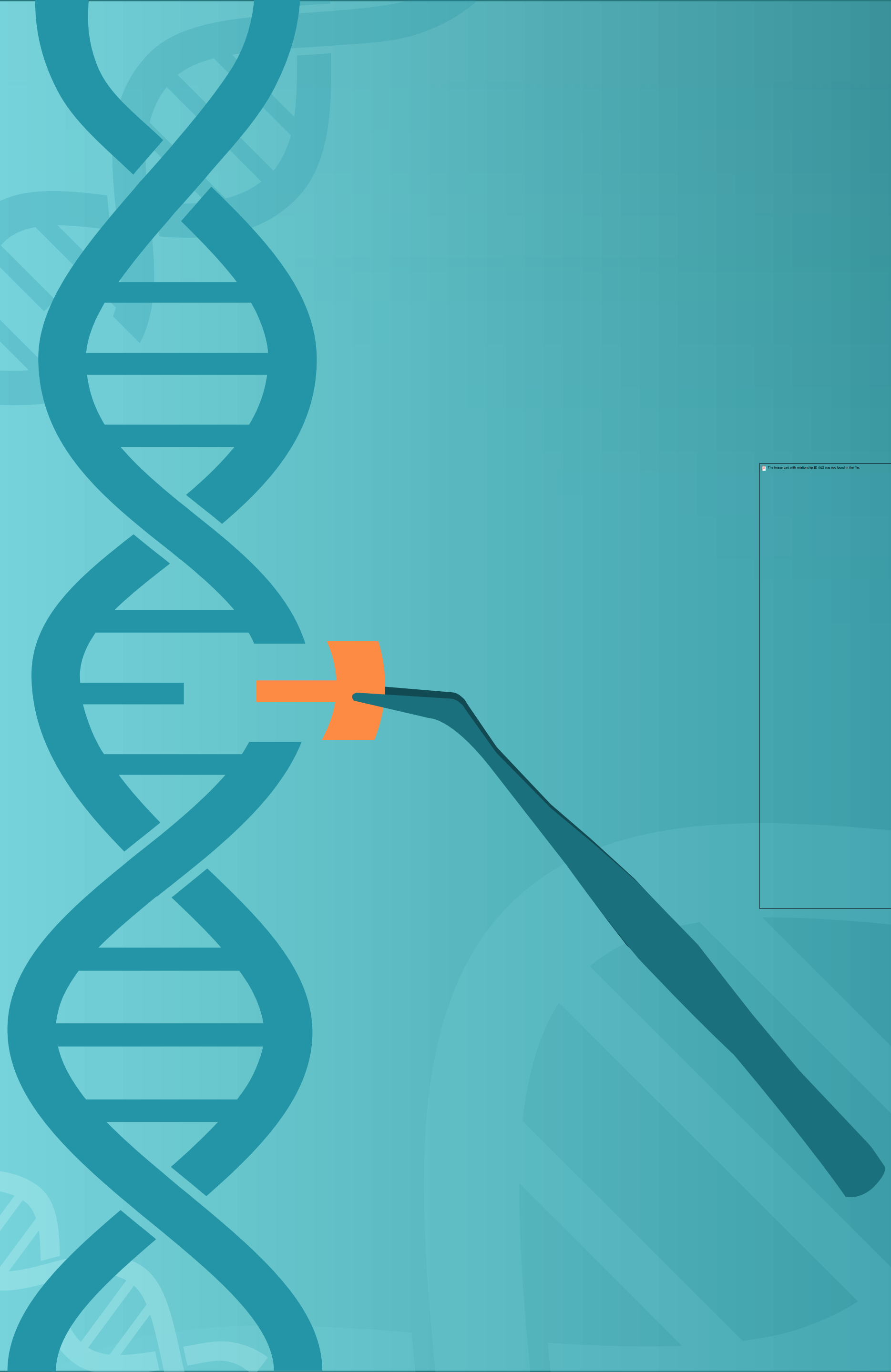

Standing, Privacy Harms, and Health Data Protection Statutes

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Agenda

- Health Data Privacy
  - Federal Law Overview
  - State Law Overview

- Standing Case Law
  - *Spokeo v. Robins* (2016)
  - *Rivera v. Google* (2018)
  - *Frank v. Gaos* (2019)

- Health Data Protection Implications

Health Data Privacy Law

Health Data Privacy: Federal Overview

- Sector-Based Approach
- Downstream (Distribution-Centric) Model
  - Confidentiality v. Privacy

- HIPAA-HITECH Framework
  - Key concept: patient health is maximized by collection/storage of all PHI and facilitation of its “free flow” w/in health care entities
  - Downstream/confidentiality model
  - Data itself is NOT protected
  - Limited coverage
    - Small v. Big (Proxy-Based) Health Data
  - Lots of secondary use exceptions
  - No private right of action

Health Data Privacy: State Overview

- California Consumer Privacy Act (CCPA)
  - GDPR-ish:
    - Data collection notification
    - 3d party sale opt-out provisions
    - Ctrl+Z: Right to be forgotten/deleted
  - Applies only to for-profit companies
  - Exempts HIPAA-covered de-identified PHI
  - “Service equality” provisions

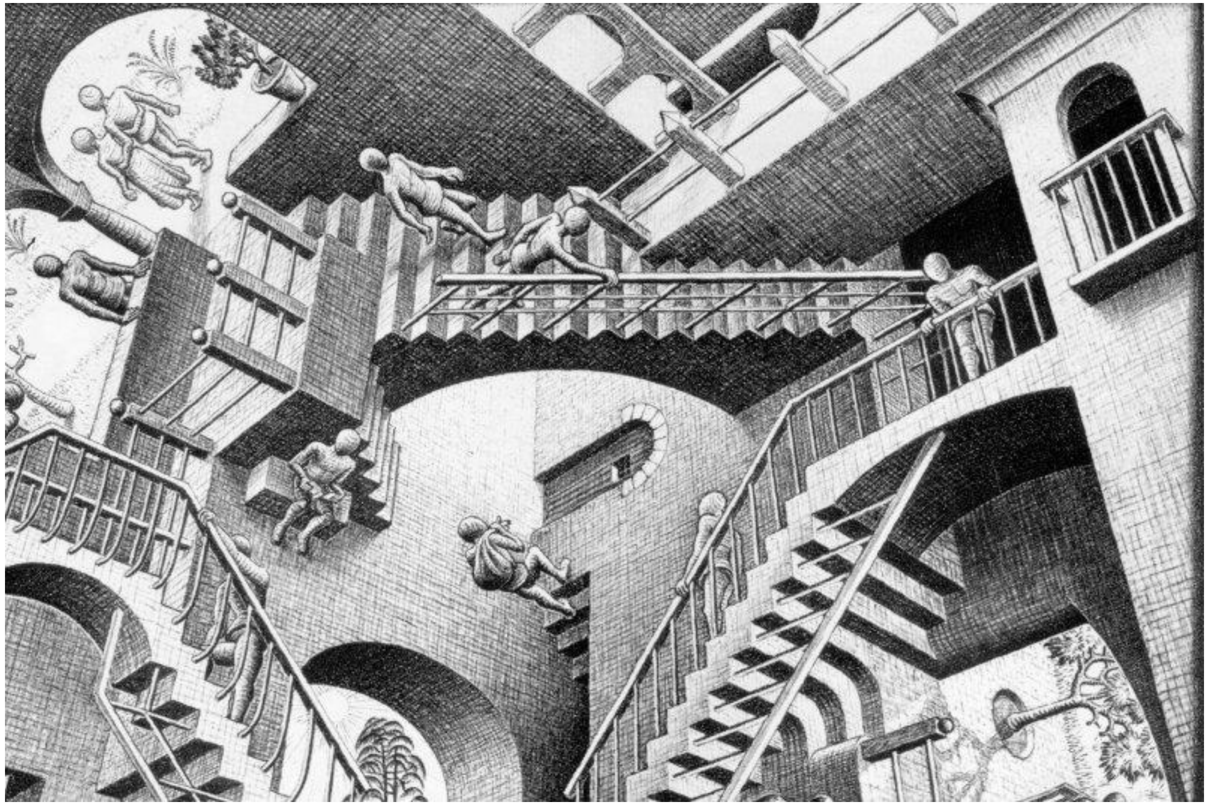
- Illinois Biometric Information Privacy Act (BIPA)
  - Precludes private entities from collecting and storing biometric data w/out notice & prior consent

Article III Caselaw

Spokeo v. Robins, 136 S.Ct. 1540 (2016)

- Spokeo violated the Fair Credit Reporting Act (FCRA)
- Spokeo defends on Article III standing grounds
  - “Injury in fact:” concrete & particularized
- When is an individual harmed by a privacy violation?
  - *Spokeo* does not give us much guidance
  - “Congress is well positioned to identify intangible harms that meet minimum Article III requirements” BUT
  - No harm where it is “difficult to imagine” what Congress imagined SO
  - An express statutory right to sue for a procedural violation can be but is not necessarily enough . . .

Spokeo in Two Pictures:



Rivera v. Google (N.D. Ill. Dec. 29, 2018)

- Google violated the Illinois Biometric Privacy Act by collecting, storing, and "exploiting" the plaintiffs' face-geometry scans
- Google: plaintiffs have not suffered "concrete" injuries sufficient to establish Article III standing
- Google's retention and storage of plaintiffs' unique face templates did not cause any concrete injury under *Spokeo*
- Case can be fairly read to hold that a plaintiff has no cause of action for these statutory violations unless and until there is a data breach or other action that results in additional harm

Frank v. Gaos (Mar. 20, 2019)

- District court awarded $8.5 million *cy pres* award in suit alleging that Google's privacy practices violated the Stored Communications Act (SCA)
- *Per curiam* decision vacating that *cy pres* settlement
- Remanded to determine whether the named plaintiffs had standing to bring the law suit under *Spokeo*
- Practice challenged: Google's transmission of user search terms to webpage hosts (referral header info)
- Google's practice violates the SCA, which extends a private right of action for violations of its terms BUT
- Does Google's expressly unlawful transmission of referral header data constitute a "concrete" harm under Article III?

Health Data Privacy Implications

- It is arguably difficult for plaintiffs to maintain statutory health data collection and storage violation claims against private parties on standing grounds
- Potential solutions:
  - Find ways to credibly allege that these statutory violations constitute concrete harm(s)
    - Time/$$ harm; emotional distress; future risk/loss of chance; disparate harm to vulnerable populations
  - File in state court: plaintiffs should look to bring a cause of action in state court where viable
    - *See Rivera v. Google*
    - Obstacle: the federal removal statute
    - Backlash: state legislative amendments

Thank You

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