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SUING TEXAS STATE SENATE BILL 8 PLAINTIFFS UNDER FEDERAL LAW FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS

*Anthony J. Colangelo**

Many people are deriding (or celebrating) the exceptional—and exceptionally deceptive—device of the Texas legislature to so-called “deputize” private individuals as government enforcement agents to carry out a state anti-abortion law that, at present, violates the U.S. Constitution. The law at issue, commonly referred to as Senate Bill 8, is extraordinarily broad, and provides that anyone can sue anyone who “aids or abets” an abortion after about six weeks of pregnancy (including, if read literally, the Uber driver who drove the woman to the clinic).¹ The law awards recovery of no less than \$10,000 and makes no exceptions for pregnancies resulting from incest or rape.²

Actually, the deceptive nature of the law can be subdivided into three devices. I’ll address each in turn with the principal aim of suing someone under *federal* law for bringing suit under the Texas state law. In this respect, I’ll be going quite a bit further than those who seek simply to spotlight the unconstitutionality of the Texas law. Rather, I’m going after the plaintiff who sues under it.

First, the Texas law attempts to take “the state”—the traditional defendant in such suits—out of the picture, essentially rendering it a private suit between private parties. This is of absolutely crucial importance for anyone seeking to enforce their rights under federal law—the “supreme Law of the Land” under the Constitution’s Supremacy Clause.³ For example, 42 U.S.C. § 1983, the principal vehicle for vindication of constitutional rights, becomes inoperative because there must be “state action” in the deprivation of the right.⁴ This is, or

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1. Tex. S.B. 8, 87th Leg., R.S. § 3, subchapter H, secs. 171.201, 171.204, 171.208 (2021) (as enrolled May 13, 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201, 171.204, 171.208).

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

3. U.S. CONST. art. VI, cl. 2.

4. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924, 929 (1982).

should be, an easy one in at least one respect: the state enacted the law, and voilà, state action. The problem is the state action extends only to enacting the law.⁵ We still need to figure out a way to get at the private party suing under it. More on that below.

Second, the Texas law actually *prohibits* bringing suit against the woman who gets the abortion; instead, it goes after those who help her do so.⁶ But she's the one whose rights are being violated. It then cleverly bans defendants from asserting the rights of third parties in general; namely, the women having abortions.⁷ But again, that's the state law. What about federal law? Here, courts have held that "[t]hough, generally speaking, [a constitutional] right . . . is a personal right of individuals, this is 'only a rule of practice', which will not be followed where the identity of interest between the party asserting the right and the party in whose favor the right directly exists is sufficiently close."⁸ Slam-dunk.

Third—and most difficult—under § 1983 the defendant must be acting “under color” of law.⁹ To a non-civil rights lawyer, this may seem obviously satisfied: the state plaintiff is acting under color of state law. But that's not what under color of law means. Rather, it is a legal term of art generally considered synonymous with “in [an] official capacity”;¹⁰ in other words, the actor must be clothed with some form of governmental authority. Thus, the private plaintiff who brings suit under a state law that is declared unconstitutional would not be acting under color of law.¹¹ And hence, the state action requirement rears its head again. For the paradigmatic actor under color of law is generally some sort of state agent.¹²

But not always. Private parties may act under color of law where their conduct “may be fairly attributed” to the state.¹³ To be perfectly honest, this is a really hard test to meet, and none of the ways to meet it seem satisfied when it comes to bringing suit under the Texas law. But the very principle that private parties may act under color of law remains an important one, even if present law does not appear capable of attaching it to state law plaintiffs.

Here's where the zealous advocate must get creative. Everyone seems hypnotized by the novel features of the Texas law as cleverly evading state plaintiffs' liability for violations of constitutional rights. But is there a way to use these novel features against themselves?

To begin—and as we've already seen—this is no ordinary law. For example, there is no requirement that the plaintiff be harmed in any way.¹⁴ So already, this

5. *Id.* at 938–39.

6. TEX. HEALTH & SAFETY CODE ANN. § 171.206(b).

7. *Id.* § 171.209(a).

8. *Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91, 104 (8th Cir. 1956) (internal citations omitted).

9. 42 U.S.C. § 1983.

10. *West v. Atkins*, 487 U.S. 42, 50 (1988).

11. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937–39 (1982).

12. *West*, 487 U.S. at 49.

13. *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000).

14. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212.

doesn't look like a typical civil suit. Rather, it looks more like the state is using private individuals as surrogates for public prosecutors enforcing a state penal law. And, it turns out, there is a test for this very sort of thing in the field of Conflict of Laws. For whether a law is penal "depends upon . . . whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."¹⁵ Again—to reiterate—the Texas law requires no injury.¹⁶ Or take Justice Cardozo's formulation: a statute is penal when it "awards a penalty to the state, or to a public officer in its behalf, *or to a member of the public*, suing in the interest of the whole community to redress a public wrong. The purpose must be, not reparation to one aggrieved, but vindication of the public justice."¹⁷ Again—to reiterate—the Texas law requires no injury,¹⁸ and thus no "reparation to one aggrieved."¹⁹ Under these tests, the Texas law looks quintessentially penal.

And who enforces penal law? State prosecutors acting under color of law. And in this regard, the Supreme Court has said that state action may be "present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"²⁰ It is difficult to imagine an action more "traditionally the exclusive prerogative of the State" than bringing a criminal prosecution.²¹

So, to return to where we started, it is not mere hyperbole to say the state has "deputized" private individuals.²² That is in fact and law exactly what the state has done, and it has removed all the constitutional protections that attend a criminal trial along the way. If some private individual chooses to step into the role of deputy prosecutor, he should also be deemed to open himself up to remedies against his unconstitutional acts.

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

16. See TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212.

17. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 198 (N.Y. 1918) (emphasis added) (internal citations omitted).

18. See TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212.

19. *Loucks*, 120 N.E. at 198.

20. *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)); see also *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

21. *Yaretsky*, 457 U.S. at 1005.

22. *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *3 (U.S. Sept. 1, 2021) (Sotomayor, J., dissenting).