Prescriptions at a Price: America’s Opioid Crisis and the Increasing Toll on Drug Record Privacy

Abstract

How should the US Constitution govern patient privacy in the face of a public health emergency? Declaring the United States’ opioid crisis as a public health emergency may put the already-compromised integrity of drug record privacy at higher risk by virtue of emerging administrative responses, existing Supreme Court precedent, and acquiescent state laws. The White House convened a summit on opioids where the then-US attorney general discussed law enforcement responses to the crisis. Although the Fourth Amendment protects against unreasonable searches and seizures, the Supreme Court’s third-party doctrine generally grants state and federal actors access to records released to third parties. Moreover, the Court has not clearly defined society’s “reasonable expectation of privacy,” especially in the context of a public health emergency in the digital age. Some states have further compromised prescription record privacy by creating prescription drug monitoring programs that acquiesce to government concerns. If a warrantless search of a state-managed monitoring program takes place during a public health emergency, government actors should not be permitted to circumvent privacy safeguards established by state and constitutional law. Rather, legislatures and courts should protect prescription drug records under the Fourth Amendment and through redaction initiatives that keep private and sensitive information safe.

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“The Decade of Pain Control” began nearly twenty years ago when Congress reauthorized federal programs researching the effects of pain management.\(^1\) Opioids are a type of pain management substance, which include a variety of drugs with similar chemical compositions.\(^2\) Some opioids, like heroin and fentanyl, are illegal substances.\(^3\) Others—including oxycodone, hydrocodone, codeine, and morphine—are commonly prescribed pain relievers.\(^4\) All opioids have the effect of dulling a user’s perception of pain and creating feelings of euphoria.\(^5\)

Over the past decade, the debate concerning the role of opioid therapy in pain control management has intensified.\(^6\) While the general consensus among pain management specialists supports the

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3. See Vigil, supra note 2, at 28.
4. See id.
5. See id.
belief that opioids can effectively treat chronic pain without significant adverse effects, some specialists argue that opioid therapy gives way to tolerance development, side effects, and addiction.7

Nearly two decades after Congress reauthorized federal programs researching pain management, roughly 64,000 people died from drug overdoses8—42,000 of those deaths were caused by opioids.9 This problem is only getting worse: evidence suggests that the drug overdose death rate continued to rise in 2017,10 Moreover, death is not the only matter of concern in the opioid epidemic.11 The problem also affects over two million Americans who are dependent on opioids and the ninety-five million Americans who used prescription painkillers in the past year.12

The proffered causes of this epidemic are plenty.13 Some suggest that medical practitioners overprescribe opioids, often giving patients more pills or higher dosages than necessary.14 Others trace the issue to

7. See Portenoy, supra note 6, at 296.
10. See Katz, supra note 8.
12. See Katz, supra note 8.
medical school training, implicit physician biases, and threats of medical malpractice liability. Another possible cause involves patient efforts to misrepresent themselves and deceive medical practitioners in order to obtain opioids to resell, abuse, or stockpile for emergencies. Sources unrelated to prescribing practices—such as military service, individual unemployment, and economic recessions—are also said to contribute to the opioid crisis. More recently, reports have characterized the opioid epidemic as a “tech problem.”

Considering the pervasive and devastating effects of the opioid crisis, solving the crisis has proven to be just as complicated as the issue itself. The federal government and most states have taken varying

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17. See, e.g., Note to Self: Is the Opioid Epidemic a Tech Problem?, NEW YORK PUBLIC RADIO (Apr. 18, 2018), https://www.wnycstudios.org/story/dark-web-nick-bilton “[Y]ou can draw a line from [the Dark Web] . . . [an] easy-to-access, secretive place on the internet, straight to real life, and the drug—specifically opioid—epidemic . . . .”) The Author of this Note acknowledges the complex and multifaceted nature of the opioid crisis. See Word News Roundup: 09/21, CBS NEWS (Sept. 21, 2018), http://audio.cbsradionewsfeed.com/2018/09/21/0921WNR_1801_4212128.mp3 (“[A] new study in the midst of an opioid crisis says this about addiction and overdose deaths: it’s complicated. . . . There are few trends, and it’s not just prescription opioids killing people. . . . [W]hile the death rate from overdoses has been climbing for decades, the elements of where, who, and the drugs of choice are constantly shifting.”). This Note specifically focuses on the regulation of prescription opioids vis-à-vis prescription drug monitoring programs. See infra Parts II, III.

approaches to address the crisis.\textsuperscript{20} Lost in the public discourse over the opioid crisis, however, are the constitutional implications concerning patient privacy.\textsuperscript{21} For example, a federal court recently held that a federal agency did not need a warrant to access a state-managed controlled substance database—despite the Fourth Amendment’s warrant clause and a state law that required all officials to obtain a valid search warrant before accessing the database.\textsuperscript{22}

This Note considers these issues and makes legal recommendations that involve state legislatures, lower courts, and the US Supreme Court. Part I reviews the Fourth Amendment and court decisions regarding warrantless searches. Part II analyzes state efforts to monitor prescription drugs. Part III analyzes federal powers and limitations in monitoring prescription drug distribution. Part IV presents several arguments that recommend balancing between opioid monitoring and maintaining Fourth Amendment privacy rights. Part V concludes that the Fourth Amendment requires the courts to protect the privacy of prescription records. In the alternative, Part VI suggests that state legislatures should require all interested parties to obtain warrants to access prescription records in non-exigent circumstances. Under all circumstances, sensitive information contained within prescription records should be redacted to protect the substantive privacy interests of patients.

\section*{I. \textsc{Fourth Amendment Protections and Exceptions}}

The Fourth Amendment of the US Constitution grants individuals the right to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”\textsuperscript{23} Thus, the

\footnotesize{\textsuperscript{20}See 21 U.S.C. § 880; Sarpatwari et al., supra note 19, at 473–74.


\textsuperscript{22}See infra Section II.A.

\textsuperscript{23}U.S. \textsc{Const.} amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).}
Fourth Amendment prohibits the government from invading the privacy of individuals—particularly when searches are warrantless and lack probable cause.24 In other words, the Constitution guarantees individual protections against government overreach.25 Notwithstanding its concise nature, Supreme Court jurisprudence surrounding the Fourth Amendment has led to a number of interpretations, tests, and exceptions.26

A. The Reasonableness Clause

All searches must be reasonable.27 The reasonableness of a search is determined by balancing compelling government interests against an individual’s legitimate expectation of privacy.28 That is, the Fourth Amendment should be construed to preserve public interests as well as the rights and expectations of individual citizens.29 As such, when the government faces “special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like,” the Court deems warrantless searches to be reasonable.30

1. Reasonable Privacy Expectations

Despite the brevity of the Fourth Amendment’s reasonableness clause,31 the Supreme Court has long grappled with the Fourth Amendment’s implicit notion of “reasonable privacy expectations.”32 Justice Harlan’s concurrence in Katz v. United States introduced the notion of a “reasonable expectation of privacy,” understanding the test as having a dual requirement: first, that an individual must exhibit “an actual (subjective) expectation of privacy” and, second, that “the expectation be one that society is prepared to recognize as ‘reasonable.’”33

24. See id.
27. U.S. CONST. amend. IV.
31. See U.S. CONST. amend. IV.
Over a decade after deciding *Katz*, the Court adopted Justice Harlan’s two-prong test in *Smith v. Maryland*.34 At the same time, *Smith* also minimized the subjective component of Justice Harlan’s test,35 stating that:

> [If] the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation’s traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual’s subjective expectations had been “conditioned” by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.36

In other words, the *Smith* Court perceived the subjective component of Justice Harlan’s test as “inadequate” in situations where external factors conflicting with the spirit of the Fourth Amendment influence an individual’s subjective expectations.37

The Court’s conception of society’s expectations of privacy has been cursory at best.38 As stated by Judge Posner, the Court’s attitude concerning Fourth Amendment privacy and modern recordkeeping programs is “difficult to understand.”39 In an attempt to empirically investigate society’s expectations of privacy, one study recruited over two hundred participants to complete an intrusiveness rating scale.40 The scale listed fifty scenarios, asking participants to rank the scenarios based on their perceived levels of intrusiveness.41 The overall

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34. *See Smith*, 442 U.S. at 735, 740.
39. Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 212 (1979) (“What makes the Court’s attitude [concerning modern recordkeeping programs] difficult to understand is that its members . . . believe the Fourth Amendment protects privacy in the sense of secrecy as well as in the sense of seclusion (e.g., *Katz*), and also that the Constitution creates a general right of privacy uncabined by any specific language in the Constitution (e.g., *Griswold*). The former belief implies that Miller should have had standing to object to the subpoena directed at the bank’s copies of his financial records. The latter implies that analysis is not at an end even if the Fourth Amendment does not entitle a person to prevent the search of a bank’s records of his financial transactions, since the constitutional right of privacy extends beyond the specific guarantees of the Fourth Amendment.”); *see also* infra Section I.A.2.
41. *See id.* at 737–39.
rankings for a number of the scenarios broadly conformed with prior holdings of the Court. However, contrary to the Court’s reasoning in United States v. Miller, participants maintained a strong expectation of privacy in personal records—ranking “[p]erusing bank records” as one of the more intrusive scenarios.

2. The Third-Party Doctrine Exception

In addition to adopting Justice Harlan’s reasonable expectation of privacy requirement, the Smith Court also affirmed the third-party doctrine seen in Miller. Miller is the seminal third-party doctrine case, holding that a person has a reduced expectation of privacy in information “voluntarily conveyed” to third parties. The idea behind this doctrine is that individuals assume the risk that their information will be shared with the government when they reveal their affairs to third parties. The Court has repeatedly held that the Fourth Amendment does not prohibit third parties from obtaining information and conveying it to the government. This holds true even when individuals believe that third parties will confidentially use their information for limited purposes. In Miller, the Court held that the government’s warrantless search of the respondent’s bank records did not violate his Fourth Amendment rights. The Court reasoned that the respondent reduced his expectation of privacy when he voluntarily opened accounts with the third-party bank. Therefore, the government did not need a warrant to obtain the records from the bank.

Similarly, the Smith Court held that a warrantless installment of a telephone pen register did not violate the petitioner’s Fourth Amendment rights.

42. See id. at 739.
43. See United States v. Miller, 425 U.S. 435, 442 (1976); infra Section I.A.2.
44. Slobogin & Schumacher, supra note 40, at 738–39 (ranking thirty-eighth out of fifty scenarios, with one being the least intrusive scenario and fifty being the most intrusive scenario).
46. See Smith, 425 U.S. at 744–45; Miller, 425 U.S. at 443.
48. See Miller, 425 U.S. at 443.
49. See id.; sources cited supra note 47.
50. See Miller, 425 U.S. at 443.
51. See id. at 437.
52. See id. at 442–43.
53. A telephone pen register is an electronic device that only records dialed telephone numbers. The device does not record the content of communications. Smith, 442 U.S. at 741.
Amendment rights. As such, the Court applied Katz’s “reasonable expectation of privacy” analysis. In doing so, it reasoned that even if the petitioner subjectively expected that the numbers he dialed would remain private, society would not recognize his expectation as reasonable since telephone users “typically know they must convey numerical information to the phone company.”

The Court, however, recently took a different approach to the third-party doctrine in a decision involving a third-party wireless carrier and an individual’s digital data. In Carpenter v. United States, the Court held that the government violated the petitioner’s Fourth Amendment rights when it seized cell-site data containing an “exhaustive chronicle of [the petitioner’s] location information casually collected by wireless carriers” without a warrant supported by probable cause. The government contended that the third-party doctrine from Miller and Smith governed because the cell-site records were business records. However, the Court rejected this argument and declined to extend Miller and Smith to cover cell-site records. Accordingly, it reasoned that there is a “world of difference” between the limited information in Miller and Smith and the vast amount of detailed location information in the instant case. Furthermore, the Court explained that the digital data at issue in this case provides an “intimate window” into a person’s life, exposing movements and deeply personal associations. Moreover, it asserted that the “unique nature” of cell-site records overcomes the fact that the information is held by a third party. Nevertheless, the case was decided on narrow grounds—thus leaving the application of Miller and Smith undisturbed. Even so, Carpenter may continue the recent trend of liberal and conservative justices banding together to ensure that the “progress of science” does not undermine Fourth Amendment protections in the digital age.

54. See id. at 745–46.
55. See id. at 743–44.
57. See id. at 2217. Cell phones create “cell-site data” by continuously connecting to networks of radio antennas known as “cell sites.” By connecting to cell sites, cell phones generate time-stamped records that contain location information. Id. at 2212–13.
58. Id. at 2219.
59. See id.
60. See id. at 2217, 2220.
61. See id. at 2219.
62. See id. at 2217.
63. Id. at 2220.
64. See id.
65. See id. at 2223; Jeffrey Rosen, A Liberal-Conservative Alliance on the Supreme Court Against Digital Surveillance, ATLANTIC (Nov. 30, 2017).
3. The Third-Party Doctrine, Medicine, and Technology

One can assume that society has a strong expectation of privacy in prescription records—perhaps even more so than bank records, and much like digital location data.\(^6^6\) Prescription records often contain secrets about human conditions concerning mental and physical health—some of which remain highly stigmatized in society.\(^6^7\) Moreover, records can include sensitive information like credit card numbers, Social Security numbers, and financial account numbers.\(^6^8\) However, one need not assume such a disposition since federal legislation has already recognized pharmaceutical record privacy expectations.\(^6^9\)

Namely, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires health care services to execute "procedures to assure that such information is provided and utilized in a manner that appropriately protects the confidentiality of the information and privacy of individuals receiving health care services and items."\(^7^0\) Moreover, the Tenth Circuit has likened individual health information privacy to other matters the Supreme Court has recognized the Constitution protects—such as marriage, procreation, contraception, family relationships, childrearing, and education.\(^7^1\) Thus, certain government attempts to obtain prescription records

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\(^{66}\) Carpenter, 138 S. Ct. at 2217; supra Sections I.A.1, I.A.2; sources cited infra note 93.


\(^{71}\) See Douglas v. Dobbs, 419 F.3d 1097, 1101–03 (10th Cir. 2005) (citing Herring v. Keenan, 218 F.3d 1171, 1173 (10th Cir. 2000)) ("The scope of personal matters protected by a right to privacy has never been fully defined. Supreme Court decisions 'make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.' Because privacy regarding matters of health is closely intertwined with the activities afforded protection by the Supreme Court, we have held that 'there is a constitutional right to privacy that protects an individual from the disclosure of information concerning a person's health.'") (emphasis added) (citations omitted)).
should be met with considerable scrutiny under the reasonableness clause of the Fourth Amendment.72

The third-party doctrine extends the government’s reach in ways that present serious threats to privacy, especially in the digital age.73 However, the Court has previously constrained the third-party doctrine in the medical context—in part because of privacy concerns.74 In Ferguson v. City of Charleston, a public hospital—with the help of state law enforcement and prosecutors—implemented a policy that authorized hospital staff to conduct drug tests via urine samples on pregnant patients suspected of substance abuse.75 Unbeknownst to the patients, the hospital turned the drug test results over to law enforcement agents.76 Law enforcement then initiated prosecution against patients who tested positive for drug use while pregnant.77 The Court held that this conduct violated the Fourth Amendment since the hospital and law enforcement used the policy, without consent or valid warrants, primarily to generate evidence for prosecution.78

Although the Court mainly analyzed this case under the “special needs” doctrine,79 the Court’s decision suggests an implicit concern with applying the third-party doctrine to instances involving substantial intrusions on privacy.80 Under the third-party doctrine, an individual does not have a reasonable expectation of privacy in information voluntarily conveyed to a third party.81 In Ferguson, the hospital is a third party.82 Assuming the patients consented to taking the urine test

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73. See United States v. Jones, 565 U.S. 400, 417 (2012) (“[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to their parties in the course of carrying mundane tasks.”) (citations omitted); Brief for Petitioner, supra note 72, at *44–46; Daniel J. Solove, Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference, 74 FORDHAM L. REV. 747, 753 (2005).


75. Ferguson, 532 U.S. at 69–72.

76. Id. at 77.

77. Id. at 70–71.

78. See id. at 82–83.

79. See id. at 86–87; SLOBOGIN, supra note 35, at 321 (describing “special needs,” an exception to the Fourth Amendment’s warrant and probable cause requirements that balances the intrusion on an individual’s privacy interest against the need to support a government program).

80. See Ferguson, 532 U.S. at 78.


82. See Ferguson, 532 U.S. at 70; Miller, 425 U.S. at 442.
II.B. Assumption of risk is some notion of choice. Less risk of having their information shared with other parties since “[i]mplicit det

The third-party doctrine, however, is not as neatly applicable to situations involving prescription records. Miller and Smith suggest that the third-party doctrine only applies when individuals voluntarily convey their information to third parties. In a case involving prescription records, the process of information conveyance is attenuated. Presumably, neither physicians nor patients voluntarily convey information to third-party prescription drug monitoring programs; rather, it is required by state law. Smith could apply to physicians, since they know or should know that their prescription practices will be stored within prescription drug monitoring programs. The applicability of Smith to patients, however, is less clear. Although patients are normally fully informed that their treatment is “contingent upon their disclosure of medications and checks of the [prescription drug monitoring program] data,” it is unclear whether patients know or should know that some state laws require physicians to report patient information to the third parties that manage prescription drug monitoring programs, and that those third parties may convey information to other parties. Thus, the applicability of Smith depends on whether the assumption of risk doctrine contemplates a two-step process by which individual information gets to the government: first from the physician to the drug monitoring program, and then from the drug monitoring program to the government.

83. See Ferguson, 532 U.S. at 70–71; Miller, 425 U.S. at 442.
84. See Ferguson, 532 U.S. at 70–71; Miller, 425 U.S. at 443.
85. See Ferguson, 532 U.S. at 86.
86. See Smith v. Maryland, 442 U.S. 735, 743–44 (1979); Miller, 425 U.S. at 442–43.
88. See Vestal, supra note 87. In such a situation, individuals would presumably assume less risk of having their information shared with other parties since “[j]implicit in the concept of assumption of risk is some notion of choice.” See Smith, 424 U.S. at 749 (Marshall, J., dissenting).
89. See Smith, 442 U.S. at 743–44; Vestal, supra note 87; infra Sections I.A.2, I.A.2, I.B.
90. See Prescription Drug Monitoring Program, CTR. OF EXCELLENCE AT BRANDEIS U., USE OF PDMP DATA BY OPIOID ADDICTION TREATMENT PROGRAMS 5 (2015); infra Sections I.A, II.B.
91. See Smith, 442 U.S. at 743.
With regard to the recent *Carpenter* ruling, the sensitive nature of cell-site data is analogous to that of prescription records.92 Much like cell-site data, prescription records also provide an “intimate window” into a person’s life—exposing deeply personal mental and physical health details.93 Although prescription records do not necessarily reveal location information in the same manner that cell-site data do, there is “a world of difference” between the bank records seen in *Miller* and the phone records seen in *Smith* on one hand, and prescription records on the other.94 Namely, the records in *Miller* and *Smith* are business records, while Congress has declared prescription records confidential and private—thus warranting special protections.95 As such, courts should similarly decline to extend *Miller* and *Smith* to prescription records if presented with the opportunity.

Unlike telephone companies and financial institutions96—where the means to achieve the ends of those services are varied and do not require third-party involvement—services provided through hospitals and pharmacies are necessary for patients that desire legitimate medical care and prescriptions.97 As such, it is critical to both create legislation that allows for pharmaceutical regulation, and not deter individuals from receiving medical treatment out of fear of automatically waiving their rights to privacy and procedural justice.98

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93. See *id.*; *Lewis* v. Superior Court, 397 P.3d 1011, 1017 (Cal. 2017) (citing *Ferguson* v. City of Charleston, 532 U.S. 67, 78 n.14 (2001); *Whalen* v. Roe, 429 U.S. 589, 602 (1977)) (“[A]n individual’s prescription records contain intimate details about his or her medical conditions, the government’s ability to access these records may cause patients to hesitate to seek appropriate medical treatment.”); *Ward*, supra note 67, at 111.
94. See *Carpenter*, 138 S. Ct. at 2219.
95. See *id.* at 2216; 42 U.S.C. § 1320a-7c (2012).
96. See *Carpenter*, 138 S. Ct. at 2210 (citing *Riley* v. California, 134 S. Ct. 2473, 2484 (2014)) (“[C]ell phones and the services they provide are ‘such a pervasive and insistent part of daily life’ that carrying one is indispensable to participation in modern society.”); *Smith* v. Maryland, 442 U.S. 735, 735 (1979); United States v. *Miller*, 425 U.S. 435, 442 (1976).
98. See *Ferguson* v. City of Charleston, 532 U.S. 67, 78 n.14 (2001) (“[A]n intrusion on . . . [privacy] expectation[s] may have adverse consequences because it may deter patients from receiving needed medical care.”); *Whalen* v. Roe, 429 U.S. 589, 602 (1977) (“Unquestionably, some individuals’ concern for their own privacy may lead them to avoid or to postpone needed medical attention.”).
B. The Warrant Clause

In addition to the reasonableness provision, the Fourth Amendment requires government officials to obtain search warrants from independent magistrates before conducting searches.\textsuperscript{99} The official must demonstrate that probable cause exists to search the particular person or object involving criminal suspicion.\textsuperscript{100} Like the reasonableness clause, the Supreme Court has also recognized a few exceptions to the warrant clause.\textsuperscript{101} Namely, this Section addresses the administrative search exception.

1. The Administrative Search Exception

The Court has construed administrative searches as one of many warrant exceptions.\textsuperscript{102} The primary goals of administrative searches are facilitative and regulatory in nature.\textsuperscript{103} Moreover, administrative searches, or “inspections,” are often conducted by nonpolice officials.\textsuperscript{104} Unlike ordinary crime control, incriminating evidence found during inspections normally results in fines or civil sanctions.\textsuperscript{105} Accordingly, administrative inspections tend to be less hostile than police intrusions because the industries that undergo these searches are routinely inspected; pervasively regulated; minimally intruded upon; normally subjected to mandated inspections for public safety, which is traditionally accepted by the public; and not inclined to have the same expectations of privacy as private citizens.\textsuperscript{106}

This Section analyzes opioid crisis under two administrative search exceptions: the \textit{Biswell-Dewey} doctrine and the \textit{Camara-See} doctrine.\textsuperscript{107} Under the \textit{Biswell-Dewey} warrant exception, as long as a search is not for the purpose of ordinary crime control, no warrants are required for pervasively regulated industries because of the supposed

\textsuperscript{99} See U.S. CONST. amend. IV.
\textsuperscript{100} See id.
\textsuperscript{101} See SLOBOGIN, supra note 35, at 317.
\textsuperscript{102} See id.
\textsuperscript{103} See id.
\textsuperscript{104} Id.
\textsuperscript{105} See id.
\textsuperscript{106} See id. at 317–21.
lesser expectation of privacy in such industries. Under the Camara-See warrant exception, agencies can conduct warrantless searches if there is no other way to protect health and safety. Moreover, the inspecting agency must give notice of the impending inspection in writing or in person, seek consent, and—if consent is not forthcoming—seek a warrant.

With regard to the opioid crisis, it is unclear whether federal agents or state officials are regulating pharmacy prescriptions records for reasons other than ordinary crime control. However, the Drug Enforcement Administration (DEA) is undeniably a crime-control agency, as its mission is to “enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system of the United States . . . those organizations . . . involved in the . . . distribution of controlled substances.” As such, DEA agents and state law enforcement officials—similar to those in Ferguson—with like missions should not have warrantless access to prescription records under the Biswell-Dewey warrant exception.

The Camara-See warrant exception’s applicability to accessing prescription records is more complicated because of the broad nature of both the doctrine and the Controlled Substances Act. Due to the

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108. See Slobogin, supra note 35, at 320–21 ("[T]he Dewey] Court explained that [the Biswell] exception applied only when the legislature 'has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the . . . regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.' More specifically, the Court concluded, the exception applies when three conditions are met: (1) the government has a 'substantial interest' in the activity being regulated; (2) warrantless searches are necessary for effective enforcement, as in Biswell; and (3) the inspection program provides 'a constitutionally adequate substitute for a warrant' by identifying and limiting the purpose and scope of the inspection.").

109. See id. at 320.

110. See id. at 317, 319.

111. Id. at 319.

112. Depending on the state, prescription records can be accessed by a variety of groups ranging from prescribers, anesthetists, health care practitioners, medical examiners, state and federal law enforcement officers, regulatory boards, and drug court judges. See NAT’L ALL. FOR MODEL STATE DRUG LAWS, PRESCRIPTION MONITORING PROGRAM STATE PROFILES—WEST VIRGINIA 22 (2014), http://www.namsdl.org/library/2FE6D83C-9AE2-7444-D36EF1CDECE0E8F/ [https://perma.cc/GD49-C7AN], Frequently Asked Questions, TENN. DEPT. HEALTH (June 20, 2017), https://www.tn.gov/health/health-program-areas/health-professional-boards/csmd-board/csmd-board/faq.html [https://perma.cc/86LU-9FW8]. For a more detailed discussion on prescription record regulation, see infra Parts II, III.


115. See Slobogin, supra note 35, at 317–20; infra Section IIIA.
extreme condition of the opioid crisis, an agency can easily advocate for warrantless searches by contending that this type of access to prescription records is the last available option for protecting the health and safety of opioid users.\textsuperscript{116} Even so, the Camara-See exception still requires that the inspecting agency give notice, seek consent, and finally seek a warrant if consent is not forthcoming.\textsuperscript{117} Although these procedures seem inconsequential when compared to the overwhelming force of the opioid crisis, the legal system cannot—and simply does not need to—gamble the predictability of procedural rights to regulate opioid prescription and misuse.\textsuperscript{118}

II. STATE REGULATION

Prescription drug monitoring programs (PDMPs) are state-level electronic databases that record controlled substance prescriptions.\textsuperscript{119} PDMPs have a number of functions that are generally comprised of two components: (1) collecting prescription information from physicians and pharmacists and (2) storing prescription information.\textsuperscript{120} State legislatures establish the regulations that govern the level of access certain groups have to PDMP information.\textsuperscript{121} Since pharmacy employees input patient data into PDMPs when they disperse prescriptions to patients, PDMPs can familiarize health care providers with patient prescription histories. In turn, these prescription histories can inform health care providers’ prescribing decisions.\textsuperscript{122} As such, PDMPs are only useful if health care providers analyze patient prescription histories stored on the system before prescribing treatment.\textsuperscript{123}

\begin{itemize}
\item[117.] See id.
\item[118.] See Shima Baradaran, Rebalancing the Fourth Amendment, 102 GEO. L.J. 1, 5 (2013) (“Blind balancing also leads to government interests trumping individual rights in most criminal procedure cases. It can also lead to an overestimation of risk in the criminal context... The risks to safety can often be exaggerated where the government relies on hypothetical threats or common sense rather than threats grounded in evidence.”).
\item[121.] See id.
\item[122.] See What States Need to Know About PDMPs, supra note 119.
\item[123.] See id.
\end{itemize}
Most states independently fund their respective PDMPs. The major sources for most PDMPs are state general funds and licensing fees. As of August 2017, the federal government constituted the primary source of funding for only eight PDMPs. As stated by the Center for Disease Control and Prevention, PDMPs “continue to be among the most promising state-level interventions to improve opioid prescribing.” However, other sources suggest that PDMPs are not so beneficial. A twelve-year study revealed that PDMPs were not effective in reducing opioid overdose mortality rates. Moreover, many PDMP laws have led to heightened litigation concerning constitutional privacy rights.

While some state legislation requires officials to obtain valid warrants to access PDMPs, others take a more expansive approach—allowing federal agents warrantless access to state PDMPs.

A. Warrant-Based Access to Prescription Drug Monitoring Programs

Some state legislatures have narrowed the scope of PDMP access to certain actors. Namely, states have regulated access to PDMPs by requiring law enforcement agents to obtain valid warrants or valid court orders based on probable cause. For example, the Rhode Island Uniformed Controlled Substance Act maintains that information.

125. See id.
126. See id.
127. See What States Need to Know About PDMPs, supra note 119.
129. See Nam et al., supra note 128, at 297–98.
132. See, e.g., TENN. CODE ANN. § 53-10-306(a) (West 2016); Frequently Asked Questions, supra note 112 (“[State] law allows a number of other state and federal officials to register with the database including, certain law enforcement officers, medical examiners, drug court judges, and others.”).
133. See, e.g., 21 R.I. GEN. LAWS § 21-28-3.32(a); UTAH CODE ANN. § 58-37-301(2).
134. See, e.g., 21 R.I. GEN. LAWS § 21-28-3.32(a)(4); UTAH CODE ANN. § 58-37-301(2).
contained in PDMPs shall be disclosed only “[p]ursuant to a valid search warrant based on probable cause to believe a violation of federal or state criminal law has occurred and that specified information contained in the database would assist in the investigation of the crime.”  

In Oregon, the state’s Health Authority can disclose PDMP information that implicates a law or regulation “[p]ursuant to a valid court order based on probable cause and issued at the request of a federal, state or local law enforcement agency engaged in an authorized drug-related investigation involving a person to whom the requested information pertains.” As such, legislation that calls for warrants, or showings of probable cause at least, can balance the proper regulation of government interests with the constitutional protections of patient privacy. However, a recent federal district court decision has proven that some courts view government interests and privacy as being mutually exclusive.

United States Dep’t of Justice v. Utah Dep’t of Commerce involves the Utah Controlled Substances Database (UCSD), an electronic database that stores “every prescription for a controlled substance dispensed in the state.” Prior to the 2015 UCSD statutory amendment, Utah permitted any law enforcement agent to access the UCSD without a warrant or other process, so long as the officer affirmed that the access was being made in furtherance of a criminal investigation. Nevertheless, in 2015, the Utah legislature amended this statute by requiring federal, state, and local officials to obtain a valid search warrant in order to access information on the database.

The DEA petitioned the court to enforce an administrative subpoena against the Utah Department of Commerce and the Utah Division of Occupational and Professional Licensing (“State”). The subpoena sought to obtain all UCSD records involving controlled prescriptions issued over several months by a medical professional suspected of prescribing controlled substances in violation of the

138. See Unger, supra note 128, at 383.
142. See Order Granting Motion to Intervene, supra note 140, at 2.
143. See id. at 4.
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Controlled Substances Act. 144 Citing the warrant provision in the UCSD statute, the State refused to provide the DEA with the requested UCSD records. 145 The DEA argued that a subpoena was sufficient under the Controlled Substances Act, which provides that “the Attorney General may sub[p]o[ena] witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation.” 146 The court ignored the State, 147 reasoning that the supremacy clause preempted state law and that pharmacy patients do not have a reasonable expectation of privacy in UCSD records since “[t]he prescription drug industry is highly regulated.” 148 As such, the court ordered the State to comply with the subpoena within twenty-one days. 149

B. Warrantless Access to Prescription Drug Monitoring Programs

A number of state laws grant federal agents and other officials significant access to PDMPs. 150 Among these states are some of those hit hardest by the opioid crisis: Tennessee and West Virginia. 151 Tennessee state law allows prescribers, certified registered nurse anesthetists, health care practitioners, and “a number of other state and federal officials”—including “certain law enforcement officers, medical examiners, drug court judges, and others”—to register for access to its PDMPs. 152 Meanwhile, West Virginia’s PDMP law authorizes prescribers, dispensers, licensing and regulatory boards, authorized agents of the Bureau for Medical Services law enforcement, the Office of the Chief Medical Examiner—as well as law enforcement, judicial, and prosecutorial officials—to receive PDMP information. 153

144. See id.; U.S. Dep’t of Justice, 2017 WL 3189868, at *1–2 (“The subpoena served November 12, 2015, seeks ‘all controlled substance prescriptions issued by the [prescriber] subject of the investigation . . . for the period January 8, 2015 to the present.’”).
145. Id. at *2.
146. Id.
147. See id.
148. Id. at *6–7.
149. Id. at *1.
152. See Frequently Asked Questions, supra note 112 (emphasis added).
153. See NAT’L ALL. FOR MODEL STATE DRUG LAWS, supra note 112, at 2.
Despite its relatively low rate of overdose deaths, California also has fairly unrestricted PDMP laws. California’s PDMP is known as the Controlled Substance Utilization Review Evaluation System (CURES). Pursuant to the California Health and Safety Code, CURES exists to assist “law enforcement and regulatory agencies in their efforts to control the diversion and resultant abuse of Schedule II, Schedule III, and Schedule IV controlled substances.” In addition, the information stored in CURES is available to the “appropriate state, local, and federal public agencies for disciplinary, civil, or criminal purposes and to other agencies or entities.” More importantly, the current legislation does not mention any warrant or court order requirements.

In Lewis v. Superior Court, a physician claimed that the Medical Board of California (“Board”) violated his patients’ privacy rights under the California Constitution. The Board, whose inspectors are police officers, investigated physicians based on patient complaints and independent initiatives. Here, the Board initiated an investigation of the physician after a patient unrelated to the case alleged that the physician recommended an extreme weight-loss regimen. After reviewing over two hundred pages of information from CURES, which contained the prescription records of hundreds of patients who did not give authorization, the Board requested that five of the physician’s patients release their full medical records. Three of the patients consented, while the other two patients’ records were obtained through administrative subpoenas, which ultimately led to several charges against the physician—including excessive prescribing.

154. See Drug Overdose Death Data, supra note 151.


156. See Lewis v. Superior Court, 397 P.3d 1011, 1014 (Cal. 2017).

157. Health & Safety § 11165(a) (Deering 2017).

158. Health & Safety § 11165(c)(2)(A).

159. See id. For more information on future effective updates to this legislation, see sources cited and accompanying text supra note 155.

160. Lewis, 397 P.3d at 1016.

161. Id. at 1015.

162. Id.

163. Id.

164. Id.
With regard to his patients’ prescription records, the physician argued that the Board did not meet the “good cause requirement” used in cases involving medical records. Under the good cause requirement, a party seeking access to a nonconsenting patient’s records must have a “written showing of the equivalent of probable or good cause made to the superior court judge.” Ultimately, the court decided that the good cause requirement was not applicable to pharmaceutical records since pharmaceutical records involve less sensitive information than medical records. Accordingly, it reasoned that the Board’s actions did not violate the patients’ right to privacy under the California Constitution since the Board’s invasion was minimal and justified by a compelling state interest.

III. FEDERAL GOVERNMENT REGULATION

Beyond state efforts to combat the opioid epidemic, the federal government has adopted its own initiative against the crisis. Pledging to “spend a lot of time, a lot of effort and a lot of money,” President Donald Trump stated on August 10, 2017, that the opioid crisis was a “national emergency.” However, two months after this statement, President Trump instead directed a “public health emergency” through the Public Health Service Act (PHSA).

Although national emergencies and public health emergencies are both forms of national emergency declarations, the scope and funding options distinguish the declarations. This Part analyzes the federal

165. Id. at 1016, 1020.
167. See Lewis, 397 P.3d at 1020–21 (contending that medical records are more sensitive than pharmaceutical records because “[a] patient’s complete medical file may include descriptions of symptoms, family history, diagnoses, test results, and other intimate details concerning treatment”).
168. See id. at 1019–21.
172. See Merica, supra note 171.
government’s ability to regulate the opioid crisis through the Controlled Substances Act (CSA), the PHSA, and other Department of Justice (DOJ) actions.

A. The Controlled Substances Act

The CSA identifies drugs and other substances based on five classifications or “schedules.”173 When determining controlled substance schedules, the US attorney general considers several factors—including potential for abuse, scope of abuse, history of abuse, and scientific evidence of effects.174 All opioids or opioid derivatives are classified as either Schedule I or II drugs, depending on their safety and status as accepted medical treatments.175 Pursuant to 21 U.S.C. § 880, administrative inspections do not require warrants in situations involving an “imminent danger to health or safety” or “other exceptional or emergency circumstance[s] where time or opportunity to apply for a warrant is lacking.”176

1. Imminent Danger to Health or Safety

Temporarily disregarding any potential implications caused by the public health emergency declaration,177 this section of the CSA should not be interpreted as a free pass for the federal government to access PDMPs without warrants.178 To properly assess how the CSA squares with the Camara-See warrant exception, one must (1) analyze the extent of the imminence of accessing PDMP records during the current situation and (2) analyze whether the circumstances surrounding PDMP inspections require expeditious access to records that preclude obtaining a warrant.179

In order to analyze whether PDMP records are connected to imminent dangers, the relevant term must be defined. “Imminent danger” is not a term of art under the definitions section of the CSA.180 However, a later section that grants the US attorney general authority to deny, revoke, or suspend181 noncompliant registrants of controlled

174. § 811(a), (c).
175. § 812.
176. § 880(c)(2), (4).
177. See infra Section III.B.
178. See discussion and sources cited supra Section I.B.1.
179. See § 880(c)(2), (4); discussion and sources cited supra Section I.B.1.
180. See § 802.
181. See § 824.
substances\textsuperscript{182} defines “imminent danger to the public health or safety” as a “substantial likelihood of an immediate threat that death, serious bodily harm, or abuse of a controlled substance will occur in the absence of an immediate suspension of the registration.”\textsuperscript{183} Under a “whole act” rule of interpretation, this term should be presumed to have a consistent meaning throughout the CSA.\textsuperscript{184} Accordingly, administrative inspections do not require warrants if a death, serious bodily harm, or abuse of controlled substance will occur immediately.\textsuperscript{185}

In most cases, this will be an exceedingly high bar to meet\textsuperscript{186}—especially when considering the following Section.

2. Exigency Preventing Warrant Procurement

Exigent circumstances, or emergencies, may permit law enforcement officials to circumvent the Fourth Amendment’s warrant requirement.\textsuperscript{187} The policy rationale behind this exception is that it would be impractical to require law enforcement agents to deliberate whether they will be able to obtain a warrant during emergency situations that may risk “too much” evidence destruction.\textsuperscript{188} However, in search cases—unlike arrests—exigent circumstances are so

\begin{footnotesize}
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  \item \textsuperscript{182} See § 823 (identifying registrants of controlled substances as manufacturers, distributors, practitioners, pharmacies, and researchers).
  \item \textsuperscript{183} § 824(d)(2) (emphasis added) ("In this subsection, the phrase 'imminent danger to the public health or safety' means that, due to the failure of the registrant to maintain effective controls against diversion or otherwise comply with the obligations of a registrant under this title or title III, there is a substantial likelihood of an immediate threat that death, serious bodily harm, or abuse of a controlled substance will occur in the absence of an immediate suspension of the registration.").
  \item \textsuperscript{184} Abbe R. Gluck & Lisa Schultz Bressman, \textit{Statutory Interpretation from the Inside -- An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I}, 65 STAN. L. REV. 901, 930 (2013) (defining “the whole act rule” as a textual canon that presumes that statutory terms have a consistent meaning throughout a given statute).
  \item \textsuperscript{186} Consider a situation similar to that in \textit{Lewis v. Superior Court}, where the Board first received a complaint, opened an investigation against the physician, and reviewed over 200 pages of PDMP information. See \textit{Lewis v. Superior Court}, 397 P.3d 1011, 1015 (Cal. 2017). Here, immediacy does not seem to be at issue enough to surpass the warrant requirement, especially with the advent of telephonic warrants. See Missouri v. McNeely, 569 U.S. 141, 156 (2013) (quoting State v. Rodriguez, 156 P.3d 771, 779 (Utah 2007)) (noting that telephonic warrants and other methods of quickly obtaining warrants undermine the per se exigency approach that “improperly ignore[s] the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement”).
  \item \textsuperscript{187} See, e.g., \textit{Payton v. New York}, 445 U.S. 573, 589 (1980) (holding that warrantless daytime home entries are impermissible, thus violating the Fourth Amendment, \textit{unless} exigent circumstances exist).
  \item \textsuperscript{188} \textit{See McNeely}, 569 U.S. at 181 (Roberts, J., dissenting).
\end{itemize}
\end{footnotesize}
“sufficiently unusual” that the Court has suggested that the “benefits of a warrant sufficiently outweigh the burdens imposed.”

Moreover, with the advent of telephonic warrants and evolving technologies, exigent circumstances should almost never prevent law enforcement from obtaining valid warrants. In *McNeely*, an officer stopped the respondent for speeding and repeatedly crossing the road’s centerline. The officer noticed signs that the respondent was intoxicated: bloodshot eyes, slurred speech, and the smell of alcohol. The officer administered a field sobriety test, which the respondent failed. After the respondent refused to take a breathalyzer test, the officer arrested the respondent and drove him to the hospital for nonconsensual, warrantless blood testing.

The government argued that the per se exigency rule applied, with the respondent’s natural metabolizing of alcohol providing a sufficient basis for a warrantless search. However, the Court found in favor of the respondent, holding that the involuntary blood test was an invalid search that required a warrant. Moreover, the Court found that the exigency exception to the warrant requirement did not apply since none of the circumstances would have led the officer to believe that he faced an emergency. In its decision, the Court also considered the fact that the Federal Rules of Criminal Procedure permit magistrate judges to telephonically issue warrants—thus decreasing the “risk” of evidence destruction.

The principles applied to the facts in *McNeely* can be squarely applied to those facts in *United States Dep’t of Justice v. Utah Dep’t of Commerce*. Utah’s PDMP statute required federal, state, and local officials to obtain a valid search warrant to access information on the database. However, the court found for the DOJ under the third-party doctrine—thus enforcing the subpoena, which sought to obtain all

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190. See *Fed. R. Crim. P.* 4.1(a) (allowing magistrate judges to consider information communicated by telephone or electronic means when issuing warrants).
192. *Id.* at 145.
193. *Id.*
194. *Id.*
195. *Id.* at 145–46.
196. See *id.* at 163.
197. See *id.* at 165.
198. *Id.* at 141 (“The trial court agreed, concluding that the exigency exception to the warrant requirement did not apply because, apart from the fact that McNeely’s blood alcohol was dissipating, no circumstances suggested that the officer faced an emergency.”).
200. See supra Section II.A.
201. See Order Granting Motion to Intervene, *supra* note 140, at 2.
UCSD records involving controlled prescriptions issued over a several-month period by a medical professional suspected of prescribing controlled substances in violation of the CSA. If, in the alternative, the DOJ argued that an agency subpoena allowed the agency to expeditiously gather evidence under the exigency exception—and that a warrant issued by an independent magistrate would have risked the destruction of the prescription records—McNeely addresses this argument by means of the telephonic warrant.

After all, warrants are superior to subpoenas since warrants are not only explicitly mentioned in the text of the Fourth Amendment, but also because of their purpose: ensuring that a detached magistrate evaluates whether law enforcement has a sound reason for potentially infringing on the privacy rights of individuals. The Court addressed this notion in Coolidge v. New Hampshire. In Coolidge, the Court held that the search of the petitioner’s automobile violated the Fourth Amendment since the warrant used by law enforcement was not issued by a detached magistrate. Instead, the warrant was signed and issued by the state attorney general—who was actively involved in the investigation and later served as the chief prosecutor at the respondent’s trial.

If per se exigency of blood alcohol content is not enough to trigger the exigency requirement in McNeely, per se exigency of the opioid crisis is also insufficient. PDMP records do not implicate imminent dangers under the CSA’s definition of the term, which is a danger that involves “substantial likelihood of an immediate threat that death, serious bodily harm, or abuse of a controlled substance will occur.” Although the opioid crisis has a substantial impact on the country, obtaining pharmacy records without a warrant may not rise to the level of immediate danger required by the CSA.

202. See id. at 15–16.
203. See McNeely, 569 U.S. at 154, 181.
204. See U.S. CONST. amend. IV; Horton v. California, 496 U.S. 128, 134 n.6 (1990); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)) (“[T]he most basic constitutional rule in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”).
205. See Coolidge, 403 U.S. at 446–47.
206. Id. at 446, 449.
207. Id. at 447.
208. See McNeely, 569 U.S. at 141.
209. 21 U.S.C. § 824(d)(2) (2012) (emphasis added) (“In this subsection, the phrase ‘imminent danger to the public health or safety’ means that, due to the failure of the registrant to maintain effective controls against diversion or otherwise comply with the obligations of a registrant under this title or title III, there is a substantial likelihood of an immediate threat that death, serious bodily harm, or abuse of a controlled substance will occur in the absence of an immediate suspension of the registration.”).
of exigency required by the exception. As such, unless the circumstances suggest that law enforcement officials face an “imminent danger to the public health or safety,” warrants issued by detached magistrates—not subpoenas—should be required at all times.

B. Implications of a Public Health Emergency Declaration

Besides the CSA, the federal government can also combat the opioid crisis through other acts and administrative departments. On March 1, 2018, the White House convened a summit on opioids. At the summit, several panelists—including US Health and Human Services Secretary Alex M. Azar II and then-US Attorney General Jeff Sessions—discussed treatment and prevention responses to the crisis. Although the Health and Human Services secretary’s responses to the crisis are statutorily limited, the US attorney general has greater enforcement discretion.

1. Actions by the Department of Health and Human Services

Pursuant to section 319 of the PHSA, a public health emergency involves “a disease or disorder [that] presents a public health emergency” or “significant outbreaks of infectious diseases or bioterrorist attacks.” The secretary determines whether public health emergencies exist and how to respond to such emergencies. After the secretary declares a public health emergency, the secretary can respond to the declaration by (1) making grants, (2) providing awards for expenses, (3) entering into contracts, or (4) conducting and supporting investigations into the cause, treatment, or prevention of

210. See McNeely, 569 U.S. at 142; discussion and sources cited supra notes 8–12.
211. See 21 U.S.C. § 824(d)(2); McNeely, 569 U.S. at 142.
212. See, e.g., President Donald Trump Speaks at White House Opioid Summit - March 1, 2018 | NBC News, supra note 14, 1:27:46–51.
213. See generally White House Convenes Summit on Opioids, supra note 6.
215. See infra Section III.B.1.
216. See infra Section III.B.2.
218. See § 247d(a).
the emergency. Additionally, the secretary is authorized to access funds appropriated to the Public Health Emergency Fund. This fund is intended to supplement other sources of funding. Lastly, the secretary has discretion to grant extensions or waive sanctions relating to Health and Human Services data submissions and reports. The secretary can make such exceptions only after determining that individuals, public entities, or private entities were unable to comply with deadlines for submitting such data or reports as a result of the public health emergency.

In addition to these actions, the secretary can respond to a public health emergency by taking a “variety of discretionary actions.” These actions include modifying, adjusting, and waiving certain requirements for programs like Medicare, Medicaid, and HIPAA. However, any such modifications must be pursuant to section 1135 of the Social Security Act, which does not authorize broad prosecutorial discretion that could possibly prompt concern about privacy protections.

On October 26, 2017, the acting secretary issued a statement upon declaring the opioid crisis a public health emergency. The statement asserted that the public health emergency “brings a new level of urgency to the comprehensive [Health and Human Services Department] strategy,” also stating that the department invested nearly $900 million in opioid-specific funding in 2017. In passing the Bipartisan Budget Act of 2018, Congress promised $6 billion to address the crisis over the 2018 and 2019 fiscal years. As of October 2018,

219. Id.
220. § 247d(b).
221. § 247d(c).
222. § 247d(d).
223. Id.
224. Public Health Emergency Declaration Q&As, supra note 217.
225. See § 247d(d); Public Health Emergency Declaration Q&As, supra note 217.
228. HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis, supra note 227.
Congress has appropriated $8.5 billion in opioid-specific funding.\(^{230}\)

Nevertheless, experts suggest that this funding is insufficient.\(^{231}\)

2. Actions by the Department of Justice

While the secretary’s remarks mainly focused on treatment, then-US Attorney Jeff Sessions’ remarks emphasized the need for stricter, “resolute” law enforcement.\(^{232}\) As a part of this approach, the DOJ undertook the largest health care fraud enforcement action in DOJ history in July 2017.\(^{233}\) The action involved charging 412 individuals—115 of whom were physicians, nurses, and other medical professionals—for allegedly participating in “health care fraud schemes” involving around $1.3 billion.\(^{234}\) The DOJ also charged some of these physicians for prescribing and distributing opioids.\(^{235}\) According to a press release issued by the then-US Attorney for the Eastern District of New York, the office executed search warrants for criminal complaint charges against two physicians.\(^{236}\)

Although stricter law enforcement against unlawful medical practitioners could very well be a necessary part of the equation to


\(^{231}\) See Lopez, supra note 229 (“Over two years, I think we need at least $12 billion for opioid addiction treatment”—an estimate [Andrew Kolodny, an opioid policy expert at Brandeis University] reached by calculating how much it would cost to provide low-threshold, effective outpatient addiction treatment in every county in the US.”); Zezima & Kim, supra note 230.


\(^{234}\) See National Health Care Fraud Results in Charges Against over 412 Individual Responsible for $1.3 Billion in Fraud Losses, supra note 233. The DOJ defined “health care fraud schemes” as medical practices that “bill[ed] Medicare, Medicaid, and TRICARE . . . for medically unnecessary prescription drugs and compounded medications that often were never even purchased and/or distributed to beneficiaries.” Id.

\(^{235}\) See id.

solving the opioid crisis, the Trump Administration’s rhetoric raises concerns about the possibility of circumventing legal process for stricter law enforcement.\footnote{See Thursday, March 1st, 2018, supra note 21; Merica, supra note 21.} For example, in a speech given in Ohio, President Trump stated that opioid regulators “have to get really, really tough—really mean—with the drug pushers and the drug dealers.”\footnote{Thursday, March 1st, 2018, supra note 21 (emphasis added).} This could encourage regulators to concentrate on the ends rather than the means of regulating criminal behavior, thus leading to more Fourth Amendment violations.\footnote{See HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING 1 (1990).} Instead, the administration should encourage law enforcement to adopt a model of enforcement that involves the appropriate use of criminal law as a means to crime-solving ends.\footnote{See id.}

## IV. Solution

Existing Supreme Court precedent is not compatible with innovations of the digital age that significantly increase the government’s potential to access intimate information.\footnote{See Brief for Petitioner, supra note 72, at *12.} Given modern technology, current law and proposed solutions allow the government nearly unlimited warrantless access to private information—a situation that conflicts with the spirit of the Fourth Amendment and HIPAA.\footnote{See Ramya Shah, Note, From Beepers to GPS: Can the Fourth Amendment Keep Up with Electronic Tracking Technology?, 2009 U. ILL. J.L. TECH. & POL’Y 281, 294 (2009). But cf. Robert Parker Tricarico, Note, A Nation in the Throes of Addiction: Why a National Prescription Drug Monitoring Program Is Needed Before It Is Too Late, 37 WHITTIER L. REV. 117, 120 (2015) (arguing that the federal government should create a national PDMP—a proposal that completely sidesteps the Fourth Amendment). HIPAA protects a variety of health care information, including (1) information that health care providers chart in patient medical records; (2) physician-patient conversations; and (3) most other patient health information. See Your Rights Under HIPAA, U.S. DEPT HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html [https://perma.cc/CPR7-3MYF] (last visited Sept. 22, 2018). However, many state agencies and most law enforcement agencies are not required to follow HIPAA Privacy and Security Rules. Id.} If a patient receives medical attention from a physician who prescribes legal opioids to the patient and who also, unbeknownst to the patient, is suspected to be engaging in illegal prescribing practices by a zealous government official—that patient’s prescription slip instantly transforms into an invitation for the government to peruse through any records the patient has stored in a given PDMP.\footnote{For the purposes of this Note, the Author assumes that standing is a nonissue since HIPAA’s Privacy Rule gives patients “rights over [their] health information and sets rules and}
official’s lack of supporting evidence or otherwise, no independent magistrate will review the reasons that gave this official cause to suspect that the physician was engaging in wrongdoing worthy of violating the patient’s privacy rights. Moreover, the patient is not even given an opportunity to consent to the search, which some patients will invariably withhold. As a result, litigation involving such patients can expose much of their private and sensitive information.

Thus, an ideal solution to this issue involves not only providing procedural protections to patients with prescription records, but also providing substantive protections. As required by the Fourth Amendment, courts and state legislatures should provide procedural protections to patients and potential defendants by requiring law enforcement agents to obtain warrants to access PDMPs. Substantive protections would involve the redaction of private and sensitive patient information from prescription records.

A. Procedural Protections

First, to both preserve procedural protections and promote initiatives that combat the opioid crisis, courts should set aside the third-party doctrine from prescription records. This solution would recognize patients’ heightened expectations of privacy and desire for treatment without unreasonable forfeitures of privacy; however, if an official has probable cause to believe that a medical professional is engaging in illegal prescribing practices, that official could still obtain PDMP records—so long as the official first obtains a valid warrant. Additionally, officials would retain warrantless access to PDMP records under truly exigent circumstances.

In the alternative, state legislatures should refrain from enacting database statutes that allow officials access to PDMP records without warrants. Instead, states should limit PDMP access to officials

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244. See Lewis v. Superior Court, 397 P.3d 1011, 1015 (Cal. 2017) (describing a situation where only three out of five patients consented to the release of their full medical records to the Medical Board of California for an investigation against a physician for excessive prescribing).

245. See infra Sections IV.A, IV.B.

246. See infra Section IV.A.

247. See infra Section IV.B.

248. At the time of writing, neither the Supreme Court nor the US Courts of Appeals have any such cases in their dockets. In the event that respondents from United States Dep’t of Justice v. Utah Dep’t of Commerce, or similarly situated parties from other cases, file an appeal with the US Courts of Appeals or, later, a writ of certiorari with the Supreme Court—the courts should seriously consider the limited applicability of Miller and Smith to prescription record cases. See supra Section I.A.3.
with valid warrants. Under this alternative solution, courts should avoid giving deference to federal government officials vis-à-vis the third-party doctrine. Instead, courts should refer to the provisions of state database statutes when determining whether the government has committed a Fourth Amendment violation or has otherwise properly utilized the appropriate channels for accessing PDMP records. This is because each state has a unique jurisprudence.\textsuperscript{249}

In the event that a given state database statute allows officials warrantless access to their respective PDMPs, courts should uphold decisions that align with the fact that some state laws provide greater protections to their citizens than the US Constitution.\textsuperscript{250} Although the Bill of Rights protects individual privacy, it is not the only law that state citizens can use for protection.\textsuperscript{251} Accordingly, some states have rejected the federal third-party doctrine—thus providing greater protections to their respective citizens.\textsuperscript{252} As such, if higher courts and various state legislatures do not follow the above solutions, lower courts should—at minimum—act in accordance with state constitutions when faced with potential third-party exception PDMP litigation.

\textbf{B. Substantive Protections}

Warrants are essential because they provide individuals with procedural privacy protections.\textsuperscript{253} However, procedural protections do not carry the day when it comes to substantive patient privacy. After all, prescription records often contain secrets about human conditions concerning mental and physical health, as well as sensitive information like credit card numbers, Social Security numbers, and more.\textsuperscript{254} Accordingly, when controversies involving prescription records are brought before a court, the court should require the redaction of such information.\textsuperscript{255} Patients can be further protected if redactions are made before pharmacy employees hand records over to law enforcement. A cost-benefit analysis should be conducted to determine the party best suited to oversee such ex ante redactions.\textsuperscript{256} By providing the

\begin{itemize}
  \item \textsuperscript{249} See Stephen E. Henderson, Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search, 55 CATH. U. L. REV. 373, 414 (2006).
  \item \textsuperscript{250} See id. at 374.
  \item \textsuperscript{251} See id. at 373–74.
  \item \textsuperscript{252} See id. at 395–96 (listing states and their dispositions on the third-party doctrine).
  \item \textsuperscript{253} See supra Sections I.A, III.A.2.
  \item \textsuperscript{254} See Your Rights Under HIPAA, supra note 242; supra Section I.A.3.
  \item \textsuperscript{255} See FED. R. CIV. P. 5.2(e)(1).
  \item \textsuperscript{256} See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 20 (1993) (emphasizing the role of cost-benefit analysis in regulatory regimes). The
aforementioned procedural and substantive safeguards, judges and lawmakers can better protect patient privacy.

V. CONCLUSION

As it stands, President Trump’s public health emergency declaration does not allow for more warrantless searches. However, an increase in forceful rhetoric concerning the opioid crisis can encourage government officials and courts to conduct and uphold warrantless searches in occasions where states explicitly require warrants.257 United States Dep’t of Justice v. Utah Dep’t of Commerce is a prime example.258 Although the Constitution makes no explicit reference to privacy, the Court has long protected privacy rights by way of substantive due process.259 That is not to say that the Constitution is no more than a grant of discretion to the Supreme Court to engage in judicial activism. Rather, the justices should use substantive due process to reconsider how the third-party doctrine should be applied, if at all, in the digital age. In order to ensure that Fourth Amendment protections are as robust as the Constitution’s Framers intended, courts should limit the outdated third-party doctrine.260 This will not stifle law enforcement; rather, it will regulate enforcement bodies to ensure a proper balance of constitutional safeguards and crime control. Accordingly, the legal system can—and must—keep up with emerging technologies.

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257. See, e.g., U.S. Dep’t of Justice v. Utah Dep’t of Commerce, 2017 WL 3189868, at *1–3; supra Section IV.B.2.

258. See discussion and sources cited supra Section I.A.


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