

A Free-Market Approach to Medical Privacy

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Introduction

Absolute confidentiality is one of the most important factors in the patient-physician relationship. Effective treatment often depends on the patients' ability to tell their doctor the truth about potentially embarrassing details of their personal life and habits. Like many physicians, I have had the frustrating experience of trying to treat a patient who refuses to disclose—or even lies about—vital information related to her medical condition. Some people may avoid seeking treatment until a minor condition turns into a major problem because of embarrassment about what physicians will learn about them.

Patient confidentiality has been recognized as important enough to justify granting physicians a legal privilege not to divulge confidential patient information in a court of law. The privilege for communication with a doctor is similar to the privilege for communications with a priest, lawyer, or spouse.

Unfortunately, the sanctity of the patient-physician relationship has eroded in recent years, leading to an increased public focus on questions related to who can have access to medical records. The growing concern over medical privacy has resulted in legislative and regulatory actions that claim to give individuals greater control over their medical information. However, these privacy laws and regulations actually *reduce* individual medical privacy by giving federal officials broad control over who does and does not have access to private medical records.

In fact, the federal “privacy protection” rule actually shreds medical privacy, allowing government agents and state-favored special interests to view medical records virtually at will.

The root cause of the erosion of medical privacy is government policies that have encouraged overreliance on third-party payers. Because the erosion of medical privacy is an inevitable side effect of the modern bureaucratic system of “health care,” it is clear that effective patient protection requires placing the consumer back in control of the medical dollar: i.e. restoring a free market in medicine.

The Individual Market for Privacy vs. Government Mandates

Most discussions of privacy use the framework of “rights.” A right is something that cannot be taken from an individual against his will by either the government or a private party. According to the political philosophy that inspired the drafters of the United States Constitution, governments exist solely to protect individual rights.

With respect to the citizen's relationship to the government, it is certainly appropriate to think of privacy as a right. However, because the right to medical privacy is actually a property interest in medical information, some control over personal information—like

other forms of property—may be freely exchanged for goods and services. The extent of a physician's property interest in the information is determined by the contract between the patient and the physician.

In a free market, individuals desire different amounts of privacy. Some will go to great lengths to protect their privacy, while others will willingly trade privacy for a variety of other benefits. Some would willingly pay more (or forgo other benefits) in order to have greater privacy than provided by government regulations. Other patients might be willing to sacrifice some of their privacy in order to receive information regarding new treatments or discounts on medical products. In a free market, each individual has the freedom to make contracts that provide the level of medical privacy that suits the individual's unique needs.

When privacy is treated exclusively as a right defined and enforced by government laws and regulations, instead of by private contracts, no individual can obtain a level of medical privacy that suits his unique needs. Instead, government enforces a rigid, one-size-fits-all standard. Individuals have only the privacy rights that government determines they should have. Obviously, there is simply no way a government functionary can know the privacy preference of every citizen, much less fashion a policy that matches each individual's preferences. Trade-offs of individual privacy will not be made to obtain goods more highly valued by the individual, but instead to meet what the government has determined to be vital social goals.

This analysis assumes that government officials are motivated by a sincere desire to help the consumer, rather than a desire to increase government power or benefit powerful special interests who may employ former bureaucrats to lobby their old agencies. It disregards the phenomenon of regulatory capture, which occurs when an agency ultimately serves interests of the industry it is supposed to regulate instead of the public interest. As large portions of the final medical privacy rule appear to benefit special interests, it is quite possible that regulatory capture occurred during the drafting of the rule.

The Roots of the Current Crisis

Once the fallacy of viewing medical privacy as a right enforceable by government edict rather than private contract is accepted, the medical privacy debate cannot be separated from the larger debate over health policy. After all, problems with the provision of medical services are rooted in government policies that took medical decisions out of the hands of individuals.

Before government policies destroyed the medical market, individuals obtained care through private arrangements, just as they sought to satisfy their other needs in the market. When medical care was a matter of contract between patients and physicians, questions regarding medical privacy were resolved by private agreement.

Under this system, medical records were possessed by physicians whose patients trusted them to respect confidentiality and share records with others only when the patient consented.

Federal laws encouraging overreliance on third-party payers fundamentally altered the relationship between patients and doctors. The first such laws were tax laws that exempted employer-provided health benefits from taxable income. This encouraged employers to offer employees health benefits in lieu of wages. Furthermore, since individuals ordinarily cannot claim a tax deduction for insurance or medical services they purchased on their own, they have a tremendous incentive to obtain these benefits through their employers.

An unintended consequence of the third-party payer system is the overuse of medical services. This makes economic sense. If Joe is providing me with “first-dollar grocery” coverage, I have no incentive to economize and buy hamburger instead of steak. This is especially true when Joe is providing me with groceries in lieu of cash wages, so I can justifiably think of the groceries as having been “earned.”

The lack of incentives to economize on medical care, combined with the inevitable increases in costs caused by the government’s expanded role via Medicare and Medicaid, naturally led employers to seek ways to contain medical costs. President Richard Nixon and congressional supporters of nationalized health care, particularly Senator Edward Kennedy, helped this process along by passing the Health Maintenance Organization (HMO) Act of 1973. Among other provisions, this law forced every employer-sponsored medical insurance plan in the nation to offer an HMO option. The politically created HMO monster allows insurance company gatekeepers to interfere in decisions between patients and physicians.¹

The HMO system is based on the premise that a third party paying the bill should have a say in how the money is spent. In other words, he who pays the piper calls the tune. Therefore, HMO gatekeepers asserted the right to limit patients’ access to certain treatments deemed too expensive. HMOs also required patients and “providers” to maneuver their way through multiple layers of bureaucracy before getting approval to administer or receive treatment.

HMOs obviously could not function if medical records were considered the private property of either the patient or the doctor. The HMOs used their role as payer to justify seizing control over medical records. As a result, the universe of people able to view medical records without patient consent steadily expanded.

Government Privacy “Protection”: Big Brother (and Pals) Invade the Operating Room

By the mid-nineties, medical privacy had become a subject of public and congressional concern. Many in the health insurance industry were also concerned that public sentiment about medical privacy could result in fifty different sets of state privacy regulations, written by state legislators not as friendly to insurance companies as the federal Congress. Concerns were also raised that excessive regulation at the state level would damage attempts to improve efficiency by relying on electronic billing.

The result of this was that the 1996 Health Insurance Portability and Accountability Act (commonly known as “HIPAA”) contained a provision requiring Congress to pass a comprehensive medical

privacy law for electronic transactions. If Congress failed in that effort, the Department of Health and Human Services (HHS) was given the power to write federal rules governing medical records for every health plan in the nation. While I was not in Congress when HIPAA was debated, I believe that treating medical privacy as a matter of private contract between a physician and a patient was never seriously considered in the HIPAA debate. In typical Washington fashion, HIPAA attempted to deal with the government-caused problem of lack of portability and exclusions for “pre-existing conditions” by expanding government’s role, rather than by returning control of the medical dollar to individuals.

Not surprisingly, the eventual regulation that emerged gave the federal government and state-favored interests an almost unrestricted ability to view medical records without patients’ consent. For example, the rule allows law enforcement and government officials virtually unrestricted access to medical records without a warrant. Warrantless searches of medical records are a blatant violation of the Fourth Amendment. As any first-year law student should know, the requirement that law enforcement officials obtain a warrant from a judge before searching private documents is one of the fundamental protections against abuse of the government’s power to seize an individual’s private documents. Though the Fourth Amendment has been interpreted to allow warrantless searches in emergency situations, it is hard to conceive of a situation in which law enforcement officials would be unable to obtain a warrant before electronic medical records would be destroyed.

Government officials were not the only ones who gained greater access to patients’ medical records. For example, sections 164.502 and 164.506 of the rule increased the ability of third parties, such as insurance companies and HMOs, to access medical records without a patient’s consent.²

Ironically, the privacy rule imposed tough restrictions on doctors, nurses, and medical facilities in the name of privacy. These regulations were so strict that some hospitals actually cautioned their nurses to whisper when having conversations with each other and/or doctors in the hall. The rule also interfered with the ability of friends and family to obtain information about the condition of a hospitalized loved one. It seems hard to believe that a doctor discussing a patient’s condition with a nurse represents a greater danger to privacy than a federal agent conducting a warrantless search of the doctor’s records!

A particularly disturbing feature of the rule is the creation of a federal right for medical researchers to access private records without individual consent.³ While researchers claim to be able to protect the autonomy of their unwilling subjects, the fact is that allowing third parties to use medical records for research purposes runs the risk of inadvertent identification of personal medical information. I am aware of at least one incident in which a man had his identity revealed when his medical records were used without his consent. As a result, many people in his community discovered details of his medical history that he wished to keep private.

Of course, some argue that there is a “social good” in allowing researchers access to medical records, even lacking patient consent. As a physician, I certainly recognize the value and importance of medical research. However, as a legislator, I also recognize that, because people have a property interest in their medical information, forcing individuals to divulge medical information without their consent violates the Fifth Amendment’s Takings

Clause, which was designed to prevent sacrifices of individual liberty and property for the “common good.”

The entire medical privacy rule is based on the premise that the government has a legitimate function in telling individuals the amount of privacy to which they are “entitled.” As shown above, this thinking springs from government policies encouraging overreliance on third-party payers and the modern view of privacy as a governmentally-guaranteed “right” rather than a market good.

Clearly, the only way to protect medical privacy is to restore individual control over the medical dollar. How can this be achieved?

Protecting Privacy by Empowering Consumers: The Health Care Freedom Agenda

Abuses of medical privacy are rooted in government policies that stripped individuals of control over their medical care, and thus their medical privacy. Therefore, government should reform its policies to create a free market in health-related services.

The first step Congress should take is to repeal the misnamed federal Privacy Rule. I have introduced HR 1699, the Patient Privacy Act, which repeals the rule. HR 1699 also repeals the law authorizing the federal government to assign to each American a unique health identifier.

Once the privacy rule is repealed, Congress should restore control over medical spending to Americans via a program of individual health-related tax cuts and tax credits. In order to provide a model for this type of reform, I have introduced the Comprehensive Health Care Reform Act of 2003 (HR 1287). The Comprehensive Health Care Reform Act puts control back into the hands of the individual through tax credits, tax deductions, Medical Savings Accounts (MSAs), and Flexible Savings Accounts (FSAs). Specifically, the Comprehensive Health Care Reform Act:

1. Provides all Americans with a tax credit for 100 percent of medical expenses. The tax credit is fully refundable against both income and payroll taxes;
2. Allows individuals to roll over unused amounts in cafeteria plans and FSAs;
3. Makes every American eligible for an MSA and changes the tax laws to increase the benefits of MSAs; and
4. Repeals the 7.5 percent threshold for the deduction of medical expenses, thus making all medical expenses tax deductible.

Congress has recently expanded access to MSAs and renamed them Health Savings Accounts (HSAs) in a provision of the otherwise disastrous Medicare prescription drug bill. The expansion of health-related savings accounts is a rare positive development, but Congress must continue to expand health-related tax cuts and tax credits and thus ensure that individuals have the ability to control their own medical decisions. Putting individuals in charge will enable them to protect their privacy by entering into contracts regarding the disposition of their medical records, without interference from the government or private-sector bureaucrats.

Conclusions

The erosion of medical privacy is, like most of the problems facing medicine, an unintended consequence of government policies that encourage overreliance on third-party payments, thus

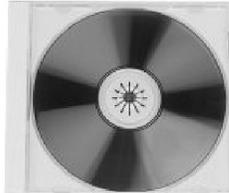
causing the third-party payers to demand greater access to individual medical records. Far from enhancing medical privacy, the federal medical privacy regulation has eroded our constitutional privacy rights by giving government agencies, as well as state-favored special interests, an even greater ability to access our personal medical information without our consent. The only way to protect privacy is to give control over medical decisions back to individuals. Thus, those of us concerned with protecting medical privacy should not seek big-government solutions. Instead, we should support efforts to create a free market in medicine in which decisions, including those related to the dissemination of personal health information, are made by voluntary agreements between patients and those to whom they entrust their care.

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