INTRODUCTION

The Supreme Court’s decision to eradicate constitutional protections for abortion has led to an array of new civil actions, from opponents and proponents of abortion alike, as both sides have turned to novel causes of action to promote their agendas. On the one side, states like Texas rely on expansive, bounty-hunter style causes of action that allow anyone—even totally uninjured, unaffiliated parties with no personal stake whatsoever in a particular abortion—to sue on loaded terms for statutory damages to the tune of $10,000. In response, blue states, with Connecticut leading the charge, have passed shield laws—including in some that create new causes of action of their own, authorizing those who lose Texas-style lawsuits to sue to reclaim any damages and expenses they had to pay out in Texas.

In other words, Texas created an expansive, novel cause of action that is designed, in part, to interfere with other states’ public policies—and in response, Connecticut created a new cause of action of its own, one that allows its courts to practically undue the financial impact of judgments under the Texas laws. A successful Texas lawsuit is, itself, the predicate for a lawsuit in Connecticut; the injury, for Connecticut law purposes, is the out-of-state lawsuit itself (or, to be precise, the judgment entered in it). Could Texas, in turn, create another new cause of action, allowing private suits to undo the impact of successful Connecticut lawsuits that itself aimed to undo the effects of an earlier Texas lawsuit? Could Connecticut respond by enacting another statute to undo the effects of Texas’s “undo the undo” law?

This essay will consider how both sides of this “arms race” dynamic fit into the private law ecosystem, and considers their broader cultural implications. Reforms like Texas’s and Connecticut’s raise complex constitutional issues and have enormous practical consequences for the lived experience of anyone who can become pregnant, as well as providers and others whose work is adjacent to abortions. But this being a symposium piece on the topic of “New Torts(?)”—emphasis on the question mark—the focus of this essay is on a different aspect of the issue: what do these novel causes of action say about the role of civil litigation on issues of such deep contestation and high political stakes more broadly? I do not mean to suggest that these laws are properly understood as “torts.” Rather, I approach them in the first instance as novel causes of action drafted to implicitly (and in the case of certain SB8 litigation, explicitly) glean legitimacy by virtue of their
superficial similarities to tort law. It is thus worth exploring just how anomalous they are.

The bulk of this essay focuses on the example of abortion. But its implications reach more broadly, for there is reason to think that future legislatures will endeavor to model future causes of action on these, especially in high-salience “culture wars”-type issues. On the left, there have already been efforts to model gun-restriction legislation on SB8; and on the right, Oklahoma’s legislature recently considered an even more extreme SB8-style bill that would have authorized any person to sue providers and others for $500,000 for providing, aiding, or abetting gender-affirming care for minors (for the moment, marginally cooler heads prevailed, and Oklahoma’s legislature instead enacted loaded legislation with enforcement via suits brought by parents, guardians, or next-of-friends, though as of this writing the more expansive measure appears to formally still be pending). It is perfectly plausible that such provisions will spawn responsive claw-back provisions like Connecticut’s, unless and until such moves are declared definitively unconstitutional. This all raises the question: what are the costs to this “tort-ification” of culture wars?

Part I sets out the basics of the novel causes of action on both sides of the abortion issue. Part II explores how each type of statute relates to the broader civil litigation landscape. SB8’s universal enforcement mechanism has some commonalities with qui tam suits and certain broad environmental laws, but also implicitly rests on a meaningfully distinct theory of universal injury. Claw-back causes of action, on the other hand, raise the question of whether there is any principled reason that a successful, valid lawsuit brought for its intended purpose in another jurisdiction cannot be a source of injury. Part II concludes by offering that while some aspects of SB8—especially the universal enforcement mechanism—are troublingly far afield from the traditional purposes of private law, meaningful constraints on the arms-race dynamic will have to come from outside of tort theory, from constitutional or extra-constitutional federalism norms (or—dare I say—political prudence).

Part III explores the broader costs of deploying novel private litigation in these culturally loaded settings. Setting substantive concerns about whether and to what extent abortion should be regulated or penalized, SB8’s enforcement mechanism has striking consequences for personal privacy: it means that compulsory civil discovery is available, and criminal procedural protections unavailable, in a set of lawsuits that can be brought by anyone about especially intimate affairs. This Part also widens the lens to consider the possibility that similar approaches will be used for other hot-button issues beyond abortion, and reflects on the cultural consequences of this move towards the “tortification” of cultural disputes.
I. NOVEL ABORTION CAUSES OF ACTION

Beginning shortly after Justice Amy Coney Barrett was appointed to the Supreme Court, anti-abortion legislatures began experimenting with bold attempts to outlaw nearly all abortions, including via novel and expansive private causes of action that would allow essentially anyone to sue those who were in any way involved in an abortion for statutory damages. In response, and especially in light of fears that these laws will penalize and chill abortion providers and others in jurisdictions where it remains legal, a number of states enacted “safe harbor laws”—and in some states, those laws included novel private causes of action of their own. This part provides a brief overview of both of these sets of novel abortion causes of action.

A. Anti-Abortion Causes of Action: SB8 & Friends

Texas’s SB8 “Heartbeat Bill” is surely the most widely-discussed and reported new cause of action. Briefly, the statute prohibits abortion after a heartbeat can be detected (ordinarily after about 6 weeks), and provides for primary enforcement via civil litigation. It creates an extremely broad cause of action: “any person, other than an officer or employee of a state or local government entity in this state, may bring a civil action against any person” who performs, induces, aids or abets an abortion (including payment or reimbursement) “regardless of whether the person knew or should have known that the abortion” would be in violation of the subchapter; or intends to do any of the above. (There is an affirmative defense available if an aider-or-abbeter affirmatively conducts an investigation to ensure that the law would be complied with before providing assistance or funding). A person who sues under SB8 is entitled to statutory damages of “not less than” $10,000 per abortion.

In other words, if an abortion is performed, anyone at all—even total strangers—can sue for damages, so long as they’re not a state actor. And anyone who knowingly aids or abets the abortion is strictly liable if it turns out the abortion violates the stringent terms of the act, unless they can prove by a preponderance of the evidence that they took reasonable steps to investigate the particular provider who performed the abortion to ensure that the law would be complied with.

The statute also expressly eliminates a number of potential defenses, including “non-mutual issue preclusion” or “non-mutual claim preclusion,” an apparent effort to ensure that multiple would-be plaintiffs could sue the same person for aiding or abetting in a particular abortion, even if, for instance, a court in one case concluded that the defendant was not liable for some reason. (The statute does provide that a defendant cannot be sued to
pay statutory damages multiple times for the same abortion). And, perhaps most strikingly of all, it provides that a court may not award costs or attorney’s fees to defendants, regardless of whether they are successful (but must award such fees to the plaintiffs if they win). In other words, the statute eliminates essentially any practical disincentive for bringing near-frivolous or exceedingly weak claims.

The statute includes a number of other rather unusual provisions aimed at limiting courts’ ability to consider constitutional arguments (for instance, an entire section of the statute is entitled “UNDUE BURDEN DEFENSE LIMITATIONS”) and limiting the practical impact of any court decision limiting the act’s scope (like a provision clarifying that it is not a defense for a defendant to have relied on any court decision, if that decision is eventually overturned by another court).

These various novel provisions work together to serves two goals. First, especially relevant pre-Dobbs, they were designed to avoid or at least delay judicial review by complicating the “state action” part of any constitutional challenges. Second, by deputizing anyone and everyone, they are apparently intended to have a very strong deterrent effect, minimizing under-detection and creating an environment of potentially near-total enforcement. As the dissenters in Dobbs noted, the Texas law “turn[s] neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.” By most measures, S.B. 8 has been a smash hit. Months before Dobbs, Supreme Court disallowed nearly all pre-enforcement challenges to the statute, acceding to the state’s efforts to disclaim its involvement in the statute.

Unsurprisingly, other states have followed in Texas’s footsteps in creating SB8-style causes of action. Oklahoma, for instance, has similarly given “any person” the right to bring a civil action and collect statutory damages for abortions. Some states have taken a slightly more limited approach to the availability of private causes of action; Idaho, for instance, has recently amended its statute to allow a wide range of family members to bring civil suits in cases of abortion. (Before the statute was amended, only the woman upon whom an abortion was performed could potentially sue a provider). Notably, though, this is still a dramatic expansion of the availability of civil recourse as compared to the pre-Dobbs and even pre-Roe

2 Id. § 171.208(i) (“Notwithstanding any other law, a court may not award costs or attorney’s fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court . . . to a defendant in an action brought under this section.”).
3 597 U.S. ___ (2022) (Breyer, dissenting) (Slip Op. 3).
4 Whole Womens’ Health v. Jackson,
The extent to which these private causes of action will actually be widely litigated remains to be seen. To date, there have been few suits brought under the statute. (Since its apparent purpose was deterrence while stymying constitutional review, rather than genuinely remedying injuries, it’s worth noting that the dearth of litigation does not necessarily mean the statute has not been effective—as a practical matter, it overruled Roe while that case was still on the books.) However, a handful of further lawsuits are making their way through Texas courts. In March of this year, for instance, a Texas man invoked SB8 to sue his ex-wife’s friends for allegedly helping her to get an abortion.\(^6\)

In December 2022, the media reported that a Texas trial court dismissed a lawsuit brought against a doctor who publicly admitted to violating SB8 in a Washington Post op-ed on the ground that Texas’s constitution does not allow suits by those who are complete strangers to an underlying incident.\(^7\) The court essentially concluded that Texas has a state equivalent to federal constitutional standing law, and that the universal enforcement provision is thus unlawful.\(^8\) That decision is being appealed.\(^9\)

It remains unclear whether other states that may attempt to create such expansive causes have other state-specific limitations.

B. Anti-Anti-Abortion Causes of Action

In response to SB8 and its progeny, a slew of states enacted various forms of “safe harbor” responses to protect in-state providers and robust in-state abortion access. Those statutes take a range of different approaches, including rules designed to limit participation in out-of-state abortion-related litigation, like extradition limitations and requirements to avoid disclosing information in out-of-state proceedings related to reproductive care.

At least two states, however, have gone even farther, responding to

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\(^8\) The trial judge apparently signed a brief order but does not seem to have issued formal findings of fact or conclusions of law, before leaving office, so the precise contours of what the trial judge actually did and whether the case is properly appealable are both apparently in dispute. See, e.g., *Gomez v. Braid*, No. 2022CI08302, Mot. To Vacate Order by Former Judge Aaron Haas and to Dismiss Felipe Gomez with Prejudice (filed Jan. 1, 2023).
the bounty-hunting statutes with novel private causes of action of their own. First, in May 2022, Connecticut passed first-of-its kind legislation that, in addition to limiting participation in out-of-state suits, creates a new private cause of action intended to effectively undo the adverse effects of such suits.\(^\text{10}\) It allows someone who lost a case under an SB-8 style statute to return the favor—to sue their former suer, and to recover damages to make them whole, “including, but not limited to,” the amount of the judgment they paid, and attorneys’ fees and costs for both actions (the out-of-state case in which the original judgment was entered, and the CT case they brought to recoup their payouts in that case). Presumably, provable damages for other financial or pain and suffering injuries could also be awarded in at least some cases.

To put this more crisply: Under SB-8, Annie could sue Dr. Bea, a Connecticut provider, for aiding and abetting in Cindy’s abortion (if, for instance, Dr. Bea prescribed an abortifacient which Annie then took in Texas).\(^\text{11}\) Judgment could be entered against Dr. Bea, requiring her to pay $10,000 to Annie, as well as all of Annie’s attorneys’ fees and litigation costs (say, $20,000), on top of her own attorneys’ fees (say, $15,000). If that happened, Dr. Bea could immediately turn around and sue Annie in Connecticut under its new cause of action, which entitles Dr. Bea to recover (at minimum) the $10,000 statutory penalty, the $20,000 she was forced to cover for Annie’s attorneys’ fees, her own $15,000 in attorneys’ fees from the Texas case, and her new costs incurred in bringing the Connecticut suit (as well as potentially other lost wages, emotional injuries, and so forth incurred as a result of the prior suit). The statute is intended to effectively undue the financial consequences of SB-8-type litigation.

Connecticut is not alone. Delaware’s legislature recently enacted nearly-identical cause of action, authorizing a suit to recover all damages

\(^{10}\) 2022 Conn. Acts 22-19 (Reg. Sess). Section 1 of Public Act 22-19 provides as follows: When any person has had a judgment entered against such person, in any state, where liability, in whole or in part, is based on the alleged provision, receipt, assistance in receipt or provision, material support for, or any theory of vicarious, joint, several or conspiracy liability derived therefrom, for reproductive health care services that are permitted under the laws of this state, such person may recover damages from any party that brought the action leading to that judgment or has sought to enforce that judgment. Recoverable damages shall include: (1) Just damages created by the action that led to that judgment, including, but not limited to, money damages in the amount of the judgment in that other state and costs, expenses and reasonable attorney's fees spent in defending the action that resulted in the entry of a judgment in another state; and (2) costs, expenses and reasonable attorney's fees incurred in bringing an action under this section as may be allowed by the court.

\(^{11}\) To be clear, on its face, SB8 would allow penalization of far more tangentially involved actors, ranging potentially from lab technicians, nurses, and pharmacists to friends who provide advice or support.
awarded in any proceeding to penalize abortions.\textsuperscript{12} Its legislation declares that out-of-state civil actions penalizing those who perform, receive, or aids in an abortion are “contrary to the public policy of this State.”\textsuperscript{13}

By its own terms, Connecticut’s law applies very broadly. Like the statutes to which it responds, it is framed as broadly and ambiguously as possible; any geographical limitation on the reach of the suit is framed as an exception from a default rule of universal applicability. The exception is as follows: the statute does not apply to “(3) an action where no part of the acts that formed the basis for liability occurred in [Connecticut].”\textsuperscript{14} The limits of the extraterritorial reach of Connecticut’s statute will surely have to be worked out in litigation.

\section*{II. ATYPICALITY & THEORETICAL SOUNDNESS}

The very existence of CT’s statute raises questions about the end-game. If Texas’s statute is valid, and Connecticut’s statute is valid, where does it end? Could Texas create its own new civil action, to recover the judgment amount-plus-costs awarded in Connecticut claw-back lawsuits? Could parties, in theory, enter into an infinite cross-state litigation loop, limited only by whoever runs out of time or money first? The current status quo seems like a state of profound disequilibrium, to say the least. Is the existence of the endless-loop possibility sufficient reason to cut off CT-style statutes at the threshold? Or, perhaps, is it a reason to minimize the extraterritorial reach of statutes like SB-8 statutes in the first place?

There is a major constitutional dimension to this conundrum, of course: the future of Connecticut’s claw-back statute likely depends upon the as-yet-undeveloped interpretation of the Constitution’s full-faith-and-credit clause. That Clause provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state.”\textsuperscript{15} How that Clause plays out in a clash like this is unclear; the case law is underdeveloped and (unsurprisingly) does not seem to address a situation like this. But suffice to say that it is far from clear that it would apply here. Professor Brilmayer, for instance, argues in forthcoming work that it does not. Her argument is that the Clause’s reference to “judicial proceedings” refers only to legitimate exercises of “judicial” power, and SB8-style “vigilante” statutes that lack a standing requirement are not “judicial” within the meaning of the Constitution.\textsuperscript{16} More broadly, the Clause

\begin{itemize}
\item \textsuperscript{12} Del. Code Ann. tit. 10, § 3929.
\item \textsuperscript{13} Id. § 3928(a).
\item \textsuperscript{14} Section 1 of Public Act 22-19.
\item \textsuperscript{15} U.S. Const. Art. IV Sec. 1.
\item \textsuperscript{16} Roberta Lea Brilmayer, Abortion, Full Faith and Credit, and the ‘Judicial Power’
\end{itemize}
is not an ironclad rule. Does the concept of granting “full faith and credit” prohibit a state from (a) formally respecting the outcome of litigation in another state, but (b) allowing a clawback counter-suit in order to achieve its own public policy? Even assuming that the answer is “yes,” that may not be the end of the story. For instance, the clause does not apply to “penal judgments,”—judgments intended to redress “a wrong to the public” rather than “a wrong to the individual”—which must be enforced in their home state. Other strands Full Faith & Credit Clause make clear that states are allowed to vigorously pursue their own public policy even when it conflicts with the law of another state, so long as the opposition is based on substantive disagreement/public policy (rather than just discrimination against the laws of other states as such). 17

This being a symposium on “New torts(?),” however, I set aside the constitutional issue here and consider other dimensions of the problem. The bulk of this essay instead asks how these novel cause of action fit within the broader landscape of civil litigation and private law and considers some broader implications of this private litigation arms-race.

As an initial matter, it’s worth noting that what seems like formal disequilibrium—this possibility of endless litigation loops and endless statutory escalation—is not necessarily disequilibrium in practice. Perhaps claw-back statutes, and the very prospect of bizarre endless litigation possibilities, have exactly the effect presumably desired by the CT legislators—to disincentivize SB-8 style litigation that even arguably could trigger a Connecticut-based response. Surely the prospect of infinite protracted litigation is unappealing to most, if not all, would-be litigants; if nothing else, the existence of CT-style statutes should counteract some of the appeal of the heavily plaintiff-friendly, streamlining rules that govern SB-8 litigation. It’s at least possible that both sides of the battle have served their practical incentive-creating and expressive purposes. But setting that possibility aside, is there anything inherent in tort theory that helps resolve this conundrum, or suggests that one or the other of these are invalid uses of private causes of action?

The approaches on both sides of the issue raise novel concerns about what the civil justice system is for. Some of these concerns track big-picture debates in tort theory circles about the appropriate role of tort law in addressing broad, societal disputes. At the most basic level, some scholars

17 Others have developed arguments about the Full Faith and Credit Clause as applied to different abortion-related safe-harbor provisions. See Diego A. Zambrano, Mariah Mastrodimos, and Sergio Valente, The Full Faith & Credit Clause and the Puzzle of Abortion Laws, N.Y.U. Law Rev. Online (2023).
(including in particular many law and economics scholars) and courts view tort law as primarily an appropriate tool in the regulatory arsenal for producing optimal levels of various forms of potentially harmful behaviors: on this view, requirements that lawsuits be brought by injured parties are peripheral practicalities that help the system function appropriately. Others understand tort law as, at core, about corrective justice between injured parties or as a tool for civil recourse. On these views, broadly speaking, there is an underlying relational dynamic that is necessary to the internal logic of tort law: tort law is for private disputes between an injured and an injurer, and injury requirements are thus not peripheral but central to the entire enterprise.

There is, of course, no requirement that legislatures create statutes that track some theoretician’s view of the common law of torts. It may nevertheless be helpful to consider how ordinary or extraordinary these recent measures are. For instance, in justifying SB-8 to the Supreme Court, Texas sought to suggest that it could not be fairly distinguished from other quotidian torts for constitutional purposes. More broadly, though, my hope is that examining these statutes in context may help us take the temperature of the legal-political state of the nation post-Dobbs.

With respect to SB8, the universal-enforcement provision—what critics call the “bounty-hunting” enforcement mechanism—renders the private cause of action rather far afield from typical conceptions of the purposes of private law, if not completely sui generis. (The same cannot be said, however, for many of the potential use-cases that most trouble advocates, including cases brought by abusive partners or family members). On the other hand, Connecticut-style claw-back statutes, though startling on their face in their blunt disrespect for sister state law, actually fit quite comfortably into a private law tradition. Both sets of laws raise troubling questions about the norms of federalism and civil society, and in the end, any constraints on arms-race dynamics will likely need to be exogenous, from constitutional law or federalism norms.

A. SB8-Style Universal Enforcement/”Bounty Hunting” Torts: Incentivized Private Enforcement of Morality Legislation?

To call SB8 novel is an enormous understatement: its one-sided incentives (like the exceedingly lopsided attorneys’ fees provisions), careful efforts at evading “state action,” and directions about the impact of judicial decisions, are individually striking, and their combined effect is rather breathtaking. But the center of gravity is the universal enforcement provision, which allows anyone to bring suit if they can non-frivolously

allege that they suspect an abortion was performed after 6 weeks, regardless of whether they have any connection to the underlying act. The provision potentially allows anyone from angry exes to snooping neighbors to strategic activists to profit off of an abortion. And given the provisions regarding lopsided attorneys fees and such, there are essentially no down-side risks for strangers that do so, even on scanty suspicion or evidence.

So, how to understand the private cause of action? At core, SB8 seems to be straightforwardly an effort to enforce public law via private litigation, and to actively incentivize private citizens to undertake those enforcement efforts. (As discussed below, this a point of contrast with the claw-back statutes on the other side). As a matter of realpolitik, the universal enforcement mechanism was designed to evade state action problems, not to allow for diffuse injuries to be remedied.

SB8 style statutes don’t obviously serve the traditional purposes of private litigation; they’re hard to justify from a recourse lens or a more law-and-economics regulatory perspective focused on cost-internalization (though the latter may depend on your underlying understanding of the “costs” of abortion, and therefore on the moral valence of abortion). Their apparent purpose is to obtain absolute or near-absolute deterrence, and perhaps more—to create a climate of distrust and fear around anyone who might be inclined to participate in or facilitate abortions.\(^{19}\) On certain understandings of tort law—under which tort law is, in fact, just another form of public law, a tool for public-policy-making—SB8 is perhaps easier to justify in the abstract. But at the Supreme Court, in its effort to evade pre-enforcement constitutional review, Texas expressly argued that SB8 litigants are not like “private attorneys general,” enforcing the law on behalf of the public; rather, they argued that was “akin” to “the tort of outrage.” Professors Goldberg and Zipursky have elsewhere persuasively argued that this interpretation is implausible, and that SB8 can only be understood as an effort to enforce a state conduct rule via a delegation of state authority to private attorneys general. The law’s “deterrent aims (and remedial provisions in furtherance of those aims)” and “the absence of any plausible claim for redress

\(^{19}\) From an individual litigant’s perspective, framed at a certain level of generality, cases under SB-8 aren’t necessarily so unique—the desire to obtain damages defined primarily by a statute or common law) is surely a primary motivator in most civil suits. They may, however, be different from traditional state lawsuits in ways that have constitutional salience. Professor Brilmayer has argued for instance that because SB-8 lawsuits do not satisfy the requirements of constitutional standing they are, for constitutional purposes, essentially just advisory opinions; thus, she argues, those decisions are not entitled to “full faith and credit” by other states under the federal constitution. The full faith and credit issues are, to date, largely unresolved (and there is a dearth of both case law and secondary writing on the issue). The proper resolution of this and related knotty constitutional issues is beyond the scope of this essay.
based on a legal wrong done to—a rights-violation suffered by—the plaintiff.” If anything, SB8 functions as an argument reductio ad absurdum for a totally non-relational vision of tort law.20

In a pre-Dobbs decision asserting that most pre-enforcement challenges to SB8 were barred—a decision that effectively enabled SB8 to remain in effect, even before Roe was overturned—Justice Gorsuch claimed that SB8 was “somewhat analogous” to other statutes allowing private causes of actions that also serve public interest.21 But although there are undoubtedly similarities, SB8 seems meaningfully different from the other areas where we see statutes authorizing anyone, even plainly uninjured and disinterested parties, to bring suit. I consider two such areas below: (1) qui tam suits for fraud against the federal government under the False Claims Act, and (2) environmental statutes that allow any citizen to bring suit for violations of environmental protections (although such suits may be primarily for injunctive or equitable relief).

Superficially, qui tam suits seem like a close analogue—there is even evidence that the architects of SB8 modeled the statute after qui tam suits in order to enable the statute to be effective even if a court enjoined the executive branch from enforcing it.22 But SB8 is not, at core, a qui tam statute. It makes no pretense that a plaintiff who invokes it is suing on behalf of the government or any other entity. It simply authorizes individual persons (and expressly not the state) to sue for $10,000. Contrast that with, for instance, the classic qui tam statute, the False Claims act, which provides that individual whistleblowers (“relators”) may bring suits “in the name of the government.”23 In qui tam actions, moreover, the government typically

20 In their view, tort law, properly understood, involves violations of obligations between parties, and the law-and-economics view that has reconceptualized it as just another tool for public policy drains tort law of its distinctive nature and normative appeal. In Goldberg and Zipursky’s view, the key way to distinguish between public and private litigation is whether someone is seeking to enforce their own rights, or has simply been deputized by the state to enforce a conduct rule for strategic enforcement reasons. SB8, as drafted, seems like the latter.

As Goldberg and Zipursky note, the question of whether SB8 can properly be understood as “private” law had surprising salience when the statute’s constitutionality was litigated to the Supreme Court. [The gist of their argument is that federal courts’ power to enjoin enforcement of SB8 (the basic issue in Jackson) depends on whether “sb8 plaintiffs would be suing, at least in part, to redress violations of their own rights.” If so, “then it would not be the case that their lawsuits are purely vehicles for the enforcement of the conduct rule at the core of S.B.8. Conversely, if they are not in any respect suing the redress violations of their own rights, then their lawsuits are purely vehicles for the sanctioning of those who violate the prohibition [on abortions].”]


retains the ability to intervene in the lawsuit at any point and effectively take over the plaintiff’s side of the litigation—an outcome that, of course, would be absurd in ordinary private litigation (and is not allowed for in SB8 or its kin). To serve its strategic constitutional evasion purposes, the statute was designed to maximally distance itself from state actors, and having private litigants serving as relators on behalf of the government would cut against that goal. But even setting aside the rhetoric and public justifications for SB8, there are still at least some important structural differences in remedy: in qui tam actions, while relators are (often handsomely) rewarded for bringing suit, the primary remedy is a damages award paid to the government. (Relators receive 15-30% of that judgment). Moreover, the ordinary rules of civil litigation—not the anti-defendant jerry-rigged SB8 incentives—generally apply. In short, while SB8 bears important similarities to qui tam actions, qui tam actions are justified under an entirely different theory (“on behalf of the state”). The primary remedy is payment of fraudulently obtained funds, and statutory multipliers, back to the public fisc. And the incentives for relators—while certainly strong in cases where alleged fraud is significant!—are proportional to actual damages sustained by the government and tempered by the usual costs and downside risks of litigation.

The universal-enforcement environmental statutes are in some respects closer kin to SB8-style bounty-hunting. Ultimately, however, the theory of injury, balance of incentives, and prerequisites are all importantly different. New Jersey’s Environmental Rights Act permits “[a]ny person” to commence a civil action “against any other person alleged to be in violation of any statute, regulation, or ordinance which is designed to prevent or minimize pollution, impairment, or destruction of the environment.” The action can be for injunctive or equitable relief, or for “civil penalties for the violation as provided by law.”24 Such suits can only be brought upon an allegation that a violation is “continuous” or “intermittent” and that “there is a likelihood that the violation will continue into the future.”25 Massachusetts has a statute that allows any Massachusetts resident to bring suit to abate “a hazard related to oil or hazardous materials in the environment” against a wide range of potential defendants, and allows courts to award costs and fees.26 And, critically, these environmental statutes also do not contain express independent incentives beyond abatement of an ongoing harm to

24 Allied Corp. v. Frola, 701 F. Supp. 1084, 1091 (D.N.J. 1988) (noting that New Jersey’s Environmental Rights Act does not create any “substantive rights” but rather merely confers standing on individuals to fill gaps in government enforcement, and dismissing claims for damages to plaintiffs). I am unaware of situations in which such fines would be paid to private parties themselves, rather than as fines to the government.
bring the suit—any statutory penalties are paid to the government, and the ordinary remedy is abatement.

The bottom line is that the other areas in which anything approaching the broad, bounty-hunting style litigation prospects have come into play in modern history—environmental and financial fraud on the government—involve much more direct claims of harm to the person bringing the suit: we all pay the cost of a poorer environment or more polluted air, and the marginal cost of government fraud is borne by all of us. This can be a powerful distinction even without drawing a bright line between private law and public purposes more broadly.\(^{27}\)

These statutes demonstrate that in at least some non-abortion contexts, there is modern American precedent for universal enforcement statutes. Given the absence of money awards for environmental plaintiffs and a focus on injunctive relief to prevent future environmental harm, however, these statutes hardly seem like “bounty hunting,” though obviously these statutes pave the way for committed environmentalists to search for ongoing violations to prevent their recurrence. The bottom line is that SB8 stands in contrast to the modern US comparators by authorizing universal enforcement for a morality crime, rather than implementing a broad but genuine notion of harm to private individuals.

I don’t mean to push the distinction between environmental or qui tam torts, on the one hand, and abortion-related torts too far. One can hold metaphysical views under which we are all as a society harmed by abortion, and I do not mean to denigrate those religious or metaphysical understandings. But suffice to say that it is a stretch to characterize these laws as allow for the vindication of either (1) harms to the individuals who bring suit, or (2) disperse harms that are otherwise too diffuse for the polity to capture, at least when they are construed to truly allow anyone to bring suit. The framing of New Jersey’s act as “Environmental Rights” suggests the idea behind it, that New Jersey believes people have a right to live in a certain kind of environment and that this right is infringed upon, harming everyone, when the environment is harmed in an ongoing way. In other words, these other laws are at least arguably based on a very broad but genuine notion of a tort-like injury to individuals—a notion of harm that is not viewpoint-specific or uncertain in the sense that whether one thinks it exists is not dependent on one’s metaphysical or religious views.

Taking a broader geographic and historical lens, SB-8-style “popular enforcement” statutes that are unequivocally targeted at what we’d ordinarily

\(^{27}\) (Though I suppose it is in principle possible that one could hold a view in which the sole purpose of private litigation is to establish optimal incentives, coupled with a strong view in the dis-value of abortion, near-absolute enforcement of a $10,000 lead to the optimal level of deterrence would suggest SB8 is an appropriate form of tort law).
think of as public law violations may not be not historically sui generis in Anglo-American jurisprudence, but they are anomalous in the modern legal landscape (and, apparently, in America). Lawmakers have long avoided such mechanisms. Professor Randy Beck recently published a historical overview of such statutes in the anglo-American tradition, which, as he puts it, “turn law enforcement into a profit-making enterprise.”\(^{28}\) He considers two case studies that (tellingly) date to the 1700s: a 1736 English statute authorizing civil actions by private citizens aiming to suppress unlicensed sales of gin and distilled liquors, and the English 1780 Lord’s Day Observance Act, which authorized a similar bounty-hunter civil litigation approach for failure to respect the Sabbath. The approach, Beck argues, backfired culturally in both cases, leading to gamesmanship, antisocial profit-seeking behavior, enforcement even for minute violations or in settings that were plainly against the public interest, and dramatic backlash (with “informers”—enforcers—eventually “so unpopular that they were repeated targets of mob violence,”)\(^{29}\) and eventual repeal.\(^{30}\)

That said, SB8 and its progeny are potentially powerful even absent their universal enforcement provisions, and there is some reason to think those provisions may be written out of the statutes going forward. The recent Texas trial court order calls this approach to injury into doubt—though SB8 is not governed by federal standing law, it may be that courts will generally read some kind of actual injury requirement into the statute, narrowing the universal enforcement provisions. If that ruling is upheld, to be clear, it will not necessarily defang the statute—rather, it seems likely to mean instead that enforcement will fall on would-be fathers (especially ex-partners) and other family members who suspect a disapproved-of abortion and can allege a closer relationship to the underlying abortion. (I think you could have a relatively pro-choice view and concede that there is at least potentially an injury in such cases, for standing-type purposes if not of the sort that would typically be remedial in tort cases).

For the subset of cases where lawsuits are brought by immediately-involved parties, the theory of injury is a dollop less novel (though by no means uncontroversial). Pre-\textit{Roe}, at least one court allowed a lawsuit against those who performed abortions on plaintiff’s spouses, on the theory \textit{not} that there was a wrongful death involved, but rather based on a theory of deprivation of a relationship with the future child.\(^{31}\) The court concluded that

\(^{29}\) \textit{Id.} at 562.
\(^{30}\) \textit{Id.}
the wife’s consent was not enough to preclude the father’s recovery. But Touriel was an unusual (and widely-commented-upon) case, and there in the pre-Roe era there did not develop any significant body of case law establishing similar liability. (In the past few years, even pre-Dobbs, a few states authorized other sorts of inter-spousal litigation: Arkansas, for instance, passed a statute allowing husbands to sue their wives’ doctors to enjoin them from receiving second-trimester abortions).

If SB8 and other expanded abortion-tort statutes are ultimately construed to be valid, but limited to a narrower scope of plaintiffs who have plausible claims to something resembling an “injury”—that is, if it limits suits to those brought by, say, partners or family members who would have been related to the baby had it been born—tort theory has less to say about it, and frankly many of the worst-case scenarios advocates worry about (a weapon for abusive partners, for instance) would remain.

B. CT-Style Claw-Back Torts: A Valid Lawsuit As An Injury?

The Connecticut approach, flat-out authorizing a suit for the sole purpose of undoing the effect of successful litigation in another state, is an even more flagrantly waving of the “we do not respect what our sister States are doing” flag than SB8 style causes of action.32 Yet in some respects, the Connecticut approach sits more comfortably within a tradition of private law. Its purpose is plainly to allow individuals who, in Connecticut’s view, have suffered a personal wrong, to seek recourse from those who wronged them; it serves the classic purposes of private law, like deterring wrongs to individuals and allowing those who are injured by a wrong to seek to be made whole. The fact that the form of the wrong is a lawsuit authorized by vigorously-pursued public policy in another state is a major wrinkle (to say the least) from a federalism perspective, but it is not obviously a problem from the perspective of private law theory. After all, there is no question that being subjected to litigation and legal process can, at least in principle, constitute a compensable harm.

At the same time, it is hard to think of a clear analog in existing law. Informally, people respond to litigation by bringing cross-claims or retaliatory lawsuits of their own all the time, of course. One of the first Texas SB8 lawsuits provides a striking example: the husband of a Texas woman sued her friends under SB8, relying in his complaint largely on a series of text messages between the women. The women have now separately filed a tort suit alleging that the plaintiff invaded their privacy by reading those text messages (they also allege that the spouse was abusive, knew about the

32 That said, a recent series of proposed SB8-style statutes focused expressly on those who aid in out-of-state abortions may come close.
abortion before it happened, and decided to allow it entirely in order to hold the prospect of an SB8 lawsuit over the friends as leverage to prevent the wife from leaving him, vindicating many pro-choice advocates’ fears about how SB8 will play into the hands of abusers). But I am not aware of any cause of action where the substance of the alleged wrong is that the defendant brought a valid and successful cause of action in another jurisdiction (or in the same jurisdiction, for that matter).

The closest analogs are probably in the cluster of torts for abusing the legal system, like malicious use of process, wrongful litigation, and abuse of process. (One way to understand SB-8 itself is by effectively authorizing what would otherwise be “abuse of process” whenever you can figure out that someone had an abortion—letting people who have not been harmed sue not to be made whole for injuries but rather largely to harass you and potentially profit). But of course, the imagined use-cases for CT’s statute are ones in which the underlying out-of-state litigation was brought for the very purposes for which the legislature created the cause of action. And neither SB8 nor CT’s statute have any intent requirement whatsoever.

In addition to allowing recouperation of actual damages incurred from acting in accordance with Connecticut’s pro-abortion public policy, the statute seems designed with a number of aims. It makes a statement about Connecticut’s commitments and expresses that it has the back of its providers and those who support, aid, or receive abortions with some nexus to Connecticut, and presumably deters SB8-style litigation that touches Connecticut providers or interests in the first place. It also seems to serve as a bit of an argument ad absurdum, a rejoinder to efforts by anti-abortion forces to extend the reach of their views across state lines and chill abortion providers nationwide with draconian laws and vague, broadly worded statutes. So at bottom, the statute is plainly designed to promote public policy goals beyond merely allowing recourse to parties “injured” by out of state litigation. And yet, at least when it comes to the private cause of action, the way the state has done so seems actually fairly consonant with the idea of tort as primarily a source of redress for injuries caused by others.

But where does it end? The bottom line is that there is not an obvious basis in tort law for limiting claw-back statutes like Connecticut’s, except, perhaps, a sui generis rule that damages awarded in a lawsuit cannot constitute a tortious injury. Yet the possibility that a state could do something like the following seems bizarre: Could a state say: “Any person may sue to claw back the damages awards pursuant to any judgment entered into in another state for which any part of the underlying events took place in this jurisdiction and which would not have been the source of liability in this
That would be the equivalent of saying, “[w]e want our laws to de facto govern all states in any situation where there is any plausible connection to our state.” Perhaps this approach is consistent with a narrow view of states’ obligations to respect each others’ court rulings and government decisions—but, unsurprisingly, the answer to that question lies in the as-yet-un-worked-out interstices of Constitutional full-faith-and-credit and federalism doctrine.

One potential limiting principle would be a rule that clawback statutes are valid only as a response to illegitimate, or particularly odious or harmful or atypical, laws. Perhaps a clawback statute cannot be enacted in response to another state’s legitimate tort law, but can be enacted in response to clever legislative schemes that merely mimic tort law. There is conceptual appeal to an approach along these lines: it suggests that damages from an illegitimate lawsuit are a wrongful injury, while leaving intact the de facto background rule that damages in a run-of-the-mill legitimate lawsuit cannot be. And practically, it would permit CT-style self-help without escalation. But of course, this raises thorny questions of how we decide (and who decides) which clever legislative schemes are legitimate and which are not. One basis for special treatment for SB8 is, of course, the universal enforcement mechanism. But that does not go quite far enough to justify the CT statute in its entirety, because it would apply equally to cases where, for instance, an ex-partner sued a doctor for an abortion pursuant to a statute that only authorized such suits by the father. Another basis, of course, would be if there is something about abortion or reproductive freedom, substantively, that justified such an approach. I suspect that both lines of thought motivated the CT statute and are appealing to its supporters—there is a whiff of both, “we need to respond tit-for-tat to protect our women from vigilante states doing crazy legalistic stuff” and “we need to make sure that access to abortion is maintained to the greatest degree possible because we view it as a fundamental human right.” But in the absence of agreement about that fundamental-right status, it is unclear that this is a workable basis for distinguishing clawback statutes about abortion from other hypothetical statutes.

III. CULTURAL COSTS

New causes of action, of course, don’t exist in a vacuum, and their

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33 This hypothetical could potentially be extended even further under the Supreme Court’s most recent personal jurisdiction jurisprudence, in cases involving corporate actors where the defendant is registered to do business in a state, even if the underlying events had no connection whatsoever to that state. See generally Mallory v. Norfolk So. R. Co., __S.Ct. __ (2023).
effects are not limited to the allocation of damages. Can you imagine widespread use of universal bounty-hunting for other sorts of violations—even including intentional torts, for which we’d presumably like near-total deterrence? Imagine if cocktail-party chatter about wrongdoing could serve as a potential damages award for anyone who had the motivation to pursue the charge, regardless of the original victim’s decision. That would plainly undermine any sense of tort law as a form of inter-party dispute resolution. But more importantly, it would infect social interactions, mores, and expectations in ways that would just plain make the social world worse. Imagine, for instance, if snooping to revel any tortious conduct could be rewarded with a successful damages suit—down on your luck? Dig up some dirt on your neighbor, and you can have $10,000!

There are reasons that we haven’t set up the social and legal world this way. One of those reasons is simply that no one wants to live in a world with the incentives that sort of system entails. There’s a reason we don’t generally want everyone looking for infractions all the time, and part of that is simply because it would be an awful world to live in. In SB8-land, the burdens of that awful world fall on people who can become pregnant and those who help them. The effect is rendered even starker because an entire suite of constitutional and procedural protections that would attach to criminal persecutions—protections ranging from double jeopardy to constraints on investigations—does not apply in the civil context.

This Part explores some further cultural ramifications of the arms-race statutes. In the abortion context, one important consequence of SB8-style rights is the erosion of privacy in intimate health-related information. More broadly, the tortification of morality and cultural disputes risks encouraging a certain personalized, grievance-based approach to hot-button conflicts. Since it is far from clear that the arms-race dynamic will be self-limiting to the abortion context, the time is ripe to consider whether our social fabric should be woven with such thread.

A. Privacy & Trust

The availability of a new civil remedy entails, of course, the availability of all of the procedural tools that come along with it, including compulsory civil discovery. Among other things, this means that bounty-hunting style statutes do not just create a risk of statutory penalties: they also create an even broader risk of widespread invasions into personal privacy. Those risks extend not only to cases where statutory damages would actually be awarded—where an illegal abortion actually took place—but potentially to any case where such an abortion is even alleged or suspected (whether or not it turns out to be true. In the context of abortion, the potential impact on
medical and sexual privacy is particularly striking. The scope of the potential privacy costs is especially enormous in light of the sheer frequency both of abortions and miscarriages, as well as the biological similarities between elective abortions and medical management of miscarriages. While case law has not yet provided much clarity on how pleading requirements will play out on the ground, it might not take much to plausibly plead that an abortion occurred, potentially entitling plaintiffs to civil discovery into particularly intimate information.

This dynamic is perhaps especially stark in Texas, which has a unique pre-litigation discovery process that is being used in a number of cases to obtain discovery—including depositions—prior to bringing a lawsuit, simply by submitting a form to a judge explaining that discovery is needed to “investigate a potential claim” against that party. This is already being used to allow depositions and potentially other invasive forms of discovery to ferret out abortions and the conduct of those who know about them.

Even absent such novel procedures, the standards for civil discovery are generally not especially privacy-protective, including for parties not at issue in the discovery. While there are arguable legal protections that ought to protect disclosure of at least some intensely personal information, as a practical matter, whether any protections will be applied to prevent disclosure of, for instance, highly sensitive medical records or locational data in any litigation likely to come down to the discretion of particular judges, meaning there is little basis for confidence that information would not be disclosed should litigation come up. The bottom line is that allowing lawsuits where one key underlying issue is likely to be whether a specific type of medical care was provided makes exposure of medical records likely.

As discussed above, bounty-hunting statutes are a tough fit for any coherent notion of private law. One normative reason for maintaining that distinction involves the relative dearth of constraints on private parties trying to ferret out wrongdoing, as compared to state actors, like the police. Private parties are not generally restrained by the Fourth Amendment from limiting searches and seizures to those on whom there is some level of suspicion; and

34 I argue in forthcoming work that there are meaningful constitutional arguments (embraced by many lower courts) that such information should not be disclosed, but as a practical matter such information is still very much at risk. Carmel Shachar & Carleen Zubrzycki, Informational Privacy After Dobbs, ALA. L. REV. (forthcoming 2023).
35 Kim Roberts, Texas Resident Seeks to Depose Offshore Abortion Provider About Violating Texas Heartbeat Act, THE TEXAN (NOV. 28, 2022), https://thetexan.news/texas-resident-seeks-to-depose-offshore-abortion-provider-about-violating-texas-heartbeat-act/ (Describing Texas rule 202 petition that seeks to investigate organization providing off-shore abortions in order to discovery “the identity of all individuals and organizations that aided or abetted illegal abortions by providing funding, insurance coverage, or logistical support”).
36 See Schachar & Zubrzycki, supra note 21.
while it would be illegal for private citizens to do some of what police do, there’s also a band of behavior that private vigilantes can get away with that the Constitution does not permit from state powers. They also are not limited, more practically, by the de facto constraints that limit the capacity of police departments.

Indeed, the federal government is sufficiently concerned about the privacy risks posed by both civil and criminal abortion statutes that it is proposing to rather dramatically amend HIPAA. HIPAA’s privacy rule currently allows medical information to be obtained in both civil and criminal investigations, so long as minimal process is followed. In light of statutes like SB8 (and criminal prohibitions elsewhere), HHS has recently issued a notice of proposed rulemaking proposing to institute a categorical bar prohibiting covered entities from disclosing medical information in proceedings intending to penalize or prosecute legal reproductive care. It remains to be seen whether the rulemaking will come to fruition, and it is sure to face legal challenges if it does—but the point remains that the federal government recognizes the sea-change in the threat level posed to privacy in the new litigation environment.

In existing law, protections for especially sensitive information in civil discovery have tended to be ad hoc, depending on exercises of judicial discretion under various balancing tests and interpretations of how much privacy protection is mandatory that vary by circuit. Carmel Shachar and I have explored the constitutional dimension of this problem in the abortion context in forthcoming work, but the question of how the information-forcing potential of civil litigation will or should play out in the developing litigation landscape remains to be explored.

B. The Tortification of the Culture Wars

More broadly, the whole situation raises questions about the role of civil litigation in society: will we look back at this tortification of this particular aspect of culture wars as a one-off glitch, or is this the wave of the future? Will we see SB8-style civil enforcement regimes of other seriously

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37 See generally Kiel Brennan-Marquez, The Constitutional Limits of Private Surveillance, 66 U. of Kans. L. Rev. 485, 493, 499-505 (2018) (describing a range of actions that private citizens have undertaken to assist police and that have been held lawful, including, for instance, indiscriminate warrantless searches of all packages passing through a FedEx facility).

38 Carleen Zubrzycki, The Abortion Interoperability Trap, 215 Yale L. J. Forum 197, 215-216 (2022). But see Schachar & Zubrzycki, supra note 21, at __ [tk editors, this will be posted on SSRN shortly and we can cite to that in final version].

contested cultural issues, and—if so—will we see competing states counter those efforts with Connecticut-style counter-suits? It might be that the extent of the polarization related to abortion is sui generis in American politics, and will thus remain a one-off, until it gets to the Supreme Court. But it might not be.

There’s at least some reason to expect expansion to other culturally contested issues: California, for instance, reacted to SB8 by enacting a closely parallel statute that allows similar bounty-hunting style enforcement for gun control (and is designed to thwart judicial review in a way that is directly patterned on SB8). The law operates towards the limit of what states can prohibit under current understandings of the Second Amendment; it bans the sale of guns to minors as well as sales of semi-automatic semi-automatic guns and guns without serial numbers, and it allows for enforcement by otherwise uninterested private citizens via private lawsuits for $10,000 statutory damages. The law differs from SB8, however, in that the underlying conduct was already criminal in California, and there is (in contrast with SB8) little reason to think it has had pervasive or invasive actual deterrent effect. And in practice, the motivations behind California’s law were probably to tee up judicial review (in order to demonstrate the unlawfulness of SB8’s enforcement strategy), whereas SB8 seemed designed for the purpose of evading that review.

As of this writing, no gun-loving states have responded to California’s laws with counter-suit statutes like Connecticut’s. That could be for any number of reasons. Perhaps there is a lack of perceived actual threat to non-California actors (I have not heard stories of gun store owners in Texas being kept up at night by California’s laws, whereas abortion providers report serious ongoing concern). Or there may be less overall political willpower when it comes to gun issues, which, however heated, tend to be one degree cooler in temperature than abortion debates. And frankly, the interests of gun-sellers may seem less ultimately critical and personal than the rights at stake as perceived by both sides of the abortion debate. Or perhaps states have a principled opposition to such federalism-bending hijinks (though this seems unlikely).

The next issue to look for a similar dynamic seems likely to be with respect to gender-affirming care. States are in the process of taking a number of creative steps to limit access to gender-affirming care, first for minors and more recently for adults as well. If civil litigation becomes a significant tool for enforcement, it seems very plausible that the Connecticuts or Californias of the world will seek to protect in-state providers and others by authorizing arms-race-style suits. This seems especially plausible because the interests of parents in obtaining care for their children and adults who obtain gender-affirming care on their own are likely to strike blue state actors as the sort of
thing that needs to be protected to the extreme, including by providing for the undoing of the adverse effects of ongoing lawsuits. Likewise for physicians who provide gender affirming care, to preserve meaningful access to all.

So far, the escalation into the gender-affirming care arena is in its early stages, but there are signs of torts arms races to come. Oklahoma’s legislature is considering a bill providing that “any person, other than [the state or state actors] may bring a civil action against any person or entity who (1) performs or induces gender the transitioning or gender reassignment procedure . . . or (2) knowingly engages in conduct that aids or abets” the same. The statute is perhaps even more remarkable than SB8 in its penalties: it provides for statutory damages of “not less than Five Hundred Thousand Dollars ($500,000) for each” transition or procedure in violation of the act. It also allows for injunctive relief, as well as compensatory damages for, e.g., loss of consortium and emotional distress, “if the claimant has suffered harm from the defendant’s conduct”—a proviso that is necessary because harm, or indeed any relationship at all to the defendant or person whose medical care is at issue, is not a necessary predicate for bringing suit in the first place. The statute of limitations is similarly absurd: bounty-hunters can bring suit for up to 20 years, and individuals can bring suit up to 25 years after obtaining the age of majority. (For comparison, Oklahoma’s wrongful death statute of limitation is 2 years, and state’s longest civil statute of limitations is 5 years).

The Oklahoma bill is the only pure bounty-hunting provision under consideration to date, but other states are similarly expanding their tort law provisions to enable broad private enforcement. New Mexico, for instance, allows civil suits along similar lines to be brought by anyone “injured or aggrieved” by a gender transition; how expansively that could be interpreted is unclear, but it is plainly intended to be broader than just, say, a parent of a minor or an individual who regrets a procedure. Texas is considering a bill along similar lines. And a few states have extended their statutes of limitations dramatically to allow civil suits against those who participate in gender-affirming procedures.

There is reason for concern in other areas. The briefs to the Supreme Court in a challenge to SB8, for instance, argued that we may see similar legislation in other areas ranging from flag burning to immigration.

Obviously, we’re in this conundrum because both sides view the stakes of abortion as existential, or near it—and have plausible claims to interests that do not easily abide state boundaries. To analogize outside the

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40 This is in order to evade constitutional review, akin to the SB8 strategy.
41 NM Ch 11.
42 H.B. 1752, 88th Leg., Reg. Sess. (Tex. 2023)
abortion context, imagine that State 1, whose population vehemently opposes physician-assisted suicide, allows family members to sue “anyone who aids or abets in the death of a family member, regardless of whether that assistance was legal where it was rendered.” This suit can, in theory, be used to target physicians practicing in states where the practice is legal. Now imagine that State 2 vehemently supports the free practice of physician assisted suicide, believing this notion of death-with-dignity to be a foundational human right. Both states really do seem to be able to claim a genuine interest in interfering with what goes on elsewhere. For State 1, the state can claim interests in protecting residents from the harm of having their loved ones taken too soon, as well deterring in-state conduct aimed at facilitating physician-assisted suicide elsewhere. (These interests are beyond whatever a state’s interest in “human life” as such might be). For State 2, there are genuine interests in protecting the ability of providers to comfortably practice without fear of retrieval; vindicate the state’s interest in allowing access to dignified deaths (or however else the broad public interest is generally defined); and protect in-state actors behaving legally within the state from burdensome litigation without it. Frankly, the interests seem nearly parallel. If the question is just, “where should we draw the line,” it seems like the answer has got to have something to do with, “where you’re interfering too much with action in other states,” or else we devolve into a set of questions about which interest (the interest in avoiding PAS or the interest in allowing it) is greater. (You could answer that neutrally, or with a ‘thumb on the scale of life,” or a “thumb on the scale of freedom and multiplicity of options”/national citizenship” coherently, I think).

Tort escalation along these lines seems like a potential risk in any area where division is deep enough (and that tracks red-state/blue-state divides) to warrant the nomenclature of “culture wars.” The very language of war is evocative—tort escalation is only a risk where states do not agree to simply accept what other states are doing, where both sides feel threatened by the very existence or state-sanctioning of the other side, and feel the need to either protect against external interference or to extend their own norms extraterritorially. It’s often said that tort law exists as an alternative to physical violence and vigilantism; SB8 seems less like a gentler replacement for violence, rather than a new creative form of repression and control. If tort is a substitute for battle, there’s some coherence to the approaches on offer in these statutes. It’s hardly surprising given the entrenched positions and intensity of the felt stakes to the groups on either side.

Yet, there is something deeply disconcerting about the invocation of private law to police culture-war issues. Private law—torts, contracts, and so forth—governs the relationships between individuals. Even in controversial “public nuisance” cases, the general rule is that private plaintiffs must show
that they have a “special injury,” a harm distinct from that suffered by the rest of the public, to bring suit. With statutes like SB8, by enabling unaffected individuals to use private causes of action to police third parties, legislatures are essentially encouraging vigilantes to view abstract “violations” as personalized, particularized harms. The private bounty-hunting approach subtly entrenches and, perhaps, escalates the sense of personalized grievance and threat that those who have from the behavior of those with different values or commitments. To put this differently, an approach like SB8 essentially encourages everyone to think of violations not as violations of community rules, but as personal affronts. Even for a vigilante who starts out with a more law-enforcement-y approach—who thinks, “I am the law, and you have violated it!” as they bring their suit, rather than “You have harmed me!”—the very experience of then being in litigation, in court, for private damages seems likely to personalize the experience. The sociological ramifications are surely subtle, but a shift towards a personalized-grievance culture hardly seems healthy. In his study of the historic examples of “popular enforcement,” Professor Beck reached a similar conclusion, arguing that when applied to socially divisive issues, “popular enforcement tends to inflame preexisting social conflicts and undermine public respect for the law.” It’s one thing to allow qui tam suits on a theory that we are all harmed when government coffers are defrauded, or even public nuisance suits brought by those with special injuries for harms to everyone; it’s quite another to use tort law to convert violations of culture-wars laws into private offenses, or potential sources of private profit.

Even beyond just evading review pre-Dobbs, the Texas approach raises questions sounding in political legitimacy. As a matter of political economy, the Texas statute seems designed to gratify certain voters without incurring the political costs that would come if the state itself were to actually go about spending its limited resources persecuting every person, regardless how sympathetic, who participated in an abortion. In a certain sense, SB8 allows Texas to have it both ways: it can be maximally anti-abortion for symbolic purposes, thereby gratifying certain voters, without incurring the full costs of criminalization or rigid state enforcement. It thereby minimizes not only judicial, but also political review for those public officials who would actually have to enforce a differently-structured law.

The cultural ramifications of claw-back-style statutes should also perhaps

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44 See, e.g., Leslie Kendrick, The Perils and Promise of Public Nuisance, 132 Yale L. J. 72, 714-715 (2023)

45 Even for a vigilante who starts out with a more law-enforcement-y approach—who thinks, “I am the law, and you have violated it!” as they bring their suit, rather than “You have harmed me!”—the very experience of then being in litigation, in court, for private damages seems likely to personalize the experience.
raise our eyebrows, even if in the particular context one thinks they provide an appropriate level of push-back for anti-abortion overreach. Even if such statutes do not violate any particular constitutional provision, the attitude that they embody of deep disrespect for the laws of sister states hardly promotes a sense of fellowship or unity. But then, of course, that’s precisely the point: we’re in territory where the disagreement and stakes are so deep that for many on these contested issues, according “respect” or promoting “unity” in the face of oppressive laws would be akin to dancing with the devil.

When abortion was a protected fundamental right, there were limits to the need for such dances, where the nature of the views renders compromise exceedingly difficult. Now that everything is up for grabs, two things need to happen, if we are to move forward: we will need to develop legal clarity on thorny federalism issues surrounding a potentially endless series of creative legislative maneuvers; and we need to find a way to have conversations as a polity to find workable equilibria in the face of radically different state approaches. Unfortunately, for now, the momentum seems to be in the opposite direction.

CONCLUSION

For better, or, probably, for worse, novel private causes of action are now tools in the culture-war arsenals surrounding abortion, on both sides of the aisle. As a doctrinal matter, any binding restraints on such clever torts will have to be worked out by the courts and will probably have to come from constitutional law. But even absent any such constraints, it might be the better part of prudence to reign in the impulse to push the boundaries of private causes of action in the service of polarizing and politicized agendas.