RECLAIMING TORT LAW TO PROTECT REPRODUCTIVE RIGHTS

Yvonne Lindgren and Nancy Levit

RECLAIMING TORT LAW TO PROTECT REPRODUCTIVE RIGHTS

Yvonne Lindgren and Nancy Levit***

In Dobbs v. Jackson Women's Health*, the Supreme Court overruled* Roe v. Wade*, the constitutional floor that had protected the abortion right for nearly fifty years, and returned the issue of abortion to the states to regulate, restrict, criminalize, or protect at the state level. In the post-*Roe *era, states are increasingly turning to private law to restrict travel and access to medical care and to undermine the privacy of individuals seeking abortions. Three states have passed antiabortion civil enforcement "bounty" provisions patterned on Texas's S.B. 8 that allows private citizens to sue providers or third parties who aid and abet an abortion that violates the state's six-week ban. At least half a dozen states have signaled that they will pass their own civil bounty antiabortion provisions. Other states, such as Missouri, have introduced legislation that would permit any private citizen to sue anyone who helps a pregnant person travel out of state to obtain an abortion. Aggressive protesting at abortion clinics and surveillance of out-of-state license plates and people entering abortion clinics have also been on the rise as private citizens take up the charge of enforcing state antiabortion laws. Under this private law scheme, pregnant bodies become politicized legal subjects to be disciplined and surveilled by the public to enforce a state's policy agenda without constitutional and civil law protections.*

*This Article argues that the use of private law to enforce abortion bans—a function that had been previously exclusively patrolled through public law—is antithetical to the purpose and function of private law to protect individuals from tortious harms by third parties. Private law is designed to compensate individuals for harms and to protect the community more broadly by discouraging individuals from engaging in harmful behavior through the deterrent force of damage awards. However, civil enforcement regimes are eroding the boundary between public and private law and exposing people to private harms through state capture of private law. These civil provisions are often coupled with criminal enforcement regimes that deprive pregnant persons of necessary medical care. Rather than protect individuals from privacy invasions by third parties, these laws incentivize the surveillance and privacy intrusions that will necessarily result from the regime of private enforcement and aggressive protesting at abortion clinics. Thus, in the post-*Roe *landscape, abortion patients and providers have lost both constitutional protection and private law's protection against harms inflicted by private actors. This Article sets forth a framework to both reassert tort law's function to offer protection against privacy invasions by third parties and restore private law's role in expressing normative values of the community—rather than of the state—that rests at the heart of a private law regime.*

It is a critical moment to challenge the emerging trend of state capture of private law and reestablish private law's traditional role to guard against privacy intrusions by third parties. Torts such as intrusion upon seclusion, public disclosure of private facts, infliction of emotional distress, and federal civil rights violations, as well as tort claims for providers such as interference with prospective business relations and civil RICO, to name only a few, may serve to reclaim private law's primary purpose to protect individuals from infringement by third parties. Shielding abortion patients and providers from surveillance, detection, and violations of medical privacy may limit overreach by bounty hunters and protestors. More importantly,

* Associate Professor of Law, University of Missouri-Kansas City School of Law.

** Associate Dean for Faculty, Curators' and Edward D. Ellison Professor of Law, University of Missouri-Kansas City School of Law. We want to convey our thanks to Jamie Abrams, Kathryn Abrams, David Achtenberg, Rory Bahadur, Naomi Cahn, June Carbone, David Cohen, andré douglas pond cummings, Greer Donley, Ryan Hudson, Kristin Luker, Guadalupe Luna, Maya Manian, Rachel Rebouché, and Allen Rostron for their extremely helpful conversations, insights, and edits. Our thanks also to the attendees at the Family Law Scholars and Teachers Conference at Temple University School of Law and the Section on Family and Juvenile Law panel at the 2023 AALS Annual Meeting for helpful feedback. Thank you to law librarian Julia Pluta for research support and to Katherine Cooper, Sydney Garcia, and Elias Vaoifi for research assistance.

it will reclaim private law's role to protect individuals and providers in the constitutional vacuum left in the wake of Dobbs.

INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*,[1] the Supreme Court overruled *Roe v. Wade*,[2] the constitutional floor that had protected the abortion right for nearly fifty years, and returned the issue of abortion to the states to regulate, restrict, criminalize, or protect at the state level. In the post-*Roe* era, states are harnessing private law to restrict travel and access to medical care and undermine the privacy of individuals seeking abortion. At least half a dozen states have signaled that they will pass antiabortion civil enforcement "bounty" provisions patterned on Texas's S.B. 8, which allows any private citizen to sue an abortion provider or a third party who aids and abets an abortion.[3] As soon as the law went into effect, Texas Right to Life used its website to urge website users to provide a "tip on how you think the law has been violated."[4] The group also launched the website prolifewhistleblower.com for users to report providers or third parties who aid and abet an abortion in violation of the six-week ban.[5] State legislatures and individual litigants are increasingly turning to private civil remedies to enforce abortion restrictions. In March 2023, a Texas man sued his ex-wife's two friends for a million dollars each for wrongful death and conspiracy after they allegedly helped his ex-wife procure an abortion.[6] The complaint relied on private text messages sent between the women to provide proof of the conspiracy to commit murder.[7] Men in Arizona[8] and Alabama[9]

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

2. Roe v. Wade, 410 U.S. 113, 166 (1973).

3. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified as TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2017)).

4. Sanford Nowlin, *Texas Right to Life Sets Up Site Asking for Anonymous Tips on People Who Get or Offer Abortions*, SAN ANTONIO CURRENT (Aug. 24, 2021, 12:54 PM), https://www.sacurrent.com/news/texas-right-to-life-sets-up-site-asking-for-anonymous-tips-on-people-who-get-or-offer-abortions-26982939 [https://perma.cc/HVP7-9HKH].

5. GoDaddy took the website down soon after it was launched. Kim Schwartz, *GoDaddy Cancels Texas Right to Life Website ProLifeWhistleblower.com*, TEXAS RIGHT TO LIFE (Dec. 30, 2021), https://texasrighttolife.com/top-article-of-2021-godaddy-cancels-texas-right-to-life-website-prolifewhistleblower-com/ [https://perma.cc/VZJ6-26JR].

6. Plaintiff's Original Petition, Silva v. Noyola, No. 23-CV-0375 (Tex. Dist. Ct., Galveston Cnty. Mar. 9, 2023).

7. *Id.* at ¶¶ 15–20 and Exhibits 2–4.

8. Nicole Santa Cruz, *Her Ex-Husband Is Suing a Clinic over the Abortion She Had Four Years Ago*, PROPUBLICA (July 15, 2022, 5:00 AM), https://www.propublica.org/article/arizona-abortion-father-lawsuit-wrongful-death [https://perma.cc/LA8L-XESQ].

9. Magers v. Ala. Women's Ctr. Reprod. Alts., 325 So. 3d 788 (Ala. 2020); *See* Kim Chandler, *Wrongful-Death Lawsuit Filed on Behalf of Aborted Embryo*, AP NEWS (Mar. 8, 2019, 5:02 PM), https://apnews.com/article/451bf70f668f4c7a9323e169a57df687 [https://perma.cc/FE7Y-GUYW].

have sued abortion providers for wrongful death for performing consensual abortions on the men's former partners.[10]

Missouri legislators have introduced bills that would permit private citizens to sue anyone who helps a pregnant person[11] travel out of state to obtain an abortion,[12] an antiabortion group has drafted model legislation that would ban interstate travel for abortion,[13] and Texas and Arkansas have begun to draft their own legislation.[14]

In addition, aggressive protesting at abortion clinics and surveillance of out-of-state license plates and people entering abortion clinics have also been on the rise as private citizens take up the charge of enforcing state antiabortion laws through civil bounty provisions.[15] Antiabortion violence has increased dramatically in recent years,[16] and harassment of clinic staff jumped 600% from 2020 to 2021.[17] Following the decision in *Dobbs*, it is expected to spiral upward as antiabortion protestors are escalating their activism.[18] The combination of civil bounty hunters and emboldened protestors spurred on by ideology and state rewards reveals how civil enforcement statutes will increase surveillance and threaten the safety of patients and providers.

---

10. *See* Yvonne Lindgren, *The Fathers' Veto and Fatherhood as Property*, 101 N.C. L. REV. 81, 97 (2022).

11. We use the term "pregnant people" instead of "pregnant women" to acknowledge that trans men and other gender-non-conforming people may also seek abortion-related health care and may have even more difficulty accessing reproductive health care than cis-women seeking abortion. *See* Elizabeth Kukura, *Reconceiving Reproductive Health Systems: Caring for Trans, Nonbinary, and Gender-Expansive People During Pregnancy and Childbirth*, 50 J.L., MED. & ETHICS 471, 471 (2022).

12. H.B. 2012, 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2022) (imposing bounty-style civil liability on anyone who performs an abortion on a Missouri resident and those who help Missouri citizens travel out of state for an abortion).

13. Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST. (June 30, 2022, 8:30 AM), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/.

14. *Id.*

15. Vera Bergengruen, *Armed Demonstrators and Far-Right Groups Are Escalating Tensions at Abortion Protests*, TIME (July 8, 2022, 7:00 AM), https://time.com/6194085/abortion-protests-guns-violence-extremists/ [https://perma.cc/7QFW-LYES] ("Eight abortion-related demonstrations featured armed individuals in the week after the June 24 ruling . . . In 2020, far-right groups appeared at only 1% of demonstrations related to abortion rights; so far this year, almost one in five events involved members of a far-right group.").

16. *See, e.g.*, Megan Burrow, *Abortion Providers in NJ Worry They Will Face More Protests After Supreme Court Ruling*, N. JERSEY (June 24, 2022, 3:04 PM), https://www.northjersey.com/story/news/new-jersey/2022/06/24/nj-abortion-providers-protests-supreme-court-roe-v-wade-dobbs/7637712001/ [https://perma.cc/U436-MPEJ].

17. Matt Bloom, *Clinics That Provide Abortion Services Are Increasingly Worried About Security*, NPR (July 26, 2022), https://www.npr.org/2022/07/26/1113615302/clinics-that-provide-abortion-services-are-increasingly-worried-about-security [https://perma.cc/NM5T-VBY4] (noting that the National Abortion Federation reports that "[i]ncidents of blockades, assaults and break-ins at clinics have all more than doubled over the past three years").

18. *Id.* (quoting the President of Colorado's Right to Life organization after the *Dobbs* decision: "We're going to be going to the homes of abortion providers and trying to accomplish a few things. . . . One of our slogans is, no child-killing with tranquility.").

Citizen enforcement of abortion restrictions is antithetical to the very purpose and function of private law.[19] While the Constitution protects citizens from abuse and overreach by the state, it is private law's function to protect against actions by individuals and corporations that violate a person's privacy, dignity, bodily autonomy, and repose.[20] Private law protects both individuals and the public generally because it leads people to alter their conduct in ways that reduce the risk of harm to the larger community through the deterrent force of damage awards. Rather than protect individuals from privacy invasions by third parties, however, these laws *incentivize* the surveillance and privacy intrusions that will necessarily result from the regime of private enforcement and aggressive protesting at abortion clinics. Thus, in the post-*Roe* landscape, abortion patients and providers have lost *both* constitutional protection *and* private law's protection against harms inflicted by private actors. This Article sets forth a framework to both reassert tort law's function to offer protection against privacy invasions by third parties and to restore private law's role in promoting normative values of the community—rather than of the state—that rest at the heart of a private law regime.

This Article proceeds in three parts. Part I describes the capture of private law by the state in the post-*Roe* landscape through the rise in antiabortion civil remedy laws as states turn to citizens to enforce the states' restrictive abortion laws. This Part also explains why private law will likely continue to be an attractive option to state legislators seeking to surveil and enforce abortion bans in ways that exceed the constitutional limits restraining state actors. This Part also evaluates the potential impact of these private enforcement regimes on the health and privacy of pregnant people seeking abortion. Part II analyzes private law's role to protect individuals and communities against private harms inflicted by third parties. It explores private law's role in expressing and enforcing normative values of the community, as opposed to the state. Community norms are expressed, for example, by the objective reasonable person standard that undergirds this legal regime. Part III considers ways to reclaim private law's protective function from state capture in the post-*Dobbs* landscape. This Part explores various tort and civil privacy statutes that may be available to protect

19. *See* John C. P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469, 470 (2021) (explaining that Texas's S.B. 8, which authorizes "nominally personal actions" to enforce a broad prohibition on abortions, is really "public law in disguise"); Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179, slip op. at 43 (Tex. Dist. Ct., Travis Cnty. Dec. 9, 2021) (holding that the Texas antiabortion civil enforcement law represented an "unconstitutional delegation of enforcement power to private persons").

20. *See, e.g.*, Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 256 (1998) (describing tort law as the body of legal theories that "protects our interests in physical integrity, emotional health, individual and collective safety, and in personal human dignity through respect and social equality").

individuals from private surveillance, publication of private facts, and invasions into private medical records. These include, among others, intrusion upon seclusion, public disclosure of private facts, and infliction of emotional distress, as well as a potential claim for federal civil rights violations. This Part also analyzes possible additional tort claims for providers, including interference with prospective business relations and civil RICO as well as federal and state statutory protections against privacy invasions, including HIPAA and FACE, and new state statutes committed to ensuring reproductive rights.

It is a critical moment to reestablish the role of private law as a force for protecting the safety, privacy, and dignity of individuals against third parties who impose upon their privacy and bodily integrity. The post-*Dobbs* legal landscape has seen a dramatic increase in the use of private law to supplement and in many cases completely supplant the traditional public law role of criminal and administrative enforcement of abortion restrictions by the state. Allowing private individuals to patrol and enforce an area of regulation that has been historically regulated by the state, which involves deeply private details of reproduction, without any of the concomitant constitutional safeguards that restrain state actors, is ripe for overreach and abuse, especially against vulnerable and marginalized pregnant people. Under this private law scheme, pregnant bodies become politicized legal subjects to be disciplined and surveilled by the public to enforce a state's policy agenda without constitutional protections or tort and civil law protection. Shielding abortion patients and providers from surveillance, detection, and violations of medical privacy may help limit overreach by bounty hunters and protestors. More importantly, it will reclaim private law's role to protect individuals and providers as well as the community more broadly against harms by third parties in the constitutional vacuum left in the wake of *Dobbs*.

I. PRIVATE LAW'S CAPTURE BY THE STATE: ANTIABORTION PRIVATE CIVIL ENFORCEMENT REGIMES

This Part sets forth the laws currently in effect that seek to enforce abortion restrictions using private causes of action. Next, it examines why states will continue to turn to private law, arguing that civil remedies deputize private citizens who can more effectively surveil the activities of pregnant people, thereby increasing the enforcement of abortion restrictions.[21] These laws are

21. While this Part details the use of private enforcement in the context of abortion, in recent years conservative lawmakers have been enacting laws that call upon private parties to enforce restrictions in a broad array of contexts beyond abortion, including religion, sexuality, gender, and race. *See* Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657, 660 (2021) (documenting an escalating use by Republican lawmakers between 1989 and 2018 of private rights of action in bills that were antiabortion, immigrant, and taxes, and pro-gun and religion); Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1190–91 (2023) (arguing that S.B. 8 is but one example of a broader trend to use private rights of action to suppress not just abortion but LGBTQ rights and the

also attractive to state legislatures as they may insulate the state from lawsuits because surveillance by private citizens is not subject to the high burdens that the Constitution imposes on searches by state actors.[22] This Part concludes by describing the types of tortious intrusions incentivized by civil bounty laws in the form of surveillance and reporting that pregnant people may face under private civil enforcement regimes. While none of the current antiabortion civil remedy laws are enforceable against the pregnant person themselves,[23] the practical impact of civil remedy laws will make pregnant people vulnerable to surveillance and invasion of privacy by third parties.

A. Restricting Abortion Through Private Civil Enforcement

States have turned to private law to function in the role traditionally reserved for public law through private civil enforcement of abortion bans.[24] Private enforcement regimes have been on the rise in abortion-restrictive laws for decades,[25] since state legislatures first began to include a private cause of action for pregnant people, and later putative fathers, to sue abortion providers for wrongful death for consensual abortion procedures that violated state laws.[26] However, these early efforts were distinguishable because they followed the traditional structure of delegation of enforcement to private citizens as an adjunct to public enforcement in a way that supports and supplements public

---

rights of teachers to discuss race, gender, and sexual orientation in the classroom). *See, e.g.*, H.B. 1233 §§ 4(a), 6(c), 112th Gen. Assemb. (Tenn. 2021) (allowing private parties to sue for the "emotional harm" caused by schools that permitted transgender students to use bathrooms that conform to their gender identity).

22. *See* Burdeau v. McDowell, 256 U.S. 465, 475–76 (1921).

23. *But see infra* discussion in text at notes 70, 393 (discussing laws against and prosecutions for self-managed abortions).

24. *See* Goldberg & Zipursky, *supra* note 19, at 470 ("Unlike genuine tort plaintiffs, persons authorized to sue by S.B. 8 do *not* sue in their own right, for wrongs personal to them. Instead, their nominally personal actions are suits on behalf of the state of Texas.").

25. *See* Michaels & Noll, *supra* note 21 (explaining that private law is being harnessed by conservatives in a broad range of battles such as abortion, religion, sexuality, gender, and race, allowing private parties to sue schools that acknowledge LGBTQ identities of students or engage in antiracist teaching, for example, Florida's STOP WOKE Act).

26. *See* Lindgren, *supra* note 10 (discussing antiabortion civil remedy laws that expand the rights of putative fathers and grant them a right to sue for consensual abortion procedures); Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 125 (2007) (describing how the earliest antiabortion civil remedy provisions granted the abortion patient herself the right to sue providers for harms that allegedly resulted from the provider violating the state's antiabortion statute); *see, e.g.*, LA. STAT. ANN. § 9:2800.12(A) (2021) ("Any person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion."); *see also* H.B. 1727, 2001 Leg., Reg. Sess. (Okla. 2001) ("Any person who performs an abortion on a minor without parental consent or knowledge shall be liable for the cost of any subsequent medical treatment such minor might require because of the abortion."); OKLA. STAT. ANN. tit. 63 § 1-740 (2022); S.F. 26, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) (providing that a woman who had an abortion could sue the provider for all damages resulting from the woman's emotional distress and signing a consent form could limit but not negate damages).

enforcement.[27] Texas's "heartbeat" bill, Senate Bill 8 (S.B. 8),[28] is a striking departure from the traditional role of private enforcement in a public law regime. The law permits private enforcement of state goals in regulating health care and expressly forbids any role for enforcement by the state.[29] The law, which went into effect in September 2021, permits private citizens to sue any person who induces or aids and abets a person to have an abortion after six weeks, thereby deputizing private citizens to enforce the state's restrictive abortion law.[30] While states have used private law in a number of ways to enforce abortion bans, this Article will focus on the S.B. 8-style, civil private enforcement mechanism in the new crop of abortion restrictions that has been dubbed a "vigilante" system of enforcing abortion restrictions.[31]

Texas's S.B. 8[32] is a six-week abortion ban *exclusively* enforceable through civil statutory remedies. S.B. 8 provides for statutory damages in the amount of no less than $10,000 in a lawsuit brought by any person against any person who performs or aids and abets an abortion in violation of the statute.[33] The law is designed to incentivize private citizens to enforce the law—a type of civil bounty—and thereby shifts abortion regulation from the state to private enforcement. The civil bounty provision makes the law difficult to challenge[34] because it provides that the ban "shall be enforced *exclusively* through . . . private civil actions" and no enforcement may be undertaken by an officer of the state

27. The most common use of private enforcement suits to supplement public enforcement is in the context of environmental protection statutes which authorize citizen suits and public comments on proposed agency actions. *See, e.g.*, Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 289–90 (2016) (discussing advantages of "legal regimes in which public and private agents may seek overlapping remedies for the same conduct on substantially similar theories"); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1153 (2012) (describing the role of private litigants as supplemental regulators in public law systems).

28. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2017).

29. *Id.* at (a).

30. *Id.*

31. Kimberly Kindy & Alice Crites, *The Texas Abortion Ban Created a 'Vigilante' Loophole. Both Parties Are Rushing to Take Advantage.*, WASH. POST (Feb. 22, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/02/22/texas-abortion-law-vigilante-loophole-supreme-court/.

32. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2017).

33. *Id.* at (b). In December 2021, the Court granted limited redress to providers to challenge the statute but left the law in effect. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 539 (2021).

34. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting) (describing S.B. 8 procedural scheme as a tactic "designed to avoid judicial review"); *Id.* at 2496 (Roberts, C.J., dissenting) (stating that the "desired consequence" of the "unprecedented" statutory scheme "appears to be to insulate the State from responsibility for implementing and enforcing the regulatory regime"). By providing that private enforcement is the *only* enforcement mechanism for the law and by specifically prohibiting the state's Attorney General and other state officials from initiating enforcement of the law, Texas legislators sought to neutralize potential pre-enforcement challenges to the law through the traditional means of seeking an injunction against state officials from enforcing the law since arguably none of the state's officials are appropriate defendants. *See* Laurence H. Tribe & Stephen I. Vladeck, *Texas Tries to Upend the Legal System with Its Abortion Law*, N.Y. Times (Jul. 19, 2021), https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html (observing that "enlisting private citizens to enforce the restriction makes it very difficult, procedurally, to challenge the bill's constitutionality in court" and describing the law as a "deeply cynical" strategy with no other purpose than to make it more difficult to challenge abortion bans in court).

or local government.[35] And indeed, the Supreme Court refused to enjoin the law in a pre-enforcement challenge[36] and offered abortion providers only limited redress to challenge the law while allowing it to remain in effect.[37]

In March 2022, Idaho passed a six-week abortion ban with a civil remedy provision modeled after Texas's S.B. 8.[38] While Texas's law permits *any* person to sue an abortion provider or third party for statutory damages, Idaho's law provides that only named family members—including grandparents, aunts, uncles, siblings, and the father—of the "preborn" child can sue under the civil remedy provision.[39] The Idaho law permits family members to sue for civil damages of not less than $20,000 for violating the six-week ban and, like the Texas law, provides that the six-week ban is exclusively enforced through the private civil causes of action.[40] In May 2022, Oklahoma's governor signed into law an S.B. 8-style, privately-enforced abortion ban that is the most restrictive in the nation, banning abortion from fertilization.[41] Ohio's legislature introduced its own S.B. 8-style bill on November 2, 2021,[42] and at least half a

35. TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (West 2017) (emphasis added) (authorizing *any person* other than an officer of the state or local government to sue an abortion provider who provides care in violation of the six-week ban, any person who aids or abets the performance of abortion, including paying for or reimbursing the cost through insurance, or any person who intends to provide or help someone obtain an abortion in violation of the ban); *id.* § 171.208(b)(1)-(3) (providing that civil enforcement relief includes $10,000 monetary damages, injunctive relief to prevent the defendant from future violations of the law, costs, and attorneys' fees); *id.* § 171.208(j) (exempting certain pregnant women from being sued).

36. *Whole Woman's Health*, 141 S. Ct. at 2495 (denying providers' pre-enforcement request for declaratory and injunctive relief and allowing Texas's S.B. 8 to take effect on September 1, 2021).

37. *Whole Woman's Health*, 142 S. Ct. at 539 (permitting abortion providers' pre-enforcement challenge to proceed only against officials with disciplinary authority over medical licenses but dismissing the pre-enforcement challenge against all other defendants). *See infra* discussion in text at note 110.

38. IDAHO CODE § 18-8807(1) (West 2006) ("[T]he father of the preborn child . . . may maintain an action for: (a) All damages from the medical professional[]" who performs an abortion in violation of the statute. The civil remedies provision also allows the abortion patient, the grandparents, aunts, uncles, and siblings of the "preborn child" to sue the abortion provider for damages.).

39. *Id.* (1)(b) (providing for statutory damages of not less than $20,000).

40. *Id.* (5) (providing that "the requirements of this section shall be enforced exclusively through the private civil causes of action described").

41. OKLA. STAT. tit. 63, § 1-745.51(4); § 1-745.54 (2023) (providing that the act shall be enforced exclusively through private civil action); § 1-745.55(A), (B)(2) (providing that "[a]ny person, other than the state, its political subdivisions, and any officer or employee of a state or local governmental entity in this state, may bring a civil action against any [abortion provider]" and that statutory damages will be no less than $10,000). In May 2023, the Oklahoma Supreme Court struck the sweeping prohibitions in that state's law and held that the Oklahoma Constitution protects a pregnant person's right to abortion in life-threatening situations and that the other parts of the statute, such as the bounty-hunter provision, were not severable. Okla. Call for Reprod. Just. V. Drummond, 2023 OK 60, 531 P.3d 117.

42. H.B. 480, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (providing that the bill banning abortion from fertilization is exclusively enforced by private right of action that allows any person to sue an abortion provider for statutory damages of not less than $10,000 for providing abortions in violation of the law). As of Oct. 26, 2023, the bill is still in House Committee. *See House Bill 480 – 134th General Assembly*, THE OHIO HOUSE OF REPRESENTATIVES, https://ohiohouse.gov/legislation/134/hb480 [https://perma.cc/73R4-BCPY].

dozen other states have signaled that they will introduce their own S.B. 8-style civil bounty laws.[43] The National Association of Christian Lawmakers has drafted model legislation that incorporates S.B. 8's private enforcement structure for other states to use.[44]

Missouri legislators were the first to attempt to use the citizen enforcement mechanism to restrict out-of-state travel for abortion. They have twice introduced legislation that would allow any private citizen to sue anyone who assists a pregnant person in traveling to another state to obtain an abortion.[45] While both bills died in committee, they reveal the extent to which states view private enforcement as a way of delegating power to private citizens in order to evade constitutional limits on state action.[46]

*B. The Expanded Use of Private Law to Restrict Abortion in the Post-*Roe *Landscape*

States are continuing to turn to private law to enforce state antiabortion policy even though *Roe v. Wade*[47] has been overturned and states are now able to ban abortion outright without needing to use the procedural loophole that motivated Texas's S.B. 8.[48] Since the passage of S.B. 8, nineteen states have

43. *See* Meryl Kornfield, et al., *Texas Created a Blueprint for Abortion Restrictions. Republican-Controlled States May Follow Suit*, WASH. POST (Sept. 3, 2021, 8:08 PM), https://www.washingtonpost.com/nation/2021/09/03/texas-abortion-ban-states/ (reporting that Republican leaders in Arkansas, Florida, South Carolina, South Dakota, Kentucky, and Louisiana have indicated that they are going to try to copy the Texas legislation).

44. NACL MODEL STATE HEARTBEAT ACT, NAT'L ASS'N OF CHRISTIAN LAWMAKERS (July 17, 2021), https://christianlawmakers.com/wpcontent/themes/naclsimpletheme/assets/docs/20210722_NACL_NLC_Heartbeat_Model.pdf [https://web.archive.org/web/20210730145942/https://christianlawmakers.com/wpcontent/themes/nacl-simple-theme/assets/docs/20210722_NACL_NLC_Heartbeat_Model.pdf].

45. *See* S.B. 1202, 101st Gen. Assemb., 2d Reg. Sess., (Mo. 2022) (extending Missouri criminal and civil abortion laws to conduct "[p]artially within and partially outside [the] state"); Summer Ballentine & John Hanna, *Missouri Considers Law to Make Illegal to "Aid or Abet" Out-of-State Abortion*, PBS (Mar. 16, 2022, 2:45 PM), https://www.pbs.org/newshour/politics/missouri-considers-law-to-make-illegal-to-aid-or-abet-out-of-state [https://perma.cc/8LPA-2CFD].

46. Justice Kavanaugh dismissed this looming concern in his concurrence, asking, "[M]ay a State bar a resident . . . from travelling [out of state] to obtain an abortion? In my view . . . no [because of] the constitutional right to interstate travel." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring). *But see* David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 19–33 (2023) (arguing that this question is much more unsettled than Justice Kavanaugh's concurrence suggests).

47. Roe v. Wade, 410 U.S. 113 (1973).

48. *See supra* discussion in text at notes 32–37; *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 937 (2018) ("When judges or elected officials fail to recognize that a statute continues to exist as law even after a court declares it unconstitutional or enjoins its enforcement, they fall victim to what I call the 'writ-of-erasure fallacy': The assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute, when the court's ruling is in fact more limited in scope and leaves room for the statute to continue to operate.").

introduced or pre-filed laws with identical enforcement mechanisms.[49] There are several reasons that states will continue to turn to private law to supplement, and in the case of civil bounty provisions, to completely replace public law enforcement of abortion restrictions. First, private law carries a lower standard of proof—the preponderance of the evidence standard—and therefore civil enforcement makes it easier to sue abortion providers and third parties who aid and abet abortion. The lower standard of proof coupled with steep civil damage awards—statutory minimums of $20,000 in the new Idaho law,[50] $10,000 under Texas's S.B. 8[51]—are designed to deter abortion providers from providing *any* abortion care for fear of violating the statute.[52] In addition, states may assume that they will be immunized from lawsuits since private actors will be undertaking the enforcement. These civil damages laws have been described as "self-executing" tort damages because they are intended to prevent individuals and entities from engaging in constitutionally protected conduct for fear of triggering liability.[53] Indeed, there was a 50% decline in the number of abortions performed in the state of Texas in the first thirty days after S.B. 8 took effect.[54]

State legislatures are also turning to private law to dissuade individuals and entities from assisting pregnant people in abortion-restrictive states from traveling for abortions. In July 2022, a group of Texas lawmakers known as the "Texas Freedom Caucus" sent a cease and desist letter to several law firms practicing in Texas, including Sidley Austin, threatening legal action against them for offering to "reimburse the travel costs of employees who leave Texas to murder their unborn children."[55] According to the letter, the law firm's travel reimbursement program violated S.B. 8 and made the law firm "complicit in illegal abortions" performed in the state.[56] The Freedom Caucus threatened that

49. Michaels & Noll, *supra* note 21, at 1204 n.71 (listing Arkansas, Arizona, Delaware, Florida, Iowa, Idaho, Kansas, Kentucky, Louisiana, Maryland, Montana, Mississippi, New Jersey, Ohio, Rhode Island, South Carolina, South Dakota, West Virginia, and Wyoming).

50. IDAHO CODE § 18-8807 (1)(b) (West 2006) (providing for "statutory damages in an amount not less than twenty thousand dollars" for each violation of the statute).

51. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2) (West 2017) (providing that if a claimant prevails under the provision, they are entitled to "statutory damages in an amount of not less than $10,000" for each abortion performed in violation of the statute).

52. *See* Manian, *supra* note 26, at 126–27 (explaining how the steep civil damages effectively stop abortion providers from engaging in constitutional behavior for fear of steep liability).

53. *Id.* (describing these tort remedies as strict liability in tort and "self-executing" because no one is willing to risk challenging them for fear of the severe damages that may be levied for infringement).

54. KARI WHITE, ET AL., TEX. POL'Y EVALUATION PROJECT (TXPEP), INITIAL IMPACTS OF TEXAS' SENATE BILL 8 ON ABORTIONS IN TEXAS AND AT OUT-OF-STATE FACILITIES (2021), https://sites.utexas.edu/txpep/files/2021/10/initial-impacts-SB8-TxPEP-brief.pdf [https://perma.cc/8KAN-JP97].

55. Letter from Texas Freedom Caucus to Yvette Ostolaza, Chair of the Mgmt. Comm., Sidley Austin, LLP 1 (July 7, 2022), https://www.freedomfortexas.com/uploads/blog/3b118c262155759454e423f6600e2196709787a8.pdf [https://perma.cc/V2YF-FNBL].

56. *Id.*

"[l]itigation is already underway to uncover the identity of those who aided or abetted these and other illegal abortions" and asked the firm to preserve and retain any records on abortions performed or induced in Texas after the law went into effect, including records related to firm employees who may have helped pay for the procedures.[57] Finally, the Freedom Caucus members indicated that they would be introducing additional citizen enforcement legislation aimed at law firms and employers who pay for travel expenses for abortion travel.[58] The law "will allow private citizens to sue anyone who pays for an elective abortion performed on a Texas resident, or who pays for or reimburses the costs associated with these abortions—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs."[59] Laws that deputize private citizens to sue those who aid and abet abortion seek to undermine the web of support that people seeking abortion often need to rely on when traveling out of state to seek an abortion. By targeting those who aid and abet an abortion, and not just the provider, pregnant people who are already parenting, for example, may be reluctant to ask a friend or family member to watch their children for fear that they may be liable under civil or criminal enforcement. Sixty percent of people seeking abortion care are already parenting,[60] so these laws will isolate pregnant people who need support to travel out of state for an abortion.

Another reason that states may continue to use private law to enforce the state's antiabortion agenda now that *Roe* has been overturned is that the civil remedies deputize private citizens who can more effectively surveil the activities of pregnant partners, friends, co-workers, and family members, thereby increasing the enforcement of abortion restrictions.[61] Surveillance by private citizens does not need to meet the higher burdens imposed by the Constitution that regulate searches by state actors. In an era of widespread access to safe and effective abortion medication through online pharmacies and across permeable state borders, the granular surveillance of private citizens offered by private law may be a more effective way to detect and enforce restrictive abortion laws.[62]

---

57. *Id.* at 2.

58. *Id.* at 1.

59. *Id.* at 2.

60. Margot Sanger-Katz et al., *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html.

61. Scholars have described the critical role of surveillance through private enforcement in the context of environmental regulations. *See, e.g.*, Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 235 (concluding that the greatest value of citizen enforcement of environmental regulations is citizens' role in monitoring environmental violations in their communities).

62. *See, e.g.*, Gabriella Borter, *U.S. States Unsure How to Halt Online Sales of Abortion Pills Amid Clinic Crackdown*, REUTERS (June 27, 2019, 5:05 PM), https://www.reuters.com/article/us-usa-abortion-pills-idUSKCN1TS1AB [https://perma.cc/4PT8-CKPK] (observing that U.S. women are increasingly turning to abortion pills obtained through foreign online suppliers "and the states say there is little they can do to stop it"). *See also* David S. Cohen et al., *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 3)

States are increasingly turning to private law to enforce abortion restrictions, a role that was previously the exclusive domain of state enforcement through public law. Citizen enforcement provisions that allow private citizens to sue providers and those who aid and abet an abortion incentivize third parties to surveil and violate pregnant people's privacy. Those violations include surveillance at home and when seeking care at clinics across state lines, as well as data privacy surveillance and tracking. States like Missouri hope to expand the use of private law to achieve travel restrictions, which would be unconstitutional if imposed by the state. Thus, tort law is changing the boundary between public and private law in these antiabortion citizen enforcement provisions. The next Subpart explains how antithetical these laws are to the purpose and goals of private law. Specifically, the purpose of private law is to protect individuals from tortious conduct by third parties. These civil bounty laws coopt private law in a way that incentivizes tortious privacy interference instead of protecting individuals from harmful conduct by third parties.

C. The Impact of Private Enforcement Regimes on Pregnant People's Privacy and Health

While civil enforcement laws are aimed at providers and third parties who aid and abet abortions, for practical purposes it is the abortion patients themselves whose medical and personal privacy is violated by private enforcement. This Subpart details some of the surveillance and exposure tactics of abortion opponents to offer a glimpse into the impact of private enforcement on the privacy of pregnant people. It concludes by suggesting that these privacy violations will disproportionately impact marginalized or vulnerable people who are already subject to increased surveillance due to their race, class, age, immigration status, or exposure to violence in their intimate relationships.

1. Surveillance of Pregnant People and Clinics

The introduction to this Article detailed how Texas Right to Life gave enormous publicity to provisions of S.B. 8's private civil enforcement.[63] While antiabortion surveillance and harassment tactics have been widespread for decades, the combination of civil enforcement statutes and protestors

(SSRN) (predicting that "abortion pills and their attendant controversies will transform the abortion debate in this country").

63. *See supra* discussion in text at notes 4–5. *See also* Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179, slip op. at 22 n.32 (Tex. Dist. Ct., Travis Cnty. Dec. 9, 2021).

emboldened by the *Dobbs* decision and spurred on by state-offered monetary incentives will increase surveillance by individuals and groups that oppose abortion.[64] Technology also increases the ability to surveil people seeking abortion care. The turn to private law incentivizes surveillance with damage awards and places the imprimatur of state sanction on these highly intrusive activities.

Abortion opponents have posted videos online of women entering abortion clinics, held up signs with the names of patients seeking care at clinics, and contacted a patient's parents and employers to notify them of the abortion.[65] The bounty laws will encourage abortion opponents, such as disapproving parents, partners, co-workers, and neighbors, to surveil people in their own homes. Surveillance will also increase for those seeking an abortion—abortion opponents will monitor those entering abortion clinics, especially pregnant people entering clinics located in states that border states with restrictive abortion laws and civil enforcement provisions.[66] States have begun to introduce laws restricting residents from seeking out-of-state abortions, and therefore surveillance at abortion clinics along state borders, such as running license plates for the names of registered car owners and geo-locating out-of-state residents by cell phone data, will be potentially lucrative ways to pursue statutory damage awards.[67] These laws will only exacerbate the well-documented harassment of patients at abortion facilities in many cities.[68]

---

64. *Van Stean*, slip op. at 8 ("Some claimants will likely be interested in the money award. But many may well be ideological claimants, interested in the [sic] enforcing the law against abortion providers and their helpers. . . . Some claimants may be acting alone, filing cases from home at their computer. . . . Other claimants will be working in tandem with activists . . . .").

65. Lindgren, *supra* note 10, at 124–25.

66. Cohen et al., *supra* note 46, at 16–19.

67. Jennifer Korn & Clare Duffy, *Search Histories, Location Data, Text Messages: How Personal Data Could Be Used to Enforce Anti-Abortion Laws*, CNN BUSINESS (June 24, 2022, 4:27 PM), https://www.cnn.com/2022/06/24/tech/abortion-laws-data-privacy/index.html [https://perma.cc/AD3T-4SWH].

68. *See* DAVID S. COHEN & KRYSTEN CONNON, LIVING IN THE CROSSHAIRS (Oxford Univ. Press 2015) (describing the aggressive harassment and targeting of abortion providers); DAVID S. COHEN & CAROLE E. JOFFE, OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA (U.C. Press 2020). For descriptions by the Supreme Court of aggressive tactics used by antiabortion protestors at clinics, see, for example, Hill v. Colorado, 530 U.S. 703, 709–10 (2000) (recounting the ways that demonstrations in front of abortion clinics "impeded access to those clinics and were often confrontational . . . [including] aggressive counselors who sometimes used strong and abusive language in face-to-face encounters"); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (upholding thirty-six foot buffer zone around clinic entrances and driveways); Schenck v. Pro-Choice Network of W. New York, 519 U.S. 357, 357–59 (1997) (invalidating the use of "floating buffer zones"); McCullen v. Coakley, 573 U.S. 464, 472 (2014) (relating stories of protestors "who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation"). *See also* Brief of Amici Curiae Planned Parenthood League of Massachusetts & Planned Parenthood Federation of America in Support of Respondents at 1, McCullen v. Coakley, 573 U.S. 464 (2014) (No. 12-1168), 2013 WL 6140516, at *1 (chronicling "thirty years of violent protests and patient harassment" at abortion clinics including the murder of two clinic employees).

Technology has also enhanced the ability to surveil and invade the privacy of abortion patients, and surveillance is incentivized by civil enforcement antiabortion laws.[69] Prosecutors have already relied upon digital evidence from Facebook messages, texts, and internet searches to prosecute pregnant people suspected of self-managed abortion, which offers a glimpse into the way that digital surveillance may be used in citizen enforcement suits.[70] Data privacy experts have issued warnings about surveillance through reproductive-health-focused apps and geo-location data gathering and search engine browser data collection and storage.[71] Technology applications that allow individuals to track their menstrual cycle also provide the opportunity for partners, parents, or others to gather data about pregnancy and abortion.[72] Geo-fencing or location-tracking technology has allowed antiabortion groups to use mobile phone surveillance techniques to identify "abortion-minded women" via their cell phone's proximity to an abortion clinic.[73] The technology allows antiabortion groups to collect data on persons at abortion clinics and to send antiabortion propaganda directly to their cell phones as they sit in abortion clinic waiting rooms.[74] The technology also has the ability to collect data from cell phones such as the names and addresses of persons seeking abortion-related health care if they have visited a clinic.[75] A report by Vice's *Motherboard* found that a location

69. This is not mere speculation, as this type of data was used as evidence in trial in at least two cases to prosecute people suspected of self-managing their abortions. *See, e.g.*, Patel v. State, 60 N.E.3d 1041, 1044–48 (Ind. 2016) (reporting that prosecutors used text messages and internet searches that sought information on medication abortion pills to obtain a sentence of twenty years for Purvi Patel for "feticide," which was later overturned); Cat Zakrzewski, et al., *Texts, Web Searches About Abortion Have Been Used to Prosecute Women*, WASH. POST (July 3, 2022, 9:20 AM), https://www.washingtonpost.com/technology/2022/07/03/abortion-data-privacy-prosecution/ (describing a Mississippi case in 2017 in which prosecutors introduced evidence of the search history on Latice Fisher's iPhone for how to "buy Misopristol [sic] Abortion Pill Online" as evidence to charge her with second-degree murder after Fisher suffered a miscarriage at thirty-five weeks).

70. "South Carolina, Nevada, Kentucky and Oklahoma all have laws outlawing self-managed abortions, administered through medications." Ella Ceron, *What Happens When Women Get Illegal Abortions in Post-*Roe *America?*, BLOOMBERG (June 24, 2022, 5:41 PM), https://www.bloomberg.com/news/articles/2022-06-24/is-abortion-illegal-overturning-roe-v-wade-means-penalties-for-some.

71. Louise Matsakis, *Privacy Groups Warn About Data-Tracking If* Roe *Is Overturned*, NBC NEWS (May 11, 2022, 5:08 AM), https://www.nbcnews.com/tech/roe-v-wade-overturned-online-privacy-data-tracking-risk-rcna27492 [https://perma.cc/U467-BSN2].

72. The apps are used by menstruating people to both conceive and prevent pregnancy and therefore track a range of sensitive user data including dates of menstruation, flow, expected date of menstruation, and dates and frequency of sexual intercourse. Allysan Scatterday, *This Is No Ovary-Action: Femtech Apps Need Stronger Regulations to Protect Data and Advance Public Health Goals*, 23 N.C. J.L. & TECH. 636, 640–42 (2022).

73. Sharona Coutts, *Anti-Choice Groups Use Smartphone Surveillance to Target 'Abortion-Minded Women' During Clinic Visits*, REWIRE (May 25, 2016, 6:52 PM), https://rewirenewsgroup.com/article/2016/05/25/anti-choice-groups-deploy-smartphone-surveillance-target-abortion-minded-women-clinic-visits/ [https://perma.cc/UV5A-9BMT].

74. *Id.*

75. *Id.*

data firm was selling data about patients visiting Planned Parenthood clinics around the country, including where the patients came from, how long they stayed, and where they went after visiting the clinic.[76] This type of data aggregating is especially significant as people cross state lines to access abortion. The location data can be very specific because it is obtained by companies using data from ordinary apps installed on individuals' cell phones[77] and because this type of surveillance by nongovernmental actors is largely unregulated.[78]

2. Privacy Violations Through the Litigation Process

Private civil enforcement suits raise significant privacy concerns for abortion patients' sensitive health information by allowing any person to put a *specific* patient and their treatment at the heart of a lawsuit against a provider.[79] The Texas case described above brought by a man against his former wife's best friends reveals the type of privacy violations that can occur through the litigation process itself. The case made national news that revealed on a national scale both the fact that the abortion took place and his ex-wife's identity.[80] What is more, the complaint, which is a publicly available record, documented several pages of private group text exchanges between his ex-wife and the two defendants and included a photo of the women with the description that the women "celebrated the murder by dressing up in Handmaid's Tale costumes for Halloween" as alleged further evidence of the conspiracy to commit "murder."[81] This type of surveillance and disclosure is highly intrusive and is incentivized by laws that award civil damages for consensual abortion.

---

76. Joseph Cox, *Data Broker Is Selling Location Data of People Who Visit Abortion Clinics*, VICE (May 3, 2022, 11:46 AM), http://www.vice.com/en/article/m7vzjb/location-data-abortion-clinics-safegraph-planned-parenthood [https://perma.cc/USA3-ZYU7].

77. *Id.* (explaining that the location data is drawn from where the phone was located overnight and that while the data is aggregated, researchers have warned about the possibility of identifying individuals from allegedly anonymized data sets).

78. Users should know that when they use femtech applications to track fertility and menstruation, the privacy policies of the companies often simply allow the sale of the user data to third parties. Scatterday, *supra* note 72, at 644–45.

79. TEX. HEALTH & SAFETY CODE ANN. §§ 171.203(b)–(c), 171.208(a) (West 2017) (stating that a physician may not perform an abortion on a patient unless the physician has determined whether the fetus has a detectable fetal heartbeat and requiring that physicians record this information in the woman's medical record); *see also* Brief of Planned Parenthood Plaintiffs-Appellees at 52, Tex. Right to Life v. Van Stean, No. 03-21-00650-CV, 2023 WL 3687408 (Tex. App.—Austin May 26, 2023, pet. filed), 2022 WL 672468.

80. Plaintiff's Original Petition at 1 n.1, Silva v. [J.N.], No. 23-CV-0375 (Tex. Dist. Ct., Galveston Cnty. Mar. 9, 2023) (stating that "[a]t the time of the events in this petition, Ms. [C's]'s name was [A.S.] She married in January of 2023 and is currently known as [A.C.]"). The complaint used full names; we have inserted initials. *See, e.g.*, Emily Bazelon, *Husband Sued over His Ex-Wife's Abortion; Now Her Friends Are Suing Him*, N.Y. TIMES (May 4, 2023), https://www.nytimes.com/2023/05/04/us/texas-man-suing-ex-wife-abortion.html.

81. Plaintiff's Original Petition ¶ 22, Silva v. [J.N.], No. 23-CV-0375 (Tex. Dist. Ct., Galveston Cnty. Mar. 9, 2023).

When the target of a lawsuit is the provider, the litigation process may reveal private medical records. Texas's S.B. 8 provides that "[a]ny person" has standing to sue "any person" who performs an abortion in violation of the statute or aids and abets such an abortion.[82] The law states that a physician may not perform an abortion unless the physician has determined that there is no fetal heart tone and states that the physician "shall record in the pregnant woman's medical record: (1) the estimated gestational age of the unborn child; (2) the method used to estimate the gestational age; and (3) the test used for detecting a fetal heartbeat, including the date, time, and results of the test."[83] This medical record then forms the basis of any litigation claiming that a physician violated the law. In Texas, a claimant may petition the court for an order allowing a deposition before bringing suit as a means of investigating their claim.[84] Thus, the law allows any private person in the state of Texas to engage in discovery before filing a lawsuit that can demand physicians produce both medical records and oral testimony from a physician about a specific patient's treatment. In December 2021, a Texas judge temporarily enjoined the law on procedural grounds in *Van Stean v. Texas Right to Life*[85] and addressed the impact of Texas's discovery rules on patient privacy, explaining that "ideological activists" who learn about an alleged breach of the law would have the ability to compel a potential defendant–provider to provide documents and to give sworn testimony in a deposition even before the plaintiffs file suit.[86] The record-keeping mandate, coupled with the disclosure of those records in S.B. 8 discovery performed in anticipation of a lawsuit to establish the fact that an abortion took place and violated the law, would expose an abortion patient's private medical records in public litigation.[87] While the patient is not currently

82. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(1)–(3) (West 2017) ("Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who: (1) performs or induces an abortion in violation of this subchapter; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise . . . ; or (3) intends to engage in the conduct described by Subdivision (1) or (2).").

83. *Id.* § 171.203(d)(1)–(3).

84. TEX. R. CIV. P. 202.1(b) ("A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions . . . to investigate a potential claim or suit.").

85. Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179, slip op. at 8 n.8 (Tex. Dist. Ct., Travis Cnty. Dec. 9, 2021).

86. *See id.* at 10 & n.11 (citing TEX. R. CIV. P. 202.1, entitled "Depositions Before Suit or to Investigate Claims," which provides that "[a] person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions . . . to investigate a potential claim or suit"). Indeed, Texas Right to Life filed a Rule 202.1 petition against two employees of the *Van Stean* plaintiff in the case seeking pre-suit depositions to support a future anticipated S.B. 8 lawsuit. Amended Brief of Appellees Van Stean Plaintiffs at 31, Tex. Right to Life v. Van Stean, No. 03-21-00650-CV, 2023 WL 3687408 (Tex. App.—Austin May 26, 2023, pet. filed), 2022 WL 834092.

87. *See* Brief of Planned Parenthood Plaintiffs-Appellees at 52, Tex. Right to Life v. Van Stean, No. 03-21-00650-CV, 2023 WL 3687408 (Tex. App.—Austin May 26, 2023, pet. filed), 2022 WL 672468

the target of civil enforcement, their privacy will be violated through the course of discovery and litigation against the provider or third parties who aid and abet. The Supreme Court has recognized that even when the abortion patient herself is not the subject of the suit, the process of introducing these records is highly intrusive of privacy and has a chilling effect on a woman's willingness to seek abortion.[88]

3. Surveillance of Marginalized Communities

The repercussion of private surveillance will disproportionately impact vulnerable individuals and communities, including people experiencing intimate-partner violence, communities with compromised immigration status, individuals living in poverty, and communities of color.[89] Much scholarship has explored the intersection of reproductive rights and surveillance of communities of color.[90] Poverty and lack of access to safe and effective contraception result in these communities experiencing higher rates of unplanned pregnancies and abortions due to their disadvantage.[91] Pregnant people living in poverty often must meet their basic needs like food, shelter,

(describing that S.B. 8 "forces health care providers who are bound by health care privacy laws to be unwilling participants in this breach of patients' most sensitive health information and their trust").

88. Bellotti v. Baird, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) (noting that "[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny"); *see also* Whalen v. Roe, 429 U.S. 589, 599–600 (1977) (recognizing that the privacy interest applies to both avoiding disclosure of personal matters and independence in making "certain kinds of important decisions").

89. Risa Kaufman et al., *Global Impacts of* Dobbs v. Jackson Women's Health Organization *and Abortion Regression in the United States*, 30 J. SEXUAL & REPROD. HEALTH MATTERS 22, 23 (2022); *see also* Maggie Clark, *Biden Administration Releases Badly Needed Maternal Mortality Strategy as* Dobbs *Decision Could Worsen Crisis*, GEORGETOWN UNIV. MCCOURT SCH. OF PUB. POL'Y, CTR. FOR CHILD. & FAMS. (June 30, 2022), https://ccf.georgetown.edu/2022/06/30/maternal-mortality-crisis-black-women-dobbs-decision/ [https://perma.cc/D7CJ-Y2ZY]; Christine M. Slaughter & Chelsea N. Jones, *How Black Women Will Be Especially Affected by the Loss of* Roe, WASH. POST (June 25, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/06/25/dobbs-roe-black-racism-disparate-maternal-health/ [https://perma.cc/B25C-CAVQ]; Elizabeth Tobin-Tyler, *A Grim New Reality—Intimate-Partner Violence After* Dobbs *and* Bruen, 387 NEW ENG. J. MED. 1247 (2022).

90. A rich body of scholarship has highlighted the intersection of reproductive oppression and racial control in a variety of contexts including forced sterilization, family caps on welfare, lack of access to culturally sensitive birth control, and criminalizing women for negative birth and pregnancy outcomes. *See, e.g.*, DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997); JAEL SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE 127 (2004); ELENA R. GUTIÉRREZ, U.C. BERKELEY, CTR. ON REPROD. RTS. & JUST., BRINGING FAMILIES OUT OF 'CAP'TIVITY: THE NEED TO REPEAL THE CALWORKS MAXIMUM FAMILY GRANT RULE (2013), https://www.law.berkeley.edu/files/bccj/CRRJ_Issue_Brief_MFG_Rule_FINAL.pdf [https://perma.cc/9ML2-ZTQP]; Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 152–54 (2006); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 321 (2013) (discussing the criminalization of women for negative birth or pregnancy outcomes and the connection between poverty and negative birth outcomes).

91. *See* Brief of Amici Curiae Reproductive Justice Scholars Supporting Respondents at 15–19, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4312136.

and health care through state social service and religiously based organizations and as a result are under greater surveillance in emergency rooms, shelters, and private and religious social service agencies.[92] Pregnant people with compromised immigration status seeking abortion care will suffer greater impacts from private surveillance and enforcement because such surveillance may result in detention and deportation.[93] Finally, private enforcement will expose people in violent intimate relationships to increased risk. Surveillance and threats to disclose an abortion procedure to prevent a woman from seeking an abortion are a recognized form of reproductive coercion used by batterers to control their partners' reproductive decision-making when seeking an abortion.[94] Civil remedy laws will only further incentivize abusive partners to surveil their partners' reproduction, now with the force of civil damage awards and a civil suit to publicly expose her abortion in open court. The new Idaho law, for example, specifically allows the "father of the preborn child" to bring a bounty-hunting lawsuit against a health care provider who performs an abortion.[95]

4. Impacts on the Health of Pregnant People

In the post-*Dobbs* landscape, state legislatures are increasingly turning to private law to restrict abortion.[96] While private civil enforcement was originally

92. Cayce C. Hughes, *A House but Not a Home: How Surveillance in Subsidized Housing Exacerbates Poverty and Reinforces Marginalization*, 100 SOC. FORCES 293, 293–96 (2021) (overviewing how state and nonstate actors surveil recipients of social services).

93. *See* Madeline M. Gomez, *Intersections at the Border: Immigration Enforcement, Reproductive Oppression, and the Policing of Latina Bodies in the Rio Grande Valley*, 30 COLUM. J. GENDER & L. 84, 91 (2015). The intersection of immigration enforcement and reproductive oppression results in acute lack of access to reproductive health care for women who lack legal immigration status. Undocumented women often experience many of the same challenges faced by poor women, such as the challenges associated with being able to afford gas to travel long distances to access care, which also often requires taking time off of work, securing childcare, and in the case of long waiting periods, also finding lodging. *See id.*; *see also* Kelly Zielinski, *The Implication of Texas Abortion Law SB8 on At-Risk Populations in Texas and Other States*, 23 DEPAUL J. HEALTH CARE L. 52, 71–72 (2022) ("[W]omen who were denied abortions were more likely to be in poverty within six months of the denial. [sic] compared to women who had access to them.").

94. *See generally* Karen Trister Grace & Jocelyn C. Anderson, *Reproductive Coercion: A Systematic Review*, 19 TRAUMA VIOLENCE & ABUSE 371 (2018) (describing reproductive coercion as one of many forms of power and control exercised by an abusive partner). The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* specifically identified this form of reproductive coercion in invalidating Pennsylvania's spousal notification law, stating, "Many [domestic violence survivors] may fear devastating forms of psychological abuse from their husbands, including . . . the disclosure of the abortion to family and friends." 505 U.S. 833, 893 (1992).

95. IDAHO CODE ANN. § 18-8807(1) (West 2006).

96. Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law [https://perma.cc/BD2Z-CUM4].

devised to circumvent *Roe*,[97] there is reason to believe that states will continue to use the private enforcement mechanism because it allows for granular surveillance and expansive privacy violations that would violate the Constitution if undertaken by the state, and it allows for suits against providers and third parties with a lower standard of proof. While none of the current antiabortion civil remedy laws are enforceable against the pregnant people themselves,[98] civil remedy laws incentivize private citizens and organizations who are ideologically opposed to abortion to surveil pregnant people in their homes, online, and across state borders at clinics and to expose the intimate details of their health through the litigation process. While it is early yet to comprehend the full impact of the rise in antiabortion statutes, the laws and the accompanying privacy intrusions also have dramatic health consequences.

The antiabortion restrictions triggered almost immediately after the *Dobbs* decision—with seventeen states allowing abortions only to save the life of a pregnant person or in a medical emergency and six states banning abortion entirely[99]—have already imperiled the life and health of numerous patients.[100] Experts say that patients who experience ectopic pregnancies or pulmonary hypertension or those who need chemotherapy for cancer may not be able to receive the needed treatment; they expect a rise in pregnancy-related deaths.[101] And health care providers across the country in states that ban or sharply limit abortions face exceptional risks (ranging from license revocation to life in prison under the Texas statute), which again impact the doctors' decisions and patient care.[102] Antiabortion protestors are targeting physicians as well.[103]

The next Part argues that antiabortion civil enforcement regimes are antithetical to the purpose of private law to protect individuals against the tortious conduct of third parties. In short, tort law is designed to protect individuals' physical well-being and their "right 'to be let alone,'" but these laws

97. *See* Mitchell, *supra* note 48, at 1001–02.

98. *But see* Ceron, *supra* note 70 (discussing laws against and prosecutions for self-managed abortions).

99. *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/EE5V-MRES] (noting that the six states with total abortion bans are Alabama, Arkansas, Missouri, Oklahoma, South Dakota, and West Virginia); *see also* Haidee Chu et al., *Here's Where Abortions Are Now Banned or Severely Restricted*, NPR (Sept. 20, 2023, 11:41 AM), https://www.npr.org/sections/health-shots/2022/06/24/1107126432/abortion-bans-supreme-court-roe-v-wade [https://perma.cc/ANV9-G8GQ].

100. Kate Zernike, *Medical Impact of* Roe *Reversal Goes Well Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sept. 10, 2022), https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html.

101. Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End It Legally?*, NBC NEWS (June 30, 2022, 12:57 PM), https://www.nbcnews.com/health/health-news/abortion-ban-exceptions-life-threatening-pregnancy-rcna36026 [https://perma.cc/ELZ8-JXNC].

102. Selena Simmons-Duffin, *Doctors Who Want to Defy Abortion Laws Say It's Too Risky*, NPR (Nov. 23, 2022, 5:01 AM), https://www.npr.org/sections/health-shots/2022/11/23/1137756183/doctors-who-want-to-defy-abortion-laws-say-its-too-risky [https://perma.cc/RKB6-2C73].

103. Sarah McCammon & Becky Sullivan, *Indiana Doctor Says She Has Been Harassed for Giving an Abortion to a 10-Year-Old*, NPR (July 26, 2022, 5:59 PM ET), https://www.npr.org/2022/07/26/1113577718/indiana-doctor-abortion-ohio-10-year-old [https://perma.cc/PE99-865G].

instead incentivize violations of the right of privacy and, ironically, damage the health of pregnant people.[104]

II. STATE COOPTATION OF PRIVATE LAW IMPERILS PREGNANT PEOPLE'S SAFETY AND PRIVACY

Public law defines the duties and powers of the government through administrative and constitutional law, while private law concerns the rights and duties of private parties to each other through contract, property, and tort law.[105] This Part argues that antiabortion civil remedies are an improper use of private law to achieve public law ends. The two primary functions of private law—to compensate individuals for harm and to deter wrongdoing by the threat of damages[106]—are undermined by antiabortion civil remedy laws. As this Part will describe, antiabortion civil remedy laws like S.B. 8 establish a private cause of action for individuals to sue private parties who have not wronged them. Because the laws do not compensate individuals for harm—since those who are authorized to bring suit have suffered no cognizable harm—the laws also undermine the protective function of damages awards. The laws do not protect individuals from harm through the deterrent force of damages, but rather the laws incentivize widespread intrusion on the privacy of individuals.

A. Private Law and Compensation

Antiabortion civil enforcement laws like S.B. 8 provide for enforcement exclusively through private civil action but do not resemble private law claims because they do not compensate an individual for harm personal to them.[107] Private law is primarily designed to allow individuals who have suffered harm at the hands of a private party to seek compensation for an injury personal to them.[108] Thus, a critical aspect of private law is that plaintiffs sue in their own right for harms they have suffered.[109] S.B. 8 authorizes any person in Texas to bring a cause of action against a provider or someone who aids and abets an

104. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (footnote omitted).

105. *See* Seth Davis, *The Private Law State*, 63 MCGILL L.J. 727, 729–30 (2018) (looking to private law to curb or correct public law's move towards "raw politics" by imposing normative standards on legislative power).

106. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 17–23 (3d ed. 2007).

107. *See* Goldberg & Zipursky, *supra* note 19, at 470, 479.

108. Davis, *supra* note 105, at 734; s*ee also* Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727 (2012). *But see* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

109. Goldberg & Zipursky, *supra* note 19, at 470; *see also* WILLIAM L. PROSSER, THE LAW OF TORTS 10 (1941) ("The civil action for a tort . . . is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer.").

abortion, but the law requires no proof that the claimant has suffered any personal injury.[110] The statutory damages are not designed to compensate the plaintiff for harms they have suffered, a critical component of private law. Justice Sotomayor in her opinion in *Jackson v. Whole Woman's Health* raised this issue, noting that the statute authorizes suits by private citizens "without . . . [a] pre-existing personal stake" in the conduct that violates the Texas statute.[111] Instead, in antiabortion civil remedy laws like S.B. 8, the state is wielding private law to its own ends rather than compensating an individual for harm. Specifically, it is imposing an artificially constructed private law right of action and remedy in a situation in which there has been no wrongful conduct by a private party that has harmed another private party. The use of private law as an enforcement tool of the state is antithetical to the very function of private law, which is designed to compensate for harm and to shield individuals from future wrongful conduct by private third parties.

Antiabortion civil enforcement laws are an improper use of private law because they seek to achieve the goals and function of public law in an area in which there is no public harm. As Professors John C. P. Goldberg and Benjamin C. Zipursky argue, the laws are actually "public law in disguise."[112] Private civil litigation has been used in limited contexts to advance public regulatory goals such as in civil rights and environmental regulations.[113] However, the vigilante-style private enforcement regimes of the antiabortion civil remedy laws are a marked departure from the traditional role of citizen suits functioning as a tool of regulatory governance. These differences reveal the ways that these laws are an improper capture of private law by the state.[114]

---

110. Justice Thomas brought out this issue in his questions at oral argument, asking the Texas Solicitor General, "[U]sually, when you think of traditional torts . . . there's an injury to the individual. It's a private matter. There is no requirement [under S.B. 8] that there be an injury to the plaintiff." Transcript of Oral Argument at 47, Whole Woman's Health v. Jackson, 595 U.S. 30 (2021) (No. 21-463); *see also* Goldberg & Zipursky, *supra* note 19, at 484–86. In one of the first tests of the reach of S.B. 8, a trial court judge in Texas dismissed a lawsuit by a private citizen against a Texas abortion provider, in a ruling that "people who have no connection to the prohibited abortion and have not been harmed by it do not have standing to bring these lawsuits." Eleanor Klibanoff, *Texas State Court Throws Out Lawsuit Against Doctor Who Violated Abortion Law*, THE TEXAS TRIB., https://www.texastribune.org/2022/12/08/texas-abortion-provider-lawsuit/ [https://perma.cc/G728-MNF9] (Dec. 8, 2022, 4:00 PM).

111. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 548–50 & n.4 (2021) (Sotomayor, J., concurring in part and dissenting in part).

112. Goldberg & Zipursky, *supra* note 19, at 470.

113. *See, e.g.*, Thompson, *supra* note 61.

114. *See* Michaels & Noll, *supra* note 21, at 1213–20 (describing the difference between traditional citizen regulatory enforcement and the new vigilante enforcement regimes); *see also* Lauren Moxley Beatty, *The Resurrection of State Nullification—and the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws*, 111 GEO. L.J. ONLINE 18, 21 (2022) (concluding that *Whole Woman's Health v. Jackson* has "resurrected the zombie doctrine of nullification," a rhetorical device used by states to resist federal law); Joshua C. Wilson, *In the Texas Abortion Law, Conservatives Adopted the Progressive Playbook and Used It Against Them*, WASH. POST (Sept. 3, 2021, 7:00 A.M.), https://www.washingtonpost.com/politics/2021/09/03/texas-sbs-abortion-law-conservatives-adopted-progressive-playbook-used-itagainst-them/ [https://perma.cc/4H7F-ZQ47]; Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the*

Specifically, these citizen enforcement laws rely *exclusively* on private enforcement but require no injury.[115] Because the party enforcing the law has not suffered an injury, the plaintiffs in these suits purportedly redress a wrong that has been suffered by the community as a whole rather than by the plaintiffs personally.[116] The duty to enforce wrongs against the community, in other words the duty to redress a public wrong, is the duty of state prosecutors, and the plaintiffs in these suits are exercising powers that are exclusively the prerogative of the state and not a subject of private law.[117] Abortion is an area that has been exclusively regulated by public law through criminal and administrative enforcement.[118] Thus, civil bounty laws such as Texas's S.B. 8 are examples of tort law functioning as a type of public law through a system of private attorneys general.[119] As Justice Sotomayor observed in her dissent in *Whole Woman's Health v. Jackson,* these laws deputize private individuals to act on behalf of the state.[120]

The next Subpart argues, as the judge in *Van Stean v. Texas Right to Life* held, that private enforcement laws are an improper delegation of state authority to private citizens.[121] The laws also compensate individuals who have not suffered an injury. Moreover, these statutes turn the purposes of private law—to enhance safety and protect individuals from harmful conduct by private parties—on their head. Instead of deterring wrongful conduct by private parties, these laws incentivize tortious conduct.

Texas Heartbeat Act and Its Imitators: New York Times v. Sullivan *as Historical Analogue*, 60 HOUS. L. REV. 93 (2022).

115. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212 (West 2017).

116. *See* Anthony J. Colangelo, *Suing Texas State Senate Bill 8 Plaintiffs Under Federal Law for Violations of Constitutional Rights*, 74 SMU L. REV. F. 136, 137–38 (2021).

117. *Id.*

118. *See* Manian, *supra* note 26, at 126–27 (suggesting that these laws are using "'private' rights of action to make an end-run around public values and to disguise 'public' governmental regulation"); *see also* Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 756 (2006) (arguing that allowing state legislatures to circumvent the judicial process through "shrewd legislative drafting" permits a form of government in which "state government is equal or superior in authority to the federal government, and one in which the legislative branch is virtually unchecked by the judicial branch"). For a discussion of the use of private enforcement to avoid governmental accountability, see Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (discussing how privatizing governmental programs may impermissibly delegate government powers to private agencies), and Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003) (addressing the privatization of governmental programs to religiously affiliated organizations).

119. Goldberg & Zipursky, *supra* note 19, at 474–75 (noting that all tort law litigants function as private attorneys general to some extent because they litigate on behalf of the public good even though incentivized to do so by damage awards).

120. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting).

121. Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179, slip op. at 43 (Tex. Dist. Ct., Travis Cnty. Dec. 9, 2021).

B. Undermining Tort Law's Role in Deterrence and Compensation

Tort law serves a public function to protect the broader community through the deterrent force of damage awards.[122] Thus, private law is not only intended to compensate an individual for harms, but also to serve a "prophylactic" purpose of preventing future harm by disincentivizing the wrongdoer and others from engaging in future wrongful conduct.[123] Thus, tort rules make the community safer by influencing people to engage in "socially beneficial" conduct and disincentivizing them from engaging in harmful or negligent conduct.[124]

This protective, "public law" function is undermined by the legislative scheme of antiabortion civil remedy laws. The laws are designed to award civil damages to those who have not been harmed and at the same time completely insulate plaintiffs against liability for harms inflicted for wrongful suits. S.B. 8, for example, insulates state-deputized, bounty-hunter plaintiffs who sue under the statute by limiting the defenses to the suit and the ability of defendants to collect attorneys' fees if they successfully defend against a wrongful suit.[125] S.B. 8 eliminates virtually all common law defenses available to a defendant, except an affirmative defense that the defendant has already been required to pay damages on the same claim in connection to the same abortion.[126] Further, if

---

122. For a discussion of the competing public "deterrence" versus private "corrective justice" frames of private law, see Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (arguing for a mixed theory of tort law that takes into account both functions, deterrence and corrective justice, between the parties); *see also, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

123. PROSSER, *supra* note 109, at 27–28; *see also* 1 DAN B. DOBBS ET AL., THE LAW OF TORTS 19–20 (2d ed. 2011).

124. Goldberg & Zipursky, *supra* note 19, at 478 ("[T]he tort system imposes liability so that the anticipation of such damages will lead rational actors to alter their conduct in a manner that is socially beneficial . . . .").

125. Under the Texas law, anyone who brings an S.B. 8 claim and prevails is entitled to recover costs and attorneys' fees. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(3) (West 2017). In contrast, S.B. 8 defendants cannot recover their own costs or attorneys' fees if they win in defending abortion access. *Id.* § 171.208(i). S.B. 8 further purports to establish a fees regime under which any abortion provider or other person who seeks a declaration of S.B. 8's invalidity or an injunction against the law's enforcement—including through counterclaims raised in S.B. 8 enforcement proceedings—is liable for the other side's fees and costs if even one of these claims is dismissed for any reason. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(b)–(c) (West 2020).

126. S.B. 8 also bars anyone sued under it from raising seven defenses, including:

> (1) ignorance or mistake of law; (2) a defendant's belief that the requirements of [the Act] are unconstitutional or were unconstitutional; (3) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates [the Act]; (4) a defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought; (5) non-mutual issue preclusion or non-mutual claim preclusion; (6) the consent of the [patient] to the abortion; or (7) any claim that the enforcement of [the Act] or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by Section 171.209.

the defendant affirmatively claims that S.B. 8 is unconstitutional, both the defendant and her counsel will be jointly and severally liable for a plaintiff's recovery, including attorneys' fees, regardless of the merits of the claim under S.B. 8.[127] The effect of the fee-shifting statute is to prevent a defendant from obtaining counsel by intimidating away attorneys for fear that they could be held jointly and severally liable for any damages. The structure of the law allows *any person* in Texas to bring suit to enforce the law and offers them near total immunity for doing so.[128]

Not only do the civil remedy laws offer immunity to those who bring suit, but the laws effectively undermine the protective, "public law" function of private law to disincentivize wrongdoing by private parties. As discussed above, the laws incentivize intrusions into providers' and pregnant people's personal and medical privacy.[129] That surveillance and exposure can occur in people's homes, at clinics, and through data surveillance. In short, antiabortion civil remedy laws undermine the very function of private law—to protect individuals from tortious acts committed against them by third parties—and instead extend a cause of action to third parties who have not been harmed by the conduct of those who can be sued: abortion providers and third parties who aid and abet the abortion procedure. The private law regime of civil bounty laws not only fails to *shield* individuals from tortious intrusions into privacy, but rather *incentivizes* violations of privacy because it encourages bounty hunters to pursue people seeking reproductive care and to collect their private medical information.

Finally, private law is a legal regime that identifies compensable harm within the context of shared social standards.[130] Jurors in the private law system serve not only as factfinders but also as "[social] norm articulators."[131] Private law is designed to identify and compensate for conduct that falls outside the bounds of community standards about what constitutes reasonable behavior.[132] Negligence law, for example, expresses wrongdoing in relation to the "ordinarily prudent person," or a "reasonable person," defined as a person who demonstrates competence in taking care that people ordinarily are expected to demonstrate.[133] As will be described in Part III, privacy law incorporates social

---

TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(1)–(7) (West 2017).

127. *Id.* § 171.208(e)(2); TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(a) (West 2020).

128. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2017).

129. *See supra* discussion in text at notes 64–78.

130. For discussion of private law and social norms, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Richard H. McAdams & Eric B. Rasmusen, *Norms and the Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1573 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

131. John C. P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1657 (2012).

132. *Id.*

133. *Id.*

norms by incorporating the reasonable person standard. Intrusion upon seclusion, for example, is defined in the *Restatement (Second) of Torts* as intruding, "physically or otherwise, upon the solitude or seclusion of another . . . if the intrusion would be highly offensive to a reasonable person."[134] Civil bounty laws co-opt private law without regard to social norms of what behavior is highly offensive or unreasonable. Civil bounty laws award statutory damages without any required showing that the plaintiff authorized to bring suit under the statute has suffered injury or harm. Indeed, polling suggests that the civil bounty mechanism *itself* is highly offensive to a majority of people across the political spectrum.[135]

There are heightened risks of intrusion, coercion, and surveillance in a post-*Roe* America, particularly under a regime of private civil suits incentivized by bounty laws. The laws improperly capture private law to achieve public law ends and undermine private law's function to protect individuals' and communities' privacy and safety. The next Part explores prospects for patients and providers to assert private law causes of action the way that they should function: to bring civil suits of their own for intrusive invasions into their privacy.

III. RECLAIMING PRIVATE LAW'S PROTECTION IN THE POST-*ROE* LANDSCAPE

Tort lawsuits have revolutionized product safety, highlighted the dangers of predatory lenders, taken tobacco ads off the air, and created safer workplaces.[136] The NAACP discovered in the 1940s the potential for "constitutional tort" suits to enforce civil rights.[137] The Southern Poverty Law Center has a storied history of bankrupting the Ku Klux Klan by bringing lawsuits and collecting damages.[138] While bringing suits for damages can be a

134. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

135. In polling, more than three-quarters of respondents opposed the use of S.B. 8-style civil enforcement laws. Domenico Montanaro, *The Provisions in Texas' Restrictive Abortion Law Are Not Popular, an NPR Poll Finds*, TEX. PUB. RADIO (Oct. 4, 2021, 12:30 PM), https://www.tpr.org/texas/2021-10-04/the-provisions-in-texas-restrictive-abortion-law-are-not-popular-an-npr-poll-finds [https://perma.cc/L3ME-97QY]. Even among Republican and Christian Evangelicals, 69% of both groups oppose proposals to allow citizen suits against abortion providers or people assisting a pregnant person seeking an abortion. Steve Benen, *Republicans Embrace the One Abortion Policy Americans Most Oppose*, MSNBC: MADDOWBLOG (May 20, 2022, 11:44 A.M.), https://www.msnbc.com/rachel-maddow-show/maddowblog/republicans-embrace-one-abortion-policy-americans-oppose-rcna29833 [https://perma.cc/2EXE-6TAA].

136. *See, e.g.*, Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1510–12 (2009).

137. Lynda G. Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before* Brown, 85 IND. L.J. 1599, 1605 (2010).

138. Bill Laytner, *Civil Rights Lawyer Who Bankrupted KKK Gets Hero's Welcome in Detroit*, DET. FREE PRESS (Jan. 31, 2018, 11:21 AM), https://www.freep.com/story/news/local/michigan/detroit/2018/01/28/civil-rights-hero-morris-dees-visits-detroit-speaks-nations-strength-immigrants/1073266001/ [https://perma.cc/ND88-8JS7]; *see also* Jason Paul Saccuzzo, *Bankrupting the First Amendment: Using Tort Litigation to Silence Hate Groups*, 37 CAL. W. L. REV. 395, 415 (2001) ("Using civil litigation, Dees, the co-founder of the Southern

protracted process,[139] it can serve as a deterrent to improper private activities.[140] In this way, tort law serves both a public and private function, to both compensate individuals and to deter harmful conduct more broadly.[141] This Part outlines ways to reclaim tort law's private function to compensate individuals whose privacy and autonomy have been violated by those trying to obtain money under civil bounty laws. The Part lays out causes of action that seek to compensate pregnant people for harms that are personal to them and may also serve as a broader deterrent for those who might be tempted to violate the privacy of pregnant people and providers. In short, the Part reclaims the role and function of private law from its public law capture by the state and turns it toward its original purpose: to compensate individuals and deter future wrongdoing.

This Part sketches a variety of possible civil claims for improper surveillance, harassment, and information disclosure that can be brought by patients, as well as health care providers and centers that provide reproductive care. The first Subpart examines potential tort privacy laws that may allow abortion patients the ability to sue individuals who violate their privacy through harassment, stalking, and disclosure of personal information. The second Subpart considers common law and statutory tort claims that reproductive care providers can bring against bounty hunters and protestors who disrupt their businesses.

The suggestions about possible lawsuits come with the recognition that bringing a lawsuit poses numerous risks. While financial risks may be mitigated by contingent fee arrangements and the backing or participation of civil justice litigation groups,[142] the risks of being targeted in reprisal are not minimal, and the emotional burdens of living a lawsuit can be significant. Counsel can consider filing the tort claims as anonymous-party lawsuits to preserve the

---

Poverty Law Center, has attained incredible success by financially hobbling supremacist groups such as the Ku Klux Klan and the Aryan Nation.").

139. As just one note, the *Scheidler* case, discussed *infra* in text at notes 345–70, took twenty years to wend through the courts. *See* Nat'l Org. for Women, Inc. v. Scheidler (*Scheidler I*), 510 U.S. 249 (1994); Scheidler v. Nat'l Org. for Women, Inc. (*Scheidler II*), 537 U.S. 393 (2003); Scheidler v. Nat'l Org. for Women, Inc. (*Scheidler III*), 547 U.S. 9 (2006); Nat'l Org. for Women, Inc. v. Scheidler, 750 F.3d 696 (7th Cir. 2014).

140. *See, e.g.*, Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 1 (1996) ("[P]laintiffs have credible threats in a much wider set of cases—including in numerous small-stakes cases—than has been suggested by prior economic analysis of the subject.").

141. Goldberg & Zipursky, *supra* note 19, at 479 ("[E]ven as there are crucially important public law aspects to tort law, it is inescapably a form of private law. . . . Even in class actions, suit is predicated on the idea that each member of the class sues in her own right for a wrong personal to her.").

142. *See, e.g.*, *About the ACLU Reproductive Freedom Project*, ACLU (Jan. 22, 1997), https://www.aclu.org/other/about-aclu-reproductive-freedom-project [https://perma.cc/3ZHN-3EZD]; IF WHEN HOW: LAWYERING FOR REPROD. JUST., https://www.ifwhenhow.org/ [https://perma.cc/XKA3-LHQK]; *Lawyers Network*, CTR. FOR REPROD. RTS., https://reproductiverights.org/lawyers-network/ [https://perma.cc/75GX-55DZ].

privacy of the plaintiff, and courts should give considerable weight to whether parties will be required to disclose highly intimate information.[143]

A. Tort Privacy Protections for Patients

Tort law privacy protections parallel constitutional privacy protections in significant ways. Louis Brandeis has argued that both the common law right of privacy in tort regarding the flow of information and the Fourth Amendment right of privacy of physical space flow from the same source: "the right 'to be let alone.'"[144] State tort laws have been a traditional fount of civil privacy protections. Although states have varying ways of delineating garden-variety common law torts, the most applicable torts to respond to the overreaching actions of protestors and bounty hunters are intrusion on seclusion (or intrusive invasions), public disclosure of private facts, and intentional infliction of emotional distress. While other torts, such as trespass,[145] false light, or defamation, might apply in a given context, these are the most likely common law torts to apply to a variety of behaviors of antiabortion protestors in a post-*Roe* world. The final Subpart addresses a federal statutory tort—the prospect of a lawsuit for civil rights violations.

1. Intrusion on Seclusion

Intrusive invasions occur when a defendant intentionally intrudes on the solitude or seclusion of the plaintiff.[146] This common law tort is recognized in at least thirty states.[147] In addition, some states have parallel statutes recognizing a similar right,[148] while several state constitutions have been interpreted to

143. *See, e.g.*, Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981); Roe v. Aware Women Ctr. for Choice, Inc., 253 F.3d 678, 685 (11th Cir. 2001) ("[A]bortion [is] the paradigmatic example of the type of highly sensitive and personal matter that warrants a grant of anonymity."). Regarding when plaintiff pseudonymity is appropriate, see Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 215 (2004).

144. Warren & Brandeis, *supra* note 104, at 195 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)) (arguing for the recognition in law of the right of privacy which they described as "the right 'to be let alone'").

145. Planned Parenthood v. Aakhus, 17 Cal. Rptr. 2d 510, 517 (Ct. App. 1993).

146. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

147. *See* Lawlor v. N. Am. Corp. of Ill., 983 N.E.2d 414, 425 n.5 (Ill. 2012) (holding that Illinois joins the following list of states recognizing the tort: Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, and West Virginia).

148. *See, e.g.*, WIS. STAT. ANN. § 995.50(2) (West 2007) (defining the invasion of privacy as meaning "[i]ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private, or in a manner that is actionable for trespass").

protect reasonable expectations of privacy from not only government, but also private actors.[149]

The *Restatement (Second) of Torts* defines intrusion upon seclusion as: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[150] Note that this tort does not depend at all upon the dissemination of discovered information or giving it any publicity; the heart of the tort is invasion into private affairs or concerns. It is the act of intrusion, and often the means of intrusion,[151] that invades the plaintiff's privacy rights. Historically, this tort applied to actions such as peeping into windows, accessing bank accounts, wiretapping phones, and taping conversations.[152]

The methods of abortion protestors' activities post-*Roe* involve tracking license plate data and taking video footage of women seeking medical care.[153] While the Texas bounty hunter law does not allow suits for the $10,000 reward to be filed against the woman seeking the abortion, only against people who "aid[] or abet[]" her,[154] the information used in these suits of necessity will involve tracking the pregnant person and inevitably some forms of personal and perhaps digital surveillance.[155] These methods of eavesdropping, spying, aggregating data, and monitoring the behavior of women seeking medical care are highly dignity intrusive. Digital surveillance of the intimate aspects of life—through websites, apps, and trackers—involves methods similar to the surreptitious taping of conversations.[156]

With the tort of intrusion on seclusion, there can be intrusive invasions from spying, eavesdropping, and making repeated phone calls to the plaintiff.[157] Actionable intrusions can occur if the defendant "penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data

149. *See* Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 641–44 (Cal. 1994) (interpreting Article 1, section 1 of the California Constitution to apply to the NCAA's drug testing policies).

150. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

151. St. Anthony's Med. Ctr. v. H.S.H., 974 S.W.2d 606, 610 (Mo. Ct. App. 1998).

152. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

153. A.W. Ohlheiser, *Anti-Abortion Activists Are Collecting the Data They'll Need for Prosecutions Post-*Roe, MIT TECH. REV. (May 31, 2022), https://www.technologyreview.com/2022/05/31/1052901/anti-abortion-activists-are-collecting-the-data-theyll-need-for-prosecutions-post-roe/ [https://perma.cc/8VMN-RBMV].

154. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2) (West 2017).

155. Emma Bowman, *supra* note 96 ("Internet search histories and apps that track reproductive health data and locations are among the tools that store data that could reveal a person's intent to get an abortion. Third-party companies that collect and sell that user data could allow anyone who purchases a dataset access to information that they can then use to report an abortion.").

156. Lori Andrews, *A New Privacy Paradigm in the Age of Apps*, 53 WAKE FOREST L. REV. 421, 451 (2018).

157. *See, e.g.*, Masuda v. Citibank, N.A., 38 F. Supp. 3d 1130, 1134–35 (N.D. Cal. 2014).

about, the plaintiff."[158] While there may not be any liability for taking a single photograph of a plaintiff who is walking on a public street,[159] the sorts of harassment and stalking activities of antiabortion protestors at clinics—such as videotaping people entering the clinics, taking pictures of their license plates, etc.—are intrusive invasions.[160]

There is a line of cases that seems to protect the "right to record events taking place in public spaces."[161] However, while patients are traveling and appearing in public spaces, these public appearances are not motivated by any impulse to seek attention and should not be considered as consent to intrusions into or publication of their actions. People retain legitimate expectations of privacy in their activities when they are in public.[162] This is particularly true when they are engaged in the extremely private matter of seeking reproductive medical care, especially when seeking that care may expose them to stigma and even violence. Patients should have a reasonable expectation that their doctors' visits remain private.[163] These sorts of surveillance and monitoring are precisely the types of intrusions into people's private affairs that would be highly offensive to reasonable people.

One aspect of the defendants' conduct that adds to its highly offensive nature is that the defendants in their antiabortion protests are intentionally trying to take advantage of the plaintiffs' known sensitivities when they visit abortion clinics.[164] There should be a reasonable expectation of privacy in public spaces where people are trying to access or provide health care.[165] Numerous decisions have held that harassing and stalking behaviors invade

158. Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 490 (Cal. 1998).

159. *See, e.g.*, RESTATEMENT (SECOND) TORTS § 652B cmt. c (AM. L. INST. 1977).

160. Erin B. Bernstein, *Health Privacy in Public Spaces*, 66 ALA. L. REV. 989, 994 n.20 (2015).

161. *Id.* at 990.

162. *See, e.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 167–69 (2002) (holding that simply because door-to-door religious canvassers revealed their faces to strangers did not mean they could be compelled to disclose their identities and obtain a permit).

163. *See, e.g.*, Noble v. Sears, Roebuck & Co., 109 Cal. Rptr. 269, 272 (Ct. App. 1973) (holding that an investigator who accessed the plaintiff's hospital room had committed "an unreasonably intrusive investigation" that "may violate a plaintiff's right to privacy"); Anderson v. Mergenhagen, 642 S.E.2d 105, 108–11 (Ga. Ct. App. 2007) (holding that public surveillance and stalking by a husband's ex-wife could be an intrusive invasion); Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1113–20 (Md. Ct. Spec. App. 1986) (finding that public surveillance of an employee by union employees to discover infidelity could constitute an invasion of privacy).

164. *See, e.g.*, Stephen D. Sugarman & Caitlin Boucher, *Re-Imagining the Dignitary Torts*, 14 J. TORT L. 101, 162 (2021).

165. *Compare* Chico Feminist Women's Health Ctr. v. Scully, 256 Cal. Rptr. 194, 199–200 (Ct. App. 1989) (holding that a women's health center was not entitled to an injunction completely barring protestors from the vicinity of the center on Saturdays simply because they might recognize patients in a small town), *with* Safari Club Int'l v. Rudolph, 862 F.3d 1113, 1127–29 (9th Cir. 2017) (conversations in a public restaurant could still retain expectations of privacy with respect to surreptitious recordings). *See generally* Melissa Tribble, *Free Speech Off My Body: Protecting Abortion Patients and Medical Privacy in Light of the First Amendment*, 54 U.C. DAVIS L. REV. 1687, 1717–19 (2021) (analyzing these cases).

expectations of privacy even in public movements.[166] Courts should hold that invasive monitoring by antiabortion protestors who track the behaviors of women seeking health care or abortion services is highly objectionable to reasonable people.

The methods of data collection may violate other state or federal laws. Citizen vigilantes whose purpose is to intimidate women seeking abortions may also run afoul of the Freedom of Access to Clinic Entrances Act[167] and state harassment or stalking laws.[168] In addition, a federal statute[169] and almost all states, by statute,[170] prohibit the interception and disclosure of wire (and wireless), oral, and electronic or digital communications. Using subterfuge to solicit highly personal information about people can constitute intrusion on seclusion.[171]

The aggregation of data can amplify the intrusiveness. With respect to data collection, a recent criminal case may be useful. In *Carpenter v. United States*, the government acquired Carpenter's cell phone data, aggregated from his movements.[172] Although the defendant had voluntarily exposed his movements to different people (at various times and places), the U.S. Supreme Court held that the aggregation of "cell-site location information" from his wireless carriers violated his reasonable expectation of privacy in physical movement.[173] It was the aggregation of publicly exposed location data that created the privacy violation.[174] The U.S. Supreme Court has recognized that "the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information."[175] If the information collected creates a "much more revealing picture than any single piece of information viewed in isolation,"

166. A line of privacy cases indicates that people have the right to be free from the intrusion of repeated stalking and telephone harassment. *See* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY 716–23 (2021).

167. *See infra* discussion in text at notes 412–22.

168. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 723–24 (2000) (upholding the use of a state statute to prevent antiabortion protestors from "knowingly approach[ing]" within eight feet of clinic patients); Suzanne L. Karbarz, Note, *The First Amendment Implications of Anti-Stalking Statutes*, 21 J. LEGIS. 333, 333 (1995) (describing the use of the Texas stalking statute to enjoin antiabortion protestors).

169. 18 U.S.C. § 2511 (barring the nonconsensual "[i]nterception and disclosure of wire, oral, or electronic communications" by private parties as well as government agencies).

170. Lindsey Barrett & Ilaria Liccardi, *Accidental Wiretaps: The Implications of False Positives by Always-Listening Devices for Privacy Law & Policy*, 74 OKLA. L. REV. 79, 93 (2022).

171. *See, e.g.*, Johnson v. Kmart Corp., 723 N.E.2d 1192, 1196 (Ill. App. Ct. 2000) (holding that an employer's placement of private detectives in a workplace to masquerade as "co-workers" was an overly intrusive and deceptive means of soliciting private information).

172. Carpenter v. United States, 138 S. Ct. 2206, 2212 (2018).

173. *Id.* at 2211, 2217, 2219.

174. Jeffrey M. Skopek, *Untangling Privacy: Losses Versus Violations*, 105 IOWA L. REV. 2169, 2215 (2020).

175. U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 764 (1989).

this can violate a person's reasonable expectation of privacy.[176] Covert data collection can be the basis for a claim of intrusion upon seclusion.[177]

Image captures and exposing the identity of patients when they access health care significantly trigger public health concerns. If these methods are allowed to persist, and particularly if there are fears that information from these digital repositories can be accessed by people wanting to control women's reproductive choices, people may self-sensor. As Professor Danielle Citron has argued, people experiencing this type of surveillance "may stop visiting sites devoted to gender, sexuality, or sexual health. They may not use period-tracking apps that help them manage anxiety, pain, and uncertainty. . . . They might avoid communicating about intimate matters for fear of unwanted exposure."[178]

2. Public Disclosure of Private Facts

At least forty states provide protection against public disclosure of embarrassing or private facts.[179] The intent of this tort is to shield people from having other people give unreasonable publicity to their private lives.[180] Reliance on this tort is not intended to further stigmatize abortion by suggesting that it should remain private or is embarrassing. Rather, the points made in this Subpart are that the current wave of restrictive abortion laws imposes the stigma (as well as potential criminal penalties) and that it should be up to individual women whether and when and where to share their stories.[181] If

176. Benjamin Zhu, *A Traditional Tort for a Modern Threat: Applying Intrusion upon Seclusion to Dataveillance Observations*, 89 N.Y.U. L. REV. 2381, 2405 (2014).

177. *See, e.g.*, McDonald v. Kiloo ApS, 385 F. Supp. 3d 1022, 1031–40 (N.D. Cal. 2019) (ruling that the plaintiff class properly stated a claim for intrusion upon seclusion against gaming-app publishers for covertly collecting the behavioral data of users); Opperman v. Path, Inc., 205 F. Supp. 3d 1064, 1081 (N.D. Cal. 2016) (finding a genuine issue of material fact regarding whether Apple and Yelp would be liable for intrusion upon seclusion for taking Contacts-app data from consumers).

178. Danielle Keats Citron, *A New Compact for Sexual Privacy*, 62 WM. & MARY L. REV. 1763, 1794 (2021).

179. *See* C. Calhoun Walters, Comment, *A Remedy for Online Exposure: Recognizing the Public-Disclosure Tort in North Carolina*, 37 CAMPBELL L. REV. 419, 423 n.27 (2015) (listing Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin).

180. *Id.* at 430.

181. Numerous groups and individuals are bringing abortion stories to light in order to destigmatize the issue, help women recognize they are not alone, and tell what a world would be like if women did not have access to safe and legal abortions. *See, e.g.*, Erin Feher & Katie Hintz-Zambrano, *Abortion Stories: 10 Women Share Their Experience*, MOTHER (May 5, 2022), https://www.mothermag.com/abortion-stories/ [https://perma.cc/W4KD-QNJN]; *My Abortion Story: 15 Women Share Their Experiences*, DOCTORS WITHOUT BORDERS (Sept. 28, 2021), https://www.doctorswithoutborders.org/latest/my-abortion-story [https://perma.cc/R4VR-WMRC] ("To mark International Safe Abortion Day, September 28, we want to help break abortion stigma by sharing some first-person stories from women in the places where MSF works."); *see also*

women are "outed" in any way, by civil bounty hunters or abortion protestors, they should have access to civil remedies for the taking of their stories and personal information and incursions into their privacy.

The elements of this tort are publication of private matters (in which the public has no legitimate concern) so as to bring humiliation or shame to a reasonable person.[182] The *Restatement (Second) of Torts* defines publicity given to private life as creating liability "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[183]

Giving publicity to the fact that someone plans to have an abortion would satisfy the elements of the public disclosure tort. Numerous courts have determined that public disclosure of medical information is typically highly offensive to reasonable people.[184] Matters concerning sexual relations and sexual orientation are particularly private.[185] Giving unwanted publicity to someone's medical records or health information is similarly highly offensive.[186] In *Doe v. Mills*, the plaintiffs successfully sued abortion protestors who carried signs that displayed the plaintiffs' names and heralded that the plaintiffs planned to have abortions.[187] In *Doe* the information about the plaintiffs' medical decision came from a clinic document that had been discarded in the trash, and a nonparty to the case had prowled through the trash, obtained the document, and given it to the protestors.[188] While the defendants argued that the clinic was located in public and the plaintiffs' comings and goings were visible to the public, the court held that this did "not mean that the public was aware of the

---

Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 YALE J.L. & FEMINISM 29 (2017).

182. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 511 (Ct. App. 2001).

183. RESTATEMENT (SECOND) OF TORTS § 652D (AM L. INST. 1977).

184. *See, e.g.*, Miller v. Motorola, Inc., 560 N.E.2d 900, 904 (Ill. App. Ct. 1990) (mastectomy); John v. Wheaton Coll., No. 2-13-0524, 2014 WL 2123197, at *13–19 (Ill. App. Ct. May 20, 2014) (disclosure that the plaintiff had impregnated an unmarried woman and advised her to get an abortion presented a jury question on whether the facts were highly offensive); Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488, 501 (Mo. Ct. App. 1990) (publication of the plaintiffs' participation in an in vitro fertilization program was a private matter); Hillman v. Columbia Cnty., 474 N.W.2d 913, 919–20 (Wis. Ct. App. 1991) (HIV status).

185. *See* Rachael L. Braunstein, Note, *A Remedy for Abortion Seekers Under the Invasion of Privacy Tort*, 68 BROOK. L. REV. 309, 334 (2002) ("[L]ike medical information and sexual choices, an abortion is a highly personal experience. Abortion is intimate because it relates to pregnancy and reproductive choice.").

186. *See, e.g.*, Grimes v. County of Cook, 455 F. Supp. 3d 630, 640–41 (N.D. Ill. 2020) (disclosure of gender dysphoria and transgender status); Zieve v. Hairston, 598 S.E.2d 25, 30–31 (Ga. Ct. App. 2004) (hair plug company disclosed a client by including his photos in a television advertisement); Walgreen Co. v. Hinchy, 21 N.E.3d 99, 103–105 (Ind. Ct. App. 2014) (company disclosed private prescription information to the plaintiff's boyfriend).

187. Doe v. Mills, 536 N.W.2d 824, 834 (Mich. Ct. App. 1995).

188. *Id.* at 831.

precise purpose of those 'comings and goings.'"[189] The court concluded that revealing the plaintiffs' identities and giving public exposure to the confidential abortion plans of the plaintiffs would be highly offensive to reasonable people.[190]

Protestors may argue that they cannot be liable for giving additional publicity to events that occurred in public view.[191] However, if protestors try to publicize the fact that a woman has had an abortion by taking photographs of her walking into an abortion clinic, this is not at all the situation of giving further publicity to a matter that is already public. There is no other way for the pregnant person to seek medical care.

The private interests are not limited to patients. In *Planned Parenthood of Great Northwest v. Bloedow*, the court refused to require the Department of Health to disclose induced-termination-of-pregnancy data under a public records act request when that data would have identified particular patients or health care providers.[192] The court held that "'[h]ealth care information is personal and sensitive information that if improperly used or released may do significant harm' to a patient and health care provider."[193]

The publicity element requires establishing that the matter was communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[194] Communication of a pregnancy and possible abortion to a single individual might typically be insufficient;[195] however, if the communication is likely to become public knowledge, that would satisfy the publicity element.[196] Some states have engrafted a special-relationship exception onto the publicity element—if the disclosure is made to someone or a small group with whom the plaintiff has a special relationship, that can make the disclosure as disturbing as disclosure to the public.[197] Courts have held that disclosures to a plaintiff's

189. *Id.* at 832; *see also Jewish Hosp. of St. Louis*, 795 S.W.2d at 502 (finding that a hospital and TV station were potentially liable for public disclosure of private facts for broadcasting the plaintiff's attendance at a hospital gathering commemorating its in vitro fertilization program).

190. *Mills*, 536 N.W.2d at 828.

191. Virgil v. Time, Inc., 527 F.2d 1122, 1126 (9th Cir. 1975).

192. Planned Parenthood of Great Nw. v. Bloedow, 350 P.3d 660, 670 (Wash. Ct. App. 2015).

193. *Id.*

194. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. L. INST. 1977).

195. Hobbs v. Lopez, 645 N.E.2d 1261, 1263 (Ohio Ct. App. 1994) (ruling that communication of this information to the patient's mother was insufficient publicity for the tort).

196. John v. Wheaton Coll., No. 2-13-0524, 2014 WL 2123197, at *19 (Ill. App. Ct. May 20, 2014) (holding that the publicity element was satisfied by disclosure of information about a father's impregnation of a woman and his encouragement of her to terminate the pregnancy from a student's confidential file to a trusted friend of the student's mother, with the knowledge that these facts were likely to be used in custody litigation).

197. Karraker v. Rent-A-Center, Inc., 411 F.3d 831, 838 (7th Cir. 2005); *see also* Hill v. MCI WorldCom Commc'ns, Inc., 141 F. Supp. 2d 1205, 1211–13 (S.D. Iowa 2001); McSurely v. McClellan, 753 F.2d 88, 112–13 (D.C. Cir. 1985).

employer, family members, or members of a plaintiff's social club or church will satisfy the "special relationship" aspect and qualify as publicity.[198]

Part of the plaintiff's burden is to show that the matters publicized are not newsworthy or of legitimate concern to the public.[199] Courts have used various approaches to instruct juries on newsworthiness, and many of these tests try to get at the standards of the community. Most courts consider the status of the plaintiff and whether the plaintiff sought publicity or consented to notoriety.[200] In almost all instances, the pregnant person is trying to seek reproductive medical care very discreetly.[201] Courts typically balance the social value of the disclosure against the extent of the intrusion into the plaintiff's private life.[202]

Courts consider not just whether the *topic* at issue is of interest to the public, but whether the information specific to the plaintiff is somehow needed by the public and whether the facts need to be disclosed about the plaintiff to satisfy the public information concerns.[203] In *Winstead v. Sweeney*, for example, the appellate court reversed the trial court ruling because of its focus on the newsworthiness of the topics of abortion and partner swapping, and its lack of recognition that the facts revealed about the plaintiff's individual situation were unnecessary.[204]

Regarding the "newsworthiness" element, the *Doe v. Mills* court concluded that while the topic of abortion might well be a matter for public discussion, the individual plaintiff's decisions to seek abortions were not of legitimate concern to the public.[205] While the newsworthiness calculus might change for public figures who take political positions on abortion-related matters or people in the public eye who are significantly disclosive on social media, private

198. *See* Andrews, *supra* note 156, at 453 ("These include disclosure of medical information to co-workers or potential employers. The rationale is that 'there certainly can be "unreasonable and serious interference" with one's privacy without everyone being informed,' such as when the group consists of individuals 'whose knowledge of the private facts would be embarrassing to the plaintiff.'") (footnotes omitted).

199. Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998).

200. *See, e.g.*, Kapellas v. Kofman, 459 P.2d 912, 922 (Cal. 1969) ("In determining whether a particular incident is 'newsworthy' and thus whether the privilege shields its truthful publication from liability, the courts consider a variety of factors, including the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety.").

201. Anna L. Altshuler et al., *A Good Abortion Experience: A Qualitative Exploration of Women's Needs and Preferences in Clinical Care*, 191 SOC. SCI. & MED. 109, 114 (2017).

202. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 511 (Ct. App. 2001).

203. Winstead v. Sweeney, 517 N.W.2d 874, 878 (Mich. Ct. App. 1994) (noting that "[m]any . . . courts . . . have made it a point to focus not only on the newsworthiness of the topic itself, but also upon the facts disclosed about the plaintiff.").

204. *Id.*

205. Doe v. Mills, 536 N.W.2d 824, 830 (Mich. Ct. App. 1995) (deciding that "even though the abortion issue may be regarded as a matter of public interest, the plaintiffs' identities in this case were not matters of legitimate public concern, nor a matter of public record, but, instead, were purely private matters.").

individuals should have the choice whether to disclose the fact of their termination of a pregnancy.[206]

In an era in which the exercise of reproductive choices are being criminalized in some states, the stigma of disclosure of information about women seeking information about abortions or even contraceptives that could be viewed as abortifacients might have extreme consequences.[207] Abortion care providers are also "targeted at private offices, hospitals, and disturbingly, their children's daycare centers."[208] Dissemination of information about whether women are seeking abortions and whether medical providers are offering reproductive care hits the trifecta of disclosure of private personal information about an intimate matter, medical treatment, and a topic on which disclosure can invite danger to the patient, doctor, or any person assisting the pregnant person.

The protestors may try to cloak tortious conduct in First Amendment garb. Important in any analysis of public issues and speech is "[t]he vehicle, context, and content of the messages."[209] For example, in *People v. Little*, the defendant stalked his wife at a women's shelter.[210] He defended that under *Snyder v. Phelps*, his conduct was First Amendment protected because he wanted to confront her about her having had an abortion.[211] The court drew a sharp distinction between speech in a public forum and speech targeted at a private individual about that person's behavior:

> Nothing in the evidence suggests that in driving by Beth's Place, defendant intended to peacefully protest a matter of public concern in a public forum. . . . [N]othing in the record demonstrates defendant intended to "convey his position on abortion utilizing a method designed to reach as broad a public audience as possible."[212]

Similarly, antiabortion protestors who appear at clinics are not trying to discuss matters with as broad an audience as possible; they are avowedly trying to

206. Jackson v. Mayweather, 217 Cal. Rptr. 3d 234, 250 (Ct. App. 2017) (holding that an ex-boyfriend's disclosure of his ex-girlfriend's abortion qualified as newsworthy celebrity gossip because she courted media attention and noting that "the subsequent termination of that pregnancy—whether by abortion (which she has neither admitted nor denied) or otherwise—and her use of cosmetic surgery to enhance her appearance would, under many circumstances, be considered intensely private information; and its unwanted disclosure might well be offensive to a reasonable person").

207. *See* Aliyah Tihani Salim & Shivana Jorawar, Roe *Is Over. Prison Sentences Are on the Way*, THINK (July 3, 2022, 4:40 AM), https://www.nbcnews.com/think/opinion/abortion-laws-punishing-women-supreme-court-ended-roe-rcna36268 [https://perma.cc/WG4J-BBWQ].

208. Brief for Feminist Majority Foundation, National Organization for Women Foundation, Southern Poverty Law Center, and Women's Law Project as Amici Curiae Supporting Petitioners at 12, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460), 2019 WL 6698206.

209. Gleason v. Smolinski, 125 A.3d 920, 939 (Conn. 2015).

210. People v. Little, No. 4-13-1114, 2014 WL 7277785, at *17 (Ill. App. Ct. Dec. 22, 2014).

211. *Id.* at *6.

212. *Id.* at *7.

influence the behavior of pregnant women seeking medical care through their techniques of harassment.[213]

Bounty hunters will likely argue that abortion is a matter that involves criminal conduct and that they are engaged in activities that involve reporting criminal action. However, if the conduct occurs in a state in which abortion is legal, the extraterritorial actions are not legitimized by the conduct being criminal in some other jurisdiction.[214]

3. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress occurs when defendants intentionally or recklessly engage in extreme and outrageous behavior that causes the plaintiff to suffer severe emotional distress.[215] The tort is recognized in all fifty states.[216]

What constitutes extreme and outrageous conduct is the subject of a legion of court decisions and law review articles.[217] A phrase often used as definitional is that conduct satisfies this standard when it goes "beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community."[218] More helpful than this general description are the patterns that courts have examined to see if conduct amounts to outrageous behavior.

---

213. *See, e.g.*, Yochi J. Dreazen, *Abortion Protesters Use Cameras, Raise New Legal Issues, Lawsuits*, WALL ST. J. (May 28, 2002, 12:01 AM), https://www.wsj.com/articles/SB1022539371607091560 (reporting that an antiabortion protestor who took digital pictures of women entering clinics and posted them on websites stated that his purpose was to "[s]hame enough women into realizing that eternal damnation awaits them if they murder their baby"); *Missionaries to the Preborn*, ACADEMIC, https://en-academic.com/dic.nsf/enwiki/4903064 [https://perma.cc/KH9S-G6AS] (reporting that the founder of Missionaries to the Preborn, Reverend Matt Trewhella, while claiming that he does not advocate violence, stated: "I don't condemn people who use force to try to protect babies, because they are human beings. And if someone uses force to try to protect those babies, it would be as if someone used force against Dr. Mengele, from Adolf Hitler's era. If someone used force against him, would I condemn the person for stopping Mengele from all the atrocities he did? No, I wouldn't condemn that person.").

214. *See* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 519 (1992) (citing cases).

215. RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

216. Cristina Carmody Tilley, *The Tort of Outrage and Some Objectivity About Subjectivity*, 12 J. TORT L. 283, 287 (2019).

217. *See, e.g.*, State v. Alvarez, 150 N.E.3d 206, 218 (Ind. Ct. App. 2020) (describing patterns of power and vulnerability that make the defendant's conduct more outrageous); Heather Berger, Note, *Hot Pursuit: The Media's Liability for Intentional Infliction of Emotional Distress Through Newsgathering?*, 27 CARDOZO ARTS & ENT. L.J. 459, 462–64 (2009); Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 117–28 (2003).

218. *See, e.g.*, Fuller v. Loc. Union No. 106 of United Bhd. of Carpenters & Joiners of Am., 567 N.W.2d 419, 423 (Iowa 1997).

One line of cases holds that patterns of harassment constitute sufficiently outrageous conduct for this tort.[219] Stalking behaviors—while also addressable under civil and criminal stalking statutes[220]—have long been predicate acts that support a finding of outrageous conduct.[221] Offensive and aggressive messages on an internet message board that follow after stalking behaviors can amplify outrageous action.[222] Extreme and outrageous conduct can also consist of spying on the plaintiff through surreptitious video recording and going through the plaintiff's mail.[223] Intimidation and implied or express threats of physical harm can constitute outrageous behavior.[224] The attempts at humiliation are often public, which is another factor in determining whether the defendant's conduct is sufficiently severe.[225]

In determining whether the defendant has engaged in extreme and outrageous behavior, one significant consideration is implicit in most cases although rarely articulated: courts do not look at the defendant's behaviors in isolation but instead consider the cumulative pattern of conduct.[226] While protests or blockades alone at clinics might not be sufficiently outrageous for

219. Allam v. Meyers, No. 09-cv-10580(KMW), 2011 WL 721648, at *10–11 (S.D.N.Y. Feb. 24, 2011); Household Credit Servs., Inc. v. Driscol, 989 S.W.2d 72, 81–82 (Tex. App.—El Paso 1998, pet. denied).

220. *See, e.g.*, Interstate Stalking Punishment and Prevention Act, 18 U.S.C. § 2261A (prohibiting the use of "mail, any interactive computer service . . . , or any other facility of interstate or foreign commerce to engage in a course of conduct that . . . places [a] person in reasonable fear of the death of or serious bodily injury to a person . . . or . . . causes . . . substantial emotional distress to" that person, a spouse or intimate partner, or a member of that person's immediate family). Examples of criminal statutes include: CAL. PENAL CODE ANN. § 646.9 (West 2020); MD. CODE ANN., CRIM. LAW § 3-802 (West 2002). An example of a civil statute allowing damages to the victim is MICH. COMP. LAWS ANN. § 600.2954 (West 2010); *see also infra* notes 285–99.

221. *See, e.g.*, Bristow v. Drake Street, Inc., 41 F.3d 345, 350 (7th Cir. 1994) (applying Illinois law); Quintero v. Weinkauf, 291 Cal. Rptr. 3d 891, 894 (Ct. App. 2022); Flamm v. Van Nierop, 291 N.Y.S.2d 189, 190–91 (Sup. Ct. 1968).

222. Stockdale v. Baba, 795 N.E.2d 727, 736 (Ohio Ct. App. 2003).

223. Miller v. Brooks, 472 S.E.2d 350, 356 (N.C. Ct. App. 1996).

224. Harris v. Cellco P'ship, No. 5:15-cv-529-Oc-30PRL, 2016 WL 232235, at *3 (M.D. Fla. Jan. 15, 2016).

225. *See, e.g.*, Neron v. Cossette, No. CV116003350S, 2012 WL 1592174, at *8 (Conn. Super. Ct. Apr. 13, 2012) ("[P]laintiffs have . . . been successful in establishing claims for intentional infliction of emotional distress where they have alleged that they were forced to suffer public ridicule.") (citations omitted).

226. Williams v. Guzzardi, 875 F.2d 46, 52 (3d Cir. 1989) (observing that courts are more inclined to find a good claim for intentional infliction of emotional distress "where there is a continuing course of conduct"); Bernard v. Doskocil Cos., 861 F. Supp. 1006, 1015 (D. Kan. 1994) ("[T]aking all of the incidents as a whole, a continued pattern of constant hostilities directed at plaintiff in his place of work, where plaintiff was the only black, is revealed. Viewing plaintiff's evidence cumulatively, . . . the alleged incidents of harassment stack up, brick upon brick, and, in the court's view, are enough to satisfy the first threshold requirement . . . ."); Jones v. Hirschberger, No. B135112, 2002 WL 853858' at *9 (Cal. Ct. App. May 6, 2002) (unpublished) (holding that "here the cumulative effect of the false accusations, persistent surveillance, and utterance of racial epithets could support a finding of outrageousness" and noting that "[t]he cumulative impact of the incidents may be far greater than any single incident viewed in isolation"); Nader v. Gen. Motors Corp., 255 N.E.2d 765, 770–71 (N.Y. 1970) (finding that overzealous surveilling of the plaintiff while he was in a public place, accosting him, and making "annoying and threatening telephone calls" created "a deliberate and malicious campaign of harassment or intimidation" sufficient for outrageous behavior).

this tort,[227] in the case of bounty hunters and protestors, the cumulative package of behaviors often includes following plaintiffs, stalking, harassing, public yelling, taking photographs, and disseminating information.[228] These are specifically targeted at coercive control and, in their accumulated impact, paint a much different picture than isolated, individual actions.[229]

While the mental-state element for most intentional torts is purpose or substantial certainty, for intentional infliction of emotional distress, in most jurisdictions, that element can be satisfied by proving that the defendant acted recklessly to cause the plaintiff severe emotional distress.[230] Recklessness is a "deliberate disregard of a high degree of probability" that emotional distress will occur.[231] In the instance of abortion protestors or bounty hunters, frequently their activities are not only intentional or purposeful but are specifically calculated to lead to emotional distress—distress so serious that a person might be shamed or afraid to continue with an intimately personal decision to abort.[232] At a minimum, there is likely reckless indifference as to whether the plaintiffs would suffer severe emotional distress.

Severe emotional distress "includes all highly unpleasant mental reactions such as embarrassment, fright, horror, grief, shame, humiliation, and worry"; it is typically defined as "distress that is so severe that no reasonable person could be expected to endure it."[233] While some courts require medical expert testimony to establish severe emotional distress,[234] the majority of courts do not insist on such testimony because "other reliable forms of evidence, including

227. Roe v. Operation Rescue, 710 F. Supp. 577, 587 (E.D. Pa. 1989), *aff'd*, 919 F.2d 857 (3d Cir. 1990).

228. *See, e.g.*, Laura C. Morel, *Abortion's Last Stand in the South: A Post-*Roe *Future Is Already Happening in Florida*, REVEAL (May 5, 2022), https://revealnews.org/article/abortion-violence-roe-wade-florida/ [https://perma.cc/BZJ5-CU76].

229. *See, e.g.*, Kathy Spillar, *The Anti-Abortion Movement Has a Long History of Terrorism. A* Roe *Repeal Will Make It Worse*, MS. MAG. (May 6, 2022), https://msmagazine.com/2022/05/06/anti-abortion-violence-terrorism-roe-v-wade/ [https://perma.cc/HZ7T-8G97] (discussing the history of violence and threats of violence by antiabortion protestors).

230. *See, e.g.*, Clark v. Clark, 867 S.E.2d 704, 716 (N.C. Ct. App. 2021).

231. *Id.*

232. *See, e.g.*, *What We Do*, HUM. COAL., https://www.humancoalition.org/what-we-do [https://perma.cc/R444-XBVH] ("There are roughly 1 million abortion-determined women in the U.S. each year. . . . Human Coalition is building a pro-life, holistic, comprehensive care network to help rescue these women and their children from abortion.").

233. GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 618 (Tex. 1999).

234. *See, e.g.*, Kazatsky v. King David Mem'l Park, Inc., 527 A.2d 988, 995 (Pa. 1987) ("Given the advanced state of medical science, it is unwise and unnecessary to permit recovery to be predicated on an inference based on the defendant's 'outrageousness' without expert medical confirmation that the plaintiff actually suffered the claimed distress."). The minority of courts that impose such a requirement seem to say that because it should not be difficult to get expert testimony, that testimony ought to be required. *Id.*

physical manifestations of distress and subjective testimony, are available."[235] In addition, testimony from the plaintiff and testimony about changes in the plaintiff's behavior from friends and family can support the claimed damages.[236] For those women who have had abortions, defendants may argue that the emotional distress stems from the "regret" over having the procedure itself.[237] However, claims that abortion harms women's mental health have been refuted by extensive social science research.[238] Also, once the plaintiff has established that the defendant's conduct caused the severe emotional distress, the burden of proof would be on the defendant to establish any alternate purported cause.[239]

To have standing, the individuals affected—pregnant people seeking reproductive care and the health care providers—will likely need to be the ones to sue.[240] In terms of possible defenses, plaintiffs should recognize that in a handful of jurisdictions, if the intentional infliction of emotional distress tort overlaps factually with a traditional tort such as assault or battery, that more specific tort is the exclusive remedy.[241]

Another defense that will likely be raised is the First Amendment rights of protestors.[242] It is important, however, to distinguish between peaceful protests and actions that involve harassment, stalking, intimidation, or violence. A case that illustrates when First Amendment-protected conduct can cross the line

---

235. *See, e.g.*, Miller v. Willbanks, 8 S.W.3d 607, 613 (Tenn. 1999) (citing decisions from Alaska, Maine, Ohio, Oklahoma, Oregon, Washington, and West Virginia); *see also* Williams v. HomEq Serv. Corp., 646 S.E.2d 381, 385 (N.C. Ct. App. 2007).

236. *Clark*, 867 S.E.2d at 715.

237. This is an emotional equivalence that even the Supreme Court has accepted, without any evidence supporting the conclusion. *See* Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

238. *See, e.g.*, M. Antonia Biggs et al., *Mental Health Diagnoses 3 Years After Receiving or Being Denied an Abortion in the United States,* 105 AM. J. PUB. HEALTH 2557 (2015); Diana G. Foster et al., *A Comparison of Depression and Anxiety Symptom Trajectories Between Women Who Had an Abortion and Women Denied One,* 45 PSYCH. MED. 2073 (2015); M. Antonia Biggs et al., *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study,* 74 JAMA PSYCHIATRY 169 (2017); M. Antonia Biggs et al., *Does Abortion Increase Women's Risk for Post-Traumatic Stress? Findings from a Prospective Longitudinal Cohort Study,* BMJ OPEN, Feb. 2016, at 1.

239. *See, e.g.*, Kahn v. E. Side Union High Sch. Dist., 75 P.3d 30, 47 (Cal. 2003).

240. Nicdao v. Two Rivers Pub. Charter Sch., Inc., 275 A.3d 1287, 1292–93 (D.C. 2022) (holding that a school lacked third-party standing to sue for intentional infliction of emotional distress on behalf of school children affected by antiabortion protests, where there was no showing the students could not protect their own interests).

241. *See, e.g.*, K.G. v. R.T.R., 918 S.W.2d 795, 799 (Mo. 1996) (holding that the plaintiff cannot also sue for intentional infliction of emotional distress "where the alleged conduct is intended to invade other legally protected interests of the plaintiff or intended to cause bodily harm" and explaining that "where one's conduct amounts to the commission of one of the traditional torts, such as battery, and the conduct was not intended only to cause extreme emotional distress to the victim, the tort of intentional emotional distress will not lie"). However, courts are beginning to hold that a separate claim for emotional distress can "be supported by pleading some additional wanton and outrageous act." Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 316 (Mo. 1993); *see also* John Doe CS v. Capuchin Franciscan Friars, 520 F. Supp. 2d 1124, 1134 (E.D. Mo. 2007) (in a suit for fraudulent nondisclosure about the sexual misconduct of a priest, the court allowed a supplemental emotional distress claim).

242. *See generally* McCullen v. Coakley, 573 U.S. 464 (2014).

into tortious activity is *Tompkins v. Cyr*, in which antiabortion protestors followed the cars of the plaintiffs (a physician who provided abortion services and his wife), picketed outside their home on both Saturdays and Sundays, made repeated, threatening phone calls to the plaintiffs, and parked their cars near the plaintiffs' residence to keep "a near-constant watch of plaintiffs inside their home."[243] These activities occurred for ten months and caused the plaintiffs extraordinary distress: the doctor wore a bullet-proof vest, and his medical practice suffered; both plaintiffs experienced sleep deprivation, fear, and extreme emotional consequences.[244] The U.S. District Court for the Northern District of Texas upheld the jury's verdict of $2.8 million in compensatory damages and $3.45 million in exemplary damages for intentional infliction of emotional distress and other privacy torts against multiple defendants, including Operation Rescue, noting that these activities of focused picketing constituted egregious conduct, not protected speech.[245]

Particularly when protestors mobilize to disseminate information and invite harassment of individuals, their conduct becomes likely to inflict emotional distress. In a case from Alaska, *State v. Carpenter*,[246] a radio host whose show was scheduled for cancellation issued a "call to arms" to his listeners and disseminated the home telephone and fax numbers of the person he deemed responsible for the cancellation.[247] The court found that this organization of a campaign of harassment was extreme and outrageous behavior and was unprotected by the First Amendment.[248]

Some antiabortion protestors dox health care providers—they publish and circulate personal information, such as the providers' home addresses or the schools their children attend, to both facilitate and encourage harassment. For example, in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*,[249] the court recognized that the antiabortion protestors' web sites with "WANTED" posters and scorecards relaying the deaths of abortion providers posed true and serious risks of physical harm.[250] As law professors Danielle Citron and Daniel Solove observe, "[s]uch information may already be available online from other sources. But when this data is used to dox victims,

243. Tompkins v. Cyr, 995 F. Supp. 664, 672 (N.D. Tex. 1998).

244. *Id.* at 673–74.

245. *Id.* at 682–83.

246. State v. Carpenter, 171 P.3d 41 (Alaska 2007).

247. *Id.* at 48, 57.

248. *Id.* at 58–60.

249. Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1085 (9th Cir. 2002).

250. *Id.*

the data no longer is innocuous," and it fuses risks of both psychological and physical harm.[251]

4. Civil Conspiracy

Many protestors act in concert with each other and with established antiabortion organizations.[252] In terms of creating institutional liability and finding potential founts of recovery, it is important to consider potential causes of action for civil conspiracy as well as individual jurisdictions' joint and several liability rules.[253]

The point of civil conspiracy is that wrongful conduct, when perpetrated by a group, is typically more damaging than the conduct of individual defendants acting alone.[254] So there must be a viable underlying cause of action on which the conspiracy claim rests. The elements of a civil conspiracy are: "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme."[255]

If antiabortion protestors conspire to defame reproductive-rights health care providers and the underlying conduct is considered tortious, then the protestors can be liable for civil conspiracy as well.[256] In the *Tompkins* case, discussed above, in which antiabortion protestors collectively engaged in a campaign of harassment and intimidation against an abortion provider, the court upheld the civil conspiracy count and ruled that "each of the losing defendants is jointly and severally liable for the actions of the others because all were found to be co-conspirators in a civil conspiracy."[257] A number of courts have upheld civil conspiracy claims against abortion protestors whose objectives were "to discourage women from patronizing respondent's business with the goal of making abortion unavailable."[258] As an evidentiary matter,

---

251. Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 834 (2022); *see also, e.g.*, Armstrong v. Shirvell, 596 F. App'x 433, 451–453 (6th Cir. 2015) (finding a prima facie intentional infliction of emotional distress claim where a defendant disseminated information about the private sexual conduct of a university's gay student body president).

252. *See, e.g.*, *Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1085.

253. In *Tompkins v. Cyr*, 202 F.3d 770, 783 (5th Cir. 2000), the court held that the defendants were "jointly and severally liable for the actions of the others because all were found to be co-conspirators in a civil conspiracy."

254. Kidron v. Movie Acquisition Corp., 47 Cal. Rptr. 2d 752, 758 (Ct. App. 1995).

255. Bottom v. Bailey, 767 S.E.2d 883, 890 (N.C. Ct. App. 2014).

256. *See* Dickson v. Afiya Ctr., 636 S.W.3d 247, 264 (Tex. App.—Dallas 2021), *rev'd sub nom.* Lilith Fund for Reprod. Equity v. Dickson, 662 S.W.3d 355 (Tex. 2023).

257. *Tompkins*, 202 F.3d at 783.

258. Gynecology Clinic, Inc. v. Cloer, 514 S.E.2d 592, 592 (S.C. 1999); *see also* Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 214 F. Supp. 3d 808, 829 (N.D. Cal. 2016) (finding that "the allegations adequately identify and link each defendant . . . to the underlying tort they are alleged to either have committed directly or conspired to commit"), *aff'd*, 890 F.3d 828 (9th Cir.), *amended*, 897 F.3d 1224 (9th Cir. 2018); Operation Rescue-Nat'l v. Planned Parenthood of Hous. & Se. Tex., Inc., 975 S.W.2d 546, 553

picketers' own literature may be used to demonstrate both the conspiracy and damages.[259]

5. Other Tort Claims

Numerous other tort causes of action may also be applicable to harassing and privacy-invasive behavior of protestors and bounty hunters that targets pregnant persons as well as health care providers and clinics. For example, many jurisdictions recognize the theory of "prima facie tort": "the intentional infliction of injury without justification."[260] Yet, if there are sufficient facts to establish essentially malevolent injury, some other more specific tort is likely to apply, and in some states, prima facie tort is only a viable theory to be submitted to a jury if no other more traditional tort is available.[261] In addition, there may be specific statutory claims, such as a federal civil rights cause of action or a False Claims Act suit or a suit under a parallel state statute, if anyone trying to recover under a civil bounty law knowingly submits a false claim to the government.[262] This Subpart touches on several other possible common law and statutory torts that might apply to a given set of facts regarding overreach by protestors and bounty hunters.

i. Defamation

There might be a cause of action for defamation for conveyance of false information if there are false accusations that women are getting abortions[263]

(Tex. 1998) (approving a jury verdict for civil conspiracy where demonstrators yelled at patients, used bull horns, blocked entrances to clinics, and vandalized clinic property, finding that the demonstrators had "violat[ed] the respondent physicians' privacy or property rights, and wrongfully interfer[ed] with the respondent clinics' ability to provide medical services").

259. *See, e.g.*, *Gynecology Clinic, Inc.*, 514 S.E.2d at 593 (finding that "[a]ppellants' own literature, which claims to have damaged respondent by causing a dramatic drop in the number of abortions performed at the clinic, is itself evidence of damages").

260. Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 447 (1990); *see also* RESTATEMENT (SECOND) OF TORTS § 870 (AM. L. INST. 1979); Aikens v. Wisconsin, 195 U.S. 194, 204 (1904); Curiano v. Suozzi, 469 N.E.2d 1324, 1327 (N.Y. 1984) (defining prima facie tort as consisting of (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful).

261. *See, e.g.*, Bandag of Springfield, Inc. v. Bandag, Inc., 662 S.W.2d 546, 554 (Mo. Ct. App. 1983) (holding that "[a]lternative *pleading* of a prima facie tort cause of action is not objectionable . . . but if at the close of all the evidence, the plaintiff's proof justifies submission of his cause as a recognized tort, the prima facie tort claim may not be submitted").

262. *See* 31 U.S.C. §§ 3729–33; *State False Claims Act Reviews*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., https://oig.hhs.gov/fraud/state-false-claims-act-reviews/ [https://perma.cc/Y5PP-5DZN].

263. *See, e.g.*, Murphree v. State, 69 So. 237, 237 (Ala. Ct. App. 1915) ("Probably it could be said in the ordinary use of the language that it would be defamatory to speak of or concerning any woman as having had an abortion performed, although it may be stated as a matter of common knowledge that such operations are

or that providers are acting improperly in providing medical services.[264] Defamation is publication to at least one other person of a false statement of fact that impeaches a person's reputation.[265] If the libel (printed defamatory statements) or slander (spoken) relate to a private person, there must be fault amounting to at least negligence on the defendant's part in publishing the matter.[266] Statements of opinion can be actionable if they imply false facts.[267]

The defamation must be "of or concerning" the plaintiff.[268] Statements must name a plaintiff specifically, or if the defamation is directed toward a group, the plaintiff must show that the group or class referred to is so small that the matter can reasonably be understood to refer to the plaintiff.[269]

Forty states recognize defamation per se[270]: if the defamatory statement falls into certain categories (most pertinent here would be allegations of involvement in criminal or unprofessional activities), the plaintiff does not need to quantify reputational damages and can recover presumed compensatory damages.[271]

One difficulty with suing people who call an abortion provider a murderer is that there is a split among courts as to whether such a statement can be characterized as opinion or fact.[272] An interesting case on defamation, *Dickson v. Afiya Center*, was decided in Texas at a time when abortion was legal in the state.[273] The Texas Court of Appeals held that an antiabortion activist's statements that abortion rights organizations were murderers and criminal organizations was a false statement of fact and that simply couching the statement in the language of opinion did not insulate it,[274] but the Texas Supreme Court reversed on appeal, determining that the defendant was simply conveying "his opinion about the legality and morality of that conduct."[275] Similarly, in *Van Duyn v. Smith*, the Appellate Court of Illinois held that that a

---

recognized by the medical profession as necessary and legitimate on rare occasions for the preservation of the life of the female.").

264. *See infra* note 272.

265. Milkovich v. Lorain J. Co., 497 U.S. 1, 11 (1990).

266. JB & Assocs. v. Neb. Cancer Coal., 932 N.W.2d 71, 78 (Neb. 2019).

267. Bryant v. Cox Enters., Inc., 715 S.E.2d 458, 464 (Ga. Ct. App. 2011) (holding that opinion statements can be the basis for defamation actions if they "can reasonably be interpreted as stating or implying defamatory facts about plaintiff" and those facts are false).

268. Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 765 (D.N.J. 1981).

269. RESTATEMENT (SECOND) OF TORTS § 564A (AM. L. INST. 1977).

270. Steven A. Krieger, *Defamation Per Se Cases Should Include Guaranteed Minimum Presumed Damage Awards to Private Plaintiffs*, 58 SAN DIEGO L. REV. 641, 642 (2021).

271. *See id.*

272. *See* Van Duyn v. Smith, 527 N.E.2d 1005, 1014 (Ill. App. Ct. 1988) (finding that a "wanted" poster in which an abortion protestor accused the executive director of an abortion clinic of "killing" "merely describes [the protestor's] opinion of the results of an abortion procedure").

273. Dickson v. Afiya Ctr., 636 S.W.3d 247, 264 (Tex. App.—Dallas 2021), *rev'd sub nom.* Lilith Fund for Reprod. Equity v. Dickson, 662 S.W.3d 355 (Tex. 2023).

274. *Id.* at 257–60.

275. *Lilith Fund*, 662 S.W.3d at 368.

"wanted" poster in which an abortion protestor accused the executive director of an abortion clinic of "killing" "merely describes [the protestor's] opinion of the results of an abortion procedure."[276]

The use of defamation actions by public figures, such as political candidates, to respond to characterizations of their views on abortion may have difficulty with the malice standard that the statements (such as that a candidate supported "abortion on demand," among other things) were knowing falsehoods or made with reckless disregard for the truth.[277] While the defamation claim likely would be available for false factual statements about a specific plaintiff—for instance, publication of video footage of a woman entering a clinic with the words "homicidal mother" accompanying her photograph when she was simply seeking a mammogram[278]—the tort would be difficult to prove regarding general antiabortion protestors hoisting signs stating their opinions about a topic.

ii. Negligent Infliction of Emotional Distress

Almost all states allow recovery for negligent infliction of emotional distress.[279] If someone is a direct victim of the negligence (rather than just a bystander witnessing harm to someone else), the elements of negligent infliction of emotional distress require the defendant to perform conduct that creates an unreasonable risk of emotional harm to the plaintiff and that actually results in that emotional distress.[280]

While only a few states still require some physical impact or that the plaintiff be in the zone of danger for such an impact before the plaintiff can sue for emotional distress,[281] more than a dozen states still require either a physical injury or some physical manifestation of the emotional distress.[282] It is an open

276. *Van Duyn*, 527 N.E.2d at 1014.

277. *See generally* Herbert v. Okla. Christian Coal., 992 P.2d 322 (Okla. 2000); *see also* Moffatt v. Brown, 751 P.2d 939, 946 (Alaska 1988) (holding that an obstetrician who performed second-trimester abortions was a public figure and that, although a right-to-life author made false statements of fact in a newsletter article, the author did not act with actual malice because he did not "entertain[] any serious doubts as to the truth of his statements").

278. Dreazen, *supra* note 213.

279. John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 809 (2007). *But see* Valenzuela v. Aquino, 853 S.W.2d 512, 513 (Tex. 1993).

280. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 816–18 (Cal. 1980).

281. *See* K.A.C. v. Benson, 527 N.W.2d 553, 557 (Minn. 1995).

282. *See, e.g.*, McMahan v. Hawkeye Hotel, Inc, No. 20-00945-CV-W-GAF, 2022 WL 1736838, at *6 (W.D. Mo. Jan. 19, 2022) (requiring the emotional distress to be "medically diagnosable and significant"); *see also* Christopher Ogolla, *Emotional Distress Recovery for Mishandling of Human Remains: A Fifty State Survey*, 14 DREXEL L. REV. 297, 366 (2022) (listing fourteen states as requiring either a physical injury or physical manifestation of symptoms of emotional distress, including "Colorado, Florida, Georgia, Kansas, Michigan,

question whether pure protests, even specific picketing of a provider's home,[283] would be redressable under negligent infliction of emotional distress.[284]

iii. Stalking and Cyberstalking

There may also be federal or state stalking or cyberstalking criminal and even civil laws applicable to the protestors' or bounty hunters' conduct if they pursue their victims or use technology in ways that make women or health care providers afraid for their safety. Cyberstalkers may pursue victims through phone calls, instant messages, email, or on social media; their techniques may include repeated, harassing messages, threats, or derogatory or privacy-invasive posts.[285] A federal statute criminalizes using electronic communication systems "with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person," if that conduct either places the "person in reasonable fear of . . . death . . . or serious bodily injury" or "causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress."[286] The federal criminal statute likely does not create a civil cause of action,[287] but a number of state laws do.

In California, for example, the stalking statute includes cyber activities and provides civil penalties for stalking and cyberstalking.[288] Michigan,[289] Oregon,[290]

Mississippi, Missouri, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, Virginia and Washington").

283. *Compare* Valenzuela v. Aquino, 800 S.W.2d 301, 309 (Tex. App.—Corpus Christi–Edinburg 1990) (dismissing a claim by an abortion provider whose home was picketed because "[t]he specter of protestors being subjected to unlimited liability for claims of negligent infliction of emotional distress from a contingent of unknown plaintiffs would doubtless have a stifling effect on expressive speech"), *aff'd in part, rev'd in part,* 853 S.W.2d 512, 513 (Tex. 1993) (approving the outcome on the grounds that "[n]o action for negligent infliction of emotional distress exists in Texas"), *with* Tompkins v. Cyr, 202 F.3d 770, 783 (5th Cir. 2000) (allowing a claim for intentional infliction of emotional distress because of the relentless harassment and targeted picketing of an abortion provider's residence).

284. *See* Snyder v. Phelps, 562 U.S. 443 (2011) (rejecting tort claims for the picketing of a funeral to protest LGBTQ rights, which the Court held involved a matter of public concern where the picketing occurred at a public place on a public street).

285. *See* Kara Powell, *Cyberstalking: Holding Perpetrators Accountable and Providing Relief for Victims*, RICH. J.L. & TECH., Spring 2019, at 1, 2–3.

286. 18 U.S.C. § 2261A(2)(A)–(B).

287. *See* Haffke v. Discover Fin. Servs., No. 10-CV-276, 2010 WL 3430843, at *2 (E.D. Tex. Aug. 3, 2010) ("Section 2261A applies to stalking, and section 223 applies to harassing telecommunications are [sic] criminal statutes and provide for no private right of action."); Fox v. Tippetts, No. 09-CV0485, 2009 WL 3790173, at *4 (W.D. La. Nov. 10, 2009); Rock v. BAE Sys., Inc., No. 12-CV-1092, 2013 WL 1091683, at *1 (M.D. Fla. Mar. 15, 2013).

288. *See, e.g.*, CAL. CIV. CODE § 1708.7 (West 2019).

289. MICH. COMP. LAWS ANN. § 600.2954(1) (West 2010) ("A victim may also seek and be awarded exemplary damages, costs of the action, and reasonable attorney fees in an action brought under this section."). Some of these are enumerated in Aily Shimizu, *Domestic Violence in the Digital Age: Towards the Creation of a Comprehensive Cyberstalking Statute*, 28 BERKELEY J. GENDER L. & JUST. 116, 128–29 (2013).

290. OR. REV. STAT. ANN. § 30.866(1)(a)–(b) (West 2013) (allowing both a protective order and damages for "knowingly or recklessly engag[ing] in repeated and unwanted contact with the petitioner or a member of the petitioner's immediate family or household thereby alarming or coercing the

Rhode Island,[291] Texas,[292] and Virginia[293] have statutory provisions that allow civil actions for damages for stalking, while Ohio and Wyoming have recognized common law claims for stalking.[294] Other jurisdictions have specifically rejected a common law tort cause of action for stalking.[295] In numerous states, although the stalking statute does not provide civil damages, plaintiffs can obtain injunctions for violations of the statute, as well as costs and attorneys' fees.[296]

Stalking is defined variously by state statutes, but typically involves a pattern of conduct of repeated harassment, following, or phone calls that would cause a reasonable person "to fear for his or her safety or the safety of others or suffer substantial emotional distress."[297] These are the same sorts of conduct that would be redressable under the tort theories above, such as intrusive invasions, trespass, or intentional infliction of emotional distress.

It is important to know that there may well be state criminal claims for stalking as well.[298] And protective or injunctive orders may be available. For example, soon after the enactment of anti-stalking laws in Florida, Minnesota, South Carolina, and Texas, judges applied the statutes to prevent antiabortion protestors from protesting outside doctors' residences, repeatedly following and harassing abortion providers, and marching to doctors' homes.[299]

6. Federal Civil Rights Violation

Federal civil rights law may provide a basis for imposing liability against plaintiffs who sue to enforce private bounty regimes. The civil rights remedy is

---

petitioner . . . [and] [i]t is objectively reasonable for a person in the petitioner's situation to have been alarmed or coerced by the contact").

291. 9 R.I. GEN. LAWS ANN. § 9-1-2.1 (West 2006).

292. TEX. CIV. PRAC. & REM. CODE ANN. § 85.004 (West 2017).

293. VA. CODE ANN. § 8.01-42.3 (West 2017) (allowing compensatory and punitive damages).

294. Veile v. Martinson, 258 F.3d 1180, 1189 (10th Cir. 2001) (applying Wyoming law); Stockdale v. Baba, 795 N.E.2d 727, 747 (Ohio Ct. App. 2003).

295. *See, e.g.*, Troncalli v. Jones, 514 S.E.2d 478, 481 (Ga. Ct. App. 1999) (allowing a claim for intrusion on seclusion).

296. *See, e.g.*, GA. CODE ANN. § 16-5-94 (West 2016); KAN. STAT. ANN. § 60-31a06 (West 2008); *see also* Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 856–62 (2013).

297. *Stalking,* OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., https://www.justice.gov/ovw/stalking [https://perma.cc/S6M2-9KZT].

298. By 1995, all fifty states and the District of Columbia had enacted criminal stalking statutes. Joseph C. Merschman, Note, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L.J. 255, 266 (2001).

299. *See generally* Karbarz, *supra* note 168.

available if a defendant deprives the plaintiff of federal constitutional or statutory rights by acting in some manner under color of state law.[300]

Professor Anthony Colangelo maintains that since plaintiffs who bring S.B. 8 claims are "deputized" by the state to sue, they are subject to Section 1983 actions because they are acting under the color of law.[301] The point of the bounty hunter laws is to immunize the state by taking it "out of the picture" and offering instead incentives for private citizens to pursue those who perform or aid abortions, thus commissioning private actors as an arm of the state.[302]

The key to determining whether private citizens are performing a public function and can be considered state actors for purposes of a civil rights suit is whether their actions are "fairly attributable to the State."[303] Thus, a private entity can exercise state action and create a constitutional violation under a number of circumstances.[304] Several theories are applicable to the state-deputized bounty hunter situation: there is "entwinement" of the private actor with a public entity;[305] the private actor is performing functions that are "traditionally" and "exclusively" conducted by the government;[306] and there is "a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself."[307] S.B. 8 does not require the bounty hunter plaintiffs to be injured at all and operates like a penal law—which is the exclusive province of the state; the statute simply outsources the state's enforcement.[308] In addition, there is such a heavy dose of encouragement by the state, which authorizes citizens to be paid for their actions of collecting information about pregnant people and their health care providers and then slants the recovery mechanisms in their favor, that the bounty hunters are essentially state actors.[309]

---

300. 42 U.S.C. § 1983. If an actor is acting under authority of federal law, the common law analog to Section 1983 is provided by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

301. *See* Colangelo, *supra* note 116.

302. *Id.* at 136.

303. Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

304. "Although not always referred to by any particular name, the Court's opinions on state action may be synthesized to reflect the following approaches: (1) the state-employment test, (2) the state-instrumentality test, (3) the public-function test, (4) the *Burton* interdependence or symbiosis test, (5) the sufficiently close nexus test, (6) the compulsion or coercion test, (7) the joint-participation test, and (8) the *Brentwood* entwinement test." Lauren N. Smith, Note, *The Constitution and the Campaign Trail: When Political Action Becomes State Action*, 70 DUKE L.J. 1473, 1485 (2021) (footnotes omitted).

305. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001).

306. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1929 (2019).

307. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

308. Colangelo, *supra* note 116, at 138 ("[T]he state is using private individuals as surrogates for public prosecutors enforcing a state penal law.").

309. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that state action exists where the state has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State").

Section 1983 provides the right to sue for violations of rights "secured by the Constitution and laws" of the United States.[310] There are a number of possible constitutional violations (all apart from whatever constitutional rights exist to protect the privacy of the abortion decision) that could form the basis for a Section 1983 claim. One constitutional frailty may be a due process violation for "legislative schemes that confer on private individuals the power to veto the provision of lawful services."[311] Another due process claim might be based on the statutory schemes themselves, which are so heavily tilted in favor of bounty hunters at the expense of pregnant people and those who assist them that the legal process is simply fundamentally unfair. For example, the Texas statute specifically says there can be no nonmutual issue or claim preclusion in favor of a defendant.[312] So each bounty hunter could sue a physician, and even if the physician wins the first suit, each additional suit will have to be defended anew. This violates ideas of fundamental fairness.[313] Another set of potential constitutional violations relates to the torts previously discussed. At times, plain, garden-variety torts can be elevated to constitutional violations if the underlying conduct that creates the tort rises to cross the constitutional threshold. Not all batteries are Section 1983 violations, for example, but the most serious Fourteenth Amendment deprivations, ones that shock the conscience, can form the basis for a civil rights suit.[314]

An important feature of using the federal civil rights statute is that courts can authorize reasonable attorneys' fees under Section 1988 to parties who prevail in suits under Section 1983.[315]

---

310. 42 U.S.C. § 1983.

311. *See* Laurence H. Tribe & David Rosenberg, *How a Massachusetts Case Could End the Texas Abortion Law*, BOS. GLOBE (Sept. 8, 2021, 5:32 AM), https://www.bostonglobe.com/2021/09/07/opinion/how-massachusetts-case-could-end-texas-abortion-law/ [https://perma.cc/345E-BV28] (citing Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 (1982), for the proposition that "delegat[ing] to private, nongovernmental entities power to veto . . . a power ordinarily vested in agencies of government" constitutes a due process violation and arguing that the U.S. Attorney General should treat bounty hunting under S.B. 8 as a criminal deprivation of civil rights under two sections of the Ku Klux Klan Act of 1871 that were designed to protect the civil rights of formerly enslaved Americans who were targeted by vigilantes).

312. TEX. HEALTH & SAFETY CODE ANN. § 171.207(e)(5) (West 2017).

313. While this is not a criminal action, the compulsion of the Texas statute requiring defendants to repeatedly defend has the flavor of a double jeopardy violation. *See* Ashe v. Swenson, 397 U.S. 436, 442–46 (1970). At times, the disproportionality of punishment—such as in the form of punitive damages—can amount to a constitutional violation. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582–83 (1996).

314. *See, e.g.*, Alexander v. DeAngelo, 329 F.3d 912, 916 (7th Cir. 2003) (deciding that when police used false information to coerce a woman into prostitution, this was essentially a rape committed under color of state law that amounted to a liberty deprivation under the Fourteenth Amendment).

315. 42 U.S.C. § 1988.

B. Common Law and Statutory Torts for Clinics

Clinics that provide reproductive health care have interests and claims that are distinct from the privacy-based claims of their patients. They may, of course, have causes of action discussed above—such as for defamation[316] and civil conspiracy—but what follows are theories particularly for reproductive care facilities.

1. Intentional Interference with Contract or Prospective Business Relationship

In addition to traditional trespass and property damage claims, which are often the basis for tort suits by clinics,[317] clinics may have claims that protest activities disrupted their business. Intentional interference with a contract may be a slightly easier claim to make if there is a specific patient who has had a visit intentionally interrupted,[318] while intentional interference with prospective economic relations or business relationship or economic advantage may reach a larger class of third-party patients whose visits are impeded or foreclosed.[319] These torts are recognized in most states.[320]

Intentional interference with a prospective business relationship or economic advantage requires:

> (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.[321]

A number of courts have held that pressures on potential clients to not use a medical center or clinic constitute interference with prospective business relationships, as long as there is "a prospective relationship with an identifiable

316. *See, e.g.*, Minyvonne Burke & Marin Scott, *Doctor Who Provided Abortion for 10-Year-Old Rape Victim Moves to Sue Indiana Attorney General for Defamation*, NBC NEWS (July 19, 2022, 4:11 PM), https://www.nbcnews.com/news/us-news/doctor-provided-abortion-10-year-old-rape-victim-moves-sue-indiana-att-rcna38968 [https://perma.cc/XBJ8-U7RF].

317. *See, e.g.*, Planned Parenthood League of Mass., Inc. v. Operation Rescue, 550 N.E.2d 1361, 1363 (Mass. 1990) (affirming an injunction for trespass); NOW v. Operation Rescue, 747 F. Supp. 760, 771–72 (D.D.C. 1990) (imposing an injunction on abortion protestors for trespass and nuisance claims, with a penalty of $50,000 for a contempt charge if violated).

318. Sw. Med. Clinics of Nev., Inc. v. Operation Rescue, 744 F. Supp. 230, 233 (D. Nev. 1989) (finding that abortion clinic protestors could be liable for business interference).

319. Kristen A. Knapp, *Internet Filtering: The Ineffectiveness of WTO Remedies and the Availability of Alternative Tort Remedies*, 28 J. MARSHALL J. COMPUT. & INFO. L. 273, 304 (2010).

320. *Id.* ("Most states recognize the common law tort of intentional interference with an existing contract as well as a tort for interference with prospective business relationships.").

321. CRST Van Expedited, Inc. v. Werner Enters., Inc., 479 F.3d 1099, 1108 (9th Cir. 2007) (quoting Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 950 (Cal. 2003)).

class of third persons."[322] *Roe v. Operation Rescue* held that protestors who blockaded abortion clinics with a purpose to shut them down (citing Operation Rescue literature) intentionally interfered with the prospective contractual relations of the clinic and its patients.[323]

Tracing causation of damages to individual protestors might pose some proof problems because the protestors might be difficult to identify. Most abortion facilities will have surveillance systems on their property, and those can provide evidence of tortious or criminal conduct. However, bounty hunters—so far in Idaho, Oklahoma, and Texas—will be self-identifying (at least with respect to a patient) if they file a lawsuit to collect any bounty.[324]

There certainly can be direct liability for antiabortion organizations that instruct or incite their members on how to protest or riot.[325] After all of these years of antiabortion protests and experience in the field, though, the parent organizations may have learned ways to have ground soldiers accomplish their objectives without doing anything so directive as to advocate violence.[326]

2. *Civil RICO*

While this would be at the innovative frontiers, it is possible for a business that promotes reproductive health to file a civil Racketeer Influenced Corrupt Organizations Act (RICO) claim against organizations that target it with terroristic acts.[327] The elements of a RICO claim require that a person employed by or associated with an enterprise that is engaged in or has activities that affect interstate commerce conduct or participate "directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[328] Racketeering activity is defined to include a number of categories of offenses. The most pertinent two are, first, specific crimes chargeable under the criminal laws in any state, including "any act or threat involving murder,

322. Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 701 (Tenn. 2002); *see also* Lipson v. Anesthesia Servs., P.A., 790 A.2d 1261, 1286 n.75 (Del. Super. Ct. 2001) ("[B]usiness relations with prospective patients can form the basis of an intentional interference claim to the extent the physician plaintiff is able to identify specific patients and/or classes of patients.").

323. Roe v. Operation Rescue, 710 F. Supp. 577, 585–86 (E.D. Pa. 1989), *aff'd*, 919 F.2d 857 (3d Cir. 1990).

324. Bowman, *supra* note 96.

325. *Operation Rescue*, 710 F. Supp. at 585–86.

326. It may be difficult to create respondeat superior liability on parent organizations. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

327. 18 U.S.C. §§ 1961–68.

328. *Id.* § 1962(c).

kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance"; and second, any act that is indictable under a wide variety of enumerated federal statutes, such as extortion or mail or wire fraud.[329] Courts have interpreted the term "involving" to "include attempts, conspiracies and solicitations as well as completed offenses."[330]

The "pattern" of racketeering element (the horizontal nexus connecting the activities) requires each RICO defendant to have committed at least two predicate acts of racketeering activity within a ten-year period.[331] The "pattern" of activity must also be connected to an enterprise (the vertical nexus), the activities of which affect interstate or foreign commerce.[332] Plaintiffs must prove that the defendant's conduct caused an injury to their business or property.[333] The remedies under RICO are generous and include costs, attorneys' fees, and treble damages.[334]

RICO may be an underutilized statute. The U.S. Supreme Court held in *Sedima, S.P.R.L. v. Imrex Company, Inc.* that RICO is not limited to being used against "mobsters and organized criminals[;] it has become a tool for everyday fraud cases brought against 'respected and legitimate "enterprises."'"[335] In recent years, plaintiffs have filed RICO claims against pharmaceutical companies and prescription benefits managers,[336] insurance companies,[337] and unions,[338] among other entities. However, RICO is limited to business or property damages, and the circuits that have addressed it have held that the

329. *Id.* § 1961(1)(A).

330. Melvin L. Otey, *Why RICO's Extraterritorial Reach Is Properly Coextensive with the Reach of Its Predicates*, 14 J. INT'L BUS. & L. 33, 41 (2015).

331. 18 U.S.C. § 1961(5). The predicate acts must show continuity and "a threat of[] continuing racketeering activity." H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 240 (1989) (emphasis omitted).

332. 18 U.S.C. § 1962(a)–(c); *see also* United States v. Mark, 460 F. App'x 103, 108 (3d Cir. 2012) ("Although sporadic and separate criminal activities cannot alone give rise to a pattern for RICO purposes, in organized crime cases, relatedness and continuity may be established 'by connecting diverse predicate acts to an enterprise "whose business is racketeering activity."' Because 'a criminal enterprise is more, not less, dangerous if it is versatile,' RICO tolerates the possibility that the predicate acts themselves may be diverse.") (citations omitted).

333. 18 U.S.C. § 1964(c).

334. *Id.*

335. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (citation omitted); *see also* Zvi Joseph, *The Application of RICO to International Terrorism*, 58 FORDHAM L. REV. 1071, 1078 (1990) ("RICO has been used in cases involving an unfair discharge, employment discrimination, sexual discrimination and harassment, employment contracts, anti-abortion protests, matrimonial disputes, and the administration of personal estates. Accordingly, the activities of terrorist organizations, traditionally not considered 'organized crime,' nonetheless appear to fit within the orbit of the behavior RICO was designed to combat.") (footnotes omitted).

336. *See generally, e.g.*, *In re* Celexa & Lexapro Mktg. & Sales Pracs. Litig., 915 F.3d 1 (1st Cir. 2019); *In re* Insulin Pricing Litig., No. 3:17-CV-0699, 2019 U.S. Dist. LEXIS 25185 (D.N.J. Feb. 15, 2019).

337. Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783, 788–89 (6th Cir. 2012).

338. United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993).

statute does not allow recoveries for personal, emotional, or reputational injuries.[339]

In this case, abortion protests are not isolated, but related, and have similar purposes, victims, and outcomes.[340] In many instances, there are coordinated criminal activities.[341] The key though is what activities constitute predicate acts that constitute a pattern of racketeering activity. The U.S. Supreme Court handled a case that reached it three times over ten years (the case itself lasted twenty years) specific to abortion clinics, protestors, and RICO.[342] The theory of the plaintiffs was that obstructing access to clinics and threatening violence against patients and doctors caused the patients to give up their reproductive rights and medical providers to give up their right to provide those services.[343] In *National Organization for Women, Inc. v. Scheidler* (*Scheidler I*), the Court held that the pattern of racketeering activity by the RICO enterprise does not have to have an economic motive.[344]

On return to the U.S. Supreme Court in 2003, in *Scheidler v. National Organization for Women*, *Inc. (Scheidler II)*, the Court held that the antiabortion protestors did not "obtain" property and therefore did not commit the predicate act of extortion, as required by RICO.[345] They were not trying to obtain the property right (to perform abortions); they were just disrupting the performance of abortions.[346] Justice Rehnquist's opinion explained that the protestors did not commit extortion under the Hobbs Act:

> Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received

339. Abrahams v. Young & Rubicam, Inc., 79 F.3d 234, 238 (2d Cir. 1996) (holding that plaintiffs cannot recoup emotional, personal, or speculative future injuries under § 1964(c)); Hamm v. Rhone-Poulenc Rorer Pharms., Inc., 187 F.3d 941, 954 (8th Cir. 1999) ("Damage to reputation is generally considered personal injury and thus is not an injury to 'business or property' within the meaning of 18 U.S.C. § 1964(c)."); Safe Streets All. v. Hickenlooper, 859 F.3d 865, 888–89 (10th Cir. 2017).

340. Nat'l Org. for Women, Inc. v. Scheidler (*Scheidler I*), 510 U.S. 249, 252–53 (1994).

341. *Id.*

342. *See generally id.*

343. *Id.* at 253.

344. *Id.* at 257–58.

345. Scheidler v. Nat'l Org. for Women, Inc. (*Scheidler II*), 537 U.S. 393, 404–05 (2003). Several pre-*Scheidler II* abortion clinic cases had held that abortion protestors who forced cancellations and closures and damaged the clinic's property had deprived the clinics of the right to do business. *See* United States v. Arena, 180 F.3d 380, 393 (2d Cir. 1999) (noting the jury finding that the defendants pursued "an overall strategy to cause abortion providers, particularly Planned Parenthood and Yoffa, to give up their property rights to engage in the business of providing abortion services for fear of future attacks."); Ne. Women's Ctr., Inc. v. McMonagle, 689 F. Supp. 465, 474 (E.D. Pa. 1988) ("For Hobbs Act purposes, the term 'property' includes intangible property interests such as the right to make business decisions free from wrongfully imposed outside pressures.").

346. *Scheidler II*, 537 U.S. at 404–05.

"something of value from" respondents that they could exercise, transfer, or sell.[347]

The Court in the third *Scheidler* opinion in 2006 did not accept the theory that the original jury verdict on RICO relied on physical violence, and held that "physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act."[348]

In *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, Planned Parenthood sued the Center for Medical Progress ("CMP") and David Daleiden for numerous counts of fraud, trespass, invasion of privacy, and civil RICO violations.[349] The company and Daleiden created a fake company and false identification to surreptitiously record portions of reproductive health care conferences and individual meetings with abortion providers.[350] The purpose of the project was to create videos to show that Planned Parenthood illegally sold fetal tissue—a thoroughly debunked claim.[351] A jury found for Planned Parenthood on all of the claims and awarded $2 million in compensatory and punitive damages.[352]

The district court rejected the plaintiff's arguments regarding several possible predicate acts.[353] The court ruled that property or money has to either be "intended to be acquired or actually acquired through the fraud to state a claim for wire or mail fraud."[354] The court also rejected, citing *Scheidler II*, a claim of business disruption as a property right.[355] Third, the court held that the defendants' attempts to acquire the plaintiff's confidential information was not property protected under the mail and wire fraud statutes because the confidential information did not qualify as a trade secret under the Uniform

347. *Id.* at 405. The Court essentially held that deprivation of control of property did not amount to acquisition. The Court explained that the "familiar meaning of the word 'obtain'—to gain possession of—should be preferred to the vague and obscure 'to attain regulation of the fate of.'" *Id.* at 403 n.8. The Hobbs Act prohibits actual or attempted extortion; it bars any conduct that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. § 1951(a). The extortion definition under the Hobbs Act is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2). The *Scheidler II* court explained that the protestors actions were more akin to the crime of coercion, which "involves the use of force or threat of force to restrict another's freedom of action." *Scheidler II*, 537 U.S. at 405.

348. Scheidler v. Nat'l Org. for Women, Inc. (*Scheidler III*), 547 U.S. 9, 16 (2006).

349. Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 214 F. Supp. 3d 808, 816–17 (N.D. Cal. 2016), *aff'd*, 890 F.3d 828 (9th Cir.), *amended*, 897 F.3d 1224 (9th Cir. 2018).

350. *Id.* at 832.

351. *See* PLANNED PARENTHOOD, THE FACTS ABOUT PLANNED PARENTHOOD AND TISSUE DONATION (2021), https://www.plannedparenthood.org/uploads/filer_public/fd/de/fddee2ba-5ae1-4a89-9c4f-7e72c8a4db02/210218-fact-sheet-cmp-fetal-tissue-backgrounder-prod.pdf [https://perma.cc/J6HA-SPL7].

352. *Id.*

353. *Planned Parenthood Fed'n of Am., Inc.*, 214 F. Supp. 3d at 821–25.

354. *Id.* at 822.

355. *Id.* at 822–23.

Trade Secrets Act.[356] However, the court found that the plaintiffs alleged sufficient facts to let a jury decide whether the defendants violated federal identity theft statutes and that these could be appropriate predicate acts.[357] The court also allowed federal Wiretap Act violations—the unconsented recordings and the dissemination of parts of the intercepted conversations—to be considered as RICO predicate acts.[358]

While acts of individual bounty hunters or protestors likely will not satisfy the complex criminal enterprise requirements to establish a RICO claim, if an enterprise establishes a central database or coordinates with a separate existing organization[359] and there are multiple coordinated predicate acts (violations of federal laws such as the use of fake identities and violations of state laws such as arson or threats of murder[360]), a RICO claim is possible. For example, in *Tompkins v. Cyr*, although it was a decision prior to *Scheidler II*, the Fifth Circuit examined the RICO claims of doctors who performed abortions against antiabortion protestors who threatened violence against them and their families.[361] The court refused to sanction the plaintiffs for filing a frivolous RICO cause of action.[362] In states where abortion is legal, efforts to force women to give up their rights through extortionate conduct might still count as wrongful predicate acts.[363] Similarly, use of phones and the internet—if they are used in plans to shut down a clinic or even efforts to trick pregnant persons into forfeiting their rights—might constitute mail or wire fraud, with business damages to a clinic.[364] Plaintiffs have used RICO successfully in the health care

356. *Id.* at 823.

357. *Id.* at 823–25.

358. *Id.* at 827–28.

359. *See* Palmetto State Med. Ctr., Inc. v. Operation Lifeline, 117 F.3d 142, 149 (4th Cir. 1997) (upholding a dismissal of RICO claims against abortion protestors because of a lack of proof that they conducted protest activities on the dates in question; also dismissing RICO claims against Operation Rescue because the "enterprise" under RICO must be distinct from the people violating RICO).

360. United States v. Ruggiero, 726 F.2d 913, 918 (2d Cir. 1984) (finding that conspiracies to murder were predicate acts), *cert. denied*, 469 U.S. 831 (1984).

361. Tompkins v. Cyr, 202 F.3d 770, 787–88 (5th Cir. 2000).

362. *Id.*

363. *See, e.g.*, State v. Cunningham, 899 N.E.2d 171 (Ohio Ct. App. 2008) (finding that a defendant who threatened violence against a rape victim to force her to recant her allegations against him committed extortion by trying to obtain a valuable intangible benefit). Another example of intangible rights protected by the Hobbs Act is the right of union participation. In *United States v. Local 560 of International Brotherhood of Teamsters*, 780 F.2d 267, 278 (3d Cir. 1985), when union members were "induced by fear . . . to surrender their membership rights," the Hobbs Act extended to protect these intangible property interests.

364. *See* Gotlin v. Lederman, 367 F. Supp. 2d 349, 357 (E.D.N.Y. 2005), *aff'd sub nom.* Gotlin *ex rel.* Cnty. of Richmond v. Lederman, 483 F. App'x 583 (2d Cir. 2012) (entertaining allegations of mail and wire fraud when patients were misled by advertisements, but finding that the damages to the patients were personal in nature and not recoverable under RICO).

context against opioid manufacturers and pharmaceutical companies that promote off-label uses.[365]

If there are bounty hunter or protestor activities that infiltrate and obtain information, those also may be sufficiently serious to qualify as RICO predicate acts. For instance, in *Huntingdon Life Sciences, Inc. v. Rokke*, an undercover People for the Ethical Treatment of Animals operative made false representations to obtain employment at a New Jersey laboratory to expose its animal testing practices.[366] She conveyed information to PETA, and the organization issued press releases about the company in a harmful public relations campaign.[367] The court held that infiltration, stealing, and transporting interstate those stolen documents and threatening economic harm amounted to a pattern of racketeering activity.[368]

It should be noted that the circuits are currently split on whether private civil RICO plaintiffs can obtain injunctive relief without proving damages.[369]

The hesitations we have with the use of RICO in this context are several. First, the *Scheidler* litigation spanned decades—and plaintiffs need much more immediate relief. Second, the theories regarding RICO are innovative (as they were in the original *Scheidler* case) and apply to unique sets of facts (as in *Planned Parenthood Federation of America*). Third, the costs of losing such a suit could be significant: the last reported decision about the *Scheidler* case is an appellate decision affirming the award of costs to the defendants.[370]

C. Necessity Is Not a Defense

Protestors and bounty hunters might try to raise a necessity defense to the above torts, arguing that their actions are justified because they are trying to protect the lives of the unborn. The defense of necessity says that the defendant's actions were justified to prevent a greater harm than the harm the defendant caused.[371] The necessity defense on the civil side parallels the criminal defense: "the accused was without blame in occasioning or developing the situation and reasonably believed [her] conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from [her]

365. *See generally* Richard C. Ausness, *The Current State of Opioid Litigation*, 70 S.C. L. REV. 565, 584–88 (2019); *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804, 2019 WL 4279233 (N.D. Ohio Sept. 10, 2019).

366. Huntingdon Life Scis., Inc. v. Rokke, 986 F. Supp. 982, 384–85 (E.D. Va. 1997).

367. *Id.*

368. *Id.* at 992.

369. *See* Chevron Corp. v. Donziger, 833 F.3d 74, 137–40 (2d Cir. 2016), *cert. denied,* 582 U.S. 915 (2017); *see also* Anna Hanke, Note, *Equitable Relief for Private RICO Plaintiffs: Using* Donziger *to Remedy Courthouse Corruption*, 26 J.L. & POL'Y 311, 323–39 (2018) (describing the circuit split and citing cases).

370. Nat'l Org. for Women, Inc. v. Scheidler, 750 F.3d 696, 700 (7th Cir. 2014).

371. *See Necessity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

own conduct."[372] Necessity requires an emergency situation, a threat of imminent harm, and the exercise of the privilege "at a reasonable time and in a reasonable manner . . . in light of all of the circumstances."[373]

The defense in these circumstances should fail for a number of reasons. First, if an abortion is lawful within a jurisdiction, it is not a legally cognizable harm that would allow a necessity defense to be raised when the conduct of the protestor or bounty hunter violates the state's civil laws.[374] The illegality of abortion in a different jurisdiction does not justify the private citizen's efforts to use extraterritorial laws.[375] Second, if the defense were recognized on the basis on which it is being asserted—the protection of fetal life—it could be used to justify shooting abortion providers.[376]

Third, the situation presents no immediate danger to the people engaged in the act, so the defense would have to be public necessity. Even then, there is no threat of imminent harm. In the case of bounty hunters, their actions are almost always going to be ex post facto attempts to prove that an abortion has occurred, so their actions, by definition, would not avert any purported harm. In the case of protestors, legal alternatives exist to persuade women not to have abortions and illegal, threatening, or privacy-invasive conduct is not the only alternative.[377] So taking the law into their own hands would generally be unreasonable.

While protestors across the political spectrum have tried to raise necessity as a defense to countenance direct-action civil disobedience, such as war or nuclear power or climate change protests,[378] in this instance, where there is a private plaintiff whose civil rights have been invaded, necessity should not apply. Necessity is intended for emergency situations, not for known, planned

372. People v. Smith, 514 N.E.2d 211, 212 (Ill. App. Ct. 1987).

373. Lange v. Fisher Real Est. Dev. Corp., 832 N.E.2d 274, 279 (Ill. App. Ct. 2005) (quoting Benamon v. Soo Line R.R. Co., 689 N.E.2d 366, 370 (Ill. App. Ct. 1997)).

374. *See* McMillan v. City of Jackson, 701 So. 2d 1105, 1107 (Miss. 1997) (disallowing a necessity defense to a trespass at an abortion clinic to prevent abortions because abortion "is not a legally recognized harm") (quoting City of Wichita v. Tilson, 855 P.2d 911, 916 (Kan. 1993)); State v. O'Brien, 784 S.W.2d 187, 192 (Mo. Ct. App. 1989) (observing that "every court which has considered the defense of necessity has for various reasons, rejected it when asserted in trespass-abortion proceedings.").

375. *See also Smith*, 514 N.E.2d at 213 ("The clinic's patients enjoy a constitutionally protected right to receive legal abortions . . . a right unacceptable, but not unknown to defendant; and the only illegality or legally cognizable 'injury' alleged in this case is that of defendant's trespass.").

376. *See, e.g.*, Hill v. State, 688 So. 2d 901, 907 (Fla. 1996) (rejecting the use of a necessity defense to justify murdering an abortion provider).

377. Zal v. Steppe, 968 F.2d 924, 929 (9th Cir. 1992) (rejecting the necessity defense raised by abortion protestors because legal methods existed to accomplish the protestors' goal of persuading women not to abort).

378. "The majority of cases on this point have held that the harms which the protestors sought to avoid were too speculative or uncertain to support the defense." John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 128 (2007).

conduct that invades private rights.[379] Numerous decisions have prohibited the political necessity defense to justify conduct that otherwise invades private rights.[380] The plaintiffs have fundamental rights, enforceable in tort law, to not have their privacy invaded by defendants' overreaching conduct.

The use of this defense in response to private suits alleging privacy, property, and emotional tort invasions is simply an attempt to enrobe the protestors' conduct in the lofty goal of protection of fetal life—which is precisely what the *Dobbs* Court held must be left to the individual states.[381] The Kansas Supreme Court summarized the difficulty of allowing private moral interpretations to supersede established rights:

> To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy.[382]

The next Subpart examines federal and state privacy protections that can shield patient privacy and prohibit the use of patient data and medical records in civil remedy suits.

D. Federal and State Statutory Protections of Personal and Medical Privacy

In addition to the traditional common law tort remedies described above, there may be federal and state statutory remedies available to plaintiffs whose privacy has been violated by bounty hunters. As this Subpart describes, legislatures in abortion-protective states are developing shield laws for patients and providers seeking reproductive health care in their states. The Biden Administration has also attempted to clarify and expand health care privacy for abortion patients through executive orders and administrative guidelines that address privacy protections in existing federal law.

1. Federal Shields for Patient Personal and Medical Privacy

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)[383] does not provide a private cause of action for patients to sue for HIPAA violations that disclose their personally identifiable information or their

379. *See* United States v. Dorrell, 758 F.2d 427, 430 n.2 (9th Cir. 1985) (holding that the necessity defense should be limited to situations in which "the actor's choices were dictated by physical forces beyond the actor's control").

380. *See, e.g.*, *Smith*, 514 N.E.2d at 213.

381. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

382. City of Wichita v. Tilson, 855 P.2d 911, 918 (Kan. 1993).

383. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in sections of 18 and 42 U.S.C.).

protected health information.[384] However, HIPAA regulations do not preempt common law tort claims, and individuals can use the regulation to establish a standard of care in suits brought in common law.[385] Plaintiffs have relied on HIPAA's Privacy Rule[386] to establish a standard of care in both negligence[387] and invasion of privacy claims in large data breach cases.[388] Invasion of privacy claims require plaintiffs to establish a legally protected privacy interest, and HIPAA may be useful for establishing this first element, especially in states where there is no common law duty to safeguard personal information from third-party disclosure.[389] In invasion of privacy suits, plaintiffs have established the defendant's duty of care by calling upon HIPAA's Privacy Rule that requires covered entities to ensure the confidentiality and integrity of all protected patient health information, to protect against any reasonably anticipated disclosures of such information, and to ensure compliance with the law by its workforce.[390]

In the wake of the *Dobbs* decision, Health and Human Services' Office for Civil Rights has recently clarified HIPAA's guidelines specifically with respect to patient information relating to reproductive health, and these clarified guidelines will be useful for plaintiffs in establishing a defendant's duty of care in common law cases.[391] The guidelines were designed to clarify when the

384. Meadows v. United Servs., 963 F.3d 240, 244 (2d Cir. 2020) (holding that there is no private right of action under HIPAA that is either express or implied); *accord* Faber v. Ciox Health, LLC, 944 F.3d 593, 596–97 (6th Cir. 2019); Stewart v. Parkview Hosp., 940 F.3d 1013, 1015 (7th Cir. 2019); Dodd v. Jones, 623 F.3d 563, 569 (8th Cir. 2010); Wilkerson v. Shinseki, 606 F.3d 1256, 1267 n.4 (10th Cir. 2010); United States v. Streich, 560 F.3d 926, 935 (9th Cir. 2009); Acara v. Banks, 470 F.3d 569, 570–71 (5th Cir. 2006). HIPAA provides that violations are enforced by the Secretary of the Department of Health and Human Services. 42 U.S.C. § 1320d-5(a)(1).

385. *See* Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C., 102 A.3d 32, 46, 49 (Conn. 2014) (holding that HIPAA can serve as a standard of care in a common law claim for breach of duty to maintain confidentiality of medical records).

386. *See* 45 C.F.R. §§ 160.101–160.552 (2023); *see also* 45 C.F.R. § 164.306(a), (d) (2023).

387. *See, e.g.*, *Byrne*, 102 A.3d at 49 (holding that "HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena"); *see also In re* Anthem, Inc. Data Breach Litig., 162 F. Supp. 3d. 953, 974–75 (N.D. Cal. 2016) (drawing upon HIPAA to establish a duty owed to plaintiff by defendant) (citing Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 635 (7th Cir. 2007)); Second Amended Consolidated Master Complaint, Fero v. Excellus Health Plan Inc., Case No. 6:15-cv-06569 (W.D.N.Y. Mar. 25, 2019), 2019 WL 1585067.

388. *See, e.g.*, *In re* Cmty. Health Sys., Inc., 2016 WL 4732630, *25–28 (N.D. Ala. 2016) (establishing duty of care in negligence following a data breach); McDonald v. Kiloo ApS, 385 F. Supp. 3d 1022, 1037 (N.D. Cal. 2019) (citing Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994)).

389. *See, e.g.*, Fox v. Iowa Health Sys., 399 F. Supp. 3d 780, 797 (W.D. Wis. 2019) (discussing whether "a defendant can be held liable for recklessly allowing a third party to invade one's privacy").

390. 45 C.F.R. § 164.306(a)(1), (3)–(4) (2023).

391. *HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care,* U.S. DEP'T OF HEALTH & HUM. SERVS. (June 29, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html [https://perma.cc/RNM5-AKE6] [hereinafter "HIPAA Reproductive Health Privacy Guidelines"].

Privacy Rule permits disclosing a patient's private health information without an individual's signed authorization when disclosure is not for purposes related to health care, with disclosure to law enforcement and third parties providing the prime example.[392] Reproductive health advocates have reported that many medical professionals misunderstand their reporting obligations and, as a result, medical providers across the country have reported incidents of suspected self-managed abortion when the incidents do not fall under any state mandatory reporting law.[393] The revised guidelines explain that HIPAA's Privacy Rule supports access to abortion care by giving patients "confidence" that their protected health information, "including information relating to abortion and other sexual and reproductive health care, will be kept private."[394] In such circumstances, permission to disclose under HIPAA's Privacy Rule will be narrowly tailored to protect privacy and support patient access to reproductive health services.[395] Specifically, the Privacy Rule permits, but does not *require*, the entity to disclose patient health information when such disclosure is required by another law.[396] Thus, the Privacy Rule permits, but does not require, an entity to disclose patient health information where there is a legal mandate in the law itself or in response to a legal process such as a court order, court-ordered warrant, subpoena, or summons.[397] In the *absence* of a legal mandate that is enforceable in a court of law, entities are not permitted to disclose patient health care information.[398] The guidelines give the example of a health care provider who suspects a patient of self-managed abortion and either discloses the information to law enforcement or who discloses the patient's health care information in response to a request by law enforcement.[399] The guidelines conclude that such a disclosure by a health care provider would violate HIPAA's Privacy Rule unless the request was accompanied by a court order or other mandate to disclose enforceable in a court of law.[400] The Privacy Rule does not permit disclosure in this example because there is no state law that requires doctors or other health care providers to report an individual suspected

392. *Id.*

393. Ji Seon Song, *Cops in Scrubs,* 48 FLA. ST. U. L. REV. 861, 895 (2021).

394. HIPAA Reproductive Health Privacy Guidelines, *supra* note 391.

395. *Id.*; *see also* 45 C.F.R. § 164.502 (2023).

396. *See* 45 C.F.R. § 164.512(a)(1) (2023).

397. HIPAA Reproductive Health Privacy Guidelines, *supra* note 391; *see also* 45 C.F.R. § 164.103 (2022) (definition of "Required by law"). The definition further states that "[r]equired by law includes, but is not limited to, court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require the production of information; a civil or an authorized investigative demand; Medicare conditions of participation with respect to health care providers participating in the program; and statutes or regulations that require the production of information, including statutes or regulations that require such information if payment is sought under a government program providing public benefits."

398. HIPAA Reproductive Health Privacy Guidelines, *supra* note 391.

399. *Id.*

400. *Id.*

of self-managing an abortion to law enforcement.[401] The duty to protect patient privacy set forth in HIPAA's Privacy Rule would establish the defendant's duty to protect patient privacy in common law for invasion of privacy when a health care provider reports a patient's private medical information to law enforcement without a legal mandate to do so.

The Privacy Rule also permits, but does not require, disclosure of patient health information when acting in good faith to avert a perceived imminent threat to health or safety of a person or the public.[402] In a common law case, a defendant might try to assert this as a defense—the privilege of private or public necessity—by arguing that the disclosure of a patient's intent to seek an abortion or evidence that they had an abortion would be necessary to protect fetal life. However, this defense is likely to fail.[403] HIPAA's guidelines specifically provide that this is not a permissible rationale under which to disclose patient health information and thereby undermines a defendant's use of such a defense. First, the guidelines explain that a patient receiving care in a state that bans abortion and who informs their health care provider of an intent to get an abortion in a neighboring state would not fall under the Privacy Rule exception because intent to seek abortion care "does not qualify as a 'serious and imminent threat to the health or safety of a person or the public.'"[404] Second, the guidelines provide that disclosing such patient health information would be inconsistent with professional and ethical standards related to the doctor–patient relationship and would therefore constitute a breach of patient health information in violation of HIPAA.[405] Relying on the guidance of the major medical organizations, including the American Medical Association and the American College of Obstetricians and Gynecologists, the guidelines reiterate that "it would be inconsistent with professional standards of ethical conduct to make such a disclosure of [patient health information] to law enforcement or others regarding an individual's interest, intent, or prior experience" relating to reproductive health care.[406] Thus, while HIPAA does

401. *Id.*; *see also Abortion Access: Know Your Rights*, REPRO LEGAL HELPLINE, https://www.reprolegalhelpline.org/sma-know-your-rights/ [https://perma.cc/ZJ4U-MTY7]. What is more, courts have consistently held that fetal life does not fall under the state-mandated reporting requirements for child abuse. *See* Paltrow & Flavin, *supra* note 90, at 322 (observing that "appellate courts have overwhelmingly rejected efforts to use existing criminal and civil laws intended for other purposes (e.g., to protect [the child]) as the basis for arresting, detaining, or forcing interventions on pregnant women").

402. HIPAA Reproductive Health Privacy Guidelines, *supra* note 391.

403. *See supra* discussion in text at notes 371–82.

404. HIPAA Reproductive Health Privacy Guidelines, *supra* note 391.

405. *Id.*

406. *Id.*; The American Medical Association (AMA) notes that "free, open and honest communication between physicians and patients is a cornerstone of effective health care" and that the "medical profession's integrity is safeguarded when physicians are permitted to exercise their duty to counsel and care for patients based on 'objective professional judgment' and ultimately respect patients' autonomy to make decisions about

not provide a private cause of action, it can help inform the duty of care in a common law case involving breach of privacy and is also relevant to defenses that may be asserted by defendants.

In addition to HIPAA's Privacy Rules, states have passed laws in the wake of *Dobbs* that enhance the duty of providers to protect patients' reproductive health information from use in civil suits related to another state's abortion ban. Connecticut's law went into effect on July 1, 2022, and prohibits any covered entity from disclosing any communications or information related to a patient's reproductive health care in any civil action unless the patient consents in writing to such disclosure.[407] The law also prohibits any court from issuing a subpoena for reproductive health records pursuant to an out-of-state civil or criminal action involving the provision of reproductive health care or aiding and abetting the same if the lawsuits involve actions that are legal in the state of Connecticut.[408] A bill passed in California, the Reproductive Privacy Act, similarly enhances privacy protections for medical records relating to reproductive health by prohibiting covered entities from disclosing information related to reproductive health to out-of-state third parties seeking to enforce abortion bans in courts in other states.[409] Thus, while HIPAA can be used to establish the duty of care in common law cases, the state laws in the state in which the plaintiff sought an abortion could help to establish the duty of care to protect patient privacy related to disclosing reproductive health care information.

HIPAA may prove to be an even greater source of protection going forward as President Biden's Executive Order of July 8, 2022, directs the Secretary of Health and Human Services to consider additional actions under HIPAA to better protect patients' sensitive medical information related to reproductive health care.[410] Two changes to HIPAA could afford greater privacy protection for patient medical records. The first would be to provide a private cause of action in HIPAA that would allow patients to bring suit against covered entities for disclosing the patient's medical information related to the

---

their own bodies and health." Gerald E. Harmon, *Unconstitutional Attack on Reproductive Health Must Not Stand,* AMA (Oct. 13, 2021), https://www.ama-assn.org/about/leadership/unconstitutional-attack-reproductive-health-must-not-stand [https://perma.cc/NKK4-8LS5]; Brief of Amici Curiae American College of Obstetricians and Gynecologists et al. at 32, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4312120. Indeed, "[t]he threat of prosecution may result in negative health outcomes by deterring women from seeking needed care." *Decriminalization of Self-Induced Abortion*, ACOG (Dec. 2017), https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2017/decriminalization-of-self-induced-abortion [https://perma.cc/S7UE-HYDY]; *see also* AM. MED. ASS'N CODE MED. ETHICS § 1.1.3.

407. Act of May 5, 2022, § 2, 2022 Conn. Acts 68, 69–70 (Reg. Sess.) (codified at CONN. GEN. STAT. § 52-146w).

408. *Id.* §§ 3, 4, 2022 Conn. Acts at 70–71 (codified at CONN. GEN. STAT. §§ 52-55a, 54-82i(b)).

409. Act of Sept. 27, 2022, ch. 628, 2022 Cal. Stat. 7344 (codified as amended in scattered sections of CAL. CIV. CODE, CAL. CIV. PROC. CODE, CAL. HEALTH & SAFETY CODE, CAL. INS. CODE, and CAL. PENAL CODE).

410. Exec. Order No. 14076, 87 Fed. Reg. 42053 (July 8, 2022).

provision of reproductive health in suits in which the patient is not a party and that do not involve the provision of health care, without specific signed consent by the patient.[411] The second would be to specifically provide that in the absence of signed authorization, entities are prohibited from disclosing patient health information in connection with civil suits against providers or third parties who have aided or abetted the patient seeking an abortion. The amendment could be tailored to specifically prohibit doctors and health care providers from providing a patient's medical information in a suit not brought by the patient themselves and being pursued under a state civil enforcement law. The effect would be to nullify a court order or subpoena from a court and to prevent states from passing laws mandating disclosure in antiabortion civil enforcement suits because such state laws would be preempted by federal law.

2. Freedom of Access to Clinic Entrances Act

While the Freedom of Access to Clinic Entrances Act (FACE Act)[412] is most useful for its criminal penalties and injunctions, it does have a civil remedies provision for actual damages or a statutory remedy of $1,000 for any nonviolent violation and $5,000 for any other violation.[413] The statute was passed in 1994 in response to escalating obstruction and violence by antiabortion protestors at abortion clinics.[414] It provides a civil cause of action for anyone "aggrieved by reason of the conduct prohibited" and the court may award injunctive relief, compensatory and punitive damages, and attorneys' fees.[415] The FACE Act allows individuals to bring a civil cause of action against a defendant who by "force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with . . . any person because that

411. While HIPAA provides privacy rules for doctors and health care organizations in the handling of patient medical records, it does not extend to information collected by apps that track sensitive reproductive health data. *See generally* Celia Rosas, Note, *The Future Is Femtech: Privacy and Data Security Issues Surrounding Femtech Applications,* 15 HASTINGS BUS. L. J. 319 (2019). This form of surveillance is beyond the scope of this article but is an emerging and ongoing issue of concern for reproductive privacy. *See* Leah R. Fowler & Michael R. Ulrich, *Femtechnodystopia*, 75 STAN. L. REV. 1233 (2023); Cristiano Lima, *Period Apps Gather Intimate Data. A New Bill Aims to Curb Mass Collection,* WASH. POST (June 2, 2022, 9:00 AM), https://www.washingtonpost.com/politics/2022/06/02/period-tracking-apps-gather-intimate-data-new-bill-aims-curb-mass-collection/; Protecting Personal Health Data Act, S. 24, 117th Cong. (2021) (a federal bill that would require the Secretary of Health and Human Services to promulgate rules regulating mobile health technologies and health-related apps and trackers to allow users to review, change, and delete health data collected by the app companies).

412. 18 U.S.C. § 248.

413. *Id.* § 248(c).

414. *Protecting Patients and Health Care Providers*, U.S. DEPT. OF JUST., CIV. RTS. DIV. (May 22, 2023), https://www.justice.gov/crt/protecting-patients-and-health-care-providers [https://perma.cc/7ZM3-W6FR].

415. 18 U.S.C. § 248(c).

person is or has been . . . obtaining . . . reproductive health services."[416] The statute defines "intimidate" as placing a person "in reasonable apprehension of bodily harm to him- or herself or to another"[417] and defines "interfere with" as "to restrict a person's freedom of movement."[418] The courts have interpreted the FACE Act to require that the plaintiff show use of force or a threat that "communicate[s] a serious expression of an intent to commit an act of unlawful violence to a particular individual."[419] In *Pennington v. Meyers*, a case involving aggressive antiabortion protesting outside of a clinic in Kansas, the protestors recognized the patient and called her by name over bullhorns urging her to repent and livestreamed on Facebook the footage of her entering the clinic.[420] Despite publication of her identity, the court held that only statements that expressed a threat of violence—"[w]e will deliver the judgments of God upon you" and "[r]epent or else"—violated the Act.[421] The conduct that violates the FACE Act includes "physical attacks," "blockades of clinic entrances," and "threats of bodily harm communicated to providers or recipients of services."[422] Therefore, it is unlikely that a plaintiff will be able to use the FACE Act's civil suit provisions for surveillance and disclosure of private facts alone and would require physical obstruction or threat of force to be actionable.

E. State Civil Causes of Action

States hostile to abortion have already begun to introduce laws to restrict the ability of pregnant people to cross state lines to access abortion, providing criminal liability as well civil enforcement suits against those who aid and abet them, as well as providers in other states who provide abortion to the state's residents.[423] Missouri lawmakers, for example, considered a law that would provide citizen enforcement suits against out-of-state abortion providers who perform an abortion on a Missouri resident and anyone who aids and abets a

416. *Id.* § 248(a)(1), (c)(1)(A).

417. *Id.* § 248(e)(3).

418. *Id.* § 248(e)(2).

419. *See, e.g.*, Pennington v. Meyers, No. 21-2591-DDC-JPO, 2022 WL 656163, at *7 (D. Kan. Mar. 4, 2022); *Virginia v. Black,* 538 U.S. 343, 359 (2003) (defining threats as statements that "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"); *Allentown Women's Ctr., Inc. v. Sulpizio,* 403 F. Supp. 3d 461, 467 (E.D. Pa. 2019) (holding that the FACE Act doesn't prohibit actions that "may intimidate" but requires "a threat of force"); *United States v. Dillard,* 795 F.3d 1191, 1199 (10th Cir. 2015) (requiring that statements include "a serious expression of an intent to commit an act of unlawful violence").

420. *Pennington*, 2022 WL 656163, at *3.

421. *Id.*

422. *Protecting Patients and Health Care Providers*, *supra* note 414.

423. H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022); Mark Joseph Stern, *How Red States Plan to Reach Beyond Their Borders and Outlaw Abortion in America,* SLATE (Apr. 13, 2022), https://slate.com/news-and-politics/2022/04/abortion-bans-out-of-state-missouri-texas-oklahoma.html [https://perma.cc/PD9V-DVGV].

patient to obtain an abortion in another state.[424] Professors David Cohen, Greer Donley, and Dean Rachel Rebouché have chronicled the coming interstate abortion wars likely to occur in the wake of *Roe v. Wade* being overturned by the *Dobbs v. Jackson Women's Health Organization* case.[425] Their article suggests ways to prevent extraterritorial abortion bans like the one proposed in Missouri.[426] In response to their blueprint, states supportive of abortion have begun to pass legislation specifically designed to protect abortion providers and third parties who may be sued in another state under a civil enforcement statute.[427] A law passed in California, for example, prohibits California courts from applying another state's civil enforcement law in a case or controversy in California courts and prohibits enforcement or satisfaction of a civil judgment rendered in another state.[428]

Several state legislatures have passed or are considering bills that create a private cause of action for interference with access to reproductive health care. For example, in anticipation of the *Dobbs* decision, New York's governor signed into law a bill that provides a civil cause of action for unlawful interference with reproductive health care to New York residents as well as those who travel to New York for reproductive health care.[429] The law allows individuals to sue a person or entity that brings a cause of action in any court in the United States based on allegations that the party accessed or aided and abetted another to access reproductive health care in New York.[430] A cause of action for unlawful

424. H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

425. Cohen et al., *supra* note 62.

426. *See id.*

427. *See* Act of June 22, 2022, ch. 42, 2022 Cal. Stat. 455, 456 (codified at CAL. HEALTH & SAFETY CODE § 123467.5) (declaring that another state's laws authorizing a civil action against a person or entity that performs or seeks an abortion or aids and abets the performance of an abortion is contrary to the public policy of the state and prohibiting the application of that law in a case or controversy heard in the state court and prohibiting enforcement or satisfaction of the civil judgement under that law); *see also* Act of May 5, 2022, § 1(b), 2022 Conn. Acts. 68, 69 (Reg. Sess.) (codified at CONN. GEN. STAT. § 52-571m) (creating a claim for abortion providers and others who assist patients to obtain "reproductive health care services" that are legal in Connecticut, when they are sued in another state).

428. Act of June 22, 2022, ch. 42, § 1, 2022 Cal. Stat. 455, 456 (codified at CAL. HEALTH & SAFETY CODE § 123467.5).

429. Freedom from Interference with Reproductive and Endocrine Health Advocacy and Travel Exercise Act, ch. 218, § 3, 2022 N.Y. Laws 1206 (codified at N.Y. CIV. RIGHTS LAW § 70-b).

430. N.Y. CIV. RIGHTS LAW § 70-b(1)–(2) (McKinney 2019). The law is part of a package of laws designed to protect both abortion patients and providers and includes an exception to extradition rules for abortion-related offenses and prohibits courts and law enforcement from cooperating in out-of-state civil and criminal cases that stem from abortion-related offenses, Act of June 13, 2022, ch. 219, 2022 N.Y. Laws 1207 (codified in scattered sections of N.Y. CRIM. PROC. LAW, N.Y. EXEC. LAW, and N.Y. C.P.L.R.), prohibits professional misconduct charges against health care providers for providing reproductive health care services for a patient who resides in a state where such services are illegal, Act of June 13, 2022, ch. 220, 2022 N.Y. Laws 1208 (codified in scattered sections of N.Y. EDUC. LAW, and N.Y. PUB. HEALTH LAW), prohibits medical malpractice companies from taking adverse action against providers who perform abortions on patients who reside in a different state, Act of June 13, 2022, ch. 221, 2022 N.Y. Laws 1210 (codified at

interference with reproductive health care allows plaintiffs to sue for compensatory damages and all costs and attorneys' fees.[431] The law also permits punitive damages where the plaintiff can prove that the defendant commenced the action for the purpose of intimidating, harassing, punishing, "or otherwise maliciously inhibiting the exercise of rights protected in New York."[432] The cause of action for interference with reproductive health care does not preclude the party from also seeking recovery under other common law claims.[433] California passed a similar interference law, permitting a person who experiences interference with the exercise of reproductive rights to sue "an offending state actor" for $25,000, as well as any exemplary damages and attorneys' fees.[434] Illinois developed a reverse-bounty-hunter law, allowing anyone who has had a judgment imposed against them for provision of or support for reproductive health care services to "recover damages from any party that brought the action leading to that judgment."[435] Cities may also pass such laws, and the City Council of New York City recently introduced a local law that would create a private right of action for interference with reproductive medical care which would allow a person to bring a claim when a lawsuit has been brought against them on the basis of seeking reproductive care in the city that is legal in New York City.[436]

CONCLUSION

State legislatures are increasingly turning to private law to enforce abortion bans because private enforcement permits granular surveillance and privacy invasions that would not be permitted if undertaken by the state, constrained as it is by constitutional limits. Antiabortion civil enforcement laws target providers and third parties who aid and abet the abortion procedure but will necessarily result in the surveillance of pregnant people seeking abortion. The laws are insidious for their potential to erode the privacy of pregnant people and make them vulnerable to family members, violent intimate partners, disapproving neighbors, and any person in their home, workplace, or community who seeks to patrol and regulate their intimate lives. Whistleblower websites,[437] fears that pregnant people will be reported by their health care

N.Y. INS. LAW § 3436-a), and allows abortion providers and patients to enroll in the state's address confidentiality program, Act of June 13, 2022, ch. 222, 2022 N.Y. Laws 1211 (codified in scattered sections of N.Y. EXEC. LAW).

431. N.Y. CIV. RIGHTS LAW § 70-b(3)(a) (McKinney 2019).

432. *Id.* § 70-b(3)(b).

433. *Id.* § 70-b(5).

434. CAL. HEALTH & SAFETY CODE § 123469(a) (West 2012).

435. 740 ILL. COMP. STAT. ANN. § 126/29-15(a) (West 2022).

436. *See* NEW YORK CITY, N.Y., ADMIN. CODE. § 17-2101 (2023), https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-155342 [https://perma.cc/95RC-27RB].

437. *See* Schwartz, *supra* note 5.

providers,[438] and surveillance and protesting at clinics[439] have increased as private citizens become the enforcers of state abortion bans.

The use of private law to enforce state abortion bans is antithetical to the very nature and purpose of private law: to compensate individuals for harm by third parties and to restrain future wrongful conduct through the deterrent force of damages. Instead, antiabortion civil remedy laws compensate those who have not been harmed (the "bounty" hunter) and incentivize rather than deter privacy violations by private parties. The state has captured private law for use to achieve state ends and left pregnant people seeking abortion care vulnerable to overreach and privacy intrusions by third parties. In short, in the post-*Roe* legal landscape, abortion patients in many states have been stripped of both constitutional and tort law's protection.

In the legal vacuum left by *Dobbs,* it is a critical moment to reclaim private law's compensatory and protective deterrent function. Numerous civil privacy laws are available to abortion patients and providers to address the privacy violations that will result from the civil bounty antiabortion provisions, including state and federal laws as well as traditional tort law. More broadly, however, antiabortion civil remedy laws lay bare what has long been fact: that pregnant bodies are politicized, and pregnancy renders a person a legal subject to be surveilled, regulated, and disciplined by the state and the community.

438. *See* Song, *supra* note 393, at 894–95 (describing the case of Purvi Patel who was reported to police by her doctor, who was a member of a pro-life physicians group, for suspected self-managed abortion); *see also* Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions,* 100 B.U. L. REV. 1111, 1115 (2020) (detailing the role of medical doctors in the detection and prosecution of pregnant women suspected of self-managing abortion).

439. *See* Bergengruen, *supra* note 15.