

**PERILOUS PRIVATE ENFORCEMENT STRATEGIES:
FROM POSSES AND CITIZEN’S ARREST TO TEXAS
HEARTBEAT STATUTES**

*Jennifer A. Brobst**

*“Pandora’s Box has already been opened a bit, and time will tell.”*¹

I. INTRODUCTION

The utility of state private enforcement statutes restricting abortion in Texas and other states is worthy of close scrutiny. The legality of abortion in the United States has drawn vituperative attention to the role of the courts, counsel, and private citizens in enforcing legal rights generally, as well as the power of states to determine critical moral questions not expressly addressed by the United States Constitution.

With respect to the latter, the Supreme Court deferred to state power in 2022 in *Dobbs v. Jackson Women’s Health Organization*, overturning the landmark *Roe v. Wade*² and *Planned Parenthood v. Casey*³ decisions.⁴ As to the former concern related to the role of enforcement of abortion restrictions, that issue was remanded back to the state courts by the United States Supreme Court in *Whole Woman’s Health v. Jackson*,⁵ where it has taken some unusual turns. In *Jackson*, the Texas Heartbeat Act bans an

*Assistant Professor, Cecil C. Humphreys School of Law, University of Memphis. The author extends her thanks to the Center for Constitutional Law at the University of Akron and to the participants of the Center’s October 28, 2022 Symposium on the Future of Reproductive Rights.

1. Order Declaring Certain Civil Procedures Unconstitutional and Issuing Declaratory Judgment, *Van Stean v. Texas Right to Life*, No. D-1-GN-21-004179 (Dec. 9, 2021) (Peeples, J.).

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

3. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

4. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228(2022).

5. *Whole Woman’s Health v. Jackson*, 595 U.S. ___, 142 S. Ct. 522 (2021). An early similar strategy in Texas involved a city ordinance permitting private enforcement of an abortion restriction, declaring the City of Lubbock to be a “sanctuary city for the unborn.” *Planned Parenthood of Greater Texas Surgical Health Services v. City of Lubbock, Texas*, 542 F. Supp. 3d 465 (N.D. Tex. 2021).

abortion after detection of a fetal heartbeat, but also relies exclusively on private enforcement through civil claims against medical providers and those who aid and abet them.⁶ Specifically, the Act provides for injunctive relief, a minimum of \$10,000 in statutory damages, and attorney’s fees, when the plaintiff citizen files a claim for the following acts:

Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.⁷

The stated rationale for the law is, in part, that “Texas has compelling interests from the outset of a woman’s pregnancy in protecting the health of the woman and the life of the unborn child.”⁸

After *Dobbs* was decided and states, like Texas, subsequently criminalized abortion,⁹ some might have considered state reliance on civil private enforcement statutes to be a non-issue. Why does it matter if a physician could be sued, if they could be imprisoned for the same act? However, this civil approach remains very much in place, and could remain as a zombie or trigger law¹⁰ even if the courts ultimately find that the statutes fail for lack of standing.

The Texas private enforcement law had immediate impact because it seeks to ensure a lack of federal constitutional oversight of a state law which severely curtails the longstanding rights of women to terminate

6. See TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a), 171.207(a), 171.208(a)(2), (3) (eff. Sept. 1, 2021). See also *SisterSong Women of Color Reproductive Justice Collective v. Governor of Georgia*, 40 F.4th 1320 (11th Cir. 2022) (quoting *Dobbs* in finding a legitimate state interest in enacting a fetal heartbeat abortion ban with regard to “respect for and preservation of prenatal life at all stages of development”); *Memphis Ctr. for Reproductive Health v. Slatery*, No. 3:20-cv-00501, 2020 WL 4274198 (M.D. Tenn. 2020), *vacated and remanded by* 2022 WL 2570275 (6th Cir. 2022) (vacating the district court’s granting of a preliminary injunction against criminal sanctions for a violation of the Tennessee fetal heartbeat ban on abortion in light of *Dobbs*).

7. TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (eff. Sept. 1, 2021).

8. *Id.* at § 171.202(3).

9. *E.g., id.* at § 171.065 (eff. Dec. 2, 2021) (felony criminal offense and administrative sanctions for drug-induced termination of pregnancy); *cf.* *Planned Parenthood of the Heartland, Inc. v. Reynolds ex. rel. State*, 975 N.W.2d 710 (Iowa 2022) (applying an Iowa statute that sanctions a physician’s license for performing an abortion, but does not impose civil or criminal liability).

10. See Rose Wagner, *It’s Not Halloween: Post-Roe America Could See Rise of “Zombie” Abortion Bans*, COURTHOUSE NEWS SERVICE (May 6, 2022), <https://www.courthousenews.com/its-not-halloween-post-roe-america-could-see-rise-of-zombie-abortion-bans> (discussing “zombie laws” in the abortion context, where state laws deemed unconstitutional remained in statute, only to revive when the Supreme Court changed its position on the constitutionality of the issue). *E.g., Planned Parenthood Great Northwest v. State*, 2022 WL 3335696 (Idaho 2022); *EMW Women’s Surgical Ctr., PSC v. Cameron*, 2022 WL 3641196 (Ky. 2022).

their pregnancy by wholly excluding state action.¹¹ The Supreme Court of Texas on remand also held that the statute precludes criminal sanctions and professional discipline against the providers for violations of the Act.¹² An odd state of affairs, for in order to avoid protection of civil rights under the federal constitution, the State of Texas had to trust its citizenry to behave like good citizens when enforcing state law.

The oral argument before the United States Supreme Court in *Jackson* began: “To allow Texas’s scheme to stand would provide a roadmap for other states to abrogate any decision of this Court with which they disagree.”¹³ That is not the only problem. Even if private enforcement has always had lawful applications, it is imperative that it be authorized very selectively and only when the public with authority to enforce the law is in relative agreement. Here, Texas chose private enforcement for one of the most controversial legal issues in American history.

Over a dozen other state legislatures have put forth similar bills that would support private enforcement of abortion restrictions, although not all have been successful.¹⁴ The Texas strategy has also been replicated for other issues, such as California legislation to authorize private lawsuits by anyone, other than the government, against anyone who manufactures assault weapons or unserialized ghost guns.¹⁵ This California firearms legislation expressly states that its provisions will become inoperative

11. See 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 (2022); Simona Grossi, *Roe v. Wade Under Attack: Choosing Procedural Doctrines Over Fundamental Constitutional Rights*, 13 CONLAWNOW 39 (2022).

12. *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569 (Tex. 2022).

13. Transcript of Oral Argument at 5, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463) (Marc A. Hearron, Attorney for the Petitioner).

14. See Susan Rinkunas, *We’re Tracking All the Texas-Style Abortion Bills*, JEZEBEL (Jan. 4, 2022), <https://jezebel.com/were-tracking-all-the-texas-style-abortion-bills-1848300080>. The Oklahoma Legislature passed a law mirroring the Texas Heartbeat Act and its private enforcement provisions, signed by the Governor on May 25, 2022 (HB 4327), to be codified under 63 OKLA. STAT. § 1-745.34.

15. Cal. S.B. 1327 (approved by the Governor, July 22, 2022) (adding BUS. & PROF. CODE § 22949.65(a), which states “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 does any of the following: [violates or aids and abets the violation of section 22949.62].”). See Tom Hals, *Explainer: Can U.S. Gunmakers be Liable for Mass Shootings?*, REUTERS (May 26, 2022), <https://www.reuters.com/world/us/can-us-gunmakers-be-liable-mass-shooting-2022-05-25/> (“The bill, which is supported by Governor Gavin Newsom, is styled on a Texas anti-abortion ‘vigilante’ law that is meant to skirt conflicting federal law.”).

should the Texas Heartbeat Act be held unconstitutional by the United States Supreme Court or the Texas Supreme Court.¹⁶

II. PRIVATE ENFORCEMENT SINCE THE WILD WEST

Although it did not issue an injunction, the district court in San Antonio held the enforcement provision of the Texas Heartbeat Act unconstitutional under the open courts and separation of powers provisions of the Texas Constitution and under the Due Process Clause of the Fourteenth Amendment.¹⁷ Aside from its procedural and constitutional infirmities, placing private enforcement in historical context aids in understanding when it may be a sustainable strategy. First, the strategy of involving the populace in the enforcement of legislative mandates has a long history in the United States. Also, self-help is a necessity where law enforcement is not equipped to prevent and respond to every call for assistance.¹⁸ Citizen's arrest, posse comitatus, and mandatory reporting of misconduct by citizens, including professional misconduct, all involve private action for the common good in state and local jurisdictions. What they also share is an undercurrent of restraint, where both the public and the government understand that private enforcement only has social utility under narrow circumstances.

A. *The Purpose and Scope of the Citizen's Arrest*

The need for restraint in the scope of citizen's arrest is demonstrated by both early and modern case law. Not surprisingly, citizen's arrest has been the subject of overzealous application by members of the public, who were themselves charged with trespass, assault, and battery.¹⁹ Without enough guidance or accountability, private citizens have a tendency toward excess, especially when they feel they are on a mission.

16. Cal. S.B. 1327 (approved by the Governor, July 22, 2022) (CAL. BUS. & PROF. CODE §22949.71).

17. See *Van Stean Order*, *supra* note 1.

18. See, e.g., *Howell v. City of New York*, 2022 WL 17096862 (N.Y. 2022) (granting motion of city and officer to dismiss for failure to state a claim based on sovereign immunity, with respect to a plaintiff victim of crime who obtained multiple protective orders, unsuccessfully sought help from law enforcement, and was ultimately thrown out of a third floor window by her ex-boyfriend).

19. See Chad Flanders et al., *The Puzzling Persistence of Citizen's Arrest Laws and the Need to Revisit Them*, 64 HOW. L.J. 161 (2020); Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J.L. & PUB. POL'Y 557 (2016) (providing a historical review of the common law right to citizen's arrest and extending it to modern citizen patrol groups such as the Guardian Angels in New York).

As a case in point, nineteenth-century case law in Illinois reflecting inappropriate motives for citizen's arrest was met with varied responses from the courts, holding a citizen's arrest unlawful for the offense of "association with persons of bad character,"²⁰ but lawful when confining a man in a "rough place" without food or contact because he was a "night walker" and could not give a "good account" of himself.²¹ Modern case law indicates that ill-advised attempts at citizen's arrest have resulted in false imprisonment and negligent infliction of emotional distress tort claims.²² In 2022, the California Court of Appeal upheld defendants' motions for summary judgment with respect to plaintiff's claim for injuries when he allegedly tried to make a citizen's arrest at a Costco gas station, which erupted into a fist fight and physical intervention by the gas station attendant.²³

The *Restatement (Third) of Torts* asserts that private actors are privileged to use force to arrest another person for acts constituting felonies and when they witness the person committing a breach of the peace,²⁴ with commentary that the privilege is "a limited, backstop mechanism to facilitate enforcement of the law."²⁵ Nevertheless, states vary in circumscribing the scope of citizen's arrest. Washington has not codified citizen's arrest, but upholds its use under the common law.²⁶ Virginia statutory law permits a citizen's arrest for acts constituting felonies, but also permits under common law such arrests for breaches of the peace or a violation of "public decorum."²⁷ The Texas Criminal Code provides that "[a] peace officer *or any other person*, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace."²⁸ Mere detention would not constitute arrest under the meaning of the Texas statute.²⁹ Illinois, however, does not

20. *Dodds v. Board*, 43 Ill. 95 (1867).

21. *Miles v. Weston*, 60 Ill. 361, 366 (1871).

22. *E.g.*, *Agindotan v. Wells Fargo & Co.*, 2021 WL 345525 (Cal. Ct. App. 2021) (holding that the coercive elements of false arrest for detention at a bank were not met, but that the false accusation of presenting a counterfeit check based on his Nigerian descent, if true, "reflect deeply troubling conduct").

23. *Valdez v. Costco Wholesale Corp.*, 2022 WL 170703858 (Cal. Ct. App. 2022).

24. *RESTATEMENT (THIRD) OF TORTS* § 35 (Oct. 2022).

25. *Id.* at § 35 cmt. B.

26. *See State v. Gonzalez*, 604 P.2d 168 (Wash. Ct. App. 1985) (holding that a private citizen, here a store owner and employee, may perform a citizen's arrest when they have observed a person shoplifting).

27. *Hudson v. Comm.*, 585 S.E.2d 583 (Va. 2003).

28. *TEX. CRIM. CODE ANN.* § 14.01(a) (West 2022) (Offense Within View) (emphasis added).

29. *See Melendez v. State*, 467 S.W.3d 586 (Tex. App. 2015).

impose contemporaneity as a restriction, where its statute provides: “Any person may arrest another when he has reasonable grounds to believe that an offense other than an ordinance violation is being committed.”³⁰ Having probable cause to effect a citizen’s arrest may also constitute a defense to criminal conduct, which is a question for the jury,³¹ but only if the conduct of the person “arrested” involved exigent circumstances.³²

Where this state variation comes together is that authority to act is given, but motive is unquestioned. This would be true of private enforcement of the Texas Heartbeat Act. The motives of those engaged in citizen’s arrests remain deeply concerning at times, such as the racist motives of the white defendants convicted in 2022 in Georgia of the murder of Ahmaud Arbery, a black man running in their neighborhood, whom they claimed they suspected to be a burglar.³³ Georgia became the first state to repeal its citizen’s arrest statute,³⁴ with some of the early history of citizen’s arrest in the United States linked to the brutal history of slavery.³⁵ In other cases, the right of the public to detain a person for traffic violations, for example, continues to be upheld by the courts.³⁶ But the courts still recognize the risks, where the Supreme Judicial Court of Massachusetts refused to extend the power of a citizen’s arrest to acts such as misdemeanor driving while intoxicated, stating that such an extension could encourage “vigilantism and anarchistic actions.”³⁷ As stated by the dissenting judge in the Court of Appeals of New York in 2020:

Our recent national history is fraught with difficulties in race relations, amidst a cultural context in which there is a sharp division over the use

30. 726 ILL. COMP. STAT. 5/107-3 (West 2022) (Arrest by Private Person).

31. *City of Helena v. Parsons*, 436 P. 3d 710 (Mont. 2019) (asserting the defense of an attempted citizen’s arrest to a charge of reckless driving, when, after observing law enforcement chase a motorcycle and blocking the road to assist, resulting in the motorcyclist crashing and becoming injured).

32. *State v. Lazaryan*, 2009 WL 3426413 (Minn. Ct. App. 2010) (holding that the trial court properly instructed the jury that citizen’s arrest was not a valid defense for trespassing and disorderly conduct charges related to gaining access to government data unlawfully).

33. *Father and Son Sentenced to Life for a Hate Crime in Ahmaud Arbery’s Death*, NPR (Aug. 8, 2022), <https://www.npr.org/2022/08/08/1116261783/mcmichael-bryan-sentencing-ahmaud-arbery#:~:text=%E2%80%9494%20The%20white%20father%20and%20son,committing%20a%20federal%20hate%20crime>.

34. See Alexandra Beato & Melissa Davies, *HB 479: Repeal of Georgia’s Citizen’s Arrest Law*, 38 GA. ST. U. L. REV. 25 (2021); see also *Bacon v. State*, 820 S.E.2d 503 (Ga. Ct. App. 2018) (holding that an off-duty police officer acting outside of his jurisdiction could not rely on his official authority, but may effect a citizen’s arrest).

35. See Roger M. Stevens, *A Legacy of Slavery: The Citizen’s Arrest Laws of Georgia and South Carolina*, 72 S.C. L. REV. 105 (2021).

36. *E.g.*, *People v. Williams*, 74 N.E. 3d 58 (Ill. App. 2017).

37. *Comm. v. Grise*, 496 N.Ed.2d 162 (Mass. 1986).

of guns. This would surely justify caution in this area [of citizen's arrest], rather than an expansion. Recent years have seen a spate of incidents in which self-proclaimed law enforcement officials, such as neighborhood watch group or homeowners association members, and similar vigilantes have engaged in aggressive conduct, often with tragic consequences. . . . The expansion of citizen's arrest jurisprudence to amplify the authority of law enforcement officials who are not police or peace officers is an egregious mistake.³⁸

Thus, private enforcement in the form of citizen's arrest has not been a preferred method of the government or the public for some time and for good reason. Although systemic abuses in enforcement of the criminal justice system have been subject to calls for reform, calling on the public to assist and intervene is an approach fraught with risk. Most members of the public are untrained and biased in their investigation practices, and are not constrained by licensure or employment discipline.³⁹

B. The Purpose and Scope of the Posse

With respect to the posse, its lawful use has been more limited historically than citizen's arrest laws. A posse or posse comitatus is generally defined as a "[g]roup of people acting under authority of police or sheriff and engaged in searching for a criminal or in making an arrest."⁴⁰ The right of law enforcement to enlist members of the public to assist them in their investigations and in making an arrest is derived from the common law and subsequently enacted into state statute. The practice has been upheld against Thirteenth Amendment challenges of involuntary servitude as a special circumstance justified by public need and civic duty.⁴¹ In early English common law, when law enforcement was less developed during the Medieval era,⁴² the sheriff had the right to call upon male members of the general public to prevent riots and to arrest suspects, a practice widely adopted by American states.⁴³

In Arkansas, for example, it is a criminal offense to refuse to assist law enforcement, upheld against constitutional challenge, where, a police

38. *People v. Page*, 149 N.E.3d 905, 916 (N.Y. 2020) (Fahey, J., dissenting).

39. *But see Romo v. State*, 577 S.W.2d 251 (Tex. Crim. App. 1979) (out-of-jurisdiction officer made lawful citizen's arrest); *see also Turner v. State*, 901 S.W.2d 767 (Tex. App. 1995) (private security guard not a peace officer but authorized to make a citizen's arrest).

40. BLACK'S LAW DICTIONARY (6th ed. 1990).

41. *Boyle v. City of Liberty, Mo.*, 833 F. Supp. 1436, 1445 (1993).

42. RESTATEMENT (THIRD) OF TORTS § 35, Rep. note a. (Oct. 2022) (addressing the origins of the "hue and cry" laws).

43. *Williams v. State*, 490 S.W.2d 117, 120 (Ark. 1973).

officer commanded two members of the public who happened to be walking by to watch the back of a house to see if a shoplifting suspect would emerge.⁴⁴ The members of the public refused vehemently and were arrested for doing so when they “profanely stated that they would not assist a police officer at any time or place, and would not help him if he were lying in the street dying.”⁴⁵ Enlistment also poses risks to members of the public, as shown in Missouri where the public was asked to park their cars in the middle of the highway to create a road block to stop a high-speed car chase, resulting in substantial property damage and the death of a participating civilian member of the posse, as well as civil litigation against the municipalities and State Highway Patrol.⁴⁶

This common law practice authorizing law enforcement to create a posse has understandably become less favorable over time and less necessary as law enforcement departments became fully and regularly staffed.⁴⁷ The continued reticence of the public to assist law enforcement is clear. For example, red flag gun statutes that involve public reporting of persons of concern who possess firearms are decried by some as unconstitutional violations of due process and sanctioning pre-crime.⁴⁸

As a narrower application, the Posse Comitatus Act of 1878 was enacted during Reconstruction after the Civil War to address the use of military personnel in the South to enforce law and to hold Federal troops accountable.⁴⁹ Today it continues to limit military involvement in local law enforcement activities:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.⁵⁰

At the federal level, military personnel who cooperate with state law enforcement in providing evidence of criminal activity, such as drug trafficking and possession, will not necessarily violate the Posse

44. *Id.* (applying ARK. CODE ANN. § 42-204 (1964)).

45. *Id.* at 119.

46. *Boyle v. City of Liberty, Mo.*, 833 F. Supp. 1436 (1993).

47. *Williams*, 490 S.W.2d at 121.

48. See Amber Phillips, *What are Red-flag Laws?*, WASH. POST (June 14, 2022), <https://www.washingtonpost.com/politics/2022/06/14/what-is-a-red-flag-law/>.

49. *People v. Hayes*, 494 N.E.2d 1238 (Ill. App. 1986) (addressing 18 U.S.C. § 1385 (1982)).

50. 18 U.S.C. § 1385 (last amended by Pub. L. 117-81, 135 Stat. 1904, Dec. 27, 2021). A member of the State National Guard is considered a “hybrid” member of the National Armed Forces and will not be subject to the Posse Comitatus Act until called to national duty. See *Doggett v. State*, 791 So.2d 1043, 1046 (Ala. Crim. App. 2000).

Comitatus Act if they are deemed to be cooperating with an investigation without engaging in military activity.⁵¹ If the military investigators are working directly for the Department of Defense pursuant to federal investigation, then there is no violation of the Act.⁵² This form of posse does not involve the same risks as private enforcement by members of the general public, where the Posse Comitatus Act addresses the risk of “the potential danger of military permeation of civilian law enforcement”⁵³ as a way to undercut democratic institutions, rather than arbitrary enforcement of the law by untrained members of the public.

C. *Modern Mandatory Reporting Laws*

In contrast, modern state mandatory reporting laws, such as child abuse and neglect reports by the public or the professional reporting of impaired colleagues, have been more well received. They often seek to prevent harm and enable early support on matters generally agreed upon by the public to be worthy of concern. These laws are justified, in part, because they rely on necessity, where state investigators have difficulty detecting potential harm. Heartbeat Act proponents would likely argue that private enforcement is also necessary to protect life from lethal actions conducted in secrecy. However, there are significant differences.

Mandatory child abuse reporting laws by members of the public are made to an official body of experts with the power to screen out those reports that are frivolous or unsubstantiated. Unlike Heartbeat Act claims, reports of abuse and neglect are not made for personal profit in the form of statutory damages. In addition, professional reporting and self-regulation relies on experience, training and expertise within the professional membership, which inherently informs and constrains those reporting legal, medical, and other professionals to disciplinary boards.

For example, the Model Rules of Professional Conduct state that “[a] lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”⁵⁴ Attorneys are guided by and trained to understand the language and import of the rules,

51. *Hayes*, 494 N.E.2d. at 1240 (holding that Naval investigators who turned over evidence of drug activity to the Chicago Police did not violate the Posse Comitatus Act).

52. *U.S. v. Hartley*, 486 F. Supp. 1348, 1357 (M.D. Fla. 1980).

53. *Id.*

54. MODEL RULES OF PROF’L CONDUCT r. 8.3(a) (AM. BAR ASS’N 2020). *See also* cmt. [3] to Rule 8.3, which provides that “[a] report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency is more appropriate in the circumstances.”

as well as their interpretation in ethics opinions, and the scope and preamble of the rules and their official comments. While members of the public may file a grievance against an attorney with the same disciplinary body, they are not mandated to do so, and they will not be financially compensated. Should they file a malpractice claim for damages, they would have clear standing as the injured client.

Physicians have a similar duty to report impaired colleagues under the American Medical Association (AMA) Code of Medical Ethics as a form of self-regulation. The purpose of the duty is to protect patient interests and assist their professional colleagues in receiving needed care.⁵⁵ However, the AMA opposes mandatory reporting of whole classes of patients or diagnoses absent a compelling public health benefit for reporting.⁵⁶ Even among professionals who may agree that particular actions are concerning, mandatory private enforcement remains unsettling. For example, the California ballot initiative which mandated that physicians report patients' undocumented status was held unlawful by the courts in the 1990s.⁵⁷ The Texas Heartbeat Act makes no such presumptions of discomfort, encouraging members of the public to sue medical professionals whom they may never have met.

III. PRIVATE ENFORCEMENT ON CONTROVERSIAL ISSUES: BAD ACTORS AND BAD POLICY

The Texas Heartbeat Act specifically permits and encourages members of the general public in any state to sue Texas medical professionals and those who aid and abet them to unlawfully perform an abortion.⁵⁸ According to the statute, such members of the public have standing to sue, although Texas courts have already found otherwise, identifying the fatal procedural flaw that there is no injury in fact to the

55. CODE OF MED. ETHICS Op. 9.3.2.

56. See Danielle Hahn Chaet, *AMA Policies and AMA Code of Medical Ethics' Opinions Related to Responding to Violence*, 20 *AMA J. ETHICS* 44 (Jan. 2018), <https://journalofethics.ama-assn.org/article/ama-policies-and-ama-code-medical-ethics-opinions-related-responding-violence/2018-01#:~:text=The%20opinion%20further%20states%20that.all%2050%20states%20%5B8%5D>.

57. CAL. PROP. 187 (1994). *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (holding that federal immigration law preempts California from enacting state law to regulate immigration, thus barring enforcement of California Proposition 187). See Susan Coyle, *Ethics Case Study: Providing Care to Undocumented Immigrants*, *THE HOSPITALIST* 25, n. 12 (July/Aug. 2003), https://www.acponline.org/system/files/documents/running_practice/ethics/case_studies/care_imm.pdf.

58. See generally Michael T. Morley, *Constitutional Tolling and Preenforcement Challenges to Private Rights of Action*, 97 *NOTRE DAME L. REV.* 1825 (2022); Richard D. Rosen, *Deterring Previability Abortions in Texas Through Private Lawsuits*, 54 *TEX. TECH. L. REV.* 115 (2021).

plaintiff.⁵⁹ In *Jackson v. Whole Woman's Health*, lack of Article III standing precluded a ruling on the substance of the claim, where the individual plaintiff, a prominent anti-abortion advocate, admitted he had no intention of filing a lawsuit despite his role in helping to create the state legislation.⁶⁰ The Court, however, in dicta did acknowledge the possibility of a challenge based on standing:

This is not to say that the petitioners, or other abortion providers, lack potentially triable state-law claims that S. B. 8 improperly delegates state law enforcement authority. Nor do we determine whether any particular S. B. 8 plaintiff possesses standing to sue under state justiciability doctrines. We note only that such arguments do not justify federal courts abandoning traditional limits on their equitable authority and our precedents enforcing them.⁶¹

The Texas state legislature expressly sought to restrict the medical profession's discretionary role in providing health services to the public, but it also attached the specter of personal liability for fees to attorneys who take on legal representation that challenges the law, allowing claims up to three years after the case is closed.⁶² The approach is to engender fear among licensed professionals of the general public to achieve a particular end, which is starkly different from most other private enforcement laws. In the Texas enforcement law, the public includes litigants from any state,⁶³ where the first three cases filed in Texas against an abortion provider who admitted he had violated the Act were from Arkansas, Illinois, and Texas, with no connection to the doctor or patient. The only persons prohibited from filing a complaint under the statute are government officials and men who caused the pregnancy through sexual violence:⁶⁴

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;

59. Standing has also been denied in challenges to a legal right to abortion by "unborn plaintiffs." *E.g.*, *Benson v. McKee*, 273 A.3d 121 (R.I. 2022).

60. *Jackson*, 142 S. Ct. at 537. *See also* *Whole Woman's Health v. Jackson*, 31 F.4th 1004 (5th Cir. 2022) (dismissing challenges to the private enforcement provisions).

61. *Id.* at 535 n.2.

62. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022 (West 2022) (Award of Attorney's Fees in Actions Challenging Abortion Laws).

63. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2022) (eff. Sept. 1, 2021).

64. *Id.* at § 171.208(j) (West 2022) (eff. Sept. 1, 2021).

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, if the abortion is performed or induced in violation of this subchapter, regardless of whether the persons knew or should have known that the abortion would be performed or induced in violation of this subchapter; or
3. Intends to engage in the conduct described by Subdivision (1) or (2).⁶⁵

Unlike some of the other forms of private enforcement discussed above, such as professional mandatory reporting, under the Texas Heartbeat Act, plaintiffs as members of the general public have no requisite expertise or training in the medical field, or understanding of the medical needs or interests of the patient receiving care. The court receiving the filing of the complaint is the general governing body screening its validity, rather than a specialized licensing body or government agency. While civil private enforcement actions under the Heartbeat Act are not mandatory and do not involve coercion by the government or use of force,⁶⁶ they offer a financial reward to the successful plaintiff and involve no assessment for the potential for improper motive. As shown by the long history of litigation surrounding citizen's arrest laws, the motives of a member of the public may often be questionable when authorized to enforce the law and exert its power.⁶⁷

Lawful abortions have now ceased in the State of Texas.⁶⁸ The Texas Heartbeat Act currently retains its private enforcement provision, and litigation to overturn it is wending its way through state and federal courts. In effect, now that the practice of medical abortion is a felony crime, those plaintiffs in the general public potentially seeking monetary gain through

65. *Id.* at § 171.208(a) (emphasis added).

66. See generally Jacob D. Charles & Darrell A.H. Miller, *Violence and Nondelegation*, 135 HARV. L. REV. F. 463 (2022).

67. Compare Kimberly Kessler Ferzan, Response, *Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground*, 100 TEX. L. REV. ONLINE ED. (Sept. 2021), <https://texaslawreview.org/wp-content/uploads/2021/09/Ferzan.Publication.pdf> (arguing that the combination of stand-your-ground laws expanding the right to use lethal self-defense, combined with citizen's arrest, creates public policy concerns).

68. Erin Douglas & Eleanor Klibanoff, *Abortions in Texas Have Stopped After Attorney General Ken Paxton said Pre-Roe Bans Could be in Effect, Clinics Say*, TEX. TRIB. (June 24, 2022), <https://www.texastribune.org/2022/06/24/texas-clinics-abortions-whole-womans-health/#:~:text=Abortions%20in%20Texas%20have%20ceased,and%20Planned%20Parenthood%20Texas%20said.>

the Act could also set in motion official criminal arrests and prosecution.⁶⁹ The Texas Heartbeat Act has revealed that private enforcement under state law is a dangerous but effective means of curtailing the conduct of individuals, even highly skilled, professionally licensed individuals without federal constitutional protection.

Whether private enforcement is an apt approach for certain types of harms deserves renewed discussion, particularly if a state legislature as a representative body has given sole enforcement power to the public. The argument here is not that private enforcement should be discouraged; it is that private enforcement is a valuable tool for society for certain, narrow, uncontroversial purposes. Admittedly, sole reliance on government enforcement of the law may be ill-advised and could lead to public apathy toward helping others,⁷⁰ or even to an imbalance of power between a government and its citizens.⁷¹ Nevertheless, clearly history would suggest that private enforcement is an unwise strategy to enforce the law when public opinion is deeply divided, as it is in the American legal abortion debate.

69. See Eleanor Klibanoff, *Texans Who Perform Abortions Now Face Up to Life in Prison, \$100,000 Fine*, TEX. TRIB. (Aug. 25, 2022), <https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion>.

70. M. CHERIF BASSIOUNI, *CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE* 76-77 (1977).

71. See Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1545 (2022).