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OPENING REMARKS BY THE 2025-2026 MANAGING EDITORS

As the academic year draws to a close, we are proud to present the first issue of Volume 6, our official volume of the academic year and largest publication yet. Our commitment to publishing work beyond conventional legal topics highlights underexplored areas of law and demonstrates their importance for rigorous academic inquiry.

As we work to ensure the Journal's continued success, we have undergone extensive editorial recruitment and training, while upholding a double-blind peer review process that ensures the professional quality of our output. Drawing on the contributions of undergraduate editors and postgraduate MLitt reviewers, this rigorous process generates in-depth, constructive feedback for our authors. We are grateful to our editors and reviewers for their dedication and effort.

Opening this volume are three articles that cover both timely and theoretical legal issues. The first article revisits H.L.A. Hart's legal positivism and proposes a new interpretation. The second article investigates the United Nations Convention on the Law of the Sea, with a particular focus on the United States. The final article considers medical confidentiality through a legal case study on reproductive rights. This issue, shaped by contributions across the St Andrews community, reflects our interdisciplinary character and encourages legal discussions across the university.

Alongside these articles, we look forward to publishing our second issue, which will likewise feature a wide range of legal topics contributed by authors both within and beyond St Andrews, reflecting the Journal's growing reach across the United Kingdom and internationally.

As our time in these roles concludes, we want to thank our editors for their hard work and commitment to the journal this year. We are especially grateful for the support of the Institute of Legal and Constitutional Research and its co-director, Professor Caroline Humfress, who has overseen our development. We can't wait to see how the Journal continues to grow and flourish in the coming years.

Yours faithfully,

Chai Ho — **Editor-in-Chief, 2025-26**

Phoebe Ray — **Journal Manager, 2025-26**

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Conventions, Disagreements, and (Hart's) Inclusive Legal Positivism

By Boyong Zhou

Introduction

In H.L.A. Hart's legal positivism, the rule of recognition is a rule that serves as an institutional check to identify the various sources of law and to ensure that laws are legally valid and binding. This rule provides us with a substantive understanding of two general theses that legal positivism commits to: the Social Fact Thesis and the Conventionality Thesis. The former claims that law originates from and is essentially a social fact. The latter states that the criteria for the legal validity of a legal system are settled by conventions held by legal officials, understood as the convergence of their beliefs and behaviours. According to Hart, the rule of recognition is both the basic social fact that makes certain rules part of the law and the very convention adopted by officials. One of the most prestigious critics of Hart (and thus of legal positivism), Ronald Dworkin, however, argues that the rule of recognition (hereinafter RoR) must be rejected because there are valid legal principles that it fails to recognize as part of the law. Furthermore, he argues that there are theoretical disagreements over 'grounds of law', which would undermine the social convention that officials are subject to and thus destroy RoR itself.

In response, in the postscript of his *The Concept of Law*, Hart describes his positivism as 'soft positivism' (i.e., inclusive positivism), according to which, in every conceptually possible legal system, there could be norms that are ascribed legal validity solely because of their moral content, rather than through the institutional check sustained by RoR. Specifically, legal principles can be incorporated into the rule of recognition and thus become part of the law without compromising its social nature. This statement is deemed the Incorporation Thesis, and inclusive positivism is the view that adopts this thesis. To what extent Hart's inclusive positivism successfully responds to Dworkin's criticism remains a question often disputed within the philosophy of law.

In this article, I will defend Hart against Dworkin's objections and answer this question by proposing a specific reading of the Incorporation Thesis, namely that the incorporation of moral norms is a necessary but not sufficient condition for legal validity. I will argue for the following two claims:

(A) Incorporating legal principles into legal validity criteria does not harm the Social Fact Thesis.
Therefore,
(B) Such incorporation is perfectly compatible with RoR as a social convention.

Then, I will respond to a potential objection from Andrei Marmor that can support Dworkin's criticism. This objection claims that inclusive positivism is false because the notion of convention it holds is conceptually wrong: inclusive positivists mistakenly think that within convention there is a gap between a rule and its application, which can be filled by moral or political content. However, there is no such gap, because a convention is nothing other than *a certain set of rules and their application*. Hence, whenever there are legal interpretation

disputes among judges, the contents of their dispute lie outside the scope of the convention. And if the convention could not address legal disputes among judges because they lie outside its scope, the Incorporation Thesis is wrong. This is because what validates laws in legal interpretation disputes is not the convention, as it does not exist there. This objection, therefore, yields the same result as Dworkin's idea of theoretical disagreement over grounds of law, which is that the social convention that positivists insist on is undermined.

By replying to this objection, I propose a new distinction that can be made in uncertain cases of legal interpretation. This distinction is one between what RoR (i.e., the convention) is and what it should be taken to be. I will argue that this new distinction would avoid Dworkin's criticism as well as Marmor's attack on the conceptual mistake of clarifying the convention and would lead to my qualified reading of the Incorporation Thesis stated above. For any norm N to be part of the law, it is necessary but not sufficient for N to meet certain moral requirements. Finally, my paper argues that, given my reading of the Incorporation Thesis, the social nature of the convention could be secured even if legal principles were validated as laws in virtue of their content alone.

1. The Foundation

1.1 The rule of recognition

I begin with a brief illustration of the concepts covered in this essay. All kinds of legal positivism hold two fundamental theses: the Social Fact Thesis and the Conventionality Thesis. According to the Social Fact Thesis, law is essentially a social fact in the sense that anything called 'the law' has properties that refer solely to a social fact, which, in turn, explain the criteria of legal validity, the existence of legal rules, and finally a legal system. Now, what is the basic social fact that is essential to explain all these? According to Hart, it is RoR, which is a higher-order law of 'the law'. It provides law identification criteria through which specific social rules are recognised as laws. As he puts it, RoR

> *"specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group."*[1]

In his view, RoR identifies sources of the law and establishes criteria for legal validity. For a system to be appropriately called a legal system, it must contain RoR to identify the specific social norms that constitute its rules, thereby determining its relevant criteria of legal validity.[2] In other words, only when RoR establishes the criteria for identifying the law can a legal system apply its norms and validity.

The fact that RoR makes social rules legally valid, in turn, leads us to the above Conventionality Thesis, which holds that the criteria for legal validity are established by social convention among legal officials. This can be explained as follows: Hart distinguishes 'the internal aspects of rules' from 'the external aspects of rules'.[3] The

[1] H.L.A. Hart, "Law as the Union of Primary and Secondary Rules," in *Classic Readings and Cases in the Philosophy of Law*, edited by Susan Dimock (New York: Routledge, 2007), 59.
[2] H.L.A. Hart, *The Concept of Law*. 3rd ed. (Oxford: Oxford University Press, 2012), 92.
[3] *Ibid*., 88-89.

latter is made by an external observer of a legal system who does not consider herself to have reason to regard its rules as a common standard regulating her behaviour. Instead, she would only make judgments that

> *"record the regularities of observable behaviour in which conformity with the rules [of a legal system] partly consists, and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met."*[4]

In short, judgments about a legal system made by such an observer are descriptive and inform that (i) a group of people obey sets of rules; (ii) these rules are consistently enforced and efficacious; and (iii) the consequences of deviant behaviour are predictable. On the other hand, the former, i.e., the internal aspect of rules, is not derived from any descriptive perspective, such as that of an observer. Instead, this aspect is claimed by a participant who views the rules of a legal system as reason-giving, used to justify, evaluate, and criticize deviant behaviours against the common standard of behaviour regulated by those rules. Therefore, the judgments such a participant would make are not merely those concerning the efficacy of laws, obedience to laws, and the predictability of disobedience as the above external observer would claim. They are rather concerned with the validity of laws and are non-descriptive, providing people with reasons to accept rules as binding and to criticize those who disobey them.[5]

On Hart's view, the internal aspect of rules is necessary for the existence of RoR and for a social convention. There would be no convention on X if X-ing were merely a behavioural convergence. X-ing constitutes a convention only if (A) X-ing is accepted as a reason to regulate behaviour, (B) X-ing is regarded as a common standard of action, and (C) non-X-ing is evaluated critically and would result in punishment. For example, a group of people prefers drinking a Coke while eating a hamburger. This is a common behavioural convergence. However, from the internal perspective we have introduced now, drinking a Coke while eating a hamburger will become a convention only if people view not doing so as grounds for criticism. This is enough to make it a convention that people drink Coke while eating a hamburger.

Now, for Hart, the convention that constitutes the legal validity criteria and thus the legal system is one of judicial consensus: a convention among judges to specify certain social norms as binding. This convention must be held by its participants from the internal aspect of rules. Thus understood, RoR is a conventional rule based on the social fact that a group of people, particularly legal officials, adheres to the criteria it sets out and shares a mutual belief in social norms and rules, which are validated as law by it, in such a way that non-compliance with these norms is subject to criticism. RoR, in other words, is the very social convention concerning officials' beliefs

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[4] *Ibid.*, 89.

[5] It should not be assumed that judgments made from the internal aspect of the rules are evaluative in a *moral* sense because they are non-descriptive. Hart makes the general point that when judgments of a behaviour B from the internal aspect of rules give reasons to accept B as a common standard of behaviour and to criticize non-B, their 'normativity' lies in imposing *institutional*, rather than moral, obligations upon those who make them. It is, therefore, wrong to assume that judgments from the internal aspect of rules are made to build up a social convention in virtue of some moral reasons, since these judgments are non-descriptive. Hart's general point here leads to, according to some scholars, the so-called 'Strong Conventionality Thesis', according to which, 'the conventional rule of recognition is a duty-imposing rule'. The duty imposed here is the institutional obligations upon judges. See Kenneth E. Himma, "Inclusive Legal Positivism," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman, Kenneth E. Himma, and Scott J. Shapiro (Oxford University Press, 2004): 133; Andrei Marmor, "Legal Conventionalism," *Legal Theory* 4, no. 4 (1998): 530.

and their convergence on its legal validity criteria in behaviour.

To summarise, firstly, RoR explains how any legal rules can become law and, therefore, their legal validity. Secondly, and more fundamentally, RoR exists as a social convention formed by legal officials' convergence of beliefs and their behaviour according to the validity criteria it specifies.

1.2 Legal Principles

So far, I have outlined the nature of RoR as the fundamentals of Hart's positivism. Dworkin, on the other hand, claims that, in a settled legal system, apart from legal rules, there are also legal principles that are not identical to legal rules. Unlike legal rules, whose validation is in an all-or-nothing manner, legal principles carry a moral weight dimension reflecting the 'requirement of justice or fairness' or other values they imply.[6]

Because of the moral weight they carry, principles are not decisive in validating a judge's decisions, as statutes are in their mandatory nature. Instead, principles merely guide a court's legal reasoning based on the moral content they embody. Because of this, principles can never be logically invalidated; they can only be outweighed or shown to be inappropriate for specific cases.

To illustrate how principles guide the court in its judgments, Dworkin cites famous cases in which principles were applied to reach the appropriate legal answer. These cases are hard cases. A hard case is one in which there are no apparent legally binding standards that could be applied in terms of the settled law.[7] For example, Dworkin cites *Riggs v. Palmer*.[8] An appointed heir murdered his grandfather, who had bestowed his heritage upon him. The court applied the principle 'No one shall be permitted to profit by his wrongdoing' to the contract law concerning the devolution of property, thereby nullifying the heir's legal right to inherit.

Dworkin believes that principles and their application in cases like *Riggs v. Palmer* undermine what he called the 'pedigree' of RoR. According to Dworkin, positivists like Hart commit to the 'Pedigree Thesis', which claims that

> *"RoR provides a method for accounting for how the law is identified, developed, and adopted."*[9]

Any elements of law and specific terms of the legal validity criteria are supported by, and traceable to, the basic convention that underpins the legal system. This kind of validation chain is what Hart's pedigree is, from Dworkin's perspective. However, as he claims, there are legal principles that are not identifiable within the validation chain Hart commits to because of their indeterminate nature, and that are as legally binding as rules.

Prima facie, a positivist would deny that principles are legally binding as rules of law are. Principles cannot be subjected to the criteria of the law because of the relative nature of their content. Hence, they fail to be subsumed under RoR's pedigree. The 'wrongdoing-ness' in 'no one shall be permitted to profit by his wrongdoing' leaves an open context subject to debate. This would lead to interpretive uncertainty regarding the legal validity

[6] Ronald Dworkin, *Taking Rights Seriously*. (London: Duckworth 1997), 22.
[7] *Ibid*., 23.
[8] *Ibid*., 23.
[9] *Ibid*., 24.

of this principle itself. Principles are thus seen by positivists as extra-legal but legally relevant standards. Dworkin agrees that the nature of principles carries moral content and plays a non-determinative role in administering the law. However, he does not see it as a flaw that reduces principles to merely extra-legal standards. For Dworkin, principles are as legally binding as the rules of law. If this is the case, the nature of principles serves as an argument against the pedigree of RoR. RoR cannot identify them as part of the law because they are validated by the moral content they reflect, which has nothing to do with the convention required to make the law what it is.

2. The Principle Objection

Let us turn to the first step in Dworkin's argument. He starts by denying that a judge has a 'strong sense' of judicial discretion that would allow him or her to either apply or not apply principles to hard cases. And since the judge has no such discretionary power, the principles are no longer extra-legal standards. Positivists claim that the judge has a 'strong sense' of discretion if, in hard cases, he is 'not bound by standards set by the authority in question [that of legal validity]'.[10] Therefore, the judge needs to look toward extra-legal standards, because there are no settled standards of legal validity for them to make the decision. However, for Dworkin, the judge does not have such strong discretion for two reasons.

Firstly, it is the principle that directly provides the court with a legal reason to extend and change the settled law. It is the intrinsic moral property of the heir's murder that overturns the contract law. This would suggest that the amendment of rules is supported affirmatively by principles that the judge has no liberty *not* to pick up.[11] There are no extra standards that the judge could fall back on to come up with an answer to the complex, hard case. Instead, there is one legally appropriate answer for the hard case that the judge ought to specify: in *Riggs v. Palmer*, the wrongness of murder. Thus, the judge has no strong discretion in the case.

Secondly, whenever the judge might be credited with possessing the supposed 'strong discretion' and thus the power to change the settled law, he ought to consider conservative principles against granting new judicial discretion to new judges. Dworkin cites two prominent principles of this kind: legislative supremacy and precedent.[12] Judges typically align their decisions with these two principles to maintain coherence within the legal system. They cannot simply dismiss them. Instead, they need to uphold the legally binding norms. Neither the first nor the second reason implies that the judge possesses a strong sense of discretion. On the contrary, in both cases, principles are as binding as the rules of law, serving to limit judges' actions.

The denial of strong discretion leads to the bindingness of principles. Consequently, if legal principles are legally binding as well, this undermines the pedigree thesis. This is the second step of Dworkin's argument. If the pedigree cannot cover legal principles because they are identified in terms of their intrinsic moral content, but not in terms of RoR, it is simply not true that it is the positivist's pedigree that provides the law identification criteria. Hart distinguishes the acceptance of RoR from the validity of rules necessitated by it. The latter receive their legal normativity under criteria provided by the former. But principles are not identified in the same way. They are

[10] *Ibid.*, 32.
[11] *Ibid.*, 37.
[12] *Ibid.*, 38.

validated by referring to other principles, which broadly include the institution's legal practice and moral authority. Unlike legal rules derived from RoR alone, the validity of principles relies on an understanding of the interaction between the 'institutional authority of common law courts, their relations to legislatures, and to ordinary moral practices' and so forth.[13] Dworkin therefore concludes that principles are proven to be as binding as laws, whereas they are not validated by RoR. Therefore, the pedigree thesis, which advocates an exclusive way of law identification through RoR, is undermined by the existence of principles.

3. Incorporation Thesis

How can we respond to Dworkin's objection? Hart and other positivists adopt what is known as 'inclusive legal positivism', the core of which is the Incorporation Thesis, which asserts that legal principles (and thus moral norms) can be included within RoR's legal validity criteria. Before presenting my claim (A): Incorporating legal principles into legal validity criteria does not harm the Social Fact Thesis, I will analyze Hart's own reply to Dworkin in the postscript to *The Concept of Law* and argue that Hart's reply is, nevertheless, insufficient.

3.1 The Postscript

Hart argues that Dworkin's preoccupation with constructive interpretation leads him to 'double error.'[14] Firstly, 'legal principles cannot be identified by their pedigree', and secondly, 'a rule of recognition can only provide pedigree criteria.'[15] For Hart, both of these two points are mistaken. He thinks that nothing in the characteristics or features of legal principles precludes their validation as part of the law by RoR, given their moral content and non-conclusive nature. The force of Dworkin's challenge would be reduced if legal validity criteria offered by the convention contained a moral-content-based test for law rather than merely a social-fact-source-based test. As Hart says,

> *"for plainly, a provision in a written constitution or a constitutional amendment or a statute may be taken as intended to operate in the non-conclusive way characteristic of principles, as providing reasons for decision, which may be outweighed in cases where some other rule or principle presents stronger reasons for an alternative decision…"*[16]

Then, he claims,

> *"[a]lso, some legal principles, including some basic principles of the Common Law, such as that no man may profit from his own wrongdoing, are identified as law by the 'pedigree' test in that they have been*

[13] S.J. Shapiro, 'The "Hart–Dworkin" debate: A short guide for the perplexed", in *Ronald Dworkin*, A. Ripstein (ed.) (Cambridge University Press, 2007): 28; see also: Dworkin, *Taking Rights Seriously*, 41.
[14] The 'constructive interpretation' is the alternative set of law identification and validation criteria Dworkin conceives of, in contrast to Hart's RoR. Covering both legal principles and rules, it is one that 'best fits and justifies both the whole institutional history of the settled law and the individual's political right.' Hart, *The Concept of Law*, 263-4; See also: Dworkin, R. *Law's Empire*. (Fontana Press, 1986).
[15] H.L.A. Hart, *The Concept of Law*. 3rd ed. (Oxford University Press, 2012), 263.
[16] *Ibid*., 264.

consistently invoked by courts in ranges of different cases as providing reasons for decision, which must be taken into account, though liable to be overridden in some cases by reasons pointing the other way."[17]

Moreover, Hart thinks that the existence of RoR is a necessary condition for legal principles to be identified as part of the law, even by the criterion of 'constructive interpretation'. The reason for this claim is that:

"The starting point for the identification of any legal principle to be brought to light by Dworkin's interpretive test is some specific area of the settled law that the principle fits and helps to justify. The use of that criterion [the interpretive test], therefore, presupposes the identification of the settled law, and for that to be possible, a rule of recognition specifying the sources of law and the relationships of superiority and subordination holding between them is necessary."[18]

As a result, we can summarise Hart's reply to Dworkin into two claims:

One: RoR does not operate in an exclusive way that validates norms as part of the law by relying solely on social facts.
Two: RoR is necessary if legal principles are to be validated.

Hart's response has been welcomed by several scholars. For example, Wil Waluchow cites empirical evidence showing that some legal systems indeed contain content-based tests of validity criteria.[19] Specifically, Waluchow cites section 7 of the Canadian Charter (which states some fundamental human rights and their infrangibility) and some amendments to the U.S. Constitution that provide the right to vote, free speech, and religious freedom.[20]

3.2 My Claim (A)

Now, we have to ask: Is Hart's reply to Dworkin sufficient? The answer, I shall argue, is that it is not. Both One and Two presuppose, *as a given fact*, that there is a social convention that operates non-exclusively to validate and identify norms as the law, either through the strict institutional checks it contains or through the content of the norms themselves. However, this presumption is wrong because we must not overlook the *conceptual* force of Dworkin's objections, which expose issues with positivism. This force arises from a profound tension Dworkin highlights within positivism: a tension between the pedigree that includes content-based constraints and its structural certainty. The structural certainty required by the pedigree can be clarified as follows. According to the Conventionality Thesis discussed above, RoR is understood as a socially conventional rule requiring the mutual convergence of officials' behaviour, motivated by their commitments to specific social rules, to accept those rules

[17] *Ibid*., 265.
[18] *Ibid*., 266.
[19] W.J. Waluchow. *Inclusive legal positivism*. (Oxford University Press, 1994): 177-8.
[20] *Ibid*., 178.

as valid and binding. But it would be meaningless to speak of such convergence or acceptance if it were not certain which sets of social rules are identified by it as valid laws. Moreover, the validity criteria RoR sets out would not be effectively binding if it were not certain what criteria are those established by RoR. Hence, the pedigree of 'RoR' must be certain. However, the moral norms reflected and embodied in the principles would provoke interpretative uncertainty among legal officials, as judges would dispute one another over their critical content, thereby potentially leading to divergence in judges' behaviour and decisions.

On the other hand, Hart's reply above assumes that Dworkin is asking the following question, which Dworkin would consider a misunderstanding on his part: Given the convention that makes up the legal validity criteria, how could legal principles be captured by it? But as we have pointed out, Dworkin focuses on the conceptual tension between the convention that incorporates legal principles and its own structural certainty. So, instead, he asks: Given the existence of legal principles, how could there ever be a convention that attempts to include them within it if their nature is incompatible with what it requires?

In other words, how can interpretative uncertainty be conceptually compatible with the conventional nature of RoR, which requires acceptance and people's convergent behaviour? Dworkin thinks this is incompatible: the moral content of legal principles automatically threatens judges' mutual acceptance and their behavioural convergence, which constitute the convention that makes up the legal validity criteria. Therefore, from a conceptual perspective, there should be no 'content-based' validity criteria offered by RoR. Dworkin's objection from principles does not assume that the pedigree as a way of identifying legal validity is useless for a legal system. He does not deny the *existence* of any pedigree. Nor does he deny that there are many instances of an inclusive convention existing within legal systems, as Hart and Waluchow point out.

Yet he argues that given the nature of principles, pedigree fails to account for them. This is why the nature of principles in itself falsifies the positivist's pedigree thesis. Hence, a successful reply to Dworkin cannot just claim that *we can incorporate principles under RoR*, because the very incompatibility between principles and the positivists' notion of pedigree is already considered to be an argument for Dworkin.

So, how should we proceed? This is where my claim (A) comes into play. Incorporating legal principles into legal validity criteria does not harm legal positivism's Social Fact Thesis. Dworkin arguably exaggerates the implications of the Social Fact Thesis. In essence, his objection assumes: *It must be a social fact that the validity of first-order law (i.e., laws validated by RoR) is explained by RoR alone.* Or in a simpler form: *Relevant social facts must come to explain the validity of first-order law.*

However, we can reject this reading of the Social Fact Thesis. Instead, we can argue that relevant social facts only explain the acceptance and the authority of *higher-order law*, namely, RoR itself. In other words, insofar as the existence of RoR is itself a social fact, subsequent legal rules identified by it do not need to have a social source. Jules Coleman's distinction between the content of RoR and its application supports my interpretation of the Social Fact Thesis here.[21] According to Coleman, when judges disagree with each other in a hard case, their disagreement should be construed as disagreeing over which set of propositions of the law satisfies the validity criteria that consist in RoR. This debate concerns how RoR is applied to validate moral principles. For example,

[21] Jules Coleman, "Negative and positive positivism", *The Journal of Legal Studies*, 11(1), 1982: 139-64.

judges might disagree on which moral principles should be validated as law. However, their disagreement should not be seen as a disagreement about the standards that constitute RoR. The convention that 'moral principles are accessible in adjudication in a hard case' is mutually agreed upon and *is itself a social fact*. Essentially, Coleman's distinction expresses the same idea as my argument: Only RoR itself must be explained as a social fact.

If my defence succeeds, it sheds light on a proper understanding of the Incorporation Thesis. The incorporation of moral standards can be regarded as a condition for legal validity without undermining the entire social pedigree of the law as the foundation of a legal system. This is how we should interpret Hart when he states that RoR has an 'open texture' in hard cases where the court must validate principles to decide.[22] The defence of 'inclusive positivism' needs to be linked to the deeper claim about the social essence of the pedigree. Consequently, Dworkin's objection based on principles fails.

4. Theoretical Disagreements

Dworkin further develops his objections to Hart's positivism in his *Law's Empire*, asserting that positivism cannot explain theoretical disagreements over grounds of law that are common among officials.[23] By 'grounds of law', he refers to the basis on which a legal rule is considered true.[24] The legislation of the California legislature or the Fife Council constitutes such a ground for specific laws enacted within their jurisdiction.

Subsequently, theoretical disagreements among officials are about what such grounds are. And if theoretical disagreement is widespread, how can positivists explain its existence while maintaining that binding legal facts are determined by RoR that, *ex hypothesi*, relies on agreement about their content?[25]

Consider the following case of *Tennessee Valley Authority (TVA) v. Hill*.[26] Conservationist plaintiffs sued TVA's 100-million-dollar dam project because its construction threatened a fish called the snail darter, thereby violating the Endangered Species Act of 1973. TVA argued that the project was funded and scheduled before the enactment of this wildlife-protection law.

Judges like Warren E. Burger argued that, although suspending dam construction is wasteful and could lead to absurd public policy outcomes, the statute prohibits threatening wildlife. Judges like Lewis F. Powell disagreed with Burger, maintaining instead that this law should not be interpreted as implying absurd outcomes, unless indicated by the legislature. Since Congress gave no affirmative indication to regard the case in question as an exception to this law, judges were obligated to decide based on common sense and the public weal.[27] According to Dworkin, here, the disagreements between Burger and Powell are theoretical. They both regarded the Endangered Species Act of 1973 as a valid law, as identified by RoR. They debated how its meaning should be interpreted, given that the legislature showed no strong conviction either in rejecting the outcomes of the dam suspension or in enacting the law. Therefore, it seems that positivists cannot account for these kinds of cases

[22] Hart, *The Concept of Law*, 252.
[23] It should be clarified that the time at which Hart wrote his postscript was after 1986, when Dworkin published his *Law's Empire*. So, Hart's reply above would cover, *according to Hart's own idea*, objections from Dworkin that I am going to discuss in section 4, even though we have seen that Hart's reply is flawed.
[24] Dworkin, *Law's Empire*, 5.
[25] *Ibid*., 6; see also: S.J. Shapiro, *The "Hart–Dworkin" debate*, 41.
[26] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978).
[27] S.J Shapiro. *The "Hart–Dworkin" debate*, 38.

because there is no convention concerning whether judges should prioritise statute law over patently absurd outcomes. There are, in fact, theoretical disagreements about whether the principle of 'the priority of statute law' is incorporated by RoR, even though RoR validates this law.

Positivists have several ways to respond to the theoretical disagreement at issue. Plainly, they can deny that such a theoretical disagreement is genuine within their framework; i.e., it is impossible given RoR. Scholars like Coleman would deny that the theoretical disagreement exists, as we learned from Coleman's distinction above. Insofar as Congress's legislative function is indisputable, there are conventions. The only possible disagreement among judges is whether to apply RoR to identify certain legal principles. Judges are disputing matters of statutory law interpretation, but such debates of interpretation do not imply a lack of convention.

Yet this reply might not be satisfactory. It errs just as Hart's own reply to Dworkin. Again, it assumes the existence of the convention as a given fact. Let me analyse how it works step-by-step. If the convention is just there, then surely, we can find a way to make it compatible with theoretical disagreements among judges, such that they do not imply the absence of the convention. The way we find such compatibility might well be explained in terms of Coleman's distinction between judges applying RoR to validate a debatable norm and judges debating RoR itself.

However, there is no reason why we should first assume the existence of any sort of convention in terms of judges' behavioural and belief convergence, if there is something that makes convention impossible in the first place. As a result, if we get rid of the assumption that *there is a convention as such*, then the phenomenon of theoretical disagreement is really disturbing, as it is incompatible with the goal of setting up a convention.

With the clarification that the theoretical disagreement makes it impossible for the convention to come into existence, the true force of Dworkin's developed objection based on that disagreement is now revealed. It can be stated as follows.

In Section 1, we saw that judgments from the internal aspect of rules give people reasons to accept rules within a legal system as legally binding and to view deviant behaviour as objectionable. To recall, these judgments are necessary for the existence of the convention. Hence, if there were a convention, namely judges' beliefs and behavioural convergence, in a legal system, they would have to make judgments from the internal aspect of rules, which are necessary for the convention as such here. However, if there were theoretical disagreements, it would mean that judges do not agree with one another in their judgments based on the internal aspects of rules. Critical, controversial, and even vague moral reasons affect judges' and legal officials' decision-making processes in producing significant judgments from the internal aspects of rules, thereby leading to no certain agreement among them. And if this is so, the following convention, defined as judges' beliefs and behavioural convergence, would be nowhere. This, I speculate, is what Dworkin should have meant when he speaks of theoretical disagreement over the grounds of law. The level of such disagreement lies in making judgments based on the internal aspect of rules, which justify the institutional obligations that judges abide by.

4.1 My Claim (B)

Despite the force of Dworkin's objection, grounded in theoretical disagreement, I shall argue that there is a possible reply that could be offered to defend Hart's positivism. One crucial premise in this objection is that moral reasons, in virtue of their critical and open-to-dispute nature, make it very difficult for judges to make judgments from the internal aspect of rules necessary for the convention. The idea supporting this premise is, from my perspective, an assumption that it must be epistemically certain for judges which judgments constitute the convention. By following this assumption, it is natural to infer that legal interpretation debates vindicate that the proposed epistemic certainty is not the case because judges were motivated by different moral or political reasons to view the same statutory law.

However, it is a mistake that judges must, epistemically, share norms and beliefs to reach their agreements and behave convergently, simply because the convention requires their mutual acceptance of identifying specific social rules as legally valid and their behavioural convergence. It is a misunderstanding of the function of the convention (namely that of RoR) to think that it is formed out of an epistemic reason for certainty about law. Granted, much of the potential debate rooted in legal interpretation reflects moral or political reasons that are controversial but still determinative. Yet these reasons can be shown to be acted upon or obeyed without reference to a specific convention. Therefore, from a conceptual perspective, the function of convention does not depend on ascribing certainty to these reasons, although conventions shape and influence them. Instead, conventions establish a social sphere of practice that a group of people values. This does not mean that everything involved in establishing a convention concerns epistemic certainty about the interpretation of moral or political reasons.

Reconsider the case in which drinking Coke while eating a hamburger is a convention. Let us suppose that there are, if any, moral reasons not to eat any hamburger (suppose we are in a possible world in which any hamburger necessarily contains meat). Hence, these presumed moral reasons prevent people from agreeing on the judgments necessary to view and justify behaviours such as drinking Coke while eating a hamburger as a convention. Nevertheless, the convention of drinking Coke while eating a hamburger would not cease to be what it is, simply because there are moral reasons against it. Insofar as the function of such a convention is independent of whether there are moral reasons for or against it, the epistemic certainty that requires judges' beliefs and behavioural convergence *is not in itself* an argument against the convention that Hart's positivism relies on. This claim should remain true, even if the degree of such a certainty existing among judges is nearly zero because of some profound theoretical disagreements. In this extreme case, positivists like Hart would simply admit that this case is one of 'general disregard of the rules of the system', such that

> *"the normal context or background for making any internal statement [judgments made from the internal aspect of rules] in terms of the rules of the system is absent."*[28]

The point here is that it would be pointless for Hart to take this extreme case as a valuable example for identifying any social convention that serves as a condition for legal validity. As he claims:

[28] Hart, *The Concept of Law*, 103-4.

> *"To insist on applying a system of rules which had either never actually been effective or had been discarded would, except in special circumstances mentioned below, be as futile as to assess the progress of a game by reference to a scoring rule which had never been accepted or had been discarded."*[29]

Consequently, extreme cases in which theoretical disagreements are so profound and widespread that the convention is either inefficacious or impossible are not a counterexample to Hart's inclusive positivism. In such extreme cases, a positivist analysis of law would no longer be applicable.

So far, I have argued that (1) only the convention itself (namely, RoR) must be explained as a social fact and (2) the function of convention is not about ascribing certainty to moral or political norms. These two statements offer positivist explanations for debates over statutory interpretation without accepting Dworkin's objections, and clarify the degree of 'certainty' that RoR requires. Neither legal principles nor theoretical disagreements would threaten the pedigree of RoR. As a result, I think the Incorporation Thesis is compatible with both the Social Fact Thesis and the Conventionality Thesis.

5. A proper reading of the Incorporation Thesis

One final objection to inclusive positivism deserves attention.[30] In this section, I examine this objection and then propose my own reading of the Incorporation Thesis, grounded in a new distinction between what RoR is and what it should be.

Recall Coleman's distinction between the application of RoR and its content. Following my arguments against Dworkin's two objections—the objection from legal principles and the one from theoretical disagreements—it seems that we can safely use Coleman's distinction when we encounter hard cases in which RoR needs to validate moral principles to be part of the law. When making legal decisions in hard cases, the judge applies RoR rather than disputing its content. However, Andrei Marmor argues that the distinction between the application of RoR and its content is conceptually flawed.

As Marmor argues, inclusive positivists assume that 'there is a potential gap between the convention, which is *a rule and its application*, a gap that can be bridged by moral or political arguments.'[31] Yet the problem is that there is no such gap. The convention, *by definition*, is just a practice of applying its rule to certain cases. The application of rules prescribed by a convention is just *that* convention.

Marmor provides an example to explain this objection. The English word 'morning', by convention, is appropriate when referring to 9 a.m. It is, however, unclear, by the convention of using this word, whether 11:30

[29] *Ibid*., 104.

[30] As I indicated, this objection is not invited by Dworkin. Instead, it is invited by an exclusive positivist, Andrei Marmor. The reason I examine it in this paper is that, though not obvious, it shares a logical commonality with Dworkin's criticisms of the Incorporation Thesis. This commonality is that they all directly focus on the tension between convention and its incorporation into moral norms. A successful defense of Inclusive Positivism requires clarifying exactly how the convention incorporates moral norms. Hence, it is not a digression to examine Marmor's objection in a paper on the Hart-Dworkin debate.

[31] Marmor, 'Exclusive legal positivism', in *The Oxford Handbook of Jurisprudence and Philosophy of Law*. J.L. Coleman, K.E. Himma and S.J. Shapiro (eds) (Oxford University Press, 2004): 112.

a.m. should be called 'morning' or 'noon.'[32] This example demonstrates that there is no convention to call 11:30 a.m. 'morning'. Therefore, the absence of a convention for 'morning' at 11:30 a.m. means that it is meaningless to ask what the 'morning' convention is (or requires to be) when it refers to 11:30 a.m. The impact of this objection is significant for inclusive positivists. They argue that RoR incorporates a content-based test for legal validity criteria. But now, in a hard case, there might be no convention. And if there were no convention in a hard case, then it would be wrong that it is through applying RoR to validate moral norms as part of the law. The Incorporation Thesis is thus wrong.

I reply to Marmor's objection by distinguishing two readings of the Incorporation Thesis: *the sufficiency reading* versus *the necessity reading*. It seems to me that Marmor's objection assumes that, according to the Incorporation Thesis, in a hard case:

1. Because it should be that Y, it is a convention that Y.[33]

In other words, this objection assumes what I refer to as the sufficiency reading of the Incorporation Thesis:

2. 'If it is morally important that Y, then it is part of the convention C that Y.'

These two equivalent statements, 1 and 2, read the Incorporation Thesis in a way that the moral content of a legal principle is a *sufficient* condition to make it legally valid.[34] However, such a reading is a mistake. A case helps to illustrate why this is.

Night: Suppose a country has an ambiguous law against involuntary labour: 'No involuntary labour is permitted at night'. Tom runs a company, and Mary, a single mother, is his employee. Tom has an unusual understanding of the notional convention "night", referring to it as 'when the sun sets'. Mary refers to it as 'after 8:00 p.m.', as this is commonly held to be the time "night" refers to. Suppose one day Tom asks Mary to work until 10:30 p.m. because he expects the sun to set at that time (this is not uncommon in the summer in Europe). Mary is unwilling to stay but has no choice. However, because Mary works until 10:30 p.m., nobody cooks for her child before this time (as usual, Mary cooks at 8 p.m.). As a result, her baby becomes seriously ill. Mary sues Tom for breaching the law that 'No involuntary labour is permitted at night'.

The court might rule that Mary wins the lawsuit based on the following argument: Neither Tom nor Mary is entitled to claim that his or her view of the conventional meaning of "night" is correct (after all, why would "night" not refer to '7:30 p.m.', '7:00 p.m.', or '6:45 p.m.'?). However, it is necessary for any law to be legally valid

[32] *Ibid*., 114
[33] *Ibid*., 155.
[34] Compare my formulation to Himma's similar one: 'There are conceptually possible legal systems in which it's a sufficient condition for a norm to be legally valid that it reproduces the content of some moral principles'. I should note that although Himma brings out this version of the Incorporation Thesis, he does not relate it to Marmor's objection and the defense of Inclusive Positivism, as I am attempting to do. See: Kenneth E. Himma, Inclusive Legal Positivism: 137.

that its content is consistent with certain moral requirements. The convention of "night" should be one that is consistent with the moral duty to care for one's child. Tom, therefore, breaches the law 'No involuntary labour is permitted at night' because Mary must work at the expense of her duty to care for her child.

According to Marmor's objection, in *Night*, the court should assume that if people ought to take care of their children on a given night, it is part of the law that no involuntary labour is permitted at night. This is incorrect. Moral norms cannot suffice to be legally valid. The court's reasoning above, as I have speculated, does not commit to the sufficiency of moral norms being legally valid by their content. Instead, the court only states that promulgated legal rules must be constrained by moral norms. In other words, moral norms are necessary but not sufficient conditions for legal validity.

If the Incorporation Thesis is understood solely as claiming that it is a necessary but not sufficient condition for L to be legally valid that L is consistent with morality, then the fact that there is no gap in the content/application of a convention does not pose any objection to the Incorporation Thesis. This is because this thesis does not have to rely on this distinction. Instead, we can assert that in a hard case, officials are disputing the scope of the convention, disputing what should be confirmed as RoR, not what it *is*. The Incorporation Thesis rests on a new distinction between what RoR is and should be, rather than on the old distinction between the content of RoR and its application.

It might be objected that I am not really posing a new distinction. Yet this is wrong. We should be careful here that these two distinctions are conceptually separate, because it is possible to conceive of Q and how to apply Q without thinking clearly about what Q really should be confirmed. In *Night*, even if there were no clear convention applicable to discern when it is night, judges are nonetheless entitled to make the convention in conformity with the moral duty of care. Such judicial discretion, in *Night*, does not expand the content of the convention that makes RoR include something that was not previously part of it. This can be explained by asking two different questions.

In *Night*, we can ask:

(i): What is the rule of recognition that validates the law that no involuntary labour is permitted at night?

Or,

(ii): What should the rule of recognition be so that the law that no involuntary labour is permitted at night is validated?

It is question (ii) rather than (i) that inclusive positivists ask, because (i) is not compatible with the Conventionality Thesis. This is because the answer to (i) is Mary's moral duty of care. When moral norms are sufficient to play the role of the rule of recognition, thereby making the law valid, the social convention would be pointless, for it would lose its function. The Conventionality thesis would, therefore, be denied since the legal validity criteria are now

explained by morality. So, the proper question that the inclusive positivists ask for their Incorporation Thesis is (ii). And the answer is: the rule of recognition should be in conformity with the moral duty of care, so that the *Night* case is one where the law that no involuntary labour is permitted at night can be applied. This answer, as far as I can tell, is perfectly compatible with the Conventionality Thesis, and thus, with the Social Fact Thesis. Hence, I conclude that the Incorporation Thesis should be read as holding that morality is necessary for any norm L to be legally valid, and that in cases of legal interpretation disputes and theoretical disagreements, judges are not disputing what RoR is, but what it should be morally taken as (in order to legalize a possible norm).

Conclusion

In this paper, I have aimed to defend Hart's inclusive positivism against Dworkin's objections, arguing that the Incorporation Thesis is compatible with both positivism's Social Fact Thesis and the Conventionality Thesis. Specifically, neither the existence of legal principles nor supposed theoretical disagreements among legal officials can successfully undermine the Incorporation Thesis. The pedigree of the rule of recognition remains secure. Finally, I propose a particular interpretation of the Incorporation Thesis that is immune to Marmor's objection against Coleman's distinction between the content and application of the rule of recognition. The Incorporation Thesis is safe when it depends on the new distinction between what should be confirmed as the convention and what the convention is, claiming only that morality is necessary for any norm L to meet for it to be legally valid.

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UNCLOS as Customary Law: Legal Constraint and Strategic Instrument in U.S. Maritime Policy

By Fabian Eryk Shelton

Introduction

The Sino-US competition has now been elevated to the forefront of geopolitical tensions: a rivalry which has upended previous international norms, having global repercussions. Both the United States and the People's Republic of China (PRC) have competed across several strategic fields: from cyber to space to semiconductors to medical innovation. However, maritime affairs have particularly been shaken throughout U.S. and China's great power rivalry. UNCLOS, the United Nations Convention on the Law of the Sea, outlines a comprehensive regime of law and order for the world's oceans, establishing rules for the allocation of States' rights and jurisdiction in maritime spaces, the peaceful use of the oceans and the management of their resources.[35] With this charter, the United Nations has provided a measure for states to preserve their maritime sovereignty and ability to conduct Freedom of Navigation Operations (FONOPs).

American adversaries have exploited UNCLOS and its sister documents towards their own ambitions. For example, China has interpreted UNCLOS in a fashion to cater to its interests: territorial aggrandizement. We see this with China's unilateral claims of territories, such as Japan's Ryukyu islands and some islands off the shores of the Philippines – i.e. the Scarborough Shoal and the Spratly Island archipelago (Fiery Cross Reef, Second Thomas Shoal, and Mischief Reef).[36] Taiwan has especially been targeted by China's abuse of UNCLOS, with the latter claiming that it is its rightful territory since the former's inception. Indeed, China has utilized UNCLOS's clauses on FONOPs to execute live fire military drills such as Operation Strait Thunder and Justice Mission[37]; indeed, from 2020-2023, there were recurring large-scale naval exercises within the Paracel Islands (located within the South China Sea), Taiwan Strait, and East China Sea.[38] Should China remain unchecked in its militarization within the region, the South China Sea would become a flashpoint for military confrontation between the PRC and other Asian countries, an event which could involve the United States in another costly war.

It is imperative to ensure stability and security within maritime matters. Further, it is imperative that the United States embrace the tenets of UNCLOS. Although it has not ratified it, the United States of America has observed UNCLOS' legal framework, relying on its principles to ensure its Indo-Pacific alliance network (i.e., the QUAD and AUKUS agreements) and to conduct FONOPs, such as the annual military exercise Talisman Sabre. This essay argues that the United States treats the United Nations Convention on the Law of the Sea as binding customary law: a benchmark to legally structure FONOPs and alliance-based maritime security. The adherence to

[35] United Nations Office of Legal Affairs, United Nations Convention on the Law of the Sea (New York: United Nations, 1997)
[36] Mira Rapp-Hooper, China's Maritime Disputes (Washington, DC: Council on Foreign Relations, 2016).
[37] Nathan Attrill, "That Isn't Signaling. China's Military is Seriously Rehearsing Around Taiwan," Australian Strategic Policy Institute, January 2026
[38] U.S. Department of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2023*, Washington, D.C.

UNCLOS illustrates international law to be a strategic instrument and a constraining framework in the United States' deterrence strategy, such as with U.S.-China great-power competition. In doing so, the United States would be a stronger ally in the Indo-Pacific, assuaging the fears of allies such as Australia, Japan, and South Korea. Furthermore, UNCLOS represents a key component of American deterrence: by upholding freedom of navigation and sovereignty, China would be deterred from becoming more aggressive towards Taiwan, preventing a potential military invasion or blockade.

The first section will pertain to UNCLOS, the logic of *opinio juris,* and customary law - tools that provide the legal basis of the United States' maritime practices; subsequently, the paper will then detail the legal definition of FONOPs, and how they are relevant towards U.S. in order to set up context for the understanding the legal implications of U.S. security policy within South China Sea and the greater Indo-Pacific theater, arguing that U.S. FONOPs are not acts of law enforcement or power projection alone, but legally calibrated operations designed to contest excessive maritime claims while remaining within the bounds of international law. Finally, the paper will explain how, despite structuring its maritime policy, UNCLOS also imposes significant legal constraints on the scope and conduct of U.S. maritime activities, reducing UNCLOS' overall advantage for American naval policy.

1. The UNCLOS and the Logic of *Opinio Juris*

Despite not ratifying the legal charter, the United States still observes UNCLOS in its practices in the South China Sea as the treaty reflects customary law that even binds non-parties. It is a misconception to view the United States' refusal to ratify UNCLOS as an instance of its aversion to international organizations and its rules and principles; on the contrary, it has been made clear the United States and its negotiations were concerned over its commercial implications for American companies. U.S. President Ronald Reagan positively viewed UNCLOS' clauses pertaining to free seas and Exclusive Economic Zones (EEZs); rather than ratify it, the Reagan Administration released the 1983 U.S. Ocean Policy Statement, which served as the United States' official position on freedom of navigation and EEZs.

The 1983 U.S. Ocean Policy Statement reveals the United States as acquiescing to some semblance of customary law. The document states that "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans – such as navigation and overflight…so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states."[39] From the excerpt it is clear that the United States views some international norms as traditional and even unalienable. State sovereignty and EEZs, are accepted by the United States, not as a basis for rhetoric but a tangible right for states to exercise. This is a powerful example of customary law and its logic of *opinio juris* and state practice. Although not ratified officially, the United States believes that *opinio juris,* or the obligation to preserve some traditional legal norms, justifies state intervention when said norms are challenged.[40] As such, the United States is able to call upon the principles of UNCLOS in its actions as it observes the treaty in *opinio juris*

[39] United States Department of State, "Presidential Statement on United States Oceans Policy, March 10, 1983," *Ronald Reagan Presidential Library and Museum*, https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy.
[40] Bernard H. Oxman, "The 1982 Law of the Sea Convention and the United States," American Journal of International Law 88, no. 4 (1994): 687–715

and the basis of customary law. This serves as the legal basis for U.S. maritime policy having maintained that it is in the interests of the United States.[41] The United States views it as customary for some states to possess EEZs and have the right to protect them. All maritime operations the United States have executed serve to advance this aim, be it having naval bases across the globe or conducting joint naval exercises with allies and partners.

In *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania, 1949)*, the International Court of Justice (ICJ) established the precedent of customary international law. The dispute arose out of the explosions of mines by which some British warships suffered damage while passing through the Corfu Channel in 1946, a zone in Albanian waters which had been previously swept. The explosions resulted in ship damage and the deaths of crew members. The United Kingdom accused Albania of having laid or allowed a third State to lay the mines after mine-clearing operations had been carried out by the Allied naval authorities.[42] The ICJ ruled that states have a right of innocent passage, through international straits used for international navigation without the consent of the coastal state, provided the passage is not prejudicial to peace and security. This was a landmark ruling for freedom of navigation and significant for customary law. Having been ruled prior to UNCLOS (it was signed in 1982), the ICJ established the tradition of limiting coastal state sovereignty in favor of upholding navigational freedom. Having been ruled by the ICJ before any official convention dictating specific laws grounded in freedom of navigation, *Corfu Channel,* represented a clear instance of how there are some traditional legal procedures that are shaped by common norms.

Guyana v. Suriname entrenches UNCLOS as a binding customary law for maritime matters. Guyana initiated arbitral proceedings which arose in relation to the activities of holders of oil concessions granted by Guyana in a maritime area claimed by both countries. A Guyanese oil rig and drill ship were ordered to leave and escorted from the area by the Surinamese navy in June 2000.[43] The ICJ ruled that the Surinamese naval actions constituted a threat of use of force, contrary to international law. Furthermore, EEZs do not grant full sovereignty towards a nation. Although coastal states possess sovereign rights (such as resource exploitation), this does not extend to territorial control. *Guyana v. Suriname* is relevant as it is a textbook case of UNCLOS. The court proceeding clarifies the limits of coastal state enforcement powers in disputed maritime zones, entrenching the role of UNCLOS in preserving navigational freedoms and prohibiting unilateral coercion, including within EEZs. Within the ruling, the ICJ referred to Articles 74(3) and 83(3) of UNCLOS which relate to the delineation of EEZs between states with opposite coasts and delimitation of the continental shelf between states with opposite coasts, respectively. Therefore, the ICJ depended on UNCLOS to serve as an authoritative expression of general law, strengthening its position as a document for customary law.[44]

UNCLOS establishes a legal foundation for customary law, preserving navigational rights as evinced from *Corfu Channel* and limits maritime enforcement, seen from *Guyana v. Suriname*. These legal precedents

[41] Office of the Staff Judge Advocate, "U.S. Position on the U.N. Convention on the Law of the Sea," *Stockton Center for International Law* 97, no. 81 (2021): 81–88
[42] *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania). ICJ Reports 1949, General List No. 1, Judgment of April 9, 1949, International Court of Justice
[43] *Guyana v. Suriname*. PCA Case No. 2004-04. Award, September 17, 2007. Permanent Court of Arbitration
[44] Naomi Burke and Jill Barrett, "Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas." *British Institute of International and Comparative Law, June 2016, pp. 8-14*

underscore how UNCLOS is a convention which permits states to conduct FONOPs. Although states possess individual EEZs, other states are allowed to have ships and other naval vehicles within said EEZs, so long as they observe innocent passage, revealing a precedent of high seas freedoms and limited maritime enforcement. Referring to Corfu Channel, there are certain norms that are traditional and customary, which do not need an official document to be enforced (which is clear from the 1983 U.S. Ocean Policy Statement). UNCLOS takes these shared legal norms and codifies them, making a binding legal document that obligates all parties, even those who have not ratified it, to enforce FONOPs and EEZs, a strong example of *opinio juris*.

China's maritime ambitions are an instance of a competing legal vision that clashes with UNCLOS-based order. This is observed from China's "Nine-Dash line", an outline of nine dashes creating a semicircular boundary extending from the Gulf of Tonkin to the east of Taiwan.[45] The Nine-Dash line represents China's territorial claims in the South China Sea, employed by the PRC since 1948 to claim sovereignty and maritime rights in the region. China's claims of sovereignty over the Nine-Dash line area clash with the sovereignty claims of Vietnam, Malaysia, and the Philippines. Such challenges have resulted in inflamed tensions between China and coastal states that possess EEZs within the South China Sea.

However, this is more than a mere power struggle, but also a legal conflict with a great-power deviating from the tenets of UNCLOS. Referring to *The Republic of the Philippines v. The People's Republic of China*, there is explicit judicial articulation of the UNCLOS-based maritime order that the United States seeks to uphold, and the clearest legal rejection of China's contrarian claims; therefore, *Philippines v. China*, is an ideal case to explore legal contestation in the South China Sea. Within the court case *Philippines v. China* there are clear instances of this. The arbitration arose from the role of historic rights and the source of navigational entitlement in the South China Sea, the status of certain nautical features in the South China Sea, and the lawfulness of certain actions by China in the South China Sea that the Philippines alleged to be in violation of UNCLOS.[46] Throughout the proceedings, the People's Republic of China adopted a position of non-acceptance and non-participation.

The outcome of the legal ruling established a precedent in denying expansive maritime influence towards revisionist powers. The legal tribunal ruled that the nine-dash line established by China had no legal bearing under the principles of UNCLOS; therefore, the PRC's claim to historic rights beyond maritime zones was rejected. Additionally, UNCLOS exhaustively allocates maritime entitlements: states cannot layer extra claims on top of EEZs and high seas freedoms. The ruling reaffirmed a rules-based maritime order aimed at preserving navigational freedoms and clearly delineating EEZ rights. This is significant in outlining the clear lines of naval territories possessed by a state. Until the mid-twentieth century, the scope of the territorial sea was limited to a narrow maritime belt, and vast areas of the oceans remained part of the high seas. Coastal States, including China, increasingly extended their jurisdiction toward the high seas to assert control over offshore resources.[47] The ruling in *Philippines v. China* curtailed China's continued attempts to assert arbitrary maritime claims extending beyond its lawful boundaries.

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[45] Oral, Nilufer, "Navigating the Oceans: Old and New Challenges for the Law of the Sea for Straits Used for International Navigation," *Ecology Law Quarterly* 46, no. 1 (2019): 163–90.
[46] *Philippines v. China* (South China Sea Arbitration). PCA Case No. 2013-19. Award, July 12, 2016. Permanent Court of Arbitration
[47] Tanaka, Yoshifumi, *The International Law of the Sea*, 3rd ed. (Cambridge: Cambridge University Press, 2019), pp. 17-21

There are strong institutional implications for this ruling. With China rejecting the ruling, *Philippines v. China* illustrates how international law, especially UNCLOS, operates not simply as an impartial arbiter that resolves great-power disputes; indeed, international law is a contested framework through which states advance and resist competing visions of maritime order. This is a quintessential case of law without enforcement: international law can still retain authority even when enforcement fails; for example, *Philippines v. China* has established a strong precedent for legal jurisprudence which has been instrumental in shaping diplomatic discourse, alliance coordination, and third-party legal assessments of maritime conduct within regions such as the Indo-Pacific. Therefore, *Philippines v. China* exemplifies how legal judgments can influence behavior indirectly by shaping legitimacy and reputational costs rather than compelling compliance. Furthermore, it clarifies territorial sovereignty in the case of maritime issues in which the arbitration distinguishes between territorial seas from high seas, in which the latter a state may enjoy innocent passage without facing interstate aggression.

2. FONOPs and U.S. Maritime Security Policy

FONOPs are the primary tools which the United States employs to operationalize its interpretation of international maritime law in the Indo-Pacific. As such, FONOPs are legal assertions of navigational rights, designed to contest what the United States and its allies and partners characterize as excessive and dubious maritime claims. Conducting naval transits and exercises considering UNCLOS provisions (i.e. innocent passage, transit passage, and high seas freedoms), the United States operates with the intention to both signal adherence to international law and deterring unlawful unilateral restrictions imposed by coastal states.[48] FONOPs supplemented with an assertive foreign policy are essential to challenge excessive maritime claims posited by the United States' adversaries; additionally, FONOPs are peaceful exercises of rights/freedoms of navigation which are recognized under UNCLOS.

FONOPs are critical components of the United States' deterrence policy within the Indo-Pacific. Not only do they reassure its alliance network, but they also reflect the United States' commitment to upholding freedom of navigation and ensuring the clear, safe lanes of communication for goods, ideas, and people. They are non-binding instruments that have been interpreted as necessary to affirm existing rules of customary international rule, in this case, UNCLOS. The advantage of integrating FONOPs within American deterrence strategy is that they are not acts of aggression: FONOPs are legal and accepted forms of exercises as they are not enforcement actions nor challenges to sovereignty; rather, FONOPs function less as coercive acts and more as a legal signaling mechanism, reinforcing normative expectations while limiting the risk of escalation.[49]

The legality of FONOPs has clear precedent from previous court rulings. Such precedent has been reinforced by prior international jurisprudence which established limited coastal state authority over navigation, prohibiting unilateral maritime enforcement. As already mentioned within this paper, *Corfu Channel* ensures

[48] Pham, Trang, and Truong-Minh Vu, "From Clash of Vision to Power Struggle: The US, China, and Freedom of Navigation," *E-International Relations*, October 2014.
[49] USINDOPACOM, "Freedom of Navigation Operations (FONOPS) – Peaceful, Principled Upholding International Law (Countering PRC Flawed Narratives)," pp. 1-2

navigational rights for all parties, justifying the legality of the United States pursuing its FONOPs whereas in *Guyana v. Suriname*, the ICJ ruled that coastal states possess sovereign rights (such as resource exploitation), this does not extend to territorial control meaning they cannot conduct coercive enforcement of territories.

In a similar vein, the United States ensures that its FONOPs align with the principles of UNCLOS. Before the United States decides whether to respond diplomatically or operationally to a maritime claim asserted by a coastal state, the appropriate lawyers, policy advisers, and technical experts within the U.S. government conduct a coordinated analysis of that foreign maritime claim in relation to the applicable international law and assess whether that claim is consistent with that body of law.[50] Additionally, for any action that the U.S. government does decide to take against an excessive maritime claim, the appropriate lawyers, policy advisers, and technical experts within the government are also involved in drafting, planning, and carrying out those actions. In a word, these official U.S. actions are deliberate and lawful.

The United States' FONOP in the Paracel Islands serves as an example of the logic of *opinio juris* and preserving the legal precedent of *Philippines v. China*. On October 21, 2016, the U.S. Navy Arleigh Burke-class destroyer *USS Decatur* conducted a FONOP by crossing China's claimed straight baselines in the Paracel Islands chain. This was in response to China's statement in 1996 which established straight baselines, points from which EEZs are measured, around the Paracel Islands in the South China Sea. Said straight baselines, which were drawn between twenty-eight basepoints, enclose the Paracel Islands in their entirety.[51] The *USS Decatur* crossed into the China's claimed territory in the Paracel Islands, the vessel loitering and conducting maneuvering drills in the area.

This instance follows the case of *Philippines v. China*, and its ruling on maritime entitlement. China's issued statement claiming the Paracel Islands as Chinese territory was justified by the People's Republic of China as measure to restore its historic borders; however, following the *Philippines v. China* ruling, states cannot erode high sea freedoms by layering extra historic claims in an effort to acquire EEZs. Having not recognized its straight baselines claim around the Paracel Islands, as UNCLOS only allows archipelagic states to draw straight baselines around island groups, the United States followed *opinio juris* to challenge China's maritime claims. By entering the Paracel Islands, the *USS Decatur* crossed into waters that would have been considered China's internal waters if its straight baseline claims were legal, which they are not. This FONOP signaled to China that it was not transiting under the right of innocent passage, thereby not considering the island chain and its waters part of China's territorial sea. This action deliberately challenged China's claim of straight baselines around the Paracel Islands, acting under precedent from *Philippines v. China* and deterring China's aggressive territorial expansionism.

The United States' FONOPs demonstrate how international law is operationalized through unilateral state practice; however, FONOPs are not isolated in scope. The strategic signaling is enhanced by the presence of U.S. allies and partners, the latter of whose own security commitments and legal obligations shape the broader maritime order of the Indo-Pacific. The legality of the United States and its allies and partners use of collective

[50] U.S. Department of State, "Limits in the Seas No. 112," March 9, 1992
[51] Freund, Eleanor, "Freedom of Navigation in the South China Sea: A Practical Guide," *Belfer Center for Science and International Affairs, Harvard Kennedy School*, June 2017

defense is structured by law to be interpreted as enabling defense cooperation while constraining escalation.

3. The Legality of Collective Defence in UNCLOS

The purpose of the U.S. alliance network within the Indo-Pacific is to not only function as a security structure, but also as a mechanism for coordinating interpretations of UNCLOS. The United States and its allies and partners have a shared understanding as to the purpose of UNCLOS - a document which provides a legal groundwork to establish clear guidelines as to what is permitted within EEZs. Moreover, UNCLOS is a benchmark for legal alignment, which matters more than force projection: common legal footing, provided by UNCLOS, allows for shared interests and reduced fragmentation. This has been affirmed by the United States and the U.K.'s relationship. The strength of the U.S.-U.K. alliance has been bolstered by joint statements affirming UNCLOS, maintaining the necessity of respecting a country's sovereignty and its EEZs. Indeed, both the United States State Department and the United Kingdom Foreign, Commonwealth, and Development Office have stated that they are "committed to reinforcing the primacy of UNCLOS in the South China Sea" by exercising their right of innocent passage in disputed waters and EEZs within the region. The operations that they have conducted, most notably the annual Talisman Sabre exercises, have been consistently couched within the legal framing of UNCLOS, illustrating how law is a common operational language for many FONOPs.

Although the United States often invokes UNCLOS to frame its FONOPs, the Convention also imposes significant legal constraints on the scope and conduct of U.S. maritime activities, reducing its overall advantages for America naval policy; rather than operating solely as a fig leaf to permit U.S. naval presence and strategic mobility, the Convention has been applied more liberally, employed in the endeavor of effective enforcement of good-faith compliance, proportionality, and the protection of coast-state and flag-state rights. Considering such developments, it is possible that UNCLOS might prove detrimental to American interests, restricting its operational flexibility, reducing its strategic posture. UNCLOS is simultaneously a strategic inhibitor of US maritime policy, as evident from the landmark rulings of *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* and *The Arctic Sunrise Arbitration (Netherlands v. Russia)*.

The ruling *in Mauritius v. United Kingdom* showcases how UNCLOS' emphasis on navigational and high sea freedoms would serve to link strategic use of maritime governance mechanisms by powerful states. The United Kingdom established a marine protected area around the Chagos Archipelago,[52] failing to act with due regard towards the country of Mauritius. The tribunal ruled that the United Kingdom had violated the tenets of UNCLOS, specifically, the obligation to act in good faith with developments in another country's EEZ and sovereign fishing rights of Mauritius; furthermore, the tribunal called on specialized agencies to recognize that the Chagos Archipelago "forms an integral part of the territory of Mauritius."[53]

The ruling established by the ICJ in *Mauritius v. United Kingdom* has implications for United States' maritime policy, regardless of the United States not being party to the court hearing. The ruling illustrates that

[52] *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom). PCA Case No. 2011-03. Award, March 18, 2015. Permanent Court of Arbitration.
[53] Waitzman, Eren, "UK–Mauritius Treaty on the Chagos Archipelago," *House of Lords Library*, Parliament of the United Kingdom, June 2025

UNCLOS forbids states to employ environmental regulations or maritime zoning as instruments of geopolitical strategy. This is clear within the court papers as the court heard arguments from Mauritius which maintained that, with the country establishing a protected marine area in the Chagos Archipelago, the United Kingdom violated its obligations to national sovereignty and self-determination. *A propos* the United States, the ruling directly challenges the United States' preference for employing maritime regulatory frameworks to advance security and environmental objectives, i.e. using fishery agencies, shipping companies to enhance sea lanes of communication and improve the efficiency of maritime operations.[54] Such a ruling would result in more American operations being classified within Grey Zone operations, which would expose the United States to further legal scrutiny, which would overall hamper the United States in its ambitions in great-power competition.

The Tribunal's ruling in the *Arctic Sunrise (Netherlands v. Russia)* arbitration clarifies UNCLOS' status as guaranteeing the rights of flag-states while imposing limits on maritime enforcement actions. On 4 October 2013, the Kingdom of the Netherlands filed arbitral proceedings against the Russian Federation under Annex VII of the United Nations Convention on the Law of the Sea.[55] The dispute concerned the boarding, seizure, and detention of the Dutch vessel *Arctic Sunrise* in the EEZs of the Russian Federation and the detention of the persons on board the vessel by the Russian authorities; subsequently, the ICJ ruled that Russia's boarding and detention of the Arctic Sunrise were unlawful *vis-à-vis* UNCLOS, emphasizing that maritime enforcement (i.e. the conditions under which vessels may be boarded, detained, or diverted) must adhere to a standard that incorporates rigorous adherence to reciprocity and international naval jurisdiction; ergo, *Arctic Sunrise* reinforced that regardless of the purpose of maritime security operations, whether brought upon by benign or bellicose intentions, they must remain firmly within the bounds of international law.

Both the *Chagos Marine Protected Area Arbitration* and *Arctic Sunrise Arbitration* reaffirm that the Law of the Sea Convention is a double-edged sword for the United States: although employed rigorously to justify its FONOPs, UNCLOS functions as a legal framework that disciplines and restricts the United States' maritime behavior. The Convention has good faith, due regard and is proportionately enshrined within its legal structure, inhibiting maritime power and its strategic power to impede a nation's sovereignty.

Conclusion

The United Nations Convention on the Law of the Sea marked an epoch in maritime regulation operations. The Convention is an official document which outlines clear delineation on EEZ's and territorial control. UNCLOS has remained an authoritative legal document throughout arbitration; it has provided the United States with clear justification to conduct FONOPs to challenge territorial claims made by its adversaries, ensuring that UNCLOS and freedom of navigation are preserved. However, it also serves as a strategic limitation for FONOPs to clarify maritime enforcement actions and limit aggressive interference in another country's EEZ. UNCLOS does not end U.S. maritime posture, it structures it: establishing clear guidelines to ensure that America's naval operations, such as conducting FONOPs, remain within the full bounds of the law, preventing the risk of damage to the United

[54] Pole Star Global, "Targeted Maritime Security Regulations Across Four Pillars," January 2025.
[55] *Netherlands v. Russia* (Arctic Sunrise Arbitration). PCA Case No. 2014-02. Award, August 14, 2015. Permanent Court of Arbitration.

States' international reputation. The United States treats the United Nations Convention on the Law of the Sea as binding customary law: a benchmark to legally structure FONOPs and alliance-based maritime security.

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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.

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).

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.*

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.

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).

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).

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.

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.*

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.*

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).

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