IN THE
TENTH COURT OF APPEALS

No. 10-17-00047-CR

EX PARTE RICHARD ALLEN MONTEY ELLIS

Original Proceeding

DISSENTING OPINION

This is one of those statutes that was passed in response to a public outcry that "there ought to be a law against it." The resulting statute is commonly known as the "revenge porn" statute. As the statute was envisioned, it was to criminalize a very limited set of circumstances. The purpose of the statute is to make it a crime if you publish an intimate picture of someone whom you are now wanting to injure. The commonly discussed purpose is to prevent persons, who were once in love and consented to the photograph being made, from then using the intimate photograph to get-back-at the other person when the separation is less than amicable. And when you read the statute with only that history in mind, it appears to be capable of providing the protection needed. But, as they say, the devil is in the details.

We are far beyond the question of whether using a photograph to convey an idea is speech for purposes of the First Amendment, particularly when the photograph is accompanied with labels, phrases, or other communication designed to characterize the image depicted or to convey meaning or identity that will allow the "reader" to appreciate the message of the person who publishes the photograph. So, I believe it is correct to say that everyone agrees the statute restricts speech as defined by and relevant to the First Amendment to the United States Constitution. The question, therefore, is whether it is an unlawful restriction of speech. In other words, is it unconstitutional?

To make this determination, we begin with our standard of review. In this instance, we all agree that because the restriction is content based, we scrutinize the restriction under the rubric of "strict scrutiny." On these issues and the related discussion, I agree with the Court's opinion.

To pass the strict scrutiny standard, the statute must be narrowly tailored to meet the State's lawful objective. This is the first place at which I diverge from the Court's opinion and analysis. Moreover, the statute must not be vague nor overbroad; two additional tests that must be passed before it is determined to be constitutional. The Court also gives the statute a passing grade on both of these additional tests, whereas I believe it fails both tests.

Many legal scholars, with a far greater understanding of the nuances of Constitutional Law than I, have written and commented upon the statute. And it will serve no useful purpose for me to engage in extended rhetoric about my views and analysis, so I will be brief in my observations.

It appears to me that in many ways, the concepts of being narrowly drawn to meet the State's lawful objectives, vague, and overbroad are merely different sides of a tetrahedron. Accordingly, it is difficult to discuss one of these three issues totally independent of the others, so I will not try.

The primary purpose of the statute fails because the statute requires no connection between the purpose of publication of the photograph and causing harm to the depicted person. Without an intent to cause the harm, the statute sweeps into its restriction every artistic expression that contains the prohibited content, presuming it meets the other elements of the statute.

Another problem is that the nature of the "harm" is not limited or defined. What is "harm" in such a circumstance? In civil cases, there has been a great debate about the issue of compensable injury such that there had to be more than "mere" embarrassment. For example, to be compensable, there had to be a physical manifestation of mental anguish. Without some way for a trial court to charge the jury with a meaningful definition of "harm," this element is left to the whims and tolerances of the persons seated in the jury box. That is not acceptable.

Further, the taking of the photograph may be at a place and time when the depicted person is incapable of giving effective consent. I will not digress, here, to the persons who suffer from cognitive disabilities, but rather focus on age as a barrier to consent. Moreover, I will leave open to others for discussion and development, the problem of minors "sexting" images of themselves or others to friends and classmates. Rather, let us focus on the most innocuous of all photographs, the infant or toddler doing something while naked, that is outrageously funny, in the bathtub or around the

house. That photograph, taken by a loving parent, when posted on social media can become a social time-bomb for the child who could not give effective consent. With no intention to cause harm, the parent will have subjected the child to humiliation and embarrassment. When it is picked up by others, the harm could continue for years. And the loving parent becomes a criminal.

Yet another problem with the statute is that the persons publishing or republishing the photograph may not know the identity of the depicted person. Rather, only when other information is provided by a third person, is the identity of the depicted person known. Thus, the individual that discloses the image may have no idea who the depicted person is, whether or not its publication will cause the depicted person harm, and certainly has no intent to cause the depicted person harm. It is only when a third person attaches identifying information that suddenly the disclosure of the image becomes a violation of the statute. And it may be the third person that actually wants to cause harm to the depicted person. Moreover, the third person might not provide the identifying information for years after the disclosure was made. Consequently, if I publish the photograph for artistic purposes and you provide the identifying information, and the depicted person suffers harm (whatever that is) because now the world knows who is depicted, it is me that can be prosecuted for a crime when it was you that linked that image to the individual and caused the harm.

A critical factor in satisfying the strict scrutiny test is that the function and purpose of the statute must be limited to achieving the state's legitimate interest in restricting free speech. Therein lies part of the failure to narrowly tailor this statute. The intent of the publisher does not have to be to cause harm; that is only the result of

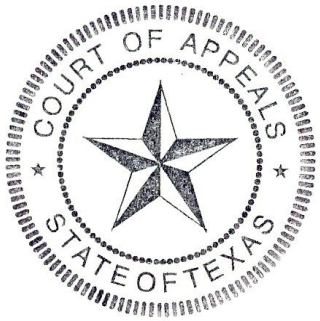
the publishing. I contend the statute, while salutary and needed, should have limited the speech only to those instances in which the parties have been in the equivalent of a dating relationship and the publisher intends to cause the depicted person harm. It does not.

Consider the following as a law school exam question on the analysis of the constitutionality of the statute.

> A person buys a box of old photographs at an estate sale. In going through the photographs, one is found that depicts a person with "intimate parts exposed." The face of the person depicted is somewhat obscured by a mask like would be worn to a masquerade ball or at Mardi Gras. The photograph is tastefully done and is in fact a wonderful work of art. The buyer, who is an aspiring photojournalist, uses the photograph in a class assignment to discuss the lighting, shading, and focus of the photograph. The professor of the class is impressed and decides to post the photograph as part of an on-line course and in a coffee table book on anonymous artists which he is writing. An art critique sees the photograph and heralds it of the quality of famed photographer Ansel Adams. The art world goes nuts. The photograph goes viral. And the depicted person is horrified, nauseous, and overwhelmed with embarrassment because she knows who is behind the mask. Then, an art historian starts trying to track down the anonymous photographer and in the process of doing so identifies the depicted person and publishes the depicted person's identity. It turns out the photograph was taken by a close friend, her college roommate, for an art studio project, but she decided it was too risqué and it was never used. Discuss the strict scrutiny test for being narrowly tailored, vagueness, and overbreadth as necessary to determine if Texas Penal Code § 21.16(b) is unconstitutional.

As you can see, this statute fails all the tests. I give it a constitutional grade of "F" and would therefore declare it unconstitutional. Because the Court allows the defendant to be prosecuted under it, I respectfully dissent.

TOM GRAY
Chief Justice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