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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**

Brian Long*

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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* J.D. Candidate, SMU Dedman School of Law, May 2019; B.A. University of Texas at Dallas, May 1998. I would like to thank my wife, Alynda Long, for her loving, enthusiastic support while writing this casenote and for encouraging me to pursue law school. I would also like to thank my classmate, Russ Pearlman, for providing ideas and feedback during this process.

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.


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\textsuperscript{7} where the defendant argued that the Texas anti-harassment statute\textsuperscript{8} is unconstitutionally vague and overbroad. By denying Reece’s petition,\textsuperscript{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.\textsuperscript{10} The county court of law denied his application without a pretrial hearing. Reece appealed to the Eastland Court of Appeals and argued that the statute was unconstitutionally vague and overbroad.\textsuperscript{11} Because this was a facial\textsuperscript{12} challenge to the statute, none of the facts\textsuperscript{13} 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 \textit{Scott v. State}\textsuperscript{14} that upheld the telephone anti-harassment statute,\textsuperscript{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.\textsuperscript{16} Following the decision of the appellate court, the Texas Court of Criminal

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\begin{itemize}
  \item Ex parte Reece, 517 S.W.3d 108, 109 (Tex. Crim. App. 2017) (per curiam) (mem. op.).
  \item 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.”).
  \item Reece, 517 S.W.3d at 109.
  \item Id.; see also Brief for Appellant at 3, Reece, No. 11–16–00196–CR, 2016 WL 6998930, at *1 (2016).
  \item 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).
  \item 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).
  \item See TEX. PENAL CODE ANN. § 42.07(a)(4) (West 2017).
  \item Reece, 2016 WL 6998930, at *3.
\end{itemize}
Appeals refused Reece’s petition. But Presiding Judge Sharon Faye Keller dissented (she also dissented in *Scott*). 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*, which made the *Scott* precedent ripe for re-evaluation. Her argument continued her prior dissent in *Scott* where she emphasized the telephone anti-harassment statute’s vagueness and overbreadth. In *Reece*, she stated, “The breadth of this statute can be accurately characterized as ‘breathtaking,’ and, as such, is appropriate for review.” Specifically, she asserted that the statute proscribes “communications even if they have a legitimate communicative purpose.”

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. For example, an ordinance criminalizing, among other things, “wandering or strolling around from place to place without any lawful purpose” does not give

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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).
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.
proper notice of how a person can avoid that activity or when a police officer can arrest a person. Additionally, when a statute is unconstitutionally overbroad, it covers both protected and unprotected First Amendment speech. 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. 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.

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 statute “[made] no attempt at all to specify whose sensitivity must be offended.” 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*, which invalidated a Texas stalking statute 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*. She also felt the new terms were subject to “uncertainties of meaning.” 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

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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).


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).


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

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 644, 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”).
purpose when sent. 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. For example, when Hurricane Harvey recently made landfall on Texas shores, a brother who sent more than one text message 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. 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 alarm her. It is also “reasonably likely” 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, 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,

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.


49. See discussion supra note 23.

50. “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).

was to either annoy\textsuperscript{54} or even embarrass\textsuperscript{55} 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.

\textsuperscript{54} Merriam-Webster defines \textit{annoy} as “to disturb or irritate esp. by repeated acts.” \textit{Annoy}, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003).

\textsuperscript{55} Merriam-Webster defines \textit{embarrass} as “to place in doubt, perplexity, or difficulties.” \textit{Embarrass}, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003).