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The Bumble Bill: A Critical Analysis on Texas's New Law Taking Indecent Exposure Regulations Online

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COMMENT

THE BUMBLE BILL: A CRITICAL ANALYSIS ON TEXAS'S NEW LAW TAKING INDECENT EXPOSURE REGULATIONS ONLINE

ASHLEY B. HURON*

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I. INTRODUCTION

The year is 2021. Meeting people, dating, and talking to people online is not as frowned upon as it was years ago. Many find meeting others online—either for friendship or romantic relationships—is more convenient and less time-consuming than venturing into the real world for these initial connections. But with technology allowing people to hide behind screens, avoid face-to-face confrontation, and even remain completely anonymous, some take advantage and send out unsolicited visual material which would annoy or appall most people. Indecent exposure has essentially transferred online in the form of these unsolicited visual materials, and there has not been a Texas law to combat and deter these unwanted advances until Texas House Bill 2789 (H.B. 2789),¹ now codified as Texas Penal Code

1. *Bill: HB 2789*, TEX. LEGISLATURE ONLINE (Jun. 10, 2019), <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=HB2789> [<https://perma.cc/P6HX-WDEJ>] [hereinafter *Bill: HB 2789*] (click the "Text" tab and follow one of the links to the PDF or Word versions of the bill and enrolled act).

Ann. Section 21.19 (“TPC Section 21.19” or “the Code”).² Although the First Amendment allows leniency in government regulation,³ Texas has not used this to its advantage to prevent these types of messages beforehand. H.B. 2789 was written as a safeguard for those who do not wish to receive these unsolicited visuals.⁴ While laws exist to prohibit this conduct in some forms, including in-person indecent exposure⁵ and online harassment when recipients can prove the sender intended to annoy or harass them,⁶ the recent issue of deterring these types of instances online remains. Texas is one of the first states to introduce a bill to do so. The Texas Legislature drafted H.B. 2789 as a response to this existing issue, aiming to stop those who wish to expose themselves to unwilling participants online.

Part II of this Comment will discuss the substantial issues within TPC Section 21.19, outline the trend of regulating the First Amendment in the U.S., and discuss where the remaining gaps leave us in protecting against online sexual advances. Part III will present arguments as to why TPC Section 21.19 will be declared unconstitutional. Part IV will examine underlying issues such as enforceability and potential claims of mistake under TPC Section 21.19. Finally, Part V compares and contrasts TPC Section 21.19 with a similar Texas statute.

II. OVERVIEW

TPC Section 21.19 took effect on September 1, 2019.⁷ As a result, those who transmit sexually explicit visual material without the expressed consent or request of the recipient could be charged with a Class C misdemeanor and a maximum fine of \$500.⁸ Under the new law, anyone who knowingly

2. Throughout this Comment, H.B. 2789 and TPC Section 21.19 may be used interchangeably to refer to the former bill and now law.

3. See generally Ronald Steiner, *Compelling State Interest*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest> [https://perma.cc/C2GS-L55N] (providing an overview of the different levels of governmental scrutiny).

4. *Bill: HB 2789*, *supra* note 1 (“AN ACT relating to the creation of the criminal offense of unlawful electronic transmission of sexually explicit visual material.”).

5. See TEX. PENAL CODE ANN. § 21.08 (providing the portion of the Code entitled “Indecent Exposure”).

6. See *id.* § 42.07(a) (“A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person: (1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene . . .”).

7. See *Bill: HB 2789*, *supra* note 1 (providing information on H.B. 2789, including passage date, voting history, and authors).

8. House Research Org., Bill Analysis, Tex. H.B. 2789, 86th Leg., R.S. (2019), <https://hro.house.texas.gov/pdf/ba86R/HB2789.PDF> [https://perma.cc/9939-DV8U].

transmits visual material depicting “any person engaged in sexual conduct or with the person’s intimate parts exposed; or covered genitals of a male person that were in a discernibly turgid state” could be held criminally liable.⁹

On its face, TPC Section 21.19 looks like a legislative victory protecting people from digital sexual harassment and preserving the morals of our community, but there may be issues lingering in the shadows of this seemingly positive law.¹⁰ The passing of this bill fills a void in Texas law—holding those who send unwanted sexually explicit pictures online accountable—and the good intentions behind it led to the initial celebration of the bill’s passing.¹¹ During Senate and House committee hearings, proponents explained that although indecent exposure is a crime, the same act committed over texting or a dating app leaves the recipient without recourse, even for repetitive offenses.¹² Proponents want exhibitionists to unwilling participants to receive criminal punishment just as they would in person.¹³ Proponents also claimed this bill was needed now more than ever, as our culture of meeting others, making friends, dating, and how we live our day-to-day lives has changed drastically in recent years, moving

9. *Id.*

10. See generally Anabel Pasarow, *Sending Unsolicited Nude Photos Isn’t Illegal. Bumble’s CEO Wants to Change That*, REFINERY29: TECH (Aug. 27, 2019, 4:10 PM), <https://www.refinery29.com/en-us/2019/08/241624/bumble-ceo-sexual-harassment-law> [<https://perma.cc/R953-5KVD>] (describing the bill and how it does not intend to curtail free expression, but intends the “standards of acceptable behavior in the digital world to match the standards that apply in real life”).

11. See HB 2789, 86th Regular Session, LEGIS. REFERENCE LIBR. TEXAS, <https://lrl.texas.gov/legis/billsearch/JournalsEtc.cfm?legSession=86-0&billtypeDetail=HB&billNumberDetail=2789&billSuffixDetail=> [<https://perma.cc/RXP2-KSJA>] [hereinafter *HB 2789, 86th Regular Session*] (click the “Online Recordings” link for “House hearings and debates [which] are available for the 86th Regular Session,” scroll down and click the “86th Session” link, then click the “Criminal Jurisprudence” link in the March 25, 2019 row) (providing an online recording of the March 25, 2019 proceeding of the Criminal Jurisprudence Committee of the Texas House of Representatives where bill author Rep. Morgan Meyer, R-Dallas, said this bill would be “filling the void where Texas laws are currently silent”); see also *Senate Committee on State Affairs (Part I)*, TEX. SENATE (May 9, 2019), https://tlesenate.granicus.com/MediaPlayer.php?view_id=45&clip_id=14468 [<https://perma.cc/QKL9-9R3P>] [hereinafter *Senate Committee on State Affairs (Part I)*] (recording the Senate Committee on State Affairs Part I, eliciting witness testimony from Senator Joan Huffman, among others).

12. *HB 2789, 86th Regular Session*, *supra* note 11.

13. See *id.* (providing a recording of the March 25, 2019 Criminal Jurisprudence Committee of the Texas House of Representatives proceeding where proponent Whitney Wolfe Herd proposed online exhibitionists should still face consequences as in-person offenders do); see also *Senate Committee on State Affairs (Part I)*, *supra* note 11 (providing Part I of the Senate Committee on State Affairs recording, including witness testimony from Senator Joan Huffman, among others, explaining the desire to hold offenders accountable).

those connections online without much-needed protection following.¹⁴ Proponents in favor of the bill testified they themselves had been victims of unwanted sexually explicit photos and expressed concern about children possibly being exposed to the same kind of obscenity when they use their parents' phones.¹⁵ It is also common for young children to have their own phones, and this bill gives parents peace of mind knowing there is extra protection for their children—even when supervised.¹⁶ Proponents also made it known they did not want to over-criminalize the offenders, proposing an accompanying Class C misdemeanor punishment as opposed to the more harsh Class B misdemeanor accompanying indecent exposure.¹⁷ If found guilty of breaking this new law, the individual shall be punished by a fine not to exceed \$500,¹⁸ as opposed to the punishment for indecent exposure: a fine not exceeding \$2,000, confinement in jail for a term not to exceed 180 days, or both.¹⁹

Although no one expressed disfavor in any of the public hearings on the bill,²⁰ there were ten “nays” in the final House vote after reviewing statements of vote.²¹ Non-legislative opponents, including Texas attorneys, have mentioned enforcement of the law could be challenging due to a

14. *Senate Committee on State Affairs (Part I)*, *supra* note 11 (providing the Senate Committee on State Affairs Part I recording, including witness testimony from Senator Joan Huffman and Whitney Herd speaking about the advances in technology).

15. *Id.* (providing the Senate Committee on State Affairs Part I recording, recording with witness testimony from proponent Brandy Davis speaking on her personal experience with receiving sexually explicit photos without asking for them).

16. *Kids Cell Phone Use Survey 2019—Truth About Kids & Phones.*, SELLCELL (July 15, 2019), <https://www.sellcell.com/blog/kids-cell-phone-use-survey-2019/> [<https://perma.cc/DG36-D9RS>] (“40% of US parents let their kids have their own phone by the age of 10. 65% of pre-teenage kids have a phone by the time they reach 13.”).

17. *HB 2789, 86th Regular Session*, *supra* note 11 (providing the recording of the March 25, 2019 Criminal Jurisprudence Committee of the Texas House of Representatives proceeding where Texas Representative Joe Moody discussed the bill with Whitney Herd explaining punishment for offenders found guilty of violating H.B. 2789).

18. TEX. PENAL CODE ANN. § 12.23.

19. *Id.* § 12.22.

20. *See Senate Committee on State Affairs (Part I)*, *supra* note 11 (providing the Senate Committee on State Affairs Part I recording of public hearing with no opponent on the bill speaking); *see also HB 2789, 86th Regular Session*, *supra* note 11 (providing the recording of the March 25, 2019 Criminal Jurisprudence Committee of the Texas House of Representatives public hearing with no opponent on the bill speaking).

21. H.J. of Tex., 86th Leg., R.S. 2291–92 (2019) (on third reading), <https://journals.house.texas.gov/hjrnl/86r/pdf/86RDAY52FINAL.PDF#page=109> [<https://perma.cc/GG75-L3QW>].

staggering volume of people affected and limited resources.²² Others have speculated there may be evidentiary issues in certain circumstances, such as when the sender denies sending the message.²³ These are very real and common issues arising in cases in which a party wishes to introduce any kind of text or online message during trial—evidence often creating costly and painful delays for victims.²⁴

For example, in order to hold an alleged sender liable for the sexually explicit picture sent to a plaintiff, the plaintiff must establish the alleged sender is indeed the offender.²⁵ Although establishing originating cell phone ownership is insufficient, the requirements of authentication are not particularly demanding and depend on a case-by-case basis whether the texts contain identifying information.²⁶ In certain circumstances, the sexually explicit material may be “distinctive” enough for the trier of fact to deem it authentic,²⁷ but, in others, parties may need to go to greater lengths to authenticate.²⁸ Even after confirming sexually explicit messages came from the accused individual's account, some cases will still go unresolved due to the plaintiff's inability to meet their evidentiary burden to show the

22. Troy Closson, *A New Texas Law Criminalizes Sending Unwanted Nudes. Lawyers Say It Might Be Difficult to Enforce.*, TEX. TRIB. (Aug. 14, 2019, 12:00 AM), <https://www.texastribune.org/2019/08/14/Texas-new-law-sending-unwanted-nudes-dating-apps-texts/> [https://perma.cc/E9ZG-XRH7] (discussing TPC § 21.19, the punishment for breaking the law, the possible repercussions, and the possible difficulty of enforcing the law).

23. *Id.* (“J.T. Morris, an Austin-based attorney whose firm specializes in First Amendment rights, said difficulties may also arise if an accused sender claims he or she wasn't the one who sent a lewd message.”).

24. *See generally* Pierre Grosdidier, *Authentication of Cell Phone Text Messages*, ST. B. OF TEX.: COMPUTER & TECH. SEC. 8, 8 (2016), <http://sbot.org/wp-content/uploads/2016/01/Authentication-of-Cell-Phone-Text-Messages.pdf> [https://perma.cc/H2K5-T75H] (explaining the challenges of and solutions to authenticating text messages to use them as evidence in court).

25. *See id.* (“Authenticating cell phone text message authorship requires something more than establishing originating cell phone ownership.”).

26. *See id.* (explaining how simply knowing a message came from a particular phone number is not enough to prove the owner of the phone actually sent it); *see also* TEX. R. EVID. 901(b)(4) (providing examples of evidence satisfying the requirement of authenticating or identifying an item of evidence: “*Distinctive Characteristics and the Like*”).

27. DAVID A. SCHLUETER & JONATHAN D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 1017 (10th ed. 2015).

28. *Sennett v. State*, 406 S.W.3d 661, 669 (Tex. App.—Eastland 2013, no pet.) (elucidating the authentication process of emails between the victim and defendant, including introduction of (1) the testimony of the victim and victim's mother regarding their familiarity with defendant's email address, and (2) the contents of the responsive emails concerning matters only the victim and defendant would have known).

individual is the one who clicked “send.”²⁹ Other opponents believe the bill is overly broad, suggesting even emailing a doctor an image for medical purposes could be considered criminal acts under the law, leading to unintended prosecutions.³⁰ Many expect the bill to be challenged in court based on the concerns raised by opponents.³¹

A. *Substantial Issues with Texas Penal Code Section 21.19*

While there should be protection for those who do not want to receive unrequested sexually explicit materials online, TPC Section 21.19 is not the proper way to ensure these protections. Although the bill was intended to fill a much-needed gap in Texas law, its extremely broad and vague language leaves it unconstitutional on its face. Undefined statutory language may also cause confusion. Several terms within the Code remain ambiguous, which could lead to misapplication of the law. First, although the bill proponents suggested the word “person” means a human being in real time,³² there is no ready indicator within the law excluding drawings, sculptures, paintings, and other images of people, which could cause confusion. Further, it bans visual materials simply including the exposed person’s intimate parts,³³ which is unconstitutionally too broad for states to regulate under *Miller v. California*.³⁴ Finally, the law requires explicit visual materials only be sent at

29. An article by Rebekah Allen discussed an investigation by the University of Texas into a Texas senator who denied sending explicit, unwanted photos to a student although they came from his account—claiming a third party with his account information sent them. This was after members of the senator’s staff followed up with the student after he initially contacted her on LinkedIn regarding what they had spoken about. This was the same LinkedIn account later used to reference inappropriate text messages sent to the student from a phone number written on the senator’s legislative business card. See generally Rebekah Allen, ‘Send a Pic?’ UT Concludes Investigation, Releases Messages Texas Senator Allegedly Sent Student, DALL. MORNING NEWS (Dec. 18, 2018, 6:12 PM), <https://www.dallasnews.com/news/politics/2018/12/19/send-a-pic-ut-concludes-investigation-releases-messages-texas-senator-allegedly-sent-student/> [https://perma.cc/N9KA-M4KK].

30. Closson, *supra* note 22 (discussing H.B. 2789 and possible repercussions).

31. See *id.* (“David Anderson, a former UT Austin law professor who focuses on free speech, expects legal challenges to the law”); Voicemail Message: Office of Drew Springer, Texas House of Representatives (Nov. 2019) (on file with author) (recording a direct response to inquiry on why Representative Springer voted “nay” on Bill 2789: the office expects the law to be challenged in court).

32. *Senate Committee on State Affairs (Part I)*, *supra* note 11 (providing the Senate Committee on State Affairs (Part I) recording with witness testimony stating they want to prevent unwanted sexual pictures from others).

33. TEX. PENAL CODE ANN. § 21.19.

34. *Miller v. California*, 413 U.S. 15, 21 (1973) (holding material may be subject to state regulation where the work, as a whole: “(a) . . . appeals to a prurient interest in sex; (b) . . . is patently offensive because it affronts contemporary community standards relating to the description or

the request of, or with the express consent of, the recipient,³⁵ but does not give direction as to what constitutes “express consent.”

When legislation is proposed, there is ample consideration in order to ensure the writing encompasses the intent of the author and also to ensure those who analyze it—including parties in both the House and Senate—consider other potential issues and misinterpretations.³⁶ Although the author of H.B. 2789 wrote with the intent to protect people from harassment,³⁷ the bill would have benefitted from additional revision, as the lack thereof has left it facially unconstitutional.³⁸

B. *Not All Speech Is Free Speech—The Historical Trend of Regulating the First Amendment*

1. Obscenity and Indecency Regulations Leading up to the 21st Century

The First Amendment of the United States Constitution protects several basic freedoms, including freedoms of religion, assembly, the press, speech, and the right to petition.³⁹ Throughout history, the government has implicated essential regulations concerning these protections.⁴⁰ While states are not allowed to create laws banning protected rights and freedoms under the Constitution, they are provided reserved powers allowing them to “legislate and regulate to protect the health, safety, and morals of citizens”

representation of sexual matters; and (c) is utterly without redeeming social [(literary, artistic, political, or scientific)] value”).

35. PENAL CODE § 21.19.

36. *How a Bill Becomes a Law*, TEX. HOUSE OF REPS., <https://house.texas.gov/about-us/bill/> [<https://perma.cc/NY86-N3BD>] (explaining the process of how a bill becomes a state law in Texas).

37. *See Senate Committee on State Affairs (Part I)*, *supra* note 11; *see also* HB 2789, 86th Regular Session, *supra* note 11.

38. David L. Hudson Jr., *As-applied Challenges*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/892/as-applied-challenges> [<https://perma.cc/K77E-3VZY>] [hereinafter Hudson Jr., *As-applied Challenges*] (explaining when a governmental regulation is unconstitutional “on its face,” it means by “the very text of the policy”).

39. U.S. CONST. amend. I.

40. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (holding certain “areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content”); *see generally* Beauharnais v. Illinois, 343 U.S. 250 (1952) (holding the First Amendment does not protect libelous speech); *New York v. Ferber*, 458 U.S. 747 (1982) (holding states are entitled to greater leeway in the regulation of pornographic depictions of children).

unprotected under the Constitution.⁴¹ When utilizing their reserved powers, states have the power to regulate activity happening both in person and online, but these laws must not overly restrict one's protected rights, or they will be found unconstitutional.⁴²

A widely known regulation of the freedom of speech is the common ban of public nudity,⁴³ or “public indecency,” which some states use as their standard for illegal nudity, generally referring to acts “involving nudity or sexual activity in view of the public, often with the intent to shock, offend, or arouse.”⁴⁴ States and localities differ on what constitutes illegal public nudity, looking at what parts of the body must be exposed and whether the alleged nudist had a particular intent.⁴⁵ The Supreme Court has clearly established its view on public nudity, calling it “the evil the State seeks to prevent, whether or not it is combined with expressive activity”⁴⁶ and holding it is not free expression protected by the First Amendment.⁴⁷ The Supreme Court has affirmed the right of individual states to define and outlaw public nudity, holding the states have a duty to “protect[] societal order and morality.”⁴⁸ This authorization gives states leeway in enacting public indecency and nudity laws.

For example, in California, in order to be convicted of indecent exposure, “the prosecution must prove an intent to sexually arouse, or sexually insult or offend someone.”⁴⁹ Contrastingly, New York simply makes it a crime to not have clothes on one’s “private or intimate parts” in a public place.⁵⁰ In Texas: “A person commits an offense if the person knowingly engages in

41. *Federalism: A Division of Power*, DALL. LEARNING CLOUD, <https://dlc.dcccd.edu/txgov1-2/federalism-a-division-of-power> [<https://perma.cc/JE6W-YUEX>].

42. *State Laws Held Unconstitutional*, JUSTIA, <https://law.justia.com/constitution/us/state-laws-held-unconstitutional.html> [<https://perma.cc/5GQT-PX2D>] (providing examples of state statutes found unconstitutional).

43. *Public Nudity Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/p/public-nudity/> [<https://perma.cc/9GQJ-NXR2>] (defining public nudity as “the indecent exposure of nakedness in a public place”).

44. *Public Indecency*, JUSTIA (Apr. 2018), <https://www.justia.com/criminal/offenses/sex-crimes/public-indecency/> [<https://perma.cc/838H-3BN3>].

45. *Id.* (describing the differences between public nudity, public indecency, illegal nudity, indecency exposure, and obscenity).

46. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571 (1991).

47. *Id.*

48. *Id.* at 568; *see also Public Indecency*, *supra* note 44.

49. *Indecent Exposure*, FINDLAW, <https://criminal.findlaw.com/criminal-charges/indecent-exposure.html> [<https://perma.cc/J76B-PSVL>] (providing samples of states’ indecent exposure laws).

50. *Id.*

any of the following acts in a public place or, if not in a public place, the person is reckless about whether another is present who will be offended or alarmed by the person's act."⁵¹ Texas's indecent exposure law, which criminalizes exposing oneself to others in person, combined with a lack of comparative protection for those who are exposed to the same type of indecency online, is what prompted Bumble's⁵² CEO, Whitney Wolfe, to advocate for H.B. 2789.⁵³ H.B. 2789 was codified as Section 21.19 of the Texas Penal Code in 2019, becoming the first law criminalizing the transmission of visual material depicting a person's exposed intimate parts.⁵⁴

Another widely known regulation of the freedom of speech is obscenity, which is also not protected by the First Amendment.⁵⁵ The actual definition of obscenity varies from one community to another, and the Supreme Court established a three-part test for obscenity in *Miller v. California*.⁵⁶ In determining whether works are obscene, the trier of fact must consider three guiding principles, including whether the works: (1) "taken as a whole, appeal to the prurient interest in sex, . . . [(2)] portray sexual conduct in a patently offensive way, and . . . [(3)] do not have serious literary, artistic, political, or scientific value [taken as a whole]."⁵⁷ The *Miller* test for obscenity is carefully based on local community standards, as "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."⁵⁸ Therefore, each state determines what is obscene by their definition of "sexual conduct."⁵⁹

51. TEX. PENAL CODE ANN. § 21.08.

52. *What is Bumble?*, BUMBLE, <https://bumble.com/en/help/what-is—bumble> [<https://perma.cc/KN9G-7YLN>] (explaining Bumble is a dating app requiring women to make the first move).

53. Pasarow, *supra* note 10 ("At Bumble, we believe that if it isn't appropriate 'IRL,' it shouldn't be tolerated on your devices.").

54. PENAL CODE § 21.19.

55. *Public Indecency*, *supra* note 44.

56. *See generally* *Miller v. California*, 413 U.S. 15, 21–22 (1973) (holding the First Amendment does not protect obscenity and creating a three-part test for obscenity).

57. *Id.* at 24.

58. *Id.* at 32.

59. *See* PENAL CODE § 21.16 ("Sexual conduct" means sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse."); *cf.* NEV. REV. STAT. ANN. § 201.263 (West 2013) ("Sexual conduct" means acts of masturbation, sexual penetration or physical contact with a person's unclothed genitals or pubic area.").

The Supreme Court has recognized “the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”⁶⁰ States, having this interest in protecting juveniles, have even gone so far as to prohibit the sale of nude magazines to minors—magazines likely not even considered obscene to adults.⁶¹ *Ginsberg v. New York*⁶² demonstrates government regulation can extend to settings where a person lacks the capacity to make a choice.⁶³ This ultimately shows the flexibility of “obscenity,” allowing states to individually adjust the definition as applied to minors even when material may not be restricted to adults. Thus, “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.”⁶⁴ Although there is not an exhaustive and easily accessible list of what constitutes obscenity, in *Miller v. California*, the Court concluded no one would be subject to prosecution for the sale or exposure of materials unless they contained patently offensive “‘hard core’ sexual conduct” set out by the regulating state law.⁶⁵

It is important to distinguish obscene content from other potentially offensive expression—but which does not rise up to the level of obscenity—in order to properly analyze TPC Section 21.19.⁶⁶ These non-obscene expressions provide more to society than senseless gestures—they contain serious literary, artistic, political or scientific value.⁶⁷ Indecent content is an example. Indecent content is differentiated from obscene

60. *Miller*, 413 U.S. at 18–19 (footnote omitted).

61. *Ginsberg v. State of New York*, 390 U.S. 629, 637 (1968) (“[T]he concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined [The State can bar] the distribution to children of books recognized to be suitable for adults.”).

62. *Ginsberg v. State of New York*, 390 U.S. 629 (1968).

63. *Id.* at 636; *see also* *People v. Kahan*, 206 N.E.2d 333, 334 (1965) (Fuld, J., concurring) (“Parental control or guidance cannot always be provided and society’s transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.”).

64. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

65. *Miller*, 413 U.S. at 27.

66. TEX. PENAL CODE ANN. § 21.19.

67. *Obscene, Indecent and Profane Broadcasts*, FCC, <https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts> [<https://perma.cc/B5H6-49U8>] [hereinafter *Obscene, Indecent and Profane Broadcasts*] (defining indecent content as content “portray[ing] sexual or excretory organs or activities in a way that [is offensive but] does not meet the three-prong test for obscenity”).

content by “the absence of a prurient appeal,”⁶⁸ portraying sexual or excretory organs or activities not meeting the three-prong test for obscenity.⁶⁹ “Nudity alone does not render material obscene under Miller’s standards.”⁷⁰ As previously mentioned, there is an understanding public nudity can be outlawed by individual states,⁷¹ but a nude photo in a medical textbook does not appeal to prurient interests in sex, portray sexual conduct in a patently offensive way, nor does it lack scientific value.

It is essential to understand pictures, sculptures, or other forms of speech, including descriptive language,⁷² may be interpreted by some as obscene, but also contain artistic,⁷³ literary,⁷⁴ political, or scientific⁷⁵ value and therefore be protected. This third prong of the *Miller* test⁷⁶ must be determined “solely on an objective basis as opposed to reference . . . to contemporary community standards.”⁷⁷ The first two prongs of the test are subjective and must be analyzed individually—applying the relevant state

68. *First Amendment—Obscenity and Indecency*, 69 J. CRIM. L. & CRIMINOLOGY 474, 480 (1978) (“The dissenters’ criticism of *Pacifica* demonstrates indecent speech is differentiated from obscene speech by the absence of a prurient appeal in the former and the presence of such an appeal in the latter.”); *see also* FCC v. *Pacifica Found.*, 438 U.S. 726, 778 (1978) (Stewart, J., dissenting) (citation omitted) (“[T]he Court today agrees, that ‘indecent’ is a broader concept than ‘obscene’ . . . because language can be ‘indecent’ although it . . . lacks prurient appeal.”).

69. *Ex Parte Thompson*, 442 S.W.3d 325, 338 (Tex. Crim. App. 2014) (“Sexual expression which is indecent but not obscene is protected by the First Amendment, . . .”) (quoting *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

70. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

71. *Public Indecency*, *supra* note 44.

72. *Kaplan v. California*, 413 U.S. 115, 121–22 (1973) (“As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution.”).

73. *Michelangelo’s David*, ACCADEMIA, <http://www.academia.org/explore-museum/artworks/michelangelos-david/> [<https://perma.cc/HCH8-S9WF>] (describing the fourteen foot tall “marble statue depicting the Biblical hero David, represented as a standing male nude”—which some could initially perceive as obscene).

74. The novel *Ulysses* contained a masturbation scene and a trial court banned the novel in the U.S. However, the ruling was overturned twelve years later allowing U.S. publication in 1934. *See* Tom Head, *Top 10 “Obscene” Literary Classics*, THOUGHTCO. (Mar. 11, 2019), <https://www.thoughtco.com/top-obscene-literary-classics-721234> [<https://perma.cc/ZYA8-WUR9>].

75. Rebecca Joines Schinsky, *Six-Pack: Smart Books About the Science and Sociology of Sex*, BOOKRIOT (Mar. 6, 2014), <https://bookriot.com/2014/03/06/books-science-sociology-sex/> [<https://perma.cc/S39F-KGDP>] (listing books explaining sexual concepts, how American culture has defined sexual deviance and dysfunction, and containing research about the brain’s role in sex, love, and dating).

76. *Miller v. California*, 413 U.S. 15, 24 (1973).

77. *Pope v. Illinois*, 481 U.S. 497, 499 (1987).

laws and “contemporary community standards”⁷⁸—but the third prong is the only one analyzed on a national standard. Obscenity must be construed on a case-by-case basis because two of the three prongs are subjective according to state and community standards.⁷⁹ There have also been attempts to broaden the scope of the *Miller* test on a federal level.⁸⁰ An example of this attempt was the Child Online Protection Act (COPA), which made it a federal crime to use the Internet to communicate commercial material considered “harmful to minors.”⁸¹ COPA was ultimately held unconstitutional because it suppressed a wide range of speech adults have a right to communicate.⁸² Despite these challenges and attempts to broaden its scope, the *Miller* test still stands as the primary standard for obscenity.⁸³

2. The Growing Trend of Content-Based Regulations

A content-based law or regulation “discriminates against speech based on the substance of what it communicates” and is presumed unconstitutional.⁸⁴ This is different than a content-neutral law, which applies to expression without regard to its substance, generally regulating the time, place, and manner of speech.⁸⁵ Content-based restrictions of speech are subject to strict scrutiny,⁸⁶ the highest form of judicial review, and can only pass if the legislature “passed the law to further a ‘compelling governmental interest,’ and . . . narrowly tailored the law to achieve that

78. *Miller*, 413 U.S. at 24.

79. *Freedom of Expression*, ACLU, <https://www.aclu.org/other/freedom-expression> [<https://perma.cc/SK9P-VDBW>] (“But the fact is, the obscenity exception to the First Amendment is highly subjective . . .”) (emphasis removed).

80. *See generally* *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 601 (2002) (holding Congress did not create an overbroad statute based on the use of “community standards” language in COPA alone; but remanding the case for future consideration of issues such as whether “the variation in community standards renders the Act substantially overbroad”).

81. *See id.* at 569.

82. *Am. C.L. Union v. Mukasey*, 534 F.3d 181, 207 (3d Cir. 2008).

83. David L. Hudson Jr., *Miller Test*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1585/miller-test> [<https://perma.cc/TCY3-TBHL>] [hereinafter Hudson Jr., *Miller Test*].

84. David L. Hudson Jr., *Content Based*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/935/content-based> [<https://perma.cc/Q7LB-TDU2>] [hereinafter Hudson Jr., *Content Based*].

85. *Id.*

86. *Id.*

interest.”⁸⁷ This is regardless of the government’s “benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”⁸⁸ Although content-based restrictions are presumed unconstitutional,⁸⁹ the Supreme Court has provided examples that have survived strict scrutiny and are constitutional.⁹⁰ Some examples of constitutional content-based restrictions include: “[I]ncitement, obscenity, defamation, speech integral to criminal conduct, so-called ‘fighting words,’ child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.”⁹¹ These types of restrictions are not protected due to their harmful content and effects.⁹²

a. Protecting Minors

The government has a strong “interest in protecting the physical and psychological well-being of children.”⁹³ *Osborne v. Ohio* illustrates such an interest, wherein the Supreme Court upheld a state law prohibiting any person from possessing or viewing child pornography, even when privately in their own home.⁹⁴ The Court recognized the law was in place to help destroy the “market for the exploitative use of children by penalizing those who possess and view the offending materials . . . which permanently record the victim’s abuse and thus may haunt him for years to come.”⁹⁵ The government also has a strong interest against allowing minors to view

87. *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [<https://perma.cc/X4FX-7DHM>].

88. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015).

89. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 817 (2000) (listing several instances the Court has ruled against the First Amendment protection of free speech).

90. *See generally* *Burson v. Freeman*, 504 U.S. 191 (1992) (“A long history, a substantial, consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right.”).

91. *United States v. Alvarez*, 567 U.S. 709 (2012).

92. *Hudson Jr.*, *Content Based*, *supra* note 84.

93. *Government Restraining of Content of Expression*, JUSTIA, <https://law.justia.com/constitution/us/amendment-01/16-government-restraint-of-content-of-expression.html> [<https://perma.cc/MMM6-3M3D>] [hereinafter *Government Restraining of Content of Expression*] (providing in-depth examples of government regulation of expression); *see also* *New York v. Ferber*, 458 U.S. 747 (1982) (creating greater leeway for states to regulate pornographic depictions of children).

94. *Osborne v. Ohio*, 495 U.S. 103, 125 (1990).

95. *Id.* at 103–04.

pornography.⁹⁶ “One of the reasons given by legislators for passing statutes protecting children from viewing pornography is that adults use such material to lure children into engaging in sexual activity.”⁹⁷ There is also a strong interest in protecting children from seeing and hearing not only obscene, but indecent material.⁹⁸ This interest is apparent both in the way states prohibit public nudity or indecent exposure and in states’ authority to restrict the selling of obscene materials to minors.⁹⁹ It is commonly known protecting minors from exposure to harmful visual material in the physical world is easier than doing so online.¹⁰⁰ States have even gone so far as to regulate the availability of adult theaters that have no suggestive displays on the outside of the theater to only allow consenting adults to enter.¹⁰¹

The Supreme Court has held “there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.”¹⁰² The Supreme Court, as it held in *FCC v. Pacifica*,¹⁰³ also allows regulation of radio broadcasting due to its “pervasive presence,”¹⁰⁴ ability to “extend into the privacy of the home[,]” and how impossible it is to “completely . . . avoid those [broadcasts] that are patently offensive.”¹⁰⁵ This ruling allows the FCC to regulate an indecent, but not obscene, radio broadcast, and the Court further explained it “never intended to place an

96. Artemus Ward, *Child Pornography*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/993/child-pornography> [<https://perma.cc/Y7BT-DVJ2>] (providing background as to why Congress wants to restrict minors’ access to pornography).

97. *Id.*

98. *Government Restraining of Content of Expression*, *supra* note 93 (“[N]on-obscene but indecent language and nudity may be curtailed [in broadcasted speech], with the time of day and other circumstances determining the extent of curtailment.”).

99. *Ginsberg v. State of New York*, 390 U.S. 629, 640 (1968) (citing *People v. Kahan*, 206 N.E.2d 311, 334 (N.Y. 1965) (Fuld, J. concurring)) (“[P]arental control or guidance cannot always be provided and society’s transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.”).

100. David L. Hudson Jr., *Harmful to Minors Laws*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/966/harmful-to-minors-laws> [<https://perma.cc/J2VV-F2QF>] [hereinafter Hudson Jr., *Harmful to Minors Laws*] (explaining what “harmful to minors’ laws” are—giving examples of both successful and non-successful ones).

101. *See generally* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973) (“We categorically disapprove the theory . . . obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only.”).

102. *Id.*

103. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

104. *Id.* at 727.

105. *Id.* at 727–28.

absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.”¹⁰⁶ Although “broadcasting obscene content is prohibited by [federal] law at all times of the day[,] [i]ndecent and profane content are [only] prohibited on broadcast TV and radio between 6 a.m. and 10 p.m., when there is a reasonable risk that children may be in the audience.”¹⁰⁷ The desire to protect minors has been prevalent throughout the rulings regulating obscene speech, as well as speech not rising to the level of obscenity.¹⁰⁸ Although the U.S. has also successfully taken steps to protect minors from inadvertently accessing harmful material online,¹⁰⁹ blanket efforts to prevent the online transmission of material harmful to minors have failed as they are often considered too broad¹¹⁰ and restrictive of adults’ rights to access content not necessarily considered obscene.¹¹¹ The Supreme Court reasoned the government may shelter minors from potentially harmful speech, but a statute doing so “is unacceptable if less restrictive alternatives would be . . . effective in achieving the legitimate purpose” of the statute as the “burden on adult speech” would otherwise be too great.¹¹²

States must tread lightly when passing laws to regulate content sharing and be fully aware of what they can and cannot restrict. States must know in what capacity and circumstances they may restrict in order for the restriction to be constitutional.

106. *Id.* at 733.

107. *Obscene, Indecent and Profane Broadcasts*, *supra* note 67.

108. *Government Restraining of Content of Expression*, *supra* note 93 (providing examples of government regulation of expression citing to protecting minors).

109. 18 U.S.C. § 2252B(a)–(b) (2006) (stating persons are subject to a fine, imprisonment, or both, who “knowingly uses a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity . . . [or] knowingly uses a misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors on the Internet . . .”).

110. *See* Am. C.L. Union v. Johnson, 194 F.3d 1149 (10th Cir. 1999) (holding a state statute “which criminalizes the dissemination by computer of material that is harmful to minors” violates the First Amendment); *see also generally* Reno v. Am. C.L. Union, 521 U.S. 844 (1997) (“Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree . . . the statute abridges ‘the freedom of speech’ protected by the First Amendment.”).

111. Hudson Jr., *Harmful to Minors Laws*, *supra* note 100 (“Many [harmful-to-minors laws] limit distribution of sexually explicit material to minors.”).

112. *Reno*, 521 U.S. at 874.

b. Banning Revenge Porn

With the rise of the Internet and social media, revenge porn has become a new and damaging phenomenon. Revenge porn has been defined as “sexually explicit images of a person posted online without that person’s consent[,] especially as a form of revenge or harassment.”¹¹³ These explicit photos are generally disseminated in “retaliation for a romantic rebuff.”¹¹⁴ They are often “accompanied by the victim’s name, address, phone number, Facebook page, and other personal information. . . . They are seen on the Internet by prospective employers and customers. Victims have been subjected to harassment, stalking, and threats of sexual assault.”¹¹⁵ State laws prohibiting the distribution of revenge porn restrict speech on the basis of its content.¹¹⁶ Not only are the laws considered content-based restrictions, but they have also been interpreted as being viewpoint-discriminatory,¹¹⁷ which is defined as “singling out a particular opinion or perspective on that subject matter for treatment unlike that given to other viewpoints.”¹¹⁸

Revenge porn laws can be interpreted as being viewpoint-discriminatory because non-child pornography is legal to view, watch, and distribute (to adults),¹¹⁹ but the government wants to limit this when someone sends out these explicit images and videos with an ill-intent. The content itself is not illegal—if the person depicted in the video(s) and image(s) is of age—but the government wants to make its distribution illegal if it harbors ill-intent, which in turn singles out a particular perspective regarding the subject matter. Viewpoint discrimination is often implicated through governmental discretion.¹²⁰ This type of discrimination is presumed unconstitutional.¹²¹

113. *Revenge Porn*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/revenge%20porn> [https://perma.cc/UBX7-BQXB]

114. John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 215 (2014).

115. Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 661 (2016).

116. *Id.* at 662.

117. *Id.*

118. Kevin Francis O’Neill, *Viewpoint Discrimination*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1028/viewpoint-discrimination> [https://perma.cc/SSW8-799C].

119. TEX. PENAL CODE ANN. § 43.24.

120. O’Neill, *supra* note 118.

121. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995) (“In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional.”) (citation omitted).

Nevertheless, in the U.S., forty-seven states and one territory have implemented revenge porn laws.¹²² The various states' revenge porn laws are diverse in their punishments, ranging from misdemeanor to felony convictions.¹²³ Although revenge porn has not been recognized as an exception to the ban on content-based restrictions,¹²⁴ some states have written their laws in a manner narrowly tailored to serve a compelling interest, surviving strict scrutiny and thus rendering them constitutional.¹²⁵ In 2018, the Vermont Supreme Court upheld its state's revenge porn law against a First Amendment challenge by comparing the "state's interest in preventing the unauthorized disclosure of intimate images with the state's interest in other forms of content-based restrictions on speech, such as restrictions on the disclosure of medical information or social security numbers."¹²⁶

Other states have tailored their laws to meet this requirement after being previously found to be overbroad and unconstitutional.¹²⁷ For example, in 2014, Texas passed its own revenge porn law, prohibiting anyone from "distributing images or video showing 'a person's intimate parts exposed' or engaging in sexual contact without the person's knowledge or consent"¹²⁸ when the material was "[1] obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private; [2] the disclosure . . . causes harm to the depicted person; and . . . [3] reveals the identity of the depicted

122. *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [<https://perma.cc/E2KR-3UWW>].

123. Michelle Mark, et al., *Here's a Map Showing Which US States Have Passed Laws Against Revenge Porn—and Those Where It's Still Legal*, BUS. INSIDER (Oct. 30, 2019), <https://www.businessinsider.com/map-states-where-revenge-porn-banned-2019-10> [<https://perma.cc/J4B7-9EM2>] (providing a map of the United States displaying which states have revenge porn laws and what punishments accompany their respective violations).

124. Koppelman, *supra* note 115, at 662.

125. Nicole McLemore, "Revenge Porn" Law Survives Constitutional Challenge in Vermont, CYBER C.R. INITIATIVE (Oct. 19, 2018), <https://www.cybercivilrights.org/revenge-porn-law-survives-constitutional-challenge-vermont/> [<https://perma.cc/766D-P656>].

126. *Id.*

127. Stephen Young, *Texas Fixes Its Revenge Porn Law*, DALL. OBSERVER (May 20, 2019, 6:56 AM) <https://www.dallasobserver.com/news/texas-passes-revenge-porn-fix-11668838> [<https://perma.cc/DM46-6RZ7>] (discussing the issue with holding third parties liable in the first Texas revenge porn law, stating: "To break the new law as outlined in the bill, . . . the person posting the videos or photos online would have to be intentionally harming the person depicted in the photos").

128. *Id.*

person in any manner.”¹²⁹ This law initially made third parties liable for the “distribution of covered content even if the defendant had no knowledge of the circumstances under which the image was taken or the privacy expectations of the person depicted.”¹³⁰ The law was struck down as overbroad¹³¹ and was subsequently amended by adding an “intent to harm a person” provision to make sure third parties were not negatively impacted.¹³² Overall, states seem to be successful in passing revenge porn laws by narrowly tailoring them to serve a compelling interest.

3. Where This Leaves Us

a. Gaps in Texas Law—the Need to Fill a Void in Online Sexual Advances

The Internet is a relatively new and revolutionary phenomenon that has allowed people to communicate easier than ever before—almost instantaneously. Following this new technology, new laws must be implemented to protect people from an array of wrongdoing. Many of these laws punishing online offenders mimic existing laws protecting those in the “real world,” or provide unity by punishing acts done in person and online indiscriminately.¹³³ In Texas, there are harassment, revenge porn, cyberbullying, and other laws in place to combat online crimes. None of these laws are as strict, per se, as TPC Section 21.19, which makes it a crime—even on the first occasion—to knowingly transmit visual material depicting a person’s exposed intimate parts if the receiving individual did not expressly consent to or request the media.¹³⁴ The Texas harassment

129. Elizabeth Nolan Brown, *Law Prohibiting ‘Revenge Porn’ Violates First Amendment, Says Texas Appeals Court*, REASON (Apr. 23, 2018, 2:20 PM), <https://reason.com/2018/04/23/texas-revenge-porn/> [https://perma.cc/RH3U-5AN2].

130. Thomas Claburn, *Revenge Pornography Ban Tramples Free Speech, Law Tossed Out—Where Else but Texas!*, REGISTER (Apr. 24, 2018, 12:41 AM), https://www.theregister.co.uk/2018/04/24/texas_first_amendment_revenge_x_rated/ [https://perma.cc/CH24-54C4].

131. *Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at *8 (Tex. App.—Tyler May 16, 2018, pet. granted) (showing defendant indicted under Texas’s first revenge porn law in 2017 had the charge dropped by the Twelfth Court of Appeals, as the law was ruled an “invalid content-based restriction and overbroad in the sense that it violates rights of too many third parties by restricting more speech than the Constitution permits”).

132. Young, *supra* note 127.

133. FLA. STAT. ANN. § 784.048 (West 2019) (“A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking, a misdemeanor of the first degree . . .”).

134. TEX. PENAL CODE ANN. § 21.19.

law is somewhat similar, punishing someone who intends to harass, annoy, alarm, abuse, torment, or embarrass another by initiating “communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene.”¹³⁵

It seems both laws share, in part, the same legislative intent—to protect those who did not consent to receiving inappropriate materials—but each has different intent requirements.¹³⁶ Texas Penal Code Section 21.19 also seems to be written with the intent to protect those who wish to avoid this type of material in a purely social or dating atmosphere. Contrastingly, the harassment law is broader, as the criminalizing of intentionally transmitting obscene material is only one part of the law.¹³⁷ Texas Penal Code Section 21.19 takes a narrower approach, clarifying what is prohibited,¹³⁸ and becoming Texas’s only law solely focused on preventing online sexual advances. This type of law is essential in a society where it is so easy to commit indecent exposure online—anonously, even.¹³⁹ Texas Penal Code Section 21.19 serves as a necessary deterrent to those who feel entitled to expose themselves through electronic means without being asked. An effective law will hopefully reduce these incidences in the long run.

III. TEXAS PENAL CODE SECTION 21.19 WILL BE DECLARED UNCONSTITUTIONAL

A. *Texas Penal Code Section 21.19 Is Facially Unconstitutional*

The government has more flexibility and control regulating in-person indecency and nudity—or when it is transmitted by broadcasting—because minors can be easily subjected to it.¹⁴⁰ There are also federal laws protecting children from harmful or obscene material on the Internet, which

135. *Id.* § 42.07(a)(1).

136. *Compare id.* § 21.19 (requiring the offender “knowingly” send inappropriate materials), *with id.* § 42.07(a)(1) (requiring the offender send inappropriate materials with “intent to harass, annoy, alarm, abuse, torment, or embarrass another”).

137. *Id.* § 42.07(a).

138. *Id.* § 21.19(b)(1).

139. Mikey Campbell, *Sending Unsolicited Nudes via AirDrop Might Soon Be Illegal in NYC*, APPLEINSIDER (Nov. 30, 2018, 10:00 PM), <https://appleinsider.com/articles/18/12/01/sending-unsolicited-nudes-via-airdrop-might-soon-be-illegal-in-nyc> [<https://perma.cc/M4M8-87N3>] (noting AirDrop presents a preview of the image on the receiver’s screen before they choose to accept or decline it, and users can send files anonously).

140. *Public Indecency*, *supra* note 44.

are not analogous to the protections adults have.¹⁴¹ What is harmful to minors is not always the same as what is harmful to adults. Even though harmful-to-minors laws may be more restricting, they typically survive constitutional challenge.¹⁴² For a state's speech regulation to pass judicial muster, it must survive strict scrutiny.¹⁴³ TPC Section 21.19's language criminalizing those who send visual materials of a "person's intimate parts exposed" is subject to strict scrutiny because the material is protected free speech.¹⁴⁴ This language alone makes TPC Section 21.19 facially unconstitutional because it is overbroad—deterring both constitutionally protected speech and unconstitutional speech.¹⁴⁵ The protected speech in this case would be a "person's intimate parts exposed," such as genitalia, the female nipple, or buttocks. Obscenity, however, would be unconstitutional—and therefore unprotected—speech TPC Section 21.19 is trying to deter.¹⁴⁶

1. Introduce the Language

H.B. 2789 (Texas Penal Code Section 21.19) "relat[es] to the creation of the criminal offense of unlawful electronic transmission of sexually explicit visual material."¹⁴⁷ H.B. 2789 explains "intimate parts," "sexual conduct," and "visual material" have meanings assigned by Section 21.16 of the Texas

141. See *Citizen's Guide to U.S. Federal Law on Obscenity*, U.S. DEPT OF JUST., <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity> [https://perma.cc/A22D-MCX7] ("It is illegal for an individual to knowingly use interactive computer services to display obscenity in a manner that makes it available to a minor less than 18 years of age. It is also illegal to knowingly make a commercial communication via the Internet that includes obscenity and is available to any minor less than 17 years of age.") (citations omitted).

142. See Hudson Jr., *Harmful to Minors Laws*, *supra* note 100 ("Nearly every state has some form of harmful-to-minors law. Many of these laws limit distribution of sexually explicit material to minors.").

143. See *Strict Scrutiny*, *supra* note 87 (providing an overview of strict scrutiny).

144. See Victoria L. Killion, *First Amendment: Categories of Speech*, CONG. RES. SERV. 1, 1–2 (Jan. 16, 2019), <https://crsreports.congress.gov/product/pdf/IF/IF11072/3> [https://perma.cc/GY T9-Q7CG] (listing examples of unprotected speech, none of which include "nudity" or "intimate parts exposed").

145. David L. Hudson Jr., *Facial Challenges*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/954/facial-challenges> [https://perma.cc/WTR3-TC22] (providing an overview of facial unconstitutionality).

146. See *Miller v. California*, 413 U.S. 15, 36 (1973) (holding obscenity is not protected by the First Amendment).

147. Act of Apr. 25, 2019, 86th Leg., R.S., ch. 848, § 1, sec. 21.19, 2019 Tex. Sess. Law Serv. 848 (codified at TEX. PENAL CODE ANN. § 21.19).

Penal Code.¹⁴⁸ H.B. 2789 starts by criminalizing “any person engaging in sexual conduct or with the person’s intimate parts exposed.”¹⁴⁹ H.B. 2789 allows for prosecution of people who knowingly, electronically transmit visual material of “covered genitals of a male person that are in a discernibly turgid state”¹⁵⁰—without the “request of or with the express consent of the recipient.”¹⁵¹ “Person” is not explicitly defined within H.B. 2789, but is defined within Chapter 1, Section 1.07 of the Texas Penal Code, entitled: “General Provisions.”¹⁵² However, the key phrase “express consent” is not defined within H.B. 2789, nor is it defined within the Texas Penal Code. Since “express consent” lacks statutory definition, the courts should read this phrase “in context and construed according to . . . common usage”¹⁵³ and construe the phrase accordingly if it has “acquired a technical or particular meaning, whether by legislative definition or otherwise.”¹⁵⁴

2. Definition of “Person”

Although the meaning of the word “person” and how it is used within H.B. 2789 does not contribute to it being unconstitutional, it is necessary to know the definition and understand how it affects bill interpretation. Texas Penal Code Section 1.07 defines “person” as “an individual or a corporation, association, limited liability company, or other entity or organization governed by the Business Organizations Code.”¹⁵⁵ Within the same section, “individual” is defined as a “human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.”¹⁵⁶ This definition completely rules out the criminalization of sending pictures of drawings or other art pieces such as Michelangelo’s *David*, which may show exposed intimate parts.¹⁵⁷ On the other hand, this definition allows prosecution of those who send photos or videos of any live human’s or

148. TEX. PENAL CODE ANN. § 21.19.

149. *Id.* § 21.19(b)(1)(A).

150. *Id.* § 21.19(b)(1)(B).

151. *Id.* § 21.19(b)(2).

152. *Id.* § 1.07(a)(38).

153. TEX. GOV’T CODE ANN. § 311.011(a).

154. *Id.* § 311.011(b).

155. PENAL CODE § 1.07(a)(38).

156. *Id.* § 1.07(a)(26).

157. Howard Halle, *The Top Famous Sculptures of All Time*, TIMEOUT (Oct. 29, 2019), <https://www.timeout.com/newyork/art/top-famous-sculptures-of-all-time> [https://perma.cc/Y7LR-DHAN] (showing a photo of Michelangelo’s sculpture, “David”).

unborn child's intimate parts without express consent of the recipient.¹⁵⁸ This prohibition would technically prohibit sending a photo of a person's nude newborn child to a person—even a family member of the newborn—without their consent, which is a fairly common practice.

3. Any Person Engaging in Sexual Conduct

Someone is criminalized under TPC Section 21.19 if—without express consent—they send visual materials of any person engaging in sexual conduct.¹⁵⁹ “Sexual conduct” is defined as “sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse” within Texas Penal Code Section 21.16.¹⁶⁰ Obscenity is not protected speech under the First Amendment.¹⁶¹ Although neither Section 21.19 nor Section 21.16 of the Texas Penal Code define “sexual conduct” as obscenity, obscene transmissions of sexual conduct are unprotected and can be criminalized under TPC Section 21.19.¹⁶² All fifty states have laws regulating and controlling obscene material.¹⁶³ Legal obscenity varies from state to state and depends on states' standards of “whether the work depicts or describes, in a patently offensive way, sexual conduct.”¹⁶⁴ What is patently offensive is determined by the trier of fact and depends on the community standards in each state.¹⁶⁵ “Materials that are declared legally obscene are not protected; they may be censored, and [the] creators and distributors may be punished, sometimes with jail sentences” depending on the state law.¹⁶⁶ Ultimately, if the sexual conduct transmitted is considered obscene it can be criminalized under TPC Section 21.19.

158. PENAL CODE § 21.19.

159. *Id.*

160. *Id.* § 21.16 (defining terms set out in TPC Section 21.19).

161. *See generally* Miller v. California, 413 U.S. 15 (1973) (holding obscenity is not protected by the First Amendment).

162. Hudson Jr., *Miller Test*, *supra* note 83.

163. *Obscenity*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/obscenity> [<https://perma.cc/A6HT-LA96>].

164. Hudson Jr., *Miller Test*, *supra* note 83.

165. *Miller*, 413 U.S. at 30 (explaining what appeals to the “prurient interest” and what is “patently offensive” are questions of fact—it is unreasonable for all states to uniformly have the same standards).

166. *Obscenity*, COMM. L. & ETHICS, https://revolutionsincommunication.com/law/?page_id=45 [<https://perma.cc/ZG2H-GP7Y>].

4. Person's Intimate Parts Exposed

Sending visual material depicting a person's exposed intimate parts without the recipient's request or express consent is considered unlawful under TPC Section 21.19.¹⁶⁷ Texas Penal Code Section 21.19 instructs "intimate parts" should be defined using the definition in Section 21.16.¹⁶⁸ "Intimate parts" is thus defined as "the naked genitals, pubic area, anus, buttocks, or female nipple of a person."¹⁶⁹ As previously explained, obscenity is not protected speech under the First Amendment; therefore, it may be regulated and even banned from being sold or transmitted at the discretion of each state.¹⁷⁰ The second prong of the *Miller* test for obscenity requires the speech to depict or describe, "in a patently offensive way, sexual conduct specifically defined by the applicable state law."¹⁷¹ In Texas, "sexual conduct" is defined as "sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse."¹⁷² "Sexual contact" is defined as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person."¹⁷³ Sending material which has only intimate parts exposed does not fall under the scope of "sexual conduct."¹⁷⁴ Therefore, because simply exposed intimate parts does not meet the second prong of the *Miller* test, it cannot be categorized as obscenity.¹⁷⁵

Texas Penal Code Section 21.19, in this case, is trying to place a restriction on content-based speech.¹⁷⁶ This type of speech is protected under the First Amendment, and if this protected content-based speech is restricted, the restriction must be subjected to strict scrutiny.¹⁷⁷ There are three levels

167. TEX. PENAL CODE ANN. § 21.19.

168. *Id.*

169. *Id.* § 21.16.

170. *Obscenity*, *supra* note 163.

171. *Miller*, 413 U.S. at 24.

172. PENAL CODE § 21.16.

173. *Id.* § 21.01.

174. *Id.* § 21.16.

175. *See Miller*, 413 U.S. at 24 (listing the second prong of the *Miller* test). *But see* PENAL CODE § 21.19(b)(1)(A) (including sexual misconduct or the exposure of intimate parts in the definition).

176. David L. Hudson Jr., *Content Neutral*, FIRST AMEND. ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/937/content-neutral> [<https://perma.cc/87EP-NL5P>] ("Content neutral refers to laws that apply to all expression without regard to the substance or message of the expression . . . in contrast to content-based laws.")

177. *Strict Scrutiny*, *supra* note 87.

of scrutiny determining “how courts prioritize competing interests of individual and governmental claimants.”¹⁷⁸ “Strict scrutiny is the most demanding form of judicial review.”¹⁷⁹ The Supreme Court has ruled strict scrutiny applies to “governmental classifications that are constitutionally ‘suspect,’ or that interfere with fundamental rights.”¹⁸⁰ The Constitution identifies fundamental rights, including the First Amendment right to free speech.¹⁸¹ In order to prohibit this type of protected speech, the law must have been passed to further a compelling governmental interest and have been narrowly tailored to achieve that interest.¹⁸² Although “compelling” has not been explicitly defined, it has been intended to be a higher interest than simply being “important” or “legitimate.”¹⁸³

Examples of visual materials that would be criminalized under TPC Section 21.19, if not sent with express consent, include: pictures of newborn’s buttocks, a sonogram depicting the intimate parts of an unborn child,¹⁸⁴ a picture of a woman breastfeeding displaying a female nipple,¹⁸⁵ a photo of an intimate part sent to an online doctor,¹⁸⁶ and much more. Not only do these examples represent non-obscene visual material,¹⁸⁷ but TPC Section 21.19 does not contain the “intent” element Texas’s indecent exposure law contains.¹⁸⁸ It also does not include the “intentionally” or “knowingly” elements like Texas’s disorderly conduct law.¹⁸⁹ Lack of an

178. Steiner, *supra* note 3 (explaining the different levels of governmental scrutiny).

179. Rodney M. Perry, Obergefell v. Hodges: *Same-Sex Marriage Legalized*, FED’N AM. SCIENTIST 1 (2015), <https://fas.org/sgp/crs/misc/R44143.pdf> [<https://perma.cc/9JZZ-GL2Z>].

180. *Id.* at 1.

181. *Fundamental Right*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fundamental_right [<https://perma.cc/7CG8-8LJL>].

182. *Strict Scrutiny*, *supra* note 87 (providing an overview of strict scrutiny).

183. Perry, *supra* note 179 at 2.

184. *Ultrasound: Pelvic, Pregnancy, and Abdominal*, UPMC, <https://www.upmc.com/patients-visitors/education/pregnancy/ultrasound-pelvic-pregnancy-and-abdominal> [<https://perma.cc/QD8L-ZE4T>] (explaining a baby’s genitals may be visible during an ultrasound).

185. TEX. HEALTH & SAFETY CODE ANN. § 165.002 (“A mother is entitled to breast-feed her baby or express breast milk in any location in which the mother’s presence is otherwise authorized.”).

186. *In-Person Consult No Longer Necessary For Online Doctor “Visit”*, CBS DFW (June 1, 2017), <https://dfw.cbslocal.com/2017/06/01/in-person-consult-no-longer-necessary-for-online-doctor-visit/> [<https://perma.cc/RM7H-2Q5D>] (explaining Texas allows consultation with a doctor via an app or without seeing a doctor in person first).

187. See *Miller v. California*, 413 U.S. 24 (1973) (stating, to be obscene, the speech must depict or describe “in a patently offensive way, sexual conduct specifically defined by the applicable state law”); see also TEX. PENAL CODE ANN. § 21.16 (indicating intimate parts exposed does not rise to the level of being labeled “sexual conduct”).

188. TEX. PENAL CODE ANN. § 21.08.

189. *Id.* § 42.01(a)(10).

intent element, combined with the fact some images or videos may be criminalized which would not normally be seen as indecent or offensive, makes TPC Section 21.19 problematic.

Due to the fact TPC Section 21.19 restricts protected content-based speech, the government must prove the law was passed to further a “compelling governmental interest” and must have been narrowly tailored to achieve that interest.¹⁹⁰ The intent of this bill is to prevent unwanted sexually explicit pictures from being sent to unwilling recipients, and it is clear that this bill is not narrowly tailored to achieve that interest, as it criminalizes visual material which may not be obscene or unwanted. This categorizes the bill as being too broad to conform to this requirement, subsequently regulating protected speech. The legislative intent of H.B. 2789 (IPC Section 21.19) is to essentially make indecent exposure over the Internet or via electronic means illegal.¹⁹¹ In order to pass a bill to regulate this speech, there cannot be any less discriminatory means available in order to achieve the governmental goal.¹⁹² Texas Penal Code Section 21.19 does not use the least restrictive means to achieve its goal, and “if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference.”¹⁹³

Although wanting to create protection for those online who are victims of indecent exposure and creating a deterrent for future potential violators can both be used by the State to argue a compelling government interest, the final draft of TPC Section 21.19 was not written narrowly enough to be constitutional. Lawmakers did not take the proper steps to ensure this bill would not criminalize parties exercising their protected First Amendment rights.

5. Defining “Request” and “Express Consent”

Texas Penal Code Section 21.19 makes it a crime to knowingly send visual material depicting: “(A) any person engaging in sexual conduct or with the person’s intimate parts exposed; or (B) covered genitals of a male person that are in a discernibly turgid state” without being requested or without the

190. *Strict Scrutiny*, *supra* note 87.

191. *HB 2789, 86th Regular Session*, *supra* note 11 (“Online recordings of House hearings for the 86th Regular Session,” “Video/Audio,” “86th Session (2019-2020)” under “Committees,” “Criminal Jurisprudence” link on “3/25/19” starting at 3:30).

192. *Strict Scrutiny*, *supra* note 87 (providing an overview of strict scrutiny).

193. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

express consent of the recipient.¹⁹⁴ “Request” and “express consent” are not defined within TPC Section 21.19, nor are they defined within Section 1.07¹⁹⁵ or in Section 21.16,¹⁹⁶ which define some of the terms set out in TPC Section 21.19. TPC Section 1.07 does define “consent” as meaning “assent in fact, whether express or apparent” but does not give direction as to how one would define “express consent.”¹⁹⁷

When words or phrases are not explicitly defined within the statute and legislative intent cannot be determined, the courts should then read the words “in context and construed according to . . . common usage”¹⁹⁸ and construe them accordingly if they have “acquired a technical or particular meaning, whether by legislative definition or otherwise.”¹⁹⁹ What constitutes a crime under TPC Section 21.19 is very different from other Texas laws which include the word “consent.”²⁰⁰ In TPC Section 22.011, the law for sexual assault, there are not definitions provided for the words “consent” or “express consent,” but rather provides certain definitions of “without consent” and how it applies to in-person sexual assault cases.²⁰¹ This does not allow an individual to apply the same meaning given to “consent” in TPC Section 21.19 because 21.19 only deals with electronic visual material.²⁰² These sections address different circumstances and therefore the definition of “without consent” from Section 22.011 cannot appropriately apply to TPC Section 21.19.

Texas, by implementing TPC Section 21.19, became the first state to “directly combat unsolicited sexually explicit photos.”²⁰³ States without laws addressing revenge porn or other types of stalking or harassment usually require an intent element.²⁰⁴ This typically fails to provide the recipient protection from receiving unwanted visual material the very first

194. PENAL CODE § 21.19 (codifying H.B. 2789).

195. *Id.* § 1.07.

196. *Id.* § 21.16.

197. *Id.* § 1.07(a)(11).

198. TEX. GOV'T CODE ANN. § 311.011(a).

199. *Id.* § 311.011(b).

200. TEX. PENAL CODE ANN. § 22.01.

201. *Id.* § 22.011.

202. *Id.* § 21.19(b).

203. R.J. Johnson, *New Law in Texas Makes it a Crime to Send Unsolicited Nude Photos*, IHEARTRADIO (Sep. 1, 2019), <https://www.iheart.com/content/2019-09-01-new-law-in-texas-makes-it-a-crime-to-send-unsolicited-nude-photos/> [https://perma.cc/GR58-LCRD].

204. *See* N.J. STAT. ANN. § 2C:33-4.1 (West 2014) (including “intent to harass” in the definition of Cyberstalking law); *see also* IND. CODE ANN. § 35-45-2-2 (West 2019) (“A person who, with intent to harass . . .”).

time it is sent, unless it can be proven the perpetrator intended to harass, annoy, et cetera. Therefore, Texas cannot rely on other state laws to assist in defining “express consent.” Because “express consent” is not explicitly defined within the statute and legislative intent cannot be determined, it should be read according to common usage.²⁰⁵

Although “express consent” is not defined in the Texas Penal Code, “consent” is defined as “assent in fact, whether express or apparent.”²⁰⁶ “Assent” can then be defined as an “[a]greement, approval, or permission; esp[ecially], verbal or nonverbal conduct reasonably interpreted as willingness.”²⁰⁷ “Express assent” is then defined as “[a]ssent clearly and unmistakably communicated.”²⁰⁸ When an element is “in fact,” it is an issue of fact to be “resolved by a trier of fact, i.e., a jury or, at a bench trial, a judge, weighing the strength of evidence and credibility of witnesses.”²⁰⁹ When applied to TPC Section 21.19, the jury, or if a bench trial, the judge, uses the evidence to decide whether the recipient of the material requested or expressly consented to receiving it.²¹⁰

The context, if any, of the conversation between the recipient and the sender will most likely determine whether the sender broke the law under TPC Section 21.19. Context may be lacking if the visual image was sent without any previous messaging back and forth between the sender and the recipient. If the recipient met the sender at a bar or on a dating site and exchanged numbers, one could argue this interaction alone is not express assent to receive a sexually explicit photo. But what if the two are messaging back and forth and the conversation turns into one more flirtatious, erotic, or sexual nature? A conversation of this nature, depending on the facts and wording of the conversation, may constitute express assent.²¹¹ The definition of “assent” can then be subjective,²¹² as the permission or approval is supposed to be reasonably determined as willingness.

To some, a flirtatious and seemingly sexual conversation, despite the recipient not literally and explicitly approving of receiving a sexually explicit

205. TEX. GOV'T CODE ANN. § 311.011(a).

206. TEX. PENAL CODE ANN. § 1.07(a)(11).

207. *Assent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

208. *Express Assent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

209. *Question of Fact*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/question_of_fact [<https://perma.cc/A7SC-XGQC>].

210. PENAL CODE § 21.19(b)(2).

211. See *Express Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“[a]ssent clearly and unmistakably communicated.”).

212. *Assent*, *supra* note 207.

photo, may be determined as willingness to receive such a kind of visual material. Others might argue it is not considered willingness, especially not by clear and unmistakably communicated assent. The subjective aspect of TPC Section 21.19 might make it difficult for prosecutors and juries to establish and decide whether the recipient “expressly consented” to receiving of visual material. This may also be complicated by a generational disconnect, due to a major shift in dating culture, for determining what constitutes assent when it comes to dating and online conversations.

The term “request” on the other hand, is not as complicated to interpret as “express consent” within the context of TPC Section 21.19. TPC Section 21.19 criminalizes those who send sexual visual materials if it is not sent at the “request of or with the express consent of the recipient.”²¹³ Request can be defined as “the act of an instance of asking for something.”²¹⁴ This is more direct and less ambiguous than “express consent” because the legislative intent of the bill was to prevent unsolicited sexually explicit visual material from reaching unwilling participants,²¹⁵ and “request” makes it necessary for the recipient to be more proactive in asking for the pictures than merely exhibiting conduct that that can be interpreted as willingness. Although there cannot be a definitive phrase or exact wording to define “request” in this scenario, it can be inferred the person requesting would in some way need to ask the sender to send this specific visual material. Overall, these terms may make it more difficult for prosecutors to determine whether the law has been broken under TPC Section 21.19 given the current dating culture.

IV. UNDERLYING ISSUES

A. *Enforceability of Texas Penal Code Section 21.19*

There are many things to consider when trying to enforce a law such as TPC Section 21.19. There are multiple necessary steps, including: (1) the recipient properly preserving the visual material and proving the person who owned the phone actually sent the illegal material; (2) the recipient did not

213. PENAL CODE § 21.19(b)(2).

214. *Request*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/request> [<https://perma.cc/X7UC-BU8B>] (defining “request”).

215. *Senate Committee on State Affairs (Part I)*, *supra* note 11 (showing a recording with witness testimony from Senator Joan Huffman among others—the relevant portion starts at the ten-minute mark and discusses the intent of H.B. 2789).

request or expressly consent to receive the material; and (3) making sure the district attorney's office has the resources to try the case—assuming it exercised its discretion and decided to move forward with prosecution. Two main issues with the overall process of prosecuting under TPC Section 21.19 are the possibility of claims of mistake and breaking past the stigma of receiving and reporting unsolicited sexually explicit photos.

1. Potential Claims of Mistake

During trial, when a piece of evidence is introduced, the proponent usually has to authenticate or properly identify it.²¹⁶ This is normally done by producing “evidence sufficient to support a finding that the item is what the proponent claims it is.”²¹⁷ Some examples of evidence that satisfies that requirement include: testimony of a witness with knowledge,²¹⁸ distinctive characteristics,²¹⁹ and opinion about a voice.²²⁰

With TPC Section 21.19, the crime committed is the sending of unsolicited material through electronic means.²²¹ Therefore, the evidence needed to prosecute is the photo or video on the recipient's phone. In addition to proving the accuracy of the duplicated photo(s) or video(s), the proponent must also show the “persons to whom they seek to ascribe the messages actually wrote them.”²²² This is crucial to prove because if the evidence is not authenticated, it is not relevant and ultimately is inadmissible.²²³ Although accomplishing this seems straightforward in the sense that one would assume if a picture came from a certain phone number, the owner of that phone number was the person who sent it—this is not always the case. Something sent from one's phone could have been sent by someone with access to the phone, or even a hacker.

It has been noted “electronic evidence, including cell phone text messages, is most often authenticated through witness testimony and circumstantial evidence.”²²⁴ For example, if the photo is sent out of the blue, without previous conversation or if the owner of the phone denies

216. See TEX. R. EVID. 901(a) (providing the necessary steps for authenticating or identifying evidence).

217. *Id.*

218. *Id.* R. 901(b)(1).

219. *Id.* R. 901(b)(4).

220. *Id.* R. 901(b)(5).

221. TEX. PENAL CODE ANN. § 21.19.

222. Grosdidier, *supra* note 24.

223. See *id.* (“Evidence that cannot be authenticated is not relevant and is inadmissible.”).

224. *Id.* at 9.

sending it, it can be more difficult to prove they were the sender than with this identifying information. The possible sender, who could be the owner of the phone, may prompt possible defenses by saying someone took the phone and sent the photo without the sender's consent, or even that a hacker sent the photo. In August 2018, State Senator Charles Schwertner was accused of sending sexually explicit messages to a student at the University of Texas.²²⁵ The Senator denied the accusations, and although the offensive messages came from his Hushed account—a privacy app allowing users to use a separate phone number—and his LinkedIn account, a forensic investigation found the messages did not come from his personal phone.²²⁶

During the investigation, an attorney representing an unknown third party claimed his client was the sender. Schwertner corroborated this person's story, stating he knew this person and had shared his user name and passwords with them, so it was possible they sent them without Schwertner's permission.²²⁷ Despite Schwertner receiving the student's number through LinkedIn and sending her a follow-up LinkedIn message directing her to the text messages he had sent her, even referring to the LinkedIn message in the following text messages, the University of Texas could not prove Schwertner sent the messages himself.²²⁸ The University even released an image of "Schwertner's legislative business card, where the [alternate] phone number used for the texts is written in by hand."²²⁹ Although the University acknowledged the unnamed person might not exist, they reported the evidence provided was not enough to prove Schwertner was the one who sent the messages. The investigation was completed without assigning blame to a party.²³⁰ This example shows just how difficult it can be to prove a certain individual sent a specific image or message.

Although there are multiple avenues a recipient or law enforcement agency may use, such as an in-depth investigation like Schwertner's, there may not be available time or the necessary resources to do so within some jurisdictions. Overcoming potential claims of mistake may be an extremely

225. Allen, *supra* note 29.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

difficult obstacle for those without resources, and circumstantial or direct evidence, needed to convict or indict a particular person.

2. Stigma Surrounding Receiving and Reporting Unsolicited Pictures

In this new digital age, sharing photos, ideas, and so much more online is viewed as a regular part of daily life, given the accessibility of the Internet and smartphones. In addition to the advantages of communicating online with others, issues arise, including online harassment and abuse.²³¹ Although men are typically more likely to experience any form of harassing behavior online, women encounter sexualized forms of abuse at much higher rates than men.²³² A U.S. survey found women, especially young women, “encounter sexualized forms of abuse at much higher rates than men. Some 21% of women ages 18 to 29 report being sexually harassed online, a figure that is more than double the share among men in the same age group (9%).”²³³ There are multiple theories as to why some men send unsolicited photos of their genitals, including: (1) men often misperceive a woman’s interest; (2) they find it thrilling; (3) it may be borne of hostility; (4) it may be about dominance; and (5) there may be an evolutionary basis.²³⁴ No matter the reason for sending these unsolicited images, receiving them has become a normalized part of some women’s lives.²³⁵ Because it is a common, talked-about, and sometimes brushed-off occurrence, the criminalizing of these acts may not be taken seriously. Women are almost expected to either ignore these sexual advances or not take them seriously.

231. See Maeve Duggan, *Online Harassment 2017*, PEW RES. CTR: INTERNET & TECH. (July 11, 2017), <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/> [<https://perma.cc/6YRT-ZW4N>] (“Men and women experience and respond to online harassment in different ways.”).

232. See *id.* (“[W]omen are about twice as likely as men to say they have been targeted as a result of their gender . . . [Men] are around twice as likely as women to say they have experience harassment online as a result of their political views . . .”).

233. *Id.*

234. See Doug Criss, *Wonder Why Men Send Photos of Their Genitals? Here Are Some Theories*, CNN: HEALTH. (Feb. 10, 2019, 5:44 AM), <https://www.cnn.com/2019/02/09/health/reasons-why-men-send-explicit-photos-trnd/index.html> [<https://perma.cc/4QLW-96BW>] (providing different theories by multiple people, including a sex therapist and psychotherapist as to why men send photos of their genitals).

235. Jennifer Swann, *19 Women on What It's Like to Receive Dick Pics*, MEL, <https://melmagazine.com/en-us/story/19-women-on-what-its-like-to-receive-dick-pics> [<https://perma.cc/Z3KR-4JMW>] (providing testimonials from women who have received unsolicited sexually explicit images and how some believe it is normal).

Texas Penal Code Section 21.19 now gives women the power to report and possibly punish the senders of this visual material,²³⁶ but some women may not want the backlash from reporting it, or they simply would rather block the sender than go through the process of reporting the incident and further cooperating with law enforcement, which can be tedious and costly for the recipient.²³⁷ This process can include having the victim file a police report, continual communication with the district attorney's office, and possibly testifying in the trial if the proceedings reach this stage without being previously terminated.²³⁸ Since TPC Section 21.19 is one of the first state laws to criminalize sending unsolicited sexually explicit images without some kind of "intent to harm or harass" element, there is no telling how many recipients of these messages will come forward and want to press charges, especially after a first occurrence with a particular person. Although some recognize there are obstacles to overcome in order to properly prosecute under the law, sponsors of the bill remain confident it will be worth passing if it acts as a deterrent to this behavior.²³⁹

V. TEXAS PENAL CODE SECTION 21.19 FILLS THE GAP FOR DIGITAL SEXUAL HARASSMENT

A. *Texas Penal Code Section 21.19 Compared to Texas's Harassment Law*

1. Texas Penal Code Section 42.07

Many states have their own harassment laws in which the criteria to prosecute under seems similar to the criteria necessary to prosecute under TPC Section 21.19, including Texas.²⁴⁰ Texas's harassment law, Penal

236. TEX. PENAL CODE ANN. § 21.19.

237. See *Criminal Case Flow*, BEXAR CNTY., <https://www.bexar.org/DocumentCenter/View/4487/Criminal-Case-Flow-Chart?bidId=> [https://perma.cc/AZ97-VZ25] (providing a flow chart describing the steps of a criminal case).

238. See *id.* (listing the steps of a criminal case).

239. See Closson, *supra* note 22 (quoting Rep. Morgan Meyer, the author of the legislation: "We understand that enforcement will be a challenge, . . . but this bill is intended to serve as a deterrent as well. It's keeping people aware that sending unsolicited lewd photos will not be tolerated . . . and stopping them from doing it in the first place").

240. Compare IND. CODE ANN. § 35-45-2-2(a)(4)(B) (West 2019) ("A person who, with intent to harass . . . uses a computer network . . . or other form of electronic communication to: (A) communicate with a person; or (B) transmit an obscene message or indecent or profane words to a person."), and PENAL CODE § 42.07(a)(1) ("(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person: (1) initiates communication and in the

Code Section 42.07, makes it a crime if, “with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person: (1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene.”²⁴¹ This harassment law has similarities but differs from TPC Section 21.19, which criminalizes the simple act of knowingly sending certain sexual visual material without the recipient’s request or express consent.²⁴²

One could argue TPC Section 21.19 is easier to prosecute under because it is not necessary to prove a certain state of mind for the sender, only that the visual material was not requested nor expressly consented to. This is unlike Texas’s Penal Code Section 42.07, which requires the offender to have had intended to “harass, annoy, alarm, abuse, torment, or embarrass another” when sending it.²⁴³ Under Section 42.07, receiving one piece of the obscene visual material described might not be enough to get a conviction if the sender claims it was to propose a genuine activity.²⁴⁴ This is different from TPC Section 21.19 because the sender of the visual material can be prosecuted after sending it for the first time, even if the sender was genuine and thought the recipient would appreciate the gesture.²⁴⁵ The “intent” element in Section 42.07 allows the recipient to press charges against the sender only when the circumstances and evidence prove beyond a reasonable doubt that the “intent” element is indeed met.²⁴⁶ Intent inherently requires more evidence than the lack of request or express consent of the recipient, which prevents an influx of lawsuits and gives law enforcement more information based on circumstantial and direct evidence provided by the recipient in determining whether the case can be tried in court successfully.

Section 42.07 also differentiates from TPC Section 21.19 by criminalizing obscene material, defining “obscene” within the statute as “containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or

course of the communication makes a comment, request, suggestion, or proposal that is obscene.”), *with* PENAL CODE § 21.19 (H.B. 2789) (explicitly excluding an “intent” requirement).

241. PENAL CODE § 42.07(a)(1).

242. *Id.* § 21.19.

243. *Id.* § 42.07(a).

244. *Id.*

245. *Id.* § 21.19.

246. *Id.* § 42.07(a).

anilingus, or a description of an excretory function.”²⁴⁷ This definition is far more narrow than what is punishable under TPC Section 21.19.²⁴⁸ Additionally, there is an “intent” requirement under Section 42.07 and it is one of seven punishable offenses under the Harassment law.²⁴⁹ Because of this, Section 42.07 is impeded from becoming a significant deterrent and symbol against the normalization of sending unsolicited sexual visual material. Texas Penal Code Section 21.19 is a major symbol and direct stance against indecent online exposure in a time of desperate need.

VI. CONCLUSION

When enacting a statute in Texas, it is presumed to comply with the Texas and United States Constitution.²⁵⁰ “The Texas Supreme Court has thereby held that when it is faced with multiple constructions of a statute, the court must interpret the statutory language in a manner that renders it constitutional, if possible to do so.”²⁵¹ Further, if only a portion of the statute is invalid, without an expression of legislative intent regarding severability, “the valid remaining portions of a statute remain enforceable so long as the invalidity of one portion does not affect the other provisions or applications of the statute that can be given effect without the invalid provision or application.”²⁵² If the unconstitutional parts of the statute are not so “inextricably interwoven in the texture” of the statute, the remainder of the statute is considered constitutional.²⁵³

Texas Penal Code Section 21.19’s largest flaw is its wording; the advocates for the bill had good intentions and could have found a constitutional way to prevent online indecent exposure, but failed to do so. An image of a person’s “intimate parts exposed” is not automatically unprotected speech under the Constitution and is used too broadly in this context to be considered constitutional. If a person sent their co-worker an image of their naked newborn’s buttocks without express consent or a request for the image, hoping to share joy for the birth of their child, they are breaking the law under TPC Section 21.19, punishable as a Class C

247. *Id.* § 42.07(b)(3).

248. *Id.* § 21.19(b)(1).

249. *Id.* § 42.07.

250. TEX. GOV’T CODE ANN. § 311.021(1).

251. Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 342, 428 (2012).

252. *Id.* at 429.

253. *Fletcher v. State*, 439 S.W.2d 656, 659 (1969).

misdemeanor²⁵⁴ and a maximum fine of \$500. This substantial oversight could have and should have been avoided by completing a more thorough reading of the bill and evaluating each section, including the three categories of material being regulated and how the bill will be applied in everyday life.

The states can regulate obscenity because it is unprotected speech.²⁵⁵ If, when TPC Section 21.19 is applied, the “sexual conduct” transmitted encompasses the requirements of “obscenity,” this section of TPC Section 21.19 is constitutional as applied,²⁵⁶ but could be unconstitutional as applied if it is not obscene and is entitled to a higher level of protection, and the state failed to prove their burden of persuasion under either intermediate or strict scrutiny.²⁵⁷ Having one major component of TPC Section 21.19 being unconstitutional on its face, in addition to the concern of punishing sexual conduct that might not fit Texas’s standards of obscenity, leaves a bill that should not stand and should be rewritten more conscientiously.

The protection TPC Section 21.19 promotes and advocates for is much needed because there is no current Texas law as potentially successful in deterring unsolicited sexually explicit visual material as much as one that can be used to prosecute a sender of the material after the very first time it is sent. In the meantime, advocates for this needed law should promote Texas’s harassment law and provide Texans with the knowledge they need to report these incidents, gradually raising the awareness for online protection from indecent exposure until the Legislature introduces a constitutional version of TPC Section 21.19.

254. PENAL CODE § 21.19(c).

255. *Obscenity*, *supra* note 163 (“All fifty states have individual laws controlling obscene material.”).

256. *See* Hudson Jr., *As-applied Challenges*, *supra* note 38 (“In as-applied challenges in First Amendment cases, litigants contend that a governmental law, rule, regulation, or policy is unconstitutional as applied to their expressive activities.”).

257. *See generally* Steiner, *supra* note 3 (describing the levels of governmental scrutiny and what they entail).