POPULAR ENFORCEMENT OF CONTROVERSIAL LEGISLATION

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Texas opted for popular enforcement of Senate Bill 8 ("S.B. 8"), prohibiting abortion once a fetal heartbeat can be detected. Rather than enforcement by government officials, any member of the public may sue for statutory damages from any person who (1) performs an abortion violating the statute, (2) knowingly aids or abets such an abortion, or (3) "intends" to perform or aid and abet such an abortion.

The cause of action authorized by S.B. 8 is a "popular action," a once common method of statutory enforcement closely related to qui tam litigation. This Article draws on the history of such litigation to argue against broad revival, particularly with respect to controversial legislation. Lawmakers had good reasons for moving away from popular actions, which turn law enforcement into a profit-making enterprise.

The financial incentives that spur popular enforcement can lead litigants to engage in self-interested conduct inconsistent with the public interest, like targeting technical statutory violations tangential to the legislative objectives, extorting secret payments to suppress litigation, encouraging violations of the law to generate additional bounties, or delaying enforcement so statutory penalties can accumulate. Practices like these characterized popular enforcement of the Gin Act 1736 and twentieth-century enforcement of the Sunday Observance Act 1780, English statutes imposing controversial legal restraints.

Where public opinion is already divided on the substance of an enactment, popular enforcement tends to inflame pre-existing social conflicts and undermine public respect for the law. S.B. 8 is prone to abusive, marginal, and pointless

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enforcement actions analogous to those observed in our two English case studies. Widespread litigation under the statute by financially motivated informers is likely to produce unintended consequences that cause even supporters of fetal heartbeat legislation to regret reliance on popular enforcement.

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INTRODUCTION

The Supreme Court's decision to overrule *Roe v. Wade*[1] in *Dobbs v. Jackson Women's Health Organization*[2] has inaugurated a period in which many states may revisit their laws governing abortion. The Court concluded that authority to regulate abortion rests with "the people and their elected representatives."[3] Legislators in many states will want to exercise that authority, albeit in different ways.

Some conservative states will be tempted to follow the path laid out by the State of Texas in Senate Bill 8 ("S.B. 8"), prohibiting abortion, except in medical emergencies, once a fetal heartbeat can be detected.[4] The statute, which became effective while the *Dobbs* case was pending, challenged then-controlling Supreme Court case law indicating that states could not prohibit elective abortions before "viability," when a fetus can survive outside the womb.[5] But that aspect of the legislation did not make S.B. 8 unusual. Nearly a third of the states had adopted pre-*Dobbs* legislation incompatible with the viability rule,[6] and whether to allow greater regulation of pre-viability abortions was the issue on which the Court granted

1. 410 U.S. 113 (1973).

2. 142 S. Ct. 2228, 2242 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

3. *Id.*

4. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.203–171.204 (West 2021) (as amended by S.B. 8); *see also* S. 8, 87th Leg., Reg. Sess. (Tex. 2021) (original text of S.B. 8). The statute defines "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." TEX. HEALTH & SAFETY CODE ANN. § 171.201(1) (West 2021). Some medical providers object to the statute's terminology on the ground that the cardiac electrical activity detected in an ultrasound early in pregnancy differs from the opening and closing of heart valves that produces the sound of a heartbeat in adults. *See* Selena Simmons-Duffin & Carrie Feibel, *The Texas Abortion Ban Hinges on "Fetal Heartbeat." Doctors Call that Misleading*, NPR: POLICY-ISH, https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion (May 3, 2022, 4:45 PM).

5. *See Casey*, 505 U.S. at 846 (before viability, State's interests are not strong enough to support prohibition or substantial obstacles to elective abortion). The District Court in *United States v. Texas* credited medical evidence that the cardiac electrical impulse that triggers the Texas statutory prohibition "can occur 'very early in pregnancy,' as soon as six weeks LMP or sometimes sooner." United States v. Texas, 1:21-CV-796-RP, slip op. at 3 (W.D. Tex. Oct. 6, 2021). Fetal viability is not currently possible at that stage of pregnancy. *Id.*

6. *See State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions (last updated May 3, 2022) ("16 states . . . have attempted to ban abortion before viability but have been stopped by court order.").

certiorari in *Dobbs*, before taking up Mississippi's invitation to reconsider the broader question of whether the federal Constitution protects a right to abortion at all.[7] What made S.B. 8 unusually controversial was not simply its incompatibility with then-controlling constitutional doctrine, but the statute's uncommon method of enforcement. Rather than providing that state officials can enforce S.B. 8, the act authorizes any person (not employed by state or local government) to sue for statutory damages of at least $10,000 from anyone who (1) performs an abortion violating the statute, (2) knowingly aids or abets such an abortion, or (3) "intends" to perform or aid and abet such an abortion.[8]

The provision for enforcement by any member of the public marks S.B. 8 as a close relative of *qui tam* legislation.[9] The cause of action authorized by S.B. 8 constitutes what Sir William Blackstone called a "popular action," a broad category that includes *qui tam* actions as a more familiar subcategory.[10] For hundreds of years in English and early American law, popular enforcement played a central role in statutory implementation, alongside suits by government officials and suits by injured parties.[11] In a popular action, a private individual—sometimes called an "informer" or "relator"—sues for a

7. *See* Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619–20 (2021) (granting certiorari "limited to Question 1 presented by the petition"); Petition for a Writ of Certiorari at i, *Dobbs*, 141 S. Ct. 2619 (2021) (No. 19-1392) (Question 1: "Whether all pre-viability prohibitions on elective abortions are unconstitutional."). In the interest of full disclosure, I note that I filed an amicus brief in support of Mississippi in the *Dobbs* case. *See* Brief of Professor Randy Beck as *Amicus Curiae* in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

8. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).

9. *See* Jenna Greene, *Crafty Lawyering on Texas Abortion Bill Withstood SCOTUS Challenge*, REUTERS (Sept. 5, 2021), https://www.reuters.com/legal/government/crafty-lawyering-texas-abortion-bill-withstood-scotus-challenge-greene-2021-09-05/ (architects of S.B. 8 "figured out how to apply qui tam statutes . . . in the abortion law context"); *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1001 (2018) (former Texas Solicitor General who helped draft S.B. 8 suggesting that "providing for private enforcement through civil lawsuits and qui tam relator actions" can "enable private litigants to enforce a statute even after a federal district court has enjoined the executive from enforcing it").

10. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES * 160.

11. *See generally* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 343–44 (1989); J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 550–51, 565–66 (2000) [hereinafter Beck, *English Eradication*]; Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1254 (2018) [hereinafter Beck, *Qui Tam Litigation*]; Note, *The History and Development of Qui Tam*, 1972 WASH. UNIV. L.Q. 81, 83.

statutory forfeiture.[12] The informer does not need to demonstrate any particularized injury or personal connection to the challenged conduct, making popular enforcement an exception to modern rules of standing.[13] Instead, the statute itself gives the litigant a stake in the lawsuit, allowing a successful informer to keep part or all of the money or property forfeited by the defendant.[14] Commentators have analogized informers to bounty hunters[15] and have compared the financial incentive in a *qui tam* statute to a contingent-fee arrangement.[16]

Popular enforcement of abortion regulations is a surprising development.[17] The long Anglo-American history of popular

12. CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 1 (2021), https://sgp.fas.org/crs/misc/R40785.pdf.

13. The Supreme Court relied on the long history of *qui tam* legislation in England and the United States to find *qui tam* litigation consistent with Article III's "case" or "controversy" requirement, even though the relator suffers no particularized injury distinct from the communal injury resulting from a violation of the law. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774–78 (2000). *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, 1039 (2022) ("The [S.B. 8] plaintiff need not allege or prove personal injury to obtain a remedy.").

14. BLACKSTONE, *supra* note 10, at *159–60.

15. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting) ("In effect, the Texas Legislature has deputized the State's citizens as bounty hunters, offering them cash prizes for civilly prosecuting their neighbors' medical procedures."); Isaac B. Rosenberg, *Raising the Hue . . . and Crying: Do False Claims Act* Qui Tam *Relators Act Under Color of Federal Law?*, 37 PUB. CONT. L.J. 271, 292 (2008) ("Many commentators have likened *qui tam* relators to bounty hunters.").

16. Beck, *English Eradication*, *supra* note 11, at 541 ("[*Q*]*ui tam* statutes privatize government litigation, permitting the private informer to sue for the government on a contingent-fee basis."); United States *ex rel.* Stevens v. Vt. Agency of Nat. Res., 162 F.3d 195, 202 (2d Cir. 1998) ("The real party in interest in a *qui tam* suit is the United States. . . . [T]he *qui tam* plaintiff has an interest in the action's outcome, but his interest is less like that of a party than that of an attorney working for a contingent fee."), *rev'd on other grounds*, 529 U.S. 765 (2000); *but see* United States *ex rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 290 n.18 (5th Cir. 1999) (unlike a contingent fee lawyer, a *qui tam* relator owes no legal duty to further the interests of the government).

17. A growing body of academic literature addresses the history of popular enforcement. *See, e.g.*, Caminker, *supra* note 11, at 341–43; Beck, *Qui Tam Litigation*, *supra* note 11, at 1259–1305; Beck, *English Eradication*, *supra* note 11, at 565–608; Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 816–17 (1969); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406–09 (1988); Cass R. Sunstein, *What's Standing After* Lujan*?*: *Of Citizen*

enforcement still plays a significant role in modern debates about constitutional interpretation, but such statutes have largely fallen out of favor with lawmakers.[18] England began the process of repealing its remaining popular actions in 1951.[19] Most statutes creating popular or *qui tam* actions in the United States have also been repealed or fallen into disuse, the principal exception being the federal False Claims Act and comparable state-level enactments aimed at protecting the government against fraud.[20]

This Article draws on the history of *qui tam* and other popular actions to argue against broad revival of popular enforcement, particularly with respect to controversial legislation. For many readers, the fact that the Texas statute seeks to regulate abortion at a relatively early stage in pregnancy will be a sufficient reason to oppose the legislation. But the goal of this Article is to convince even people who might support S.B. 8's abortion-related legislative aims to reject the method of enforcement, and to advise caution for legislators wondering whether S.B. 8 might serve as a template for enforcement in other controversial areas of law.

Texas resorted to popular enforcement of S.B. 8 in an effort to limit pre-enforcement judicial review of its fetal heartbeat legislation. Before *Dobbs*, abortion providers often challenged state abortion regulations in federal court before they went into effect, seeking preliminary injunctions against state officials with enforcement powers.[21] Texas legislators sought to avoid that outcome by letting

Suits, "Injuries," and Article III, 91 MICH. L. REV. 163, 164 (1992); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement for a Partisan World* (forthcoming) (on file with author).

18. *See* Beck, *Qui Tam Litigation*, *supra* note 11, at 1305–16 (discussing constitutional implications of long history of popular enforcement of duties of government officials); Beck, *English Eradication*, *supra* note 11, at 553–55 (discussing small number of remaining federal *qui tam* statutes); Caminker, *supra* note 11, at 341 (discussing "relative obscurity" of *qui tam* enforcement today); *id.* at 354–87 (discussing status of *qui tam* litigation under Articles II and III of U.S. Constitution).

19. *See* Beck, *English Eradication*, *supra* note 11, at 604–08.

20. *See* Caminker, *supra* note 11, at 342 ("Most early qui tam statutes have long been repealed; of those remaining, most lie essentially dormant."). The federal False Claims Act is codified at 31 U.S.C. §§ 3729–3733. Federal law creates financial incentives for states to enact their own qualifying false claims statutes. *See State False Claims Act Reviews*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. INSPECTOR GEN., https://oig.hhs.gov/fraud/state-false-claims-act-reviews/ (last visited May 22, 2022); *see also, e.g.*, CAL. GOV'T CODE §§ 12650–12656 (West 2013).

21. *See, e.g.*, Whole Woman's Health v. Paxton, 264 F. Supp. 3d 813, 825 (W.D. Tex. 2017) (temporary restraining order preventing Texas Attorney General and other state officials from enforcing law requiring physician to bring about fetal demise prior to performing dilation and evacuation abortion); *see generally Ex parte* Young, 209 U.S. 123, 159–60 (1908) (sovereign immunity did

private citizens enforce S.B. 8 and explicitly denying state officials power to implement the legislation.[22] The Fifth Circuit had previously rejected a pre-enforcement challenge to a state law affording private citizens a tort claim against a doctor who performed an abortion.[23] As the Texas Legislature hoped, the Fifth Circuit applied that precedent to deny a stay of S.B. 8.[24] As a result, many Texas abortion clinics pared back their services to comply with the statute and a significant number of women began traveling to abortion providers in surrounding states.[25] The United States Supreme Court initially authorized a narrow pre-enforcement claim against state medical licensing officials, reading S.B. 8 to allow certain enforcement activities by those officials, but the Texas Supreme Court shut the door to that avenue of relief when it construed the statute to bar enforcement through licensing actions.[26]

Texas's success in limiting pre-enforcement judicial review of its fetal heartbeat bill led other conservative-leaning states to consider measures comparable to the Texas statute. Idaho authorized a more circumscribed civil action against medical professionals who perform post-heartbeat abortions.[27] Oklahoma enacted legislation closely

not bar suit for injunctive relief against state official seeking to enforce unconstitutional state statute).

22. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (West 2021).

23. Okpalobi v. Foster, 244 F.3d 405, 409, 429 (5th Cir. 2001) (en banc).

24. Whole Woman's Health v. Jackson, 13 F.4th 434, 442–43 (5th Cir. 2021) (per curiam). By the time the Fifth Circuit released its opinion, the Supreme Court had already rejected an emergency request to intervene. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495–96 (2021).

25. Petitioner's Brief at 14–15, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463).

26. *Compare Whole Woman's Health*, 142 S. Ct. at 531–37 (2021), *with* Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022) (opinion on certified question from United States Court of Appeals for the Fifth Circuit). At the same time that the Supreme Court considered the clinics' case, it also heard oral argument in a case brought by the Department of Justice against the State of Texas, but the Court ultimately dismissed the writ of certiorari as improvidently granted. United States v. Texas, 142 S. Ct. 522, 522 (2021). Meanwhile, fourteen suits were filed in the state courts seeking pre-enforcement review of S.B. 8. The cases were consolidated for pretrial proceedings, Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179, slip op. at 3 (Dist. Ct. Travis Cnty., Tex. Dec. 9, 2021), and the judge granted partial summary judgment, issuing a declaratory judgment that S.B. 8 violated Texas law concerning standing, imposed punishment without due process of law and violated Texas law regarding delegation of executive authority. *Id.* at 47 (granting declaratory relief, but denying injunctive relief pending trial on the merits).

27. Petitioners' Brief, *supra* note 25, at 48; S. 1309 § 6, 66th Leg., 2d Reg. Sess. (Idaho 2022); S. 1358 § 1, 66th Leg., 2d Reg. Sess. (Idaho 2022); Kelcie Moseley-Morris, *Idaho Governor Signs Bill Effectively Banning Most Abortions*, IDAHO CAP. SUN, https://idahocapitalsun.com/2022/03/23/idaho-governor-signs-

modeled on the Texas law.[28] Meanwhile, those on the other end of the political spectrum have openly discussed whether liberal states should adopt similar legislation to enforce controversial regulations in other sensitive areas.[29] Governor Gavin Newsom of California signed legislation modeled on the Texas statute creating a popular action against anyone who manufactures, distributes, transports, or imports assault weapons or certain other banned firearms or parts.[30] The Petitioner's brief for the Supreme Court in *Whole Woman's Health v. Jackson* indicates that comparable legislation has been introduced in Illinois to regulate gun possession and argues that analogous enforcement mechanisms could be used in contexts relating to marriage rights, flag burning, religious freedom, immigration, and campaign expenditures.[31]

There may be limited areas in which popular enforcement makes sense.[32] But there are good reasons why lawmakers moved away from widespread reliance on popular actions, which turn law enforcement

bill-effectively-banning-most-abortions/ (Mar. 23, 2022). The Idaho legislation is more narrowly tailored than the Texas legislation. It does not allow suit by any member of the public, but only by "[a] female upon whom an abortion has been attempted or performed, the father of the preborn child, a grandparent of the preborn child, a sibling of the preborn child, or an aunt or uncle of the preborn child." *See* S. 1358 § 1, 66th Leg., 2d Reg. Sess. (Idaho 2022). The statute allows recovery of actual damages and statutory damages of $20,000, but liability is limited to "medical professionals" who "attempted, performed or induced" a post-heartbeat abortion. *Id.* The Idaho legislation does not include a provision like the Texas law allowing suit against anyone who aids or abets an abortion violating the statute. *See id.*

28. *See* Oklahoma Heartbeat Act, 63 OKLA. ST. ANN. §§ 1-745.31–1-745.44 (2022).

29. *See* Alison Durkee, *California Moves Forward with Gun Control Bill that Mimics Structure of Texas Abortion Ban*, FORBES (Feb. 18, 2022, 3:22 PM), https://www.forbes.com/sites/alisondurkee/2022/02/18/california-moves-forward-with-gun-control-bill-that-mimics-structure-of-texas-abortion-ban/?sh=60852d4b7897.

30. *See* Veronica Stacqualursi, *Newsom Signs California Gun Bill Modeled After Texas Abortion Law*, CNN (July 22, 2022), https://www.cnn.com/2022/07/22/politics/california-newsom-gun-bill-texas-abortion-law/index.html; California Senate Bill 1327 (signed July 22, 2022) (CAL. BUS. & PROF. CODE, Ch. 38, §§ 22949.62, 22949.65).

31. Petitioners' Brief, *supra* note 25, at 48–50.

32. Selectively reviving carefully circumscribed *qui tam* litigation against government officials could enhance legal accountability in contexts where rules of standing make enforcement actions difficult to pursue. *See* Randy Beck, *Promoting Executive Accountability Through* Qui Tam *Legislation*, 21 CHAP. L. REV. 41, 41–43 (2018); Randy Beck & John Langford, *Reviving Qui Tam Monitoring of Executive Branch Officials*, LAWFARE (Jan. 22, 2020, 8:06 AM), https://www.lawfareblog.com/reviving-qui-tam-monitoring-executive-branch-officials.

into a profit-making enterprise.[33] While a government attorney enforcing a statute may act out of self-interest, the attorney faces institutional and political constraints that moderate the enforcement process and help protect the public interest.[34] Popular enforcement, on the other hand, expressly appeals to a litigant's desire for financial gain and permits pursuit of private agendas that distort the enforcement process, undermining legislative goals and short-changing the common good.[35]

Part I of the Article argues that legislation providing for popular litigation tends to undermine important ideals relating to the process of statutory enforcement.[36] A law creating a popular action includes a built-in conflict of interest. A person filing a popular action represents the communal interest in law enforcement, but simultaneously pursues private financial gain and sometimes other personal objectives as well.[37] The financial incentives and personal motives that spur popular enforcement have historically led to a laundry list of self-interested practices by informers that undermine the public interest. The conflict of interest inherent in popular enforcement manifests itself, for instance, when informers file claims based on technical statutory violations tangential to the legislative objectives, extort secret payments to suppress litigation, encourage violations of the law to create new litigation targets, or delay enforcement so statutory penalties can accumulate.

Part II offers two historical case studies of popular enforcement of controversial legislation. We first consider a 1736 English statute enlisting informers to suppress unlicensed retail sales of gin and

33. 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 139 (1956) (enforcement by common informers consistently and sharply criticized); *see generally* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 1 (2013) (overview of process by which our institutions made "the absence of the profit motive a defining feature of government").

34. *See* Ellen Yaroshefsky, *New Models for Prosecutorial Accountability*, 2016 CARDOZO L. REV. DE NOVO 132, 136 (2016) (prosecutorial obligations enforceable through "disciplinary systems, judicial control over prosecutorial conduct, and internal systems within the prosecutors' offices"); Morrison v. Olson, 487 U.S. 654, 728–32 (1989) (Scalia, J., dissenting) (discussing political and institutional checks on executive branch prosecutors that are absent in the case of an independent counsel).

35. *See* Andrew Keshner, *Texas Abortion Law: $10,000 Penalty Could Incentivize 'Bounty Hunters' to Make 'Tens of Thousands of Dollars*,*'* MARKETWATCH (Sept. 6, 2021), https://www.marketwatch.com/story/texas-abortion-law-10-000-penalty-could-incentivize-bounty-hunters-to-make-tens-of-thousands-of-dollars-11630609738.

36. *See infra* notes 46–204 and accompanying text.

37. *See* 2 RADZINOWICZ, *supra* note 33, at 138.

other distilled liquors.[38] Informers enforcing the legislation routinely deceived merchants into violating the statute, sought unjustified recoveries against innocent defendants through perjury, or extorted secret payments from potential litigation targets. Informers became so unpopular that they were repeated targets of mob violence, with several losing their lives and others forced into naval service by British "press gangs."[39] The judiciary abandoned attempts to enforce the statute, and Parliament eventually replaced the controversial regulatory scheme.[40]

The second case study considers twentieth-century enforcement of England's 1780 Lord's Day Observance Act.[41] Professional informers sought to enrich themselves through litigation to defend "the English Sunday," targeting popular recreational activities and shutting down charitable fundraisers designed to benefit British troops during and after World War II.[42] Following embarrassing press accounts of the activities of self-interested informers, some of whom did not share the legislation's Sabbatarian aims, Parliament responded in 1951 by eliminating England's remaining statutory provisions that allowed popular enforcement.[43]

The emergence of analogous problems in these two very different social and legal contexts highlights the structural flaw embedded in legislation providing for popular actions. Self-interested informers wielding law enforcement powers tend to inflame pre-existing social conflicts. As accounts of unwarranted enforcement actions and abusive litigation tactics circulate, the public tends to lose respect for laws subject to popular enforcement, particularly in contexts where opinions were already divided on the underlying legislative mandates.

Part III discusses ways that the conflict of interest inherent in popular enforcement could produce abusive and pointless litigation under S.B. 8 if the Texas statute ever becomes widely enforced.[44] The legislation creates numerous opportunities for self-interested litigation targeting individuals and companies with little or no connection to the state's abortion industry and includes features making it difficult to defend against an S.B. 8 action, even if the

38. *See infra* notes 209–337 and accompanying text.

39. *See* Jessica Warner & Frank Ivis, *"Damn You, You Informing Bitch."* Vox Populi *and the Unmaking of the Gin Act of 1736*, 33 J. SOC. HIST. 299, 317, 319 (1999).

40. *Id.* at 320.

41. *See infra* notes 338–520 and accompanying text.

42. *See The Common Informer: Council Seeks a Way Out*, KINEMATOGRAPH WKLY., Feb. 10, 1944, at 20.

43. *See Lord's Day Act Informer*, YORKSHIRE OBSERVER, July 2, 1951, at 3 (royal assent granted to bill abolishing common informers).

44. *See infra* notes 521–627 and accompanying text.

defendant complied with statutory requirements.[45] Widespread litigation under S.B. 8 by financially motivated informers could easily become corrosive to the rule of law, undermining public respect for the legal system and causing even supporters of fetal heartbeat legislation to regret the scheme of popular enforcement.

I. CONFLICTING INTERESTS IN POPULAR ACTIONS

Sir William Blackstone, in his *Commentaries on the Laws of England*, discusses "penal statutes" that impose forfeitures for conduct violating legislative requirements.[46] The defendant who violates a penal statute must give the money or property forfeited "to such persons as the law requires."[47] "The usual application of this forfeiture," according to Blackstone, "is either to the party grieved, or else to any of the king's subjects in general."[48] A statutory recovery by a person aggrieved or injured by unlawful conduct is a common feature of modern law.[49] We are less familiar though with the other category Blackstone describes:

> [M]ore usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, & c, quam pro seipso in hac parte sequitur*."[50]

In Blackstone's taxonomy, the S.B. 8 cause of action falls within the "genus" of "popular actions" because the statute provides for a forfeiture to be recovered by any member of the public who will sue for it.[51] As a technical matter, a claim filed under S.B. 8 does not fall within the "species" of "*qui tam* actions" because the successful

45. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).

46. BLACKSTONE, *supra* note 10, at *159.

47. *Id.*

48. *Id.* at *159–60.

49. *See, e.g.*, Anderson v. Credit Bureau Collection Servs., Inc., 422 F. App'x. 534, 535–36 (7th Cir. 2011) ("an aggrieved consumer may recover actual or statutory damages not exceeding $1,000" under Fair Debt Collection Practices Act, 15 U.S.C. § 1692k).

50. BLACKSTONE, *supra* note 10, at *160. (emphasis omitted). The United States Supreme Court translated Blackstone's Latin phrase to mean "who pursues this action on our Lord the King's behalf as well as his own." Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000).

51. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).

litigant gets to keep the entire forfeiture and does not split it with the government or the poor or devote any portion to a public use.[52]

Informers in popular actions operate under incentive structures and expectations very different than those applied to government officials. Individuals who work for the government are typically paid a fixed salary and expected to perform duties for the benefit of the public, rather than for any personal or private benefit.[53] In the context of statutory enforcement, this includes selecting enforcement targets to further legislative aims, while minimizing negative consequences associated with the enforcement process.[54] By contrast, legislation creating a *qui tam* or popular action places the power of statutory enforcement in the hands of any person willing to bring a lawsuit.[55] The statute expressly encourages litigation motivated by the hope of personal financial rewards.[56] The desire for pecuniary gain and other private interests of informers regularly produce enforcement activities that conflict with public interests affected by the enforcement process.[57]

52. *See id.* The term "popular enforcement" in this article encompasses all popular actions, including *qui tam* actions. For our purposes, Blackstone's technical distinction between the broad set of "popular actions" and the subset of "*qui tam* actions" makes little difference. Any statute creating a popular action authorizes an uninjured private litigant to enforce the law for the benefit of the public and offers the litigant a contingent economic benefit to incentivize that law enforcement activity. The problems with popular enforcement discussed below flow from conflicts between public interests associated with the process of law enforcement and the private interests of informers. These problems could arise under any statute creating a popular action, whether or not they meet Blackstone's criterion for *qui tam* legislation. If anything, a popular action that does not constitute a *qui tam* action may create greater problems because the economic incentive to file suit is stronger when the informer does not need to split the recovery with the government or other beneficiaries.

53. Richard W. Painter, *Ethics and Government Lawyering in Current Times*, 47 HOFSTRA L. REV. 965, 966 (2019) ("The big picture here is that government officials should be responsible to the public and should not be making decisions based on their own personal, financial interests."); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE, *supra* note 33, at 1 ("In America today, the lawful income of a public official consists of a salary.").

54. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 847–48 (8th ed. 2011) (discussing case selection by a public agency considering costs and benefits of possible resource allocations).

55. *See Beck*, *English Eradication*, *supra* note 11, at 608–09.

56. *See id.* at 608–09, 611.

57. *See* 2 RADZINOWICZ, *supra* note 33, at 138 (common informer's "aim was not justice, but gain"); Beck, *English Eradication*, *supra* note 11, at 608–09, 611.

A. Personal Interests of Government Attorneys and Private Informers

The process of enforcing a law involves a wide range of discretionary decisions, including questions concerning who should face enforcement actions, what conduct should be challenged, and many subsidiary issues of substance and procedure.[58] The enforcement process will be guided to a significant extent by the mindset a litigant brings to those discretionary determinations. In thinking through the incentive structure underlying popular enforcement, it helps to compare the financial inducements offered to informers with the very different expectations applied to government attorneys.

We expect public officials carrying out their responsibilities to serve the public interest.[59] The Supreme Court has explained that the government attorney's duty to the public imposes higher obligations than those facing an attorney for an ordinary party.[60] Since the sovereign is required to govern impartially, the government's true interest in any case is not victory, but rather that justice be done.[61] The government attorney must operate as a "servant of the law," seeking to ensure both "that guilt shall not escape or innocence suffer."[62] The attorney may pursue suspected lawbreakers "with earnestness and vigor," yet "while he may strike hard blows, he is not at liberty to strike foul ones."[63]

To strengthen government officials' commitment to the public interest, we typically require "disinterested" performance of public duties.[64] Government attorneys and other public officials may not work on matters that significantly affect their personal or private interests.[65] Reasoning from the government obligation to impartially pursue justice, for instance, the Supreme Court in *Young v. United States ex rel. Vuitton et Fils S.A.*[66] invoked its supervisory power to

58. *See* Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 596 (2019) ("Prosecutorial discretion pervades every aspect of prosecutors' work."); *In re* Aiken Cnty., 725 F.3d 255, 264 & n.9 (D.C. Cir. 2013) (executive branch likely has the same power to exercise discretion with respect to civil penalties and sanctions as it does in criminal matters).

59. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980).

60. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

61. *See id.*

62. *Id.*

63. *Id.*

64. *See, e.g.*, 28 U.S.C. § 528; 18 U.S.C. § 208.

65. *See* Painter, *supra* note 53, at 966 ("[G]overnment officials should be responsible to the public and should not be making decisions based on their own personal, financial interests.").

66. 481 U.S. 787 (1987).

throw out a criminal contempt conviction where the trial court had appointed counsel for a private company to prosecute the contempt action.[67] The *Young* Court reasoned that the government's interest "in dispassionate assessment of the propriety of criminal charges" might conflict with the private client's interest in enforcing the court order:

> A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.[68]

This requirement of disinterested action by government officials is reinforced by legislation at the federal level.[69] The Department of Justice is statutorily required to ensure that its employees do not participate in an "investigation or prosecution" that "may result in a personal, financial, or political conflict of interest, or the appearance thereof."[70] A federal employee, including a prosecutor, can face criminal charges for "personally and substantially" participating in a matter affecting the employee's financial interests or those of certain family members or businesses.[71]

Like the Supreme Court in *Young*, many other federal and state courts have enforced the norm requiring disinterested performance of law enforcement functions, seeking to prevent attorneys from making significant decisions about enforcing the law while laboring under a conflict of interest.[72] In *United States v. Spiker*,[73] the Eleventh Circuit found clear error undermining a guilty plea where a federal prosecutor failed to recuse himself after the defendant tried to have the prosecutor killed and then attempted to smuggle a weapon into the courtroom to carry out the attack himself.[74] In *United States v. Miller*,[75] the Ninth Circuit criticized a federal prosecutor's "disregard of elementary prosecutorial ethics" in seeking an FBI investigation

67. *Id.* at 790, 805–06.

68. *Id.* at 805.

69. *See, e.g.*, 28 U.S.C. § 528; 18 U.S.C. § 208.

70. 28 U.S.C. § 528.

71. 18 U.S.C. § 208; *see also id.* § 216 (specifying punishments for those charges).

72. *See generally, e.g.*, United States v. Spiker, 649 F. App'x 770, 774 (11th Cir. 2016) (prosecutor's failure to recuse after defendant's threatening and actually attempting to kill him); State v. Culbreath, 30 S.W.3d 309, 311–12, 316 (Tenn. 2000) ("special interest group" attorney working with county district attorney's office to prosecute obscenity cases).

73. 649 F. App'x 770 (11th Cir. 2016).

74. *Id.* at 771–74.

75. 953 F.3d 1095 (9th Cir. 2020).

and participating in the early stages of a criminal case concerning embezzlement from a company owned by the prosecutor's father.[76] The court upheld the conviction only because the Justice Department took steps to eliminate any taint arising from the conflicted prosecutor's involvement.[77] The Fifth Circuit, in *Griffith v. Oles* (*In re Hipp, Inc.*),[78] overturned a contempt conviction sought by the trustee of a bankruptcy estate on the ground that the bankruptcy estate had a financial interest in the prosecution.[79]

The Tennessee Supreme Court's opinion in *State v. Culbreath*[80] is particularly instructive with respect to the influence of financial interests on decisions regarding enforcement of the law.[81] A public prosecutor arranged for a private attorney to work with the prosecutor's office in investigating potential obscenity violations by sexually-oriented businesses in the county.[82] The private attorney was compensated for his time and expenses by private donors, including an interest group called Citizens for Community Values, Inc. ("CCV"), receiving more than $410,000 over a nineteen-month period.[83] The court noted that "prosecutors are expected to be impartial" and that "charging decisions should be based upon the evidence, without discrimination or bias for or against any groups or individuals."[84] In the *Culbreath* case, the outside attorney working with the public prosecutor's office had a conflict of interest:

> He was privately compensated by a special interest group and thus owed a duty of loyalty to that group; at the same time, he was serving in the role of public prosecutor and owed the duty of loyalty attendant to that office. Moreover, because [the attorney] was compensated on an hourly basis, the reality is that he acquired a direct financial interest in the duration and scope of the ongoing prosecution.[85]

Given the private attorney's extensive involvement in prosecution decisions, the court concluded the indictments should be dismissed under the due process protections of the Tennessee Constitution.[86]

76. *Id.* at 1099–1100.
77. *Id.* at 1105–06.
78. 895 F.2d 1503 (5th Cir. 1990).
79. *Id.* at 1506–09.
80. 30 S.W.3d 309 (Tenn. 2000).
81. *See generally id.*
82. *Id.* at 311.
83. *Id.* at 311–12.
84. *Id.* at 314.
85. *Id.* at 316.
86. *Id.* at 317–18. The court relied upon the "law of the land" provision of the Tennessee Constitution, which had been interpreted to afford due process protections higher than the minimum level of protection required by U.S. Supreme Court case law. *See id.* at 317 (citing TENN. CONST. art. I, § 8).

Legislation creating a *qui tam* or popular action places informers in a conflict of interest very much like those we seek to avoid for government attorneys.[87] The statute deputizes the informer to pursue the public interest in enforcing the law but also offers the informer a private financial reward if the action succeeds.[88] The public interests connected with the law enforcement process and the informer's private interest in the statutory bounty may sometimes align perfectly. But there will inevitably be situations where the public interest and the informer's private interests diverge.[89] The Supreme Court explained in *Hughes Aircraft Co. v. United States ex rel. Schumer*[90] that the private rewards offered by a *qui tam* statute lead informers to think differently about litigation decisions than government attorneys: "As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good."[91]

The incentive structures applicable to private informers can lead them to pursue cases a government attorney would reject. For example, the Supreme Court suggested that private *qui tam* relators under the False Claims Act ("FCA") would be "less likely than . . . the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."[92] The Court acknowledged that, historically, "informer statutes were highly subject to abuse."[93] Nevertheless, in the context of the FCA, the Court has long deferred to the congressional decision to select *qui tam* litigation as a means of statutory enforcement:

> [The FCA *qui tam* provision was] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods

87. Beck, *English Eradication*, *supra* note 11, at 609–15.

88. *See id.* at 611.

89. *See id.* at 615.

90. 520 U.S. 939 (1997).

91. *Id.* at 949.

92. *Id.*

93. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775 (2000) (noting Sir Edward Coke's observation that informers had used "obsolete" *qui tam* statutes to "vex and entangle the subject" (quoting 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *192)).

> as the enterprising privateer does to the slow-going public vessel.[94]

In this view, a legislature may find the financial inducement offered by a *qui tam* statute justified because it minimizes the burden on government resources and promotes more vigorous enforcement than when public officials monopolize the enforcement process.

Recognition of the common informer's conflict of interest can be found at least as early as Sir Edward Coke's seventeenth-century *Institutes of the Laws of England*.[95] Coke lauded regulatory reforms designed to restrain "the vexatious informer . . . who under the reverend mantle of law and justice instituted for the protection of the innocent, and the good of the common-wealth, did vex and depauperize the subject, and commonly the poorer sort, for malice or private ends, and never for love of justice."[96] On the one hand, in Coke's view, the informer assumed the "mantle" of the public interest, acting to enforce laws designed to protect the innocent and promote the common good.[97] On the other hand, the informer's self-interested motives conflicted with the common good the informer purported to champion. Informers acted for "malice or private ends," not for "love of justice."[98]

The most common and pervasive "private end" pursued by informers is financial gain.[99] A popular action allows an informer to sue for and keep part or all of a statutory forfeiture imposed on the defendant.[100] But the grant of universal standing to members of the public also allows informers to pursue other private agendas in addition to the hope of profit.[101] Coke's reference to informers acting from "malice" corresponds to the Supreme Court's recognition that *qui tam* actions might be motivated by "personal ill will."[102] An informer can vent animosity toward a foe or rival by initiating a popular action that puts the defendant at legal risk and forces him to respond to charges of unlawful conduct.

The "private ends" that motivate informers can also be ideological in nature. A good example can be found in the religiously motivated Societies for the Reformation of Manners ("Societies") that sprang up in London and other cities in the late seventeenth and early

94. *Hughes Aircraft Co.*, 520 U.S. at 949 (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943)).

95. *See generally* COKE, *supra* note 93, at *192–93 (discussing "three mischiefs" arising from common informer statutes).

96. *Id.* at *194.

97. *Id.*

98. *Id.*

99. Beck, *English Eradication*, *supra* note 11, at 622.

100. *Id.* at 551 (citing BLACKSTONE, *supra* note 10, at *160).

101. *Id.* at 607.

102. *Compare supra* notes 94 and 96 and accompanying text.

eighteenth centuries.[103] The Societies employed common informers to enforce statutes targeting vices like cursing, drunkenness, adultery, prostitution, or profaning the Sabbath.[104] Recognizing the unpopularity of *qui tam* litigation in other contexts, supporters of the Societies sought to distinguish these informers as reform-minded community advocates, pursuing litigation out of love for God and neighbor.[105] Some informers working for the Societies reportedly refused to accept their share of fines from cases they pursued, though at least some received a salary directly from the organizations that employed them.[106]

In cataloguing "private ends" that might motivate informers pursuing popular enforcement, we should also mention one other possible motivation: helping regulated parties. Early in the history of *qui tam* legislation, potential defendants figured out ways to work with friendly informers to shield illegal conduct from the full weight of penalties imposed by a statutory regime.[107] Some informers have thus pursued popular actions as part of an effort to undermine the effectiveness of a legislative remedy.[108] We will discuss below how the collusion between defendants and informers worked and the legislative response designed to address the practice.[109]

B. Manifestations of Informers' Conflict of Interest

Sir Leon Radzinowicz, a historian of English criminal law, observed that "[f]ew, if any, instruments of criminal justice were more consistently or more sharply criticised than was the common

103. *See* Angela M. Laughlin, *Learning from the Past? Or Destined to Repeat Past Mistakes? Lessons from the English Legal System and Its Impact on How We View the Role of Judges and Juries Today*, 14 WIDENER L. REV. 357, 368–69 (2009).

104. Jeanne Clegg, *Reforming Informing in the Long Eighteenth Century*, TEXTUS XVII 337, 343–48 (2004); *Reformation of Manners Campaigns*, LONDON LIVES 1690 TO 1800: CRIME, POVERTY & SOC. POL'Y IN THE METROPOLIS, https://www.londonlives.org/static/Reformation.jsp#fn1_6 (last visited May 25, 2022).

105. Clegg, *supra* note 104, at 348–49.

106. *Reformation of Manners Campaigns*, *supra* note 104; *see also* Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 162–63 (1994) (Reformation of Manners societies used common informers to enforce "temperance and vice" laws despite criticisms about reliability and the financial incentive). *See also id.* at 162 n.467 (citing 2 RADZINOWICZ, *supra* note 33, at 16 & n.68) (one society hired full-time informers).

107. *See* Beck, *English Eradication*, *supra* note 11, at 574.

108. *Id.*

109. *See infra* notes 199–204 and accompanying text.

informer."[110] The criticism flowed from informers' motives and the litigation decisions that resulted.[111] By holding out private financial rewards for litigation victories, legislation permitting popular enforcement encourages pursuit of private ends in the process of enforcing the law.[112] Informers routinely engaged in self-interested practices inconsistent with legislative goals and other communal interests.[113]

1. Technical Violations

The Supreme Court in *Hughes Aircraft* predicted that *qui tam* relators under the FCA would be more likely than government attorneys to pursue actions premised on "technical noncompliance" with government reporting requirements that did not really harm the Treasury.[114] The Court's prediction derived from the premise that *qui tam* litigants are "motivated primarily by prospects of monetary reward rather than the public good."[115] The problem of "technical" statutory violations arises from the imprecision of regulatory language. No legislative body has the foresight and resources to precisely identify all circumstances in which a statute should apply.[116] A legislature will often deal with this uncertainty by framing a statute in general and overinclusive terms.[117]

Prosecutorial discretion can soften the impact of an overly broad statute, allowing a careful selection of cases that advance legislative goals.[118] A disinterested public prosecutor can consider the purposes

110. 2 RADZINOWICZ, *supra* note 33, at 139. Historically, *qui tam* legislation often straddled the line between civil and criminal enforcement. *See* Beck, *English Eradication*, *supra* note 11, at 551–52. Statutes providing for popular enforcement sometimes gave the litigant a choice between civil and criminal procedural mechanisms for pursuing a statutory forfeiture. *Id.* at 552 & n.47.

111. Beck, *English Eradication*, *supra* note 11, at 581–82.

112. *See id.*

113. *See id.* at 110.

114. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997).

115. *Id.*

116. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 121 ("[L]awmakers have limited foresight, legislative time and resources are scarce, and human language is imprecise. So all laws will, in some applications, seem overinclusive and underinclusive in relation to their ultimate purposes.").

117. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 4–5 (2001); POSNER, *supra* note 54, at 845–46 ("[R]ules of law often are overinclusive; the costs of precisely tailoring a rule to the conduct intended to be forbidden are prohibitive because of the inherent limitations of foresight and ambiguities of language.").

118. POSNER, *supra* note 54, at 846 ("Discretionary nonenforcement is a technique by which the costs of overinclusion can be reduced without a corresponding increase in under inclusion (loopholes).").

behind an enactment and decline to pursue cases that arguably fall within the statutory language, but have minimal relevance to the problems the legislature sought to address.[119] Popular legislation, on the other hand, empowers private informers to pursue claims that fall within broad statutory language, whether or not a disinterested prosecutor would believe the litigation advances legislative purposes or serves the common good.[120] For a private informer, the decision whether to file a *qui tam* or popular action may be driven less by concern for accomplishing legislative goals or advancing common interests than by the perceived likelihood that the action could generate a profitable payout.[121]

The False Claims Act offers a good example of a broadly drafted statute enforceable through *qui tam* litigation.[122] *Qui tam* relators frequently assert FCA claims that government attorneys would be unlikely to pursue.[123] For instance, relators may sue based on allegedly false documentation submitted by a defendant in the course of carrying out a government contract, but struggle to show that alleged misrepresentations were "material" to the government's decision to pay claims.[124] In *United States ex rel. Bachert v. Triple Canopy, Inc.*,[125] the defendant contracted to provide security services to the United States Department of State worldwide.[126] One assignment within the scope of the contract involved security for the U.S. embassy in Baghdad.[127] The relator was a senior armorer responsible for inspection and maintenance of over 1,700 weapons stockpiled at the embassy.[128] While stationed at the embassy, the relator complained about a fellow armorer who allegedly failed to properly inspect weapons or record inspections.[129] The State

119. *Cf. id.* at 847–48 ("[T]he agency acts as a rational maximizer, comparing the expected returns and expected costs of alternative uses of its resources.").

120. *See* Beck, *English Eradication*, *supra* note 11, at 628.

121. POSNER, *supra* note 54, at 845 (in system of private enforcement, "all laws would be enforced that yielded a positive expected net return").

122. 31 U.S.C. §§ 3729–3333.

123. *Cf.* CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES, 11 (2021), https://sgp.fas.org/crs/misc/R40785.pdf (noting that "the government" may intervene in *qui tam* litigation and "is likewise free to move to dismiss or settle the litigation over the objections of the relator").

124. *See generally* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002–04 (2016) (discussing materiality requirement under FCA).

125. 321 F. Supp. 3d 613 (E.D. Va. 2018).

126. *Id.* at 617.

127. *Id.*

128. *Id.*

129. *Id.*

Department investigated and sought some corrective action but did not withhold payments under the contract.[130]

After leaving the defendant's employment, the relator filed a lawsuit claiming that he had experienced retaliatory employment actions as a result of his whistle-blowing activity.[131] He also alleged that the defendant had violated the FCA by creating inaccurate weapon inspection records to support contractual payments.[132] The District Court granted summary judgment for the defendant on the FCA claim, finding that the allegedly inaccurate records maintained by the relator's co-employee were not material in the context of the overall contract.[133] The contract provided for the defendant to perform numerous security-related tasks around the globe.[134] The inspection records of a single armorer in a single location played a very small role in relation to the overall contractual performance.[135] Therefore, "[n]o reasonable factfinder could conclude that these types of minor missteps in a small number of inspections, even assuming they occurred, would have impacted the government's decision to pay defendant under the Base Contract."[136] The court relied on Supreme Court precedent indicating that materiality "cannot be found where noncompliance is minor or insubstantial."[137] The entry of summary judgment on materiality was bolstered by the fact that the State Department had investigated the relator's allegations concerning his co-employee and had never withheld payment or requested a refund.[138]

It would be hard to imagine government attorneys pursuing an FCA claim based on allegedly inaccurate records like those at issue in *Bachert*. At any given time, the Department of Justice is investigating hundreds of leads concerning people who may have submitted false or fraudulent claims violating the FCA.[139] In deciding which cases to pursue, the government will presumably seek to deploy resources efficiently, prioritizing cases based on factors like the

130. *Id.*
131. *Id.* at 616.
132. *See id.* at 617.
133. *Id.* at 619–21.
134. *Id.* at 617.
135. *Id.* at 619–20.
136. *Id.* at 620.
137. *Id.* at 619 (quoting Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016)).
138. *Id.* at 621.
139. In fraud statistics maintained by the Civil Division of the Department of Justice, the Department indicates that there were 922 new matters in Fiscal Year 2020, 250 not connected with *qui tam* actions, and 672 arising from *qui tam* filings. *See* FRAUD STATISTICS – OVERVIEW: OCT. 1, 1986 – SEPT. 30, 2020, 2 tbl. 1 (n.d.), CIVIL DIV., U.S. DEP'T OF JUST., CIVIL DIV., https://www.justice.gov/opa/press-release/file/1354316/download.

quality of the evidence that the statute was violated, the defendant's culpability, the amount of harm done to the Treasury, and the size of any potential recovery.

The relator in an FCA *qui tam* case, on the other hand, has much less information than the government about potential violations of the statute. As in *Bachert*, the relator may be a former employee of a contractor who has inside information about one particular government contract. In deciding whether to file an FCA action, the relator does not have the government's luxury of sifting through a large volume of potential cases to select those most worthy of litigation.[140] Instead, the relator must work with the facts in his possession. The relator may perceive personal benefits from filing even a technical or tenuously supported FCA claim, however, because it could have settlement value or could be abandoned in exchange for a higher settlement on another cause of action like the relator's employment-related claim in *Bachert*.[141]

2. Inducing Statutory Violations

Informers in popular actions have often been accused of seeking to bring about violations of a statute, through deception or trickery, so that they can sue for the penalty.[142] Judge Posner points out that a system of private enforcement incentivizes the informer to increase "his 'catch,' and hence his income, by augmenting the supply of 'offenders.'"[143] The legislature adopts a penal statute in order to suppress conduct deemed harmful, but an informer's financial interests can be furthered by encouraging individuals to commit statutory violations.[144]

Private prosecutors can be found attempting to encourage violations of the law in the context of eighteenth-century English efforts to suppress theft and other property crimes.[145] Parliament passed a number of statutes that offered rewards for successful prosecution of specified crimes, starting with highway robbery.[146]

140. *Cf.* POSNER, *supra* note 54, at 848 (discussing how agencies weigh legal merits and litigation costs in deciding which cases to pursue).

141. *Cf.* Tycko & Zavareei Whistleblower Prac. Grp., *What Is a Qui Tam Relator?*, NAT'L L. REV. (Feb. 16, 2021), https://www.natlawreview.com/article/what-qui-tam-relator ("When fraud-committing organizations seek to retaliate despite the protections provided by the FCA, [an employee] ha[s] the right to bring a lawsuit against [the] employer for termination.").

142. *See* Beck, *English Eradication*, *supra* note 11, at 633–34.

143. POSNER, *supra* note 54, at 843.

144. *Id.*

145. *See* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660–1800, at 52 (1986).

146. *Id.* at 51–52.

When crime rates rose, statutory rewards were sometimes temporarily increased by government proclamation.[147] These statutes and proclamations created even greater incentives for private prosecution than legislation creating standard *qui tam* or popular actions because the reward money was paid by the government rather than the less certain prospect of securing a share of money or property from the defendant.[148] Groups of merchants, crime victims, or others might raise the financial inducement for prosecutions even higher by offering additional rewards to supplement those available from the government.[149]

The money available for successful criminal prosecutions inspired a cohort of "thief-takers," who tracked down and prosecuted alleged thieves in order to win public and private bounties.[150] The financial incentives ironically spurred unsavory efforts to increase the number of thefts committed.[151] Thief-takers were "commonly

147. *Id.* at 52–53.

148. One can draw procedural distinctions between standard *qui tam* statutes for recovery of a penalty and statutes addressing more serious criminal activity. Penal actions filed under *qui tam* statutes "were usually summary proceedings heard before Justices of the Peace, without a jury." Douglas Hay, *Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850*, POLICING AND PROSECUTION IN BRITAIN 1750–1850, at 354 (Douglas Hay & Francis Snyder eds., 1989). More serious crimes were also prosecuted by private prosecutors in eighteenth-century England but involved grand jury indictment and trial by jury. *See* Hale v. Henkel, 201 U.S. 43, 59 (1906) ("Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration."), *overruled on other grounds*, Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 65–77 (1964); *see generally* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983) (discussing the interaction of magistrates, private prosecutors, and juries in eighteenth-century English criminal trials). For purposes of this Article, however, a statute offering a reward for conviction of a serious crime creates the same potential for conflict between the financial interests of the private prosecutor and the public interest in just and impartial enforcement of the laws. *See also* 2 RADZINOWICZ, *supra* note 33, at 146; Ruth Paley, THIEF-TAKERS IN LONDON IN THE AGE OF THE MCDANIEL GANG, C. 1745–1754, POLICING AND PROSECUTION IN BRITAIN 1750–1850, at 327 ("[T]here can be little doubt left that the everyday business of the London thief-taker amounted to nothing less than a systematic manipulation of the administration of the criminal law for personal gain.").

149. BEATTIE, *supra* note 145, at 53–54.

150. *See generally id.* at 55–59 (discussing thief-takers); Paley, *supra* note 148, at 303–10 (discussing backgrounds of a number of thief-takers operating in London).

151. *See, e.g.*, BEATTIE, *supra* note 145, at 56.

accused of being thief-makers" who "enticed naive young thieves into committing offenses in order to prosecute them and collect the reward money."[152] A particularly elaborate case of entrapment was perpetrated by a gang of five conspirators, including a well-known thief-taker named Stephen Macdaniel.[153] A contemporary newspaper account explains the scheme:

> One of [the five conspirators, named Blee] was to seduce two persons into a robbery on the highway, in which, to prevent suspicion, he was to be an accomplice; another of them was to be the person robbed; a third was to buy the stolen goods of the thieves; a fourth [Macdaniel] was to seize them as an officer; and the fifth was to join the rest in the prosecution. He that had assisted to commit the robbery [Blee] was to escape, the [robbers recruited by Blee] were to be hanged, and the gang were to share the reward.[154]

The conspirators arranged for the theft to take place in an area where residents had offered an additional £20 reward beyond the statutory bounty established by Parliament.[155] The two young men duped into carrying out the robbery were found guilty.[156]

The scheme unraveled when a constable captured Blee and then accused Macdaniel and the other conspirators of being "accessories before the fact" who had planned the whole "robbery."[157] Macdaniel and his crew had reportedly collected £1,720 from the government for prior convictions obtained at the Old Bailey alone.[158] Corrupt thief-takers like Macdaniel cast doubt on the efforts of better-intentioned crime fighters, including the "Bow Street" informers who worked with magistrates to enforce the law.[159]

152. *Id.*; *see also* Paley, *supra* note 148, at 323.

153. *See An Account of Stephen Macdaniel, John Berry, James Egan, and James Salmon, Tried as Accessories in Procuring the Said Salmon to Be Robbed by Peter Kelly and John Ellis; and of —- Blee, Their Accomplice and Accuser*, Mar. 3, 1755, SCOTS MAG., 120–26 [hereinafter *An Account of Stephen Macdaniel*], for a comprehensive, contemporary account of the conspiracy.

154. *Id.* at 120; *see also London*, DERBY MERCURY, Feb. 27–Mar. 5, 1756, at 3.

155. *An Account of Stephen Macdaniel*, *supra* note 153, at 121; *London*, *supra* note 154, at 3.

156. *London*, *supra* note 154, at 3; Paley, *supra* note 148, at 302.

157. *See An Account of Stephen Macdaniel*, *supra* note 153, at 124–25; *London*, *supra* note 154, at 3; Paley, *supra* note 148, at 302.

158. *An Account of Stephen Macdaniel*, *supra* note 153, at 125.

159. BEATTIE, *supra* note 145, at 56; Langbein, *supra* note 148, at 113–14 (Magistrate John Fielding "was concerned that the scandal would taint his Bow Street force, which also lived in part from reward money").

3. False and Malicious Accusations

Another common complaint against informers is that they sometimes lodge false or malicious accusations.[160] Judge Posner notes that a scheme of private enforcement typically pays the informer "per offender convicted, regardless of the actual guilt or innocence of the accused."[161] To illustrate the point, consider another scheme carried out by eighteenth-century thief-taker Stephen Macdaniel and his co-conspirators.[162] Macdaniel's companion Blee recruited a porter named Joshua Kiddon, concocting a story about a gentleman who would pay for help in surreptitiously moving some goods at night.[163] Blee left Kiddon at a public house in Edmonton and then returned later to say that the job had been postponed.[164] As Blee and Kiddon returned to London, they saw a woman who was secretly working with Macdaniel's gang.[165] Blee suggested that they rob the woman, but Kiddon steadfastly refused.[166] Blee later returned, claiming he had robbed the woman himself and offering Kiddon half of the money, but Kiddon again refused.[167] Kiddon was subsequently apprehended by Macdaniel the thief-taker and falsely accused of holding a knife to the woman's throat while Blee robbed her.[168] Kiddon was prosecuted and convicted of participating in a robbery and was put to death, while Macdaniel and his companions collected the statutory reward.[169] Macdaniel and his accomplices were subsequently convicted of murdering Kiddon through perjury, but the judgment was stayed and they were sentenced on lesser charges.[170]

Convictions for perjury have been obtained with respect to informers pursuing popular actions under various statutes. One historian studied cases enforcing the turnpike laws, which limited the number of horses that could pull a wagon on a turnpike and allowed an informer to seize any horses beyond the legal limit.[171] Several "horse-taker" informers were convicted of perjury and sentenced to the pillory, imprisonment, or transportation.[172] As we will see below,

160. *See* Beck, *English Eradication*, *supra* note 11, at 581–83, 598–99.

161. POSNER, *supra* note 54, at 843.

162. See *An Account of Stephen Macdaniel*, *supra* note 153, at 125–26, for the portion of the Scots Magazine article dealing with this scheme.

163. *Id.* at 125.

164. *Id.* at 125–26.

165. *Id.* at 126.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 125, 126. The account concludes, "Thus have several innocent men lost their lives for sham robberies." *Id.* at 126.

170. Paley, *supra* note 148, at 334–35.

171. *See* Hay, *supra* note 148, at 356.

172. *Id.* at 358.

false accusations became a particular problem with popular enforcement of the Gin Act 1736.[173] Magistrates John and Henry Fielding thought informers' reputation for perjury and other forms of corruption made them poor witnesses and hindered their usefulness for law enforcement.[174]

4. Abusive Litigation Tactics

Informers pursuing *qui tam* or other popular actions have sometimes engaged in abusive litigation tactics designed to compel settlements by making it burdensome for the defendant to mount a defense.[175] Sir Edward Coke highlighted informers' practice of filing all actions at Westminster regardless of where the statutory violation allegedly took place.[176] The costs of traveling to London and waiting for trial were too high for some defendants, who felt pressure to submit to informers' settlement demands.[177] In 1587, Parliament took a limited step toward reform, allowing defendants in certain cases to make their initial appearance through an attorney.[178] Two years later, Parliament offered greater protection to defendants, providing that a popular action could only be filed in the county where the offense was committed.[179]

A nineteenth-century communication from London sheriffs to a parliamentary committee describes another abusive tactic informers used to force settlements under a statute against illegal insurance.[180] The informer would sue out a writ of capias, resulting in arrest of the defendant, and claim several penalties "to prevent the possibility of procuring bail without the consent of the Plaintiff or his Attorney."[181] The informer would then demand a sizable payment from the defendant as the price to consent to release, at which point the case would no longer be prosecuted.[182] The arrests would often take place on a Saturday evening so that the defendant would remain in custody on Sunday, increasing the likelihood of a compromise.[183]

173. *See infra* Subpart II.A.

174. 3 RADZINOWICZ, *supra* note 33, at 26.

175. *See, e.g.*, Beck, *English Eradication*, *supra* note 11, at 583 (filing cases in inconvenient fora).

176. *Id.*; COKE, *supra* note 93, at *192.

177. Beck, *English Eradication*, *supra* note 11, at 583; MARGARET GAY DAVIES, THE ENFORCEMENT OF ENGLISH APPRENTICESHIP: A STUDY IN APPLIED MERCANTILISM 1563–1642, at 27 (1956).

178. An Act for the Continuance and Perfecting of Divers Statutes 1587, 29 Eliz. c. 5, § 21.

179. An Act Concerning Informers 1589, 31 Eliz. c. 5, § 2.

180. 2 RADZINOWICZ, *supra* note 33, at 149.

181. *Id.*

182. *See id.*

183. *Id.*

5. Payments to Suppress Litigation

Informers have often been accused of "blackmail" or "extortion" for collecting informal payments from regulated parties to discontinue pending actions or refrain from filing suit.[184] Professor Radzinowicz reports, for instance, that numerous people and businesses in nineteenth-century London and other cities made regular "hush money" payments to informers in order to "keep them sweet."[185] Parliament identified secret settlements as a problem early in the history of *qui tam* legislation, punishing informers who entered into "compositions" with defendants without a license from the court.[186]

Hush money payments and unlicensed settlements can diverge from the public interest in different ways. *Qui tam* statutes typically provide for an informer to split any money recovered with the government, but unlicensed compositions often resulted in the informer keeping any payment without sharing it with the government.[187] Secret payments to informers might be smaller than the forfeiture imposed by statute, reducing the legislature's intended deterrent impact. Moreover, a secret settlement can allow illegal activity to continue when public disclosure might cause statutory violations to cease. Two witnesses before a nineteenth-century parliamentary committee argued that informers sometimes allowed people to break the law with impunity "by buying off the information."[188]

6. Delaying Litigation

Judge Posner notes that a private enforcer who learns of someone preparing to commit a crime has an incentive to wait until the crime is completed if the penalty for prosecution would be greater than the penalty associated with prosecuting an attempt.[189] In the same vein, informers have sometimes delayed litigation in order to increase the size of a potential bounty.[190] An anonymous nineteenth-century

184. *E.g.*, Zimmerman, *supra* note 106, at 159; *see id.* at 147 (informers "could reap a remarkably abundant harvest, either from the penalties appointed by the legislature or by means of their own technique of blackmail and extortion"); Beck, *English Eradication*, *supra* note 8, at 580–81 (discussing transaction cost-based rationale of informers' conduct).

185. 2 RADZINOWICZ, *supra* note 33, at 150–51; *see also* Zimmerman, *supra* note 106, at 159.

186. Beck, *English Eradication*, *supra* note 11, at 587.

187. *See id.* at 580–81.

188. 2 RADZINOWICZ, *supra* note 33, at 153.

189. POSNER, *supra* note 54, at 843.

190. *See* Beck, *English Eradication*, *supra* note 11, at 634–35.

pamphleteer alleged that informers in many cases "would rather nurse the criminal than check the crime."[191]

A modern FCA case potentially involving intentional delay by an informer is *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*[192] The relator met with a lawyer midway through 1987, using an assumed name, to discuss an ongoing scheme to submit false claims to the United States in connection with a military aid contract benefitting a foreign government.[193] In July 1989, the relator returned to the law firm, revealed his true identity, and supplied documents supporting the claims of fraud.[194] The *qui tam* complaint was filed in November 1990, roughly three weeks after a foreign general allegedly involved in the fraud was arrested on unrelated charges.[195] In the three and a half years between the relator's first meeting with his attorney and the time suit was filed, the total amount of false claims submitted to the U.S. government grew from $13.1 million to $41.6 million.[196] General Electric claimed that the relator's law firm had coached him on procrastinating and evading requirements of the contractor's regulatory compliance policy.[197] Reviewing an award of attorney's fees, the Sixth Circuit remanded so the trial court could "resolve the parties' conflicting claims over whether the relators' delay in filing their action was aimed at 'running up costs' and at increasing the prospective bounty."[198]

7. Collusive Litigation

As noted previously, there is one additional way in which personal interests of informers have conflicted with interests of the public.[199] Early in the English experiment with popular enforcement, Parliament identified a problem of collusion between informers and regulated parties.[200] A person who violated a statute would agree with a friendly informer to bring an action.[201] The informer would then sign a release or take the case to judgment, presumably without actually collecting the bulk of the forfeiture provided by statute.[202] The release or judgment would then be pled as a defense to any later

191. 2 RADZINOWICZ, *supra* note 33, at 152.
192. 41 F.3d 1032 (6th Cir. 1994).
193. *See id.* at 1037.
194. *Id.*
195. *Id.*
196. *Id.* at 1038–39.
197. *Id.* at 1039.
198. *Id.* at 1044.
199. *See supra* notes 107–09 and accompanying text.
200. Beck, *English Eradication*, *supra* note 11, at 574.
201. *Id.*
202. *See id.*

qui tam action arising from the same facts.[203] Parliament responded with legislation barring a commoner from granting a release in a popular action and denying effect to a prior recovery tainted by collusion.[204]

II. POPULAR ENFORCEMENT OF CONTROVERSIAL LEGISLATION: TWO CASE STUDIES

Legislation authorizing popular enforcement allows informers to pursue financial gain or other personal agendas while representing the communal interest in enforcing the law. Any scheme permitting popular actions will generate conflicts between public and private interests. The consequences of the conflict may prove less troubling, however, when informers are enforcing a statute with broad public support. For instance, the False Claims Act in this country deputizes *qui tam* relators to discover and pursue claims against persons allegedly defrauding the government.[205] Supporters of the FCA's *qui tam* enforcement mechanism can argue that any downsides of popular enforcement are outweighed by the capacity of private relators to disclose fraudulent behavior that would otherwise remain hidden.[206] In the lucrative world of government contracting, one may reasonably conclude that the risk of unmeritorious *qui tam* suits is a cost of doing business with the government, one easily borne by contractors—particularly the large companies that provide government-funded health care services or manufacture weapons systems for the military.

On occasion, however, popular enforcement has been deployed in regulatory fields where government intervention is more controversial and public opinion divided. In these contexts, reliance upon volunteer law enforcement by self-interested bounty hunters can exacerbate the pre-existing political conflict. Popular enforcement of controversial legislation may generate public sympathy for those targeted by informers and undermine respect for the law.[207] We will see these dynamics play out in the English history surrounding enforcement of the Gin Act 1736 ("Gin Act") and in twentieth-century popular enforcement of the Sunday Observance Act 1780 ("Sunday Observance Act").[208]

203. *Id.*

204. *Id.*

205. 28 U.S.C. § 3730(b).

206. Senator Howard explained selection of *qui tam* enforcement in the False Claims Act as implementing a policy of "setting a rogue to catch a rogue." Beck, *English Eradication*, *supra* note 11, at 556 n.64 (quoting CONG. GLOBE, 37th Cong., 3d Sess. 955–56 (1863)).

207. *See infra* Subpart II.A.5.

208. *See generally History of London: 18th Century Gin Craze*, HIST., https://web.archive.org/web/20151001175716/http://www.history.co.uk/study-

A. The Gin Act 1736

The English Societies for the Reformation of Manners[209] that sprung up near the end of the seventeenth century eventually ceased operations, but the religious impulse toward social reform (including suppression of vice) would re-emerge in various forms in the decades that followed.[210] Thomas Bray, founder of the Society for Promoting Christian Knowledge ("SPCK"), partnered with James Oglethorpe in pressing for prison reform and suggested to Oglethorpe the plan of establishing Georgia as a colony where English debtors could build a new life.[211] Magistrate John Fielding, Methodist preacher John Wesley, and others were involved in renewed efforts to counter Sabbath-breaking, swearing, gambling, and prostitution, relying on both education and litigation.[212] William Wilberforce played a leading role in the movement to abolish the slave trade and also helped found the Proclamation Society Against Vice and Immorality, seeking to implement a proclamation issued by King George III.[213]

A coalition came together in the 1730s around the view that England's working classes had succumbed to excessive drinking, with adverse consequences for the country.[214] London was said to be home to 1,500 distillers, a reflection of rising demand.[215] Gin had become popular among the working classes due in part to a price advantage over beer and ale, which were subject to greater regulation and higher

topics/history-of-london/18th-century-gin-craze (discussing historical context behind Gin Acts); Christopher Lane, *The Striking History of Britain's Sunday Law*, HUFFPOST: BLOG (Mar. 11, 2012), https://www.huffpost.com/entry/britain-sunday-observance-law-striking-history_b_1184586 (discussing historical context for the Sunday Observance Acts).

209. *See supra* notes 103–106 and accompanying text.

210. *See Reformation of Manners Campaigns*, *supra* note 104 (explaining that the Societies "disappeared from the historical record in 1738").

211. *See* Peter Clark, *The "Mother Gin" Controversy in the Early Eighteenth Century*, 38 TRANSACTIONS ROYAL HIST. SOC'Y 63, 74–75 (1988).

212. *See Reformation of Manners Campaigns*, *supra* note 104.

213. ANNE STOTT, WILBERFORCE: FAMILY AND FRIENDS 33 (2012). As Wilberforce once wrote, "God Almighty has set before me two great objects; the suppression of the slave trade and the reformation of manners." M.J.D ROBERTS, MAKING ENGLISH MORALS: VOLUNTARY ASSOCIATIONS AND MORAL REFORM IN ENGLAND, 1787–1886, at 17 (2004). Wilberforce's Clapham community became a driving force behind a variety of social reform efforts. *See* Russell Smandych, *"To Soften the Extreme Rigor of Their Bondage": James Stephen's Attempt to Reform the Criminal Slave Laws of the West Indies, 1813–1833*, 23 LAW & HIST. REV. 537, 538 (2005) ("[T]he famous Evangelical 'Clapham Sect' . . . took a leading role in promoting a number of different humanitarian and social reform causes in the first half of the nineteenth century.").

214. *See generally* Clark, *supra* note 211 (discussing historical context for this coalition).

215. *Id.* at 64.

taxes.[216] Middlesex and Westminster magistrates played a key role in pressing for suppression of distilled liquors, seeing close connections among consumption of gin, poverty, and criminal activity.[217] Grand juries called attention to the problem.[218] Sir Joseph Jekyll, with support from Church of England bishops, lobbied Queen Caroline on the consequences of the gin trade.[219] Jekyll, known for his interest in the welfare of the working classes, became the chief sponsor of legislation to address the problem in Parliament.[220] Leading figures in the SPCK circulated literature on the dangers of gin, though one bishop warned that the campaign was a distraction from the group's core evangelical and educational mission.[221]

In response to these lobbying efforts, Parliament adopted "[a]n Act for laying a Duty upon the Retalers of Spirituous Liquors, and for licensing the Retalers thereof."[222] The preamble recited the concerns prompting Parliament to act:

> [T]he drinking of Spirituous Liquors or Strong Waters is become very common, especially among the People of lower and inferior Rank, the constant and excessive Use whereof tends greatly to the Destruction of their Healths, rendering them unfit for useful Labour and Business, debauching their Morals, and inciting them to perpetrate all Manner of Vices; and the ill Consequences of the excessive Use of such Liquors are not confined to the present Generation, but extend to future Ages, and tend to the Devastation and Ruin of this Kingdom.[223]

The "dramatic and draconian" provisions of the Gin Act "threatened to close down the spirits trade overnight."[224] Professor Radzinowicz noted that the legislation "almost amounted to the prohibition of all alcoholic liquors, at a time when drinking was particularly rife."[225]

The Gin Act contained a number of regulations concerning sale of distilled liquors, including a duty of twenty shillings per gallon, accompanied by penalties for failure to comply.[226] Two provisions of the Gin Act generated the most litigation. First, establishments that wished to sell "spirituous liquors" in retail quantities were required

216. *Id.* at 65.
217. *See id.* at 67, 73.
218. *Id.* at 71.
219. *Id.* at 67.
220. *See id.* at 75–76.
221. *Id.* at 74.
222. An Act for Laying a Duty upon the Retalers of Spiritous Liquors, and for Licensing the Retalers Thereof 1736, 9 Geo. 2 c. 23 [hereinafter Gin Act 1736].
223. *Id.* § 1.
224. Clark, *supra* note 211, at 63.
225. 2 RADZINOWICZ, *supra* note 33, at 147.
226. Gin Act of 1736, *supra* note 222, §§ 3, 11, 15.

to purchase a £50 annual license.[227] A person who sold distilled liquor in quantities less than two gallons without first getting the license was subject to a forfeiture of £100 that could be sought in an action before the Commissioners of Excise.[228] The penalty was enforceable by *qui tam* action, with the money divided "one Moiety" (half) to the king "and the other Moiety thereof to the Person or Persons who shall inform or sue for the same."[229] A license could only be issued to someone who kept an inn or other establishment devoted to sale of food or drink.[230] The licenses were too expensive for profitable retail operation, and only a small number were sold over the life of the statute.[231] Thousands of shopkeepers decided to risk the penalties of the Gin Act by continuing to engage in retail sales of distilled liquors without purchasing a license.[232]

The second heavily litigated provision of the statute sought to penalize hawkers who sold distilled spirits in streets, fields, sheds, wheelbarrows, or other places ineligible for issuance of a license.[233] The penalty was £10 for this offense, with half payable to the *qui tam* informer and the other half for the use of the poor of the parish.[234] An action under this section of the statute could be tried before any Justice of the Peace with jurisdiction where the offense was committed.[235] The statute provided that any person convicted under the hawking provision who would not or could not pay the £10 forfeiture would be imprisoned with hard labor for two months.[236]

Deploying *qui tam* informers to enforce the Gin Act ultimately undermined the legislation. The informers' personal interests led to various litigation abuses.[237] As informers' misconduct multiplied and accounts of their activities circulated, public opinion turned decisively against the statute, making it unenforceable.[238] As one historian has argued, "[t]o employ informers in such a controversial matter as the Gin Act was to court disaster."[239]

227. *Id.* § 1.
228. *See id.* §§ 2, 4; Warner & Ivis, *supra* note 39, at 303; Clark, *supra* note 211, at 79.
229. *See* Gin Act 1736, *supra* note 222, § 5.
230. *See id.* § 10.
231. Warner & Ivis, *supra* note 39, at 303.
232. *See id.* at 303–04; Clark, *supra* note 211, at 79.
233. *See* Gin Act 1736, *supra* note 222, § 13.
234. *Id.*
235. *Id.*; *see* Clark, *supra* note 211, at 79.
236. Gin Act 1736, *supra* note 222, § 13.
237. *See* Clark, *supra* note 211, at 80.
238. *Id.* at 80–81.
239. *Id.* at 81.

1. Procuring Statutory Violations

The fact that thousands of gin sellers continued operating without purchasing the statutorily required license suggests that many sellers had a base of trusted customers who maintained silence.[240] Any of those customers could potentially make some money by filing an information disclosing the illegal sales. But the rewards of informing were uncertain in the absence of cooperating witnesses or corroborating evidence.[241] Moreover, the strategy could work only one time, and the attempt would incur negative social and reputational consequences.[242] Informers, therefore, had to figure out ways to convince gin sellers to serve people outside their circle of loyal customers.

One common strategy among informers was to play on the sympathies of suspected gin merchants by feigning illness or claiming they needed gin for someone who was sick.[243] Distilled liquors were widely recognized as having medicinal value.[244] The Gin Act included an exemption for doctors and apothecaries who used spirituous liquors as an ingredient in medicines "for Sick, Lame, or Distempered persons only."[245] Shortly after the statute went into effect, an apothecary was convicted before the Commissioners of Excise for "prescribing to pretended-ailing Patients, nothing but entire Gin, without any Mixture or Composition."[246] Counsel for the Crown observed that it appeared to be a "more sickly time," given that more people than usual were visiting apothecaries.[247] The defendant replied that "the late Act of Parliament had given many People the Gripes [*i.e.*, stomach pains] which occasioned a great Laughter in the Court."[248]

Informers constructed elaborate ruses in their efforts to dupe litigation targets into retail sales.[249] One newspaper account tells of a female informer who went to a barber shop "complaining of Sickness, and desiring to be reliev'd by bleeding,"[250] a medical procedure provided by barbers at the time. After receiving the

240. *Cf.* Warner & Ivis, *supra* note 39, at 303–04 (noting that per capita consumption dropped only temporarily after the Gin Act 1736 passed).

241. *Id.* at 308–09.

242. *Id.* at 309.

243. *Id.* at 308; *see London*, STAMFORD MERCURY, Mar. 2, 1738, at 2 (two women on temporary release from prison assisted informers by feigning illness so "unwary People" would serve them spirituous liquors).

244. Warner & Ivis, *supra* note 39, at 325 n.57.

245. Gin Act 1736, *supra* note 222, § 12.

246. *Wye's Letter*, CALEDONIAN MERCURY (Edinburgh), Oct. 26, 1736, at 1.

247. *London*, DERBY MERCURY, Oct. 28, 1736, at 2.

248. *Id.*

249. Warner & Ivis, *supra* note 39, at 307–09.

250. *London*, DERBY MERCURY, Dec. 21, 1738, at 1.

"puncture" from the barber, the informer feigned a fainting spell and requested some spirits to assist in the recovery.[251] The barber brought her a dram, for which she paid.[252] She then declared how helpful it had been and asked for another, which was brought by the barber's wife, occasioning a second payment.[253] Since both the barber and his wife had violated the statute, they were imprisoned together for two months,[254] suggesting they either could not or would not pay the forfeiture provided by statute.

In another scheme, two women entered an alehouse.[255] One pretended to be pregnant in order to "dr[aw] compassionate persons in," so they would sell her liquor and she could inform against them.[256] The two women went to a Middlesex Justice of the Peace to charge the owner of the alehouse, who happened to be the magistrate's neighbor.[257] A search of the "pregnant" informer revealed a cushion under her clothing.[258] The magistrate was compelled to convict the defendant, who paid £5 to the informer, but the other £5 payment for the parish poor was waived.[259] While the informer collected her bounty, the magistrate also had her incarcerated as a "cheat."[260]

Some litigation targets managed to avoid the attempted deceptions of informers. One apothecary believed a woman who pretended sickness and requested some spirits, but refused to accept any payment.[261] The woman informed nevertheless, leading the magistrate to have her committed to prison.[262] On another occasion, a female merchant suspected dishonesty when an informer requested gin for his "very sick" wife.[263] The woman gave the man a bottle of vinegar instead.[264] When the informer tried to bring charges, he was set in the stocks for the affront to the court.[265] A mob took advantage of the informer's vulnerable position to tar and feather him.[266] Some particularly cautious gin sellers developed a practice of avoiding all

251. *Id.*
252. *Id.* at 1–2.
253. *Id.*
254. *Id.*
255. *From Several London Prints*, NEWCASTLE COURANT, July 1, 1738, at 1.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Bagnall's News*, IPSWICH GAZETTE, Oct. 15–Oct. 22, 1736, at 4.
262. *Id.*
263. *London*, DERBY MERCURY, Oct. 20, 1737, at 1.
264. *Id.*
265. *Id.*
266. *Id.*

face-to-face interaction with customers.[267] A customer would come to the entryway of a shop and cry out a password, after which a drawer would slide into the room through which the customer could pay and the drink could be served without the customer ever seeing the merchant.[268]

The newspapers also include accounts of the public looking out for merchants who were tricked by potential informers.[269] When a group of eleven diners had eaten at a public house, one claimed to be suffering from cholic and asked for some brandy.[270] The landlord talked about the dangers of retailing distilled liquors but, nevertheless, brought the brandy when the diners promised secrecy.[271] An argument ensued when the diners suggested they might inform against the landlord, and a crowd took the landlord's side, managing to dunk seven of the eleven individuals in the river.[272] On another occasion, an inebriated man procured a vial of gin from a Mrs. How, allegedly for his sick wife.[273] He then told three or four acquaintances of his plan to inform on Mrs. How.[274] The acquaintances reportedly managed to distract the informer long enough to drink the gin and replace it with a bodily substance the judges found less than amusing.[275]

2. False and Fraudulent Accusations

English newspapers contain numerous accounts of false accusations by informers seeking penalties under the Gin Act. In one instance, a well-dressed man ordered some ale at an inn operated by a widow.[276] He asked the innkeeper if she could give or sell him some brandy.[277] The woman reportedly indicated that she could not sell the man any brandy but identified a cupboard where he could find a bottle.[278] The man poured some brandy into his ale and also poured an extra half-pint into a vial that he put in his pocket.[279] On his way out, he told the woman he wanted to pay her six pence extra because of her "extraordinary civilities."[280] He then went directly to a

267. *London*, STAMFORD MERCURY, Feb. 23, 1738, at 2.
268. *Id.*
269. *London*, DERBY MERCURY, July 28, 1737, at 4.
270. *Id.*
271. *Id.*
272. *Id.*
273. *From Wye's and other Letters*, NEWCASTLE COURANT, Aug. 27, 1737, at 1.
274. *Id.*
275. *Id.*
276. *From Several London Prints*, NEWCASTLE COURANT, Jan. 15, 1737, at 2.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*

magistrate to file an information against the widow for illegally selling distilled liquor.[281] The magistrate called for the widow and, when it came out that the man took the vial of brandy without the widow's knowledge, sent the informer to jail and bound the widow over to prosecute him.[282]

On another occasion, nine informers were heard by people in an adjoining room of a public house plotting to lodge false accusations.[283] Those who overheard the plan went and warned the magistrate.[284] When the informers arrived and made their accusations, the defendants were called and denied having seen the informers previously.[285] The judge concluded the accusations were a "base and scandalous contrivance" and committed the informers to prison.[286]

Many of the newspaper accounts involve a simple financial motive for a false accusation, but there is occasionally more to the story. One account involved an accusation against a Mr. Ballard for retailing liquor in violation of the statute.[287] At trial, Mr. Ballard denied the charge and alleged that the information was filed out of spite.[288] He was a creditor of the informer's husband.[289] When he asked to be repaid, he was told that he would be paid with his own money.[290] Mr. Ballard initiated legal proceedings to collect the debt, at which point the debtor's wife sought revenge by accusing him of violating the Gin Act.[291] This defense was proved to the satisfaction of the court, and Mr. Ballard was acquitted of retailing distilled liquors.[292]

One study of a sample of cases under the Gin Act found thirty-one informers indicted for perjury, of whom seventeen were convicted.[293] Even without an indictment or conviction for perjury, perceptions of informers' truthfulness could influence proceedings under the statute. On one occasion, the Commissioners of Excise dismissed informations against sixteen individuals and severely

281. *Id.*
282. *Id.*
283. *London*, STAMFORD MERCURY, Aug. 24, 1738, at 2.
284. *Id.*
285. *Id.*
286. *Id.*
287. *From Several London Prints*, NEWCASTLE COURANT, June 24, 1738, at 2.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *See* Warner & Ivis, *supra* note 39, at 315–16; *see also*, *From Several London Prints*, NEWCASTLE COURANT, Sept. 23, 1738, at 1 (informers convicted of perjury); *London*, STAMFORD MERCURY, Dec. 21, 1738, at 2 (woman convicted of perjury).

reprimanded the informers.[294] This disposition flowed from the commissioners' conclusion that the informers' "only View was to get Money" and that they had previously "convicted great Numbers of innocent People."[295]

The significant number of false accusations under the Gin Act hardened public antipathy toward informers.[296] A particularly prolific informer named Edward Parker was charged in several indictments in late 1738 for suborning perjury.[297] Parker was an exciseman who reportedly coordinated a network of thirty informers and was responsible for allegations against 1,500 defendants.[298] Before the perjury cases were tried, Parker passed away, possibly by suicide.[299] He was interred in a private ceremony "for fear the Mob should tear his Corpse to Pieces."[300]

3. Extorting Payments for Non-Enforcement

The sizable penalties under the Gin Act created opportunities for potential informers to coerce payments from merchants fearful of prosecution.[301] The study referenced in the previous Subpart discovered nineteen indictments for extortion against informers, resulting in fourteen convictions.[302] For example, early in 1738, a constable was convicted of extorting a guinea from a food seller "on [p]retence of" his violating the statute.[303] Shortly thereafter, the mayor of London committed several people to jail over the course of several days "for extorting Money from People to stifle Informations" for retailing distilled liquors.[304]

In November of 1741, London merchants became alarmed when an unfounded rumor circulated that fresh orders had been issued to resume strict enforcement of the Gin Act.[305] The papers conjectured that the rumor was circulated by "a Set of Villains," who collected payments to suppress informations and wanted to induce panic

294. *London*, IPSWICH J., Mar. 24, 1739, at 23.

295. *Id.*

296. *See generally* Warner & Ivis, *supra* note 39, at 313 (discussing "popular protests" responding to the Gin Act 1736 and its effects).

297. *From Wye's and Other Letters*, NEWCASTLE COURANT, Oct. 21, 1738, at 2; *London*, STAMFORD MERCURY, Nov. 16, 1738, at 2.

298. Clark, *supra* note 211, at 80; Warner & Ivis, *supra* note 39, at 320.

299. *From Several London Prints*, NEWCASTLE COURANT, Jan. 13, 1739, at 1. The account reports that Parker took the perjury indictments "much to Heart, which was the Occasion of his Death." *Id.*

300. *Id.*

301. *See generally* Warner & Ivis, *supra* note 39, at 303–04 (discussing the fines and the effects of their high amounts).

302. *Id.* at 316.

303. *London*, STAMFORD MERCURY, Mar. 9, 1738, at 1.

304. *From Several London Prints*, NEWCASTLE COURANT, May 6, 1738, at 2.

305. *London*, STAMFORD MERCURY, Nov. 19, 1741, at 2.

among targets of their extortion.[306] A few days later, the Commissioners of Excise dismissed three excisemen for extorting payments from merchants "under pretense of stifling Informations," while a fourth member of the gang testified against his co-conspirators.[307]

4. Collusive Actions

A newspaper account from the height of Gin Act enforcement raises a suspicion of collusion between informers and targets of litigation.[308] One difficulty with the original 1736 legislation was that it provided inadequate incentives for *qui tam* actions against low-income street hawkers.[309] The Gin Act provided for a forfeiture of £10, which was more than the annual wage for many working-class citizens at the low end of the London pay scale.[310] A person who could not or would not pay was imprisoned for two months.[311] However, informers had little reason to prosecute low-level gin sellers whose poverty made recovery of a bounty unlikely. To address the problem, Parliament enacted legislation in 1737 providing that an informer who did not receive a £5 payment from a convicted defendant could be paid by the Commissioners of Excise.[312] The defendant was to be whipped at the end of the period of imprisonment.[313]

A newspaper account shortly after the statutory change reported that informers were gaining considerable sums by convicting offenders at the Excise office, but without any reduction in the

306. *Id.*

307. *Id.*; *see also London*, DERBY MERCURY, Dec. 10, 1741, at 4 (reporting on dismissal of "a noted Exciseman" who terrorized distillers and was proved to have received a total of 40 Guineas from several persons under the pretense of stifling informations that had been lodged against them).

308. *From Wye's Letter, and the London Prints*, NEWCASTLE COURANT, July 30, 1737, at 3.

309. *See supra* notes 233–236 and accompanying text.

310. *See Currency, Coinage and the Cost of Living*, THE PROCEEDINGS OF OLD BAILEY, https://www.oldbaileyonline.org/static/Coinage.jsp#wages (last visited May 28, 2022).

311. Gin Act 1736, *supra* note 222, § 13.

312. Warner & Ivis, *supra* note 39, at 306; An Act for Repealing the Present Duty on Sweets, and for Grating a Less Duty Thereupon; and for Explaining and Enforcing the Execution of an Act Passed in the Ninth Year of His Present Majesty's Reign, Intituled, *An Act for Laying a Duty upon the Retailers of Spirituous Liquors, and for Licensing the Retailers Thereof*; and for Appropriating the Supplies Granted in this Session of Parliament; and for Making forth Duplicates of Exchequer Bills, Lottery Tickets and Orders, Lost, Burnt, or Otherwise Destroyed 1737, 10 Geo. 2 c. 17, § 9 [hereinafter Gin Act 1737].

313. Warner & Ivis, *supra* note 39, at 306; Gin Act 1737, *supra* note 312, § 9 (before being discharged, defendant was to be "stript naked from the Middle upwards, and whipt until his or her Body be bloody").

popularity of retail gin sales.[314] The story reported on suspected collusion between informers and defendants:

> 'Tis remarked also, that the Informers could not make such Sums by their Informations, but that they agree with the Persons prosecuted, who are of the poorer Sort, and are glad of an Opportunity to share the Premium. It seems this has been concerted ever since the Act passed the Royal Assent.[315]

The suspicion seems to be that some low-income gin sellers might be willing to undergo prosecution if the informer promised to share part of the bounty, now paid by the government. The financial reward was great enough to induce cooperation between informers and hawkers, even though the defendant might suffer two months in prison and a potential whipping before release. Despite the lack of readily available evidence to this effect, it would not be surprising to learn that some particularly desperate individuals were actually lured *into* the gin trade through collusion with informers. If so, government payments designed to help suppress the gin trade might actually turn into a sort of subsidy for street hawking of distilled liquors.

5. The Demise of the Gin Act 1736

Attempting to shut down an industry supplying a popular and addictive pastime was inevitably going to be a challenge. But it seems clear that the large role Parliament gave to *qui tam* enforcement contributed significantly to the failure of the Gin Act. In an address to Parliament, the King complained of "Defiance of all Authority, Contempt of Magistracy, and even Resistance of the Law."[316] Dozens of informers were assaulted while the act remained in force.[317] One historian observed that the attacks sometimes took on a ritual character. Informers were drawn through the mud; one was even buried in ashes and cinder in a dung hill.[318] Some received "the usual Discipline of Pump and Horse-Pond."[319] At least four informers were

314. *From Wye's Letter, and the London Prints*, NEWCASTLE COURANT, July 30, 1737, at 3.

315. *Id.*

316. *See* George II, His Majesty's Most Gracious Speech to Both Houses of Parliament (June 21, 1737), *in* WELCOME COLLECTION, https://wellcomecollection.org/works/xnyjzvgk.

317. Warner & Ivis, *supra* note 39, at 309; Clark, *supra* note 211, at 80 (after new Act in 1737, "several informers a month suffered brutal physical assaults").

318. Clark, *supra* note 211, at 81.

319. *London*, N. COUNTRY J. IMPARTIAL INTELLIGENCER (Newcastle upon Tyne, Tyne and Wear), Aug. 20, 1737, at 2.

killed, including a female informer.[320] A number of informers were targeted by press gangs and forced into service in the Royal Navy.[321]

Public anger was directed not just at informers, but also at government officials who heard their cases and enforced the statute.[322] Constables and other officers seeking to arrest defendants or enforce judgments were sometimes met with violence.[323] One study found evidence of at least thirty-six demonstrations that took place in Westminster from 1736–40, nine of which involved gatherings outside the place where a case was being tried.[324] The researchers classified seven of the demonstrations as "riots," including three outside the home of Justice Thomas De Veil, a magistrate particularly active in hearing cases under the statute.[325] De Veil sought to prosecute Roger Allen for inciting a riot involving 1,000 participants.[326] The jury acquitted Allen based on his lawyers' claim of insanity, possibly intimidated by the large mob that gathered outside Westminster Hall while Allen was being tried.[327]

Opposition to the Gin Act spread, and some church wardens who received money for the poor under the statute ended up returning the funds to retailers who had been convicted.[328] The Commissioners of Excise decided not to hear further claims for retailing spirituous liquors unless "reputable persons" supported the informer's character, in order to "prevent innocent Persons from becoming a Prey to those People who live upon their Spoil."[329] Justices of the Peace gradually entertained fewer cases under the statute.[330] The 1736 statute had become a dead letter by 1741 and was formally replaced with less draconian legislation in 1743.[331]

Hindsight placed blame for failure of the statute on the enforcement role given to *qui tam* informers and the public backlash they provoked.[332] Justice De Veil noted that the statute set loose "a crew of desperate and wicked people who turn'd informers merely for

320. Warner & Ivis, *supra* note 39, at 309; *see also From Wye's and Other Letters*, NEWCASTLE COURANT, Nov. 12, 1737, at 2 (two informers killed by a mob).

321. Warner & Ivis, *supra* note 39, at 319–20.

322. *See id.* at 305.

323. *See id.* at 310–11; *London*, N. COUNTRY J. IMPARTIAL INTELLIGENCER (Newcastle upon Tyne, Tyne and Wear), June 27, 1737, at 1.

324. Warner & Ivis, *supra* note 39, at 310.

325. *Id.* at 309; Clark, *supra* note 211, at 80.

326. Warner & Ivis, *supra* note 39, at 317.

327. *Id.*

328. *London*, DERBY MERCURY, Aug. 10, 1738, at 2; Warner & Ivis, *supra* note 39, at 315; Clark, *supra* note 211, at 82.

329. *London*, DERBY MERCURY, Apr. 5, 1739, at 1; Warner & Ivis, *supra* note 39, at 314.

330. Clark, *supra* note 211, at 82; Warner & Ivis, *supra* note 39, at 318–19.

331. Warner & Ivis, *supra* note 39, at 306.

332. *See id.* at 299.

bread."[333] Lord Bathurst, in parliamentary debates on replacement legislation, noted that perjury by informers was "so flagrant and common, that the people thought all informations malicious, or at least, thinking themselves oppressed by the law, they looked upon every man that promoted its execution as their enemy."[334] Public opposition "wearied the magistrates" and intimidated legitimate informers so that the law fell into disuse.[335] Ultimately, the Gin Act failed to maintain "that consensus of acceptance in the country as a whole which was essential if it was to be enforceable,"[336] instead producing "open contempt for the law" and those who enforced it.[337]

B. Twentieth-Century Enforcement of the Sunday Observance Act

Beilby Porteus, bishop of Chester and later bishop of London, was the highest-ranking Church of England official to support Wilberforce's efforts to abolish the English slave trade.[338] He was also the leading supporter of the legislation that became the Sunday Observance Act.[339] The concerns that led to enactment of the statute included businesses providing public entertainment on the Sabbath, but also Sunday debates about Scripture by people untutored in theology.[340]

Under the Sunday Observance Act, any house, room, or place that charged admission or sold tickets for "public Entertainment or Amusement" or for "publicly debating on any Subject whatsoever" on

333. MEMOIRS OF THE LIFE AND TIMES, OF SIR THOMAS DEVEIL, KNIGHT, HIS MAJESTY'S JUSTICES OF THE PEACE, FOR THE COUNTIES OF MIDDLESEX, ESSEX, SURRY, AND HERTFORDSHIRE, THE CITY AND LIBERTY OF WESTMINSTER, THE TOWER OF LONDON, AND THE LIBERTIES THEREOF 39 (1748); Clark, *supra* note 211, at 80.

334. 2 RADZINOWICZ, *supra* note 33, at 147.

335. *Id.*

336. Clark, *supra* note 211, at 83.

337. Warner & Ivis, *supra* note 39, at 320.

338. Joshua Kellard, *Beilby Porteus: Social Reformer, Public Apologist*, ROUND CHURCH CAMBRIDGE, https://roundchurchcambridge.org/porteus-reformer-apologist/ (last visited May 28, 2022).

339. Christopher Lane, *On the Victorian Afterlife of the 1781 Sunday Observance Act*, BRANCH, https://www.branchcollective.org/?ps_articles=christopher-lane-on-the-victorian-afterlife-of-the-1781-sunday-observance-act (last visited May 28, 2022). The Act was proposed in 1780 and enacted in 1781, so references to the statute sometimes use the latter date. However, we will refer to the statute as the "Sunday Observance Act 1780," which appears to be the official designation. *See* Short Titles Act, 1896, U.K. Stat. 1896, ch. 14, Schedule 1.

340. An Act for Preventing Certain Abuses and Profanations on the Lord's Day, Called Sunday, 21 Geo. 3, c. 49, § 1 (Eng.) [hereinafter Sunday Observance Act 1780]; *see also The Common Informer*, YORKSHIRE POST, July 18, 1931, at 10 (by concerning theological debates, the act "was a measure of protection for the Church and the clergy, as well as for the suppression of Sunday entertainments").

a Sunday was deemed a "disorderly house."[341] The act imposed forfeitures of £200 for the "keeper" of a disorderly house; £100 for a person serving as master of ceremonies or as moderator of a public debate; £50 for a doorkeeper or other person collecting money or tickets; and £50 for advertisements promoting forbidden gatherings.[342] The forfeitures could be collected by any person who would sue for them,[343] making the lawsuit a "popular action" under Blackstone's classification.[344] The statute remained in effect through World War II and beyond, and the activities of common informers enforcing the statute helped build support for abolishing popular enforcement in England.[345]

1. Millie Orpen and Sunday Cinema

Early in the twentieth century, cinema began to take root in England as a form of public entertainment.[346] In the Cinematograph Act of 1909, Parliament empowered local county councils to license the operation of cinemas and impose conditions on those licenses.[347] In an early case interpreting the statute, a three-judge court determined that the London County Council ("LCC") had broad power to impose reasonable conditions on cinema licenses, including conditions unrelated to public safety.[348] Thus, the LCC was within its authority to require the cinema to remain closed on Sundays, Good Friday, and Christmas.[349] Justice Avory noted that similar conditions had been imposed in licensing music and dance halls and viewed the restriction as simply requiring the licensee to obey the law with respect to Sunday entertainments.[350]

Over the next two decades, many English jurisdictions disallowed Sunday cinema.[351] The authorities governing London and certain resort areas, however, came to embrace a more flexible approach.[352] One newspaper account explained that a number of local authorities assumed the Sunday Observance Act was "nearly

341. Sunday Observance Act 1780, *supra* note 340, § 1.

342. *Id.* §§ 1, 3.

343. *Id.* § 4.

344. *See supra* notes 50–52 and accompanying text.

345. Lane, *supra* note 339.

346. *See* Ingrid Jeacle, *"Going to the Movies": Accounting and Twentieth Century Cinema*, 22 ACCT., AUDITING & ACCOUNTABILITY J. 677, 679 (2009).

347. Cinematograph Act 1909, 9 Edw. 7 c. 30, § 2.

348. London Cnty. Council v. Bermondsey Bioscope Co. [1911] 1 KB 445 at 451, 453, 454.

349. *Id.* at 451–52 (Lord Alverstone, C.J.); *id.* at 453 (Pickford, J.); *id.* at 453–54 (Avory, J.).

350. *Id.* at 453–54.

351. *Sunday Observance and the Law*, DUNDEE COURIER & ADVERTISER, Dec. 5, 1930, at 6.

352. *Id.*

obsolete" and could be ignored.[353] The LCC developed a set of conditions under which it would approve an application to operate a cinema on Sundays, so long as the net profits were donated to an approved charity.[354]

The LCC's practice of allowing Sunday cinema operations seemed unfair to owners of live theaters and music halls, which were not shown the same consideration.[355] A change in the law seemed unlikely. According to a theater industry publication, the head of the influential Lord's Day Observance Society ("LDOS") had polled leaders of the three major political parties and received assurances that none of them intended to introduce legislation to repeal the Lord's Day Observance Act.[356] The author of the article therefore suggested a "test action" under the 1780 statute against a cinema authorized to operate on Sundays, in order to have Sunday cinema declared illegal and establish parity of treatment between cinemas and theaters.[357] The author expressed some ambivalence about seeking to enforce a statute that a judge once called "a wanton and vexatious interference with the liberty of the subject," but he doubted that theater managers could "afford to let rival interests consolidate their position," especially given the advent of talking movies.[358]

Theater industry representatives did end up filing a test action in 1930 in the Divisional Court of the King's Bench, though they decided to sue the LCC rather than litigate directly against a cinema operator.[359] The LCC had approved an application filed on behalf of Streatham Astoria to show movies on Sundays, and the plaintiffs challenged the LCC action as *ultra vires*.[360] Counsel for the LCC represented that the agency had received applications for Sunday operations from "the vast majority" of cinema halls and had imposed a uniform set of conditions:

> Applications had been granted on the strict conditions that the class of entertainments given on Sunday was of a healthy, decent character; that the workers were safe-guarded from doing an extra day's work; and that there was no question of private profit made out of the entertainment, but on the contrary that the profits—ascertained by a scheme of

353. *Id.*

354. *Sunday Entertainments*, STAGE (London), Dec. 11, 1930, at 20.

355. *See id.*; *Sunday Cinema Shows*, SCOTSMAN (Edinburgh), Dec. 5, 1930, at 12.

356. *Sunday Entertainments*, *supra* note 354, at 20.

357. *See id.* ("A test action, the issue of which is not in doubt, would clear the air and hasten reform.").

358. *Id.*

359. *Id.*; *Sunday Cinema Shows*, *supra* note 355, at 12.

360. *Sunday Entertainments*, *supra* note 354, at 20.

> accountancy that was clearly laid down—should be handed to a charity.[361]

According to counsel, roughly £200,000 had been paid to hospitals and other charities in that year.[362] The three-judge court agreed with the plaintiffs that the LCC lacked authority to permit the cinema to operate on Sundays.[363] Justice Avory explained that the LCC was purporting to authorize something expressly forbidden by an act of Parliament.[364] The judges rejected the LCC's technical defense that the council was not really granting permission to operate on Sundays, but merely announcing a set of conditions under which it would take no legal action.[365]

The decision sent immediate shock waves through the London entertainment community since it implied that all London cinemas operating on Sundays under licenses from the LCC were in violation of the Sunday Observance Act.[366] One newspaper observed that the decision provoked discussion of an "immensely controversial subject," dividing "Puritans" and their opponents, and that "[v]ery strong feelings are aroused on both sides."[367] The LDOS saw the ruling as a vindication for their position but also expressed concern that it could lead to legislative efforts to repeal or weaken the Sunday Observance statute.[368] The majority of the LCC voted to pursue an appeal and seek a meeting with the Home Secretary to discuss the situation, over the objection of some LCC members who thought the court's decision was clearly correct.[369] The Reverend A.G. Prichard argued that an appeal would be a waste of money and deemed it delusional to imagine Parliament might repeal the Lord's Day Observance Act, since "[r]eligious opinion was strong and united on this matter, while political opinion was divided."[370]

As public officials and cinema executives wrestled with the implications of the court's decision, an enterprising common informer

361. *Id.*; *Sunday Cinema Shows*, *supra* note 355, at 12. One member of the LCC explained that while the cinemas had to give up Sunday profits, they still benefited financially from Sunday operations: "The proprietors spread rents and overhead charges over seven days a week instead of six." *Sunday Entertainments*, *supra* note 354, at 20. This suggests that while cinemas donated Sunday profits, permission to open on Sundays made Monday through Saturday exhibitions more profitable.

362. *Sunday Entertainments*, *supra* note 354, at 20; *Sunday Cinema Shows*, *supra* note 355, at 12.

363. *Sunday Entertainments*, *supra* note 354, at 20.

364. *Id.*

365. *See id.*

366. *See Sunday Observance and the Law*, *supra* note 351, at 6.

367. *Id.*

368. *Sunday Cinema Shows*, *supra* note 355, at 12.

369. *Sunday Entertainments*, *supra* note 354, at 20.

370. *Id.*

sprang into action.[371] Four days after the Divisional Court's ruling, a twenty-three-year-old clerk working for the law firm of Jacques, Asquith & Jacques, with the help of the firm's principal (and perhaps only) attorney, signed a deed changing her name from "Millie Oppenheim" to "Millie Orpen."[372] Two days later, Ms. Orpen filed popular actions against eight London cinema companies and many individual members of their boards of directors, claiming penalties under the Lord's Day Observance Act for Sunday cinema exhibitions stretching over an extended period.[373] The £195,000 in penalties Ms. Orpen sought from cinema companies and their directors amounted to "a fortune," over £14 million in today's currency, or a bit under $17 million.[374] Ms. Orpen also filed additional claims seeking penalties from newspapers for carrying Sunday cinema advertisements.[375]

The filing of so many actions under the Sunday Observance statute provoked curiosity and speculation about the identity and motivations of the informer who had "declared war" on Sunday cinema.[376] The Lord's Day Observance Society quickly disclaimed any knowledge of the informer's identity and denied that they were directly or indirectly responsible for the litigation.[377] One newspaper

371. *See Girl Sues for a Fortune: Could Penalties Be Remitted?*, NEWS CHRON. (London), Dec. 15, 1930, at 1 [hereinafter *Girl Sues*] (Common informer, Millie Orpen, suing eight cinemas for £195,000).

372. Orpen v. Haymarket Capitol, Ltd. [1931] All ER 360 (KB) at 361–62; *Sunday Cinema Performances*, HALIFAX DAILY COURIER & GUARDIAN, Jul. 15, 1931, at 6 (clerk testified that firm's principal was Jacques Cohen, who registered under the name Jacques, Asquith & Jacques; clerk had never met a Mr. Jacques or a Mr. Asquith). Trial testimony identified the date of the name change as December 8, 1930. The Divisional Court announced its decision on December 4. *See Sunday Observance and the Law*, *supra* note 351, at 6.

373. *See Girl Sues*, *supra* note 371, at 1.

374. *Id.* According to one online inflation calculator, £1 in 1930 was worth approximately £72.65 in 2022. *See CPI Inflation Calculator*, 2013 DOLLARS, https://www.in2013dollars.com/uk/inflation/1930 (last visited Aug. 3, 2022). By that metric, Ms. Orpen's claims against cinemas totaled £14,166,750 in today's currency. Applying a conversion rate of £1 equals $1.1897, from a Western Union currency conversion site, Ms. Orpen's claims total around $16,854,182.48. *British Pound to US Dollar*, WU, https://www.westernunion.com/gb/en/currency-converter/gbp-to-usd-rate.html (last visited Aug. 3, 2022).

375. *Sunday Opening*, STAGE (London), Dec. 18, 1930, at 17.

376. *See, e.g.*, *Woman's "War" on Sunday Kinemas: Action as Common Informer*, PORTSMOUTH EVENING NEWS, Dec. 12, 1930, at 6; *Cinemas to Carry On*, NEWS CHRON. (London), Dec. 13, 1930, at 7 ("mystery surrounds the 'informer,' Miss Millie Orpen"); *id.* (mother, who said her name was "Offenheim," would only say she worked in a city office).

377. *Sunday Opening*, *supra* note 375, at 17; *see also Girl Cinema Informer*, W. MAIL & S. WALES NEWS, Dec. 13, 1930, at 6 (Sunday Observance societies "surprised" by *qui tam* actions).

noted a rumor that officials might have encouraged Ms. Orpen to file her actions but thought the more likely motive was financial: "although the sums she is claiming are enormous and will not be paid, she may yet make a considerable monetary gain out of the whole matter."[378] Another journalist also subscribed to the theory that Orpen was motivated by the hope of collecting enormous sums under "an old, old law, out of date for years but never repealed."[379] The controversy over Sunday cinema was one aspect of a much broader national debate concerning activities appropriate for Sunday.[380] A recently opened greyhound racing club held its first Sunday meeting soon after Ms. Orpen filed suit, and 2,000 people showed up at their track or another nearby.[381] Magistrates in Walsall issued a license "for what it is worth" for a police band to hold a Sunday fundraising concert for a children's camp, leading one clerk to worry that the Chief Constable might have to initiate proceedings under the Sunday Observance Act against his own officers.[382] The LCC, which had permitted cinemas to open on Sundays, simultaneously sought to shut down Sunday boxing matches, already taking place at eight venues.[383] A boxing ring manager criticized the LCC's decision as a "terrible interference with the rights of private individuals," wondering why people could play golf or tennis or go joy-riding on Sunday but not watch boxing.[384] Meanwhile, an English vicar complained from the pulpit about a public authority's decision to open a golf course for tee times on Sunday mornings.[385] The Reverend Pitt Bonajee, a pastor in Brighton—which he described as "Babylon-on-Sea"—considered suing a local cinema as a common informer, though he indicated that he would not claim the penalties provided under the Sunday Observance Act.[386] Back in London, Ms. Orpen's filings apparently did nothing to reduce the number of residents going to movies on Sundays,[387] but they did work like an accelerant on the smoldering Sunday opening debate, with the threat of enormous legal

378. *Miss Millie Orpen*, MUSSELBURGH NEWS, Dec. 19, 1930 at 2.

379. James Mark, *Innocent Occupation of Getting Money*, DUNDEE EVENING TEL., Dec. 23, 1930, at 2.

380. *See generally The English Sunday*, NEWS CHRON. (London), Dec. 15, 1930, at 1 (reporting controversies over Sunday cinema, boxing, golf, and dog racing).

381. *Sunday at "the Dogs,"* NEWS CHRON. (London), Dec. 15, 1930, at 1.

382. *Sunday Opening*, *supra* note 375, at 17.

383. *Sunday Boxing to Stop: Effect on Eight London Halls*, NEWS CHRON. (London), Dec. 15, 1930, at 1.

384. *Id.*

385. *Sunday Golf Protest*, NEWS CHRON. (London), Dec. 15, 1930, at 2.

386. *Brighton Pastor Takes Action*, NEWS CHRON. (London), Dec. 15, 1930, at 2.

387. *Girl Sues*, *supra* note 371, at 1 (London cinemas open and most of them full).

penalties increasing pressure for an expeditious legislative response.[388]

The first of Ms. Orpen's cases to be tried targeted Haymarket Capitol, Ltd., which operated the Capitol Cinema Theatre, and four individual members of the company's board of directors.[389] The case was tried before Justice Rowlatt of the King's Bench, without a jury, in July 1931. Justice Rowlatt explained that statutes permitting suit by a common informer "enlisted the motive of private greed" to ensure an offender is "made to smart" for violating the law.[390] The reference to "private greed" suggests that the judge understood the action to be financially motivated but also underscores that the informer's motives were irrelevant.[391]

Ms. Orpen sought £5,000 each against the company and the four individual defendants on the theory that each was a "keeper" of the cinema where tickets had been sold to the public for Sunday film exhibitions.[392] The statute made a "keeper" of a "disorderly house" liable for £200 per offense, and Ms. Orpen sought to establish that the cinema had violated the statute on twenty-five separate Sundays between June 22 and December 7, 1930.[393] Justice Rowlatt found the company liable for £5,000, rejecting a technical defense that a company could not be a "keeper" of a house under the statute.[394] He was not swayed by the supposed lack of evidence that any customer who bought a ticket actually entered the cinema, noting that "[i]t would be a great reflection on the sanity of the persons paying the money to say that they did not go in."[395] Counsel provoked laughter by responding that they might not have entered because "they were stricken in their consciences."[396] While the judge was satisfied that the company was liable, he dismissed claims against the individual directors for lack of evidence that any of them had been present or given orders to open the cinema on any of the Sundays in question.[397]

388. *See Girl Cinema Informer*, *supra* note 377, at 6 (Members of Parliament ready to pursue legislative correction if LCC appeal not successful); *Sunday Opening*, *supra* note 375, at 17 (bill introduced in Parliament that would require written consent of Attorney General for common informers to seek recovery of penalties).

389. Orpen v. Haymarket Capitol, Ltd. [1931] All ER 360 (KB) at 362.

390. *Id.* at 361.

391. *Id.* In a similar vein, the judge speculated that "perhaps" Ms. Orpen changed her name so she "could more colourably come forward as a champion of the English Sunday," but concluded that "I have nothing whatever to do with those circumstances." *Id.* at 361–62.

392. *See id.* at 363–65.

393. *Id.* at 361, 364.

394. *Id.* at 362–63, 365.

395. *Sunday Cinema Performances*, *supra* note 372, at 6.

396. *Id.*

397. *Orpen* [1931] All ER at 363–64.

After the ruling, Ms. Orpen commented that "[i]t was necessary that a test action of the kind should have been brought, and the terms of the judgment show that. It means that kinemas [sic] will have to close on Sundays or that the law will have to be amended."[398] Her statement does not suggest a strong conviction one way or the other on the question of whether cinemas should be allowed to operate on Sundays. Her claim to public service rested on having clarified an unsettled point of law. Articles shortly after the decision noted multiple obstacles that might hinder collection of the £5,000 judgment: the case was being appealed, Parliament was considering legislation that would require dismissal of Ms. Orpen's claims, and the Crown had power under an 1875 statute to remit forfeitures imposed on the cinema.[399] A week after the judgment, Ms. Orpen's law firm announced that she had signed a deed renouncing the £5,000 penalties from Haymarket and that, in fact, it had always been her intention to relinquish them.[400] The claim that she never intended to collect the money seems a bit implausible, particularly given that Ms. Orpen's attorney had unsuccessfully pressed Haymarket to give up its right to seek remission of the penalties in exchange for Ms. Orpen's agreement to a stay pending appeal.[401] In any event, Ms. Orpen's inability to collect the forfeiture from Haymarket was cemented a short time later when the Home Secretary sent a letter advising that the King had decided to remit the entire £5,000 penalty.[402]

Ms. Orpen's short career as a common informer resulted in two pieces of legislation, with one being merely temporary.[403] When Ms. Orpen filed her lawsuits, Parliament began working on legislation to prevent copycat claims by other informers, and the statute was eventually expanded to require dismissal of Ms. Orpen's pending claims as well.[404] In September 1931, the Home Secretary

398. *Informer Gets £5,000 Damages*, PORTSMOUTH EVENING NEWS, July 17, 1931, at 9.

399. *Informer's £5,000 Award: Will She Actually Get the Money?*, BIRMINGHAM GAZETTE, July 18, 1931, at 1 [hereinafter *Informer's £5,000 Award*]; *Sunday Cinema "Informer" Awarded £5,000*, NEWS CHRON. (London), July 18, 1931, at 3.

400. *"Informer's" £5,000: Penalties Renounced by Miss Millie Orpen*, LEED'S MERCURY, July 22, 1931, at 5; *Common Informer Relinquishes £5,000: Never Intended to Take Penalties*, BIOSCOPE (London), July 22, 1931, at 14.

401. *Sunday Cinema "Informer" Awarded £5,000*, *supra* note 399, at 3.

402. *Sunday Kinemas*, N. DAILY MAIL (Hartlepool), July 24, 1931, at 10; *That's £5,000 – That Was!*, BIOSCOPE (London), July 29, 1931, at 22.

403. *See generally* Sunday Performances (Temporary Regulation) Act 1931, 21 & 22 Geo. 5 c. 52 (Eng.); Sunday Entertainments Act 1932, 22 & 23 Geo. 5, c. 51 (Eng.).

404. *See Informer's £5,000 Award*, *supra* note 399, at 1; *Millie Orpen Gets Costs*, BIOSCOPE (London), Oct. 21, 1931, at 24.

urged Parliament to "clarify the present ridiculous position."[405] Without new legislation, the "ancient and obsolete" Sunday Observance Act would continue in force and "amusements as innocent as band concerts, lectures and debates will be illegal on Sunday."[406] The police would either have to overlook violations or enforce the Act "with a vigorous and ruthless hand" that the public would never tolerate.[407] The next month, Parliament passed the Sunday Performances ("Temporary Regulation") Act of 1931, which dismissed pending claims under the Sunday Observance Act and prevented the filing of further claims without the approval of the Attorney General or Solicitor General.[408] The court was allowed to award costs in pending actions, so Ms. Orpen did not walk away empty-handed.[409] The act was to continue in force for no more than a year and authorized local authorities like the LCC to license Sunday cinema exhibitions and musical performances.[410]

The Temporary Regulation was replaced the following year by the Sunday Entertainments Act of 1932 ("Sunday Entertainments Act").[411] On the controversial topic of Sunday cinema, the statute grandfathered in the power of local governments that had been licensing Sunday film exhibitions to continue doing so, with conditions requiring charitable donation of some or all of the profits and provisions protecting workers against a seven-day work week.[412] The statute also provided a route for new local governments to seek the power to license Sunday cinema exhibitions if there was adequate popular support in the jurisdiction.[413] In addition, the act conferred on local governments the power to license Sunday musical performances and exempted museums, picture galleries, zoological gardens, botanical gardens, lectures, and debates from the

405. *Mr. Clynes Condemns 1781 Act: Threatens Even Sunday Bands!*, DAILY HERALD (London), Sept. 3, 1931, at 9 [hereinafter *Mr. Clynes Condemns*].

406. *Id.*

407. *Id.*

408. Sunday Performances (Temporary Regulation) Act 1931, 21 & 22 Geo. 5, c. 52, § 2.

409. Sunday Performances (Temporary Regulation) Act, § 2. Ms. Orpen was awarded costs in one of the pending actions, but also ordered to pay costs of individual directors against whom she did not proceed. *Common Informer's Costs: Sunday Cinemas Question*, EVENING TEL. (Dundee), Oct. 19, 1931, at 10; *Millie Orpen Gets Costs*, *supra* note 404, at 24. She settled at least one of the other pending cases. *Miss Millie Orpen*, SUNDERLAND ECHO & SHIPPING GAZETTE, Oct. 13, 1931, at 1.

410. Sunday Performances (Temporary Regulation) Act 1931, 21 & 22 Geo. 5 c. 52, §§ 1(1), 3(3).

411. Sunday Entertainments Act 1932, 22 & 23 Geo. 5 c. 51, § 6(2).

412. *See id.* § 1.

413. *Id.* § 1 & Schedule.

restrictions of the Sunday Observance Act.[414] While some members of Parliament wanted to allow theaters to open on Sundays, the legislation did not go that far.[415]

The statute ultimately enacted was a compromise measure crafted after an earlier bill providing broad authorization for Sunday cinema failed to garner adequate support.[416] Though the Lord's Day Observance Society succeeded in narrowing the scope of parliamentary action, the Sunday Entertainments Act still seems like a defeat for the strict Sabbatarian position. One opponent of the legislation complained that Parliament had "legalised illegality" by grandfathering in Sunday cinema licenses improperly issued by the LCC and other public bodies.[417] The legislative changes seemed like a parliamentary admission that the eighteenth-century Sunday Observance Act was outdated and unduly restrictive.[418]

The Lord's Day Observance Society and the cinema industry found themselves embroiled in a series of local contests in which citizens were asked whether to authorize Sunday cinema in particular jurisdictions.[419] These local contests "concentrated public

414. *Id.* §§ 3–4.

415. *This Week in Parliament: Free Vote on Sunday Cinemas Bill*, YORKSHIRE POST, Apr. 11, 1932, at 7 (noting that MPs supporting Sunday theater would vote against earlier Sunday cinema bill, along with Sabbatarians); *Stage Celebrities' Plea to M.P.'s: The Theatre "Ruthlessly Overridden,"* EDINBURGH EVENING NEWS, June 21, 1932, at 6 (MPs heard plea from stage actors to allow Sunday opening of theaters on same terms as cinemas).

416. *Sunday Amusements*, SHEFFIELD DAILY TEL., May 13, 1932, at 6; *A New Sunday Cinemas Bill: Present Measure to Be Scrapped*, LIVERPOOL ECHO, May 12, 1932, at 8.

417. *Dr. R.C. Gillie Criticises: Sunday Entertainment Act*, BATH CHRON. & HERALD, Aug. 6, 1932, at 19.

418. Leading figures in the church began articulating a more permissive attitude toward Sunday cinema. The Archbishop of Canterbury spoke in favor of the Sunday Entertainments Act in the House of Lords, and his remarks were later re-published by those supporting expansion of Sunday cinema to new areas. *See, e.g.*, Advertisement, RUGBY ADVERTISER, Jan. 24, 1936, at 3 (advertisement for the Rugby Sunday Cinema Association). The Bishop of Croydon spoke in favor of permitting Sunday cinema in his city after industry representatives promised that church representatives would be involved in selecting wholesome films suitable for Sunday exhibition. *"Talkies" in the Streets: Test Programme on Sunday*, CROYDON TIMES, Nov. 26, 1932, at 1; *Wholesome Films: Definite Undertaking of Adequate Supply*, CROYDON TIMES, Nov. 26, 1932, at 11; *see also Bishop's Support: Croydon Council Approves Sunday Cinemas*, YORKSHIRE POST, Oct. 4, 1932, at 7 (discussing the Croydon Borough Council's vote to allow Sunday films and the committee's composition, including the Bishop of Croydon and a representative of "the Free Churches").

419. *Sunday Cinemas*, SHIELDS NEWS, Oct. 4, 1933, at 2; W. Holt White, *The Sunday Cinema: The Battle Royal Which Is Now to Be Fought in 750 Electoral Areas*, SPHERE, Dec. 10, 1932, at 418–19, 454.

attention" on "the general question of Sunday entertainments."[420] As one journalist noted, "[t]o open cinemas on Sundays is to open the floodgates of all forms of public pleasure and entertainment which are not positively pernicious."[421] The legislative and political setback for the strict Sabbatarian position came about in significant part because of Ms. Orpen's litigation.[422] The large penalties she sought infused the Sunday cinema question with an urgency that even the earlier court ruling on the subject had not generated.[423]

2. Common Informers and World War II

Ms. Orpen's highly publicized actions against London cinemas raised the visibility of popular actions as an effective and potentially lucrative means of enforcing the remaining restrictions of the Sunday Observance Act. In the years that followed, common informers recovered penalties against forms of Sunday entertainment Parliament had not exempted in the 1932 legislation.[424] A congregational minister, for instance, won £1,500 in penalties with respect to Sunday boxing matches, immediately pledging not to use a penny for himself, but to donate the money to a religious or charitable institution.[425] Other informers won penalties against organizers of "all in" wrestling exhibitions and newspapers that advertised the events.[426]

420. *Sunday Cinema Controversy: Aftermath of Croydon Poll*, YORKSHIRE POST, Dec. 1, 1932, at 8.

421. *Sunday Entertainment*, ECKINGTON, WOODHOUSE & STAVELEY EXPRESS, Apr. 16, 1932, at 5; *see also* I.J.C., Letter to the Editor, *Sunday Entertainments Bill*, SCOTSMAN (Edinburgh), June 9, 1932, at 7 (letter to the editor from Scottish Sabbatarian characterizing Sunday cinema as "the thin edge of the wedge").

422. *See supra* text accompanying notes 403–410.

423. *See Mr. Clynes Condemns*, *supra* note 405 (reporting on Home Secretary Clynes's condemnation of the Sabbatarian law after Ms. Opren's £5,000 judgment).

424. As noted above, the 1932 legislation exempted those involved with any "musical entertainment . . . museum, picture gallery, zoological or botanical garden or aquarium . . . [or] any lecture or debate." Sunday Entertainments Act 1932, 22 & 23 Geo. 5 c. 51, §§ 4(b), 4(c), 4(d) (Eng.).

425. *"Common Informer": Congregational Minister Awarded £1500*, SCOTSMAN (Edinburgh), July 6, 1932, at 13.

426. *£300 for "Common Informer": Sunday All-In Wrestling Bouts*, EVENING TEL. & POST (Dundee), Jan. 16, 1936, at 4 (informer awarded £300 for all-in wrestling at Chelsea Palace); *Common Informer: Two More Awards in All-In Wrestling Cases*, N. DAILY MAIL (Hartlepool), Jan. 20, 1936, at 1 (awards of £350 against newspaper for advertising Sunday wrestling and £400 against organizer); *see also King Halves Common Informer's Award, Following Petition for Clemency*, EVESHAM STANDARD & W. MIDLAND OBSERVER, May 16, 1936, at 5 (King remits half of £300 award to informer in all-in wrestling case).

The legislative proceedings following Ms. Orpen's claims led many members of Parliament to develop decidedly negative views of common informers and popular enforcement.[427] Two years after the passage of the Sunday Entertainments Act, Sir Gerald Hurst received permission to introduce legislation that would prohibit penal actions by common informers; enforcement actions would instead be brought by government officials or by private parties injured by a statutory violation.[428] Introducing the bill, Hurst told members about a Sunday garden party for charity that was thwarted when an individual living 184 miles away threatened a lawsuit.[429] Characterizing common informer litigation as a form of legalized blackmail, Hurst suggested that decisions to enforce the Sunday Observance Act should be made by public officials.[430] Hurst realized his bill was introduced too late in the session to have a chance at passage but wanted to begin the abolition debate and lay the groundwork for later legislative action.[431]

After the commencement of World War II, the government drafted a defense regulation that would allow local authorities to license the Sunday opening of live theaters and dance halls.[432] Herbert Morrison, the Home Secretary, suggested that only a minority of the public was strongly opposed to Sunday theater.[433] He believed additional forms of Sunday entertainment would help maintain the spirits of workers taxed by the war effort and was a reasonable extension of the statutory permission already granted for licensing Sunday movies.[434] After a debate, however, Parliament by a margin of eight votes rejected the government's order expanding the list of permissible Sunday entertainments.[435] A large contingent of Members of Parliament ("MPs") with posts in the government abstained.[436] They did not want to vote in favor of Sunday opening,

427. *Common Informer: Condemnation by Members of Parliament*, N. DAILY MAIL (Hartlepool), July 23, 1931, at 5 (several MPs criticize common informers in debate over Consumers' Council Bill).

428. *Stop Common Informer: Commons Welcomes New Bill*, COURIER & ADVERTISER (Dundee), Nov. 7, 1934, at 3.

429. *Id.*

430. *Id.*; *The Common Informer*, SHIELDS NEWS, Nov. 10, 1934, at 2.

431. *See* Beck, *English Eradication*, *supra* note 11, at 603–04.

432. *The Proposed Sunday Theatre Order: Controversy May Be Renewed at West Hartlepool*, N. DAILY MAIL (Hartlepool), Feb. 21, 1941, at 3.

433. *No Sunday Theatre Opening: M.P.s Declare Against Recent Order*, SCOTSMAN (Edinburgh), Apr. 2, 1941, at 9 [hereinafter *No Sunday Theatre Opening*].

434. *Id.*

435. *Id.*

436. *Sunday Theatre Problem: Congratulations Sent to Mr. Magnay,* N. DAILY MAIL (Hartlepool), Apr. 2, 1941, at 1; *see also No Sunday Theatre Opening*, *supra* note 433 (noting that only "280 M.P.s went into the division lobbies" to vote).

but the Home Secretary had bound them not to vote against the measure.[437]

Some theater fans objected to Parliament's action as unreasonable, noting that the British Broadcasting Company ("BBC") often broadcast theatrical performances on Sundays. It seemed ironic that one could watch the movie version of *No Time for Comedy* on a Sunday, but the law prevented one from seeing the stage version a short distance away.[438] Following the failed attempt to authorize Sunday theater and dancing, the Lord Chancellor told a select committee of the House of Commons that litigation involving common informers was a "monstrous machine" and that he did not think litigation involving informers "was creditable to anybody."[439] The select committee proposed abolition of the common informer, but the proposal was not implemented.[440]

Common informers continued to stir up controversy as World War II unfolded, repeatedly targeting events designed to benefit the troops or war-related charities.[441] The *Liverpool Echo* noted that common informers had become active during the war.[442] Those organizing shows for the troops or benefits for war charities often planned the events on Sundays because professional artists would be free to perform.[443] While the 1932 legislation exempted musical performances from the Sunday Observance Act, common informers threatened legal proceedings if the organizers planned anything like a variety show or the performers intended to wear costumes.[444] A

437. *Sunday Theatre Problem: Congratulations Sent to Mr. Magnay*, *supra* note 436.

438. *Sunday Theatre "Unreason,"* YORKSHIRE EVENING POST, Apr. 4, 1941, at 6; *No Sunday Theatre Opening*, *supra* note 433.

439. *The Common Informer: Should Be Abolished, Says Lord Simon*, BELFAST NEWSL., June 20, 1941, at 2 (reporting on Lord Chancellor's testimony to select committee); *Common Informer: Sir John Simon on "a Cut-Throat Business,"* N. DAILY MAIL (Hartlepool), June 20, 1941, at 3 (same); Editorial, *The Informer*, MANCHESTER EVENING NEWS, June 20, 1941, at 4 (common informer actions anachronistic and have no public support; would not be a bad thing if they ended up a war casualty).

440. *Common Informer: Proposed Abolition of Rights*, BELFAST NEWSL., Feb. 6, 1942, at 6 (House of Commons approves report of select committee, which included proposal to abolish rights of common informers).

441. *See, e.g.*, *Common Informer Stops Gift Draw: Leicester Was Running One for P.O.W. Fund*, MKT. HARBOROUGH ADVERTISER & MIDLAND MAIL, May 28, 1943, at 11 (informer contacts police to shut down gift drawing to benefit prisoners of war after organizers had collected £1,400).

442. *The Common Informer*, LIVERPOOL ECHO, Nov. 7, 1942, at 2.

443. *Id.*

444. *Id.* The paper described common informers as "a survival from a less enlightened age," but noted that the House of Commons did not have time during the war to debate an abolition bill. *Id.* In one case, a local authority decided to ignore an anonymous letter threatening *qui tam* litigation if a Sunday concert

member of Parliament asked the Home Secretary whether he had looked into abuses by common informers relating to Sunday entertainments for the troops.[445] Home Secretary Morrison responded: "I fully sympathise with the objections to the antiquated provisions as to suing for penalties which can be abused by individuals not interested in any public purpose but in the chance of making money."[446] However, he deemed it impossible to amend the law "without raising the whole question of Sunday entertainment."[447]

The activities of common informers helped generate controversy between local officials and the Lord's Day Observance Society ("LDOS").[448] The Whitefield Urban District Council adopted a resolution in 1944 asking Parliament to amend the Sunday Observance Act, suggesting that the statutory scheme conferred unwarranted power on the LDOS:

> The Council are confident that the Lord's Day Observance Society does not, by its actions, express the feeling of the great majority of the community and they consider that steps should be taken to induce Parliament to introduce the necessary legislation to remove the existing anomaly whereby the society are in a position to prevent Sunday entertainments being given for the benefit of members of the services, the public and the charities for which they are organised.[449]

Whitefield circulated the resolution to around 300 other local councils, seeking their support.[450] This led the LDOS to draft letters of its own to local authorities, responding to the Whitefield Council's implication that LDOS was responsible for the activities of common informers enforcing the Sunday Observance Act.[451] Some local jurisdictions voted to support the Whitefield resolution, while others declined.[452]

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took place as scheduled, given that the Sunday Entertainments Act allowed musical performances. *Common Informer's Threat: Heywood Committee Ignores It*, ROCHDALE OBSERVER, Jan. 22, 1944, at 5.

445. *Common Informer*, LIVERPOOL EVENING EXPRESS, Jan. 20, 1944, at 4.

446. *Id.*

447. *Id.*

448. *See, e.g.*, *Ramsgate Town Council: Sunday Entertainments Debate*, THANET ADVERTISER & ECHO, Feb. 4, 1944, at 1.

449. *Id.*

450. *Council's Revolt Against L.D.O.S.: "The Common Informer,"* KINEMATOGRAPH WKLY., Jan. 20, 1944, at 5 (Whitefield resolution on agenda at perhaps 300 councils).

451. *Bradford Council Debate on Sunday Shows: Views on the Alleged Activities of a Society*, YORKSHIRE POST & LEEDS MERCURY, Feb. 9, 1944, at 5; *The Common Informer: Council Seeks a Way Out*, *supra* note 42, at 20.

452. *See, e.g.*, *The Common Informer: Council Seeks a Way Out*, *supra* note 42, at 20 (Holyland Urban District Council and Padiham Council support Whitefield

While the Whitefield resolution was circulating for debate, Members of Parliament raised the issue with the Home Secretary, expressing hope that Parliament would be given the opportunity to reverse its earlier vote on Sunday entertainments.[453] The Home Secretary sympathized with the concerns expressed: "About the common informer, [Mr. Morrison] shared the general feeling of the House. It was an antiquated and undesirable device. Individuals had exploited the Act to an extent which came very near blackmail."[454] However, Morrison cast doubt on claims about the role of the LDOS: "I have had no evidence that the Lord's Day Observance Society is in the least involved in that kind of activity."[455] As to a new vote in Parliament, the government had not detected a shift in legislative sentiment that would warrant reopening the Sunday entertainments debate.[456] The LDOS celebrated Morrison's statements as a vindication.[457]

The government did take steps two months later to rein in a particular abuse by common informers.[458] The Home Secretary informed the House of Commons that he had "been in consultation with the Lord Chancellor about cases in which the common informer arranges with the offender to compound [*i.e.*, settle] the penalty."[459] These often-secret settlements presumably formed the basis for Morrison's earlier comments about informers engaging in conduct "very near blackmail."[460] As noted previously, comparable conduct by informers had been addressed in a sixteenth-century statute enacted during Queen Elizabeth I's reign.[461] The Home Secretary and the Lord Chancellor agreed, based on the Elizabethan statute, that an informer's settlement of a claim for statutory penalties required

resolution); *Leominster Borough Council*, KINGTON TIMES & N. HERTFORDSHIRE ADVERTISER, Jan. 29, 1944, at 3 (Leominster Borough Council debates and votes not to support Whitefield resolution).

453. *Sunday Shows Anomaly: M.P.s Want It Swept Away*, DUNDEE COURIER & ADVERTISER, Feb. 4, 1944, at 2.

454. *Id.*

455. *A Victory for Sunday: L.D.O.S. "Full of Rejoicing,"* BIGGLESWADE CHRON. & BEDFORDSHIRE GAZETTE, Feb. 25, 1944, at 8.

456. *Sunday Shows Anomaly: M.P.s Want It Swept Away*, *supra* note 453, at 2.

457. *See A Victory for Sunday: L.D.O.S. "Full of Rejoicing," supra* note 455, at 8.

458. *Common Informer: Sunday Observance Cases*, BELFAST NEWSL., Apr. 7, 1944, at 3.

459. *Id. See Compound*, BLACK'S LAW DICTIONARY (11th ed. 2019) (third definition of "compound" is "[t]o settle (a matter, esp. a debt) by a money payment, in lieu of other liability; to adjust by agreement").

460. *Sunday Shows Anomaly: M.P.s Want It Swept Away*, *supra* note 453, at 2.

461. Beck, *English Eradication*, *supra* note 11, at 587.

judicial consent and that this consent "ought to be made in open court so that there may be public knowledge of any such proceedings."[462]

Parliament's failure to take more aggressive action allowed common informers to continue disrupting charitable events scheduled for Sundays.[463] An informer reportedly shut down a Christmas drawing for British and Allied airmen in 1944 after 5,000 tickets had been sold.[464] Plans for a post-war event to support a British Legion building fund were completely revised after receipt of a letter from the LDOS contending that the anticipated "variety concert" format would violate the Sunday Entertainments Act.[465] Several of the original performers were excluded and others substituted based on the risk of suit by a common informer.[466] A branch of the R.A.F. Association cancelled a variety show due to fear of popular enforcement.[467] The local chapter then persuaded the national organization to pass a resolution at its 1949 annual conference deploring the ability of common informers to prevent a registered war charity from staging a Sunday variety show.[468] The following month, an MP asked the new Home Secretary, J. Chuter Ede, for legislation updating the Sunday Observance Act and taking enforcement "out of the hands of cranks, busybodies and cheap informers."[469] Ede responded that "[t]his matter would entail very great controversy, and at the present time there is no prospect of legislation."[470]

3. Common Informer No. 1: Alfred Green, a.k.a. Anthony Houghton-le-Touzel

Millie Orpen enjoyed celebrity status for a few months in 1930–31 as the mysterious twenty-three-year-old common informer who sought large penalties against London cinemas.[471] The press later became even more fascinated with Alfred William Green, who they

462. *Common Informer: Sunday Observance Cases*, BELFAST NEWSL., *supra* note 458, at 3.

463. *See, e.g.*, GLOUCESTERSHIRE ECHO, Nov. 23, 1944, at 4; Fairplay, Letter to the Editor, *The Common Informer*, BROUGHTY FERRY GUIDE & CARNOUSTIE GAZETTE, Dec. 9, 1944, at 3.

464. GLOUCESTERSHIRE ECHO, *supra* note 463, at 4.

465. *Local Concert Upset: Action by Lord's Day Observance Society*, HALIFAX DAILY COURIER & GUARDIAN, Feb. 11, 1946, at 2.

466. *Id.*

467. *"Common Informer Threat": Why Sunday Show Was Cancelled*, N. WALES WKLY. NEWS, Sept. 16, 1948, at 5.

468. *Attack on Common Informer: Call for Repeal of Act Banning Sunday Charity Shows*, NOTTINGHAM J., June 13, 1949, at 5.

469. *Ede Will Not Stop "Common Informer,"* NOTTINGHAM J., July 8, 1949, at 5.

470. *Id.*

471. *See supra* notes 371–423 and accompanying text.

began calling Britain's "Common Informer No. 1."[472] Green also began informing at twenty-three years of age, like Ms. Orpen, but kept at it on and off for fifteen years, eventually changing his name to "Anthony Houghton-le-Touzel."[473] Green's reputation was sufficiently problematic that, when he assumed his new name, several members of the ancient "le Touzel" family publicly disclaimed any familial connection.[474]

Green/le Touzel once described his first legal action as a desperate effort to escape the extreme poverty of his childhood: "Only a man in despair would do what I did—bring an action on his own with no legal knowledge or experience. But a man who is hungry and homeless seizes any remote chance of a meal and a bed."[475] The real story may be closer to the less dramatic version he later told a bankruptcy court. Green/le Touzel worked as a clerk until he came across the Sunday Observance Act and "recognised its possibilities," at which point he became a professional informer.[476] He once told a jury that "[h]e did not see why he should confine himself with being a £6 a week clerk, when he could create for himself, by personal hard work, a career that would bring him a much larger sum."[477] Green/le Touzel claimed that he made between £1,500–2,000 annually in the years before the war.[478]

Green/le Touzel sometimes attributed his Sunday Observance Act claims to his "religious conscience," though he also admitted that "I like money and I get a very handsome return."[479] He was careful to note in one interview that "I do not describe my activities as an occupation—for the income tax authorities might begin to wonder whether it was in fact an occupation."[480] Green/le Touzel was less

472. *See, e.g.*, Christian Petersen, *One of the Strangest Ways of Making Money–Legally: Profits of a Common Informer*, SUNDAY DISPATCH (London), May 15, 1949 at 1; *The Man Who Was Common Informer No. 1*, DAILY MIRROR (London), Oct. 4, 1951, at 3.

473. *The Man Who Was Common Informer No. 1*, *supra* note 472, at 3.

474. Christian Petersen*, Informer Green Offers Truce–But Makes Another £315 in a Week*, SUNDAY DISPATCH (London), May 22, 1949, at 3 (Mr. Gibbon Monypenny le Touzel and his nephew John Francis Monypenny le Touzel complain about new name selected by common informer); E.F.G. le Touzel, Letter to the Editor, *"Not Me, Sir!,"* SUNDAY PICTORIAL (London), Jan. 15, 1950, at 16 (letter from E.F.G. le Touzel denying family connection to common informer).

475. Ralph Champion, *'I do it for money' says Britain's No. 1 Common Informer*, SUNDAY PICTORIAL (London), Jan. 8, 1950, at 3.

476. *The Man Who Was Common Informer No. 1*, *supra* note 472, at 3.

477. *Common Informer Sues for Alleged Libel: 'Mr. Green Defends a Good Money Job*,*'* COVENTRY EVENING TEL., Nov. 20, 1950, at 1 [hereinafter *Common Informer Sues*].

478. Petersen, *supra* note 472, at 1.

479. *Id.*; *Informer Green Offers Truce*, *supra* note 474, at 3.

480. Petersen, *supra* note 472, at 7.

nuanced about his motivations in later statements: "I do not bring these actions from any religious motive. I bring them solely to make money."[481] As he told a jury, "I do not stand up as the champion of the Christian Sunday. I do not go to church and I do not profess to be one of those persons—I wish I was."[482] He denied any connection to the Lord's Day Observance Society and criticized them for stopping a Sunday cricket match organized for charity.[483]

Green/le Touzel once claimed to have "fought between 200 and 300 cases" under the Sunday Observance Act,[484] though he later gave a bankruptcy court the more modest figure of "more than fifty actions."[485] His first common informer action sought £400 in penalties as a result of a Sunday boxing match.[486] Green won penalties totaling £350: £200 from the "keeper" of the boxing ring, £100 from the "master of ceremonies," and £50 from the printer of a magazine advertisement.[487] An additional claim for £50 failed because the judge decided that the name of a printing company on a handbill was not sufficient evidence, by itself, to prove that the company had actually done the printing.[488] From the start, Green pursued cases *pro se*, rather than hiring lawyers to prosecute for him.[489] While he was disliked by the businesses he targeted, solicitors were said to have a secret respect for his work preparing cases and his knowledge of the law.[490] He boasted that he once "stood alone against nine K.C.s [King's Counsel] and five junior counsel."[491] The Lord Chancellor supposedly told him that the bar would need to put up a statue in his honor because of all the work he generated for them.[492]

Green/le Touzel devoted significant attention to dance halls that opened on Sunday, making him "the most hated man in the world of dancing."[493] Companies sought to avoid liability under the Sunday Observance Act by selling memberships in dance clubs and confining

481. Champion, *supra* note 475, at 3.
482. *Common Informer Sues*, *supra* note 477, at 1.
483. Champion, *supra* note 475, at 3.
484. Petersen, *supra* note 472, at 1.
485. *The Man Who Was Common Informer No. 1*, *supra* note 472, at 3.
486. *See* Green v. Berliner [1936] 2 KB 477 at 479 (Eng.).
487. *Id.* at 489, 491, 497.
488. *Id.* at 491–95.
489. Christian Petersen, *Common Informer Gives Up–But He Is Going to Get a Shock*, SUNDAY DISPATCH (London), Nov. 26, 1950, at 1 (when friend pointed out cost of lawyers would diminish recovery, Green joked, "I will do it myself"; friend dared Green and he accepted challenge).
490. Petersen, *supra* note 472, at 1.
491. *Id.*
492. *Informer Green Offers Truce*, *supra* note 474, at 3.
493. Petersen, *supra* note 472, at 1.

Sunday dancing to those who were already members.[494] But laxity in enforcing these rules could create a risk of litigation.[495] Green/le Touzel reportedly joined a dance club on one occasion and used the manner of his enrollment as evidence of a violation.[496] On another occasion, he won a case for £200 against Mecca, Ltd. when his wife was allowed to purchase a ticket for Sunday dancing at a dance hall in Brighton.[497]

Mecca had reportedly settled three prior cases pursued by Green/le Touzel for £100, £100, and £50.[498] Reporters found a similar pattern with other dance companies: "Managements, we find, have taken it in turns to pay le Touzel. It has been cheaper than fighting."[499] While Green/le Touzel reportedly received court approval to settle his actions (at least after 1944, when the courts began insisting on the point) there is evidence that his settlements included additional terms not publicly disclosed.[500] For instance, one newspaper account reported on a letter Green/le Touzel sent to a large dance promotion firm. In the letter, the informer suggested that "a truce 'for a few years' MUST be good business or other companies would not have agreed to one."[501] He mentioned a payment of "300 guineas" the previous week by a firm of solicitors in exchange for an undisclosed "gentlemen's agreement."[502] The implication is that companies were paying Green/le Touzel for a prospective promise to leave them alone for some period of time after a case was settled. If so, Green/le Touzel was not simply reaching settlements regarding past violations of the Sunday Observance Act but, in effect, giving businesses his own personal license to violate the statute in the future without threat of litigation by "Britain's Common Informer No. 1."

Mecca, Ltd.'s 1950 decision to fight a case brought by Green/le Touzel was a departure from their prior practice of settling claims.[503] Reporters quoted Mecca's managing director as saying: "Nonsense to all this. No more pacts or agreements . . . . Let's fight so that

494. *Id.*

495. *See id.* ("But the legality of this method has always depended mainly upon the ability of the halls to prevent non-members from gaining admittance.").

496. *Id.*

497. *Informer's Wife Says She Went to 'Exotic' Dancing-Hall*, DAILY MIRROR (London), Feb. 21, 1950, at 12 (wife's testimony about buying Sunday dancing ticket); Houghton-le Touzel v. Mecca, Ltd. [1950] 2 KB 612 at 616 (Eng.) (allowing le Touzel's action to proceed because "a limited company is within" the "Sunday Observance Act"); *The Dance Hall Case: £200 Award*, BIRMINGHAM GAZETTE, Feb. 22, 1950, at 5 (£200 award against Mecca, Ltd.).

498. *Personality Parade*, SUNDAY PICTORIAL (London), Feb. 26, 1950, at 8.

499. *Id.*

500. *See Informer Green Offers Truce*, *supra* note 474, at 3.

501. *Id.*

502. *Id.*

503. *See Personality Parade*, *supra* note 498, at 8.

everyone will know about the man."[504] The decision to litigate significantly altered the financial incentives for Green/le Touzel. While he won £200 against Mecca, plus costs of £4 (since he pursued the action *pro se*), he lost a related case against Sherry's (Brighton), Ltd., which owned the dance hall where Mecca's event took place.[505] The court awarded costs to Sherry's that, by one estimate, might total £600.[506] Adding insult to injury, the Home Secretary remitted half of the award against Mecca, reducing it to £100.[507]

Later that year, Green/le Touzel filed a libel action against the owners and publishers of Dance News, based in part on an article titled: "Common Informer Menace to Sunday Dance Clubs."[508] However, he dismissed the action part way through trial, resulting in another significant award of £567 in costs.[509] A few days later, Green/le Touzel announced he was ending his career as a common informer.[510] The effort of litigating was worthwhile when defendants settled quickly, but it no longer made sense now that "every action I bring will be fought."[511] The Home Secretary "always" reduced the penalty by half under the remittance statute, so that a £200 award at trial resulted in a £100 recovery.[512] A recovery of that size did not justify the eighteen months of hard work required to take a case to trial.[513]

This was the second time Green/le Touzel had announced his retirement as a common informer.[514] In the late 1930s, he had been hit with large cost awards in unsuccessful cases.[515] When one of the defendants sued Green/le Touzel to recover an award of costs, it turned out that he had relocated to Paris.[516] He sent a letter read in court indicating that he was "entirely finished with that career."[517]

504. *Id.*

505. *Id.*; *The Dance Hall Case: £200 Award*, *supra* note 497, at 5.

506. *Personality Parade*, *supra* note 498, at 8.

507. *Common Informer Sues*, *supra* note 477, at 1.

508. *'No Spiv,' Says Informer in Libel Action*, DAILY MAIL (Hull), Nov. 20, 1950, at 5.

509. *Id.*; *The Man Who Was Common Informer No. 1*, *supra* note 472, at 3 (costs of £567 awarded in libel action).

510. Petersen, *Common Informer Gives Up*, *supra* note 489, at 1.

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.*, *see also Informer Writes: "Finished,"* DAILY HERALD (London), Feb. 17, 1939, at 7 (Le Touzel's first retirement).

515. *See, e.g.*, *Sunday Observance Claim Fails: Informer to Pay Costs*, NORFOLK & SUFFOLK J. & DISS EXPRESS, Feb. 19, 1937, at 2; *"Common Informer" Protest: Actions Becoming a Scandal, Says K.C.*, EVENING TELEGRAPH (Dundee), Jan. 27, 1939, at 10.

516. *Informer Writes: "Finished," supra* note 514.

517. *Id.*

However, he later backtracked, bringing additional popular actions after he was discharged from the army.[518] Green/le Touzel did not have time to rethink his second retirement from enforcement of the Sunday Observance Act. With the support of the government, Parliament quickly pushed through legislation that abolished the office of common informer in English law.[519] Green/le Touzel filed for bankruptcy, claiming he had technically been insolvent since 1937 due to outstanding awards of costs entered against him, which he had never paid but could still be collected.[520]

III. CONSEQUENCES OF S.B. 8: INTENDED AND UNINTENDED

We have observed that our legal system seeks to minimize the impact of personal interests that might influence public officials in the performance of their duties.[521] Statutes providing for popular enforcement, on the other hand, expressly offer personal financial rewards to motivate enforcement activities and leave room for pursuit of other personal concerns.[522] The interests of informers often conflict with interests of the public, leading to abusive enforcement activities and unfair litigation tactics.[523]

We looked more carefully at two circumstances in which England turned to popular enforcement to implement unusually controversial legislation. Informers enforcing the Gin Act and twentieth-century informers enforcing the Sunday Observance Act often pursued financial gain in a manner inconsistent with the common good.[524] The activities of informers under the Gin Act generated such a public backlash that the statute became unenforceable, while popular enforcement of the Sunday Observance Act undermined respect for the law, leading Parliament to chip away at the statute and eventually to abolish popular enforcement altogether.[525] In this Part, we draw on the history of popular enforcement to consider ways in

518. Petersen, *supra* note 472, at 7. Green/Le Touzel claimed that he had "cleaned up all Liverpool" while he was in the army. *Id.*

519. Petersen, *Common Informer Gives Up*, *supra* note 489, at 1 (ministers supporting bill to abolish common informer); *Lord's Day Act Informer*, YORKSHIRE OBSERVER, July 2, 1951, at 3 (bill abolishing common informers receives royal assent).

520. *The Man Who Was Common Informer No. 1*, *supra* note 472, at 3.

521. *See supra* notes 58–86 and accompanying text.

522. *See supra* notes 87–109 and accompanying text.

523. *See supra* notes 110–204 and accompanying text.

524. *See supra* notes 205–520 and accompanying text.

525. *See From Wye's Letter, and the London Prints*, NEWCASTLE COURANT, at 2 (two informers under the Gin Act killed by mob); *see also* sources cited *supra* note 519 (abolition of the Sunday Observance Act).

which the informer's conflict of interest could produce unseemly, pointless, and abusive litigation by plaintiffs enforcing S.B. 8.[526]

A. Popular Actions Under S.B. 8

Under S.B. 8, a physician considering an abortion must determine whether the fetus has "a detectable heartbeat" and memorialize the results in the patient's medical records.[527] A physician violates the statute if he performs or induces an abortion after detecting a heartbeat or failing to conduct appropriate tests.[528] The statute recognizes an exception when the doctor believes "a medical emergency exists that prevents compliance" and makes notations concerning the emergency in the medical records.[529]

S.B. 8 authorizes any person "other than an officer or employee of a state or local governmental entity" to file a civil action against any person who (1) performs or induces an abortion violating the statute, (2) aids or abets such an abortion, or (3) "intends to engage in conduct" that would result in liability.[530] Under the aiding or abetting provision, the person must "knowingly" engage in the challenged conduct but can be liable regardless of whether the person knew the abortion would be performed in a manner violating the statute.[531] At the same time, the statute provides an affirmative defense to a defendant who reasonably believes after a reasonable investigation that the doctor complied with or would comply with the statute.[532] So, for instance, an insurance company that pays for an illegal abortion would presumably be liable if it simply assumed a doctor followed the law but could have an affirmative defense if an investigation established a reasonable basis for believing the doctor did so.

526. The Supreme Court's decision in *Dobbs* removes the most likely federal constitutional impediment to litigation under S.B. 8. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (authority to regulate abortion rests with the people and their elected representatives). The ultimate extent of enforcement activity under S.B. 8 may depend on the outcome of the pending state constitutional challenges to the statute. *See supra* note 26 (discussing state trial court decision declaring S.B. 8 unlawful under various state constitutional theories). For the short term, abortion providers have changed their practices to avoid claims under the statute. *See supra* note 25 and accompanying text. Some of the hypothetical S.B. 8 lawsuits discussed below would be most likely to occur in a scenario where the statute remains enforceable, and a set of abortion providers in the state decides to resume post-heartbeat abortions on a clandestine basis in defiance of the legislation.

527. TEX. HEALTH & SAFETY CODE ANN. § 171.203(b), (d)(3) (West 2021).

528. *Id.* § 171.204(a).

529. *Id.* § 171.205(a)–(b).

530. *Id.* § 171.208(a).

531. *Id.* § 171.208(a)(2).

532. *Id.* § 171.208(f).

If the plaintiff prevails in a civil action under S.B. 8, the statute instructs the court to award injunctive relief sufficient to prevent further violations, statutory damages of "not less than $10,000" for each abortion, and costs and attorney's fees.[533] The substantive provisions of the statute are to be enforced "exclusively" through private civil actions.[534] State officials and employees may not enforce or threaten enforcement of the statute's requirements and may not intervene in actions filed by private claimants.[535] A majority of the United States Supreme Court understood a savings clause in S.B. 8 to permit action by state licensing authorities against medical professionals who violate the statute, but the Texas Supreme Court ultimately concluded that even those licensing officials lack any enforcement authority.[536]

The provisions of S.B. 8 aggressively stack the deck in favor of claimants and make actions under the statute difficult to defend. The private civil action can be filed against a defendant in any Texas county where the claimant resides, and venue cannot be transferred without the consent of all parties.[537] Nothing in the statute prevents multiple claimants from filing suit regarding the same abortion, and the statute does not recognize a defense of "non-mutual issue preclusion or non-mutual claim preclusion."[538] Thus, a Dallas abortion clinic alleged to have violated the statute could be sued by claimants in many different counties with respect to the same abortion. Even if the clinic won a case in one county, the matter would not be barred by *res judicata* and other cases could proceed elsewhere in the state.[539] The most helpful defense for the clinic under the statute may be a provision that bars relief if the defendant "paid the full amount of statutory damages . . . in a previous action" with respect to the same abortion.[540] Ironically, a clinic might be better off confessing judgment and paying a $10,000 statutory damage award

533. *Id.* § 171.208(b).

534. *Id.* § 171.207(a).

535. *Id.* §§ 171.207(a), 171.208(h).

536. *Compare* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535–37 (2021), *with* Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (2022) (opinion on certified question from United States Court of Appeals for the Fifth Circuit).

537. TEX. HEALTH & SAFETY CODE ANN. §§ 171.210(a)(4), (b) (West 2021).

538. *Id.* § 171.208(e)(5).

539. *Id. See also* Motion for Leave to File and Brief of Administrative Law, Constitutional Law, and Civil Procedure Scholars as Amici Curiae in Support of the Application to Vacate Stay of Preliminary Injunction, United States v. Texas, 142 S. Ct. 14 (2021) (No. 21A85) ("The law provides no mechanism for plaintiffs or courts to coordinate enforcement decisions or duplicative actions, and . . . blocks courts from giving *res judicata* effect to claims and issues litigated to their conclusion in prior suits.").

540. TEX. HEALTH & SAFETY CODE ANN. § 171.208(c) (West 2021).

in order to cut off duplicative claims, even if the clinic has evidence that a particular abortion complied with statutory requirements.

The fee-shifting provisions of S.B. 8 also seem quite one-sided.[541] It is worth recalling that English informers under the Sunday Observance statute risked an order to pay costs, including the defendant's attorney's fees, if an action was unsuccessful, potentially heading off even greater abuses in enforcement of the statute.[542] As noted above, S.B. 8 provides that a court "shall award" "costs and attorney's fees" to a prevailing plaintiff.[543] The statute expressly bars an award of attorney's fees to a prevailing defendant "under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court."[544] One litigant argues that S.B. 8 would permit a Texas court to shift fees in favor of a defendant under a statutory provision barring frivolous, vexatious, or harassing conduct,[545] but that's much more limited than the automatic award of attorney's fees to a prevailing plaintiff. [546]

B. Potential Manifestations of an S.B. 8 Informer's Conflict of Interest

The unique enforcement mechanism incorporated into S.B. 8 accomplished the Texas legislature's goal of preventing pre-enforcement review of the statute in federal court through a suit against state officials.[547] It seemed for a while that the only way to obtain a court ruling on S.B. 8's constitutionality might be as a defense to an action filed under the statute.[548] Alan Braid, a doctor in San Antonio, published a letter in the Washington Post shortly

541. *See id.* § 171.208(b)(3), (i) (mandating the award of court costs and attorney's fees to successful plaintiffs but never defendants).

542. *See* Petersen, *supra* note 472, at 1.

543. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(3) (West 2021).

544. *Id.* § 171.208(i).

545. Reply Brief for Respondent Mark Lee Dickson at 2, Whole Woman's Health v. Jackson, No. 21-463 (U.S. Oct. 29, 2021) (citing TEX. CIV. PRAC. & REM. CODE §§ 10.001–10.006 (2021)).

546. S.B. 8 also seeks to deter challenges to abortion legislation by making an attorney or law firm jointly and severally liable to pay the attorney's fees of the prevailing party if the attorney "seeks declaratory or injunctive relief to prevent . . . any person" from enforcing a law that regulates abortions. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(a) (West 2021). It has been argued that this liability would not attach to an attorney who merely raised a constitutional defense to an action under S.B. 8. *See* Reply Brief for Respondent Mark Lee Dickson, *supra* note 545, at 3.

547. *See supra* notes 22–26 and accompanying text.

548. *See generally* Kate Zernike and Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html (reporting on failure of all pre-enforcement challenges).

after the statute went into effect claiming that he had performed a first-trimester abortion in violation of S.B. 8.[549] One reason for publicly confessing to the statutory violation was "to make sure that Texas didn't get away with its bid to prevent this blatantly unconstitutional law from being tested."[550]

The Washington Post published Dr. Braid's letter on Saturday, September 18, 2021.[551] On Monday morning, September 20, two individuals from other states filed suit against Dr. Braid under S.B. 8. The first case was filed by Felipe Gomez, an attorney disbarred by the United States District Court for the Northern District of Illinois for sending harassing and threatening communications and filing frivolous complaints against other attorneys.[552] Gomez styled himself "Pro Choice Plaintiff" and labeled Dr. Braid "Pro Choice Defendant."[553] Rather than asking for statutory damages under S.B. 8, Gomez asked the court "to declare that the Act is Unconstitutional, and in violation of Roe v Wade."[554]

The second complaint was filed later the same morning by Oscar Stilley, who described himself as "a disbarred and disgraced former Arkansas lawyer."[555] Stilley acknowledged in the complaint that he was serving the twelfth year of a fifteen-year federal home confinement sentence for tax evasion and conspiracy, though he criticized the federal charges as "utterly fraudulent" and indicated that he expects to eventually be exonerated.[556] Stilley requested relief including "the sum of $100,000, but in no case less than the statutory minimum of $10,000."[557] Stilley told reporters that he was not opposed to abortion and wanted to facilitate a challenge to the law.[558] However, he also indicated that he would be happy to take the

549. Alan Braid, *Why I Violated Texas's Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021), https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/.

550. *Id.*

551. *Id.*

552. *In re* Gomez, 829 F. App'x 136, 137 (7th Cir. 2020).

553. *See* Complaint, Gomez v. Braid, No. 2021Cl19920 (224th Dist. Ct., Bexar Cnty., Tex. Sept. 20, 2021).

554. *Id.* ¶ 2.

555. Complaint, Stilley v. Braid ¶ 3, No. 2021Cl19940 (438th Dist. Ct., Bexar Cnty., Tex. Sept. 20, 2021).

556. *Id.* ¶¶ 4–6.

557. *Id.* ¶ 27.

558. Sanford Nowlin, *Two Separate Suits Filed Against San Antonio Doctor who Performed Abortion in Violation of Texas Law*, SAN ANTONIO CURRENT (Sept. 21, 2021, 9:30 AM), https://www.sacurrent.com/sanantonio/two-separate-suits-filed-against-san-antonio-doctor-who-performed-abortion-in-violation-of-texas-law/Content?oid=27179092.

money if he won: "If there's a $10,000 pot of gold at the end of this rainbow, I want it. Why shouldn't I get it?"[559]

Texas Right to Life, which worked to enact S.B. 8, was not happy with these first two cases filed under the law.[560] A spokesperson for the organization described the filings as "bogus" and complained that "neither of these lawsuits are valid attempts to save innocent lives."[561] Another Texas Right to Life official complained that "[b]oth cases are self-serving legal stunts, abusing the cause of action created in the Texas Heartbeat Act for their own purposes."[562]

What Texas Right to Life highlights concerning these first two lawsuits under S.B. 8 is the informer's conflict of interest, which is inevitable when a legislature authorizes significant financial rewards for popular enforcement. By permitting any member of the public to sue and offering financial rewards as an inducement, the statute virtually invites litigation by individuals pursuing personal agendas that may not align with the legislative purposes underlying the statute. Assuming S.B. 8 continues to be enforced, the cases filed by Gomez and Stilley may be the first of many that prioritize interests of the informer over legislative goals or the common good more broadly defined.

1. Technical Statutory Violations

S.B. 8 allows a lawsuit against any person "who performs or induces an abortion in violation of" the statute.[563] One can envision actions by informers that clearly further the legislative goals. The claimant might possess strong evidence that a person performed an elective abortion well after commencement of a detectible fetal heartbeat. One can even imagine cases under the statute that would have been permissible under pre-*Dobbs* federal case law concerning

559. Jason Whitely, *Meet the Two 'Yahoos' Suing over Texas' New Abortion Law*, WFAA (Sept. 28, 2021, 4:15 PM), https://www.wfaa.com/article/news/local/texas/meet-two-yahoos-suing-texas-new-abortion-law-yallitics-attorney-arkansas/287-60fe5362-480c-4c86-970e-76c36231ac9b. A third lawsuit against Dr. Braid was filed in Smith County, Texas by an organization called the Texas Heartbeat Project. *See* Lauren Goodman, *Reproductive Rights Groups Seek to Combine Lawsuits Against Texas Physician Who Violated Abortion Law*, KXAN (Oct. 5, 2021, 6:50 PM), https://www.kxan.com/news/reproductive-rights-group-seeks-to-combine-lawsuits-against-texas-physician-who-violated-abortion-law/.

560. *See* Madison Hall, *The Anti-Abortion Group that Championed Texas' Vigilante Law Is Upset 2 People Suing over Abortion Aren't Making 'Valid Attempts to Save Innocent Human Lives,'* BUS. INSIDER (Sept. 21, 2021, 11:16 AM), https://www.businessinsider.com/texas-anti-abortion-group-is-upset-that-lawsuits-arent-saving-lives-2021-9.

561. *Id.*

562. *Id.*

563. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(1) (West 2021).

privacy rights. Three individuals intervened in the Department of Justice lawsuit challenging S.B. 8, claiming that they only wanted to pursue enforcement actions under the statute in situations where then-existing case law would reject a substantive due process claim, such as "non-physician abortions" or "post-viability abortions that are not necessary to preserve the life or health of the mother."[564]

On the other hand, it is also easy to imagine informers bringing actions based on conduct that violates the terms of the statute, but only in technical ways tangential to the core legislative purposes. As the Supreme Court recognized in *Hughes Aircraft*, a financially motivated private informer may be more likely than a government attorney to file a claim based on "a mere technical noncompliance with reporting requirements."[565] Consider a case where a doctor performed an abortion early in pregnancy after conducting appropriate tests and determining there was not yet a fetal heartbeat. Through an oversight, the doctor did not record all of the information S.B. 8 requires in the patient's medical records, omitting "the estimated gestational age of the unborn child," or the method used to make the estimate, or neglecting to specify the "date" and "time" of the required heartbeat test.[566] A government attorney convinced that the doctor substantially complied with the statute would likely direct limited enforcement resources to other cases. For an informer, however, the legislature's policy objectives may be less significant than the perceived likelihood of collecting a forfeiture from the defendant. Similarly, an acquisitive informer might be less concerned than a government attorney about the risks of second-guessing medical determinations and might therefore be more likely to bring a case challenging a doctor's conclusion that a medical emergency justified a post-heartbeat abortion or alleging that the doctor failed to properly document the emergency as required by the statute.[567]

Claims based on technical or attenuated readings of S.B. 8 may be even more likely under the provision allowing suit against anyone who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion."[568] Pre-*Roe* case law holds that knowingly driving someone to the site of an illegal abortion can be an act aiding and abetting the abortion.[569] Anticipating claims of this nature, the Lyft and Uber ride sharing services have announced

564. *See* Brief for Intervenor-Respondents at 6, U.S. v. Texas, No. 21-588, (U.S. Oct. 27, 2021).

565. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997).

566. TEX. HEALTH & SAFETY CODE ANN. § 171.203(d) (West 2021).

567. *Id.* § 171.205(b)(1), (c).

568. *Id.* § 171.208(a)(2).

569. State v. Siekermann, 367 S.W.2d 643, 648–49 (Mo. 1963).

that they will pay legal fees for their drivers sued under the statute.[570] Liability might turn on whether the driver had sufficient information about the destination or purpose of the trip to act "knowingly" within the meaning of the statute.[571] As noted above, liability does not require knowledge that an abortion would be performed in violation of the statute,[572] so a driver could conceivably be liable even if the passenger explained that she was on her way to an abortion clinic, but assured the driver that she intended to comply with all legal requirements.

The concept of "aiding and abetting" has sometimes been interpreted quite broadly. Could an informer bring an S.B. 8 cause of action against a parent, counselor, or doctor who provided information to a pregnant teenager about how to access abortion services or helped put her in contact with an abortion provider? Individuals have been convicted of aiding and abetting distribution of illegal drugs when they helped a purchaser find a willing seller.[573] One can argue that merely telling someone where abortions are performed should be a protected form of free speech.[574] S.B. 8 itself provides that the legislation "may not be construed to impose liability on any speech or conduct protected by the First Amendment" or the comparable provision of the Texas Constitution.[575] But an informer considering whether to file a claim under S.B. 8 may not care about a possible free speech defense if he anticipates settling the case before the First Amendment issue gets litigated.

There are also cases in which a parent's failure to protect a minor from misconduct by a third party has been found to constitute aiding and abetting.[576] Could a parent be liable under S.B. 8 based on knowledge of a planned abortion that the parent did not intervene to prevent? A government attorney would likely insist on strong

570. Jessica Guynn, *Uber and Lyft Will Cover Legal Fees for Drivers Sued under Texas Abortion Law*, USA TODAY (Sept. 3, 2021, 9:02 PM), https://www.usatoday.com/story/tech/2021/09/03/abortion-law-texas-uber-lyft-legal-fees-drivers/5719717001/.

571. *See generally* H.R. REP. NO. 109-51, at 101–04 (2005) (discussing implications for taxicab drivers under legislative proposal to prohibit interstate transportation of minors for abortions).

572. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2) (West 2021); *but see id.* § (f)(1).

573. Lowman v. United States, 632 A.2d 88, 90–92 (D.C. 1993). On the other hand, merely providing the name and address of the drug dealer might not be enough for aiding and abetting liability. *Id.* at 91–92.

574. *See* Bigelow v. Virginia, 421 U.S. 809, 827–29 (1975) (First Amendment protected advertisement in Virginia newspaper for New York abortion services legal where they would be provided).

575. TEX. HEALTH & SAFETY CODE ANN. § 171.208(g) (West 2021).

576. *See* People v. Ogg, 161 Cal. Rptr. 3d 584, 587, 590–91 (Cal. Ct. App. 2013).

evidence of culpable parental neglect before considering such a claim. But an informer seeking a quick payout under the statute may care little about the nuanced and difficult questions of parental responsibility involved.

The widest latitude for broad construction and inventive pleading may come through the S.B. 8 provision allowing a claim against any person who "intends to engage in conduct" that would violate other provisions.[577] There is pre-*Roe* case law indicating that a woman must in fact be pregnant before someone can commit an abortion-related offense.[578] Thus, a doctor who made contingent plans to perform an abortion due to his patient's physical build could not be punished for unprofessional conduct when testing revealed that the woman was not pregnant.[579] Under S.B. 8, however, where liability is imposed on anyone who "intends" to aid and abet an abortion, it is not clear that an actual pregnancy would be a necessary element to prove a violation.[580] The provision for claims based on intent to aid and abet an abortion could be especially helpful for informers seeking to entrap potential defendants, as discussed below.

2. Inducing Statutory Violations

A legislative body enacting a statute or a public official enforcing the legislation wants to reduce the occurrence of conduct violating legislative requirements. An informer seeking to collect penalties, on the other hand, may benefit from encouraging statutory violations, even violations that would not otherwise occur, in order to increase the supply of potential bounties.[581] Informers under the eighteenth-century Gin Act routinely placed orders for distilled liquors in order to gather evidence to support claims.[582] Informers who view S.B. 8 as a business opportunity could take comparable steps aimed at entrapping potential litigation targets.

Assuming S.B. 8 continues in effect, those who work for the abortion industry will likely be on guard against pro-life "sting" operations. Other potential defendants may be less wary. An informer posing as a woman seeking a post-heartbeat abortion could solicit support in various forms. She could ask counselors or medical professionals for advice or abortion referrals. She could seek financial assistance to pay for an abortion. She could ask someone for a ride to a clinic. One can imagine elaborate stories crafted to induce sympathy from potential litigation targets.[583] Anyone tricked into

577. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(3) (West 2021).
578. *See* Sherman v. McEntire, 179 P.2d 796, 797–98 (Utah 1947).
579. *Id.* at 796, 798.
580. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).
581. *See supra* notes 142–44 and accompanying text.
582. *See supra* notes 240–75 and accompanying text.
583. *See supra* notes 243, 250–51, 256 and accompanying text.

offering assistance might furnish the evidentiary basis for a claim that the person "intended" to aid and abet an abortion violating the statute, even if the informer was not in fact pregnant or had no intention of actually accessing abortion services.

Another technique for entrapment could come from the opposite direction. Informers could pose as individuals willing to help people obtain abortions after the point permitted by S.B. 8. The statute includes an exemption that prevents a claim against a woman seeking an abortion.[584] However, in the course of making arrangements for a promised abortion, the informer might gather evidence concerning other litigation targets willing to somehow facilitate the transaction through funding, rides, or other forms of support and who, therefore, might be liable for intending to aid or abet a post-heartbeat abortion in violation of the statute.

3. False or Malicious Accusations

Informers enforcing the Gin Act were routinely prosecuted for filing false claims that someone had served distilled liquor in violation of the statute.[585] S.B. 8 creates analogous opportunities for false allegations that someone "intended" to aid and abet an abortion in violation of the law. An informer could make fraudulent claims that a person offered to assist with an illegal abortion. One could even envision situations where a person filed a claim under S.B. 8 as a means of leverage in a hard-fought child custody or domestic relations dispute, perhaps based on a manufactured or exaggerated claim that a spouse or domestic partner wanted to have a child aborted.[586]

4. Abusive Litigation Tactics

One of the earliest critiques of common informers was the use of abusive litigation tactics designed to make it difficult to defend against a claim.[587] Sir Edward Coke criticized informers for filing suits in London, regardless of where the defendant lived.[588] Traveling to London to mount a defense was expensive and time-consuming,

584. TEX. HEALTH & SAFETY CODE ANN. § 171.206(b)(1) (West 2021).

585. *See supra* Subpart II.A.2.

586. *See In re* W.R.M.D., No. 10-07-00046-CV, 2007 WL 3025024, at *1–2 (Tex. Ct. App. 2007) (in proceeding regarding parental right to determine child's residence, trial court did not abuse discretion in excluding evidence that father wanted mother to have an abortion); Lessard v. Londo, No. 336156, 2017 WL 2562569, at *1 (Mich. Ct. App. 2017) (father in custody action conceded he initially suggested abortion but claimed he changed his mind when he felt baby kick); Adoption of B.K., G049223, 2014 WL 3390373, at *1, 5 (Cal. Ct. App. 2014) (upholding termination of parental rights of father who initially suggested abortion and then consented to adoption).

587. *See* Beck, *English Eradication*, *supra* note 11, at 583.

588. *Id.*

especially if the defendant needed testimony from fact witnesses.[589] Parliament eventually responded with reform legislation requiring informers to file suit in the county where an offense occurred.[590]

By permitting an informer to file suit in the informer's county of residence and preventing any change of venue without the informer's consent,[591] S.B. 8 seems to revive the long-abandoned practice of making popular actions easy to file and difficult to defend. S.B. 8 includes a generous four-year statute of limitations,[592] much longer than the one-year statute of limitations Parliament adopted to rein in sixteenth-century English informers.[593] Blackstone tells us that "the verdict passed upon the defendant in [a popular action] is a bar to all others, and conclusive even to the king himself."[594] Once someone had filed a popular action under English law, no one else could pursue the matter absent evidence of collusion between the defendant and the informer.[595] S.B. 8, on the other hand, allows multiple suits targeting the same conduct and prevents any defense based on nonmutual claim preclusion unless the defendant has actually paid statutory damages in an earlier suit.[596]

Pro-life legislators who enacted S.B. 8 may have had little sympathy for potential defendants, envisioning claims against abortion providers, clinics, insurance companies, and others who support a disfavored industry. Informers, on the other hand, may not limit S.B. 8 litigation exclusively to those the legislators viewed in a negative light. The tactic of filing a lawsuit far from the defendant's residence, or multiple informers pursuing concurrent cases in different parts of the state, could be applied to defendants the Texas legislature might view with greater sympathy. As the petitioners argued in *Whole Woman's Health v. Jackson*, anyone aiding a woman who obtains a prohibited abortion could be "sued in hundreds of duplicative suits, in courts in every Texas county, by an unlimited number of people with no personal connection to the abortion."[597]

To flesh out the concern, imagine that an informer learns of a college student who obtains a first-trimester abortion believed to have been performed in violation of S.B. 8. In discovery for a lawsuit against the doctor, the informer learns that the student paid for the

589. *Id.*

590. *Id.* at 588.

591. TEX. HEALTH & SAFETY CODE ANN. § 171.210(a)(4) (West 2021).

592. *Id.* § 171.208(d).

593. Beck, *English Eradication*, *supra* note 11, at 588.

594. *Id.* at 551 (quoting BLACKSTONE, *supra* note 10, at *162).

595. 2 RADZINOWICZ, *supra* note 33, at 138 (once an informer began a popular action, no one else could pursue it unless collusion appeared).

596. TEX. HEALTH & SAFETY CODE ANN. § 171.208(c), (e)(5) (West 2021).

597. Reply Brief for Petitioners, Whole Woman's Health v. Jackson, No. 21-463 (U.S. Oct. 29, 2021), 2021 U.S. S. Ct. BRIEFS LEXIS 3435, at *4.

abortion out of a $1,500 payment received shortly beforehand from her mother, a businesswoman living in a suburb of Dallas. The informer files suit against the patient's mother in El Paso, 630 miles from Dallas, claiming the mother aided and abetted the illegal abortion by funding it. The informer shares the information with an occasional collaborator, who files another suit against the mother in McAllen, Texas, 500 miles from the mother's location. A third informer reads the complaint filed in El Paso and files a copycat lawsuit against the mother in Lubbock, 350 miles from the mother's residence.

The mother believes she can establish that the payment to her daughter was for living expenses and that she did not know her daughter was pregnant or would use the money to pay for an abortion violating the statute. However, to defend against the claims filed under S.B. 8, the mother would need to retain lawyers and litigate suits pending in three widely separated locations, all remote from where she lives. Even if the mother prevailed in one action, that would not preclude the other two informers from proceeding against her. The mother might prevail in all three suits, but only after spending tens of thousands of dollars, or perhaps hundreds of thousands, on legal fees and travel expenses. None of these expenses would be recoverable from the informer unless the mother could convince a court that the claim was frivolous and warranted sanctions. If the mother loses on any of the suits, she will have to pay at least $10,000 in statutory damages, plus the informer's attorney's fees, in addition to any litigation and travel expenses incurred in defending the action.[598]

5. Payments to Suppress Litigation

One recurring manifestation of a common informer's conflict of interest has been solicitation of payments to suppress litigation. Anthony Houghton-le-Touzel, for instance, in settling cases against English dance halls under the Sunday Observance Act, sometimes sweetened the settlement offer with a promise to leave the defendant alone for a period of time.[599] Those enforcing the Gin Act were repeatedly convicted of extortion for collecting money to suppress litigation against retailers of distilled liquors.[600]

S.B. 8 provides fertile soil for similar activities. Consider our hypothetical Dallas mother discussed in the previous Subpart. Suppose an informer learns that the mother had supplied the money her college-aged daughter used in paying for a post-heartbeat abortion. The informer meets with the mother privately and shares

598. *See id.*

599. *See supra* notes 498–502 and accompanying text.

600. *See supra* notes 301–07 and accompanying text.

the information he has learned about the source of abortion funding. He explains how S.B. 8 operates and the large expenses the mother is likely to incur if the informer files suit. On the other hand, he lets it be known that there would be no need for a lawsuit and the informer would be happy to keep the information private if the mother would just pay him $10,000, the minimum he would recover if the claim is successful. Many people would be tempted by that offer, particularly if they are concerned not just about the expense and time of litigation, but also the reputational damage they might suffer.

6. Delaying Litigation

A government attorney enforcing S.B. 8 would presumably be interested in preventing the occurrence of abortions violating the statute. If the attorney acquired solid evidence that a person performed an abortion violating the statute, the attorney would be apt to file suit early in order to obtain injunctive relief. On the other hand, the financial rewards available to an informer depend on the number of illegal abortions performed and the number of separate individuals who aided and abetted each abortion. If an informer obtained information about a doctor or clinic that sometimes violates the statute, the informer might be inclined to keep the information secret to allow the number of abortions and the number of litigation targets to increase before filing suit. In a system where the first claim filed takes precedence, the incentive to delay would be balanced by the desire to establish priority. However, since S.B. 8 permits multiple suits arising from the same abortion, the informer's risk in delaying litigation is reduced.[601] If someone else files suit first, the informer might still be in a position to litigate more quickly and obtain the first recovery.

7. Collusive Litigation

One early abuse identified in the history of popular enforcement involved collusion between potential defendants and friendly informers.[602] An informer might file a claim under a *qui tam* statute and then settle the action, giving a release to the defendant. Or the informer might litigate the case to judgment without resistance by the defendant based on a secret agreement to accept a smaller payment than the forfeiture called for by the legislation. A fifteenth-century statute from the reign of Henry VII sought to prevent use of a prior recovery as a bar to litigation if it could be shown that the prior case was the product of collusion.[603]

601. *See supra* notes 538–39 and accompanying text.
602. *See supra* notes 199–204 and accompanying text.
603. Beck, *English Eradication*, *supra* note 11, at 574.

Oscar Stilley, one of the first two plaintiffs to file suit under S.B. 8, has apparently spent some of his time in home confinement thinking about possible ways to manipulate the statute in order to allow post-heartbeat abortions to continue. He was sufficiently proud of his solution to outline it in a federal court filing after he intervened in the Justice Department's lawsuit against the State of Texas.[604] Under his plan, Stilley would quickly file an S.B. 8 suit against a defendant—*e.g.*, an insurance company—even if another informer sued them first.[605] He would then immediately call the defendant's lawyer to propose a settlement.[606] The company would confess to a judgment of $10,000 per abortion.[607] Stilley would then sell the judgment to a third party for as little as $100.[608] The third-party assignee would accept a promissory note for the amount of the judgment from the defendant and enter satisfaction of the judgment in the court records.[609] If the defendant was sued by anyone else, the defendant could plead the satisfaction of the earlier judgment as a defense.[610]

The scheme apparently depends on collusion between the defendant and the third-party purchaser of the judgment obtained by Stilley. If the third party decided to collect on the proffered promissory note, the defendant would not have improved its position. On this point, Stilley wants no information: "What the judgment debtor and the buyer of the judgment do is no concern of Stilley. In fact, Stilley prefers plausible deniability of knowledge of such matters."[611] But one can imagine a judgment assignee, motivated for ideological reasons to soften the impact of S.B. 8, willing to pay Stilley $100 for the judgment and content to leave the promissory note uncollected.

Stilley's scheme presumably would not work if the courts looked behind a recorded satisfaction of judgment. S.B. 8 only recognizes a defense for a defendant who "previously paid the full amount of statutory damages" for a particular abortion,[612] and a promissory note might not suffice to demonstrate payment of "the full amount."[613] On

604. Intervenor Oscar Stilley's Response in Opposition to the United States' Motion for Temporary Restraining Order or Preliminary Injunction at 6, United States v. Texas, No. 1:21-cv-796 RP (W.D. Tex. Sept. 28, 2021).

605. *Id.*

606. *Id.*

607. *Id.*

608. *Id.*

609. *Id.*

610. *Id.*

611. *Id.*

612. TEX. HEALTH & SAFETY CODE ANN. § 171.208(c) (West 2021).

613. Intervenor Oscar Stilley's Response in Opposition to the United States' Motion for Temporary Restraining Order or Preliminary Injunction, United States v. Texas at 6, No. 1:21-cv-796 RP, (W.D. Tex. Sept. 28, 2021).

the other hand, there could be variations on Stilley's proposal that might be more successful. For instance, one suspects there may be informers willing to sue quickly, accept full payment from the defendant to satisfy a confessed judgment, and then voluntarily donate most of the proceeds back to the defendant.

Whether or not Stilley's proposal could work, it illustrates how an informer's interests may conflict with legislative goals. The Texas legislature wants to deter post-heartbeat abortions and set the penalty at a high enough level to accomplish that purpose.[614] However, whether defendants are deterred from offering post-heartbeat abortions is a matter of indifference to Stilley, who is happy to make a quick $100 per abortion and then walk away. One suspects Stilley is not the only potential informer trying to identify mechanisms that would allow abortion clinics to continue offering post-heartbeat abortions in Texas, notwithstanding S.B. 8.

C. Unintended Downsides of S.B. 8

Texas legislators provided for popular enforcement of S.B. 8 to address a very specific problem. They hoped the absence of enforcement mechanisms for state officials would prevent federal courts from rendering the law a nullity before it went into effect.[615] The law accomplished that purpose. It went into effect without being enjoined by the federal courts, and abortion providers adjusted their conduct accordingly.[616] The Supreme Court's decision in *Dobbs* has largely addressed the Texas legislature's concern about a federal court enjoining enforcement of a fetal heartbeat law.[617] Even if such a law was enforced by state officials, it would presumptively satisfy *Dobbs*' rational basis standard for abortion regulations.[618]

Some pro-life legislators may argue that popular enforcement remains necessary to solve the problem of public officials reluctant to bring enforcement actions. At least five district attorneys in Texas have announced their intention not to enforce the state's abortion legislation.[619] However, that concern could be addressed without resort to popular enforcement. For instance, enforcement power

614. *Cf.* TEX. HEALTH & SAFETY CODE ANN. § 171.208(b) (West 2021).

615. *Cf. id.* § 171.208; *see supra* notes 21–22 and accompanying text.

616. *See supra* notes 24–25 and accompanying text.

617. *See* Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2279 (2022) (authority to regulate abortion rests with the people and their elected representatives).

618. *Id.* at 2284.

619. *See* Brad Johnson, *'Don't Enforce Abortion Law' Texas Democratic Party Tells Local Officials and Law Enforcement*, TEXAN (June 24, 2022), https://thetexan.news/dont-enforce-abortion-law-texas-democratic-party-tells-local-officials-and-law-enforcement/ (five district attorneys declare intention not to enforce Texas abortion restrictions).

could be distributed concurrently to multiple public officials.[620] Or enforcement could be allowed by individuals aggrieved by a violation.[621]

Even though S.B. 8 has fully accomplished its principal purpose, its provisions authorizing popular enforcement remain on the books. Assuming the statute remains enforceable, what unforeseen consequences might it produce beyond the intended consequences envisioned by the legislature? The legislators who voted on S.B. 8 did not have a broad base of experience with popular enforcement. The state does make *qui tam* enforcement available under the Texas Medicaid Fraud Prevention Act, comparable to the federal FCA.[622] But popular enforcement has not been widely utilized in a manner that would acquaint the average Texas legislator with the dynamics of such litigation.

The history of popular enforcement, particularly with respect to controversial legislation, provides a glimpse of unintended paths enforcement may take under S.B. 8 if it survives review under state constitutional law.[623] The powerful legal weapon fashioned in S.B. 8 has been made available to anyone who wishes to take it up.[624] Some plaintiffs will be ideological allies of the legislation's sponsors, sharing their commitment to suppressing post-heartbeat abortions. Other plaintiffs with no particular commitment to the legislature's aims will embrace the statute as an engine of financial reward or a means to other private ends. A few, like Britain's Common Informer No. 1, Alfred Green a.k.a. Anthony Houghton le Touzel, may read S.B. 8 and "recognise its possibilities," setting aside other pursuits to make a living enforcing the statute.[625]

620. *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 544–69 (2011) (many states confer concurrent enforcement power on state and local officials in particular areas of criminal law); *see also* FTC v. AT&T Mobility LLC, 883 F.3d 848, 862 (9th Cir. 2018) (concurrent jurisdiction of FTC and DOJ with respect to antitrust enforcement); *cf.* Lone Starr Multi Theaters, Inc. v. State, 922 S.W.2d 295, 298 (Tex. App. 1996) (Texas district attorneys represent state in criminal matters; attorney general generally represents state in civil litigation).

621. *See supra* notes 48–49 and accompanying text.

622. *See generally In re* Xerox Corp., 555 S.W.3d 518, 524–25 (Tex. 2018) (discussing the act).

623. *See, e.g.*, Madlin Mekelburg, *Texas Supreme Court Rules Against Providers in Challenge to Six-Week Abortion Ban*, AUSTIN AM.-STATESMAN (Mar. 11, 2022, 4:17 PM), https://www.statesman.com/story/news/politics/state/2022/03/11/texas-supreme-court-abortion-six-week-ban-alexis-mcgill-johnson/6999793001/ (discussing Texas Supreme Court ruling that foreclosed pre-enforcement federal court review and noting the pending state court challenge to the bill); *see supra* note 26.

624. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).

625. *See supra* note 476 and accompanying text.

Texas' fetal heartbeat legislation could take on a very different cast in the minds of the public if S.B. 8 actions end up being directed at friends and family members of women seeking abortions, rather than being confined to doctors and others who work for abortion clinics. A few accounts of S.B. 8 plaintiffs committing perjury or extortion, or even encouraging people to facilitate post-heartbeat abortions in order to trick them into violating the statute, could quickly build public opposition to the legislation. Just as the Lord's Day Observance Society found itself responding to claims that it was responsible for the activities of informers under England's Sunday Observance Act,[626] Texas Right to Life may end up having to issue a series of press releases distancing the organization from plaintiffs filing unseemly S.B. 8 claims.

The provisions designed to make S.B. 8 actions difficult to defend—authorizing venue in the plaintiff's home county, allowing multiple informers to file actions relating to the same conduct, and imposing one-sided liability for payment of attorney's fees—could easily contribute to public disenchantment with the statute.[627] An S.B. 8 defendant who lacks the means to defend himself in court may instead try his case in the media. Imagine the effect of multiple press accounts concerning individuals who could prove they complied with S.B. 8, but who nevertheless paid $10,000 to an S.B. 8 plaintiff because it was so much cheaper than defending multiple lawsuits in remote locations. As S.B. 8 lawsuits proliferate and stories circulate of marginal claims or abusive litigation tactics directed at people with little connection to the abortion industry, public opposition may build and pro-life Texans may come to see the statute as a liability for their cause.

CONCLUSION

Texas legislators who voted for S.B. 8 were persuaded to undertake an experiment with popular enforcement of abortion legislation. The history of popular enforcement, particularly in the context of controversial legislation, suggests they may not be happy with the results if the statute is ever widely enforced.[628] Legislators addressing controversial areas of law should look elsewhere for models of enforcement.

626. *See supra* notes 449–51 and accompanying text.

627. TEX. HEALTH & SAFETY CODE ANN. §§ 171.210(a)(4), 171.208(b)(3) (West 2021).

628. *See supra* notes 36–43 and accompanying text.