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First Amendment Electronic Speech: *Ex Parte Reece*, a Missed Opportunity to Narrow Texas's Unconstitutionally Overbroad Anti-Harassment Statute

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FIRST AMENDMENT ELECTRONIC SPEECH:
EX PARTE REECE, A MISSED
OPPORTUNITY TO NARROW TEXAS'S
UNCONSTITUTIONALLY OVERBROAD
ANTI-HARASSMENT STATUTE

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ELECTRONIC communications¹ containing harassing threats² are part of the cyberbullying problem that exists in Texas with very real consequences for school-aged children and the vulnerable who need protection.³ The legislature has recently modified Texas law⁴ to further address online cyberbullying.⁵ In this light, this casenote⁶ analyzes

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1. The Texas Penal Code defines electronic communications to mean “a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.” TEX. PENAL CODE ANN. § 42.07(b) (West 2017). It also lists several nonexclusive examples. *See id.*

2. *See, e.g.,* Massimo v. State, 144 S.W.3d 210, 212 (Tex. App.—Fort Worth 2004, no pet.) (“I will kill you and your two kids.”); *see also* Lyrisa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 701–02 (2012) (describing a tragic suicide linked to cyberbullying that failed to produce a criminal conviction due to lack of “clear guidelines” or “objective criteria” in the Computer Fraud and Abuse Act of 1986 (CFAA), 18 U.S.C. § 1030 (2012)).

3. *See generally* Adrienne Morris, *Cyberbullying in Texas: Reform Is Necessary to Keep the Virtual Playground Safe*, 63 BAYLOR L. REV. 498, 498–500 (2011) (discussing the harms of cyberbullying in Texas); Benjamin Walther, *Cyberbullying: Holding Grownups Liable for Negligent Entrustment*, 49 HOUS. L. REV. 531, 532–35 (2012) (discussing the harms of cyberbullying).

4. *See* David’s Law, 2017 Tex. Sess. Law Serv. Ch. 522 (West) [hereinafter, David’s Law]; Roland Rodriguez, *David’s Law Takes Effect*, KRISTV.COM (Sept. 6, 2017, 7:35 AM), <http://www.kristv.com/story/36299408/davids-law-takes-effect> [<https://perma.cc/CZ2P-E3CD>].

5. For a discussion of Texas law prior to David’s Law, *see* Morris, *supra* note 3, at 509–15. The discussion includes Texas Penal Code Section 33.07, the Texas Educational Code, and other issues.

6. A full discussion of cyberbullying is beyond the scope of this casenote. *See generally* Lidsky & Garcia, *supra* note 2, at 718–25 (providing a cyberbullying legislative primer).

*Ex parte Reece*⁷ where the defendant argued that the Texas anti-harassment statute⁸ is unconstitutionally vague and overbroad. By denying Reece's petition,⁹ the Court of Criminal Appeals missed an opportunity to prod the legislature to craft a more narrow statute that will continue to protect vulnerable children from damaging harassment. The current anti-harassment statute is unconstitutionally overbroad because it includes vague terms, lacks other limiting language, and potentially extends to non-harassing situations based on prosecutorial discretion.

Reece was charged with harassment in a county court of law; he then filed a pretrial writ of habeas corpus challenging the constitutionality of the law.¹⁰ The county court of law denied his application without a pre-trial hearing. Reece appealed to the Eastland Court of Appeals and argued that the statute was unconstitutionally vague and overbroad.¹¹ Because this was a facial¹² challenge to the statute, none of the facts¹³ of Reece's alleged harassment were at issue. The appellate court denied his appeal by relying on the Texas Criminal Court of Appeals decision in *Scott v. State*¹⁴ that upheld the telephone anti-harassment statute,¹⁵ which also covers electronic communications. Therefore, the appellate court ruled that Reece could not facially challenge the statute because it did not implicate expression that had First Amendment protections.¹⁶ Following the decision of the appellate court, the Texas Court of Criminal

7. *Ex parte Reece*, 517 S.W.3d 108, 109 (Tex. Crim. App. 2017) (per curiam) (mem. op.).

8. TEX. PENAL CODE ANN. § 42.07(a)(7) (West 2017) (The statute defines an offense when a person uses repeated electronic communication, intends to "harass, annoy, alarm, abuse, torment, or embarrass another," and that communication is "reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.").

9. *Reece*, 517 S.W.3d at 109.

10. *Ex parte Reece*, No. 11-16-00196-CR, 2016 WL 6998930, at *1 (Tex. App.—Eastland Nov. 30, 2016) (mem. op., not designated for publication), *pet. ref'd*, 517 S.W.3d 108 (Tex. Crim. App. 2017) (per curiam) (mem. op.).

11. *Id.*; see also Brief for Appellant at 3, *Reece*, No. 11-16-00196-CR, 2016 WL 6998930, at *1 (2016).

12. A facial challenge seeks to invalidate a statute because it violates First Amendment rights in general without specific consideration of the violation of the defendant's rights in this specific case. In comparison, an "as-applied" challenge would seek to invalidate a statute based on the merits of the defendant's specific Constitutional rights being violated with this specific application. For a more complete discussion, see 16 C.J.S. *Constitutional Law* § 243 (2017).

13. See Brief for Appellee at 3-4, *Reece*, No. 11-16-00196-CR, 2016 WL 6998930, at *1 (2016) (describing emails and phone calls that Reece's ex-wife reported by which she was "annoyed and frightened"). Although Reece's conduct may need punishment, other remedies existed such as potential charges for intentional access without authorization to his ex-wife's Facebook account. See CFAA, 18 U.S.C. § 1030(a)(2)(C) (2012).

14. 322 S.W.3d 662, 669-70. (Tex. Crim. App. 2010), *abrogated by* *Wilson v. State*, 448 S.W.3d 418, 422 (Tex. Crim. App. 2014) (holding that a similar statute, Texas Penal Code Section 42.07(a)(4), which related to telephone communications, did not have First Amendment protection); see also Donald H. Flanary, III & Jessica J. Pritchett, *Cyberspace: A Constitutionally Protected Forum for Free Speech*, 17 SMU SCI. & TECH. L. REV. 489, 499-501 (2014) (synopsis of the *Scott* decision).

15. See TEX. PENAL CODE ANN. § 42.07(a)(4) (West 2017).

16. *Reece*, 2016 WL 6998930, at *3.

Appeals refused Reece's petition.¹⁷ But Presiding Judge Sharon Faye Keller dissented (she also dissented in *Scott*).¹⁸ She argued that (1) electronic communication is much broader than the telephone communication in *Scott*, and (2) the limits proposed by the court in *Scott* had been abandoned in a more recent case, *Wilson v. State*,¹⁹ which made the *Scott* precedent ripe for re-evaluation.²⁰ Her argument continued her prior dissent in *Scott* where she emphasized the telephone anti-harassment statute's vagueness²¹ and overbreadth.²² In *Reece*, she stated, "The breadth of this statute can be accurately characterized as 'breathhtaking,' and, as such, is appropriate for review."²³ Specifically, she asserted that the statute proscribes "communications even if they have a legitimate communicative purpose."²⁴

Because the anti-harassment statute criminalizes repeated communications that merely *alarm* or *annoy*, it is unconstitutionally overbroad and needs to be limited. The statute is overbroad because its words are vague, it lacks limiting language, and it extends to non-harassing communications.

When a statute is unconstitutionally vague, it violates the Fourteenth Amendment right to due process by not giving proper notice of prohibited conduct or proper guidance to law enforcement.²⁵ For example, an ordinance criminalizing, among other things, "wandering or strolling around from place to place without any lawful purpose" does not give

17. *Ex parte Reece*, 517 S.W.3d 108, 109 (Tex. Crim. App. 2017) (per curiam) (mem. op.).

18. *Scott*, 322 S.W.3d at 671–77 (Keller, J., dissenting).

19. 448 S.W.3d 418, 422, 425 (Tex. Crim. App. 2014). When deciding *Scott*, the Court had limited the term *repeated* to multiple calls close enough to be considered a "single episode." *Scott*, 322 S.W.3d at 669 n.12. Likewise, the court held that harassing calls only have an intent to "inflict emotional distress for its own sake." *Id.* at 670. In *Wilson*, the court abandoned both of these limits. For this reason, Judge Keller noted that four other judges were ready to revisit *Scott*. *Reece*, 517 S.W.3d at 110 n.16 (Keller, J., dissenting).

20. *Reece*, 517 S.W.3d at 109–110.

21. *See Scott*, 322 S.W.3d at 671–72 (Keller, J. dissenting) (discussing Texas decisions that held the terms *alarm* and *annoy* in earlier anti-harassment statutes similar to Section 42.07(a)(7) were vague).

22. *Id.* at 676 ("But nothing in the statute limits its application to those occasions when the actor's sole intent is to inflict emotional distress, and if the court is implying that situations are rare in which a person has more than one intent, I disagree. The mischief this statute can create is enormous . . .").

23. *Reece*, 517 S.W.3d at 110 (Keller, J., dissenting). When Judge Keller wrote her dissent, Section 42.07(b) of the Texas Penal Code only included a small non-inclusive list of "electronic mail, instant message, network call, . . . facsimile machine[,] and . . . a pager." *Id.* at 109. The Texas legislature has since expanded the list to include "a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, [or] any other Internet-based communication tool" as types of electronic communication but still does not limit the list to only those forms. David's Law § 13 (codified at TEX. PENAL CODE § 42.07(b)(1)). This expanded list does nothing to further limit the inclusiveness of terms such as *alarm* and *annoy*; it only expands the statute's breadth.

24. *Reece*, 517 S.W.3d at 111 (Keller, J. dissenting).

25. *Scott*, 322 S.W.3d at 665 n.2.; *see also* *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603–04 (1967) (holding a strict vagueness standard related to freedom of speech).

proper notice of how a person can avoid that activity or when a police officer can arrest a person.²⁶ Additionally, when a statute is unconstitutionally overbroad, it covers both protected and unprotected First Amendment speech.²⁷ Similarly, a statute meant to criminalize photographs taken without consent to gratify sexual urges is overbroad if the language of the statute also includes public photography of celebrities by a reporter.²⁸ While both vagueness and overbreadth are independent reasons to void a statute, vagueness can lead to overbreadth. Statutes that have vague terms are prone to broad application that includes protected First Amendment speech.²⁹

First, the words *alarm* and *annoy* as used in Section 42.07(a)(7) are vague. The Fifth Circuit ruled the words *alarm* and *annoy* are unconstitutionally vague because the old Texas statute³⁰ “[made] no attempt at all to specify whose sensitivity must be offended.”³¹ Here, because *alarm* and *annoy* are inherently subjective states of mind, the court is right to declare them vague, absent some notice to whom they apply. Likewise, Section 42.07(a)(7) lacks this specification. Judge Keller later adopted the *Kramer* analysis in *Long v. State*,³² which invalidated a Texas stalking statute³³ that used words very similar to those in Section 42.07. She noted the words *alarm* and *annoy* were now “‘joined by the words ‘harass,’ ‘abuse,’ ‘torment,’ and ‘embarrass’” but that the words were joined by “or” and thus did not limit the vagueness of *alarm* and *annoy*.³⁴ She also felt the new terms were subject to “‘uncertainties of meaning.’”³⁵ Thus, the same problem still existed from *Kramer*. Despite the new words that were added to the list, it was still too difficult to understand the prohibited effect on sensitivities of unspecified individuals. Later, although the newer statute still used the same vague words, the court in *Scott* equated

26. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1, 162 (1972). For a discussion of vague laws and related prosecutorial harms, see Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1085–88 (1997).

27. *Scott*, 322 S.W.3d at 665 n.2. See also *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (holding statutes overbroad if they reach protected speech).

28. *Ex parte Thompson*, 442 S.W.3d 325, 350 (Tex. Crim. App. 2014).

29. See, e.g., BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 1:32 (2017 ed.) (comparing vagueness and overbreadth doctrines).

30. Penal Code of 1973, ch. 399, § 1, 1973 Tex. Gen. Laws 883, 956 (amended 1983) (current version at TEX. PENAL CODE § 42.07).

31. *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983), *reh'g granted*, 716 F.2d 284, *vacated without addressing merits*, 723 F.2d 1164 (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)). Later, the Court of Criminal Appeals adopted the ruling explicitly as applied to the same statute. *May v. State*, 765 S.W.2d 438, 440 (Tex. Crim. App. 1989).

32. 931 S.W.2d 285, 28–89 (Tex. Crim. App. 1996) (“While the [Fifth Circuit] declined to address the question of overbreadth [in *Kramer*], it nevertheless indicated that First Amendment considerations were intertwined with the vagueness issue. . . . [T]he Fifth Circuit held that the words ‘annoy’ and ‘alarm’ were inherently vague and that Texas courts had not construed the terms to lessen their vagueness.”) (citations omitted).

33. Act of June 12, 1993, ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3677–78, (amended 1995) (current version at TEX. PENAL CODE § 42.072).

34. *Long*, 931 S.W.2d at 289.

35. *Id.*

six terms used in Section 42.07 with “emotional distress” by citing Webster’s dictionary³⁶ without addressing *Kramer* or *Long*.³⁷

Even though it did not address *Kramer* or *Long*, the court seemed to recognize the need to limit the breadth of its opinion in *Scott*. The court required that repeated communication be limited to a “single episode”³⁸ and that violating calls would have no “intent to engage in . . . legitimate communication.”³⁹ But in *Wilson*, the court abandoned these requirements.⁴⁰ Thus, the statute, as currently interpreted, is still vague and overbroad.

Second, the anti-harassment law lacks language that would limit its breadth. Other states that have encountered similar anti-harassment statutes have ruled them either unconstitutionally vague⁴¹ or unconstitutionally overbroad.⁴² In addition to some state courts invalidating vague and overbroad laws, other state legislatures have adopted laws that better limit breadth.⁴³ What these better anti-harassment laws have in common is a level of scienter, or “knowledge that makes a person legally responsible,”⁴⁴ that more narrowly matches the level of guilt that society should punish. For example, these laws require that the harassing communication impart a reasonable fear of injury or property destruction to the recipient,⁴⁵ or that the communication lack any legitimate communication

36. *Scott v. State*, 322 S.W.3d 662, 669 n.13 (Tex. Crim. App. 2010), *abrogated by* *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014).

37. *Id.* at 669 (“First, the text requires that the actor have the specific intent to harass, annoy, alarm, abuse, torment, or embarrass the recipient of the telephone call. That is, the text requires that the actor have the intent to inflict harm on the victim in the form of one of the listed types of emotional distress.”).

38. *Id.* at 669 n.12.

39. *Id.* at 670.

40. *See supra* note 19; *see also* *Wilson v. State*, 448 S.W.3d 418, 426 (Tex. Crim. App. 2014) (Keller, J., concurring) (noting that the *Scott* precedent can now be applied to any calls that occur at least twice and that facially legitimate communication does not bar enforcement).

41. *See* *State v. Codiamat*, 317 P.3d 664, 665 n.1, 678–79 (Haw. 2013) (finding vague a statute with the words “harass, annoy, or alarm”); *People v. Golb*, 15 N.E.3d 805, 813 (N.Y. 2014) (finding vague a statute with the words “harass, annoy, threaten or alarm”).

42. *See* *State v. Nowacki*, 111 A.3d 911, 931 (Conn. App. 2015) (finding overbroad a statute that included “harass, annoy or alarm” as applied to defendant); *McKenzie v. State*, 626 S.E.2d 77, 79 (Ga. 2005) (holding statute overbroad when not limited to only unwelcome speech); *State v. Dugan*, 303 P.3d 755, 772 (Mont. 2013) (holding statute overbroad when it included “intent to terrify, intimidate, threaten, harass, annoy, or offend”); *State v. Pierce*, 887 A.2d 132, 135 (N.H. 2005) (holding statute overbroad that included intent to “annoy or alarm another”); *People v. Golb*, 15 N.E.3d 805, 813 (N.Y. 2014) (holding overbroad).

43. *See, e.g.*, ARK. CODE ANN. § 5-41-108 (West 2017) (requiring threats of personal injury or property damage or use of obscene, lewd, or profane language); HAW. REV. STAT. ANN. § 711-1106(1) (West 2017) (using *alarm* and *annoy* but adding additional conditions such as (a) physical contact, (b) provocation of immediate violent response, and (c) repeated electronic communication without legitimate communication purpose); MO. REV. STAT. § 565.090 (West 2017) (requiring harassing communication be “without good cause” and with “purpose to cause emotional distress”).

44. *Scienter*, BLACK’S LAW DICTIONARY (10th ed. 2014).

45. *See, e.g.*, ALASKA STAT. ANN. § 11.61.120(a)(7) (West 2017) (requiring that harassment “places the person in reasonable fear of physical injury”).

purpose when sent.⁴⁶ A Texas law modified to include a more specific scienter requirement would exclude benign scenarios of legitimate communication. Additionally, specific scienter requirement provides the level of narrow construction that puts a potential defendant on notice of what the law is and also provides better guidance to law enforcement and prosecutors on what type of offenses to prosecute.

Third and finally, one can envision many types of non-harassing communications protected by the Fourth Amendment that would trigger Section 42.07(a)(7) because the statute uses the words *alarm*, *annoy*, and *embarrass* as prohibited intents if they are also reasonably likely results.⁴⁷ For example, when Hurricane Harvey recently made landfall on Texas shores, a brother who sent more than one text message⁴⁸ with intent to alarm his sister to evacuate ahead of the storm could theoretically have been prosecuted under the statute. His text messages fit the definition of electronic communication.⁴⁹ And the fact that the brother sent the text message out of concern for his imperiled sister does not change the fact that he still had an intent to alarm⁵⁰ her. It is also “reasonably likely”⁵¹ that more than one text message urging someone to evacuate before a hurricane makes landfall would alarm that person receiving it. Likewise, imagine another scenario where a woman published a Facebook post that advocated for change in Confederate names of Dallas schools,⁵² and she posted several follow-up comments. Because she posted more than once, she would meet the element of *repeated*. Because her intent, in part,⁵³

46. See, e.g., MASS. GEN. LAWS ANN. ch. 269, § 14A (West 2017) (requiring the “sole purpose” of repeated electronic communication be “harassing, annoying or molesting the person”) (emphasis added).

47. In Judge Keller’s dissent in *Scott*, she reasons that “low intensity emotional states” included in the statute can be used for legitimate communications protected under the First Amendment. 322 S.W.3d 662, 676 (Tex. Crim. App. 2010), *abrogated by* *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014) (Keller, J., dissenting). Judge Keller mentions the following legitimate examples: (1) calls to Congress with an intent to annoy in order to spur action on grievances; (2) political calls made to voters to alarm them to action; and (3) messages left by a concerned friend to an adulterous husband on an answering machine in hopes of embarrassing him when his wife overhears. *Id.*

48. Telephones, texting, and social media were all important tools for family communications during the storm. See Natalia E. Contreras, *Hurricane Harvey: How to Stay in Touch with Loved Ones During the Storm*, CORPUS CHRISTI CALLER-TIMES (Aug. 24, 2017, 11:07 PM), <http://www.caller.com/story/news/2017/08/24/hurricane-harvey-how-stay-touch-loved-ones-during-storm/600347001/> [<https://perma.cc/BA9B-T4HH>].

49. See discussion *supra* note 23.

50. Merriam-Webster defines *alarm* as “to give warning to.” *Alarm*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

51. “Reasonably likely” has not been defined as a reasonable person standard but is something less than that. *Long v. State*, 931 S.W.2d 285, 290 (Tex. Crim. App. 1996).

52. See Eva-Marie Ayala & Corbett Smith, *Dallas ISD Wants to Strip Confederate Names from Schools, but How?*, DALL. MORNING NEWS (Aug 16, 2017, 5:50 PM), <https://www.dallasnews.com/news/education/2017/08/16/dallas-trustees-consider-renaming-schools-honoring-confederates> [<https://perma.cc/777K-9YY9>].

53. Recall that *Wilson* held that a “facially legitimate” message does not negate the criminal culpability under the statute. *Wilson v. State*, 448 S.W.3d 418, 425 (Tex. Crim. App. 2014).

was to either annoy⁵⁴ or even embarrass⁵⁵ those on Facebook who supported these Confederate names, and such language is likely to annoy or embarrass those individuals, the statute includes her political Facebook posts. Of course, neither of these scenarios deserves prosecution because they lack a solely malicious intent to inflict emotional distress. The hurricane scenario is an alarming set of text messages that are intended for the sister's benefit, and the political Facebook posts are intended to communicate legitimate political speech.

In conclusion, Texas should revisit Section 42.07 again because the current statute is overbroad. The best law to protect children is a law that can remain on the books. Having a law that is vulnerable to attack for overbreadth and vagueness unnecessarily keeps Texas children in suspense as to whether the law will protect them. By correcting this law through elimination of vague terms or addition of limiting language, Texas can best protect its children and vulnerable citizens. Texas should look to other states' less broad and less vague statutes for examples of narrow but effective definitions of what electronic communications it should punish for harassment.

54. Merriam-Webster defines *annoy* as "to disturb or irritate esp. by repeated acts." *Annoy*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

55. Merriam-Webster defines *embarrass* as "to place in doubt, perplexity, or difficulties." *Embarrass*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).