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Are S.B. 8's Fines Criminal?

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Last year, Texas passed its Heartbeat Act, also known as S.B. 8, which uses a unique structure of private enforcement to circumvent the constitutional limitations of Roe *and* Casey *to restrict abortion. That Act created a bounty regime, with no involvement of government actors, through which any individual could sue defendants alleged to have aided and abetted an abortion and receive a minimum of $10,000 statutory damages from the defendants. The design of the statutory regime was to prevent abortion by way of severe fines but bar challenges to the constitutionality of the statute by insulating the regime from government involvement. The ploy created waves, raising many constitutional and procedural issues. Indeed, it has even inspired a similar statutory regime in California attacking illegal gun ownership.*

One feature of S.B. 8 that has received little attention is that it is purportedly a civil remedy. In this Essay, I challenge that claim. I argue that the intent, magnitude, and nature of S.B. 8's damages provision show that it is a criminal sanction, which entails that defendants facing claims under S.B. 8 deserve criminal procedure protections. These protections can be substantial escutcheons for S.B. 8 defendants. Lastly, I contend that this type of argument may have greater reach on other forms of purportedly civil remedies.

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Introduction

The Supreme Court, through its decision in *Dobbs v. Jackson Women's Health Organization*,[1] took the drastic step of erasing the right to abortion that had been constitutionally protected for nearly 50 years.[2] But *Dobbs* did not itself ban abortion—it simply rendered legislation that would ban abortion constitutionally valid.[3] In light of that, several states have taken legislative action. Indeed, some states had taken preemptive action, through so-called trigger bans of abortion that would take effect upon *Roe v. Wade*[4] being overturned.[5] Others subsequently passed laws banning abortion at differing times during gestation.[6] Some have exceptions for rape and incest,[7] while others do not.[8] These bans of abortion, especially those earlier in pregnancy and those that would criminalize abortion, appear to be unpopular. Both recent polling and recent electoral results suggest that efforts to change the status quo of the *Roe v. Wade* and *Planned Parenthood v. Casey*[9] framework are against the popular will.[10]

In light of all that, consider Texas's Heartbeat Act, Senate Bill 8 ("S.B. 8").[11] S.B. 8 has a unique structure utilizing private enforcement. It was passed before *Dobbs*, with the design of circumventing the then-existing constitutional protections for abortion healthcare.[12] To that end, S.B. 8

1. 142 S.Ct. 2228 (2022).

2. *Id.* at 2279.

3. *Id.* at 2284–85.

4. 410 U.S. 113 (1973).

5. Ava Sasani, *What Are the Effects of New 'Trigger' Bans in Tennessee, Idaho and Texas?*, N.Y. TIMES (Aug. 24, 2022, 1:28 PM), https://www.nytimes.com/article/abortion-trigger-laws-tennessee-idaho-texas.html [https://perma.cc/6F2R-LKLN]; Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned [https://perma.cc/7EJ4-3NJX].

6. Larissa Jimenez, *60 Days After Dobbs: State Legal Developments on Abortion*, BRENNAN CTR. FOR JUST. (Aug. 24, 2022), https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion [https://perma.cc/7FMZ-5K3A].

7. *Id.*

8. *Id.*; Louis Jacobson, *15 States with New or Impending Abortion Limits Have No Exceptions for Rape, Incest*, POYNTER. (July 20, 2022), https://www.poynter.org/fact-checking/2022/post-roe-v-wade-state-bans-no-exceptions-rape-incest/ [https://perma.cc/9VLZ-PKGR].

9. 505 U.S. 833 (1992).

10. *See, e.g.*, Domenico Montanaro, *Poll: Two-Thirds Say Don't Overturn Roe; The Court Leak Is Firing Up Democratic Voters*, NPR (May 19, 2022, 5:00 AM), https://www.npr.org/2022/05/19/1099844097/abortion-polling-roe-v-wade-supreme-court-draft-opinion [https://perma.cc/Z84F-N4K6].

11. Texas Heartbeat Act, 87th Leg., R.S., S.B. 8 (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212 (West 2021)), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00008F.pdf [https://perma.cc/96CL-R4DX].

12. *See, e.g.*, Mary Ziegler, *The Court Invites an Era of Constitutional Chaos*, ATLANTIC (Dec. 10, 2021), https://www.theatlantic.com/ideas/archive/2021/12/supreme-court-texas-abortion/620972/ [https://perma.cc/R3VK-9JCB].

specifically barred public enforcement and instead allowed private actors to stop abortions or collect a bounty for abortions already performed.[13] The bounty regime allows "any person, other than an officer or employee of a state or local governmental entity in this state," to sue those who perform, induce, aid, or abet an abortion, or intend to do any of those things.[14] The statute makes clear that it does not authorize suing women who obtain abortions.[15] If victorious, the plaintiff—who might be any random person—could obtain injunctive relief *and* statutory damages of not less than $10,000, as well as attorneys' fees and costs.[16] The basic idea of this statutory scheme was to empower private actors—outside the purview of constitutional limits—to enforce the state's intentions on banning abortion, which it could not then directly enforce due to *Roe* and *Casey*.

Whereas the initial utility of S.B. 8 in circumventing the constitutional limitations on banning abortion was eliminated by the Court's action in *Dobbs*, S.B. 8 will likely have an enduring role to play given the unpopularity of outright bans on abortion. That is, because outright bans on abortion, especially those enforced through the criminal system, may be highly unpopular, states may be able to accomplish the same ends of practically eliminating abortion through S.B. 8-type regimes. Consequently, the myriad constitutional questions about S.B. 8 are of pressing concern.

Moreover, as many warned, the regime could go beyond abortion jurisprudence. Indeed, it has already been utilized in California against illegal firearms: The bill, SB 1327, allows Californians to sue those making, selling, transporting or distributing illegal assault weapons or ghost guns for at least $10,000 in damages.[17] Gun dealers who illegally sell firearms to those under the age of twenty-one could also be liable for the same damages.[18]

If S.B. 8-type regimes are allowed to proliferate unchecked, it may be open season on our constitutional rights—or at least those rights that the current Supreme Court disfavors.

Scholars and commentators have expressed several concerns with S.B. 8. Jon Michaels and David Noll have challenged the appropriateness of the state's use of private enforcers of the law to circumvent federal constitutional

13. Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 189–91 (2022).

14. TEX. HEALTH & SAFETY CODE ANN. §§ 171.207–171.208 (West 2021).

15. *See id.* § 171.206(b)(1).

16. *See id.* § 171.208(b)(2).

17. Act of July 22, 2022, ch. 146, sec. 1, §§ 22949.62(a), .65(a), .65(b)(2)(A)(i) (codified at CAL. BUS. & PROF. CODE §§ 22949.62(a), .65(a), .65(b)(2)(A)(i) (West 2023)).

18. *Id.* §§ 22949.62(c)(1), .65(a), .65(b)(2)(A)(i).

protections, which they term "vigilante federalism."[19] Peter Salib has suggested that the law is in fact tautological.[20] David S. Cohen, Greer Donley, and Rachel Rebouché have analyzed whether S.B. 8 would authorize judgments against out-of-state actors, thereby chilling out-of-state travel to obtain abortion healthcare.[21] And Howard Wasserman and Rocky Rhodes have exhaustively considered the standing and procedural issues raised by the Act.[22]

One feature has received relatively less attention: the purportedly civil nature of the remedy of statutory damages for successful plaintiffs. One striking feature of S.B. 8 is that it purports to be a "civil" regime, on the reasoning that it allows a purely private right of action. Consequently, defendants have considerably fewer protections than if the state was attempting to prosecute them criminally. This I contend is mistaken. Instead, I argue that the statutory damages provision of S.B. 8—that levies a minimum $10,000 fine against defendants who aid or abet an abortion—in fact imposes a *criminal* fine and that this has important implications for how cases under S.B. 8 (and any other similar regime) must be adjudicated.

This Essay proceeds in three further parts. First, I explain why the statutory damages provision of S.B. 8 is a criminal fine and consider how the context of private litigation impacts the inquiry. Second, I consider the implications of the criminal nature of S.B. 8's sanction on how such cases are administered. Finally, I explain how this argument may impact other kinds of punitive, noncompensatory damages.

I. Analyzing the Nature of S.B. 8's Damages Provision

As discussed, S.B. 8 contains a damages provision that allows "any person" to bring a claim against any person who aids and abets an individual in obtaining an abortion, with the exception that a claim cannot be brought against the mother herself.[23] If successful, the claimant receives a minimum

19. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. (forthcoming 2023) (manuscript at 3–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944 [https://perma.cc/M4WJ-QTD2]; Jon Michaels & David Noll, Opinion, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES (Sept. 4, 2021), https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html?fbclid=IwAR0xw9dsNmP_wOsfwp1dEyqUoka7uGp7QNkgWBq7qRyNmy_2vh6usTAXDCw [https://perma.cc/585E-RJ4Q].

20. Peter N. Salib, *Ban Them All; Let the Courts Sort Them Out.: Saving Clauses, the Texas Abortion Ban, and the Structure of Constitutional Rights*, 100 TEXAS L. REV. ONLINE 13, 15 (2021).

21. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 4, 48–49 (2023).

22. *See generally* Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029 (2022); Rhodes & Wasserman, *supra* note 13.

23. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2) (West 2021); *id.* § 171.206(b)(1).

of $10,000 in damages, plus attorneys' fees and costs.[24] The statute is designed to be a civil remedy, with the aim of circumventing the then-existing constitutional limitations on states enforcing abortion bans.[25] As a result of being a civil remedy, cases brought under S.B. 8 need only be proven by a preponderance of the evidence and could potentially obtain pretrial resolution, like through summary judgment.

Despite its designs, however, there is something amiss about categorizing S.B. 8 as a civil remedy. Principally, the question arises: What is S.B. 8 remedying? What is the putative claimant's injury that is being compensated through S.B. 8's remedial scheme? The individuals who bring this claim can be "any[one]."[26] How does the fact that some individual obtained an abortion injure the claimant?

We can certainly imagine cases where some particular claimant would have a plausible explanation of their injury due to an individual getting an abortion. The analysis of particular cases is of course inherently complex and factually sensitive. Consider a simplified example of a couple where one partner becomes pregnant. The pregnant partner decides to get an abortion over the objection of the other partner. The objecting partner may have a plausible claim of injury—perhaps because they have an interest in the fetus or because the abortion would be emotionally damaging to them. Whether such claims should be legally or morally cognizable is controversial—but it is at least a plausible claim of injury that could give rise to a civil remedy. Importantly, however, S.B. 8's regime does not even guarantee a claimant will have any such claim for injury. *Anyone* can bring a claim against those aiding and abetting an abortion. And it does not require individuals to prove what their injury is—instead it grants them a minimum of $10,000 damages, with an addition for attorneys' fees and costs for bringing the claim.

The damages scheme of S.B. 8 does not seem to be compensating individuals for their injury, but rather compensating—and incentivizing—their labor in detecting those who aid and abet abortions, and bringing them before the judicial process. We have other regimes like this: *qui tam* actions, for example.[27] But such actions are on behalf of the government. "Qui tam" is literally an abbreviation for "qui tam pro domino rege quam pro se ipso in hac parte sequitur"—which means "who as well for the king as for himself sues in this matter."[28] In such actions, the government is considered to be the claimant–plaintiff.[29] If we understand S.B. 8 claims to be circuitous *qui tam*

24. *Id.* § 171.208(b)(2)–(3).

25. *See id.* §§ 171.207(a), .208(a), .208(e)(2), .208(e)(7).

26. *See id.* §§ 171.207–171.208 (West 2021).

27. *See* Paul E. McGreal & DeeDee Baba, *Applying Coase to Qui Tam Actions Against the States*, 77 NOTRE DAME L. REV. 87, 88–89 (2001).

28. *Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

29. *See* McGreal & Baba, *supra* note 2727, at 88–89, 94.

or private-attorney-general actions, then they are actions on behalf of the government. But that would still leave the question as to whether they are civil or criminal. Indeed, for example, *qui tam* claims brought under the federal False Claims Act are considered civil claims.[30]

To the question of whether the sanction is criminal, in *Hudson v. United States*,[31] the Supreme Court considered whether monetary sanctions and occupational debarments against bank officers counted as criminal sanctions that would, as a matter of double jeopardy, bar further criminal actions.[32] In deciding the case, the Court set forth a test to determine whether and when purportedly civil monetary sanctions could be a criminal sanction for purposes of constitutional protections.[33] The Court observed that it is principally a question of statutory construction.[34] The analyzing court is to first ask what label the legislature used.[35] But that is not dispositive. "Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect,' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty[.]'"[36] To that point, the Court set forth the following seven factors:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."[37]

I contend that under *Hudson* there is a strong argument that S.B. 8's statutory minimum fine of $10,000 is a criminal sanction—not a civil one. As an overarching matter, consider that in Section 2 of the Act, the statutory text states that the State of Texas never repealed the laws prohibiting or

30. *See, e.g.*, United States *ex rel.* Clausen v. Lab'y Corp. of Am., 290 F.3d 1301, 1307 (11th Cir. 2002) (observing that "[t]he False Claims Act ('the Act') permits private persons to file a form of civil action (known as *qui tam*) against, and recover damages on behalf of the United States from," individuals who make a fraudulent claim on the government).

31. 522 U.S. 93 (1997).

32. *Id.* at 98–99.

33. *Id.*

34. *Id.* at 99 (citations omitted).

35. *Id.*

36. *Id.* (first quoting United States v. Ward, 448 U.S. 242, 248–49 (1980); and then quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

37. *Id.* at 99–100 (quoting factors in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–169 (1963)) (internal quotation marks omitted).

criminalizing abortion[38]—so the statute itself recognizes that this is operating in the shadow of criminal prohibitions that the legislature ruefully could not impose. Thus, we can infer that the legislature was intending to impose a criminal sanction circuitously. In a similar vein, we can observe that the main cost to be compensated for claimants is their attorneys' fees and costs, yet the $10,000 minimum damages provision is in addition to those fees and costs. This clearly suggests that the $10,000 is not serving a compensatory function.[39]

With that in mind, I consider each of the *Hudson* factors:

(1) Is this an affirmative disability or restraint?

Of course, it is not incarceration. But the fine is so excessive that it operates—by design—to make it prohibitive and infeasible for doctors and others to engage in or promote abortion. In that sense, it is a restraint.

Now one might object here that fines are categorically not affirmative disabilities or restraints. But this seems wrong. Exorbitant fines can operate as affirmative disabilities—indeed, the Constitution itself recognizes that in the Eighth Amendment.

(*2) Historical Grounding*

Monetary sanctions themselves have not been considered punishment per se; there are myriad civil damages regimes aimed at compensating those injured by actions. But noncompensatory fines have been traditionally considered punishment.[40] Consequently, this noncompensatory monetary sanction has proper historical grounding as punishment.

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38. *See* Texas Heartbeat Act, 87th Leg., R.S., S.B. 8 (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212 (West 2021)), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00008F.pdf [https://perma.cc/X798-QPVT] ("The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.").

39. One might contend here that the $10,000 minimum damages was intended to compensate for putative plaintiffs' costs in discovering the conduct in question. And since *Dobbs* has removed the constitutional bans on abortion, and states have enacted such bans, we might anticipate that people obtaining abortions will be more surreptitious—which in turn raises S.B. 8 plaintiffs' investigative costs. Thanks to Steve Cleveland and Peter Kutner for raising this query.

I think it plausible that there may be investigative costs that are not fully provable and thus compensable. But I find it highly implausible that these ordinarily reach the sum of $10,000, such that that would be an appropriate floor for the damages level. That said, I am not dogmatic about this. Rather, I think it incumbent on the legislature to assert and establish the plausibility of such a figure, especially if it is going to circumvent criminal-procedure rights and protections.

40. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908 (AM. L. INST. 1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 126 (2008) ("Punitive damages, like criminal sanctions, also carry a stigma.").

(3) Scienter

Here, the statute explicitly requires knowing conduct by the physician and it requires knowing aiding or abetting by other individuals.[41] That is a requirement of scienter.[42]

(4) Traditional Aims of Punishment

The $10,000 floor is clearly constructed to deter actors from engaging or promoting abortions. Its function is not compensatory. Rather, it is meant to create a sufficient monetary disincentive from engaging in the sanctionable conduct (engaging or promoting abortions). That is a deterrent function.

We can also infer the excessive punishment has a retributive component to it. Though the statute is itself silent on any retributive component, it is plausible that the excessive fine has a stigmatizing component. This is similar to the stigmatizing function of punitive damages.[43]

(5) Already Criminal Conduct

When passed, the behavior that S.B. 8 sanctioned was not already a crime—because of the then-existing protections of *Casey* and *Roe*. But the statute makes clear that, according to the legislature, the State of Texas understood the conduct to be criminally prohibited. Indeed, Jonathan Mitchell—the architect of S.B. 8[44]—espoused the view that unconstitutional laws aren't erased by the Supreme Court.[45] Under this view, the sanctioned conduct was already "criminal" under state law, but could not be sanctioned due to operation of constitutional law.

Even if we were to determine the sanctioned conduct was not criminal, there is a strong argument that this element is met. The reason is that S.B. 8's sanction is designed precisely to circumvent the constitutional protections that made abortions legal and noncriminal. The ultimate point of this factor is to determine whether there is "punitive purpose or effect" in sanctioning the conduct. Here, because the sanction is reaching conduct that the state wishes to criminalize, that "punitive purpose or effect" is manifest.

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41. TEX. HEALTH & SAFETY CODE ANN. §§ 171.208(a)(1)–(2) (West 2021).

42. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST., Proposed Official Draft 1962) (defining "knowingly" as a mental state capable of satisfying the scienter requirement). The statute goes on to say that persons aiding and abetting may be liable even if they did know that the abortion was in violation of the statute, but that addresses ignorance of the law—not the scienter of the action. TEX. HEALTH & SAFETY CODE ANN. §§ 171.208(e) (West 2021).

43. *See supra* note 40 and accompanying text.

44. Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html [https://perma.cc/D8RW-3QHP].

45. *See generally* Jonathan F. Mitchell, *The Writ-Of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

(6 & 7) Relation to Alternative Purposes

It is unclear what the alternative purpose for the $10,000 might be. It isn't compensatory to the bounty hunters—they will already have their attorneys' fees and costs covered and it is unlikely that discovering the conduct of engaging in or promoting abortions costs them $10,000. That amount seems clearly excessive, and it is a floor not a ceiling. So if there are cases that approach or exceed $10,000, setting the floor much lower, and allowing claimants to prove the higher amount would do no harm to compensating claimants for their true discovery costs. This make clear that $10,000 is excessive in relation to the posited alternative purpose of compensating claimants' discovery costs. And this in turn bolsters the conclusion that the intent is not compensatory, but punitive.

* * *

All told then, there is a strong argument that both the actual legislative intent and the seven-factor test point to this being a criminal sanction.

One preliminary, perhaps familiar objection is that S.B. 8 is civil because it doesn't involve the government, only private actors. But that argument, I contend, is too quick.

Suppose a statute defined some conduct as wrongful and authorized private actors to incarcerate offenders in, say, private prisons. The sanction of incarceration is clearly a criminal one. Does the fact that the statute asks private actors to carry out the sanction negate the "criminal" label? Indeed, such a formalistic understanding has the potential to render the constitutional protections on criminal process a nullity.[46] A related response is that the sanction is not criminal but that such a statutory regime cannot stand because the legislature cannot delegate to private parties essential "criminal" functions.[47] Notice that on this understanding, S.B. 8's $10,000 sanction would be rendered invalid, as a delegation of essential criminal functions to private parties.

Another objection is that the notion of punitiveness is too capacious for the "criminal" label. [48] In particular, the *Hudson* test, in its fourth factor, focuses on whether the sanction has a deterrent aim. But many features of our legal system, and in particular remedies, have the express or implicit purpose of deterrence. That is, even compensatory remedies—such as those available in tort—seek to deter actors from committing similar conduct in the future

46. One natural objection to this point is that this kind of statute would never be passed. We can hope that's correct, but we might never have thought that bounty-hunter statutes targeting abortion would have passed. Further, the objection may beg the question: the reason such a statute seems inappropriate is because it involves the government exporting criminal functions to private parties.

47. *See* Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Argument from Moral Burdens*, 28 CARDOZO L. REV. 2629 (2007).

48. *See, e.g.*, Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 105 (2005).

that cause such injuries.[49] Thus, the argument goes, this test taken to its logical conclusion may eviscerate the civil–criminal distinction.

This is a serious objection, but it derives its potency from the existing tenuous distinction between tort and criminal law.[50] Thus, a comprehensive answer to this objection would demand a convincing account of what separates tort from criminal law. Indeed, such an account has proven elusive. There are a number of competing accounts for what distinguishes the objects of the criminal law and tort law: that crimes require heightened *scienter* without focusing on harm, while torts require harm without focusing on heightened *scienter*;[51] that crimes are categorically prohibited while torts are not;[52] and crimes target deontological wrongs, while torts target consequentialist wrongs.[53] Each of these theories on the crime–tort distinction recognize that there are exceptions and overlaps, but they contend the criteria cover the core cases. There are a great many things to say for and against each of the accounts, but what we can notice is that on each of them, there is a strong argument that S.B. 8's prohibition, and the nature of the resultant punishment, is criminal rather than tortious or civil. S.B. 8 does require *scienter*, without a focus on harm; it does, through the magnitude of punishment, seek to impose a categorical ban; and it arguably has a retributive component that suggests it sees the conduct as a deontological wrong (though perhaps also as a consequentialist wrong). Indeed, much of this is captured by the other factors of the *Hudson* test.

II. The Protections of Criminal Law and Procedure

So, what comes of all this? A lot. Setting aside the difficult question of whether private parties can legally pursue criminal sanctions, and assuming that private parties are properly deputized to pursue the criminal sanction of S.B. 8, the fact that it is a criminal sanction means that defendants should have criminal procedure protections. In such cases, there are four principal

49. DAN B. DOBBS, THE LAW OF TORTS § 11 (2001) (stating an aim of tort law is "to deter certain kinds of conduct by imposing liability when that conduct causes harm"); RESTATEMENT (SECOND) OF TORTS § 901 (1979) (stating that one of the "purposes for which actions of tort are maintainable" is "to punish wrongdoers and deter wrongful conduct").

50. Note that one potential response is that the *Hudson* test may require the sanction to have both deterrent and retributive purpose—and so even if tort law remedies are deterrent, that is not enough. I think this is too quick. First, some tort remedies, properly within our civil regime, may have retributive purposes. Second, and I think more strongly, one can believe there is an appropriate institution of criminal law—distinct from civil institutions—without believing in retribution at all.

51. *See, e.g.*, Richard A. Epstein, *Crime and Tort: Old Wine in Old Bottles*, *in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 231, 248 (Randy E. Barnett & John Hagel III eds., 1977).

52. *See, e.g.*, John C. Coffee, *Does "Unlawful" Mean "Criminal?": Reflections on the Disappearing Tort/Crime Distinction In American Law*," 71 B.U. L. REV. 193, 193–94 (1991) (also using the concept of "continuity" and "discontinuity" in characterizing the distinction).

53. *See, e.g.*, Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 271 (1996).

protections that may be triggered: ***First***, there is the standard of proof: cases against criminal defendants must be proved beyond a reasonable doubt. [54] ***Second***, criminal defendants are entitled to exercise their right to remain silent under the Fifth Amendment *without adverse inference*. [55] ***Third***, criminal defendants are entitled to constitutional protection against Double Jeopardy. [56] ***Fourth***, there is the protection through jury trial. [57] We consider each in turn.

A. The Beyond a Reasonable Doubt Standard

The principal protection for defendants facing punishment is the extremely heightened standard of proof that must be met to sustain a guilty verdict—that the conduct be proven beyond a reasonable doubt. This is constitutionally mandated. [58] And it differs sharply from the standard of proof in a civil case, the preponderance of the evidence, which requires only that it be more likely than not that the defendant committed the conduct. [59] We note the beyond-a-reasonable-doubt standard is closely related to, and instantiates, the Blackstone ratio—which asserts that it would be better to let ten, one hundred, or even one thousand men go free than to wrongly punish one innocent person. [60] The upshot then is that if S.B. 8's sanction is understood as criminal, then a defendant in an S.B. 8 suit must be afforded this protection of a heightened standard of proof—which is much more difficult to meet.

B. The Fifth Amendment Right to Silence Without Adverse Inference

Another critical protection for defendants is the right to silence. Specifically, defendants have, under the Fifth Amendment, the right against self-incrimination. So, if a defendant's putative testimony is potentially incriminating and compelled, then the defendant may assert the right to refuse to testify, and this privilege extends to all stages of the criminal proceedings.[61] Indeed, this privilege also extends to civil proceedings but with a critical difference: unlike in criminal proceedings, the jury may draw an "adverse inference" against the defendant for asserting their Fifth Amendment right to remain silent. [62] That means a court may allow the factfinder to determine "that if the witness had answered, the answer would

54. In re Winship, 397 U.S. 358, 361–62 (1970).

55. U.S. CONST. amend. V; *see also* Carter v. Kentucky, 450 U.S. 288, 299–300 (1981).

56. U.S. CONST. amend. V.

57. U.S. CONST. amend. VI.

58. In re Winship, 397 U.S. at 361–62.

59. *Id.* at 371–72 (Harlan, J., concurring).

60. Coffin v. United States, 156 U.S. 432, 456 (1895).

61. ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE 493–94 (1st ed. 2008).

62. Bank of Am., N.A. v. Fischer, 927 F. Supp. 2d 15, 26 (E.D.N.Y. 2013).

have been unfavorable to the witness."[63] This is unlike criminal cases, where the defendant is entitled to an instruction that informs the jury that no adverse inference may be drawn from a defendant's exercise of their Fifth Amendment right to be silent.[64] How pleading the Fifth and whether an adverse inference instruction is given to the jury will impact any particular case depends on the facts of the case and the litigation strategy, but given the common perception against pleading the Fifth Amendment,[65] this difference can be substantial in protecting the defendant.

C. Double Jeopardy

Criminal defendants are also assured protections against double jeopardy. That is, under the Constitution, criminal defendants may not be tried more than once in the same jurisdiction for the same crime.[66] Notice however under S.B. 8's regime, individuals have little protection against being placed in double jeopardy. That is because multiple individuals can bring claims against S.B. 8 defendants—and they can do so serially. Suppose one plaintiff brings a claim against a defendant for aiding and abetting an abortion and loses. As a matter of the purportedly *civil* statutory scheme, nothing prevents another plaintiff from bringing a claim under S.B. 8 based on the same conduct—to take another crack at prosecuting the defendant.[67] Indeed, the fact that defendants may face essentially limitless monetary liability, and that they may face the prospect of repeated litigation even if they win, could have perilous results.[68] For example, doctors, nurses, and hospitals may not provide even routine, nonprohibited medical care involving reproductive matters for fear that they will be tormented through litigation.

Now, if S.B. 8's fines are understood as criminal sanctions, and thus cases under S.B. 8 are criminal actions, then there may be Double Jeopardy protections for such defendants. In this scenario, the S.B. 8 defendant faces a criminal prosecution under Texas state law—namely, S.B. 8—and is found not guilty. At that juncture, the defendant cannot be put twice in jeopardy under the same Texas state law for the same conduct, even if the prosecuting

63. United States *ex rel.* Lokosky v. Acclarent, Inc., 464 F. Supp. 3d 440, 443 (D. Mass. 2020) (citing Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)).

64. Carter v. Kentucky, 450 U.S. 288, 299–300 (1981).

65. *See, e.g.*, Eli Yokley, *Voters Don't Necessarily Think Pleading the Fifth Implies Guilt, But It Varies by Party*, MORNING CONSULT (May 16, 2018, 2:57 PM), https://morningconsult.com/2018/05/16/voters-dont-necessarily-think-pleading-the-fifth-implies-guilt-but-it-varies-by-party/ **[**https://perma.cc/69PE-JFZW] (surveying voters and finding that 36% of people think that pleading the Fifth is a strong indicator of the defendant's guilt).

66. Chemerinsky & Levenson, *supra* note 61, at 887.

67. Indeed, nothing prevents an individual from bringing a duplicate claim, even if the first is successful! Thus, defendants may face multiple damages awards.

68. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

parties are different. This is analogous to a prosecution by a city and a prosecution by a state following thereafter, both under state law. The Supreme Court held that this was impermissible under the Double Jeopardy Clause because local and state entities were seeking to enforce the law of the same sovereign.[69] Similarly, individuals seeking to enforce a criminal sanction under the same state law can be understood as agents of the same sovereign seeking to enforce the law of one sovereign—which would be prohibited under Double Jeopardy doctrine.[70]

D. The Right to Jury Trial

Then there's the right to jury trial. Peter Salib and I argued that jury nullification may be a potent way of negating abortion prosecutions.[71] However, that avenue may be blocked in civil suits because of the possibility of summary judgment and other forms of early resolution prior to jury verdict.[72] This is where understanding the sanction as criminal, and the consequent criminal procedure, protections may matter.

First, the Texas Constitution gives criminal defendants the right to jury trial.[73] Thus, if S.B. 8 imposes a criminal sanction, then the defendant may have an absolute right to a jury trial in Texas. And because of the potential of jury nullification, this may be practically very significant for defendants.

The U.S. Constitution's jury trial right is less categorical, and thus it is unclear whether the right to jury would attach in S.B. 8 cases as a matter of federal constitutional law. That said I contend there is an argument that it would. As background, in *Blanton v. City of North Las Vegas*[74] and *United States v. Nachtigal*,[75] the Court rejected claims that crimes with penalties of $1,000 and $5,000, respectively, were serious offenses to which the jury trial would attach.[76] However, both cases recognized that there might be a "rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6–month incarceration line.'"[77] Here, there is an argument that the legislature intended to do exactly that. First, the severe monetary penalties were passed on a legal backdrop, at

69. *See* Waller v. Fla., 397 U.S. 387, 393 (1970).

70. If the putative plaintiffs are seen as agents of the state, then they may be prohibited from bringing serial actions, based on *res judicata* principles. *See* In re Schimmels, 127 F.3d 875, 882 (9th Cir. 1997). This argument does not require the sanction be considered criminal.

71. Peter N. Salib & Guha Krishamurthi, *Nullification in Abortion Prosecutions*, 72 DUKE L.J. ONLINE 41, 42 (2022).

72. I thank Mike Dorf for raising this point.

73. TEXAS CONST. art. I, § 10.

74. 489 U.S. 538 (1989).

75. 507 U.S. 1 (1993).

76. Blanton, 489 U.S. at 544–45; Nachtigal, 507 U.S. at 5. *Nachtigal* was decided in 1993 and, using an inflation calculator, that $5,000 in 1993 is equivalent to over $10,200 today.

77. Blanton, 489 U.S. at 544.

the time of the Act's passage, where the legislature was disallowed from imposing incarceration. Furthermore, the $10,000 is the floor of the monetary penalty that the defendant may face in one case. There is nothing preventing other bounty hunters from filing duplicate cases, so the actual monetary sanction contemplated by the regime might be vastly more.[78] In light of those observations, it may be that the grave monetary penalties may provide S.B. 8 defendants with a federal constitutional right to a jury trial as well.[79]

III. Analogies to Other Sanctions Regimes

Lastly, this argument about purportedly civil sanctions actually being criminal ones—and thus requiring further criminal protections—has potentially broader reach. A key example of this is with punitive damages awarded in tort cases. The standard account of punitive damages "is that punitive damages are intended to *punish* a defendant who has engaged in a form of tortious conduct that is particularly egregious. Courts routinely state that the 'punishment' delivered by punitive damages is justified by both deterrent and retributive concerns."[80] Indeed, the Supreme Court itself has addressed punitive damages as "quasi-criminal punishment."[81]

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78. One potential objection to using the possibility of multiplicative fines in duplicate cases is that, in terms of incarceration, the Supreme Court has stated in *Lewis v. United States*, 518 U.S. 322, 323–24 (1996), that sentences on multiple, distinct offenses could not be aggregated to meet the six-month jury trial trigger. But *Lewis* seems disanalogous. Here the possibility of multiplicative fines is based on the very same conduct—not distinct offenses. Thanks to Jon Lee for raising this issue.

79. Moreover, setting aside summary judgment, Texas does not require unanimous verdicts for civil proceedings, but criminal proceedings do require unanimous verdicts (per Texas statute and the Supreme Court's recent holding in *Ramos v. Louisiana*, 140 S.Ct. 1390, 1397 (2020). That too makes a substantial difference, especially in terms of nullification.

80. Zipursky, *supra* note 48, at 105 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003)). Zipursky contends this standard account is incomplete, as the punitive nature of these damages includes the state's imposition of punishment, but also the plaintiff's right, as an individual, to be punitive against the defendant. *Id.* at 106–07.

A. Mitchell Polinsky and Steven Shavell provide an economic analysis of punitive damages and proffer that punitive damages are needed "to offset the deterrence-diluting effect of the chance of escaping liability." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 870 (1998). Under this account, punitive damages—so limited—may not be viewed as punishment. But as they note, punitive damages regimes are generally not so limited, especially that they do emphasize moral blameworthiness and retribution. Similarly, others have argued that punitive damages are compensatory, targeting intangible harms that may otherwise escape compensation. Andrew W. Marrero, *Punitive Damages: Why the Monster Thrives*, 105 GEO. L.J. 767, 786 (2017). But here too, punitive damages often extend beyond any plausible compensation of intangible harms.

81. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991). In discussing the history, the U.S. Supreme Court referenced two cases from the English Court of Common Pleas—*Wilkes v. Wood* Lofft 1, 98 Eng. Rep. 489 (C.P. 1763) and *Huckle v. Money*, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (C.P. 1763)—where the English Court recognized "exemplary damages" that were justified by the need to further purposes beyond compensation, such as "punishment, deterrence, assessing the degree of reprehensibility of the defendant's conduct, and recording the jury's sense of moral outrage as an expression of societal norms." Andrew W. Marrero, *Punitive Damages: Why the*

Under this account, punitive damages are noncompensatory monetary fines that are a regime of punishment fashioned by the state[82] but enforced by individual private plaintiffs in the civil arena. Thus, the analogy to S.B. 8 is clear. One argument then is that since punitive damages are firmly within the civil arena, so too S.B. 8 should be appropriately considered a civil regime, despite its punitive purposes and effects. But the other conclusion is as robust (if not stronger): Just as S.B. 8 is a criminal sanction that requires defendants be given criminal procedure protections, so too should these protections extend to defendants facing punitive damages. Indeed, the conclusion is not new; several commentators have observed the anomaly that punitive damages have at core a criminal nature, without criminal protections.[83] Though thus far the view that criminal protections are constitutionally required for defendants facing punitive damages has not taken foot,[84] jurisdictions have voluntarily adopted some of these protections. For example, several jurisdictions have required a higher standard of proof for showing punitive damages[85] and jury determinations of whether to award punitive damages and in what amount.[86] While welcome, I maintain this is insufficient to provide defendants facing noncompensatory sanctions, like S.B. 8's monetary damages and punitive damages, with the requisite protections. As seen, if these are subject to change by a willing legislature, then they might be if the political winds so blow.

Now punitive damages provide a crisp example of how the reasoning of *Hudson* could apply beyond S.B. 8, and to other noncompensatory fine regimes. But the principles here apply to any other regime of

Monster Thrives, 105 GEO. L.J. 767, 777 (2017) (citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 490 (2008)).

82. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 614 (1996) (Ginsburg., J., dissenting) (appendix providing a list of statutory reforms to punitive damages in numerous states).

83. *See, e.g.*, Richard Adelstein, *Victims As Cost Bearers*, 3 BUFF. CRIM. L. REV. 131, 160 (1999) ("But punitive damages are controversial (and relatively rare) precisely because they blur the distinction between tort and crime and require juries to assess their magnitude without formal guidance or the procedural safeguards afforded defendants in criminal cases."); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 382 (1994); Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1435 (2009); *see also* Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 455–56 (2008) (suggesting a hybrid approach where punitive damages used to address "public wrongs" are criminal, requiring such protections).

84. *See, e.g.*, *Haslip*, 499 U.S. at 1.

85. *See* Markel, *supra* note 83, at 1437 (citing 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES, §5.3 (H)(2) (5th ed. 2005)); *see generally* HENRY COHEN & TARA ALEXANDRA RAINSON, CONG. RESEARCH SERV., RL31721, PUNITIVE DAMAGES IN MEDICAL MALPRACTICE ACTIONS: BURDEN OF PROOF AND STANDARDS FOR AWARDS IN THE 50 STATES (2006).

86. Markel, *supra* note 83, at 1438–39. I have argued elsewhere that defendants should have the constitutional right to waive jury trial, but nevertheless the right to jury trial is an important criminal procedure protection.

noncompensatory fines that has a punitive function. Ultimately, defendants facing punishment—whether by the state or by deputized private parties—should receive the protections of criminal law and procedure. Anything short of that flouts the law and spirit of the Constitution.

Conclusion

S.B. 8 was specifically designed to circumvent constitutional limitations on the state, which protect individuals from government overreach. It does this by creating a regime for private individuals to pursue large, debilitating monetary sanctions on defendants for aiding and abetting abortions, with the purposes of stigmatization, retribution, deterrence, and incapacitation. In short, it levies punishment, using private actors as enforcers. This Essay has argued that S.B. 8 is essentially a regime of criminal sanctions, and that even if the state is using private actors to enforce these sanctions, defendants require the protections of criminal law and procedure. These protections are no panacea to the dangers of outlawing reproductive healthcare, but they can mitigate the harms to some extent. Moreover, the more general principle may apply to other regimes of noncompensatory fines, and thus this type of argument may be important in defending our constitutional rights from legislative chicanery.