Hosp.}, 715 N.E.2d 518, 523 (Ohio 1999) (circumscribing conduct of "physician[s] or hospital[s]" in its definition of physician disclosure tort).

\textsuperscript{130} For a discussion of the wide variety of information which is exchanged in the context of a physician-patient relationship, see \textit{infra} note 101 and accompanying text.

\textsuperscript{131} See \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 791-92 (1989) (upholding city ordinance mandating use of city's amplification equipment at concerts because purpose of ordinance was to ensure maximum decibel level, not to dissuade certain bands from playing). The Court in \textit{Ward} stated that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not on others." \textit{Id.} at 791 (stating rule for content-neutral determination).

\textsuperscript{132} See generally \textit{United States v. O'Brien}, 391 U.S. 367 (1968) (establishing rule for determining whether state action targets expression in conduct and therefore requires strict scrutiny under First Amendment).

\textsuperscript{133} See, e.g., \textit{City of Erie v. Pap's A.M.}, 529 U.S. 277, 282 (2000) (upholding city's ordinance ban on public nudity despite its incidental and minimal effect on dancers' ability to convey erotic message in strip tease establishment); \textit{O'Brien}, 391 U.S. at 386 (upholding defendant's conviction for burning draft card in protest of Vietnam War).
they restricted. In United States v. O'Brien, the Court upheld the conviction of a defendant who burned his draft card to protest the draft and the Vietnam War. The Court, applying intermediate scrutiny, stated that laws serving a substantial government interest unrelated to suppressing speech, but which incidentally restrict speech, are constitutional. The governmental interest upheld in O'Brien was the efficient operation of the Selective Service System, in spite of the law's incidental prohibition on a particular form of symbolic expression.

The Oregon Supreme Court, in Anderson v. Fisher Broadcasting Co., cast the distinction based on the nature of the conduct itself as opposed to the interest served by the law prohibiting it. The court dismissed the plaintiff's claim for emotional distress resulting from a news station's broadcast of his auto accident trauma because the publication of truthful facts was not wrongful beyond the broadcast itself. The court held, however, that tort liability would attach if the purpose or manner of the injurious conduct were wrongful apart from creating hurt feelings—such as when a defendant disregards a duty of confidentiality.

134. See, e.g., Texas v. Johnson, 491 U.S. 397, 399-400 (1989) (reversing defendant's conviction for burning American flag under state law banning desecration of venerated object on grounds that defendant's expressive conduct was protected by First Amendment); Boos v. Barry, 485 U.S. 312, 315-18 (1988) (striking down District of Columbia law prohibiting display of signs denigrating foreign government within 500 feet of that government's embassy on grounds that law was targeting content of expression inherent in conduct). "[T]hat the government may not prohibit expression simply because it disagrees with its message . . . is not dependent on the particular mode in which one chooses to express an idea." Johnson, 491 U.S. at 416.


136. See id. at 386 (finding federal law prohibiting destruction of draft cards constitutional).

137. See id. at 376-77 (setting forth guidelines for evaluating whether governmental interest furthered by law justifies restriction of First Amendment rights to free expression). The Court established the following test for considering a law's constitutionality:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

138. See id. at 377-81 (describing function and purpose of draft cards as being substantial and legitimate aid to effective functioning of Selective Service System).

139. 712 P.2d 803 (Or. 1986).

140. See generally id. (examining defendant's conduct independently from state's interest in punishing behavior through judicial endorsement of tort).

141. See id. at 814 (noting that plaintiff's claim was only for emotional distress damages, not for unpaid endorsement value of broadcast).

142. See id. (outlining circumstances which would sustain claim for emotional distress resulting from "presentation of facts concerning a person"). The court provided examples that could meet its wrongful conduct standard, including publishing in a socially intolerable manner, obtaining the information wrongfully, or
Whether examined according to the governmental interest served by the state action under O'Brien or according to the wrongfulness of the conduct under Anderson, the physician disclosure tort created in Biddle can be construed as not targeting speech. The Biddle court stated that the tort's purpose was the preservation of patient confidentiality. Courts invariably recognize that an assurance of confidentiality between physician and patient is necessary to provide adequate medical treatment—a substantial governmental interest distinct from restricting physicians' speech. Underscoring this distinction are the numerous regulations that exist to maintain a high quality health care system which do not infringe on speech.

The unauthorized disclosure itself has been described by a chorus of courts as "so palpable a wrong" that a remedy is justified. It violates professional ethics codes and has been the basis of plaintiff recovery, albeit inadequate, on other legal theories. A breach of this duty of confidentiality, exemplified in Anderson as conduct wrongful enough to sustain a claim for emotional distress resulting from speech, is the same wrong punished by Biddle's physician disclosure tort.

As state action targeting health care providers and punishing conduct that is inherently wrongful, a physician disclosure tort should avoid strict First Amendment scrutiny and be found constitutional under intermediate scrutiny. If the tort fails Cohen's test as state action targeting speech, then its infringement on physician expression will be subject to strict scrutiny.

breaching confidentiality or another statutory duty. See id. (outlining "wrongful conduct" holding).

143. For a discussion of how the physician disclosure tort in Biddle is content-neutral under O'Brien or Anderson, see infra notes 144-49 and accompanying text.

144. See Biddle v. Warren Gen. Hosp., 715 N.E.2d 518, 523 (Ohio 1999) ("[T]o support liability, a more appropriate basis can be found in the nature of the physician-patient relationship itself . . . because it is customarily understood to carry an obligation of secrecy and confidence.").

145. For examples of courts recognizing importance of free sharing of information by patient with physician, see supra note 23.


147. For a list of courts declaring unauthorized physician disclosures "so palpable a wrong," see supra note 61.

148. See Biddle, 715 N.E.2d at 523 (discussing reasons relied on by courts to uphold physician liability, though commenting on inadequacies of traditional theories in providing appropriate remedies for patients).

149. See Anderson v. Fisher Broad. Cos., 712 P.2d 803, 814 (Or. 1986) (listing types of conduct so wrongful apart from speech that liability properly attaches).

150. For a discussion of how the physician disclosure tort in Biddle can be found content-neutral, see supra notes 128-49 and accompanying text.

151. See Gilles, supra note 4, at 69-70 (describing satisfaction of Cohen criteria as necessary to avoid strict scrutiny under First Amendment).
B. **Physician Disclosure Tort Under First Amendment Strict Scrutiny**

The United States Supreme Court's decision in *B.J.F. v. Florida Star*\(^\text{152}\) applied the strict scrutiny standard to a state law that targeted the press.\(^\text{153}\) The plaintiff in *Florida Star* was a rape victim, whose name was inadvertently included in a police press report, and then subsequently published in the defendant's newspaper.\(^\text{154}\) The plaintiff sued the newspaper for negligence in violating Florida's law banning the publication of sex crime victims' names.\(^\text{155}\) The plaintiff won at trial, but her award of compensatory and punitive damages was overturned by the United States Supreme Court.\(^\text{156}\)

The Court carefully noted that the constitutionality of state actions under the First Amendment are decided on a case-by-case basis, and that it was willing to uphold a state law infringing on publication of lawfully obtained true speech only upon a showing by the state that the law furthered an "interest of the highest order."\(^\text{157}\) The Court did not believe that Florida's publication ban met this standard, despite its clear purpose in protecting the privacy of rape victims and promoting their coming forward to report crimes.\(^\text{158}\)

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152. *491 U.S. 524 (1989).*

153. See generally id. at 524 (applying strict scrutiny analysis to newspaper's publication of rape victim's name in violation of Florida law). The strict scrutiny rule was formulated in a previous case, *Smith v. Daily Mail Publishing Co.*, where the court stated: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 533 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)) (alteration in original).

154. See *id.* at 527-28. A reporter-trainee from the defendant newspaper had copied a police press release, including the victim's full name, verbatim, into a "Police Reports" story. *See id.* at 527. Further, the publication of the rape victim's name was contrary to the newspaper's internal policy. *See id.* at 528.

155. See *id.* (stating procedural history). At trial, the plaintiff won a directed verdict finding the newspaper per se negligent in violation of the Florida statute banning publication of rape victims' names. *See id.* at 529 (summarizing lower court procedure).

156. See *id.* at 532 (overturning lower court's award of damages to plaintiff because Florida could not justify law under strict scrutiny analysis).

157. See *id.* at 530 ("Our decisions . . . involving government attempts to [im-pede] the accurate dissemination of information . . . have not . . . exhaustively considered this conflict. On the contrary . . . each time . . . we were resolving this conflict only as it arose in a discrete factual context."); see also Jurata, *supra* note 39, at 501 (noting Court's refusal in *Florida Star* to hold that publication of truthful information can never be punished without violating First Amendment).

158. *See Florida Star*, 491 U.S. at 538-40 (discussing reasons why Florida law did not meet strict scrutiny standard). The Court did not say that the protection of rape victims from their assailants and governmental encouragement to come forward were not significant interests. *See id.* at 537 (stating rationale for decision). On the contrary, the Court recognized the importance of these goals. *See id.* ("[I]t is undeniable that these are highly significant interests."). Florida's law furthering these interests, however, was unconstitutional because it singled out "instruments of mass communication" and because Florida failed to employ less drastic means
In his *Florida Star* dissent, Justice White suggested that if the protection of rape victims' names was not a state interest of the highest order, the Court's decision had "obliterate[d] . . . the tort of publication of private facts."159 Some commentators have seized upon Justice White's statement to declare that the Court will never permit punishment targeted at true speech.160 Other commentators point to the Court's refusal to find any law infringing on true speech unconstitutional per se as hope that an appropriately formulated law or common law tort can meet the Court's standard.161 There are two bases upon which a physician disclosure tort directly implicating speech can survive strict scrutiny under *Florida Star*: first, a showing that protection of confidentiality in the physician-patient relationship is a "state interest of the highest order," or, second, by distinguishing *Florida Star* as a press-specific doctrine.162

Courts unanimously recognize how critical patient confidentiality is to receiving medical treatment.163 Courts also recognize a physician's duty to maintain patient confidentiality when testifying in judicial proceedings.164 The privacy interest in the intimate details of a patient's medical treatment arguably exceeds a rape victim's privacy interest in maintaining anonymity.165 Patient confidentiality being paramount to quality health care, combined with the Court's willingness to consider a viable candidate than punishing true speech to achieve these ends. See *id.* at 538-40 (noting lack of evenhanded application of ban on publication of rape victims' names).

159. *Id.* at 550. Because the B.J.F. brought her cause of action alleging negligence, not invasion of privacy, Justice White's comment regarding the status of the private facts branch of the invasion of privacy tort may have overstated the effect of the Court's ruling. See *id.* at 528 (stating facts).

160. See Gilles, *supra* note 4, at 74-75 (characterizing *Florida Star* test as "impossibly strict" such that "a tortious action for breach of confidence faces either automatic unconstitutionality or a scrutiny so strict that no plaintiff can recover").

161. See Harvey, *supra* note 18, at 2463-64 (distinguishing Court's *Florida Star* invasion of privacy ruling from its breach of confidence ruling in *Cohen*, characterizing Court's problem with Florida's law as state targeting of speech content); Jurata, *supra* note 39, at 510, 525-26 (arguing that judicial willingness to uphold private facts claims to protect confidential medical information may stem from claims' focus on non-media defendants).

162. See *Florida Star*, 491 U.S. at 533 (stating that heightened scrutiny standard for punishment of "newspapers" requires "state interest of the highest order").

163. For judicial statements regarding the importance of confidentiality in the physician-patient relationship, see *supra* note 23 and accompanying text.


165. See Jaffee v. Redmond, 518 U.S. 1, 11 (1996) (upholding a psychotherapist-patient testimonial privilege, stating that "mental health of our citizenry, no less than its physical health, is a public good of transcendent importance" (emphasis added)).
for "highest order" state interest, creates an opportunity for the narrowly tailored tort in Biddle to survive strict scrutiny.\footnote{166}

Alternatively, Florida Star can be distinguished.\footnote{167} The Court's decision followed a line of cases involving press defendants.\footnote{168} Its holding requiring a "state interest of the highest order" to uphold a state action infringing speech specifically applied only to "newspapers" publishing "matter[s] of public significance."\footnote{169} The tort created by Biddle focuses on the disclosure by a health care provider to a third party and protects information that, for the average patient, is not of public significance.\footnote{170} The Court's ruling in Florida Star was premised on a concern that the chilling effect of punishing the publication of true facts would result in "timidity and self-censorship."\footnote{171} The Biddle tort recognizes that liability does not attach for legally justified disclosures.\footnote{172} Without legal justification or consent to disclose, physician self-censorship is in the best interest of the patient.\footnote{173}

V. Conclusion

Patient privacy is an issue of serious public concern today.\footnote{174} This concern has culminated in regulations under HIPAA that increase requirements imposed on health care providers to protect patient confidentiality.

\footnote{166. See Jurata, supra note 39, at 525 (arguing that upholding claims for breaches of patient confidentiality is an emerging trend in American courts).

167. See, e.g., Harvey, supra note 18, at 2463-64 (distinguishing Court’s strict rulings against punishing publication of private facts as protecting publishers as opposed to protecting other sources of information, such as physicians).

168. See B.F.J. v. Florida Star, 491 U.S. 524, 530-31 (1989) (noting preceding cases informing decision). The Court cited cases involving a television station and two newspapers that were sued for publishing private facts, where in each case the state action was found unconstitutional. See id. (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975), Okla. Publ’g v. Okla. County Dist. Court, 430 U.S. 308 (1977), and Smith v. Daily Mail Publ’g Co., 443 U.S. 97 (1979)).

169. Id. at 533.

170. See Biddle v. Warren Gen. Hosp., 715 N.E.2d 518, 523 (Ohio 1999) (defining tort); see also Harvey, supra note 18, at 2465 (arguing that breach of confidence actions target protector of confidential information as opposed to media).

171. See Florida Star, 491 U.S. at 533 (noting negative effect which would result from permitting media defendants to be held liable for publishing true information).

172. See Biddle, 715 N.E.2d at 524 (recognizing that physicians are legally justified in disclosing confidential information, without being subject to liability, if they have statutory or common law duty to do so).

173. See Gostin, supra note 1, at 490-91 ("Patients are less likely to divulge sensitive information to health professionals if they are not assured that their confidences will be respected.").

174. See Barefoot, supra note 1, at 283 ("Americans are worried about their privacy. Surveys consistently indicate widespread concern about access to and use of personal information by others, with the privacy of health-related information the object of particular concern." (footnotes omitted)); Schwartz, supra note 1, at 296 ("Americans are highly concerned about the processing and use of their personal data.").
tiality. Notably absent from these regulations, however, is a private right of action for patients harmed by unauthorized disclosures of their private medical information. Biddle's physician disclosure tort fills this regulatory gap, complementing its prophylactic privacy protection with a deterrent in the form of a direct remedy for patients. As the tort evolves, compliance with the federal regulations may influence a health care provider's liability when unauthorized disclosures occur.

In Biddle, Ohio has taken a positive step towards improving patients' ability to rely on their doctors' assurances of confidentiality. By establishing an independent physician disclosure tort, the Ohio Supreme Court has freed an important cause of action from its historical chains, permitting the boundaries of the remedy to be explored and shaped by future cases. The Biddle decision has already influenced other jurisdictions by encouraging a second look at their common law tort remedies for patients harmed by physician disclosure. Should it be challenged on First Amendment grounds, the tort should prevail as a content-neutral state ac-

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175. See Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918 (proposed Nov. 3, 1999) (to be codified at 45 C.F.R. pt. 160) (imposing regulations on health care providers, requiring implementation of programs and procedures to restrict access to health records and to account for disclosures).

176. See id. at 59,923 (stating authors' concern that regulations do not provide private right of action for patients harmed by violations).

177. For a brief discussion of the scope of the regulations promulgated by the HHS under HIPAA, see supra notes 29-32 and accompanying text.


180. See Gilles, supra note 4, at 58 (suggesting two reasons for creating direct breach of confidence tort: (1) damages are measured differently for tort than for contract or fiduciary breach, and (2) courts' "desire to escape formalities of contract and fiduciary law"); see also Vickery, supra note 34, at 1451 (discussing advantage of judge-made breach of confidence tort over legislated one in its ability to adapt and evolve as litigants present unique fact patterns). For a broader discussion of the limitations of contract and fiduciary law as applied to actions for breach of patient confidence, see supra notes 50-58 and accompanying text.

181. See Berger v. Sonneland, 1 P.3d 1187, 1196 (Wash. Ct. App. 2000) (upholding patient cause of action under statutory provision permitting claims for healthcare-related injuries and citing Biddle in recognition that although physician disclosure tort is analogous to invasion of privacy tort in that recoverable emotional distress need not be accompanied by objective symptoms, privacy tort does not really fit breach of confidence actions); Gracey v. Eaker, 747 So. 2d 475, 477-78 (Fla. Dist. Ct. App. 1999) (citing Biddle as persuasive in its certification of question "of great public importance" to state supreme court as to whether requirement of accompanying physical injury for any claim of emotional distress should be waived for actions where statutory duty to protect patient confidentiality has been violated).
As other jurisdictions see fit to take similar steps, the remedy will enjoy a proper outline of its contours through civil jurisprudence.\(^{183}\)

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182. For a discussion of the reasons why the physician disclosure tort in \textit{Biddle} should be construed as content-neutral, see \textit{supra} notes 122-50 and accompanying text.

183. See Gilles, \textit{supra} note 4, at 58 (suggesting two reasons for creating a direct breach of confidence tort: (1) damages are measured differently for tort than for contract or fiduciary breach, and (2) courts' "desire to escape formalities of contract and fiduciary law"); see also Vickery, \textit{supra} note 34, at 1451 (discussing advantage of judge-made breach of confidence tort over legislated one in its ability to adapt and evolve as litigants present unique fact patterns).