The Future Cannot Come Soon Enough: How Federal Regulation of Telepsychiatry Is Necessary to Create Greater Access to Mental Health Services During a Time When Psychiatrists Are in Short Supply

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THE FUTURE CANNOT COME SOON ENOUGH: HOW FEDERAL REGULATION OF TELEPSYCHIATRY IS NECESSARY TO CREATE GREATER ACCESS TO MENTAL HEALTH SERVICES DURING A TIME WHEN PSYCHIATRISTS ARE IN SHORT SUPPLY

Lisa V. Parciak*

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I. INTRODUCTION

According to a 2016 study prepared for the U.S. Department of Health and Human Services (“HHS”), 44.7 million adults in the U.S. experienced some type of mental illness in the previous year.¹ Of those 44.7 million people, 10.4 million people experienced a mental illness in the previous year that was so serious that it interfered with one or more major life activities.² Examples of serious mental illness include schizophrenia and bipolar disorder.³ Mental illness is treatable, and there are a variety of treatments available, including psychotherapy and medication.⁴ While there are many types of mental health professionals,⁵ the focus of this Article is on psychiatrists. Psychiatrists, unlike other types of mental healthcare professionals, are physicians and, therefore, are able to prescribe medications to treat their patients’ mental illnesses.⁶

Despite mental illness being treatable, it is believed that only half of the people with mental illness actually receive treatment.⁷ While there are several barriers to treatment,⁸ one significant barrier to treatment is limited access to care.⁹ The U.S. is currently experiencing a severe shortage of mental health professionals.¹⁰ Not only are there not enough mental health professionals practicing in the U.S., but the ones that are practicing are not

² Id.
⁴ Id.
⁶ Id.
evenly distributed throughout the U.S. Mental health professionals are predominately located in large urban areas. Furthermore, people living in the southern part of the U.S. have less access to mental healthcare than people living in other parts of the country.

All hope, however, is not lost because telepsychiatry has the potential to create greater access to quality mental healthcare for those most in need. Telepsychiatry is the provision of mental healthcare services through the use of telemedicine. Telemedicine is the use of telecommunication technologies to diagnose and treat patients when patients and providers are separated by distance. Because the practice of psychiatry requires a high degree of patient-provider interaction, telepsychiatry typically involves interactive videoconferencing systems over high-bandwidth networks. Telepsychiatry creates greater access to mental healthcare by eliminating geographic barriers to care and by providing psychiatric treatment in a non-stigmatizing environment. Telepsychiatry is an effective way to deliver psychiatric services and is comparable to traditional in-person care.

Although telepsychiatry has the potential to create greater access to quality mental healthcare for those most in need, many psychiatrists have yet to incorporate telepsychiatry into their private practices. While telepsychiatry is finding success in certain settings, such as veteran hospitals, its potential to create greater access to mental healthcare services is being stifled by several

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11 Id. at 2.
12 Id.
13 See Allison N. Winnike et al., Rewiring Mental Health: Legal and Regulatory Solutions for the Effective Implementation of Telepsychiatry and Telemental Health Care, 17 HOUS. J. HEALTH L. & POL’Y 21, 31 (2017).
14 Id. at 23.
15 Id. at 43.
16 Id. at 44.
17 Deslich et al., supra note 8, at 4.
18 Winnike et al., supra note 13, at 23.
19 DAVID D. LUXTON ET AL., A PRACTITIONER’S GUIDE TO TELEMENTAL HEALTH: HOW TO CONDUCT LEGAL, ETHICAL, AND EVIDENCE-BASED TELERACTICE 111 (2016).
21 Winnike et al., supra note 13, at 23.
Barriers to the expansion of telepsychiatry include (1) state licensure laws, (2) restrictive reimbursement, (3) state telemedicine laws, (4) malpractice uncertainty, and (5) privacy and security concerns.

In order to create greater access to mental healthcare services to those most in need during a time in which there is a national shortage of psychiatrists, the federal government should create a national license to practice telepsychiatry and adopt preemptive legislation regulating its practice. Furthermore, to encourage psychiatrists to incorporate telepsychiatry into their practices, this Article proposes (1) reforming Medicare, Medicaid, and private insurance telemedicine reimbursement and (2) requiring liability insurance companies to cover interstate telepsychiatry in parity with traditional psychiatry. Lastly, to address patients’ concerns regarding their privacy, this Article suggests amending federal privacy and security rules to include greater protections for the data created via telepsychiatry.

Part II provides background information on mental illness, the barriers to mental healthcare, and the benefits of telepsychiatry. Finally, Part III addresses the barriers to the expansion of telepsychiatry and the legislation that should be adopted in order to make the expansion of telepsychiatry a reality.

II. BACKGROUND

A. The Prevalence of Mental Illness in the U.S.

Mental illness is a general term used to describe a variety of mental, behavioral, and emotional disorders ranging in severity from mild to severe. While each mental illness has its own particular symptoms, common signs of mental illness include, but are not limited to, the following: (1) excessive sadness, (2) excessive worry and/or fear, (3) extreme mood swings, (4) confused thinking, (5) delusional thinking, (6) hallucinations, (7) thoughts of suicide, (8) substance abuse, and (9) difficulty understanding or relating to


26 Hoffmann & Rowthorn, supra note 24, at 32.


Mental illness can be broken down into two categories: (1) Any Mental Illness ("AMI") and (2) Serious Mental Illness ("SMI"). The AMI category includes mental, behavioral, and emotional disorders that range from no impairment to severe impairment. The SMI category is a sub-set of AMI and includes mental, behavioral, and emotional disorders that cause serious functional impairments, which substantially interfere with or limit one or more major life activities. Examples of serious mental illnesses include major depressive disorder, schizophrenia, and bipolar disorder. Signs of mental illness usually manifest early in a person’s life; for instance, 75% of all mental health conditions occur by the time a person turns 24 years old. As stated previously, mental illness is a common affliction in the United States. However, only half of those individuals with mental illness receive some form of mental health treatment.

Mental illness does not just impact individuals with mental illness and the people who love them; mental illness also has a large impact on society. For instance, untreated mental illness increases a person’s risk of being homeless. An estimated one-third of all homeless people are mentally ill. Moreover, people with mental illness are eight times more likely to be incarcerated than non-mentally ill people. The U.S. spends an estimated $15

30 Mental Illness, supra note 28.
31 Id.
32 Id.
35 Mental Health Information: Statistics, supra note 7.
36 Id.
37 Id.
39 Winnike et al., supra note 13, at 31.
40 Id.
41 Id. at 30.
billion per year incarcerating individuals with mental illness.\footnote{Id. at 28.} Furthermore, between government spending on mental healthcare and the lost earnings of those with serious mental illnesses, the U.S. loses approximately $1 trillion per year.\footnote{Id.}

\section*{B. Barriers to Treatment and the Shortage of Psychiatrists in the U.S.}

Fortunately, mental illness is treatable, and there are a variety of treatments available, including, but not limited to, therapy and medication.\footnote{See Mental Health Treatment & Services, NAT’L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/Learn-More/Treatment (last visited Oct. 2, 2019).} Despite being treatable, it is estimated that only 50% of individuals with mental illness receive some type of mental health treatment.\footnote{Mental Health Information: Statistics, supra note 7.} Barriers to treatment include lack of proximity to care, treatment costs, transportation difficulties, time restraints,\footnote{Deslich et al., supra note 8, at 3.} and social stigma.\footnote{Winnike et al., supra note 13, at 32.} The shortage of psychiatrists practicing in the U.S. is another barrier to treatment.\footnote{NAT’L COUNCIL MED. DIR. INST., supra note 9, at 6.} As of June 2018, there are 5,119 designated mental healthcare Health Professional Shortage Areas (“HPSA”) in the U.S.\footnote{Help Wanted: HRSA Presents a Virtual Job Fair for Professional Counselors, AM. COUNSELING ASS’N (Sept. 14, 2018), https://www.counseling.org/news/aca-blogs/aca-government-affairs-blog/aca-government-affairs-blog/2018/09/14/help-wanted-hrsa-presents-a-virtual-job-fair-for-professional-counselors [hereinafter Help Wanted].} To be considered a mental health care HPSA, an area’s population-to-psychiatrist ratio must be, at a minimum, 30,000 to 1.\footnote{Mental Health Care Health Professional Shortage Areas (HPSAs), KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/mental-health-care-health-professional-shortage-areas-hpsas/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22Location%22%22sort%22:%22asc%22%22%7D (last visited Oct. 2, 2019).} Over 126 million people live in mental healthcare HPSAs.\footnote{Help Wanted, supra note 49.}

Children and adolescents with mental illness experience even greater difficulty in accessing mental healthcare, with 55% of the states in the U.S. experiencing a serious shortage of child and adolescent psychiatrists.\footnote{NAT’L COUNCIL MED. DIR. INST., supra note 9, at 6.} Other populations that experience greater barriers to accessing treatment include individuals with disabilities, individuals with limited English proficiency, and
individuals located in low-income urban areas. The shortage of psychiatrists in the U.S. is so great that many emergency rooms do not have psychiatrists on staff even though one in eight emergency room visits involves a mental illness or substance abuse issue.

The shortage of psychiatrists is only expected to get worse. One recent study predicted that by 2025, an additional 6,090 psychiatrists will be needed to meet the service demand. Another study projected the demand by 2025 to be much higher, finding that by 2025, 15,600 more psychiatrists will be needed to meet the demand for services. Reasons for the shortage of psychiatrists include an aging workforce, burnout, low reimbursement rates, and burdensome record-keeping.

Moreover, the psychiatrists that are practicing in the U.S. are not evenly distributed throughout the country. The majority of mental health care HPSAs are located in rural and partially rural areas. Furthermore, states located in the southeast region of the U.S. (Alabama, Florida, Georgia, Kentucky, Mississippi, South Carolina, North Carolina, and Tennessee) have greater shortages, with only 28.51% of their needs being met, than those states located in the northeast region of the U.S. (Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont), with 41.59% of their needs being met.

Areas with sufficient patient-psychiatrist ratios are experiencing a different kind of shortage—a shortage of psychiatrists accepting insurance as a source of payment. Currently, 40% of the psychiatrists in the U.S. do not accept insurance as a form of payment. The insurance acceptance rate for psychiatrists is significantly lower than the insurance acceptance rate for other

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53 Winnike et al., supra note 13, at 34–39.
55 NAT’L COUNCIL MED. DIR. INST., supra note 9, at 15.
56 Id.
57 Id.
58 Id. at 6.
59 See Adams et al., supra note 10, at 2.
60 See Mental Health Care Professional Shortage Areas, supra note 50.
61 Id.
62 Janet R. Cummings, Rates of Psychiatrists’ Participation in Health Insurance Networks, 313 JAMA 190, 190 (2015).
63 Tara F. Bishop et al., Acceptance of Insurance by Psychiatrists and the Implications for Access to Mental Health Care, 71 JAMA 176, 179 (2014).
medical specialists. Low insurance reimbursement rates for psychiatric services may explain the rise in cash-only practices. It has also been suggested that perhaps psychiatrists do not need to accept insurance anymore to attract patients because their services are in such high demand.

C. Telemedicine and Psychiatry

Telemedicine is the delivery of clinical care by a licensed healthcare provider in one location (commonly referred to as the “distant site”) to a patient in another location (commonly referred to as the “originating site”) by way of telecommunication technologies. The telemedicine industry has seen exponential growth in the past few years. In fact, the market will generate $1.9 billion this year—which is a 50% increase from 2013. Telemedicine is also a hot topic for the government, with telehealth legislation being regularly proposed at the state and federal levels.

Telemedicine can be practiced on an interstate or an intrastate basis. Intrastate telemedicine occurs when the patient and the provider are located in the same state, while interstate telemedicine occurs when the patient and the provider are located in different states. When physicians practice intrastate telemedicine, they must only concern themselves with the laws and regulations of one state. As this Article will discuss at length, matters become much more complicated when providers branch out into interstate telemedicine.

While there are many telecommunication technologies available, such as telephone, facsimile, electronic mail, and still imaging, most psychiatrists who use telemedicine use live videoconferencing to treat their patients.

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64 Id.
65 Id.
66 Id. at 180.
69 Id.
72 Id.
73 Id.
74 Id.
75 Hilty et al., supra note 20, at 444.
Videoconferencing allows providers and patients who are separated by distance to see and hear each other in real time. Telepsychiatry videoconferencing systems typically include a video camera, a microphone, speakers, and one or two video monitors at each location site. Most laptops and mobile devices already have the necessary videoconferencing hardware built in. Telepsychiatry via videoconferencing also requires a reliable and secure internet connection and Health Insurance Portability and Accountability Act of 1996 ("HIPAA") compliant videoconferencing software. Videoconferencing works well for psychiatry because the practice of psychiatry involves observation and verbal interaction. The term “telepsychiatry” in this Article only refers to the use of live videoconferencing to treat patients.

Telepsychiatry has the ability to create greater access to mental healthcare to those most in need because it eliminates the issue of geography and offers treatment in a non-stigmatizing environment. Moreover, telepsychiatry enables patients, primary care physicians, and emergency room physicians to have direct access to psychiatrists. Psychiatrists can provide a variety of services via telepsychiatry, such as consultations, diagnostic evaluations, individual therapy, family therapy, group therapy, patient education, and medication management.

In addition to creating greater access to care, telepsychiatry leads to positive clinical outcomes and patient satisfaction. Telepsychiatry is an effective modality of care for a variety of mental illnesses, including panic disorders, depression, and post-traumatic stress disorder. Telepsychiatry has also been found to be an effective modality of treatment across a variety of populations, including children, college students, immigrants, veterans,

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76 Kreitner, supra note 67, at 24.
77 Deslich et al., supra note 8, at 4.
78 Luxton et al., supra note 19, at 19.
80 Myers, supra note 22, at 217.
81 See Winnike et al., supra note 13, at 23.
82 Luxton et al., supra note 19, at 111.
83 What Is Telepsychiatry?, supra note 54.
84 Id.
86 Id.
inmates, and rural residents. Patients report being satisfied with telepsychiatry and feeling as though they can share the same information via videoconferencing as they can in person. Diagnostic reliability appears to be the same for videoconferencing as it is for traditional in-person care. Moreover, telepsychiatry is a cost-effective way to deliver mental health services when compared to in-person treatment and video consultations. According to the American Psychiatric Association, “[t]here is substantial evidence of the effectiveness of telepsychiatry and research has found satisfaction to be high among patients, psychiatrists and other professionals. Telepsychiatry is equivalent to in-person care in diagnostic accuracy, treatment effectiveness, quality of care and patient satisfaction. Patient privacy and confidentiality are equivalent to in-person care. Telepsychiatry can be implemented in a variety of settings, including, but not limited to, clinics, emergency rooms, nursing homes, group homes, schools, and patients’ homes. Psychiatrists can offer telepsychiatry services directly to patients by implementing telemedicine videoconferencing software, or they can contract with virtual group practice companies. Virtual group practice companies provide psychiatrists with a client base, reimbursement, and necessary infrastructure.

Telemedicine and telepsychiatry have already found success in a variety of settings. The Veteran Health Administration (“VHA”) of the Department of Veteran Affairs (“VA”) has already found great success in delivering mental health services to veterans via telemedicine and is considered to be a national leader in the delivery of telemental-health services. The VHA currently uses telemedicine to treat a variety of mental health illnesses, including mood disorders, anxiety disorders, post-traumatic stress disorder, psychotic disorders, and substance-use disorders. Since 2003, VHA has

87 Deslich et al., supra note 8, at 3.
88 Lauckner & Whitten, supra note 85, at 306.
90 Winnike et al., supra note 13, at 44.
91 What Is Telepsychiatry?, supra note 54.
92 Hilty et al., supra note 20, at 451.
93 Myers, supra note 22, at 217.
94 Id.
95 Petzel, supra note 23.
96 Id.
provided more than two million telemental health encounters. The U.S. Department of Defense (“DoD”) recently gave telehealth vendor GlobalMed the authority to deploy its virtual health applications, hardware, and software directly onto DoD networks, thereby making its telehealth services available to 57 military hospitals, 400 military clinics, and numerous military bases around the world. Telepsychiatry has also been successfully employed in the correctional setting. In fact, 25 correctional systems located in the U.S. use some form of telemedicine, and 80% of those correctional systems use telepsychiatry. However, despite being implemented successfully in certain settings, telepsychiatry is not being used to its full potential. Many psychiatrists have yet to incorporate telepsychiatry into their private practices.

III. BARRIERS TO THE EXPANSION OF TELEPSYCHIATRY AND SOLUTIONS

The legal framework currently regulating the practice of telemedicine in the U.S. hinders telemedicine’s widespread adoption and growth. In particular, the current regulatory framework places unreasonable administrative burdens upon practitioners who desire to practice interstate telemedicine. Because telepsychiatry is a form of telemedicine, the barriers that restrain the expansion of telemedicine also restrain the expansion of telepsychiatry. These barriers include, but are not limited to, (1) state physician licensure laws, (2) state telemedicine laws, (3) malpractice uncertainty, (4) restrictive

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99 Deslich et al., supra note 8, at 7.
100 Id. at 8.
101 Myers, supra note 22, at 217.
102 Hoffman & Rowthorn, supra note 24, at 5.
104 Romney & Baird, supra note 25, at 32.
105 Hoffman & Rowthorn, supra note 24, at 32.
reimbursement, and (5) privacy concerns.\textsuperscript{106} For the purposes of this Article, these barriers have been grouped into the following three categories: (1) state regulation, (2) reimbursement, and (3) privacy and security concerns.

A. State Regulation Is a Barrier to the Expansion of Telepsychiatry

1. Physician Licensure

The state licensure system in the U.S. stifles the expansion of telepsychiatry because it prevents psychiatrists from treating patients that live in states in which the psychiatrist is not licensed.\textsuperscript{107} Currently, every state in the union has a medical practice act that regulates the practice of medicine and licensure within its borders.\textsuperscript{108} Through the licensure process, state medical boards make sure that the physicians practicing in their state have the necessary academic and clinical competencies to practice general medicine.\textsuperscript{109} State medical practice acts, however, are not all the same.\textsuperscript{110} Medical practice acts can vary in how they define the practice of medicine and in what they require for physician licensure.\textsuperscript{111}

The states have a long history of regulating the practice of medicine within their own borders.\textsuperscript{112} Shortly after the U.S. became a nation, individual states began regulating the practice of medicine pursuant to the police powers granted to them by the U.S. Constitution’s Tenth Amendment.\textsuperscript{113} The Tenth Amendment gives each state the authority to regulate activities that impact the health, safety, and welfare of the people located within its borders.\textsuperscript{114} In 1889, the U.S. Supreme Court held that a state’s authority to protect its citizenry included the ability to regulate medical licensure.\textsuperscript{115} Most physician licensure


\textsuperscript{108} Gupta & Sao, supra note 106, at 393.

\textsuperscript{109} Peter Critikos III, Comment, License to Screen: A Review of the Medical Licensure Scheme Impacting Telehealth Proliferation in the United States, the European Union, and Australia, 32 EMORY INT'L L. REV. 317, 329 (2018).

\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id. at 328.

\textsuperscript{113} Id.

\textsuperscript{114} Zilis, supra note 103, at 201.

\textsuperscript{115} Critikos, supra note 109, at 328.
laws were adopted in the early 1900s, a time when the practice of medicine was solely local in nature.\textsuperscript{116}

Most medical boards require physicians to be licensed in the states where their patients are located before they make diagnoses or recommend treatments.\textsuperscript{117} This holds true when the physician and the patient see each other face-to-face or communicate with the assistance of telemedicine.\textsuperscript{118} Therefore, unless a state creates a licensure exception for telemedicine, a physician must be licensed in the state where the patient is located to legally treat the patient using telemedicine.\textsuperscript{119} Physicians who use telemedicine to treat out-of-state patients risk liability for the unauthorized practice of medicine if they are unlicensed in a patient’s state.\textsuperscript{120} Performing the unauthorized practice of medicine can result in civil damages, criminal penalties, and disciplinary sanctions.\textsuperscript{121}

However, obtaining a license to practice medicine in every state in which a physician would like to treat patients is not practical.\textsuperscript{122} Obtaining a license to practice medicine is an expensive and time-consuming endeavor.\textsuperscript{123} The process of becoming licensed to practice medicine is an arduous process that requires full disclosure.\textsuperscript{124} Moreover, although states have many of the same basic standards for medical licensure, each state has its own unique filing and administrative requirements, which make maintaining multiple state licenses burdensome.\textsuperscript{125} For instance, states vary in how they approach continuing medical education requirements, finger printing, and background checks, among other things.\textsuperscript{126} Moreover, state licensing fees, which are an

\begin{flushleft}
\textsuperscript{116} Hoffman \& Rowthorn, supra note 24, at 9.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Kepler \& McGinty, supra note 117, at 10.
\textsuperscript{123} Id.
\textsuperscript{124} Zilis, supra note 103, at 202.
\textsuperscript{126} Id. at 422.
\end{flushleft}
important source of state revenue, must be paid and can range anywhere from $200 to $1,000. Licenses must also be renewed and, in some states, licensing fees must be paid on an annual basis. Because of the costly and painstaking nature of the licensure process, many physicians maintain only one license for the state in which their practice is physically located. In fact, only 22% of active and licensed physicians maintain licenses in more than one state.

2. State Telemedicine Laws

The ability of each state to regulate telemedicine as it deems appropriate has resulted in great variation amongst the states. Some of the adopted legislation encourages the use of telemedicine by providing clarity regarding its practice. For example, some states have adopted legislation that says the standard of care for telemedicine is the same as the standard of care for traditional in-person care. Several states have legislation that says that a physician-patient relationship is created when services are provided via telemedicine. Moreover, as of 2017, 20 states and Washington D.C. have statutes requiring informed consent for telemedicine services.

While some states have legislation that facilitates and encourages the use of telemedicine across state lines, other states have restrictive legislation. Some attempts to provide clarity for telemedicine have resulted in more stringent or heightened standards of care. For example, Texas and Georgia require an in-person visit after the use of most telemedicine services. Furthermore, several states have adopted specific policies regarding the

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129 Schumacher, *supra* note 125, at 422.
131 *Id.*
132 Schumacher, *supra* note 125, at 420.
134 *Id.*
135 *Id.* at 9.
136 Schumacher, *supra* note 125, at 422.
138 *Id.* at 8.
prescription of medicine through telemedicine.\textsuperscript{139} Although the federal government regulates remote online prescribing via the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 ("Ryan Haight Act"), state laws providing greater restrictions for online prescribing are not preempted by the federal law.\textsuperscript{140}

State regulation of telemedicine has resulted in a patchwork quilt of regulations across the nation.\textsuperscript{141} Physicians interested in practicing telemedicine in more than one state bear the heavy burden of complying with various and, in some situations, incongruent state laws.\textsuperscript{142}

3. Malpractice Uncertainty, Variability, and Liability Insurance

In the event a state does not have telemedicine specific legislation, existing state malpractice case law, tort law, and civil procedure will apply to telemedicine malpractice cases.\textsuperscript{143} State malpractice laws can vary in regards to standards of care, statutes of limitation, informed consent requirements, arbitration requirements, and damage caps, among other things.\textsuperscript{144} State law variances limit the predictability of loss allocation and the effectiveness of risk management.\textsuperscript{145} Additionally, because few telemedicine malpractice cases have been litigated, there is very little case law from which to draw guidance.\textsuperscript{146} There is also little guidance at both the federal and state level regarding jurisdiction and choice of law when the provider and patient live in different

\textsuperscript{139} Romney & Baird, supra note 25, at 33.
\textsuperscript{143} Kepler & McGinty, supra note 117, at 17.
\textsuperscript{144} Id. at 21.
\textsuperscript{145} Id.
states. Uncertainty regarding malpractice liability causes many physicians to fear utilizing telemedicine to its full potential.

The availability of malpractice insurance is another barrier to the expansion of telemedicine. Not all medical malpractice insurance plans cover telemedicine services. Furthermore, most insurance companies do not offer multi-state medical malpractice coverage. Therefore, physicians who want to practice interstate telemedicine may have to purchase multiple malpractice insurance policies to ensure coverage for the use of telemedicine.

Further complicating matters is the fact that each state has its own insurance code with specific laws and procedures regarding medical liability insurance coverage. Many states have statutes barring medical malpractice insurers from selling insurance across state lines without a license to sell insurance or some other permission. Moreover, in states where “government administered funds have been set up for basic or excess professional liability,” coverage is often limited to services rendered in the state and frequently do not cover telemedicine services.

4. Solution: National Licensure and Federal Regulation of Telepsychiatry

The current regulatory framework stifles the expansion of interstate telemedicine by placing unreasonable administrative burdens upon practitioners who desire to practice telemedicine in more than one state. In order for telemedicine to grow, the current state-based regulatory framework should be replaced by a uniform and centralized system run by the federal government.

The current laws and regulations governing the practice of medicine are reflections of the time in which they were drafted—a time when patients and physicians lived and worked within the same state. When the practice of medicine was only a local activity, it made practical sense for the states to

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147 Id. at 848–49.
148 Id. at 849.
150 Id.
151 Id.
152 Gupta & Sao, supra note 106, at 397.
153 Id.
155 Zilis, supra note 103, at 213.
157 Hoffman & Rowthorn, supra note 24, at 5.
However, advances in medical knowledge and technology have changed the practice of medicine so that it is no longer a local activity restricted to a state’s borders. Health care is now a “global commercial activity.”\textsuperscript{160} For instance, because of technological advancements, not only can physicians treat patients remotely, patients can also travel across state and national borders to obtain medical treatment.\textsuperscript{161} Moreover, many health care providers work for or with national hospital chains or multi-state managed care companies.\textsuperscript{162} Because our health care system is no longer local in nature,\textsuperscript{163} the current state-by-state regulatory framework is unable to handle the challenges of the modern health care industry.\textsuperscript{164}

While the practice of intrastate telemedicine does help create greater access to mental health care services, interstate telemedicine is what is really needed to improve the health care situation in the U.S.\textsuperscript{165} In order for telepsychiatry to create greater access to psychiatric services to those most in need, psychiatrists must be able to practice across state lines without having to obtain licensure in every state in which they wish to practice.\textsuperscript{166} To achieve this end, federal regulation and national licensure for the practice of telepsychiatry are needed.

Under a national licensing scheme, psychiatrists who want to practice interstate telepsychiatry could do so provided they have a national license to practice telepsychiatry.\textsuperscript{167} The national license would be an additional and secondary medical license limited to the practice of interstate telepsychiatry. Psychiatrists would have to be licensed in their home states in order to apply for the national license. To protect patients from incompetent psychiatrists, only psychiatrists who are certified by the American Board of Psychiatry and Neurology and in good standing would be able to obtain the national license. Moreover, when psychiatrists’ state medical licenses are revoked, their national licenses to practice telepsychiatry will also be revoked.\textsuperscript{168}

\begin{thebibliography}{9}
\bibitem{158} Gupta & Sao, supra note 106, at 406.
\bibitem{159} Id.
\bibitem{160} Id. at 417.
\bibitem{161} Id.
\bibitem{162} Id.
\bibitem{163} Id. at 405.
\bibitem{164} Id.
\bibitem{165} See Zilis, supra note 103, at 203.
\bibitem{166} Id. at 213–14.
\bibitem{167} See Schumacher, supra note 125, at 432.
\bibitem{168} Id. at 433.
\end{thebibliography}
To implement this proposed national licensure scheme, a national licensing board would be created and charged with determining licensure criteria, collecting licensure fees, and determining any disciplinary matters involving the use of telepsychiatry. The national licensing board would also inform state medical boards of any disciplinary matters brought before it, and, in turn, each state would report any state disciplinary action to the national licensing board. Any issues regarding the traditional practice of psychiatry would continue to be handled by the psychiatrist’s home state’s medical board. Under this proposed licensing scheme, states would not lose any of their medical licensure revenue, which is often cited as the reason states are hesitant to support national licensure programs, because psychiatrists would continue to need a state medical license to practice both traditional psychiatry and telepsychiatry.

For a national telepsychiatry licensing scheme to succeed, uniform guidance and clarity regarding the practice of telepsychiatry are necessary. Therefore, in addition to adopting a national licensing scheme, Congress should also adopt legislation that (1) regulates the practice of interstate telepsychiatry and (2) preempts conflicting state laws. Because state law variation and uncertainty stifle the expansion of telemedicine, having one set of clear expectations will lead to greater certainty and ease the administrative burdens of having to comply with multiple state laws. In particular, Congress should clearly state the appropriate standard of care for interstate telepsychiatry and whether informed consent for telepsychiatry is required. Furthermore, to remove any doubt, Congress should adopt legislation that says telepsychiatry creates a patient-doctor relationship. Congress should also adopt legislation that addresses choice of law and jurisdiction. Moreover, any federal law regarding the practice of telepsychiatry should preempt any conflicting state law as it relates to telepsychiatry. For example, the Ryan Haight Act should preempt state laws regarding the prescription of medicine via telepsychiatry. Having uniform legislation regarding the practice of interstate telepsychiatry should encourage more psychiatrists to incorporate telepsychiatry into their private practices.

The national telepsychiatry licensing scheme suggested in this Article is a realistic and practical approach to help create greater access to mental health services to those most in need. The licensing scheme proposed in this Article should receive congressional support for several reasons. First, one of

169 Id. at 432–33.
170 Id. at 433.
171 Id.
172 Id. at 432.
173 See Gupta & Sao, supra note 106, at 434.
the benefits of the proposed licensing scheme is that it is narrowly tailored to address a nationwide problem and only applies to a specific group of physicians.\textsuperscript{174} Under the proposed national telepsychiatry licensing scheme, states will maintain their revenue stream and their ability to protect their citizens from incompetent physicians within their borders.\textsuperscript{175} Second, Congress should support the licensing scheme proposed in this Article because Congress previously supported a similar licensing scheme for the purpose of creating greater access to telemedicine for U.S. veterans.\textsuperscript{176} The licensing scheme proposed in this Article should also receive the current Administration’s support because the VA recently passed a rule granting physicians and other health care providers the ability to render treatment to veterans using telemedicine, regardless of the location of the patient and provider.\textsuperscript{177} The VA’s new rule makes it clear that the federal government is exercising its powers of preemption to override conflicting state licensure and state telemedicine laws.\textsuperscript{178}

Congress can use either its commerce powers or its spending powers to create a national telepsychiatry license and to regulate telepsychiatry.\textsuperscript{179} Article 1, Section 8, Clause 3 of the U.S. Constitution grants Congress the power to regulate “[c]ommerce with foreign Nations, and among the several States, and with the Indian Tribes.”\textsuperscript{180} The provision of medical services has already been determined to be a form of commerce.\textsuperscript{181}

In \textit{United States v. Lopez},\textsuperscript{182} the U.S. Supreme Court set forth three types of activities Congress can regulate using its commerce power.\textsuperscript{183} Pursuant

\begin{itemize}
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} \textit{Id.} at 435.
\item \textsuperscript{177} Press Release, U.S. Dep’t of Veteran Affairs, VA Expands Telehealth by Allowing Health Care Providers to Treat Patients Across State Lines (May 11, 2018), https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=4054.
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} \textit{See} Schumacher, \textit{supra} note 125, at 439.
\item \textsuperscript{180} U.S. CONST. art. 1, § 8, cl. 3.
\item \textsuperscript{181} Poma, \textit{supra} note 68, at 94–95.
\item \textsuperscript{182} 514 U.S. 549 (1995).
\end{itemize}
to *Lopez*, Congress may use its commerce power to regulate (1) the channels of interstate commerce; (2) the instrumentalities, persons, or things in interstate commerce; or (3) those activities that substantially affect interstate commerce.\(^{184}\) While telemedicine need only fit into one of the three *Lopez* categories to be federally regulated, telemedicine likely fits into all three *Lopez* categories.\(^ {185}\) First, when physicians transmit and receive medical information across state lines using telemedicine, telemedicine networks serve as the channels of interstate commerce.\(^{186}\) Second, physicians become instrumentalities of interstate commerce when they use telemedicine to provide services to patients across state lines.\(^ {187}\) Third, telemedicine is currently a billion dollar industry\(^ {188}\) and, therefore, has a substantial effect on interstate commerce.\(^ {189}\)

The U.S. Supreme Court has interpreted the Commerce Clause to mean Congress has the exclusive authority to regulate interstate commerce.\(^ {190}\) The Dormant Commerce Clause, while not expressly put forth in the U.S. Constitution, has been recognized by the U.S. Supreme Court to mean Congress can invalidate state laws that impede upon interstate commerce, even when those state laws concern areas that Congress has not yet acted upon or where there is no explicit federal law preemption.\(^ {191}\) The Commerce Clause, therefore, can be used by Congress to regulate telepsychiatry, to preempt state licensure regulation, and to create a national license for telepsychiatry.\(^ {192}\)

In addition to the Constitution’s Commerce Clause, the Constitution’s Spending Clause can also be used to create a national license for telepsychiatry and to preempt state law regarding the regulation of same.\(^ {193}\) Article 1, Section 8, Clause 1 of the U.S. Constitution sets forth Congress’s spending power, which states that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”\(^ {194}\)

\(^{183}\) *Id.* at 558.

\(^{184}\) *Id.* at 558–59.

\(^{185}\) Gupta & Sao, *supra* note 106, at 429.

\(^{186}\) Matak, *supra* note 120, at 247.

\(^{187}\) *Id.*

\(^{188}\) Poma, *supra* note 68, at 79.

\(^{189}\) Schumacher, *supra* note 125, at 437.

\(^{190}\) Gupta & Sao, *supra* note 106, at 417.

\(^{191}\) *Id.* at 418.

\(^{192}\) See Schumacher, *supra* note 125, at 438.

\(^{193}\) *Id.* at 437.

\(^{194}\) U.S. CONST. art. 1, § 8, cl. 1.
Spending Clause has been broadly interpreted.\footnote{Gupta & Sao, supra note 106, at 429.} Congress has the discretion to determine what is in the U.S.’s general welfare.\footnote{Id. at 431.} Furthermore, Congress has the right to determine the terms and conditions for dispensing federal funds to the states.\footnote{Id.} In order to pass constitutional muster, however, a regulation drafted pursuant to the Spending Clause must: (1) advance the general welfare, (2) bear some relation to the spending program, (3) be clearly expressed to recipient states, and (4) be voluntarily to the states.\footnote{Id. at 430.} Therefore, Congress could implement a national licensure scheme for telepsychiatry pursuant to the Spending Clause, provided it conditioned the receipt of federal funds upon a state’s voluntary adoption and implementation of the national licensure scheme.\footnote{Id. at 431.}

The national licensure of telemedicine is not without its critics. Both the American Medical Association and the Federation of State Medical Boards oppose it.\footnote{Id. at 431.} Critics of national licensure believe that the states are better equipped to protect their citizens from unqualified physicians.\footnote{Id. at 438.} Critics argue that because “health and safety issues have ‘local peculiarities,’” states are best suited to regulate them.\footnote{Zilis, supra note 103, at 214.} However, this argument ignores the fact that medicine is no longer a local activity because medical knowledge is now able to transcend state boundaries.\footnote{Id. at 430.} This argument also ignores the fact that state medical licensure only enables physicians to practice general medicine.\footnote{Id. at 438.} State medical licenses are not specialty specific.\footnote{United States Medical Licensure Requirements, U.S. MED. LICENSING EXAMINATION, https://www.usmle-courses.eu/united-states-medical-licensure-requirements (last visited Sept. 25, 2019).} National private specialty boards govern specialty practice.\footnote{Id.}

Critics of national licensure also argue that the Tenth Amendment of the U.S. Constitution gives states the exclusive authority to regulate health care.\footnote{Ameringer, supra note 141, at 67.} While the Tenth Amendment has been interpreted to mean that states...
have the authority to police activities affecting the health, safety, and welfare of their citizens, this authority is not exclusive to the states. Historically, the U.S. Supreme Court has affirmed federal involvement in areas traditionally viewed as being under the states’ purview when Congress has the concurrent right to regulate under its enumerated constitutional powers.

Furthermore, the argument that health care and licensure are matters that have been exclusively relegated to the states ignores the fact that the federal government has been involved in the regulation of health care for years. For instance, the Food and Drug Administration is a federal agency that administers a national policing system tasked with regulating drugs and medical devices for the purpose of protecting the public’s health. Other examples of the federal government regulating health care include the Affordable Care Act and Medicare. Furthermore, national medical licensing systems already exist for physicians employed by the VA, the U.S. Military, and the Bureau of Indian Affairs.

Some states have recognized the limiting effects that state licensures have on telemedicine and have created expedited licensing options, such as reciprocity and endorsement schemes, for physicians already licensed in one state. Another pathway to multi-state licensure is the Interstate Medical Licensure Compact (“IMLC”). At least 29 states, the District of Columbia, and the Territory of Guam have joined the IMLC. A state that opts into the IMLC agrees to implement an expedited licensing process for physicians who maintain medical licenses in other IMLC states and meet certain eligibility requirements set by the IMLC. The licensure process is expedited because states in the IMLC agree to rely upon the verification and approval processes of other IMLC states. If a physician’s state of principal license is in the IMLC, the physician may—with the requisite approval—practice in any of the IMLC

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208 Id. at 413–14.
209 Id. at 414.
210 Marino et al., supra note 156, at 299–300.
211 Gupta & Sao, supra note 106, at 409.
212 Marino et al., supra note 156, at 302.
213 Matak, supra note 120, at 245.
217 Id.
218 Id.
219 Id.
Physicians, however, must still pay the licensing fees for all of the states in which they practice. The IMLC is not an adequate solution to the licensure problem plaguing the expansion of telepsychiatry. First, the decision to join the IMLC is voluntary. States do not have to join the IMLC if they do not want to, and many states have not joined the IMLC, including New York and California. Furthermore, expedited licensing schemes do not eliminate the costs or the burden of having to go through the licensure process. Physicians applying through the IMLC are required to complete an additional application, pay an application fee, and undergo a background check. Additionally, under the IMLC, physicians must pay the licensing fees of every state in which they desire to practice. Furthermore, even though certain licensure schemes, such as the IMLC, may expedite the licensure process, physicians are still subjecting themselves to multiple jurisdictions and multiple board regulations.

If this nation is serious about creating greater access to psychiatric care, it needs to lessen the burdens of practicing telepsychiatry across state lines; this can only be accomplished through national licensure and federal regulation. Although some states will likely balk at the concept of national licensure and see it as an attempt to infringe on their state police powers, this position can be overcome by the Commerce Clause and the Spending Clause.

**B. Reimbursement Policies as a Barrier to the Expansion of Telepsychiatry**

While state licensure laws stifle the expansion of interstate telemedicine, the reimbursement policies of private and public payors limit the expansion of both interstate and intrastate telemedicine and, therefore, telepsychiatry. Although Medicare, Medicaid, and private health insurance

\[220\] Id.


\[222\] The IMLC, supra note 216.

\[223\] Id.

\[224\] Kepler & McGinty, supra note 117, at 10.


\[226\] Id.


\[228\] Schumacher, supra note 125, at 431.

\[229\] Id. at 425.
companies, the three main healthcare insurers in the U.S., have recently begun to provide reimbursement for telepsychiatry services, their reimbursement remains limited, as each insurer conditions its reimbursement upon certain circumstances being met. When insurers fail to provide adequate reimbursement for telemedicine services, providers lack the necessary incentive to provide telemedicine services.

1. Medicare

Medicare provides federally funded and federally regulated health insurance for individuals over 65 years of age and individuals under 65 years of age with certain qualifying disabilities. According to 2015 data, approximately 16% of all health insured individuals have Medicare. Medicare limits reimbursement for telepsychiatry services in several ways. First, Medicare only provides reimbursement for certain approved telemedicine services and only when the patient receives the telemedicine service in an approved originating site. Approved originating sites include provider offices, hospitals, rural health clinics, federally qualified health centers, skilled nursing facilities, community mental health centers, and hospital-based or critical access hospital-based renal dialysis centers. Under Medicare rules, a patient’s home is not an approved originating site. Second, Medicare only provides reimbursement for telemedicine services when the originating site is located in a Health Professional Shortage Area (“HPSA”) or in a county that is outside of a Metropolitan Statistical Area (“MSA”) as defined by the U.S. Census Bureau.

Gupta & Sao, supra note 106, at 403.
Deslich et al., supra note 8, at 6.


Telehealth and Medicare, supra note 232.

Id.

Schumacher, supra note 125, at 429.

Medicare Program – General Information, supra note 233.
2. Medicaid

Medicaid provides health insurance for qualifying low-income individuals and people with eligible disabilities.\textsuperscript{239} According to 2015 data, approximately 19\% of all health insured individuals have Medicaid.\textsuperscript{240} While Medicaid programs receive both state and federal funding, each state administers its own Medicaid program.\textsuperscript{241} Because each state administers its own Medicaid program, each state decides whether to provide reimbursement for telemedicine services.\textsuperscript{242} Therefore, every state is free to condition or limit reimbursement for telemedicine services.\textsuperscript{243}

Although Medicaid programs in all 50 states and Washington D.C. provide reimbursement for some form of live video telehealth services, many Medicaid programs condition their reimbursement upon certain factors being met.\textsuperscript{244} For example, as of September 2019, 23 states maintain reimbursement policies that restrict the type of facility that can serve as an originating site.\textsuperscript{245} Many Medicaid programs exclude the patient’s home from serving as an originating site.\textsuperscript{246} Furthermore, some states condition reimbursement for telemedicine services upon providers adhering to heightened standards regarding privacy, informed consent, and care.\textsuperscript{247} Because states are free to decide whether to provide reimbursement for telemedicine services and if so, to what extent, wide variation regarding telemedicine reimbursement exists between the states.\textsuperscript{248}

\begin{footnotesize}
\begin{enumerate}
\item[240] Barnett & Vornovitsky, supra note 234.
\item[241] Medicaid, supra note 239.
\item[243] Id.
\item[245] CTR. FOR CONNECTED HEALTH POLICY, STATE TELEHEALTH LAWS AND REIMBURSEMENT POLICIES: A COMPREHENSIVE SCAN OF THE 50 STATES AND THE DISTRICT OF COLUMBIA 9 (2019).
\item[246] Id. at 8.
\item[247] Kepler & McGinty, supra note 117, at 17.
\item[248] Id.
\end{enumerate}
\end{footnotesize}
3. Private Insurance Companies

According to 2015 data, approximately 67% of individuals with health insurance have private insurance policies.249 Only recently have private insurers begun to reimburse providers for telemedicine services.250 Private insurers that reimburse providers for telemedicine services either do so voluntarily or as a result of state legislation.251 Currently, over half of the states in the U.S. have some type of private insurance telemedicine parity statute.252 Full parity for telemedicine services is defined as reimbursement that is comparable to the reimbursement for traditional in-person services.253 However, many state parity statutes do not require full parity.254 Many state parity statutes often contain language that restricts and conditions reimbursement for telemedicine services.255 For example, some state telemedicine parity laws condition reimbursement on where the patient is located within the state.256 Other state parity statutes do not provide reimbursement for telemedicine services unless a patient-provider relationship existed prior to the telemedicine service.257 Although private insurance parity statutes are intended to create comparable coverage for telemedicine services, the reality is that they do not do so.258 Because the majority of individuals with health insurance are insured by private insurers, the lack of reimbursement parity by private insurers is a substantial barrier to the expansion of telemedicine259 and, therefore, telepsychiatry.

249 Barnett & Vorovitsky, supra note 234, at 1.
251 Id.
253 Lewis, supra note 250, at 484.
254 Id.
255 Id.
256 Id. at 485.
257 Id. at 486–87.
258 Id. at 487 (citing Kirsten Rabe Smolensky, Telemedicine Reimbursement: Raising the Iron Triangle to a New Plateau, 13 HEALTH MATRIX 371, 382 (2003)).
259 Id. at 481–82.
4. Solution: Expand Medicare, Medicaid, and Private Insurance Reimbursement

In order to encourage more psychiatrists to offer telepsychiatry to their patients, Medicare, Medicaid, and third-party insurers need to cover traditional psychiatry and telepsychiatry in parity with one another. This means that telepsychiatry services should be reimbursed under the same conditions and at the same rate as traditional psychiatry services. Because state variation is a known barrier to the expansion of telemedicine, as previously discussed in this Article, it is essential that every state adopts the same telemedicine reimbursement policies. Furthermore, because the majority of Americans are insured by private health insurance companies, it is imperative that all private health insurance companies provide reimbursement for telemedicine services. Under the Tenth Amendment of the U.S. Constitution, each state has the ability to require private health insurance companies that do business in the state to provide reimbursement for telemedicine services.

The current reimbursement policies regarding telemedicine deter both the provider and the patient from using it. Without proper reimbursement, provider-initiated telemedicine projects cannot grow or be sustainable for any length of time. Without proper financial motivation, psychiatrists are unlikely to stray from providing their services in the traditional face-to-face setting. Furthermore, patients are less likely to take advantage of telemedicine if doing so means paying for such services out of pocket.

C. Privacy Concerns Are a Barrier to the Expansion of Telepsychiatry

Privacy concerns are another barrier to the proliferation of telemental health. Digital health breaches are on the rise. Computer files containing

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260 Deslich et al., supra note 8, at 6.
261 Lewis, supra note 250, at 473.
262 Id. at 482.
263 Id. at 482–83.
264 Schumacher, supra note 125, at 425.
265 Id.
267 Schumacher, supra note 125, at 425.
268 Sherman, supra note 27, at 1129–30.
health information are particularly vulnerable to being breached or “hacked” because of the valuable information they contain, such as full names, dates of birth, and health histories.\textsuperscript{270} Hackers specifically target health information because it can be sold on the dark web and used to commit identity theft.\textsuperscript{271} On the black market, medical information is believed to be ten times more valuable than a credit card number.\textsuperscript{272}

Because patients are aware of the vulnerability of their health information, there has been a rise in “privacy protective behavior.”\textsuperscript{273} In an attempt to protect their privacy, patients give incorrect or incomplete health information or request that embarrassing information be omitted from their medical record.\textsuperscript{274} Because physicians require complete candor from their patients in order to render appropriate diagnosis and treatment, privacy protective behavior is very harmful.\textsuperscript{275}

For telemedicine to reach its full potential, patients and providers must trust that the systems being used to deliver telemedicine services are protecting patient privacy and are being kept secure.\textsuperscript{276} The importance of patients feeling confident in the privacy and security of their personal information is all the more true for telespsychiatry because of the sensitive nature of the information that could be exposed by a data breach.\textsuperscript{277} Unfortunately, the current regulatory framework regarding the privacy and security of personal health information is ill-equipped to address telemedicine’s heightened security and privacy risks.\textsuperscript{278}

1. The Current Regulatory Framework for Protecting Patients’ Privacy

The federal government has enacted several laws that were designed to protect the privacy and security of health information—specifically, HIPAA and the Health Information Technology for Economic Clinical Health Act of 2009 (“HITECH”).\textsuperscript{279} HIPAA provides general guidance regarding the privacy

\textsuperscript{270} Id. at 7–8.
\textsuperscript{271} Id. at 8.
\textsuperscript{272} Sherman, supra note 27, at 1130.
\textsuperscript{273} D’Arcy Guerin Gue & Steven J. Fox, Growing Need for Data Standardization, Privacy Protection and Security, GUIDE TO MED. PRIVACY & HIPAA 110, 112 (2015).
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} Joseph L. Hall & Deven McGraw, For Telehealth to Succeed, Privacy and Security Risks Must Be Identified and Addressed, 33 HEALTH AFF. 216, 216 (2014).
\textsuperscript{277} See Sherman, supra note 27, at 1118.
\textsuperscript{278} Id. at 1131.
\textsuperscript{279} Winnike et al., supra note 13, at 54–55.
and security of certain health information\textsuperscript{280} and instructs the Department of Health and Human Services ("HHS") to create two comprehensive regulations, namely the Privacy Rule and the Security Rule.\textsuperscript{281} In 2009, Congress passed HITECH in an effort to strengthen the privacy and security of patient information.\textsuperscript{282} Most significantly, HITECH applied HIPAA’s privacy and security rules to the business associates of covered entities.\textsuperscript{283} HIPAA’s privacy and security protections preempt weaker state laws regarding the privacy and security of health information.\textsuperscript{284} States, however, are free to adopt laws that provide greater privacy and security protections.\textsuperscript{285} The Office for Civil Rights is tasked with enforcing the Privacy and Security Rules through voluntary compliance activities and civil money penalties.\textsuperscript{286}

The Privacy Rule protects the privacy of all individually identifiable health information, in any form or media, that is held or transmitted by a covered entity or its business associate.\textsuperscript{287} The Privacy Rule sets forth how and when personal health information ("PHI") can be used and disclosed.\textsuperscript{288} PHI is data that identifies the individual or provides a reasonable basis for identifying the individual and discloses (1) an individual’s past, present, or future mental or physical health; (2) an individual’s healthcare services; or (3) an individual’s past, present, or future payment for healthcare services.\textsuperscript{289} Individual identifiers include, but are not limited to, names, addresses, dates of birth, and social security numbers.\textsuperscript{290} Covered entities include, but are not limited to, health providers who transmit “health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA.”\textsuperscript{291} Business associates are people or organizations that perform

\textsuperscript{280} Id. at 55.
\textsuperscript{281} Sherman, supra note 27, at 1132.
\textsuperscript{282} Id.
\textsuperscript{283} Winnike et al., supra note 13, at 57–58.
\textsuperscript{284} Id. at 58.
\textsuperscript{285} Id.
\textsuperscript{287} Id.
\textsuperscript{289} Summary of the HIPAA Security Rule, supra note 286.
\textsuperscript{290} Id.
\textsuperscript{291} Id.
certain activities for covered entities, and such activities involve using or disclosing PHI.292 Whenever a covered entity engages the services of a business associate, the covered entity and the business associate must enter into a written business associate agreement.293 A business associate agreement must contain language regarding the confidential nature of PHI, as well as language instructing the business associate to implement certain privacy and security measures.294

The Security Rule implements the Privacy Rule as it pertains to PHI that is held or transmitted in electronic form (“e-PHI”).295 The Security Rule does not apply to PHI that is transmitted orally or in writing.296 In general, the Security Rule requires covered entities and their business associates to (1) protect the confidentiality, integrity, and availability of the e-PHI that they create, receive, maintain, and transmit; (2) identify and protect against reasonably anticipated threats to the security and integrity of e-PHI; (3) protect against reasonably anticipated impermissible uses and disclosures; and (4) maintain a compliant workforce.297 The Security Rule requires covered entities to adopt and implement reasonable and appropriate administrative, technical, and physical safeguard standards.298 The Security Rule recognizes that covered entities vary in size and resources, and therefore it does not dictate any specific administrative, technical, or physical safeguard measures.299 Furthermore, simply having technology in place that claims to be HIPAA compliant does not protect a provider from liability in the event of a security or privacy breach.300

The Security Rule requires that covered entities perform risk analysis’ so that they can determine which security measures are reasonable and necessary under their circumstances.301 Standards with implementation specifications are identified as either required or addressable.302 While required implementation specifications are mandatory, the Security Rule gives covered entities the ability to determine for themselves whether an addressable

292 Id.
293 Id.
294 Id.
295 Id.
296 Id.
297 Id.
298 Id.
299 Id.
300 See Lucton et al., supra note 19, at 36.
301 Summary of the HIPAA Security Rule, supra note 286.
302 Id.
implementation specification is reasonable and appropriate. Under the Security Rule, should a covered entity find an addressable implementation to be unreasonable and inappropriate, the covered entity may adopt alternative measures in order to achieve the purpose of the standard.

Under the Security Rule, the use of encryption is an addressable implementation specification. Encryption renders data files useless and indecipherable to everyone that does not have the necessary password to unlock or de-scramble the data. Encryption can be used to protect both stored data and data that is in-transit.

2. HIPAA and Its Progeny Are Insufficient to Protect Patients’ Privacy

HIPAA fails to protect the privacy of telepsychiatry patients. For instance, HIPAA does not provide mental health records any special or additional protection, with the exception of psychotherapy notes. Under HIPAA, in order for psychotherapy notes to be released, patient authorization is always required, even for treatment purposes. However, stored video-conferencing sessions are not considered psychotherapy notes. While HIPAA does not treat mental health records differently than other health records, each state has statutes that specifically address the privacy and security of mental health records. Some states even have statutes that address the privacy and security of records created as a result of telemedicine. “Because state laws regarding privacy and security are typically more stringent than HIPAA, they are not preempted.” As previously discussed in this Article, state variation stifles the expansion of telemedicine because of the administrative burdens that it creates. Having to comply with both federal and

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303 Id.
304 Id.
306 Lanterman, supra note 269, at 9.
308 Sherman, supra note 27, at 1133.
309 Id. at 1149.
310 Id. at 1143.
311 Id. at 1144.
312 Id. at 1145.
313 Id. at 1144–45.
state privacy and security standards is expensive, difficult, and time-consuming.\textsuperscript{314}

Furthermore, HIPAA’s Security Rule also fails to protect the privacy of telepsychiatry patients.\textsuperscript{315} While the Privacy Rule protects all forms of PHI, the Security Rule only protects e-PHI.\textsuperscript{316} According to the HHS website, e-PHI does not include video teleconferencing.\textsuperscript{317} The HHS website says that video teleconferencing is not e-PHI because the information being exchanged during a videoconference does not exist in electronic form before its transmission.\textsuperscript{318} The preamble to the Security Rule also states that videoconferencing is excluded from the Security Rule’s scope.\textsuperscript{319} Interestingly, the body of the Security Rule does not specifically exclude videoconferencing from its definition of electronic media.\textsuperscript{320} However, based on the Security Rule’s preamble and the HHS website, it appears as though the Security Rule does not apply to live telepsychiatry sessions because the data transmitted during a live telepsychiatry session does not exist in electronic form prior to its transmission.\textsuperscript{321}

However, even if the Security Rule was modified to protect live videoconferencing, the Security Rule would still be insufficient to protect patients’ privacy because the Security Rule does not require the encryption of telepsychiatry sessions.\textsuperscript{322} Because encryption is merely addressable and not required under the Security Rule, providers can avoid encrypting their computers by merely documenting why encryption is not reasonable or appropriate under the circumstances.\textsuperscript{323}

3. Solution: Amend HIPAA Privacy and Security Rules

For telepsychiatry to create greater access to mental healthcare, HIPAA’s Privacy and Security Rules must be amended to address the privacy

\textsuperscript{314} Gupta & Sao, supra note 106, at 403.
\textsuperscript{315} Sherman, supra note 27, at 1137.
\textsuperscript{316} Summary of the HIPAA Security Rule, supra note 286.
\textsuperscript{318} Id.
\textsuperscript{319} Id. at 1138.
\textsuperscript{320} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Id. at 1139.
\textsuperscript{323} Id.
and security of videoconferencing in the context of telepsychiatry. For instance, the Security Rule should be amended to protect live videoconferencing sessions.\(^{324}\) There is no valid reason to exclude live videoconferencing sessions from the Security Rule.\(^{325}\) Merely amending the Security Rule to include live video-conferencing sessions, however, is not enough to protect patients’ privacy. The Security Rule should also be amended to require encryption for all live and stored telepsychiatry sessions.\(^{326}\)

To further protect the privacy of telepsychiatry patients, the Privacy Rule should be amended to require informed consent to store videoconferencing sessions.\(^{327}\) Additionally, the Privacy Rule should also be amended to require patient authorization to disclose telepsychiatry sessions for any reason, just as it is required for psychotherapy notes.\(^{328}\) Furthermore, because state variation stifles interstate telemedicine due to the administrative burdens that it creates, psychiatrists who provide telepsychiatry services should only have to comply with one set of privacy and security laws.\(^{329}\) Therefore, HIPAA should be amended to preempt any and all state privacy and security laws as they relate to telepsychiatry.\(^{330}\)

In addition to amending HIPAA, organizations can minimize security risks by creating and maintaining a “culture of security.”\(^{331}\) To create a “culture of security,” organizations should implement strong policies regarding passwords, encryption, mobile devices, software updates, downloading, and non-work related internet-surfing, among other things.\(^{332}\) Organizations can also maintain a “culture of security” by educating themselves and their staff on the importance of data security and being sure to never place more emphasis on convenience than security. In fact, providing regular employee education programming is considered to be the most cost-effective security control that an organization can implement.\(^{333}\) Because even the best education programs cannot prevent every employee from violating an organization’s privacy and security policies, a fair and consistent sanction policy is necessary.

\(^{324}\) Id. at 1147.
\(^{325}\) Id.
\(^{326}\) Id.
\(^{327}\) Id. at 1149.
\(^{328}\) Id.
\(^{329}\) Id. at 1151.
\(^{330}\) Id. at 1150.
\(^{331}\) Lanterman, supra note 269, at 9.
\(^{332}\) Id. at 9–10.
\(^{333}\) Murphy, supra note 307, at 211.
to maintain a compliant workforce.\textsuperscript{334} Moreover, in order to minimize security risks, third-party vendors should be carefully vetted during the hiring process.\textsuperscript{335} Providers should also insist that all third-party vendor contracts include the ability to audit the vendor’s compliance with privacy and security laws.\textsuperscript{336}

**IV. CONCLUSION**

Telepsychiatry has the potential to provide quality mental health services to those desperately in need during a time when mental health professionals are in short supply.\textsuperscript{337} Unfortunately, the following barriers prevent telepsychiatry from reaching its full potential: (1) state regulation of the practice of telemedicine,\textsuperscript{338} (2) lack of reimbursement for telemedicine,\textsuperscript{339} and (3) privacy and security concerns.\textsuperscript{340} To remove these barriers, the federal government should create a national license to practice telepsychiatry and adopt comprehensive preemptive legislation regarding the practice of telepsychiatry. To encourage more psychiatrists to incorporate telepsychiatry into their practices, steps must be taken to make reimbursement for telepsychiatry less restrictive. Finally, in order for telepsychiatry to expand, patients must trust the privacy and the security of the technology that is being used.\textsuperscript{341} Because HIPAA fails to secure the privacy and security of both stored and transmitted videoconferencing, amendments to HIPAA must be made.\textsuperscript{342} Because of the stigma that still plagues individuals with mental illnesses, HIPAA should be further amended to provide additional privacy and security protections for telepsychiatry sessions.\textsuperscript{343}

Clearly, something must be done in order to address the mental health situation in this country. The solutions regarding regulation, reimbursement, and privacy suggested in this Article are reasonable and practical because they are narrowly tailored to address a nationwide problem and will not have a drastic impact on state governance or state revenue. Perhaps the success that telepsychiatry is currently experiencing with veterans and the VA will help to

\begin{itemize}
  \item Id. at 212.
  \item Lanterman, supra note 269, at 9.
  \item Id.
  \item Winnike et al., supra note 13, at 40.
  \item See supra Section III.A
  \item Myers, supra note 22, at 217.
  \item Sherman, supra note 27, at 1120.
  \item See id. at 1118–19.
  \item Id. at 1153.
  \item See id.
\end{itemize}
persuade the federal government to offer similar telepsychiatry services to the public. However, in order to expand telepsychiatry to the public, the way in which telepsychiatry is regulated must change. For the millions of Americans who suffer from mental illness and lack access to quality mental healthcare, the future cannot come soon enough.