ISSN 2634-5102

Title: Dobbs, Jaffee, HIPAA and Reproductive Privacy Protections

Author(s): Amélie Didda

Source: *University of St Andrews Law Journal* 6, no. 1 (June 2026): 35-46.

Published by: Institute of Legal and Constitutional Research, University of St Andrews

Stable URL: https://doi.org/10.15664/stalj.v6i1.3150

DOI: 10.15664/stalj.v6i1.3150

This work is protected under Creative Commons Attribution 4.0 International (CC BY 4.0) License 2020.

The author(s) retain copyright holding, having permitted the *University of St Andrews Law Journal* to distribute (publish) their work.

The *University of St Andrews Law Journal* is an Open-Access publication of the University of St Andrews, recorded by the ISSN National Centre for the UK. Published in partnership with the Institute of Legal and Constitutional Research, University of St Andrews.

Copyright @ 2026 University of St Andrews Law Journal

All use subject to:

https://creativecommons.org/licenses/by/4.0/

ISSN 2634-5102

ISSN 2634-5102

Dobbs, Jaffe, HIPAA and Reproductive Privacy Protections

By Amélie Didda

Introduction

Dobbs v. Jackson Women's Health Organization transferred final regulatory authority to "the people and their elected representatives", overruling the recognition of abortion as a constitutional right under the Fourteenth Amendment.[56] The Court held that abortion is not an interest deeply rooted in the nation's history and tradition and thus is exempt from due process protections.[57] The Court reframed abortion as a matter to be resolved through state governance rather than federal constitutional doctrine.

Dobbs did not meaningfully acknowledge the informational infrastructure necessary to enforce abortion regulation. In fact, *Dobbs* maintains that *Roe v. Wade* conflated the right to shield information from disclosure and the right to make personal decisions without government interference.[58] However, criminal or civil penalties, civil liability and professional enforcement mechanisms depend upon access to patient records, provider disclosures and mandated reporting systems. Enforcement of post-*Roe* abortion laws is therefore inseparable from access to reproductive health information.

The difference between the right to decide without government interference and the right to withhold information is analytically important. Even if abortion itself is no longer constitutionally protected, the evidentiary use of confidential medical communications raises separate concerns about professional ethics and the fair use of evidence in trials. As states rely more heavily on data-driven enforcement, there exists a doctrinal gap on how to address reproductive health data in post-*Roe* legal contexts.

This Article uses the term privilege to refer to an evidentiary rule that permits the holder to refuse to disclose and to prevent others from disclosing confidential communications in legal proceedings. Privilege operates specifically at the level of admissibility in court, unlike general privacy protections. The *Health Insurance Portability and Accountability Act of 1996* (HIPAA) regulated the disclosure of protected health information (PHI). However, it does not create a physician-patient evidentiary privilege – and importantly, was never intended to.[59] HIPAA specifically does not pre-empt certain types of state laws, including those that require reporting of death, injury, child abuse, birth, or that require public health surveillance, investigation or intervention.[60] Regardless, even improperly disclosed PHI can still be admissible in criminal or civil proceedings, subject to the

[56] *Dobbs v. Jackson Women's Health Organization* 597 US 215, 78–79 (2022).
[57] *Dobbs 597 US 215*, 285 (2022) (Thomas J concurring).
[58] *Dobbs* 597 US 215, 262 (2022).
[59] Jenna Phipps, "State of Confusion: The HIPAA Privacy Rule and State Physician-Patient Privilege Laws in Federal Question Cases," *Suffolk Journal of Trial and Appellate Advocacy* 12, no. 1 (2007): 159, https://dc.suffolk.edu/jtaa-suffolk/vol12/iss1/11/.
[60] U.S. Department of Health and Human Services, "Does the HIPAA Privacy Rule Preempt State Laws?," *HIPAA for Professionals FAQ*, last reviewed December 28, 2022, accessed February 11, 2026, https://www.hhs.gov/hipaa/for-professionals/faq/399/does-hipaa-preempt-state-laws/index.html.

Copyright © The Author(s)

CC BY 4.0

typical rules of evidence. Further, the digital age increasingly places reproductive health data outside of HIPAA's designated reach. Information held in electronic health record systems, consumer-facing digital health applications and period-tracking applications illustrate gaps in health privacy regulations.

This Article argues that the post-*Roe* legal landscape reveals concerning gaps in the regulatory privacy framework. Drawing on *Jaffee v. Redmond,* which recognized a federal psychotherapist-patient privilege under *Federal Rule of Evidence 501*, this Article maintains that reproductive health communications warrant comparable protection in federal proceedings.[61] This privilege would not constitutionalize abortion or eliminate mandatory reporting obligations. Instead, it would regulate admissibility in court and preserve the confidentiality necessary for effective medical care. It would also reaffirm confidentiality as an ethical norm.

Part I examines the consequences of *Dobbs* on information privacy, especially in the digital era, and the enforcement mechanisms that depend on reproductive health data. Part II analyses HIPAA's structural limits, highlighting the difference between regulating disclosure and evidentiary need in court. Part III introduces *Jaffee*, identifying the legal foundations required for recognizing new privileges under Rule 501 and how they could apply to a theoretical reproductive health information privilege. Part IV expands on a reproductive health evidentiary privilege tailored to the post-*Roe* environment and addresses counterarguments about federalism and the need for reporting mandates.

1. Dobbs and the Relevance of Information Privacy in Abortion Enforcement

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court rejected the notion that abortion falls within the Fourteenth Amendment's protection of liberty. It also argued that the "zone of privacy" precedent derived from the First, Third, Fourth, Fifth and Ninth Amendments did not include abortion.[62] The opinion repeatedly emphasized that the Constitution does not prohibit states from regulating abortion.[63]

Although *Roe* no longer protects abortion under an implied right to privacy, the question of patient information privacy was never addressed. The Court did not eliminate privacy protections for medical records. It instead assumed that ordinary privacy protections would remain intact. The reality is that reproductive health information has been consistently used to criminalize individuals who have received or provided abortion care or reproductive care in general. These types of prosecutions rely on evidence drawn from medical records, provider communications, laboratory results, hospital reporting systems and even personal digital communications; this includes text messages introduced in *Patel v. State*[64] and toxicology results used in the *Ex parte Ankrom*[65] prosecutions under Alabama's chemical endangerment statute. In each case, information generated within the context of seeking medical care or communicating medical issues was transformed into evidence of criminal

[61] *Jaffee v. Redmond* 518 US 1 (1996).
[62] *Dobbs* 597 US 215, 286 (2022) (Thomas J concurring).
[63] *Dobbs* 597 US 215, 224 (2022).
[64] *Patel v. State* 60 NE 3d 1041 (Ind Ct App 2016).
[65] *Ex parte Ankrom*, 152 So 3d 397 (Ala 2013).

Copyright © The Author(s) CC BY 4.0

activity. The confidentiality of medical and personal communications is ethically pressing. Existing law does not adequately protect individual medical confidentiality, especially post-*Roe*, where reproductive choices can trigger criminal investigations.

Since *Dobbs*, forty-five states and the District of Columbia have some form of mandatory abortion reporting.[66] These state reporting requirements thus fall within HIPAA's public health and reporting exceptions, raising privacy concerns about reproductive health data misuse. Further, sixteen states have enacted or enforced laws imposing criminal consequences for performing abortions, aiding or abetting abortion or violating gestational limits.[67] In abortion-related investigations, requests for medical records and related health information in search of evidence for potential legal violations are common.[68] A report covering the first year after *Dobbs* (June 24, 2022 - June 23, 2023) found that of 210 pregnancy-related cases, 121 involved information obtained or disclosed in a medical setting.[69] This includes cases that allege fetal harm or substance use during pregnancy. Evidently, criminal prosecution cases use medical information as evidence, demonstrating a clear, albeit concerning, pattern in the post-*Roe* context regarding abortion and wider reproductive health care.

2. Structural Limits of HIPAA

HIPAA's Privacy Rule establishes national standards governing the use and disclosure of PHI by covered entities, including health care providers and health plans.[70] The Rule generally forbids disclosure without individual patient consent,[71] but has exceptions: disclosures "required by law",[72] disclosures for law enforcement purposes,[73] and disclosures pursuant to judicial and administrative proceedings.[74] HIPAA regulates when covered entities can disclose information and enforces penalties for noncompliance. It does not govern a right to confidentiality, but a right to disclosure.

HIPAA lists a wide range of rules and their exceptions but imposes no limits on the scope of reporting statutes "required by law".[75] Rather, it permits disclosure to the extent required by such law.[76] *Dobbs* equally offers no safeguards. If the state has no "required by law" reporting mandates, HIPAA permits disclosures in response

[66] Guttmacher Institute, *Abortion Reporting Requirements, State Laws and Policies (as of January 2026)*, 2026, https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements.
[67] Human Rights & Gender Justice Clinic, *Criminalization and Punishment for Abortion, Stillbirth, Miscarriage, and Adverse Pregnancy Outcomes: Shadow Report to the UN Human Rights Committee for the Fifth Periodic Review of the United States* (Human Rights & Gender Justice Clinic, CUNY School of Law, If/When/How, Pregnancy Justice, et al., September 12, 2023), accessed February 11, 2026, https://www.law.cuny.edu/academics/clinical-programs/hrgj/projects/report-u-s-criminalization-of-abortion-and-pregnancy-outcomes/.
[68] Ellen Wright Clayton, Peter J. Embí, and Bradley A. Malin, "Dobbs and the Future of Health Data Privacy for Patients and Healthcare Organizations," *Journal of the American Medical Association* 328, no. 2 (2022): 156.
[69] Casey Hunter, "When Prenatal Care Becomes a Crime," *Fordham Law Review* 93 (2025): 2273.
[70] Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R pt. 160, pt. 164 subpt. E.
[71] 45 C.F.R §§ 164.502(a), 164.508(a)
[72] 45 C.F.R § 164.512(a).
[73] 45 C.F.R § 164.512(f).
[74] 45 C.F.R § 164.512(e).
[75] 45 C.F.R § 164.512(a)(1).
[76] *Ibid.*

Copyright © The Author(s) CC BY 4.0

to court-ordered subpoenas or warrants if specific safeguards are met.[77] These safeguards are a good-faith effort to give notice to the individual whose PHI will be released, and documentation showing reasonable effort to obtain a qualified protective order.[78] The notice window may be the only opportunity for a patient to prevent disclosure. However, a court order, warrant or grand jury subpoena for criminal investigations under the law enforcement exception bypass notice requirements.[79] In abortion-related prosecutions, this is critical. The patient is given no chance to object or exercise their rights. HIPAA thus withdraws as a protective barrier where the state requests information or requires reporting. It is also simply poorly equipped to handle protecting PHI in a post-*Roe* environment.

Importantly, most states have historically conducted abortion statistics surveillance as part of a national public health initiative spearheaded by the Centers for Disease Control and Prevention (CDC).[80] This data collection is considered pivotal to public health research on reproductive health.[81] State submission to the CDC is entirely voluntary. However, as state-level abortion reporting mandates expand in post-*Roe*, the context surrounding abortion data collection shifts. The United States' privacy regime recognizes that privacy infringement can be justified when the data is used to meet public health goals.[82] Although abortion surveillance data is generally submitted to the CDC and state health departments, new reporting requirements operate within broader state regimes that can include civil or criminal penalties for abortion care. Requirements differ by state, but reporting mandates can ask for detailed information such as payment method, gestational age, method of abortion, reasons for the abortion, fetal viability and provider compliance.[83] HIPAA demands that disclosures be limited to what is "minimally required", which can encompass the name of the medical facility, the clinician providing care, the patient's demographic characteristics, residence information and the type of abortion provided.[84] Despite the exclusion of patient names, this standard does not eliminate identification risk, particularly in smaller communities or states with few providers. Consequently, the privacy protections afforded by HIPAA may be narrower than its formal requirements suggest.

The digitisation of health records has significantly increased the speed and scope at which medical information can be accessed and transmitted. Although this improves efficiency, it also expands the potential for sensitive health data exposure. HIPAA was enacted in 1996, long before the widespread integration of electronic health record (EHR) systems. Despite efforts to modernize HIPAA, it does not offer adequate digital health privacy protections. Beyond statutory reporting requirements, EHR systems thus raise equally concerning confidentiality questions. EHR systems are designed for access by medical staff to facilitate faster care.[85] Although HIPAA

---

[77] 45 C.F.R §§ 164.512(e)(1), 164.512(f)(1).
[78] 45 C.F.R § 164.512.
[79] 45 C.F.R § 164.512(f)(1)(ii)(A)(B).
[80] Centers for Disease Control and Prevention, *Abortion Surveillance System*, accessed February 11, 2026, https://www.cdc.gov/reproductive-health/data-statistics/abortion-surveillance-system.html.
[81] Anya E. R. Prince, "Abortion Surveillance," *Journal of Gender, Race & Justice* 28 (2025): 606.
[82] Prince, "Abortion Surveillance," 607.
[83] Guttmacher Institute, "Abortion Reporting Requirements."
[84] *Ibid.*
[85] Clayton, Embí, and Malin, "Dobbs and the Future of Health Data Privacy," 156.

Copyright © The Author(s) CC BY 4.0

requires limits to who can access this kind of information,[86] internal access to sensitive reproductive health data may be broader than what patients anticipate. Sensitive reproductive information – the kind disclosed in confidential communications with a physician – can be stored, searched and transmitted with ease. A physician searching for one patient's information can inadvertently encounter someone else's information.[87] In the post-*Roe* environment where reproductive choices can trigger criminal investigations, the extent to which sensitive information can be accessed and shared takes on a heightened importance.

HIPAA applies only to covered entities and their business associates. Unless officially provided by a hospital or health care provider, many digital health applications – like period-tracking apps – fall outside that framework. Controlled by technology companies rather than health care entities, these platforms are not subject to HIPAA's restrictions on disclosure. As demonstrated by the 2020 Flo Health case, data can be shared with third parties or released in response to legal process.[88] Users input detailed, personal reproductive data into mobile applications: menstrual cycles, sexual activity, ovulation timing, symptoms and health concerns are all examples of said inputs. The data practices of these applications are primarily governed by general consumer protection law and their own privacy policies – and most people do not read the fine print.

There are already numerous reports that women who seek or have abortions can be identified by examining the data they store in personal apps or by the information they seek.[89] If this kind of consumer-generated data can be used to identify individuals who seek abortion care, then it can be inferred that the "minimally necessary" information under HIPAA-compliant disclosure may also carry identification risks.

Reproductive privacy is evidently no longer confined to the typical physician-patient relationship. Historically, sensitive reproductive information primarily resided within communications between physician and patient. Today, individuals seek health advice through AI tools and enter reproductive data into digital platforms that exist outside of the official medical system. These developments complicate existing privacy protections. A general physician-patient privilege, in theory, would not extend to most of this digitally generated data. Even where traditional confidentiality rules apply, digital trails may exist elsewhere and remain accessible. Reform efforts must account for this broader data environment and not just the physician-patient relationship. At the same time, this reality reinforces the need for trust within structured medical settings. In an increasingly digital landscape, the physician's office may remain one of the few settings where meaningful privacy safeguards can be reliably enforced.

In 2024, the former Biden Administration attempted to address growing reproductive health privacy concerns by introducing the Final Rule[90] to the HIPAA Privacy Rule. The Final Rule prohibited disclosure of PHI for the purpose of investigating or prosecuting individuals seeking, obtaining, providing, or facilitating lawful

---

[86] 45 C.F.R § 164.506.
[87] Clayton, Embí, and Malin, "Dobbs and the Future of Health Data Privacy," 156–157.
[88] Bridget G. Kelly, Ornsiree Junchaya, Jie Min, and Michael Burdan, "Safeguarding Autonomy: Examining the Complexities and Implications of Under-Regulated Period-Tracking Apps and Paired Devices in a Post-Roe Landscape," *Contraception* (2025): 110981.
[89] Clayton, Embí, and Malin, "Dobbs and the Future of Health Data Privacy".
[90] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed Reg 32976 (26 April 2024).

Copyright © The Author(s) CC BY 4.0

reproductive health care.[91] It also required covered entities to obtain attestations from requesters that PHI would not be used for such prohibited purposes.[92] The Rule reflected an acknowledgement that reproductive health information had become uniquely vulnerable after the *Dobbs* decision.

However, most of the Final Rule was vacated by a federal district court in June 2025, and the Fifth Circuit later dismissed the government's appeal in September 2025.[93] Even in full effect, the Rule did not create an evidentiary privilege. It would have regulated disclosure but not rendered improperly disclosed information inadmissible in court. The Final Rule represents an important but incomplete reform. Regularly privacy alone is unstable and can be rescinded, narrowed or invalidated. This highlights another structural limit of HIPAA. The statute governs when and how PHI may be disclosed but lacks authority over admissibility once information enters court proceedings. Federal common law does not recognize a general physician-patient and thus improperly disclosed health information is not excluded from federal criminal trials on HIPAA grounds. As a result, even strict regulatory compliance cannot guarantee that reproductive health information, once disclosed, will be shielded from use in litigation. Regulatory protections can reduce disclosure risk, but they remain subject to change. They do not provide a strong enough barrier against the evidentiary use of reproductive health information.

3. Jaffee v. Redmond and New Privileges

Federal Rule of Evidence 501 provides that, unless otherwise required by the Constitution, another federal statute or Supreme Court rule, new privileges shall be "governed by the principles of the common law as they may be interpreted [...] in the light of reason and experience".[94] Thus, new privileges must be justified by common law and public policy.

In *Jaffee v. Redmond*, the Supreme Court recognised a federal psychotherapist-patient privilege under Rule 501.[95] The Court relied on three principal points to make its case. First, it observed that nearly every state had recognized some form of psychotherapist privilege at the time of the decision.[96] The Court used this widespread consensus to argue that the privilege was already favoured at common law.[97] Second, the Court emphasized that effective psychotherapy depends primarily on trust. As one Advisory Committee noted, "among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely".[98] Patients must feel free to disclose deeply intimate and personal information without fear of later disclosure in court proceedings. Third, the Court reasoned

---

[91] HIPAA Privacy Rule, 89 Fed Reg 33000 (26 April 2024).
[92] HIPAA Privacy Rule, 89 Fed Reg 32990 (26 April 2024).
[93] *Purl v. U. S. Dep't of Health & Hum. Servs*., No. 2:24-CV-228-Z (N. D. Tex. June 18, 2025), appeal dismissed, No. 25-10743 (5th Cir. Sept. 10, 2025).
[94] Federal Rule of Evidence 501.
[95] *Jaffee* 518 US 1, 15.
[96] *Jaffee* 518 US 1, 12–13.
[97] *Ibid*.
[98] Advisory Committee's Note to Proposed Rule 504, Federal Rules of Evidence 56 FRD 183 (1972).

Copyright © The Author(s) CC BY 4.0

that protecting the mental health of the citizenry serves a public good of “transcendent importance”.[99]

Most importantly, *Jaffee* rejected a case-by-case approach to the “balance” test: weighing a patient’s interest in confidentiality against the evidentiary need for disclosure. The Court acknowledged that a privilege reliant on this method would undermine predictability and consequently undermine the effectiveness of such a privilege. 45 Privileges operate as exceptions to the truth-seeking purpose of courts because they benefit society. They exclude relevant evidence to protect relationships that are pivotal to day-to-day life. Attorney-client privilege preserves the legal system; spousal privilege protects marital harmony; psychotherapist privilege safeguards mental health treatment. Jaffee demonstrates that federal courts have concluded that public health and social welfare interests justify limiting evidentiary disclosure through privilege doctrine in specific contexts.

4. Reproductive Health Care and the Case for Privilege

Reproductive health care – including abortion, miscarriage management, prenatal care, fertility treatment and postpartum services – often requires disclosure of intimate personal information. Patients may reveal sexual history, contraceptive use, pregnancy intentions, substance use, partner violence, or financial burdens.

Emerging reports suggest that fear of criminal investigation or mandatory reporting mandates can deter some individuals from seeking care[100] or from disclosing relevant, important information to providers.[101] In states where reproductive choices have led to prosecution, patients can reasonably assume that medical settings are potential pathways to legal action. As with *Jaffee*, predictability matters. Trust is maintained and honesty preserved if patients know for certain that disclosed communications cannot later be used against them in court. Reduced candour can delay treatment, limit diagnosis, and undermine overall public health objectives.

With modification, the logic that drove the *Jaffee* privilege can extend to reproductive health care. Many states do recognize some form of physician-patient privilege, though its scope and exceptions vary.[102] While consensus is less uniform than the one the court presented in *Jaffee*, it nevertheless reflects a judgment that medical confidentiality serves important legal and social interests. Effective reproductive care also depends on trust. Patients seeking abortion care, mental health support after miscarriage, or substance use counseling during or after pregnancy must be able to speak openly with their providers. Confidentiality is thus foundational to comprehensive care. The public interest in maternal and perinatal health further supports strong protections. Access to comprehensive reproductive care boosts the economy, whereas poor perinatal care has severe financial

[99] *Jaffee* 518 US 1, 11.
[100] Molly McNulty, “Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses,” *New York University Review of Law & Social Change* 16, no. 2 (1987): 277–320; Anna E. Austin, Rebecca B. Naumann, and Elizabeth Simmons, “Association of State Child Abuse Policies and Mandated Reporting Policies With Prenatal and Postpartum Care Among Women Who Engaged in Substance Use During Pregnancy,” *JAMA Pediatrics* 176, no. 11 (2022): 1123–1130, https://doi.org/10.1001/jamapediatrics.2022.3396.
[101] McNulty, “Pregnancy Police,” 302 (quoting *Help Is Hard to Find for Addict Mothers*, *Los Angeles Times*, December 12, 1986, J4).
[102] Congressional Research Service, “Federal Rule of Evidence 501 and Privilege Law,” LSB11347 (2023), https://www.congress.gov/crs_external_products/LSB/HTML/LSB11347.html.

Copyright © The Author(s) CC BY 4.0

consequences.[103] When legal systems permit the use of medical information in criminal proceedings, they risk discouraging patients from seeking appropriate treatment.

This concern is not hypothetical. Laws such as Alabama's Chemical Endangerment Law have been used to prosecute pregnant individuals whose children test positive for substances since the 1980s.[104] This includes cases involving otherwise healthy births. Local prosecutors have treated prenatal drug use as a criminal issue rather than a public health one.[105] Further, health data becomes a tool for criminal enforcement. Critics argue that these prosecutions deter prenatal care and disproportionately affect vulnerable populations.

A reproductive health data privilege would not resolve broader moral or regulatory debates surrounding abortion. Rather, it would address whether excluding confidential medical communications from evidentiary use would preserve trust in clinical care and improve public health. This argument is not about shielding unlawful conduct but about protecting the integrity of medical treatment systems.

The case of Crystal Armstead, an Iraqi war veteran, under Alabama's Chemical Endangerment law, illustrates this issue.[106] Her newborn tested positive for trace substances allegedly used months prior to pregnancy awareness.[107] Hospital reporting obligations triggered law enforcement involvement; officers then accessed her medical records and used that information to build a case against her.[108] A year after giving birth to a healthy baby, Armstead was arrested.[109]

Critics of mandatory reporting regimes like these argue that such practices can deter pregnant individuals from seeking care or disclosing substance use to their providers.[110] Further research suggests that fear of criminal consequences discourages prenatal treatment rather than encourages it.[111] The broader issue is whether confidential medical communications should later be admissible in court proceedings rather than whether reporting statutes should exist. Evidently, the medical information necessary for prenatal care is effective evidence for prosecution.

As the Court observes in *Jaffee*, "it makes little sense to discourage individuals from seeking health care at

---

[103] Hunter, "When Prenatal Care Becomes a Crime," 2298–2305.
[104] Kathleen Adams, "Chemical Endangerment of Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights," *Alabama Law Review* 65, no. 5 (2014): 1353–1374.
[105] Seema Mohapatra, Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy, 26 Wisconsin Journal of Law, Gender & Society 241, 253–54 (2011) ("Pregnant women cannot continue to face the risk that they will be arrested, committed, incarcerated, confined, or otherwise detained due to drug use during pregnancy.").
[106] Cary Aspinwall, "These States Are Using Fetal Personhood to Put Women Behind Bars," The Marshall Project, July 25, 2023, https://www.themarshallproject.org/2023/07/25/pregnant-women-prosecutions-alabama-oklahoma.
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] J. R. McTavish, M. Kimber, K. Devries, M. Colombini, J. C. D. MacGregor, C. N. Wathen, A. Agarwal, and H. L. MacMillan, "Mandated Reporters' Experiences with Reporting Child Maltreatment: A Meta-Synthesis of Qualitative Studies," *BMJ Open* 7, no. 10 (2017): e013942, https://doi.org/10.1136/bmjopen-2016-013942; J. R. McTavish, M. Kimber, K. Devries, M. Colombini, J. C. D. MacGregor, C. N. Wathen, and H. L. MacMillan, "Children's and Caregivers' Perspectives about Mandatory Reporting of Child Maltreatment: A Meta-Synthesis of Qualitative Studies," *BMJ Open* 9, no. 4 (2019): e025741, https://doi.org/10.1136/bmjopen-2018-025741.
[111] *Ibid.*

Copyright © The Author(s) CC BY 4.0

the time when their problems may be the most treatable" by threatening later disclosure of their communications for prosecution.[112] The context here differs from psychotherapy, but the principle is similar. If patients believe that what they disclose for medical treatment can be used against them in a court of law, effective care suffers.

A reproductive health evidentiary privilege in federal proceedings could be carefully defined. It could protect confidential communications between a patient and a licensed health care provider relating to reproductive health diagnosis or treatment. It could preserve existing mandatory reporting requirements and allow for patient waiver. Such a privilege would not prevent states from regulating abortion or enforcing reporting statutes. It would simply exclude covered communications from federal evidentiary use absent waiver or a recognized, valid exception. The proposal thus does not change state regulatory authority.

The limits of federal privilege must also be acknowledged. Federal privilege law strictly governs federal proceedings.[113] In civil cases in which state law supplies the rule of decision, state privilege rules apply.[114] Absent constitutional backing, a federal reproductive health privilege would not automatically bind state courts. *Roe v. Wade* was strong because it established a federal and constitutional right to abortion.

The reach of such a privilege would not be trivial. State cases involving federal questions may be removed to federal court. More importantly, a privilege would directly restrict federal investigations and prosecutions. Federal recognition also carries normative weight. As *Jaffee* itself demonstrated, the Supreme Court shaped evidentiary principles nationwide by formally recognizing the social value of confidentiality in a psychotherapist-patient relationship. Although many reproductive health prosecutions occur in state courts, a federal adoption could still have an impact at the state level.

A point of contention is that such a privilege would obstruct investigations of child abuse or fetal harm. That concern conflates disclosure with admissibility. Mandatory reporting obligations operate during care. A privilege governs the later stage of whether confidential communications may be used as evidence in court. Just as the psychotherapist-patient privilege recognized in *Jaffee* did not eliminate reporting duties, a reproductive health privilege need not do so.

Under Federal Rule of Evidence 501, privilege law is developed "in the light of reason and experience".[115] *Jaffee* required a demonstrated judgment that confidentiality was essential to effective treatment and served the public interest. The same inquiry applies in the reproductive health case. The argument is not grounded in moral consensus about abortion. This Article maintains that protecting confidential reproductive health communications promotes effective medical care and serves broader public welfare interests.

[112] *Jaffee* 518 US 1, 11-12.
[113] Federal Rule of Evidence 501.
[114] *Ibid.*
[115] *Ibid.*

Copyright © The Author(s) CC BY 4.0

Conclusion: Privacy, Tradition and the Proper Doctrinal Response

Dobbs grounded its decision in history and tradition and rejected abortion as a component of liberty protected by due process. The decision did not address the informational requirements that make abortion regulation possible. Post-*Roe* enforcement depends on access to provider communications, medical records and systems. Reproductive health information has therefore become pivotal to investigation and criminalization.

This Article has argued that the most pressing legal vulnerability in the post-*Roe* landscape is the absence of predictable, enforceable protection of medical communications. HIPAA regulates PHI disclosure. The 2024 Final Rule – now vacated – attempted to narrow these categories of disclosure. However, statutory and administrative reforms operate at the level of compliance and agency enforcement. They do not constrain courts once information has been disclosed.

For these reasons, an evidentiary privilege is not redundant. It addresses a distinct doctrinal gap, regulating the use of evidence rather than just its disclosure. Privilege constrains judicial power during litigation. A narrowly tailored reproductive health privilege under Federal Rule of Evidence 501 would ensure that confidential communications made for medical diagnosis or treatment are not transformed into tools of prosecution. In this way, privilege is predictable – a characteristic that regulatory mechanisms do not have.

Jaffee v. Redmond[116] demonstrates that where confidentiality is essential to effective treatment and public welfare, federal courts may recognize evidentiary privilege under Rule 501. Reproductive health care presents conditions analogous in structure. Candid disclosure is necessary for reproductive health care; fear of legal consequences may deter treatment, and public health consequences extend beyond individual cases.

Dobbs relied on a historical analysis to resolve the question of due process. Constitutional interpretation, however, has never been static. Decisions such as *Loving v. Virginia*[117] and *Obergefell v. Hodges*[118] reflect how the Court can consider the Constitution in tandem with changing social conditions. In this same vein, privacy has dramatically transformed. The information world of 2026 bears little resemblance to that of 1868. Digital storage, electronic health records, consumer-facing applications and artificial intelligence have reshaped what it means to keep medical information fully confidential and prevent misuse.

A reproductive health privilege would not re-constitutionalize abortion. It would address the fragility of reproductive privacy. In a legal environment where enforcement depends on health data, a privilege provides one structured means of addressing the relationship between confidentiality, medical care and criminalization.

---

[116] *Jaffee* 518 US 1, 9–13.
[117] *Loving v. Virginia* 388 US 1 (1967).
[118] *Obergefell v. Hodges* 576 US 644 (2015).

Copyright © The Author(s) CC BY 4.0

ISSN 2634-5102

BIBLIOGRAPHY

Adams, Kathleen. “Chemical Endangerment of Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women’s Rights.” *Alabama Law Review* 65, no. 5 (2014): 1353–1374.

Advisory Committee’s Note to Proposed Rule 504, Federal Rules of Evidence. 56 F.R.D. 183 (1972).

Aspinwall, Cary. “These States Are Using Fetal Personhood to Put Women Behind Bars.” *The Marshall Project*, July 25, 2023. https://www.themarshallproject.org/2023/07/25/pregnant-women-prosecutions-alabama-oklahoma.

Austin, Anna E., Rebecca B. Naumann, and Elizabeth Simmons. “Association of State Child Abuse Policies and Mandated Reporting Policies with Prenatal and Postpartum Care Among Women Who Engaged in Substance Use During Pregnancy.” *JAMA Pediatrics* 176, no. 11 (2022): 1123–1130. https://doi.org/10.1001/jamapediatrics.2022.3396.

Centers for Disease Control and Prevention. *Abortion Surveillance System*. Accessed February 11, 2026. https://www.cdc.gov/reproductive-health/data-statistics/abortion-surveillance-system.html.

Clayton, Ellen Wright, Peter J. Embí, and Bradley A. Malin. “Dobbs and the Future of Health Data Privacy for Patients and Healthcare Organizations.” *Journal of the American Medical Association* 328, no. 2 (2022): 156.

Congressional Research Service. “Federal Rule of Evidence 501 and Privilege Law.” LSB11347 (2023). https://www.congress.gov/crs_external_products/LSB/HTML/LSB11347.html.

Dobbs v. Jackson Women’s Health Organization. 597 U.S. 215 (2022).

Ex parte Ankrom. 152 So. 3d 397 (Ala. 2013).

Federal Rule of Evidence 501.

Guttmacher Institute. *Abortion Reporting Requirements: State Laws and Policies*. 2026. https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements.

HIPAA Privacy Rule to Support Reproductive Health Care Privacy. 89 Fed. Reg. 32976 (April 26, 2024).

Human Rights & Gender Justice Clinic. *Criminalization and Punishment for Abortion, Stillbirth, Miscarriage, and Adverse Pregnancy Outcomes: Shadow Report to the UN Human Rights Committee for the Fifth Periodic Review of the United States*. CUNY School of Law; If/When/How; Pregnancy Justice, September 12, 2023. Accessed February 11, 2026. https://www.law.cuny.edu/academics/clinical-programs/hrgj/projects/report-u-s-criminalization-of-abortion-and-pregnancy-outcomes/.

Hunter, Casey. “When Prenatal Care Becomes a Crime.” *Fordham Law Review* 93 (2025): 2273.

Jaffee v. Redmond. 518 U.S. 1 (1996).

Kelly, Bridget G., Ornsiree Junchaya, Jie Min, and Michael Burdan. “Safeguarding Autonomy: Examining the Complexities and Implications of Under-Regulated Period-Tracking Apps and Paired Devices in a Post-Roe Landscape.” *Contraception* (2025): 110981.

Loving v. Virginia. 388 U.S. 1 (1967).

McNulty, Molly. “Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses.” *New York University Review of Law & Social Change* 16, no. 2 (1987): 277–320.

Copyright © The Author(s) CC BY 4.0

McTavish, J. R., M. Kimber, K. Devries, M. Colombini, J. C. D. MacGregor, C. N. Wathen, A. Agarwal, and H. L. MacMillan. "Mandated Reporters' Experiences with Reporting Child Maltreatment: A Meta-Synthesis of Qualitative Studies." *BMJ Open* 7, no. 10 (2017): e013942. https://doi.org/10.1136/bmjopen-2016-013942.

McTavish, J. R., M. Kimber, K. Devries, M. Colombini, J. C. D. MacGregor, C. N. Wathen, and H. L. MacMillan. "Children's and Caregivers' Perspectives about Mandatory Reporting of Child Maltreatment: A Meta-Synthesis of Qualitative Studies." *BMJ Open* 9, no. 4 (2019): e025741. https://doi.org/10.1136/bmjopen-2018-025741.

Mohapatra, Seema. "Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy." *Wisconsin Journal of Law, Gender & Society* 26 (2011): 241–254.

Mueller, Christopher B., Laird C. Kirkpatrick, and Liesa Richter. *Evidence*. 6th ed. New York: Wolters Kluwer, 2018.

Obergefell v. Hodges. 576 U.S. 644 (2015).

Patel v. State. 60 N.E.3d 1041 (Ind. Ct. App. 2016).

Phipps, Jenna. "State of Confusion: The HIPAA Privacy Rule and State Physician-Patient Privilege Laws in Federal Question Cases." *Suffolk Journal of Trial and Appellate Advocacy* 12, no. 1 (2007): 159. https://dc.suffolk.edu/jtaa-suffolk/vol12/iss1/11/.

Prince, Anya E. R. "Abortion Surveillance." *Journal of Gender, Race & Justice* 28 (2025): 606.

Standards for Privacy of Individually Identifiable Health Information. 45 C.F.R. pts. 160, 164 subpt. E.

U.S. Department of Health and Human Services. "Does the HIPAA Privacy Rule Preempt State Laws?" HIPAA for Professionals FAQ. Last reviewed December 28, 2022. Accessed February 11, 2026. https://www.hhs.gov/hipaa/for-professionals/faq/399/does-hipaa-preempt-state-laws/index.html.

Copyright © The Author(s) CC BY 4.0