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Fact or Phallus? Considering the Constitutionality of Texas's Cyber-Flashing Law Under the True Threat Doctrine

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FACT OR PHALLUS? CONSIDERING THE CONSTITUTIONALITY OF TEXAS'S CYBER-FLASHING LAW UNDER THE TRUE THREAT DOCTRINE

*by: Brenna C. Miller**

Abstract

As societal reliance on digital and online communication continues to grow, courts are grappling with how best to provide legal recourse for novel, technology-related issues while still protecting American citizens' First Amendment right to free speech. The State of Texas recently enacted Penal Code section 21.19, which criminalizes the transmission of unsolicited sexually explicit images to another person—or as it is commonly known, "cyber-flashing." Cyber-flashing occurs through digital and online platforms, including text messages, apps, and social media. Section 21.19 is one of the first statutes of its kind in the United States. In the age of "dick pics," this law has emerged at a crucial time in an evolving social and technological world. While section 21.19 has ample support, critics argue that it is ultimately unconstitutional. Proponents argue that it combats sexual harassment and the "growing problem of aggressive and unsolicited sexual communication online."[1] *Additionally, many victims view cyber-flashing as a threatening and intimidating form of sexual violence. This fact is legally significant, in that the First Amendment's true threat doctrine allows governmental regulation of speech that places individuals in fear of harm. This Article argues that section 21.19 is constitutional under the true threat doctrine and, alternatively, proposes a possible solution for Texas to ensure the statute's compliance with First Amendment free speech protections.*

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1. Nicole Cobler, *Bumble Founder Wants Texas Lawmakers to Make Unwanted Sexting a Crime*, Dall. Morning News (Mar. 26, 2019, 1:07 PM), https://www.dallasnews.com/business/technology/2019/03/26/bumble-founder-wants-texas-lawmakers-to-make-unwanted-sexting-a-crime/ [https://perma.cc/Q6GD-EULC].

I. INTRODUCTION

> *I went out on quite a few dates with this guy but eventually we had to break up . . . but he didn't take it too well. A few days later, I got a WhatsApp message from him: "You know you want this," with a few dick pics. I happened to open his message in a crowded train . . . . I exited at the next stop out of embarrassment.*[2]
>
> *I couldn't even tell you how many times I've been sent dick pics on dating apps, specifically Tinder and Bumble and also on WhatsApp during conversations[,] without me asking.*[3]
>
> *I was travelling home alone by bus when a dick pic popped up on my phone [via AirDrop]. In the space of a second or two I was confused, shocked, then disgusted. . . . It didn't occur to me until afterwards that someone would deliberately send that to a stranger . . . . I didn't consider reporting it to the transport network or police. I imagine they would've just dismissed it as a prank.*[4]

While these personal experiences may seem unsettling or frustrating, they are not unique—in fact, they are all too common in our modern technological world.[5] "Dick pics," as these women describe them, are a product of evolving technology. It is difficult to imagine, for example, a situation in the seemingly distant past of no cellphones or internet where a man hands a woman photographs of his genitals on the bus, or mails them to her when she ends their relationship. There is no doubt that society is becoming increasingly dependent upon technology and digital communication—a 2018 survey indicated that 99% of eighteen- to forty-nine-year-olds in the United States owned

2. Brittany Cox, *14 Women Talk About the Worst Dick Pic They Ever Got (and What Made It Particularly Awful)*, THOUGHT CATALOG (Jan. 9, 2017) (cleaned up), https://thoughtcatalog.com/brittany-cox/2017/01/14-women-talk-about-the-worst-dick-pic-they-ever-got-and-what-made-it-particularly-awful/ [https://perma.cc/97NA-S8PM].

3. Natalie Gil, *Women Who've Been Cyberflashed on Why Dick Pics Are No Laughing Matter*, REFINERY29, https://www.refinery29.com/en-gb/2019/01/222278/cyberflashing-dick-pics (Feb. 8, 2019, 4:58 PM) [https://perma.cc/N4SC-JQPW].

4. *Id.*

5. *See id.*; *see also* Cox, *supra* note 2.

or used a cell phone, while 97% used the internet, and 82% used social media.[6] Wide adoption of online technologies, particularly mobile platforms, makes it easier and more convenient for individuals to communicate with social and professional networks. Online communication is a hallmark of modern life that has become deeply integrated into most individuals' daily lives.[7] But many forms of online communication can be less personal and more removed from reality than their in-person counterparts.[8] For example, many people prefer texting over talking on the phone or in-person conversations, a notion that would likely be unimaginable in the recent past.[9] Moreover, while traditional forms of communication are primarily used to facilitate and augment established relationships, many emerging digital platforms also enable and encourage the creation of new connections, often with no preexisting relationship in the physical world.[10] One need only delve into the world of online dating, video games, and the like to see just how pervasive meeting and forming relationships with strangers online is today.[11]

As is often the case with changing landscapes, these technological and societal shifts produce many new and intriguing problems. One particularly relevant issue, as previously illustrated, is the sending of dick pics from one person to another.[12] "Dick pic" is the common term for a sexually explicit image of male genitals, typically transmitted electronically from a man to a woman.[13] Arguably more often than not, a dick pic sender acts without solicitation.[14] This act is called

6. Paul Hitlin, *Internet, Social Media Use and Device Ownership in U.S. Have Plateaued After Years of Growth*, PEW RSCH. CTR. (Sept. 28, 2018), https://www.pewresearch.org/fact-tank/2018/09/28/internet-social-media-use-and-device-ownership-in-u-s-have-plateaued-after-years-of-growth/ [https://perma.cc/DDW8-5UDF].

7. *See id.*

8. *See* Neil Howe, *Why Millennials Are Texting More and Talking Less*, FORBES (July 15, 2015, 11:00 AM), https://www.forbes.com/sites/neilhowe/2015/07/15/why-millennials-are-texting-more-and-talking-less/#16f80de45975 [https://perma.cc/RC6Y-3F6H].

9. Mariel Loveland, *Teens Would Rather Text and Chat Online with Their Friends than Hang Out in Real Life, Study Says*, INSIDER (Sept. 12, 2018, 10:30 AM), https://www.insider.com/study-teens-would-rather-text-with-friends-than-hang-out-in-real-life-2018-9 [https://perma.cc/R687-Z4RG] (finding 61% of teenagers aged thirteen to seventeen in one study preferred communicating via text or social media over talking to their friends in person).

10. *See* Ryan Anderson, *The Ugly Truth About Online Dating*, PSYCH. TODAY (Sept. 6, 2016), https://www.psychologytoday.com/us/blog/the-mating-game/201609/the-ugly-truth-about-online-dating [https://perma.cc/ESK8-S7QL].

11. *Id.*

12. *See supra* quotations accompanying notes 2–4.

13. *Dick Pic*, DICTIONARY.COM, https://www.dictionary.com/e/slang/dick-pic/ [https://perma.cc/5D5X-HCDF].

14. *See* Sue Scheff, *The Rise of Uninvited Sexual Images*, PSYCH. TODAY (Oct. 12, 2017), https://www.psychologytoday.com/us/blog/shame-nation/201710/the-rise-uninvited-sexual-images [https://perma.cc/KU2G-2QKZ].

"cyber-flashing."[15] Although many individuals voluntarily send or receive intimate content via photo or video,[16] the problem arises when said content is transmitted without the recipient's request or consent. This problem is heightened when considering that much cyber-flashing is perpetrated by someone unknown to the recipient.[17] Cyber-flashers typically transmit these sexually explicit images through popular online platforms, such as text messages, apps, dating websites, and social media—where communication with strangers is all but unavoidable.[18]

In September 2019, the State of Texas enacted a new law aimed at addressing this issue.[19] Section 21.19 of the Texas Penal Code makes it a crime to "knowingly transmit[] by electronic means visual material" that depicts either "any person engaging in sexual conduct or with the person's intimate parts exposed" or "covered genitals of a male person that are in a discernibly turgid state" if the material "is not sent at the request of or with the express consent of the recipient."[20] "Intimate parts" are defined as the "naked genitals, pubic area, anus, buttocks, or female nipple of a person."[21] An offense under this statute is a Class C misdemeanor,[22] punishable by a fine of up to $500.[23] While the statute's language technically includes images of female "intimate parts," it focuses mainly on images of male genitalia. Accordingly, this law has been referred to as the "unsolicited dick pic" or "cyber-flashing" law.[24] Although section 21.19 criminalizes certain conduct, consenting adults may still freely send intimate sexual material to one another.[25]

Section 21.19 reflects increased concern with sexual harassment and consent issues, particularly online. The statute was enacted in part through lobbying efforts by Whitney Wolfe Herd, founder and CEO of Bumble, a dating app that seeks to empower women by giving them greater control in the matching and communication process.[26] Al-

15. Gil, *supra* note 3.

16. *See Sext Much? If So, You're Not Alone*, SCI. AM. (Feb. 4, 2014), https://www.scientificamerican.com/article/sext-much-if-so-youre-not-alone/ [https://perma.cc/7BBC-JMFQ].

17. *See* Gil, *supra* note 3.

18. *See id.*

19. Act effective Sept. 1, 2019, 86th Leg., R.S., H.B. 2789, § 1 (codified at TEX. PENAL CODE ANN. § 21.19).

20. TEX. PENAL CODE ANN. § 21.19(b).

21. *Id.* § 21.19(a) (incorporating the definition of "intimate parts" provided in section 21.16(a)(1) of the Penal Code); TEX. PENAL CODE ANN. § 21.16(a)(1).

22. PENAL § 21.19(c).

23. TEX. PENAL CODE ANN. § 12.23.

24. Arwa Mahdawi, *Put It Away: Texas Passes Law Banning Dick Pics*, THE GUARDIAN (Sept. 7, 2019, 9:00 AM), https://www.theguardian.com/commentisfree/2019/sep/07/texas-passes-law-against-dick-pics-week-in-patriarchy [https://perma.cc/7KZJ-4BGS].

25. *See* PENAL § 21.19; Cobler, *supra* note 1.

26. Cobler, *supra* note 1.

though men may fall victim to cyber-flashing, online and digital harassment is overwhelmingly targeted toward women.[27] In a 2017 survey, 41% of women aged eighteen to thirty-six reported that they had received at least one unwanted picture of a penis.[28] A similar study found that 53% of millennial women reported receiving dick pics, and of those women, 78% said the sexual image they received was unwanted.[29] For many women who receive such pictures, especially from strangers, this conduct can range from merely annoying to upsetting or frightening.[30] In addition, for some victims, the receipt of unwanted sexual images can be so high in volume or frequency that their daily lives are negatively affected.[31]

Women who receive unsolicited, inappropriate pictures through dating apps or other online platforms previously had limited options to fight back against the sender, at least in Texas.[32] Prior to section 21.19's enactment (and currently in most other states), the only tangible repercussions for sending unsolicited nude images was to ban the content itself or the sender's account from the particular platform used.[33] In an overt effort to combat cyber-flashing, some platforms are exploring and introducing artificial intelligence ("AI") technology to screen for nudity.[34] One woman is developing a screening technology called safeDM, which she intends to launch as a free service for Twit-

27. *Researcher Discusses 'Unjust Burden' Put on Women by Online Harassment*, CITY UNIV. OF LONDON (Nov. 5, 2018), https://www.city.ac.uk/news/2018/october/online-abuse-and-harassment-research [https://perma.cc/NBH8-GFA5] [hereinafter *Researcher Discusses 'Unjust Burden'*].

28. Anna North, *One State Has Banned Unsolicited Dick Pics. Will It Fix the Problem?*, VOX (Sept. 3, 2019, 4:00 PM), https://www.vox.com/policy-and-politics/2019/9/3/20847447/unsolicited-dick-pics-texas-law-harassment [https://perma.cc/V6WF-ASWP].

29. Scheff, *supra* note 14; *see also New Texas Laws: Illegal to Send Unsolicited Nude Photos*, FOX 4 NEWS (Aug. 30, 2019), https://www.fox4news.com/news/new-texas-laws-illegal-to-send-unsolicited-nude-photos [https://perma.cc/7EXY-RZ82] [hereinafter *New Texas Laws*].

30. *See* David J. Ley, *Why Men Send Pics of Their Junk*, PSYCH. TODAY (Feb. 18, 2016), https://www.psychologytoday.com/us/blog/women-who-stray/201602/why-men-send-pics-their-junk [https://perma.cc/U65H-YME9].

31. *See* Irene Cruz, *Texas Outlawed Unsolicited Nude Pictures, Legal Experts Call Law 'Unconstitutional'*, NEWS4SA (Sept. 19, 2019), https://news4sanantonio.com/news/local/texas-outlawed-unsolicited-nude-pictures-legal-experts-call-law-unconstitutional [https://perma.cc/4E32-69DV].

32. Dan Solomon, *Texas May Outlaw Unsolicited Sexual Images. Would That Be Enforceable—and Does It Even Matter?*, TEX. MONTHLY (Mar. 28, 2019), https://www.texasmonthly.com/news/texas-may-outlaw-unsolicited-sexual-images-would-that-be-enforceable-and-does-it-even-matter/ [https://perma.cc/9A4Q-JCNH].

33. *Id.*; Issie Lapowsky, *How Would NYC's Anti-AirDrop Dick Pic Law Even Work?*, WIRED (Dec. 3, 2018, 4:50 PM), https://www.wired.com/story/nyc-anti-air-drop-dick-pic-law/ [https://perma.cc/3M6D-ET6N].

34. Brittany Wong, *A California Lawmaker Wants to Fine Those Who Send Unwanted Dick Pics*, HUFFPOST (Dec. 2, 2019, 5:52 PM), https://www.huffpost.com/entry/unsolicited-nude-photo-law_l_5ddd9eb2e4b0913e6f7566d6 [https://perma.cc/75ZR-XZL7]; Kelsey Bressler, *I'm Asking Men to Send Me Dick Pics to Create a Solution to Cyberflashing*, HUFFPOST (Nov. 15, 2019, 10:19 AM), https://www.huffing

ter users.[35] SafeDM is a filter that uses AI to monitor a user's messages for incoming photos, identifies photos that contain penises, and automatically deletes them.[36] Bumble has also implemented an AI system that has the ability to recognize most explicit photos sent through direct messages.[37] The app alerts users who receive such photos by blurring them and then enabling the recipient to view or delete the image.[38] Users can also choose to report the sender.[39] Such extensive efforts to prevent and place consequences on cyber-flashing indicate that it is a significant and widespread concern for many users of online platforms. Under section 21.19, Texas has become one of the first states to recognize these concerns in a significant way, and now provides legal recourse for cyber-flashing victims.[40]

Bumble CEO Wolfe Herd conceptualized section 21.19, saying that "it feels like men and women are being told that this increasingly common problem is really no big deal."[41] She approached Texas House Representative Morgan Meyer to create legislation that would help reign in a previously unchecked type of sexual harassment,[42] addressing the "growing problem of aggressive and unsolicited sexual communication online."[43] Wolfe Herd believes the digital world "is basically a society with no rules," and many proponents of the law view cyber-flashing as a technology-based form of sexual harassment that should be punished.[44] Many women also see it as a form of intimidating and threatening sexual violence,[45] a fact which carries legal significance.[46] While punishment is one goal of section 21.19, deterrence is another.[47] Section 21.19 operates like "sin taxes" on alcohol and cigarettes, in that the law aims to discourage people from engaging in

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tonpost.co.uk/entry/cyberflashing-revenge-porn_uk_5dce6dcce4b0d2e79f8a785f [https://perma.cc/NGH7-ZY44].

35. Bressler, *supra* note 34.

36. *Id.*

37. Wong, *supra* note 34.

38. *Id.*

39. *Id.*

40. *See* TEX. PENAL CODE ANN. § 21.19.

41. 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/8UJQ-UWVA].

42. *Id.*

43. Cobler, *supra* note 1.

44. Rachel Hosie, *Sending Unsolicited Dick Pics Is Now Illegal in Texas, and Could Result in a $500 Fine*, INSIDER (Sept. 3, 2019, 8:32 AM), https://www.insider.com/unsolicited-dick-pic-sending-now-illegal-texas-500-fine-bumble-2019-9 [https://perma.cc/62CW-6T9M].

45. *See* Ley, *supra* note 30; *see generally* Charlotte Palermino, *The Airdropped Dick Pic Epidemic Is upon Us*, ELLE (Mar. 21, 2018), https://www.elle.com/culture/tech/a19549140/the-airdropped-dickpic-epidemic-is-upon-us/ [https://perma.cc/2ARX-F6FA].

46. *See* discussion *infra* Section II.B.

47. Closson, *supra* note 41.

behavior that "violates the norms of what [society] think[s] is proper."[48] Getting the law involved is a way of "shaping norms to get this behavior taken more seriously."[49] Ultimately, Texas has enacted section 21.19 not only to place consequences on sending unsolicited sexual images but primarily to prevent such behavior in the first place.[50]

Although Texas is one of the first states to enact a cyber-flashing law, other states, cities, and countries are considering or have enacted similar legislation.[51] In South Carolina, it is against the law to "anonymously send any lewd content without the consent of the person receiving it."[52] A California lawmaker introduced a similar bill into the California Senate in January 2020, with the help and inspiration of Bumble and Wolfe Herd's success in Texas.[53] Additionally, a similar bill proposed in New York City would criminalize "send[ing] an unsolicited sexually explicit video or image to another person with intent to harass, annoy or alarm such other person."[54] This bill was introduced as a response to commuters being cyber-flashed via their phones' AirDrop feature when in close proximity to others on public transportation.[55] Cyber-flashing legislation across the United States and other countries reflects widespread concern in combatting the growing issue of cyber-flashing and the government's strong interest in addressing it.

While there is ample support for the general goals and rationale behind section 21.19, some legal scholars believe the law will face First Amendment challenges.[56] Section 21.19 certainly appears to straddle the line between free speech protections and the government's interest in combatting sexual harassment and addressing consent issues in an online era. While the government has a significant interest in pro-

48. Solomon, *supra* note 32.

49. *Id.*

50. *See id.*

51. *See* Rachel Thompson, *It's Time to Stop Saying 'Unsolicited Dick Pics.' Here's Why.*, MASHABLE (July 19, 2019), https://mashable.com/article/cyberflashing-unsolicited-dick-pics-terminology/ [https://perma.cc/Y5XN-LYEM]; *see also* Cara Curtis, *The UK Government Is Looking to Criminalize Unsolicited Dick Pics*, THE NEXT WEB (Mar. 7, 2019), https://thenextweb.com/tech/2019/03/07/uk-government-looking-to-criminalize-unsolicited-dick-pics/ [https://perma.cc/W547-G9W9].

52. *New Texas Laws*, *supra* note 29.

53. Press Release, Ling Ling Chang, Sen., California's 29th Senate District, Senator Chang Introduces Legislation to Outlaw Cyber-Flashing in Collaboration with Bumble (Jan. 7, 2020), https://chang.cssrc.us/content/senator-chang-introduces-legislation-outlaw-cyber-flashing-collaboration-bumble [https://perma.cc/253F-7Y7C].

54. N.Y.C. Council Int. No. 1244 (2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3763643&GUID=F06C28F9-16D1-4DDA-82D7-372C94B8E84D [https://perma.cc/B6H5-TEXE] (quoting bill summary); North, *supra* note 28.

55. *See* North, *supra* note 28.

56. Most critics argue that the law is potentially overbroad and vague because it could criminalize behavior that is protected by the First Amendment. *See* Solomon, *supra* note 32; Cruz, *supra* note 31; Cobler, *supra* note 1; Closson, *supra* note 41.

tecting First Amendment rights, it has a similar, if not greater interest in preventing sexual harassment and sexual violence, including fear of physical and sexual assault—which many cyber-flashing victims experience.[57] But there may be a way to strike a balance between protecting free speech and preventing threatening conduct—the true threat doctrine.

This Article examines Texas Penal Code section 21.19 under the First Amendment's free speech guarantee. Part II examines indecency as constitutionally protected speech, but with reduced protection in circumstances characterized by a lack of consent or an additional threat element, particularly focusing on indecent exposure and examining cyber-flashing as its functional equivalent. Part II also introduces "true threats" as a category of constitutionally unprotected speech and argues that statutory "affront or alarm" requirements in indecent exposure laws are a practical application of the true threat doctrine. Part III applies the true threat doctrine to section 21.19 by arguing that cyber-flashing encompasses a threat element, and ultimately concludes that section 21.19 is therefore constitutional. Finally, Part IV alternatively recommends amending section 21.19 to include an "affront or alarm" requirement to better ensure compliance with First Amendment protections while still effectuating the statute's goals.

II. The First Amendment and the True Threat Doctrine

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[58] Similarly, the Texas Constitution protects the "liberty to speak, write or publish . . . opinions on any subject."[59] Although the First Amendment is stated in absolute terms, there are certain contexts where the government may regulate speech.[60] Even so, the Supreme Court has said that "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort."[61]

A. *Indecency*

Sexually explicit material is typically considered indecent speech under the First Amendment,[62] which generally protects indecency, at

57. *See generally* Palermino, *supra* note 45.

58. U.S. Const. amend. I.

59. Tex. Const. art. I, § 8.

60. Victoria L. Killion, Cong. Rsch. Serv., The First Amendment: Categories of Speech (2019), https://fas.org/sgp/crs/misc/IF11072.pdf [https://perma.cc/PN3W-3C2V].

61. Thompson v. W. States Med. Ctr., 535 U.S. 357, 373 (2002).

62. David L. Hudson, Jr., *Pornography & Obscenity*, Freedom F. Inst., https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/adult-entertainment/pornography-obscenity/ [https://perma.cc/A4JR-NEQ4].

least where it involves adults.[63] The Supreme Court has "made it perfectly clear that '[s]exual expression which is indecent . . . is protected by the First Amendment.'"[64] While certain speech may be offensive or undesirable to society, that fact alone cannot justify its suppression.[65]

However, while still considered protected speech, indecency is sometimes subject to reduced First Amendment protection.[66] The government may regulate some categories of speech because of their content, but only where the speech is "of such slight social value . . . that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality."[67] Both content and context are important elements in such a First Amendment analysis.[68] The Supreme Court has repeatedly held that not all protected speech is equal—and has been willing to place some constitutional limits on certain categories of speech, including indecency.[69] For example, the Court has upheld many indecency regulations that aim to protect children from exposure to sexually explicit material.[70] Courts have also upheld indecency regulations in the context of nudity, particularly in situations where there is a potential risk of exposure to the public.[71]

In *Barnes v. Glen Theatre*, a Supreme Court plurality upheld an Indiana statute prohibiting public indecency related to nude dancing.[72] The Court determined that while dancing may typically have First Amendment protection because of its expressive quality, the nude dancing in this case did not, because the statute targeted the physical

63. *See* Ruth Ann Strickland, *Indecency and the Electronic Media*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/971/indecency-and-the-electronic-media (July 2017) [https://perma.cc/F7UE-E2GJ]. *But see* FCC v. Pacifica Found., 438 U.S. 726, 749–51 (1978) (holding that indecent material in the context of broadcasting which has a reasonable risk of reaching children is subject to First Amendment restrictions).

64. Reno v. ACLU, 521 U.S. 844, 874 (1997) (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

65. Texas v. Johnson, 491 U.S. 397, 414 (1989); Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977).

66. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

67. R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

68. *Pacifica Found.*, 438 U.S. at 744 (citing Schenck v. United States, 249 U.S. 47, 52 (1919)).

69. *See Barnes*, 501 U.S. at 567; *Non-Obscene but Sexually Explicit and Indecent Expression.*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-1/non-obscene-but-sexually-explicit-and-indecent-expression [https://perma.cc/9DAU-LNB3].

70. *See* Reno v. ACLU, 521 U.S. 844, 887 (1997) (O'Connor, J., concurring in part and dissenting in part); *Pacifica Found.*, 438 U.S. at 750; *see generally* Amicus Brief of the American Center for Law & Justice in Support of Neither Party, FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2012) [hereinafter Amicus Brief] (No. 10-1293), 2011 WL 4100441.

71. *See Barnes*, 501 U.S. at 567–68.

72. *Id.* at 572.

act of nudity "whether or not it [was] combined with expressive activity."[73] The Supreme Court has held that when conduct consists of both speech and nonspeech elements, a sufficiently important governmental interest sometimes "justif[ies] incidental limitations on First Amendment freedoms."[74] The Court analyzed the Indiana statute under the *O'Brien* test, which permits governmental regulation of speech by laws that impact expressive conduct, i.e., conduct that contains both speech and nonspeech elements.[75] The test holds that governmental regulation is sufficiently justified under the following circumstances:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[76]

The Court emphasized the notion that statutes regulating indecency are designed to "protect morals and public order," and that such regulation, despite its potential to restrict expressive quality, furthers a substantial and legitimate government interest in achieving these goals.[77] While sexually explicit, nude conduct is typically protected "within the outer perimeters of the First Amendment," the Court expressed that it is "only marginally so,"[78] indicating that it is subject to reduced First Amendment protection.

1. Reduced Protection for Unsolicited Indecency

With already reduced protection for some forms of indecency, courts are additionally willing to uphold regulations that address acts of foisting unsolicited or unconsented-to indecent material or speech on another person. This type of regulation centers around consent. While indecency and sexual harassment—which many, including lawmakers, view cyber-flashing as[79]—are not necessarily related concepts, they often overlap when a lack of consent is involved. Consent is a key issue in the current dialogue of sexually related conduct[80] and one that state governments consider increasingly important.[81] This in-

73. *Id.* at 561.
74. United States v. O'Brien, 391 U.S. 367, 376 (1968).
75. *Barnes*, 501 U.S. at 566–67.
76. *O'Brien*, 391 U.S. at 377.
77. *Barnes*, 501 U.S. at 569.
78. *Id.* at 566.
79. Sharon Otterman, *Sending Lewd Nudes to Strangers Could Mean a Year in Jail*, N.Y. TIMES (Nov. 30, 2018), https://www.nytimes.com/2018/11/30/nyregion/air-drop-sexual-harassment.html [https://perma.cc/8S2F-AYUN].
80. Judith Shulevitz, *Regulating Sex*, N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html [https://perma.cc/E5WF-XBNR].
81. For example, concern with consent is illustrated by states' growing adoption of affirmative consent requirements in sexual assault statutes. *Id.*; *see also* Noah Hilgert,

creased concern reflects the government's strong interest in protecting individuals from unwanted and unsolicited sexual conduct, whether it be physical, verbal, or visual.

Regulation of unsolicited sexually explicit material and conduct is thus permitted in several contexts. For instance, Title VII and Title IX prohibit unwanted, uninvited sexual harassment and discrimination in the workplace and public education systems.[82] Under Title VII of the Civil Rights Act of 1964, sexual harassment is considered prohibited discrimination.[83] "Unwelcome sexual advances . . . and other verbal or physical conduct of a sexual nature constitute sexual harassment when [the] conduct explicitly or implicitly affects an individual's employment . . . or creates an intimidating, hostile, or offensive work environment."[84] Under this definition, any uninvited or unconsented-to sexually related speech—including sexually oriented pictures[85]—that affects an individual's employment or negatively impacts her is considered sexual harassment and thus violates Title VII.[86] Similarly, Title IX prohibits sex-based discrimination in public education programs.[87] Supreme Court decisions have extended Title IX's protection to cover a broad scope of behavior, including unwelcomed verbal, visual, and physical sexual conduct.[88] While Title VII and Title IX are concerned with speech in specific contexts, they nonetheless reflect the government's willingness to regulate speech regarding unsolicited sexual behavior and material.

Additionally, the federal government has already placed some limits on unsolicited indecent speech transmitted via online communication. Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM") to address the emerging issue of commercial email spam containing unsolicited

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The Burden of Consent: Due Process and the Emerging Adoption of the Affirmative Consent Standard in Sexual Assault Laws, 58 ARIZ. L. REV. 867, 889–90 (2016).

82. *See* Title IX of Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (1972) (codified as amended at 20 U.S.C. § 1681); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255–57 (1964) (codified as amended at 42 U.S.C. § 2000e-2).

83. *See* 42 U.S.C. § 2000e-2; *Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 15, 1997) https://www.eeoc.gov/eeoc/publications/fs-sex.cfm [https://perma.cc/C3JH-KZ3R].

84. *Facts About Sexual Harassment*, *supra* note 83.

85. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1990-8, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment [https://perma.cc/7VB5-BEJV]; *see* Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 572–73 (W.D.N.Y. 1987).

86. *See* § 2000e-2(a)(1).

87. 20 U.S.C. § 1681(a).

88. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 & 24–25 n.6 (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/WJV2-2ZMK].

sexually explicit material.[89] CAN-SPAM mandates that senders of commercial email containing sexually oriented material place warning labels in the subject line or in the message itself before the content can be viewed, unless the recipient has given prior affirmative consent to receiving the message.[90] The Federal Trade Commission also requires that any commercial email messages containing sexually explicit material be labeled "SEXUALLY-EXPLICIT" in a clear and conspicuous manner.[91] And when a recipient requests that she not receive some or all communications from the sender, the sender must cease such communications promptly within ten business days.[92] These mandates put recipients of indecent material on notice and allow them to avoid viewing sexually explicit material without their consent.[93]

In *Miller v. California*, the Supreme Court recognized that 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."[94] The Court examined whether Marvin Miller's mass mailing of sexually explicit brochures violated a California statute by knowingly distributing obscene material.[95] The distributed brochures contained images and drawings of men and women with their genitals displayed and engaged in various sexual acts.[96] Miller mailed the brochures to recipients without their request or consent.[97] The recipients also did not express desire to receive the materials.[98] Although the *Miller* Court addressed obscenity—an unprotected category of speech[99]—rather than indecency, it nonetheless generally condemned the transmission of unsolicited sexually explicit material to nonconsenting individuals.[100] However, the majority criticized and rejected Justice Brennan's dissenting suggestion that suppression of unprotected obscene material should be permissible by statute to prohibit exposure to minors and nonconsenting adults.[101] The Court reasoned there was no way to more clearly draw the line between protected and unprotected materials under a consent standard than for regulation of com-

89. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, §§ 2(a)(1)–(3), 5(d)(1)–(2), 117 Stat. 2699, 2699, 2709–10 (2003) (codified at 15 U.S.C. §§ 7701(a)(1)–(3), 7704(d)(1)–(2)).

90. 15 U.S.C. § 7704(d)(1)–(2).

91. *CAN-SPAM Act: A Compliance Guide for Business*, FTC, https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business [https://perma.cc/C94T-BCKG].

92. *Id.*; § 7704(a)(4)(A).

93. *CAN-SPAM Act: A Compliance Guide for Business*, *supra* note 91.

94. Miller v. California, 413 U.S. 15, 18–19 (1973).

95. *See id.* at 16–18.

96. *Id.* at 18.

97. *Id.* at 17–18.

98. *Id.* at 18.

99. *Id.* at 23, 36–37.

100. *Id.* at 17–19.

101. *Id.* at 27; *see id.* at 47–48 (Brennan, J., dissenting).

mercial exposure to consenting adults only.[102] Although the Court rejected Justice Brennan's statutory consent argument, both the majority and Justice Brennan's dissent implied a general governmental interest in protecting nonconsenting adults from exposure to unwanted sexually explicit material.[103]

2. Indecent Exposure: Even Further Reduced Protection for Unsolicited Indecency with an Additional Threat Element

Courts often uphold statutory limits on indecent behavior in the context of indecent exposure laws. Most indecent exposure statutes target public or in-person exposure.[104] At their most basic level, indecency statutes "reflect moral disapproval of people appearing in the nude."[105] Indecent exposure statutes capture this concept, while also encompassing a fear or threat-based rationale. Scholars argue that the law forbids indecent exposure because of fears that the exposer will move on to a sexual or physical assault due to physical proximity between the perpetrator and the victim.[106] Physical safety concerns relating to indecent exposure are significant.[107] For example, individuals who experience crimes related to or posing a potential threat of sexual violence, such as receiving obscene phone calls or indecent exposure, elicit high levels of fear responses.[108] Victims of indecent exposure report feeling that indecent exposers are dangerous and that the experience is distressing.[109]

Indecent exposure is a punishable crime in all fifty states and the District of Columbia.[110] In Texas, it is prohibited by Penal Code section 21.08.[111] The statute makes it a crime when a person "exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act."[112] Indecent exposure is a Class B misdemeanor[113] and is punishable by a fine of up to $2,000, jail confinement for up to 180 days, or both.[114] The statu-

102. *Id.* at 27 (majority opinion).
103. *Id.* at 18–19, 27; *see id.* at 47–48 (Brennan, J., dissenting).
104. *See* Amicus Brief, *supra* note 70.
105. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 568 (1991).
106. Sharon Riordan, *Indecent Exposure: The Impact upon the Victim's Fear of Sexual Crime*, 10 J. FORENSIC PSYCHIATRY & PSYCH. 309, 313–15 (1999).
107. Hannah Scott, *Stranger Danger: Explaining Women's Fear of Crime*, 4 W. CRIMINOLOGY REV. 203, 204 (2003).
108. *Id.*
109. *See* Riordan, *supra* note 106, at 312.
110. *See* Amicus Brief, *supra* note 70; *see also Nudity and Public Decency Laws in America*, HG.ORG, https://www.hg.org/legal-articles/nudity-and-public-decency-laws-in-america-31193 [https://perma.cc/GF5P-YZRW].
111. TEX. PENAL CODE ANN. § 21.08(a).
112. *Id.*
113. *Id.* § 21.08(b).
114. TEX. PENAL CODE ANN. § 12.22.

tory requirement of "any person" is met when the defendant acted with the intent to arouse or gratify his own sexual desires.[115] Additionally, the indecent exposure need not occur in public. In *Young v. State*, a Texas court of appeals concluded that the defendant only had to act recklessly: a defendant commits indecent exposure "when he is aware of but consciously disregards a substantial and unjustifiable risk" that another individual would see and be alarmed or offended by his exposure.[116] Section 21.08 "does not expressly require that the State prove [the defendant] exposed himself in a *public place*; it merely requires the State to prove he recklessly exposed himself to another."[117]

Many state indecent exposure statutes have been upheld as constitutional, including section 21.08.[118] In *Kew v. Senter*, the United States District Court for the Northern District of Texas relied on *Miller* and the *O'Brien* test in concluding that statutes regulating indecent exposure like section 21.08 are primarily directed at nonverbal, physical conduct—conduct that Texas has a greater interest and ability in regulating than purely expressive speech.[119] While the plaintiff's nudity may or may not have consisted of expressive content, section 21.08 primarily targets physical conduct and thus only incidentally impacts speech.[120] The court reasoned that "it is difficult to conceive of ideas entitled to First Amendment protection which can be solely or even best expressed by baring the anus or genitals in the circumstances forbidden by the statute[]."[121] By holding that regulation of indecent exposure is "certainly [an] area[] of respectable and substantial governmental interest,"[122] the court solidified regulation of indecent sexually explicit behavior as an important and substantial interest of the Texas government—one in which Texas has the power not only to punish conduct, but to prohibit it.

In considering both indecent exposure and cyber-flashing, the question is whether transmitting images of genitals over a digital device without solicitation is different from physically exposing one's genitals without solicitation—and if so, how? Legally and practically, cyber-flashing is a functional equivalent of indecent exposure. The most obvious, and potentially only, significant difference is that indecent exposure occurs in person, while sending unsolicited sexually explicit images occurs via technology. Some scholars argue that while indecent

115. Cate v. State, 124 S.W.3d 922, 931 (Tex. App.—Amarillo 2004, pet. ref'd) (per curiam); Malcolm v. State, No. 05-17-01488-CR, 2019 WL 2521717, at *4 (Tex. App.—Dallas June 19, 2019, pet. ref'd) (mem. op., not designated for publication).

116. Young v. State, 976 S.W.2d 771, 774 (Tex. App—Houston [1st Dist.] 1998, pet. ref'd) (quoting and applying the definition of "reckless" provided in TEX. PENAL CODE ANN. § 6.03(c)).

117. *Id.* (emphasis added).

118. *See* Kew v. Senter, 416 F. Supp. 1101, 1104–05 (N.D. Tex. 1976).

119. *Id.* at 1104.

120. *Id.* at 1105.

121. *Id.*

122. *Id.*

exposure stems from concerns of physical assault, when exposure is virtual, this risk is much lower, if not non-existent.[123] For example, public nudity may be "viscerally perceived as real and immediate in a way that a video [or visual image] is not."[124] But what if exposure occurs both through virtual means *and* within physical proximity, as in cases where cyber-flashing is perpetrated through AirDrop?[125]

State courts are beginning to see litigation regarding the digital transmission of sexually explicit images and whether this conduct constitutes indecent exposure. In *State v. Legassie*, Maine's highest court concluded that Andrew Legassie's transmission of "explicit digital images" of his exposed genitals did not qualify as indecent exposure.[126] Legassie was prosecuted under section 854(1)(B) of Maine's indecent conduct statute, which makes it a crime when, "in a *private* place, the actor exposes the actor's genitals with the intent that the actor be seen from a public place or from another private place."[127] Section 854(1)(A)(2) of the same statute makes it a crime when, in *public*, an actor "knowingly exposes the actor's genitals under circumstances that in fact are likely to cause affront or alarm."[128] While section 854(1)(B), under which Legassie was prosecuted, contains no "affront or alarm" requirement for the victim,[129] the in-public provision of the same statute does.[130] The court ultimately determined that Legassie's conduct was not indecent exposure because the record contained "no evidence of any in-person contact that formed the basis of the alleged crimes"[131] and because that interpretation of the statute would "criminalize private behavior between consenting adults."[132] The court expressed concern that criminalizing exposure through digital means under section 854(1)(B) would "present serious constitutional problems because [it] contains no 'affront or alarm' requirement."[133] Although the alleged cyber-flashing did not qualify as indecent exposure,[134] the court's holding indicates that Legassie's

123. Mark A. Lemley & Eugene Volokh, *Law, Virtual Reality, and Augmented Reality*, 166 U. PA. L. REV. 1051, 1077 (2018).

124. *Id.*

125. *See* discussion *infra* Section III.B.

126. State v. Legassie, 171 A.3d 589, 591, 596 (Me. 2017).

127. *Id.* at 592; ME. REV. STAT. ANN. tit. 17-A, § 854(1)(B) (West 2006) (emphasis added).

128. § 854(1)(A)(2).

129. *Id.* § 854(1)(B).

130. *Id.* § 854(1)(A)(2).

131. *Legassie*, 171 A.3d at 591–92.

132. *Id.* at 596; *see also* Eugene Volokh, *Sending Nude Selfies Doesn't Qualify as 'Indecent Exposure,' Says Maine High Court*, WASH. POST (Oct. 5, 2017, 4:44 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/05/sending-nude-selfies-doesnt-qualify-as-indecent-exposure-says-maine-high-court/ [https://perma.cc/2GS8-LYM3].

133. *Legassie*, 171 A.3d at 596.

134. *Id.*

conduct would likely have qualified if the statute contained an "affront or alarm" element.

Most indecent exposure statutes contain "affront or alarm" language.[135] While section 21.19 contains a non-consent requirement, it lacks an "affront or alarm" element.[136] Section 21.19 has been criticized as unconstitutional as is, but would a Texas court find that sending unsolicited sexually explicit material to another person qualifies as indecent exposure, if section 21.19 had an "affront or alarm" requirement? Based on *Legassie*, it appears so. However, some courts have upheld indecent exposure statutes with non-consent requirements alone, which would work in section 21.19's favor without alteration.[137] In *Legassie*, the court indicated that the constitutionality of Maine's indecent exposure statute hinged on the presence of an "affront or alarm" requirement.[138] Thus, "affront or alarm" requirements are a way that indecent exposure statutes—and potentially similar statutes—can survive First Amendment challenges. For example, New York City's proposed cyber-flashing bill criminalizes cyber-flashing committed "with intent to harass, annoy or alarm" the recipient.[139]

The current landscape of indecent exposure law in Texas and elsewhere has significant implications for cyber-flashing. As discussed, cyber-flashing is essentially equivalent to indecent exposure, albeit in an online rather than in-person format. Application of section 21.08 shows that Texas courts are willing to extend indecent exposure law to its outer limits. Because they have held that indecent exposure need not necessarily take place in public, cyber-flashing could very well fall near, if not within, the parameters of our current understanding of indecent exposure jurisprudence. Outcomes such as these illustrate courts' broad interest in prohibiting indecent exposure and beg the question of whether cyber-flashing is a form of indecent exposure that can, and should, be regulated as such.

Ultimately, the similarities between cyber-flashing and indecent exposure are difficult to ignore. Whitney Wolfe Herd compared the two in a hearing with the Texas House Criminal Jurisprudence Committee when lobbying for section 21.19's enactment: "If indecent exposure is a crime on the streets, then why is it not on your phone or computer?"[140] Additionally, Representative Morgan Meyer argued that "if a person commits indecent exposure, it is a crime. . . . But if that same person engages in such an act over texting or a dating app, the

135. *See* Amicus Brief, *supra* note 70, app. at 1a–76a.

136. TEX. PENAL CODE ANN. § 21.19.

137. *See* State v. Galbreath, 419 P.2d 800, 802–03 (Wash. 1966).

138. *See Legassie*, 171 A.3d at 595–96.

139. N.Y.C. Council Int. No. 1244 (2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3763643&GUID=F06C28F9-16D1-4DDA-82D7-372C94B8E84D [https://perma.cc/B6H5-TEXE] (quoting bill summary).

140. Cobler, *supra* note 1.

unwanting recipient has absolutely no recourse."[141] Thus, lawmakers introduced section 21.19 to provide such recourse with the view that cyber-flashing is a form of online indecent exposure that should be punishable and preventable by law—just like its physical counterpart.

B. *The True Threat Doctrine*

While most categories of speech are either protected or subject to reduced protection, some categories do not fall within the First Amendment's protection at all.[142] One category is "true threats."[143] The true threat doctrine permits the government to enforce regulations of, and prohibit, speech that conveys threats of violence against an individual.[144] A true threat exists when the speaker "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[145] A speaker need not intend to actually carry out the threat; the true threat exception is meant to protect the listener from fear of violence.[146] The speaker must only intentionally or knowingly communicate the threat.[147] Intimidation is a type of true threat that is not protected by the First Amendment, wherein a speaker directs a threat toward another person with the "intent of placing the victim in fear of bodily harm or death."[148] States may prohibit intimidating behavior so long as it is not criminalized solely on the basis that society finds it offensive.[149] The Supreme Court has set forth three reasons why the First Amendment does not protect threats of violence: to protect individuals "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[150] True threat litigation has increased in recent years, with many threats arising from social media and the internet.[151]

As previously discussed, most indecent exposure statutes contain an "affront or alarm" element.[152] Because these statutory requirements serve to prevent and punish lewd behavior that alarms or offends a victim, "affront or alarm" requirements are in effect practical applications of the true threat doctrine. Victims who are alarmed by indecent

141. *Id.*
142. KILLION, *supra* note 60.
143. *Id.*; Watts v. United States, 394 U.S. 705, 708 (1969).
144. Virginia v. Black, 538 U.S. 343, 359 (2003) (citing *Watts*, 394 U.S. at 708).
145. *Id.*
146. *Id.* at 359–60; Ana Vieira Ayala, *Hate Speech Is Free Speech but Free Speech Is Not Absolute*, 81 TEX. BAR J. 330, 330 (2018).
147. *See Black*, 538 U.S. at 359.
148. *Id.* at 360.
149. *Id.* at 358.
150. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).
151. Alison J. Best, Elonis v. United States*: The Need to Uphold Individual Rights to Free Speech While Protecting Victims of Online True Threats*, 75 MD. L. REV. 1127, 1127 (2016); David L. Hudson, Jr., *Threatening Words*, 104 A.B.A. J. 56, 57 (2018).
152. *See* Amicus Brief, *supra* note 70, app. at 1a–76a.

exposure often fear physical harm by the offender—and thus feel that the act is a potential threat of violence. Some indecent exposure statutes even contain an explicit threat element.[153] For example, in Alaska, a person commits indecent exposure in the second degree when he knowingly exposes his genitals "with reckless disregard for the . . . frightening effect the act may have."[154] An indecent exposer placing an individual in fear of violence by alarming or affronting her is exactly the type of conduct the true threat doctrine aims to prevent. Indecent exposure can be regulated by the government, both statutorily and constitutionally—because the First Amendment does not protect threats of violence.[155]

III. Applying the True Threat Doctrine to Section 21.19

A. *The True Threat Intent Standard in an Online Era*

Because section 21.19 criminalizes behavior, an individual must have the statute's requisite *mens rea* to be convicted of cyber-flashing. Criminal laws require that a defendant act with a minimum level of intent.[156] Statutes generally contain either a specific (or subjective) intent or a general intent standard.[157] If criminal statutes do not explicitly mandate a level of intent and carry the risk of criminalizing innocent behavior, courts interpreting them should infer a required subjective intent.[158] Section 21.19 requires only that a person "knowingly transmits" a sexually explicit image to another person[159]—so what is the intent standard when viewing section 21.19 under a true threat theory?

For true threats, a general intent standard requires only that a reasonable person would interpret a communication as a threat.[160] A specific intent standard requires that the speaker intended the communication as a threat or that he should have foreseen his communication would be viewed as one.[161] Circuits are split on what intent standard to use for true threat analysis.[162] Despite a general lack of explicit intent requirements in true threat-applicable statutes, most circuits favor a general intent, or reasonable listener test, while a few circuits have adopted a specific intent or reasonable speaker test.[163] The Fifth Circuit—and Texas courts—utilize a reasonable listener

153. *See, e.g.*, Alaska Stat. § 11.41.460 (2018).
154. *Id.*
155. *R.A.V.*, 505 U.S. at 388.
156. Morissette v. United States, 342 U.S. 246, 250–51 (1952).
157. *See id.* at 252; *see also* Liparota v. United States, 471 U.S. 419, 423 n.5 (1985); Staples v. United States, 511 U.S. 600, 605 (1994).
158. *See Liparota*, 471 U.S. at 425–26; *Staples*, 511 U.S. at 605–06.
159. Texas Pen. Code Ann. § 21.19(b).
160. Best, *supra* note 151, at 1132.
161. *See id.* at 1132–33, 1156.
162. *Id.* at 1140.
163. *Id.* at 1140–41.

standard.[164] Under a reasonable listener standard, the speaker need not intend his speech to be an expression of violence—the only requirement is that a reasonable listener understands the speech to be a threat.[165]

In *Elonis v. United States*, the Supreme Court missed an opportunity to address an intent requirement for true threats, particularly in regard to online communication.[166] The Court examined Anthony Elonis's convictions under 18 U.S.C. § 875(c) for making true threats on Facebook to his ex-wife, his former co-workers, law enforcement officers, elementary school children, and an FBI agent.[167] A person commits a felony and may be imprisoned for up to five years under § 875(c) if he "transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another."[168] The statute "prohibits the communication of true threats to speech transmitted through online social networking."[169] The statute requires both that a communication is transmitted and that it contains a threat, but does not specify a particular intent requirement.[170] Elonis's Facebook posts consisted of violent rap lyrics, which appeared targeted at certain individuals.[171] Elonis claimed that his statements online were "therapeutic" and allowed him to express his feelings, but were not directed at any real persons.[172] However, Elonis's ex-wife and co-workers considered his online posts genuine threats and testified that they were afraid of him.[173] Elonis was convicted in the district court on four of five counts and appealed on the basis that the jury instructions should have required a finding that he actually intended his Facebook posts to be true threats.[174]

The Third Circuit Court of Appeals declined application of a subjective intent standard and instead determined that the proper standard was "the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat."[175] The Supreme Court granted certiorari to decide the appropriate intent standard for a true threat under § 875(c),[176] and ultimately re-

164. *See* Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 616–17 (5th Cir. 2004).
165. Best, *supra* note 151, at 1140–41.
166. *See* Elonis v. United States, 135 S. Ct. 2001 (2015).
167. *Id.* at 2004–07.
168. 18 U.S.C. § 875(c); *Elonis*, 135 S. Ct. at 2008; *see* 18 U.S.C. § 3559(a)(5) (classifying statutes with max imprisonment terms of less than five years but more than one year as a felony).
169. Best, *supra* note 151, at 1128; *see also Elonis*, 135 S. Ct. at 2008.
170. *Elonis*, 135 S. Ct. at 2008.
171. *Id.* at 2005–07.
172. *Id.* at 2005.
173. *Id.* at 2007.
174. *Id.*
175. *Id.* (summarizing the lower court's decision).
176. United States v. Elonis, 134 S. Ct. 2819 (2014) (mem.) (granting certiorari).

versed the Third Circuit's decision, holding that some level of intent beyond general intent was required to convict Elonis.[177] The Court held that it was not sufficient that a reasonable person would have viewed Elonis's Facebook posts as threats because this level of intent may result in criminalizing innocent conduct.[178] Citing precedent, the Court broadly construed the statute to require a more specific level of intent, even though the statute was silent on the matter.[179] However, the Court failed to specify a definite standard beyond general intent that was necessary for conviction under § 875(c).[180] Additionally, the Court ruled narrowly, limiting its holding to application of § 875(c), and declined to address any First Amendment issues.[181] In doing so, the Court failed to clarify a definitive intent standard for true threats generally.[182]

Because the *Elonis* Court failed to set out a concrete, universal standard, lower courts will likely continue to use different intent standards in interpreting true threats under First Amendment analysis, especially in regard to online communication and social media.[183] The leniency of the intent requirement for true threats will likely work in section 21.19's favor and allow for the statute to apply to a broader range of cyber-flashing cases, at least until (or if) the Supreme Court revisits the issue. Because the Fifth Circuit and Texas courts use a general intent, or reasonable listener standard, many individuals who send unsolicited explicit photos likely meet the true threat intent standard, whether or not they actually intend the images to threaten or intimidate the recipient. Under the true threat doctrine, Texas courts analyzing section 21.19 need only find that the sender intentionally sent an unsolicited explicit image and that a recipient reasonably felt threatened or intimidated by it.

B. *Crossing the Line: Cyber-Flashing as a Threat*

Recipients of unsolicited and unconsented-to explicit sexual images report feeling a variety of emotions: disgust, humor, pity, sadness.[184] Some feel indifferent. But many feel angry, intruded upon, and vio-

177. *Elonis*, 135 S. Ct. at 2012.
178. *Id.*
179. *Id.* at 2009–10.
180. Best, *supra* note 151, at 1144.
181. *Elonis*, 135 S. Ct. at 2012–13.
182. *See id.*; *see id.* at 2013–14 (Alito, J., concurring).
183. Best, *supra* note 151, at 1128.
184. Simon Doherty, *This Study Reveals Some Embarrassing Truths About Dick Pic Senders*, VICE (Aug. 1, 2019, 6:50 AM), https://www.vice.com/en_ca/article/qv7ggv/dick-pics-why-men-send [https://perma.cc/3TXN-M2MV]; Sophie Gallagher, *Cyber Flashing: 70 Women on What It's Like to Be Sent Unsolicited Dick Pics*, HUFFPOST, https://www.huffingtonpost.co.uk/entry/cyberflashing-70-women-on-what-its-like-to-be-sent-unsolicited-dick-pics_uk_5cd59005e4b0705e47db0195 (July 12, 2019) [https://perma.cc/4LWL-VSQM].

lated.[185] Many victims are genuinely upset by cyber-flashing and feel that it compromises their privacy.[186] But where does cyber-flashing cross the line from being merely an annoyance or upsetting to being an actual or perceived threat?

One increasingly common situation where recipients of unsolicited explicit images feel unsafe, unsettled, and even threatened occurs when they are cyber-flashed via AirDrop in public places.[187] AirDrop is a feature on iPhones and other Apple products that allows a user to instantly send or receive photos and other content to and from other Apple users who are physically close.[188] AirDrop enables the transfer of information using Wi-Fi and Bluetooth.[189] When an image is sent via AirDrop, a preview window appears on the recipient's phone or device.[190] Anyone with the AirDrop feature turned "on" and set to "everyone" will receive a notification if he or she is within thirty feet of the sender and the sender chooses to send an image to his or her phone.[191] Because of the preview feature, there is no way to decline or reject an image before the recipient views it.[192] Another characteristic of AirDrop is that a sender can transmit content without revealing his or her identity.[193] Essentially, a sender can share an "AirDropped" image without the recipient's consent; even when a recipient declines the image, he or she has still been forced to view it.

Often, AirDrop cyber-flashing occurs on public transit.[194] Because recipients know they are in physical proximity to the sender, many fear that the sender will "take the harassment from [the] phone to real life."[195] For example, one victim who was riding the Washington, D.C. Metro when she was cyber-flashed expressed concern with "the notion that whoever sent her the lewd photo was somewhere near her."[196] The victim stated: "If someone is willing to do that, that's not a person that I necessarily want to be in a metal tube under the ground with . . . ."[197] In response, a spokesperson said that the Metro encourages the public to change their AirDrop settings to "off" or "contacts

185. Doherty, *supra* note 184.
186. *See id.*
187. *See* Palermino, *supra* note 45.
188. Caroline Knorr, *What's AirDrop and Why Are Kids Using It?*, HUFFPOST (Mar. 19, 2019, 11:00 AM), https://www.huffpost.com/entry/airdrop-kids-file-sharing-iphones_l_5c8c3188e4b02591c26ab02a [https://perma.cc/Y2Z4-ACQ8].
189. *Id.*
190. *Id.*
191. *Id.*
192. North, *supra* note 28.
193. *Id.*
194. Rachel Kurzius, *Someone AirDropped a Woman an Unsolicited Dick Pic During Her Metro Commute*, DCIST (Mar. 11, 2019, 2:59 PM), https://dcist.com/story/19/03/11/someone-airdropped-a-woman-an-unsolicited-dick-pic-during-her-metro-commute/ [https://perma.cc/U5QX-BR6F].
195. Palermino, *supra* note 45.
196. Kurzius, *supra* note 194.
197. *Id.*

only" while travelling to avoid being cyber-flashed.[198] Other victims have received similar advice.[199] Some report that routinely ensuring AirDrop, which many set to "everyone" for work or other purposes, is set to "contacts only" is part of their checklist for their commutes home.[200] Some women change the "name" of their phone that appears to the public for AirDrop purposes to men's names to prevent cyber-flashing—and it works.[201] But should the onus be on victims to take action against cyber-flashing? Victims argue that "women don't need another 'to-do' to keep . . . from getting harassed."[202] Others express anger: "Why should I have to stop using my phone how I want? . . . I hate that men control how I behave."[203] This sort of response is victim-blaming, by focusing on what the victim should have done to prevent the cyber-flashing rather than the actions of the perpetrator.[204]

The fear of an AirDrop cyber-flasher taking harassment from the phone to real life is exactly the same concern embedded in indecent exposure statutes—the fear that an exposer might move on to a physical or sexual assault. As one woman stated: "How do I know the guy is not going to get violent if I speak up?"[205] Many victims view cyber-flashing as sexual harassment and even sexual violence, especially when it takes place within physical proximity.[206] Additionally, many AirDrop cyber-flashing victims believe that the sender's intent is to upset, alarm, or intimidate the recipients and to get a reaction from them.[207] Many women feel specifically targeted.[208] Cyber-flashing victims also report feeling uncomfortable or unsafe to the extent that they change train cars or take alternate routes home to avoid both being cyber-flashed generally and being in physical proximity to a sender.[209] Some women even fear that the sender may be watching them or may follow them off a train or bus.[210] One woman who was cyber-flashed at a train station reported that the sender slowly approached her while repeatedly sending her explicit images, maintain-

198. *Id.*

199. *Id.*

200. Palermino, *supra* note 45.

201. Sophie Gallagher, *Would You Rename Your Phone to Avoid Unsolicited Dick Pics? This Woman Did*, HUFFPOST (Oct. 30, 2018, 6:00 AM), https://www.huffingtonpost.co.uk/entry/it-has-become-second-nature-to-protect-myself-these-women-are-changing-their-behaviour-to-avoid-becoming-victims-of-cyberflashing_uk_5bd6d0f8e4b0a8f17ef9778a [https://perma.cc/93G8-DXVX].

202. Palermino, *supra* note 45.

203. Gallagher, *supra* note 201.

204. Thompson, *supra* note 51.

205. Gallagher, *supra* note 184.

206. *See id.*

207. *Id.*; Palermino, *supra* note 45.

208. Gallagher, *supra* note 184; Thompson, *supra* note 51.

209. Palermino, *supra* note 45; Gallagher, *supra* note 201.

210. Gallagher, *supra* note 184.

ing eye contact, and waiting for her reaction.[211] Later, as she boarded her train, she saw the man had followed her and was watching her.[212]

Another major concern occurs when the volume or frequency of unsolicited sexually explicit images disrupts a recipient's daily life or makes a recipient fear for her safety. Women who receive AirDropped explicit images during their commutes often decline the images, only to have them reappear on their screens—again and again.[213] Despite recipients declining the images, the cyber-flashers in these cases continuously sent explicit photos, in one case with such frequency that the victim could not access her settings screen to turn off the AirDrop feature.[214] The same victim reported that the sender's physical proximity and persistence made her feel violated and unsettled.[215] One Texas woman moved to a new address and changed her phone number out of fear because she continuously received unsolicited sexually explicit photos from strangers—hundreds of them.[216] She filed a police report and blocked the senders but said there was nothing else she could do because the senders continued to make new accounts with which to send her the images.[217] She expressed concern that cyber-flashing at this level of intensity is a threat to victims' safety: "It goes unnoticed until something happens to the person."[218] Effectively, high-volume cyber-flashing is very similar to stalking.[219] In Texas, stalking is a felony crime.[220] A person is guilty of stalking under Texas Penal Code section 42.072 when he knowingly and repeatedly engages in conduct targeted at a specific person, which he "knows or reasonably should know the other person will regard as threatening," and that would cause a reasonable person to feel threatened.[221] Section 42.072 illustrates Texas lawmakers' concern with preventing and punishing crimes in which victims feel threatened or harassed. Texas has a substantial interest in regulating behavior with these consequences—consequences that also result from cyber-flashing.

211. Sophie Gallagher, *'He Was Staring at Me Across the Concourse, His Hands Were Shaking': Why Cyber Flashing Isn't Just a Digital Problem*, HUFFPOST, https://www.huffingtonpost.co.uk/entry/he-was-staring-at-me-across-the-concourse-his-hands-were-shaking-why-cyberflashing-isnt-just-a-digital-problem_uk_5ca1ca0de4b0bc0dacab0dd0?utm_hp_ref=UK-cyberflashing (July 12, 2019) [https://perma.cc/J9CC-UCEN].

212. *Id.*

213. Thompson, *supra* note 51.

214. *Id.*

215. *Id.*

216. Cruz, *supra* note 31.

217. *Id.*

218. *Id.*

219. *See* Asher Flynn, *Cyberflashing – Old-Style Sexual Harassment for the Digital Age*, MONASH UNIV. (Sept. 6, 2019), https://lens.monash.edu/@politics-society/2019/09/06/1376441/cyberflashing-the-latest-form-of-digital-sexual-harassment [https://perma.cc/FX2S-BWR3].

220. TEX. PENAL CODE ANN. § 42.072(b).

221. *See id.* § 42.072(a).

Much dialogue surrounding this issue indicates that victims perceive cyber-flashing as sexual harassment, and ultimately, a threat to their safety. Even many men who send sexually explicit images believe that women find cyber-flashing an uncomfortable experience.[222] In one study, 29% of men who sent dick pics said they believe women find them distressing, while 24% said they believe women find them threatening.[223] Laura Thompson, a researcher who investigates online abuse and harassment, says that women are taught to protect themselves from sexual harm and that such "safety work" is a "never-ending task."[224] She says this impacts women's "freedom, sense of security, and ability to occupy public spaces," and argues that because bad actors can now use digital communication methods to harass via "image-based sexual offences, this unjust burden on women is growing."[225] Organizations that focus on awareness and prevention of gender-based violence have pushed for the criminalization of cyber-flashing.[226] Even Whitney Wolfe Herd, the driving force behind section 21.19, expressed that the statute's purpose in part is to address "the safety of young adults . . . using technology."[227] Many women believe that cyber-flashing feels more targeted and personal than run-of-the-mill street harassment, ultimately making it feel more threatening.[228] Many, if not most, women who have been cyber-flashed have not reported the incident.[229] They believe it will not be taken seriously or will be dismissed as a prank.[230] However, many victims say that if cyber-flashing was prohibited by law, they would be much more likely to report it;[231] and now, in Texas, they have the opportunity to do so. Cyber-flashing is more than a mere annoyance and is something to be taken seriously—conduct that is forcing victims to alter their own behavior to avoid uncomfortable or unsafe situations. Ultimately, the litany of dialogue on cyber-flashing and its consequences shows that the act of cyber-flashing contains a significant threat element, even if not *all* recipients of unsolicited sexually explicit images report feeling threatened or intimidated.

222. Matthew Smith, *Four in Ten Female Millennials Have Been Sent an Unsolicited Penis Photo*, YouGov (Feb. 15, 2018, 6:00 PM), https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic [https://perma.cc/E4CX-4E3D].

223. *Id.*

224. *Researcher Discusses 'Unjust Burden'*, *supra* note 27.

225. *Id.*

226. *See, e.g.*, *Previous Campaigns*, THE EMPOWER PROJECT, https://www.theempowerproject.co.uk/prevcampaigns [https://perma.cc/ZUV8-35SU].

227. Cobler, *supra* note 1.

228. Gallagher, *supra* note 201.

229. *See* Gallagher, *supra* note 184.

230. Gil, *supra* note 3.

231. Gallagher, *supra* note 201; Gallagher, *supra* note 184.

C. *Constitutionality of Section 21.19 Under the True Threat Doctrine*

The threat element embedded in cyber-flashing emerges from the perception that cyber-flashing is a form of sexual harassment and sexual violence. Section 21.19 was enacted to address these issues and protect individuals from unsolicited sexually explicit material and the fears that come with it. Thus, section 21.19 is likely constitutional under the true threat doctrine.

Even without considering cyber-flashing as threatening conduct, it likely already has reduced First Amendment protection, because it involves both nudity and foisting unsolicited sexually explicit material on another individual. Cyber-flashing is indecent speech that is socially undesirable and offensive—which alone does not justify its suppression.[232] However, the Supreme Court has held that regulating indecency or nudity to further a substantial and legitimate government interest in "protecting order and morality" is permissible, whether or not it may have expressive qualities.[233] Because such indecency is "certainly [an] area[] of respectable and substantial governmental interest,"[234] the Texas government may prevent the physical act of indecent exposure; therefore, Texas may similarly prevent acts like cyber-flashing. Notably, the court in *Kew v. Senter* doubted whether any ideas or speech protected by the First Amendment could be solely or best expressed through exposing genitals to another person in a sexually explicit manner prohibited by statute.[235] While transmitting sexually explicit images to another person via cyber-flashing may have some expressive value, section 21.19 specifically targets indecent conduct and physical exposure through digital means; it does not aim to curb any potential expressive quality of the images.[236] While perhaps there is some expressive speech that cyber-flashing conveys—for example, expression of a romantic interest—the government's substantial and legitimate interest in regulating the indecent conduct itself "justif[ies the] incidental limitations on First Amendment freedoms."[237]

Because many individuals consider cyber-flashing a threatening or intimidating experience, and because it is likely already subject to reduced First Amendment protections—"within [its] outer perimeters"[238]—regulation of cyber-flashing by section 21.19 is likely

232. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

233. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569, 571–72 (1991).

234. Kew v. Senter, 416 F. Supp. 1101, 1105 (N.D. Tex. 1976).

235. *Id.*

236. *See* TEX. PENAL CODE ANN. § 21.19.

237. United States v. O'Brien, 391 U.S. 367, 376 (1968).

238. *Barnes*, 501 U.S. at 566.

constitutional under the true threat doctrine. Under current Texas law, a "reasonable listener" need only reasonably believe that speech is a threat in order for regulation to be permissible. Many cyber-flashing victims reasonably interpret sexually explicit images they receive to be threats of violence or intimidation, whether because they receive such images in a particular location or manner, or even from a particular individual. Even if such indecent speech may have expressive value, Texas has a substantial interest in regulating and prohibiting such behavior to protect cyber-flashing victims from fear of violence, just as it does with physical indecent exposure. Thus, section 21.19's regulation of cyber-flashing is very likely permissible and constitutional under the true threat doctrine.

IV. Improving the Constitutionality of Section 21.19

Although section 21.19 is likely constitutional under the true threat doctrine, in the alternative, Texas could amend the statute's language to better ensure it survives constitutional challenges by adding an "affront or alarm" requirement. This element is a commonality among indecent exposure statutes, which typically survive First Amendment challenges. Such a requirement could help strengthen section 21.19 against First Amendment attacks while ensuring the goals of preventing and punishing cyber-flashing are met.

While section 21.19 contains an existing non-consent element, there are no guarantees that this provision will alone ensure its constitutionality.[239] To err on the side of caution, Texas could amend the statute to add an "affront or alarm" requirement similar to the proposed cyber-flashing bill in New York City or Texas's own section 21.08 indecent exposure statute. For example, section 21.19 could implement "recklessness" language similar to section 21.08, such as:

> A person commits an offense if he knowingly transmits by electronic means sexually explicit content that is not sent at the request or with the express consent of the recipient and is reckless about whether another person will be offended or alarmed by his act.

Or Texas could adopt intent-based language resembling the New York City cyber-flashing bill, which would criminalize "send[ing] an unsolicited sexually explicit video or image to another person with intent to harass, annoy or alarm such other person."[240] Both a recklessness requirement and an intent requirement present viable options to ensure section 21.19's constitutionality.

239. *See* Miller v. California, 413 U.S. 15, 27 (1973).

240. N.Y.C. Council Int. No. 1244 (2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3763643&GUID=F06C28F9-16D1-4DDA-82D7-372C94B8E84D [https://perma.cc/B6H5-TEXE] (quoting bill summary).

V. Conclusion

As technology and online communication continue to evolve, legislatures and courts are struggling to determine the government's role in regulating social media and the digital world. Cyber-flashing has become commonplace; most people have probably either been cyber-flashed or know someone who has. Just as many new statutes are introduced to address novel issues, Texas's section 21.19 was enacted to combat a growing new problem in modern society. While it is now socially acceptable to consensually share intimate and sexually explicit images through digital communication, a serious problem arises when a person transmits such images without solicitation or the recipient's consent. Unsolicited sharing of sexually explicit material is not viewed in the same manner as consensual sharing—so it should not be treated the same either. Cyber-flashing victims view it as sexual harassment and even as a form of sexual violence, and many feel intimidated, distressed, and threatened by it.

Although critics argue that section 21.19 may be unconstitutional as a restriction on free speech, speech which conveys threats of violence against individuals is not protected by the First Amendment—and thus can be regulated by state governments. Most women who report feeling threatened by cyber-flashing are likely reasonable in that belief, which is all the law requires in Texas to regulate speech under the true threat doctrine. And even if section 21.19 is found to violate the First Amendment as is, legislators can codify an "affront or alarm" requirement similar to those in indecent exposure statutes to ensure its constitutionality. Ultimately, the purposes of the true threat doctrine are reflected in section 21.19 and the Texas government's decision to regulate cyber-flashing: to protect individuals "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[241] As one of the first states to enact a cyber-flashing law, Texas has taken a stance, asserted that this type of behavior will not be taken lightly, and set an example for other states that may want to follow suit in enacting legislation to combat cyber-flashing.

241. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).