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THE PENAL JUDGMENT EXCEPTION TO FULL FAITH AND CREDIT: HOW TO BIND THE BOUNTY LAWS

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Abstract: In the current moment of interstate friction over abortion, the penal judgment exception poses a barrier against interstate enforcement of bounty laws. A doctor who prescribes a medicated abortion to a Texas patient may be exposed to civil liability—even in faraway Washington State. A Washington court asked to enforce a Texas judgment against the doctor is subject to the Full Faith and Credit Clause. Article IV, Section 1 of the United States Constitution mandates that each state give full faith and credit to judgments rendered in sister states. Under Texas Senate Bill 8 (S.B. 8), any member of the public may obtain a civil judgment in state court against anyone who performs, aids, or abets an abortion. This Comment argues that, despite the exacting requirements of the Full Faith and Credit Clause, courts in other states are not obliged to enforce such judgments. Bounty laws like S.B. 8 impose civil liability that may be recovered by any member of the public, rather than a person with a private right. The law punishes an offense against the state. S.B. 8 is therefore a penal law that, under what is called the penal judgment exception, is not due full faith and credit under the Constitution. The penal judgment exception applies when the judgment does not satisfy a private right and punishes an offense against the state. It is narrow but has been established by the Supreme Court during past moments of interstate friction. This Comment surveys that history and illustrates how the exception preserves the evidentiary, res judicata, and comity goals of full faith and credit within the federal system. Bounty laws threaten the federal balance, but they can and should be bound by the penal judgment exception.

INTRODUCTION

A Washington doctor may prescribe a medicated abortion to a Texas patient. Under Texas Senate Bill 8 (S.B. 8, formally titled The Texas Heartbeat Act),[1] that doctor may be subject to statutory damages in Texas. A Washington court may then, under Article IV, Section 1 of the United States Constitution, be asked to enforce the Texas judgment against the doctor and their assets in Washington.[2] Article IV, Section 1 requires each state to give "Full Faith and Credit" to the "public Acts, Records, and judicial Proceedings of every other State."[3] Scholars have referred to this clause as "that most-obscure constitutional

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1. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).
2. U.S. CONST. art. IV, § 1.
3. *Id.*

provision"[4] and its history as one "not [to] be taken up by those with weak stomachs."[5] Supreme Court Justice Robert Jackson called it the "lawyer's clause," indicating its seemingly parochial implications in a seminal 1945 law review article by the same name.[6]

Recently, states have passed "bounty laws"—named for the monetary reward litigants can reap—that push the boundaries of this bedrock constitutional provision.[7] Most prominently, S.B. 8 bans abortion after the detection of fetal heartbeat activity.[8] Private citizens enforce the law: any member of the public is authorized to bring a civil lawsuit against anyone who performs, aids, or abets an abortion.[9] Defendants are directly liable to the plaintiff for at least $10,000 per offense.[10] Copycat abortion bills have been enacted in Oklahoma and Idaho.[11]

Bounty laws are not limited to abortion. California recently passed a law that permits similar citizen suits against sellers of certain guns.[12] Some legal scholars argue or suggest that bounty law penalties are criminal.[13] Others worry that bounty laws may be used by some states to target transgender rights or domestic violence by others, resulting in a civil arms race between politically polarized states.[14] And if enforced across state lines, these laws all challenge the independent sovereignty of

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4. Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 3 (2005).

5. Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 259 (1998).

6. Robert H. Jackson, *Full Faith and Credit—the Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 2–3 (1945).

7. *See* Paul Schiff Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. 1, 82 (2024).

8. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–12 (West 2021).

9. *Id.* §§ 171.207–08.

10. *Id.* § 171.208(b)(2).

11. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 48 n.259 (2023).

12. CAL. BUS. & PROF. CODE § 22949.62 (West 2023) (prohibiting certain firearms); *Id.* § 22949.64 (specifying "the requirements of this chapter shall be enforced exclusively through . . . private civil actions").

13. Guha Krishnamurthi, *Are S.B. 8's Fines Criminal?*, 101 TEX. L. REV. ONLINE 141, 144–50 (2023) (arguing that the damages resulting from a successful S.B. 8 sanction are criminal penalties and thus trigger several constitutional protections); *see also* Lea Brilmayer, *Abortion, Full Faith and Credit, and the "Judicial Power" Under Article III*, at 21–23 (Jan. 10, 2023) (unpublished manuscript) (on file with the author) (arguing that the Supreme Court's definition of penal laws is broad enough to cover bounty laws); Haley Amster, *Abortion, Blocking Laws, and the Full Faith and Credit Clause*, 76 STAN. L. REV. ONLINE 110, 117–18 (2024) (explaining how penal laws are criminal laws that are not subject to full faith and credit).

14. *See* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187 (2023).

the states within the United States.[15] This Comment addresses a different question than prior scholarship.

Must states enforce judgments from other states based on S.B. 8-style bounty laws? This Comment argues that the answer is no. Bounty laws like S.B. 8 are penal laws: they impose civil liability that may be recovered by any person, regardless of their connection to the underlying conduct at issue.[16] And under an old and admittedly musty exception, penal laws are not due full faith and credit.[17]

First expounded by the Supreme Court in *Huntington v. Attrill*[18] (decided 1892), the penal judgment exception permits state courts to refuse to enforce an out-of-state judgment that is penal.[19] A judgment is penal when it does not satisfy a private right and punishes an offense against the state.[20] Since *Huntington*, courts have used the exception to assess full faith and credit obligations in federal and state decisions[21] related to gambling[22] and alcohol.[23] More recent Supreme Court precedent has reiterated the exception.[24]

In determining what constitutes a penal law for purposes of the exception, the Supreme Court has recognized that a law's label is not dispositive; what controls is whether the law is "a punishment of an offense against the public, or a grant of a civil right to a private person."[25] A law against gambling, for example, that permits any person to sue a gambling creditor is penal.[26] Under this exception, states may avoid enforcing bounty judgments rendered in other states.[27] A state may not depend on its public policy—in statute, state constitution, or otherwise—to entirely preempt bounty judgments.[28] But, under the presumption

15. *See infra* section II.A.

16. *See infra* Part III.

17. Huntington v. Attrill, 146 U.S. 657, 673–79 (1892).

18. 146 U.S. 657 (1892).

19. *See, e.g.*, City of Oakland v. Desert Outdoor Advert., Inc., 267 P.3d 48 (Nev. 2011) (holding that a Nevada court did not need to enforce a money judgment pursuant to a California sign code violation).

20. *Huntington*, 146 U.S. at 673–74.

21. *Id.* at 674.

22. Stichtenoth v. Cent. Stock & Grain Exch. of Chi., 99 F. 1, 3–4 (C.C.N.D. Ill. 1900).

23. United Breweries Co. v. Colby, 170 F. 1008, 1010–11 (C.C.N.D. Iowa 1909).

24. Nelson v. George, 399 U.S. 224, 229 (1970) ("[T]he Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment."); *see also infra* section II.E.2 (expanding on cases that use the penal judgment exception).

25. *Huntington*, 146 U.S. at 683.

26. *Stichtenoth*, 99 F. at 2–3.

27. *See infra* Part III.

28. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

against extraterritoriality, states need not enforce the criminal, public laws of other states.[29] And punishment for a public offense may not simply masquerade as a civil judgment.

This Comment begins in Part I with a historical and textual introduction to the Full Faith and Credit Clause. Standards of evidence, comity, and res judicata count among its primary goals. Part II explains the penal judgment exception and provides historical examples of laws that have and have not been held to be penal. Anti-liquor and anti-gambling laws provide some illustrations. Part III outlines an example bounty law today, S.B. 8, and demonstrates that judgments pursuant to S.B. 8 are penal judgments. This Comment argues that full faith and credit may be denied to such judgments under the penal judgment exception. This Comment concludes by making recommendations for litigators and policymakers who seek to use this exception in defense against bounty laws.

I. "THE LAWYER'S CLAUSE": FULL FAITH AND CREDIT

The Full Faith and Credit Clause helps forge the separate and sovereign states into one nation: the United States.[30] The lawyers of the Constitutional Convention, including James Madison, sought a "truly national system of justice" where the legal proceedings of one state were treated as more than foreign in another state.[31] As this Part explains, the Full Faith and Credit Clause is the foundation of several laws that require courts in one U.S. jurisdiction to give effect to judgments rendered in another. Together, these laws prescribe the proof necessary for out-of-state judgments and the effect of those judgments.[32] Civil judgments are precisely the type of "judicial proceedings" that the Framers had in mind and courts since have respected across state lines.[33] This Part unpacks the constitutional and statutory text, defines the relevant judicial proceedings, and explains the obligations that are due to out-of-state judgments.

A. Constitutional and Statutory Text

The United States Constitution provides that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws

29. The Antelope, 23 U.S. (10 Wheat) 66, 123 (1825).

30. *See* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 277 (1935).

31. Jackson, *supra* note 6, at 34.

32. In this context, "proof" is what a litigant needs to demonstrate for a court to accept that a judgment is legitimate, while "effect" is what the court does with the judgment once proven. *See infra* section II.B.

33. *See infra* section II.B.

prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[34] The first sentence of the Clause predates the 1787–1789 Constitutional Convention: it was inherited almost verbatim from the Articles of Confederation (the Articles).[35] Prior to the American Revolution, courts in England struggled to manage proceedings from across the empire and adopted strict rules that only accepted foreign judgments, including from its own colonies, as rebuttable and prima facie evidence.[36] This presumption put some British judgments on par with some foreign judgments.[37] After the Revolution, the exact genesis of the Full Faith and Credit Clause in the Articles is unclear,[38] but the United States was intent on greater legal integration than Britain. James Madison cited debt as a practical contemporary concern.[39] Debtors could avoid their obligations in one state by fleeing to another, distant state.[40] The Extradition Clause immediately follows the Full Faith and Credit Clause; it obliges states to extradite criminal fugitives.[41] Full faith and credit, in a sense, addresses civil fugitives.

The Convention debates suggest that one primary obstacle to the interstate system under the Articles was evidentiary.[42] If a debtor fled from one state to another, and if the creditor could locate them, courts of the forum state (the state in which the claim was brought) would have no intrinsic method to authenticate the foreign claim.[43] The second sentence

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34. U.S. CONST. art. IV, § 1.

35. "Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State." ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3. The differences between this clause and the first sentence of the Full Faith and Credit Clause are word choice and capitalization.

36. David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1597–601 (2009).

37. *Id.* at 1600 (describing how, in one action for debt based on a judgment from the British colony of Jamaica, an English court noted that a Jamaican judgment could not be a "record" because it was not from an English court).

38. *Id.* at 1607.

39. THE FEDERALIST NO. 42, at 280 (James Madison) (Harv. Univ. Press 2009).

40. *See, e.g.*, Armstrong v. Carson's Ex'rs, 2 U.S. (2 Dall.) 302, 303 (C.C.D. Pa. 1794) (recognizing the record of a debt claim brought in New Jersey to have the same effect in Pennsylvania); Hitchcock v. Aicken, 1 Cai. 460, 461–66 (N.Y. Sup. Ct. 1803) (opinion of Thompson, J.) (explaining that debt judgment rendered in Vermont is worth more than prima facie evidence in New York); Curtis v. Martin, 2 N.J.L. 399 (1805) (considering the validity of a *nil debet* plea in New Jersey on a debt judgment rendered in Pennsylvania); Wade v. Wade, 1 N.C. (Cam. & Nor.) 601, 602 (1804) (recognizing another state's judgement on the debt as evidence that the debt existed and rejecting a *nil debit* plea because it would not be permissible in the other state).

41. U.S. CONST. art. IV, § 2, cl. 2.

42. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448 (Max Farrand ed., 1911).

43. When first discussed at the Constitutional Convention, full faith and credit was said to provide grounds for actions in one state to handle insolvency in another. *Id.* at 447. Historically, English

of the Full Faith and Credit Clause provides a solution absent from the Articles: Congress may prescribe "the Manner" in which foreign claims "shall be proved."[44] This grant was seized in the 1790 Act,[45] which set the standard for authenticating state "judicial proceedings," and remains largely unchanged today.[46] Authentication requires a seal, the attestation of the court clerk, and a certificate from the judge.[47] This standard provides a creditor (for instance, a Texas plaintiff) with a method to certify a claim against their debtor (a Washington doctor) to an out-of-state court (in Washington). In Justice Joseph Story's early commentaries on the Constitution, he described this aspect of full faith and credit as a straightforward prescription of "proof."[48]

The Clause concludes by giving Congress the power to prescribe "the Effect" of the relevant acts, records, and judicial proceedings in forum courts.[49] This phrase was also an innovation on the Articles, but it did not come without controversy. The Clause was introduced as a prescription rather than a grant to Congress: it began, "the Legislature shall."[50] Delegates from states like Virginia worried that this congressional power would impinge on state autonomy: the federal government would be commanding them to enforce a different state's laws.[51] Madison offered an amendment that substituted "may" for "shall," which passed unanimously and apparently assuaged the states' fears by making federal prescription optional rather than mandatory.[52]

But Congress, despite the states' concerns, immediately seized this power: the 1790 Act specified that judgments duly certified "shall have such faith and credit given to them in every court . . . as they have by law or usage in the courts of the [forum] state."[53] Decisions in the early period interpreted this command to mean that a certified judgment must be given effect on par with judgments from the states' own courts; otherwise, as

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common law courts had a system of seals that verified judicial proceedings to other courts and were treated as prima facie evidence. Engdahl, *supra* note 36, at 1602.

44. U.S. CONST. art. IV, § 1.

45. Act of May 26, 1790, ch. XI, 1 Stat. 122, 122 (1790) (current version at 28 U.S.C. § 1738).

46. *Id.*; 28 U.S.C. § 1738.

47. 28 U.S.C. § 1738.

48. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 470–72 (Carolina Acad. Press 1987).

49. U.S. CONST. art. IV, § 1, cl. 2.

50. THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 42, at 485.

51. *Id.* at 448. Edmund Randolph protested how far James Madison wanted to take full faith and credit, saying, "there was no instance of one nation executing judgments of the Courts of another nation." *Id.*

52. *Id.* at 486.

53. Act of May 26, 1790, ch. XI, 1 Stat 122, 122 (1790).

Justice Story wrote, "this clause in the constitution would be utterly unimportant and illusory."[54] Congress could have prescribed any effect, including a uniform effect, but it did not go that far.[55] Instead, the state that issued a judgment prescribes its effect extraterritorially.[56] While there was initially some dispute over whether Article IV, Section 1 was self-executing, which would make the 1790 Act superfluous, the enactment by the first Congress, now codified as 28 U.S.C. § 1738, settles "effect" as a legal matter.[57]

Article IV, Section 1 was the Framers' contribution to an interstate justice system. The system is more integrated than courts of foreign nations but less integrated than courts of the same jurisdiction.[58] The first sentence of the Full Faith and Credit Clause can be viewed as prologue to the procedure permitted by the second.[59] The first sentence provides the principle; the second provides the proof and effect.[60] The first is critical, however, because it assumes some bounds to which judicial proceedings will be recognized.[61] Another key limit is that the Constitution and congressional statute require "Faith and Credit," but they do not specify the action and enforcement that must be taken.[62]

States themselves have gone further and adopted common procedures to enforce out-of-state judgments. Neither the Constitution nor Congress prescribes these actions.[63] States have addressed, for one, the type of proceeding that a creditor may seek against a debtor: summary judgment for an action on a foreign judgment.[64] The Uniform Enforcement of Foreign Judgments Act (UEFJA), first created in 1948 and amended in 1964, supplies this procedure in the forty-eight

54. Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485 (1813).

55. Engdahl, *supra* note 36, at 1634.

56. *Id.* at 1633–35.

57. Between the 1790 Act and *Mills v. Duryee*, federal and state judges disagreed whether the Constitution itself mandated giving effect to other states' judgments. *See* Engdahl, *supra* note 36, at 1635–47. The interpretation in *Mills* that the Act executed the effect pursuant to Congress's constitutional authority ultimately won out. *See id.* at 1647–55.

58. Jackson, *supra* note 6, at 19–20.

59. U.S. CONST. art. IV, § 1, cl. 1–2.

60. *Id.*

61. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 cmt. c (Am. L. Inst. 1971).

62. U.S. CONST. art. IV, § 1, cl. 2; 28 U.S.C. § 1738.

63. U.S. CONST. art. IV, § 1, cl. 2; 28 U.S.C. § 1738.

64. REVISED UNIF. ENF'T FOREIGN JUDGMENTS ACT, at prefatory note (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1964).

adopting states.[65] An out-of-state judgment authenticated according to 28 U.S.C. § 1738 may be filed in a state court, which "shall treat the foreign judgment in the same manner as a judgment of the . . . state."[66] In essence, UEFJA provides a "speedy and economical method of doing [what] is required . . . by the Constitution."[67] Like the congressional statute, UEFJA defines relevant judgments in reference to the first sentence of Article IV, Section 1: "'foreign judgment' means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state."[68] It provides for stays in the event there is an appeal pending in the foreign state.[69] It does not elaborate on which judgments are or are not due full faith and credit.[70] It only implies that some are not.[71] On face value, UEFJA, 28 U.S.C. § 1738, and Article IV, Section 1 all might suggest that full faith and credit demands nationwide, identical enforcement of any and every state judgment in any and every other state. But it does not. The courts, instead of Congress or the states, have established the boundaries of what "judicial proceedings" are due full faith and credit in the first place.[72]

B. "Judicial Proceedings" Include Judgments

Judicial proceedings include orders, injunctions, decrees, and, as UEFJA prescribes, judgments from foreign states.[73] But a judgment issued

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65. *Id.* §§ 2–4. California and Vermont are the two states that have not enacted UEFJA. *Enforcement of Foreign Judgments Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=e70884d0-db03-414d-b19a-f617bf3e25a3 (click "Enactment History" under "1964 | Enforcement of Foreign Judgments Act"). Instead, they require that judgments be domesticated, a straightforward filing procedure obligated by full faith and credit. *See* CAL. CIV. PROC. CODE § 1710.15 (West 1985); VT. R. CIV. P. 9(e).

66. REVISED UNIF. ENF'T OF FOREIGN JUDGMENTS ACT § 2 (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1964).

67. *Id.* at prefatory note.

68. *Id.* § 1.

69. *Id.* § 4.

70. *Id.*

71. *Id.*

72. While this Comment focuses on the interstate rule of full faith and credit, the federal preclusion standard is substantially similar to that under state law. *See* Chevron Corp. v. Donziger, 886 F. Supp. 2d 235, 278 n.267 (S.D.N.Y. 2012). Because federal preclusion rules tend to respect the constitutional spine, including full faith and credit, the rules that would apply enforcing a bounty judgment in federal court would be similar. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506–09 (2001).

73. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (AM. L. INST. 1971); REVISED UNIF. ENF'T OF FOREIGN JUDGMENTS ACT § 1 (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1964).

by a state court does not qualify per se; it must be valid and final.[74] Validity opens out-of-state judgments to collateral attack,[75] for example, on personal jurisdiction.[76] A Texas bounty judgment against a Washington doctor may lack personal jurisdiction in the first place.[77] The Supreme Court has confirmed that state courts may make a "limited" inquiry into whether the foreign court had proper jurisdiction.[78] The judgment must also be final.[79] UEFJA Section 4 recognizes this premise in its stay provisions for judgments on appeal.[80]

Finality also distinguishes judgments from causes of action, which a state court is not obligated to give full faith and credit.[81] Under the presumption against extraterritoriality,[82] a court does not need to recognize another state's basis for suit.[83] It is unlikely that a bounty suit could be initiated in a Washington court against an abortion provider using Texas Senate Bill 8's cause of action. A Washington court may freely decline to recognize the action.[84] This principle does not, however, permit Washington courts to decline to recognize or enforce a final and valid judgment rendered in Texas by a court of competent jurisdiction.[85]

C. "Full Faith and Credit" Requires Even-Handed Recognition and Enforcement

State courts must recognize foreign judgments, even if the judgment is unwise under forum state policy or incorrect as a matter of law.[86] Besides

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74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (AM. L. INST. 1971).

75. Collateral attacks challenge a prior judgment in the course of a new action (here, the action in the forum court) rather than in an appeal (which would occur in the original, foreign state). *Collateral Attack*, BLACK'S LAW DICTIONARY (11th ed. 2019).

76. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (requiring "minimum contacts" with the forum state to have personal jurisdiction that comports with due process).

77. *But see* Bullion v. Gillespie, 895 F.2d 213, 216–17 (5th Cir. 1990) (applying the minimum contacts analysis and finding personal jurisdiction, for the purposes of a motion to dismiss, in Texas over a California doctor who mailed medication to a patient in Texas).

78. V.L. v. E.L., 577 U.S. 404, 407 (2016).

79. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 cmt. c (AM. L. INST. 1971).

80. REVISED UNIF. ENF'T OF FOREIGN JUDGMENTS ACT § 4 (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1964).

81. Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 275 (1935).

82. *See infra* section II.A.

83. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (AM. L. INST. 1971) ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.").

84. *Id.*

85. *See* Fauntleroy v. Lum, 210 U.S. 230, 237 (1908).

86. *Id.*

the practical benefits to a creditor, full faith and credit also benefits judicial administration.[87] The doctrine of res judicata[88] precludes re-litigation when there is an earlier and final judgment on the merits of a similar claim between similar parties.[89] Full faith and credit helps ensure finality by preferring recognition over re-litigation.[90] Within the federal system, a judgment has preclusive effect across state lines.[91] This is true even if the cause of action is unavailable in the forum state.[92]

In *Kenney v. Supreme Lodge of the World*,[93] the Supreme Court invalidated an Illinois statute that blocked recovery on an out-of-state wrongful death judgment.[94] The statute precluded such actions if the death occurred outside of Illinois.[95] An Alabama court had granted a money judgment in a wrongful death suit in Alabama.[96] An Illinois court then refused to recognize the judgment based on the statute, but the Supreme Court reversed.[97] It held that Illinois could not deny enforcing judgments solely on the ground that the action could not be brought in Illinois.[98] Despite the duly enacted policy of the state, Illinois was bound to recognize, and ultimately enforce, the wrongful death judgment from Alabama.[99]

State courts must enforce even erroneous judgments from sister states.[100] In *Fauntleroy v. Lum*,[101] a Missouri court granted a money judgment based on debt incurred in Mississippi.[102] The Missouri judgment

87. Jackson, *supra* note 6, at 2.

88. *Res Judicata*, BLACK'S LAW DICTIONARY, *supra* note 75 ("a thing adjudicated"); *see also* Risinger v. Concannon, 117 F. Supp.2d 61, 66 (D. Me. 2000) ("The doctrine of *res judicata* precludes the relitigation of claims that were raised or could have been raised in a prior case if the Court determines that the party opposing the present litigation has established three elements: the resolution of the earlier action in a final judgment on the merits; 'sufficient identity between the causes of action asserted in the earlier and later suits'; and 'sufficient identity between the parties in the two suits.'" (quoting Porn v. Nat'l Grange Mut. Ins. Co., 93 F.3d 31, 34 (1st Cir. 1996)).

89. RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 24 (AM. L. INST. 1982).

90. *See generally* Jaffe v. Accredited Sur. and Cas. Co., 294 F.3d 584 (4th Cir. 2002).

91. 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4467 (3d ed.).

92. Kenney v. Supreme Lodge of the World, Loyal Ord. of Moose, 252 U.S. 411, 415 (1920).

93. 252 U.S. 411 (1920).

94. *Id.* at 416.

95. *Id.* at 414.

96. *Id.* at 413–14.

97. *Id.* at 414, 416.

98. *Id.* at 415.

99. *See id.*

100. *See* Fauntleroy v. Lum, 210 U.S. 230, 237 (1908).

101. 210 U.S. 230 (1908).

102. *Id.* at 233–34.

was based on an erroneous interpretation of Mississippi law; in Mississippi, the parties' futures contract[103] was unenforceable as a form of gambling.[104] Despite that error, the Supreme Court held that the Full Faith and Credit Clause required the Mississippi court to enforce the Missouri judgment.[105] Res judicata demands recognition of judgments, whether the outcome was wrong or right.[106]

Federal courts have been suspicious of statutes that preclude recognition of out-of-state judgments on public policy grounds. Oklahoma enacted a statute in 2004 that barred its courts from recognizing adoptions by same-sex couples.[107] While same-sex couples could not adopt in Oklahoma, they could in several other states.[108] Despite Oklahoma's clear public policy against same-sex adoption, the Tenth Circuit invalidated the statute in *Finstuen v. Crutcher*:[109] "final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause."[110]

The Clause does not require complete judicial lockstep, however. States may choose to enforce a judgment differently than the foreign state that rendered the judgment.[111] Louisiana, for example, refused to print both names of an unmarried same-sex couple from New York on an adoption certificate.[112] In *Adar v. Smith*,[113] the Fifth Circuit upheld this administrative procedure as a valid enforcement.[114] The State did not dispute or refuse to recognize the effect of adoption; it just enforced the

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103. A "futures contract" is one where the contracting parties agree on the sale and purchase of a good at a future date for an agreed price, regardless of the market value of the good at that time. *See Futures Contract*, BLACK'S LAW DICTIONARY, *supra* note 75.

104. *Fauntleroy*, 210 U.S. at 234, 238.

105. *Id.* at 237 ("[A]s the jurisdiction of the Missouri court is not open to dispute the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law.").

106. *Id.* at 238; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 cmt. c. (AM. L. INST. 1971) (explaining that a "valid judgment" includes those that are "erroneous").

107. OKLA. STAT. tit. 10, § 10-7502-1.4(A) (2004).

108. Legal adoptions from Washington, California, and New Jersey were the subject of *Finstuen v. Crutcher*. 496 F.3d 1139, 1142 (10th Cir. 2007).

109. 496 F.3d 1139 (10th Cir. 2007).

110. *Id.* at 1156.

111. Estin v. Estin, 334 U.S. 541 (1948) (holding that a final divorce settlement from New York did not need to include alimony when enforced in Nevada, despite the fact that New York would have enforced alimony).

112. Only married couples could jointly adopt in Louisiana. LA. CHILD CODE ANN. art. 1221 (1992).

113. 639 F.3d 146 (5th Cir. 2011).

114. *Id.* at 158–59. The dissenters in *Adar* roundly criticized the majority for taking too narrow a view of recognition and accepting too broad a range of enforcement. *Id.* at 177 (Winer, J., dissenting). The case illustrates the discretion that courts are granted under exceptions to full faith and credit. The penal judgment exception is no exception to that judicial power.

adoption differently than New York.[115] Enforcement is prescribed by the forum state's law.[116] This principle extends to statutes of limitation,[117] venue provisions,[118] and criminal penalties.[119] The Supreme Court has held that enforcement must be "evenhanded,"[120] which the Fifth Circuit interpreted to mean "that the state executes a sister state judgment in the same way that it would execute judgments in the forum court."[121]

States may not refuse to enforce a judgment based on substantive public policy.[122] In *Baker v. General Motors*,[123] one of the Supreme Court's most recent full faith and credit decisions, the Court considered two conflicting state injunctions.[124] In the instant litigation, a Missouri court sought testimony from a General Motors employee.[125] But, as a result of a prior settlement, that employee had been enjoined by a Michigan court from offering similar expert testimony.[126] The Court held that the Michigan injunction against the employee's testimony was a method of enforcement, not a judgment, and thus attached only to the original

115. *Id.* at 151 (majority opinion).

116. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (AM. L. INST. 1971).

117. McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839) (upholding a five-year Georgia statute of limitations on out-of-state judgments); Watkins v. Conway, 385 U.S. 188, 189–90 (1966) (reasoning that the plaintiff could return to the foreign state to revive the judgment); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 118, 99 cmt. a (AM. L. INST. 1971) (explaining that, so long as the methods are not made unduly burdensome, forum states may prescribe the enforcement of foreign judgments). *But see* Christmas v. Russell, 72 U.S. 290, 302 (1866) (invalidating a statute that precluded out-of-state judgments when the original cause of action could not have been brought under the forum state's statute of limitations).

118. Anglo-Am. Provision Co. v. Davison Provision Co., 191 U.S. 373, 373–74 (1903) (upholding a New York statute that barred causes of action between foreign corporations where the action did not arise in New York on the grounds that states may provide venue as they see fit).

119. Rosin v. Monken, 599 F.3d 574, 577 (7th Cir. 2010) (upholding application of an Illinois statute that required sex-offender registration against an offender whose New York plea agreement struck registration).

120. Baker v. Gen. Motors Corp., 522 U.S. 222, 235 (1998).

121. Adar v. Smith, 639 F.3d 146, 159 (5th Cir. 2011). A recent Connecticut law, while respecting out-of-state bounty judgments, subjects abortion bounty judgments to countersuit rewarding the abortion provider with damages at least equivalent to the bounty. H.B. 5414, 2022 Gen. Assemb. (Conn. 2022). This law has yet to be tested and there is no case law supporting or questioning the law.

122. Broderick v. Rosner, 294 U.S. 629, 642 (1935) ("But the room left for the play of conflicting policies is a narrow one."). The Fifth Circuit treated Louisiana's adoption regime as administrative rather than policy in *Adar*, but the policy toward unmarried rather than same-sex couples at least implicates public policy. *See, e.g.*, Elizabeth Redpath, Comment, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records*, 62 EMORY L.J. 639, 676 (2013) (arguing that the adoption decree in *Adar* implicates public policy and, as such, it should be recognized, although not necessarily enforced, nationwide).

123. 522 U.S. 222 (1998).

124. *Id.* at 226.

125. *Id.* at 229.

126. *Id.* at 228.

settlement.[127] Missouri could therefore satisfy its full faith and credit obligations, recognize the Michigan judgment, and still enforce its own subpoena.[128] Writing for the majority, Justice Ginsburg noted dryly that policy may be relevant to choice of law, but there is "no roving 'public policy exception' to the full faith and credit due judgments."[129] Lower courts have since followed suit.[130]

Public policy may be relevant when a state decides whether to apply its own law or that of another state,[131] but it does not provide grounds to discriminate against foreign judgments.[132] Exceptions do exist. Congress, for example, may preclude certain enforcement under Article IV, Section 1 by modifying 28 U.S.C. § 1738.[133] And even in the absence of Congress, there are territorial limits to where a state is "competent to legislate."[134] There may also be substantive limits, on certain "subject matter," to states' competency.[135] These exceptions provide grounds to deny enforcement when one state's judgment threatens to upend the federal balance and disturb another state's police power.

II. THE PENAL JUDGMENT EXCEPTION

The Full Faith and Credit Clause is also a part of the Constitution's larger nationalization effort.[136] *Baker* supports the contention that

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127. *Id.* at 239.

128. *Id.* at 240–41.

129. *Id.* at 233 (emphasis omitted) (citing Estin v. Estin, 334 U.S. 541, 546 (1948)). The Supreme Court noted that *Nevada v. Hall*, 440 U.S. 410 (1979), permitted a state to apply its own statutory damages cap despite that of another state but only as a result of choice of law. *Baker*, 522 U.S. at 240–41.

130. *See, e.g.*, Jaffe v. Accredited Sur. & Cas. Co., 294 F.3d 584, 592 (4th Cir. 2002) ("[N]either a state nor a federal court can refuse to give full faith and credit to the judgment of a state court because of disagreement with the public policy basis for that decision."); *see also* Redpath, *supra* note 122, at 656–69 (explaining *Baker* and its effect on *Adar*).

131. *See Hall*, 440 U.S. at 421–24.

132. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 (AM. L. INST. 1971). *But see* Diego A. Zambrano, Mariah E. Mastrodimos & Sergio F.Z. Valente, *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, 98 N.Y.U. L. REV. ONLINE 382, 393–97 (2023).

133. *See, e.g.*, Defense of Marriage Act, Pub. L. No. 104–199, § 2, 110 Stat. 2419, 2419 (1996) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe . . . .").

134. *Baker*, 522 U.S. at 232–33 (quoting Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493 (1939)).

135. *Id.*

136. Jackson, *supra* note 6, at 33–34.

> [t]he animating purpose of the full faith and credit command . . . "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation."[137]

Justice Jackson similarly wrote that Article IV furthers the national project, and its opening clause leads the effort.[138] Legal balkanization was and is a threat to federalism.[139] Jackson distinguished between the states' shared interest in constitutional law and their self-interest in their own laws.[140]

This Part explains the presumption against extraterritoriality for state laws. The penal judgment exception flows from this presumption. This Part also explores the traits that characterize a penal judgment. It concludes by providing historical examples of state laws that have and have not been held to be penal.

A. Courts Do Not Enforce Foreign Laws

There is a tension between full faith and credit and conflict of laws. This tension has existed within and alongside the federal system since its founding. Prior to 1789, "each [colony] was independent of all the others . . . . The assembly of one province could not make laws for another; nor confer privileges."[141] Separate sovereigns, otherwise governed by international law, then joined in a federal union.[142] But the separate sovereigns remained legally distinct.[143] As Justice Marshall wrote in 1825, "[t]he Courts of no country execute the penal laws of another."[144] When the states entered the union, they retained their residual status as independent sovereigns.[145] Because of this status, international

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137. *Baker*, 522 U.S. at 232 (quoting Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 277 (1935)).

138. Jackson, *supra* note 6, at 17.

139. *See, e.g.*, Oral Argument at 1:26:58, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023) (No. 21-468), https://apps.oyez.org/player/#/roberts13/oral_argument_audio/25447 (last visited May 24, 2024) (expressing concerns from Justice Elena Kagan about "balkanization" in a "divided country" when considering whether California standards violated the Commerce Clause). Conflict between state laws on slavery notably presented challenges that foreshadowed the Civil War. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (invalidating a Pennsylvania law that prohibited the removal of escaped slaves).

140. Jackson, *supra* note 6, at 11–16.

141. STORY, *supra* note 48, at 74.

142. *See M.E. White Co.*, 296 U.S. at 277.

143. *See* The Antelope, 23 U.S. (10 Wheat) 66, 123 (1825).

144. *Id.*

145. Printz v. U.S., 521 U.S 898, 918–19 (1997).

law provides the background for proceedings between states within the union.[146] Marshall's premise has often been cited to support the proposition that states do not have to enforce some laws of other states.[147] In particular, as *Baker* teaches, forum states need not enforce other states' laws in areas the forum state is competent to legislate on.[148] This principle follows the presumption against extraterritoriality: laws are assumed to affect conduct within the state where they are enacted, and not without.[149] In the absence of full faith and credit, the presumption would be stronger as between the states.[150] A forum court enforcing another state's judgment may well be enforcing the other state's law. The Constitution might demand as much, according to full faith and credit jurisprudence.[151] But the tension favors the forum state for certain laws.

B. The Penal Judgment Exception

The penal judgment exception to full faith and credit permits state courts to decline to enforce judgments pursuant to other states' penal laws. Typically, when a litigant brings an out-of-state judgment to a second, forum state, the forum state will enforce that judgment.[152] This enforcement may be a matter of right: UEFJA sets forth procedures for proof and 28 U.S.C. § 1738 prescribes the effect as authorized by Article IV, Section 1.[153] In the alternative, a state court may choose to

146. McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 324 (1839) ("[T]hough a judgment obtained in the Court of a state is not to be regarded in the Courts of her sister states as a foreign judgment, or as merely prima facie evidence of a debt to sustain an action upon the judgment, it is to be considered only distinguishable from a foreign judgment in this, that by the first section of the fourth article of the Constitution, and by the act of May 26, 1790, section 1, the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given, when authenticated as the act of Congress has prescribed.").

147. *See, e.g.*, Huntington v. Attrill, 146 U.S. 657, 666 (1892) (citing *The Antelope*); Loucks v. Standard Oil Co., 120 N.E. 198, 198 (N.Y. 1918) (same); City of Oakland v. Desert Outdoor Advert., Inc., 127 Nev. 533, 538 (2011) (same).

148. Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998).

149. Yarborough v. Yarborough, 290 U.S. 202, 215 (1933) ("In the assertion of rights, defined by a judgment of one state, within the territory of another, there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other.").

150. *See The Antelope*, 23 U.S. at 123.

151. *See supra* section II.B.

152. *See supra* section I.A.

153. REVISED UNIF. ENF'T FOREIGN JUDGMENTS ACT, § 2 (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1964); 28 U.S.C. § 1738; U.S. CONST. art. IV, § 1.

exercise its discretion to grant comity to an out-of-state judgment that falls short of the statutory and constitutional requirements.[154]

The forum state's discretion to decline enforcement is perhaps at its zenith with respect to penal laws: those that regulate or punish on behalf of the public.[155] A state is sovereign with respect to the police power.[156] This sovereignty gives rise to the penal judgment exception to full faith and credit. The concept is familiar in the criminal context: it would be strange to ask a Washington court to punish a Washington doctor under a Texas criminal abortion statute.[157] It is less familiar in civil law, but the exception has been illuminated by occasional frictions between the states.

Huntington v. Attrill is the leading case on the penal judgment exception.[158] Both the Supreme Court of the United States and the Privy Council of the United Kingdom[159]—in separate decisions addressing the same civil suit—held that the exception has the weight of "the English and American constitutions."[160] And both high courts held that the exception did not apply to the judgment before them.[161]

Huntington, a stockholder, had obtained a judgment in New York against Attrill, a corporate officer (and resident of a U.K. dominion, Canada), for a false report issued by the corporation.[162] The relevant 1875 New York statute[163] imposed private liability on corporate officers for such misrepresentations.[164] Huntington tried to enforce the New York judgment against Attrill in Maryland (and Canada). The Maryland Court of Appeals dismissed the claim as a "penalty . . . [that] cannot be enforced

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154. *See, e.g.*, Chapman v. Aetna Fin. Co., 615 F.2d 361, 363–64 (5th Cir. 1980) (holding that certain claims could be brought in Georgia even though they were barred by Georgia law).

155. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 232–33 (1998).

156. *See, e.g.*, Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 503 (1939) ("[The Constitution] could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power.").

157. Instead, extradition may be an approach. *See* U.S. CONST. art. IV, § 2.

158. *See* Zambrano et al., *supra* note 132, at 399–401.

159. The Judicial Committee of the Privy Council, at the time of *Huntington*, was the highest United Kingdom appellate court for cases from across the Commonwealth, including Canada. *Judicial Committee of the Privy Council*, BLACK'S LAW DICTIONARY, *supra* note 75.

160. Huntington v. Attrill, 146 U.S. 657, 667 (1892).

161. *Id.* at 680–681, 686; Huntington v. Attrill [1893] A.C. 150, 161.

162. *Huntington*, 146 U.S. at 660–63.

163. 1875 N.Y. Laws 760, 764, 765, Ch. 611, §§ 21, 37, 38.

164. *Huntington*, 146 U.S. at 663. As interstate creatures, corporations could create frictions that sparked full faith and credit concerns. *Id.*

in this state" for two reasons.[165] First, the New York cause of action did not inquire whether the "deception" of Attrill's false report induced Huntington's investment.[166] Second, the New York cause of action did not limit the amount of recovery.[167]

Huntington appealed to the United States Supreme Court, claiming the judgment had been denied full faith and credit.[168] The Supreme Court reversed the Maryland court, limiting the factors for a penal judgment to the "the strict, primary, and international sense"[169]: the purpose and recovery of the cause of action.[170] It held that New York's law was remedial as to Huntington rather than penal as to the State.[171] Therefore, the judgment in favor of Huntington was due full faith and credit by the Maryland court.[172]

Contemporary scholarship in 1892 saw "penalt[y]" as a murky concept, but ultimately supported the wisdom of *Huntington*.[173] More recently, the Second Restatement on Conflict of Laws included the exception: "[a] valid judgment rendered on a *non-penal* governmental claim in a State of the United States will be recognized and enforced in a sister State."[174] The same can be said of treatises,[175] think tanks,[176] law review articles,[177] and lower state court decisions.[178] The exception has also been used in subsequent federal court decisions detailed below, whether on similar full

165. Attrill v. Huntington, 16 A. 651, 653 (1889).

166. *Id.* at 652.

167. *Id.*

168. *Huntington*, 146 U.S. at 666.

169. *Id.* at 679.

170. *Id.* at 673–74.

171. *Id.* at 676–77.

172. *Id.* at 686.

173. Note, *The Meaning of "Penal" in International Law*, 6 HARV. L. REV. 154, 154–55 (1892).

174. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 120 (AM. L. INST. 1971) (emphasis added).

175. *See* 2 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS: INCLUDING THE DOCTRINE OF RES JUDICATA § 870 (2d ed. 1902).

176. *The Heritage Guide to the Constitution*, THE HERITAGE FOUND., https://www.heritage.org/constitution/#!/articles/4/essays/121/full-faith-and-credit-clause (last visited Apr. 6, 2024).

177. *See, e.g.*, Ronald A. Hecker, Comment, *Full Faith and Credit to Judgments: Law and Reason Versus the Restatement Second*, 54 CALIF. L. REV. 282, 285–86 n.31 (1966) (noting how "courts of no country [shall] execute the penal laws of another" (quoting The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825))); Zambrano et al., *supra* note 132, at 405 (concluding that the Full Faith and Credit Clause does not require states to enforce penal laws of another state).

178. City of Oakland v. Desert Outdoor Advert., Inc., 267 P.3d 48, 56 (Nev. 2011); State v. Schmidt, 712 N.W.2d 530, 537 n.3 (Minn. 2006). The Ninth Circuit observed and used California's four-factor test for penal judgments, which was derived from *Huntington*, from a foreign country. de Fontbrune v. Wofsy, 838 F.3d 992, 1001–02 (9th Cir. 2016).

faith and credit issues or on jurisdictional ones.[179] While some scholars suggest that later Supreme Court cases call the exception into question,[180] those cases leave *Huntington* and the exception untouched in light of their narrow application.[181]

C. Factors Indicating a Penal Judgment

While the Supreme Court and the Privy Council both supported the penal judgment exception in *Huntington*, each found slightly different factors that indicate a judgment is penal. The Privy Council, which issued its decision first, emphasized that penal judgments recover to or on behalf of the State.[182] While most obvious in lawsuits to which the State is a party, the Privy Council explained that this could include "common informer[s]" who are empowered to enforce laws on behalf of the state in "actio popularis"[183]: a cause of action brought by a member of the public in the interest of the public.[184] Penal judgments may also include qui tam suits: suits brought by private citizens, at least in part, on behalf of the State.[185] Citizen enforcement has a tradition at common law that blurs the line between public and private law.[186] Some United States courts have made the same inquiry as the Privy Council—whether the judgment recovers to or on behalf of the State—when deciding whether laws are penal.[187] Similar qui tam actions and actions brought by common informers have been held penal under this theory.[188]

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179. Broderick v. Rosner, 294 U.S. 629, 642 (1935); Nelson v. George, 399 U.S. 224, 229 (1970); *see also* United Breweries v. Colby, 170 F. 1008, 1010–13 (N.D. Iowa 1909) (analyzing whether the court had jurisdiction over the action). Section 1332 provides jurisdiction over "all civil actions," which makes the exception relevant to penal actions over which the federal courts may not have jurisdiction. 28 U.S.C. § 1332.

180. *See* Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497, 548 (2002).

181. Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 273 (1935).

182. Huntington v. Attrill [1893] A.C. 150, 157–58.

183. *Id.* at 158.

184. *Actio popularis*, BLACK'S LAW DICTIONARY, *supra* note 75.

185. *See Qui tam action*, BLACK'S LAW DICTIONARY, *supra* note 75 ("An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive."); *see also* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768, n.1 (2000) ("*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'").

186. *See* Peter B. Kutner, *Judicial Identification of "Penal Laws" in the Conflict of Laws*, 31 OKLA. L. REV. 590, 601–02 (1978).

187. *See* Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 198 (N.Y. 1918).

188. Stichtenoth v. Cent. Stock & Grain Exch. of Chi., 99 F. 1, 3 (C.C.N.D. Ill. 1900).

But the Supreme Court defined penal judgment more broadly than the Privy Council. Penal laws, the Court reasoned, were those with a "purpose . . . to punish an offense against the public justice of the State . . . ," rather than "to afford a private remedy to a person injured by the wrongful act."[189] The U.S. rule applies to qui tam actions and those brought by common informers, and it includes more.[190] The *Huntington* Court also observed that criminal laws constitute penal laws and cannot be enforced extraterritorially.[191] The remedy for a crime may not flow to an injured party at all: speed limits penalize drivers who speed, even if they do not threaten or injure a particular private party.

By way of illustration, the Supreme Court explained that wrongful death suits are "intended to protect life" by imposing liability on those who cause death, but they recover not to the state; instead, they recover to the family of the deceased.[192] "To maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual."[193] Wrongful death suits are not penal.[194] The remedy and who recovers is dispositive: a wrongful death suit directly compensates the family of a driver killed by a speeding driver.[195]

Both speed limits and wrongful death suits disincentivize dangerous driving, but *Huntington* reveals a distinction.[196] Penal laws punish the offense against the public; private laws seek to compensate individuals for harm proximately caused by unlawful conduct.[197] Penal law plaintiffs are wholly divorced from both harm and proximate causation. *Huntington* characterized penal laws as those that "punish an offense against the public justice of the state . . . ."[198] Penal judgments, therefore, are final and valid judgments that stem from penal causes of action.

The Privy Council and Supreme Court—two high courts in common law jurisdictions[199]—agreed that the label assigned by statute to the cause of action is not conclusive.[200] Neither decision considered the forum

189. Huntington v. Attrill, 146 U.S. 657, 673–74 (1892).

190. *Id.* at 672–74.

191. *Id.* at 674–75.

192. *Id.* at 675.

193. *Id.* at 676–77.

194. *See id.* at 674 (citing Dennick v. Cent. R.R. Co. of N.J., 103 U.S. 11, 17 (1880)).

195. *See Dennick*, 103 U.S. at 20.

196. *See Huntington*, 146 U.S. at 674–75.

197. *Huntington*, 146 U.S. at 673–74.

198. *Id.* at 674.

199. *See Judicial Committee of the Privy Council*, BLACK'S LAW DICTIONARY, *supra* note 75

200. Huntington v. Attrill [1893] A.C. 150, 161; *Huntington*, 146 U.S. at 683.

state's policy relevant to the penal judgment exception (in accord with *Baker*).[201] The law of the sister state is evaluated by the cause of action, regardless of the facts of the case at hand.[202] A judgment pursuant to a penal law is a penal judgment. *Huntington* demonstrates a thorough inquiry into whether a judgment pursuant to a given law is or is not penal. Courts competent in both criminal and civil law conduct this inquiry: they examine de novo the meaning and effect of a statute.[203] It is an inquiry that is useful to jurisdictional, conflict of laws, and full faith and credit issues. Lower courts, both state and federal, illustrate the penal judgment exception in action beyond *Huntington*.[204]

D. Laws that Are Not Penal

The *Huntington* Court's preoccupation with wrongful death suits is understandable: a raft of state courts split over whether these were penal since their appearance in the mid-1800s.[205] Justice Cardozo, writing for the Court of Appeals of New York, squarely addressed whether wrongful death suits were penal in *Loucks v. Standard Oil Co. of New York*[206] (decided 1918). Pursuant to a Massachusetts statute, the estate of Loucks brought an action in New York after Loucks was killed by Standard Oil employees driving on a Massachusetts highway.[207] Cardozo cited *Huntington* directly for the proposition that a statute may be penal in the sense that the cause of action is brought "in the interest of the whole community to redress a public wrong."[208] He acknowledged that while damages may be punitive, the cause of action underlying the Massachusetts law is brought by an executor on behalf of an estate: "[h]e is the representative of the outraged family. He vindicates a private right."[209] Therefore, the Massachusetts wrongful death statute was deemed not to be penal and, ultimately, could be grounds for a cause of

201. Baker v. Gen. Motors Corp., 522 U.S. 222, 233–34 (1998).

202. *See Huntington*, 146 U.S. at 684.

203. *See* Adam v. Saenger, 303 U.S. 59, 64 (1938).

204. *See infra* sections II.E, II.D.

205. *See* Kutner, *supra* note 186, at 610 n.145; *see also* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390 (1970) ("In the United States, every State today has enacted a wrongful-death statute.").

206. 120 N.E. 198 (1918).

207. *Id.* at 198.

208. *Id.*

209. *Id.* at 200.

action in New York, despite New York's different wrongful death statute.[210]

In addition to wrongful death statutes, liquor laws varied drastically between states at the peak of the Temperance movement.[211] Some states, such as Iowa, passed "dramshop" acts that imposed liability on businesses that sold intoxicating liquors.[212] Parties injured by an intoxicated family member could recover from these businesses.[213] Iowa additionally imposed liability on alcohol vendors, providing a cause of action to any purchaser.[214] Illinois, by contrast, was less temperate and imposed no such liabilities.[215]

In *United Breweries Co. v. Colby*[216] (decided 1909), a diversity suit was brought in Iowa's federal district court for liquor debts owed in Illinois.[217] A counterclaim was brought under the Iowa statute that permitted recovery by the buyer against the seller.[218] United Breweries argued that the Iowa statute was penal, not civil, and therefore the federal court was without jurisdiction over that claim.[219] The district court held that the Iowa counterclaim could be brought; although the Iowa penalties were "severe,"[220] the statute gave the purchaser of liquor a right of recovery that was "purely remedial as to the purchaser."[221] The policy difference between Iowa and Illinois had no bearing on the court's analysis; the penal

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210. *Id.* at 202. Note that full faith and credit does not oblige states like New York to give direct effect to out-of-state causes of action, but it does not prevent them from doing so. *Id.* The Massachusetts law did not violate New York public policy, which made it enforceable as a matter of state tort law. *Id. But see* Kenney v. Supreme Lodge of the World, Loyal Ord. of Moose, 252 U.S. 411, 415 (1920) (holding that, as a matter of full faith and credit, the difference in public policy did not prohibit the suit).

211. The Temperance movement sought to restrict liquor and alcohol sales, peaking in the Eighteenth Amendment. *See generally* Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, *in* ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127, 141 (Mark H. Moore & Dean R. Gerstein eds., 1981).

212. *See* IOWA CODE § 123.92 (2024); IOWA CODE § 2054 (1935).

213. IOWA CODE § 2055 (1935); *see also* Osborn v. Borchetta, 129 A.2d 238, 241 (Conn. Super. Ct. 1956) (imposing liability for wrongful death on defendants who sold liquor via a New York statute).

214. IOWA CODE § 2423 (1897).

215. *Cf.* United Breweries Co. v. Colby, 170 F. 1008, 1009 (C.C.N.D. Iowa 1909) (alleging sale of alcohol in Illinois, not Iowa).

216. 170 F. 1008 (C.C.N.D. Iowa 1909).

217. *Id.* at 1009.

218. *Id.*

219. *Id.*

220. *Id.* at 1012.

221. *Id.* at 1013.

judgment exception was considered, but ultimately found to be inapplicable.[222]

Some suits have tried to stretch the penal judgment exception to include laws that provide more than restitution.[223] Liability that exceeds the injury might seem to extend beyond the private right described in *Huntington*. But the Supreme Court has held that a fixed sum award untethered to the particular injuries caused by a railroad company is not penal.[224] In *Atchison, Topeka, and Santa Fe Railway Co. v. Nichols*[225] (decided 1924), the railway contested a wrongful death award in California district court that was based on a New Mexico law providing $5,000 to every deceased passenger.[226] The railway argued this was a penal law, citing *Huntington*.[227] The Court upheld the award, finding New Mexico's law was not penal because the "motive and effect of the law is not punishment in the sense of a penal law, but remuneration."[228] More recent courts have also indicated that punitive and exemplary damages are also not penal.[229] The remedial nature of a law, not the amount nor label of liability, controls.

The Supreme Court expressed its greatest reservations about the penal judgment exception in *Milwaukee County v. M.E. White Co.*[230] (decided 1935). A Wisconsin locality had obtained a judgment for tax liability owed by an Illinois corporation and sought enforcement in the Illinois district court.[231] Prior to *Huntington*, in *Wisconsin v. Pelican Insurance Co.*[232] (decided 1888), the Supreme Court had indicated that tax penalties were penal and not due full faith and credit.[233] But *White* overturned this part of *Pelican Insurance Co.*[234] It clarified that the

222. *Id.* at 1011–13.

223. *See, e.g.*, de Fontbrune v. Wofsy, 838 F.3d 992, 995–96, 1000–07 (9th Cir. 2016) (considering whether the French "*astreinte*" was a penalty or not).

224. Atchison, Topeka & Santa Fe Ry. Co. v. Nichols, 264 U.S. 348, 353 (1924).

225. 264 U.S. 348 (1924).

226. *Id.* at 350; *see also* N.M. STAT. ANN. § 1820, *reprinted in* NEW MEXICO STATUTES ANNOTATED (W.H. Courtright Publ'g Co. 1915) (assigning $5,000 liability for any death caused by a railroad corporation's negligence).

227. *See* Nichols v. Atchison, T. & S. F. Ry. Co., 286 F. 1, 3 (9th Cir. 1923).

228. *Atchison*, 264 U.S. at 352.

229. *See, e.g.*, Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1260–62 (Fla. 2006) (allowing the State to bring punitive damages claim in the course of tobacco litigation because it was asserting private interests, not interests of common concern to all its citizens).

230. 296 U.S. 268 (1935).

231. *Id.* at 269–70.

232. 127 U.S. 265 (1888).

233. *Id.* at 299.

234. *M.E. White Co.*, 296 U.S. at 278–79.

original cause of action need not be recognized in the forum state for full faith and credit to compel enforcement.[235] The Court distinguished between the cause of action and the judgment: "[i]n a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis," including taxes.[236] As for the penal judgment exception, the Court reserved the question:

> We intimate no opinion whether a suit upon a judgment for an obligation created by a penal law, in the international sense, see *Huntington v. Attrill* . . . , is within the jurisdiction of the federal district courts, or whether full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.[237]

Thus, while perhaps skeptical, the Court in *White* left *Huntington* untouched. The penal judgment exception remains.

E. Laws That Are Penal

The laws that courts have held to be penal since *Huntington* cement the validity of the exception. These include criminal laws, laws that recover to the state, and laws that recover to strangers.

1. Criminal Laws

The penal judgment exception has occasionally stymied litigants who have sought to enforce criminal laws extraterritorially. In *Nelson v. George*[238] (decided 1970), the Supreme Court considered a federal habeas petition by a California prisoner who was also under a detainer in North Carolina.[239] The Court cited and reiterated *Huntington* almost a century after it was originally decided: "the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment."[240] And *White* was cited in support, not contradiction.[241] The Court held that California law could give the effect it wanted to the North Carolina detainer, in the absence of any extradition obligation; full faith and credit did not oblige

235. *Id.* at 278.
236. *Id.* at 275–76.
237. *Id.* at 279.
238. 399 U.S. 224 (1970).
239. *Id.* at 225, 229.
240. *Id.* at 229.
241. *Id.*

California to enforce North Carolina's penal laws.[242] While courts facing similar criminal questions can turn to general principles of extraterritoriality,[243] the logic of the penal judgment exception also applies.[244]

2. Laws That Recover to the State

The penal judgment exception has also prevented recovery of some civil judgments to municipalities or states. These holdings echo the primary reasoning of the U.K. Privy Council in *Huntington*.[245] Although *White* overturned *Pelican Insurance Co.*'s specific holding that taxes were penal, the Court reasoned more broadly in *Pelican Insurance Co.* that a money judgment for corporate violations did not need to be enforced by the state of Louisiana because recovery went to the state of Wisconsin.[246] More recently, in *City of Oakland v. Desert Outdoor Advertising, Inc.*,[247] the Nevada Supreme Court denied enforcing a judgment due to a California municipality based on a violation of its sign code.[248] Desert Outdoor erected a billboard that violated Oakland's prohibition on off-premise advertising.[249] After sending several notices to Desert Outdoor, Oakland obtained a judgment for civil statutory penalties against Desert Outdoor in California.[250] Oakland then sought enforcement against Desert Outdoor in Nevada pursuant to UEFJA and full faith and credit.[251]

Oakland argued (as have several scholars)[252] that *Huntington's* penal judgment exception was mere dicta and a "relic" of "questionable authority."[253] The Nevada Supreme Court rejected both of these arguments.[254] First, the court observed that the judgment in *Huntington*

242. *Id.* The California district court therefore had jurisdiction. *Id.* at 230.

243. *See supra* section II.A.

244. *See* Amster, *supra* note 13, at 117–18.

245. *See supra* section II.C.

246. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 299 (1888).

247. 267 P.3d 48 (Nev. 2011).

248. *Id.* at 54.

249. *Id.* at 49.

250. *Id.* at 49–50.

251. *Id.* at 50; *see id.* at 53.

252. *See, e.g.*, PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS 1412 (6th ed. 2018) (noting how the Court ruled language from *Huntington* that "for the protection of its revenue[,] or other municipal laws" is "said to be dictum" in a later Supreme Court case); Finch, *supra* note 180, at 548–51 (arguing that the objections to enforcing another state's law tend to decrease "once a legal claim has been reduced to a money judgment," and noting that the Supreme Court has never denied enforcement based on *Huntington*).

253. *Desert Outdoor Advert.*, 267 P.3d at 50.

254. *Id.*

turned on whether the New York law was penal.[255] The court also rejected California's argument that UEFJA supplanted the exception because that statute only obliges recognition of judgments that are entitled to full faith and credit in the first place.[256] Penal laws are not entitled to full faith and credit.[257]

Per *Huntington*, the Nevada court held that the California judgment did not satisfy a private right because it recovered to the City of Oakland, "not a private entity," pursuant to California statute.[258] Therefore, it was a penal judgment, which the court would not enforce.[259] Although not central to the United States Supreme Court's formulation, the Privy Council's rule on recovery remains influential on the penal judgment exception.[260] It also remains good evidence that a law punishes an offense against the public.[261]

Judgments that recover to private parties instead of the state (like those resulting from bounty laws such as Texas Senate Bill 8) require the broader analysis that the Supreme Court used to find the purpose of a law. Common informers and private attorneys general have long been permitted at common law to enforce public laws privately, as the Privy Council discussed in *Huntington*.[262] Qui tam actions, in this tradition, are based on statute and recover, at least in part, to the informer.[263] These have been held penal.[264]

3. Laws That Recover to Strangers

In *Stichtenoth v. Central Stock and Grain Exchange of Chicago*[265] (decided 1900), a woman sued the exchange on which her husband purchased stock futures.[266] An Illinois statute specified that these were gambling contracts and permitted "any person," as a common informer,

255. *Id.* at 52.

256. *Id.* at 53.

257. *Id.*

258. *Id.* at 54.

259. *Id.* at 53.

260. *See supra* section II.C.

261. *Id.*

262. Huntington v. Attrill [1893] A.C. 150, 157–58; *see also* Michaels & Noll, *supra* note 14, at 1195 ("Legislatures in the United States have long used private, civil litigation as a tool for implementing, enforcing, and elaborating statutory policy.").

263. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774–78 (2000) (documenting the history of qui tam actions in English common law and early American history).

264. *See infra* section II.E.3.

265. 99 F. 1 (C.C.N.D. Ill. 1900).

266. *Id.* at 1.

to sue for treble the purchase price, with one half recovering to the local county and the other half to the informer.[267] The law provided a bounty against gambling (even on stocks).[268] The Northern District of Illinois considered whether it had subject-matter jurisdiction (if the law was civil) or not (if the law was penal).[269] Although the plaintiff wife had a personal interest, the cause of action was facially dispositive: "[t]he statute is clearly highly penal in its nature."[270] It permitted even "a total stranger to the loser and to the transaction" to recover.[271] This stranger received half of the recovery only for their "diligence and philanthropy in asserting the dignity of the state," not for any private right.[272] The court concluded that it could "conceive of no statute more thoroughly penal in its character, and, within the reasoning of the [S]upreme [C]ourt of the United States in *Huntington v. Attrill*."[273] Therefore, the court held it did not have jurisdiction over the suit because it was not civil, and that only Illinois state courts could hear the cause of action based on the penal statute.[274]

The Southern District of New York considered the same Illinois anti-gambling statute thirty-seven years later in *Richter v. Empire Trust Co.*[275] (decided 1937). This time, the penal judgment exception did not apply.[276] Richter's gambling debt resulted from poker, not futures.[277] And the unlucky plaintiff himself sought to recover in New York based on a different section of the statute that permitted recovery to the gambler.[278] Although not relevant to this suit, the court took notice of the qui tam action elsewhere in the statute and agreed with the *Stichtenoth* court that the action there was penal.[279] It quoted *Huntington* at length for the proposition that causes of action may be distinguishable by plaintiff, and provided an illustration: "[t]he action of an owner of property against the hundred to recover damages caused by a mob was said . . . to be 'penal

267. 38 ILL. COMP. STAT. § 132, *reprinted in* REVISED STATUTES OF THE STATE OF ILLINOIS 1224 (James C. Cahill ed., 1922).

268. *Id.* § 130.

269. *Stichtenoth*, 99 F. at 3.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 4.

275. 20 F. Supp. 289 (S.D.N.Y. 1937).

276. *Id.* at 291.

277. *Id.* at 290.

278. *Id.* at 290–91.

279. *Id.* at 291.

against the hundred, but certainly remedial as to the sufferer.'"[280] Therefore, the relevant part of the Illinois statute for the purposes of Richter's suit was "not penal but remedial in character in so far as it gives the loser the right to recover back the money lost at gaming."[281] *Stichtenoth* and *Richter* illustrate that a law may be penal in one cause of action but not in another.[282]

Despite scant examples, the Supreme Court, lower federal courts, and state courts have articulated an important distinction: penal judgments are not civil judgments.[283] It is an exception to both federal jurisdiction and full faith and credit. Courts have applied the exception to fewer laws than not, illustrating that it is a narrow exception, especially for money judgments.

In *Magnolia Petroleum Co. v. Hunt*[284] (decided 1943), the Supreme Court held that a Texas workers' compensation judgment was due full faith and credit in Louisiana.[285] The Court recognized "there may be exceptional cases," but insisted "the actual exceptions have been few and far between."[286] The Court went on,

> We are aware of no such exception in the case of a money judgment rendered in a civil suit. Nor are we aware of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition.[287]

The Court cited judgments for wrongful deaths,[288] gambling debts,[289] and taxes,[290] which were all due full faith and credit despite local policies

280. *Id.* at 292 (quoting Huntington v. Attrill, 146 U.S. 657, 667 (1892)).

281. *Richter*, 20 F. Supp. at 291.

282. Although the suit was not barred by the penal judgment exception, Richter was doubly unlucky: the complaint failed to allege where the debt accrued, and the court could not determine that the gambling debt actually occurred in Illinois. *Id.* at 293. Richter could not bring the Illinois cause of action in New York under the presumption against extraterritoriality and the case was dismissed. *Id.* at 292–93.

283. *See supra* section II.E.

284. 320 U.S. 430 (1943).

285. *Id.* at 443.

286. *Id.* at 438. Louisiana's contrasting workers' compensation statute was not such an exception. *See id.* at 442.

287. *Id.* at 438.

288. *Id.* at 438–39 (citing Kenney v. Supreme Lodge of the World, Loyal Ord. of Moose, 252 U.S. 411, 415 (1920)).

289. *Id.* (citing Fauntleroy v. Lum, 210 U.S. 230, 233 (1908)).

290. *Id.* (citing Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 279 (1935)).

against those judgments.[291] It did not cite or distinguish *Stichtenoth*, however. *Magnolia Petroleum Co.* presents stiff opposition to a Washington doctor using the penal judgment exception to defend themselves against a Texas money judgment. But the Court's lack of awareness in *Magnolia Petroleum Co.* does not mean that it has always lacked imagination. And the absence of clear contours to the penal judgment exception does not mean that such an exception is impossible or absent in case law. *Huntington* and its progeny establish that a money judgment may fall afoul of full faith and credit in the narrow case of a penal judgment. Such a narrow exception applies only to unique laws.

III. TEXAS S.B. 8 BOUNTY JUDGMENTS ARE UNENFORCEABLE UNDER THE PENAL JUDGMENT EXCEPTION TO FULL FAITH AND CREDIT

In 2021, the Texas Legislature passed and enacted S.B. 8, the Texas Heartbeat Act.[292] The Texas Legislature found that laws criminalizing abortion enacted before *Roe v. Wade*[293] had not been implicitly repealed.[294] S.B. 8 makes all abortions carried out after the detection of a "fetal heartbeat" illegal.[295] While other states have pushed back on *Roe* since it was decided,[296] and more have gone further since *Dobbs v. Jackson Women's Health Organization*[297] overturned *Roe* in 2022,[298] what is unique about the Texas law is its civil enforcement mechanism. This novel cause of action, called by some a "bounty,"[299] triggers the penal judgment exception. This Part examines the cause of action created under S.B. 8. Then, it demonstrates that the S.B. 8 cause of action does not satisfy a private right, does compensate common informers, and does punish an offense against the state. As such, its bounty judgments are penal judgments and not enforceable outside of Texas state courts, whether in Washington or in federal court. This Part also examines two copycat bounty laws, one of which is not penal. Finally, this Part offers several recommendations for litigators and legislators using the exception.

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291. *Id.*

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

293. 410 U.S. 113 (1973).

294. S.B. 8, 87th Leg. Sess. § 2 (Tex. 2021).

295. TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021).

296. *See* Cohen et al., *supra* note 11, at 9.

297. 597 U.S. __ , 142 S. Ct. 2228 (2022).

298. *Id.* at 2242.

299. *See, e.g.*, Cohen et al., *supra* note 11, at 71 n.394 (labeling S.B. 8 a "bounty law").

A. S.B. 8 Does Not Satisfy a Private Right

S.B. 8 is enforced exclusively by civil actions.[300] The law provides a cause of action that may be brought by "[a]ny person, other than an officer or employee of a state or local governmental entity in [Texas]."[301] The action may be brought against any person who "knowingly" performs or aids and abets an illegal abortion or "intends" as such.[302] The patient, however, is exempt from the action.[303] The law is plaintiff-friendly: it bars certain affirmative defenses[304] and provides a broad range of venues.[305] There is no requirement that the plaintiff has any relationship to the patient receiving an abortion, the defendant, or the abortion performed. The only requirement is that the plaintiff not be a government official.[306] Hypothetically, a Texas plaintiff may bring an action against a Washington doctor prescribing abortion medication for aiding and abetting an abortion, regardless of the plaintiff's relationship to the doctor or the patient.

The cause of action in S.B. 8 is distinguishable from the Illinois action in *Richter*. Richter was the indebted gambler bringing an action available to losers.[307] Richter was the one for whom the law was remedial because it permitted them to recover the money they had lost.[308] In contrast, S.B. 8 provides a remedy to hundreds of conceivable plaintiffs (and many more): "[a]ny person" can bring the action to recover.[309] The cause of action is also distinguishable from the false reporting law in *Huntington*. There, the New York law permitted action by stockholders of the corporation that made a false report; the stockholder-corporation relationship circumscribed a private right under New York law.[310] The parties that may bring bounty suits under S.B. 8 are not circumscribed in any such way.[311] Thus, the action does not satisfy a private right.

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300. TEX. HEALTH & SAFETY CODE ANN. § 171.207 (West 2021).

301. *Id.* § 171.208(a).

302. *Id.* §§ 171.208(a)(1)–(3). The statute defines "physician" as being licensed in Texas, but the liability extends beyond physicians. *Id.* § 171.061(7).

303. This may raise equal protection issues that are beyond the scope of this Comment. *See* Eisendstand v. Baird, 405 U.S. 438 (1972).

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

305. *Id.* § 171.210(a).

306. *Id.* § 171.208(a). This is meant to avoid pre-enforcement equal protection challenges that require state action. *See* Michaels & Noll, *supra* note 14, at 1208.

307. Richter v. Empire Tr. Co., 20 F. Supp. 289, 290 (S.D.N.Y. 1937).

308. *Id.* at 291.

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

310. Huntington v. Attrill, 146 U.S. 657, 676 (1892).

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

B. S.B. 8 Compensates Common Informers

If a plaintiff prevails under S.B. 8, the defendant is liable to them for at least $10,000 per offense.[312] The court must also award injunctive relief to prevent further abortions by the defendant.[313] The damages in these qui tam actions recover exclusively to the plaintiff who brings the suit.[314] The Texas plaintiff suing the Washington doctor is therefore a common informer under the bounty law.

Recovery under S.B. 8 is analogous to *Stichtenoth*. The Illinois statute provided a cause of action against futures traders to "any person," just as in Texas Senate Bill 8.[315] Although the wife in *Stichtenoth* was married to the purchaser, the statute was facially penal and thus unenforceable.[316] Whether a Texas plaintiff may happen to be related to the recipient of medicated abortion is irrelevant; S.B. 8 is penal on its face. S.B. 8, as written, could compensate "total stranger[s]."[317]

The judgment in *Stichtenoth* recovered in part to the Illinois locality. Under the Privy Council's decision in *Huntington*, that fact would be highly relevant.[318] S.B. 8 would look more penal, under the U.K. Privy Council's approach, if it assigned some of the statutory damages to the Texan who brought suit and some of the damages to Texas. But under the United States Supreme Court's decision in *Huntington*, whether any part of the bounty recovers to Texas does not control.[319] Indeed, in *Stichtenoth*, the partial recovery to Illinois was not relevant to the court's analysis. What was dispositive was the reason that the plaintiff recovered: diligence in executing a public law, rather than a private right.[320] Therefore, while the cause of action does not recover to the state, Texas Senate Bill 8 does compensate common informers.

The result of a lawsuit pursuant to S.B. 8 may be a final money judgment, which the Supreme Court suggested in *Baker* is due "exacting" full faith and credit.[321] Although no judgments have been successfully

312. *Id.* § 171.208(b)(2).

313. *Id.* § 171.208(b)(1).

314. *See id.* § 171.208(b)(2).

315. Stichtenoth v. Cent. Stock & Grain Exch. of Chi., 99 F. 1, 3 (C.C.N.D. Ill. 1900); TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021).

316. *See Stichtenoth*, 99 F. at 3–4.

317. *Stichtenoth*, 99 F. at 3.

318. *See* Huntington v. Attrill [1893] A.C. 150, 157–58.

319. *See* Huntington v. Attrill, 146 U.S. 657, 672–73 (1892).

320. *Stichtenoth*, 99 F. at 3.

321. Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

obtained under S.B. 8,[322] the law remains on the books because the Supreme Court could not find a state actor to enjoin from enforcing the law.[323] Although Chief Justice Roberts may frown on the bounty law,[324] it presents a current challenge to the interstate and federal balance. Part of the frustration with bounty laws comes from the intuitive dissonance between their civil form and their public purpose. Under the penal judgment exception, the latter controls their status.

Between the two purposes offered in *Huntington*—a cause of action either addresses an "offen[s]e against the public justice of the State" or "afford[s] a private remedy to a person injured by the wrongful act"—Texas S.B. 8 addresses an offense against the state.[325] As demonstrated above, the bounty action does not afford a private remedy to a person injured by or related to the abortion. This is analogous to the sign ordinance in *City of Oakland*: although the judgment may be civil, the real right may be public. There, the public right was obvious based on the judgment recovering to Oakland.[326] Here, the public nature is less obvious but still identifiable because it is available to any person rather than a discrete set of persons. The Texas plaintiff may be a stranger to the abortion patient and the Washington doctor. They may not have been injured, as understood in *Huntington*, in any way distinguishable from the State of Texas as a whole. They may not even be a Texan. Under the penal judgment exception, Texas may define an injury, like wrongful death, liquor, and anti-gambling laws of the past. What it may not do is assign liability so broadly and expect other states to enforce its judgments. The Texas bounty law is penal and is not due full faith and credit under the penal judgment exception.

C. Copycat Laws May or May Not Be Enforceable

Other states have copied S.B. 8 to varying degrees. Oklahoma enacted an identical bounty provision,[327] and elsewhere forbade abortion from

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322. Eleanor Klibanoff, *Anti-abortion Lawyers Target Those Funding the Procedure for Potential Lawsuits Under New Texas Law*, TEX. TRIB. (Feb. 23, 2022), https://www.texastribune.org/2022/02/23/texas-abortion-sb8-lawsuits/ [https://perma.cc/Q4KV-NNET]; *see* De Mino v. Gomez, No. 04-22-00017, 2022 WL 465397, at *2 (Tex. App. Feb. 16, 2022) (holding that a plaintiff who brought suit under S.B. 8 lacked jurisdiction), *review denied*.

323. *See* Whole Woman's Health v. Jackson, 595 U.S. __, 142 S. Ct. 522, 532 (2021).

324. *See id.* at 545 (Roberts, C.J., concurring) ("The clear purpose and actual effect of S.B. 8 has been to nullify this Court's rulings.").

325. Huntington v. Attrill, 146 U.S. 657, 674 (1892).

326. City of Oakland v. Desert Outdoor Advert., Inc., 267 P.3d 48, 54 (2011).

327. S.B. 1503, 2022 Reg. Sess. § 9 (Okla. 2022).

fertilization.[328] The Oklahoma law is also arguably penal. In Idaho, abortion was made illegal upon detection of a "fetal heartbeat."[329] Idaho copied Texas's bounty law but limited civil enforcement to the recipient of an abortion and family members, including the father, grandparent, sibling, aunt, or uncle of the "preborn child."[330] This statute stands in direct opposition to the policy of its next-door neighbor, Washington, which protects the right to abortion from state interference in RCW 9.02.110.[331]

The Idaho law is distinguishable from Texas Senate Bill 8 and likely due full faith and credit notwithstanding the penal judgment exception. Like the action for gambling losers in *Richter*,[332] a person in Idaho may only sue if they are a privately affected party. And like the wrongful death suit in *Loucks*,[333] the Idaho Legislature has prescribed recovery to family members of an abortion patient.[334] A person in Idaho may only sue a doctor if they have a defined, familial relationship to the abortion patient.[335] The effect and relationship may reflect the policy of Idaho rather than Washington, but both are circumscribed to certain plaintiffs. This limit is similar to that in *United Breweries*,[336] where only families of those injured by intoxicating liquors could bring suit. How wide a legislature may prescribe that right is an open question. Great-grandparents may still be sufficiently related; neighbors may not be. While the penal judgment exception is likely not effective against the Idaho law, the Idaho law itself greatly reduces the chill and liability risks to doctors by reducing the number of potential plaintiffs.[337] This restriction makes the Idaho law more like a wrongful death suit and less like the bounty laws of recent creation.

California has also enacted a bounty law that permits its citizens to sue manufacturers of untraceable and so-called "ghost guns."[338] Illinois has

328. *See* H.B. 4327, 2022 Reg. Sess. § 1(1) (Okla. 2022) (defining "abortion" as using means to end pregnancy "with reasonable likelihood" for causing the death of an "unborn child"); *id.* § 1(4) (defining "unborn child" as a "fetus or embryo in any stage of gestation from fertilization until birth").

329. IDAHO CODE § 18-8804 (2022).

330. *See* IDAHO CODE § 18-8807 (2023).

331. WASH. REV. CODE § 9.02.110 (2022).

332. *See supra* section II.E.3.

333. *See supra* section II.D.

334. IDAHO CODE § 18-8807 (2023).

335. *See id.*

336. *See supra* section II.D.

337. The Idaho statute may raise other issues, like standing or injury in fact, which are beyond the scope of this Comment.

338. S.B. 1327, 2022 Leg. Sess. (Cal. 2022). Enforcement of part of the law was enjoined the same year it was passed. Miller v. Bonta, 646 F. Supp. 3d 1218, 1232 (S.D. Cal. 2022).

considered legislation that permits bounties against domestic abusers.[339] These state laws all threaten comity and the federal balance. All of them are statutory, enforced by any private citizen,[340] recover to any private citizen, and represent vastly different public policies between the states.[341] This last similarity is legally irrelevant to the full faith and credit obligations any judgments may impose. The first three, however, make all of these bounty judgments unenforceable in other states under the penal judgment exception. The exception works to restore some of the federal balance by ensuring state sovereignty while preserving some comity. In the dissonance that bounty laws create between full faith and credit and conflict of laws, the penal judgment exception works to preserve harmony.

In the wake of *Dobbs*, which overturned *Roe v. Wade*'s abortion protections, states may forego bounty laws and simply criminalize abortion.[342] If Texas imposes criminal sanctions and seeks extraterritorial application, the constitutional analysis will be different than under full faith and credit. Extradition, for example, is only required if a person flees criminal proceedings.[343] Subpoenas are typically governed by state statute as a matter of comity.[344] So far, the abortion bounty laws remain on the books. Litigants should be prepared to defend against them, and the penal judgment exception may provide a useful tool.

D. Litigating with the Exception

Litigants should be aware of the exception as a defense against interstate enforcement of bounty laws, as well as the factors that indicate a judgment is penal. If a Texas plaintiff were to seek enforcement in a Washington court of a S.B. 8 judgment against a Washington doctor, the doctor should raise the penal judgment exception to quash the suit. Litigants can use the exception, UEFJA notwithstanding. As *Desert Outdoors* held and the text of UEFJA makes clear, those procedures are

339. H.B. 4146, 102nd Gen. Assemb. (Ill. 2021).

340. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 171.207–08 (West 2021) (granting statutory damages to any person who prevails against any person who performs or aids and abets an abortion).

341. Schiff et al., *supra* note 7, at 9 (contrasting "anti-abortion" and "pro-access" states).

342. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. __, 142 S. Ct. 2228 (2022).

343. U.S. CONST. art. IV, § 2.

344. *See, e.g.*, N.Y. C.P.L.R. § 3119 (McKinney 2022) (describing the procedures to "request" enforcement of an out-of-state subpoena). The Uniform Interstate Depositions and Discovery Act (UIDDA) has streamlined the interstate subpoena process and been adopted by forty-six states. *Interstate Depositions and Discovery Act*, UNIF. L. COMM'N, https://my.uniformlaws.org/committees/community-home?CommunityKey=181202a2-172d-46a1-8dcc-cdb495621d35 [https://perma.cc/QSN5-M743] (last visited Apr. 25, 2023).

only applicable to those judgments due full faith and credit.[345] Penal judgments are not. The limited case law may hinder this defense, but its validity has been laid out above. Legislation would provide more solid ground for this defense.

E. Legislating with the Exception

The penal judgment exception is also useful to the states' own sovereign interests. States should amend their respective foreign judgment statutes to specify that penal judgments are not entitled to full faith and credit. This change would bring them in line with the American Legal Institute's Restatement (Second) Conflict of Laws.[346] The National Conference of Commissioners on Uniform State Laws should lead by offering an amended UEFJA. For example, the first section could be amended to read, "In this Act 'foreign judgment' means any *non-penal* judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." Although perhaps redundant, the emphasis could provide clarity.

California partially adopted this strategy in enacting A.B. 1666. The law precludes enforcement of out-of-state judgments on public policy grounds that strongly protect abortion.[347] But this exception runs head-on into *Baker*'s prohibition on public policy exceptions. Elsewhere, California A.B. 2091 deploys the penal judgment exception, but only in a limited capacity against subpoenas.[348] California, and other states, would do better to rely on the penal judgment exception rather than public policy grounds.[349] This would preclude enforcement of bounty laws like S.B. 8.

Alternatively, Congress could preempt the extraterritorial effect of bounty laws under its Article IV, Section 1 power to prescribe the effect of judgments. Congress had done so before: Section 2 of the Defense of Marriage Act[350] removed any full faith and credit obligations of one state toward same-sex marriages recognized by other states.[351] Although Congress does not need to provide the penal judgment

345. *See supra* section II.E.2.

346. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 120 (AM. L. INST. 1971).

347. A.B. 1666, 2022 Gen. Assemb. (Cal. 2022).

348. A.B. 2091 § 2, 2022 Gen. Assemb. (Cal. 2022).

349. *But see* Zambrano et al., *supra* note 132, at 393–98; Amster, *supra* note 13, at 118–21 (arguing that California may be able to change the method of enforcing an out of state warrant under the state's public policy).

350. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *repealed by* Respect for Marriage Act , Pub L. No. 117-228, § 3, 136 Stat. 2305, 2305 (2022).

351. *Id.* at § 2.

exception, federal (or state) legislation would buttress protections against bounty laws.

CONCLUSION

The penal judgment exception is faithful to the roots of Article IV, Section 1. It does not disturb evidentiary requirements or res judicata obligations toward out-of-state judgments. It is even-handed and only abridges national comity to the extent that state sovereignty demands. It is appropriate to apply the penal judgment exception to laws that create friction between states. Bounty laws like S.B. 8 are exceptional and not due full faith and credit.

The factors of a penal law help distinguish public laws masquerading in private causes of action. This may raise further implications for bounty laws beyond full faith and credit. For one, they are likely unenforceable in federal court.[352] And their penal nature may provide a creative path to pre-enforcement review. Other federal and state citizen-suit provisions are subject to standing requirements that mimic the penal judgment exception,[353] but some may yet cast penal shadows. *Huntington* provides a framework to analyze these laws. It should be used at least to shield parties from bounty judgments rendered in far-away states; it may be able to do more.[354]

352. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 772–74 (2000) (upholding Article III standing for federal qui tam actions brought under the False Claims Act due to the United States' injury and despite the informer's unrelated interest). Texas has disclaimed any injury to the state under S.B. 8 by prohibiting state officials from bringing suit, whereas the United States retained the right to take over, intervene in, or dismiss qui tam suits brought under the False Claims Act. *See id.*; TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021).

353. *See, e.g.*, 11A FED. PROC., L. ED. § 32:721 (2019) (explaining that individual plaintiffs may bring suit if, among other requirements, they have suffered an injury themselves); *see also* Brilmayer, *supra* note 13, at 39–44 (arguing that Article IV, Section 1 "judicial proceedings" must be Article III judicial proceedings that fulfill various criteria, including standing).

354. *See, e.g.*, Amster, *supra* note 13, at 121 (arguing that the penal judgment exception may prevent enforcement of out-of-state search warrants concerning abortion violations).