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# Text but Don't Touch: Making (Non)Sense of Texas Teacher-Student Relationships

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# TEXT BUT DON'T TOUCH: MAKING (NON)SENSE OF TEXAS TEACHER-STUDENT RELATIONSHIPS

By: Paul Elkins\*

## ABSTRACT

*Young people, especially those enrolled in primary and secondary schools, are particularly susceptible to being taken advantage of by people they trust. Section 21.12 of the Texas Penal Code criminalizes improper relationships between educators and students in an effort to prevent the mental and physical harm that occurs when school employees use their classrooms as pools from which to choose potential sexual encounters. While few would argue that such a purpose is not well-intentioned, the law as it currently stands falls far short of criminalizing predatory behavior only where a position of authority has been abused. Rather, the Improper Relationship Statute's current language actually has the potential to punish most certified school employees, regardless of whether the employee actually teaches in a classroom on a regular basis or has any regular interaction with the student that may be involved. Furthermore, the Improper Relationship Statute's language goes beyond the walls of the teachers' own classrooms—and even their own schools—by extending the prohibition to all students within the entire school district.*

*Despite numerous amendments since the Improper Relationship Statute's enactment, no amendments have narrowed the Improper Relationship Statute's language so as to reach only those offenders who use their position of power to elicit a relationship with a student. As a result, the Improper Relationship Statute not only fails in specifically targeting the originally intended perpetrator—a predatory teacher—it also carries far greater consequences than necessary to accomplish its appropriate purpose.*

*This Comment proposes changes to the language of the Improper Relationship Statute that will lessen the overreaching nature of the current language by adding an abuse-of-authority component. Although this proposal is not without its shortcomings, it puts the focus of the prohibited conduct on the relationship between the accused and the student and not simply the accused's profession.*

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## I. INTRODUCTION

Over the past several years, much has been written, discussed, and “Google’d” about improper relationships between Texas teachers and their students, and it only seems to be increasing.<sup>1</sup> It is unlikely that an average weekly news cycle does not include at least some mention of an investigation into an allegedly inappropriate relationship between a teacher and a student. In fact, Texas reportedly leads the nation in number of improper-relationship cases.<sup>2</sup> While the ever-increasing availability to access such stories—via the Internet, social media, and mobile devices—is a subject warranting discussion on its own, the growing number of improper-relationship cases inevitably leads to one place: a courtroom.

The Texas Legislature passed section 21.12 of the Texas Penal Code (the Improper Relationship Statute) in 2003.<sup>3</sup> The language has been amended three times since its passing, and the purpose of the majority of those amendments was to enlarge the scope and breadth of the Improper Relationship Statute, not only in terms of *whose* conduct is covered under the Improper Relationship Statute, but also *what* actions are covered.<sup>4</sup> As will be shown, the Improper Relationship Statute’s coverage is fairly broad and covers everything from “sexting”<sup>5</sup> to

1. *Interest over Time*, GOOGLE TRENDS, <http://www.google.com/trends/explore#q=texas%20student%20teacher%20sex&cmpt=q> (last visited Dec. 29, 2013).

2. Tiffany Craig, *Texas Ranks No. 1 in Inappropriate Student-Teacher Relationships*, KHOU.COM (Mar. 26, 2013), <http://www.khou.com/news/texas-news/Texas-ranks-No-1-in-inappropriate-student-teacher-relationships-200151691.html>.

3. TEX. PENAL CODE ANN. § 21.12 (West 2003).

4. *See infra* Part II.A.

5. Due to the Texas Court of Criminal Appeals’s recent decision in *Ex Parte Lo*, it is unclear whether certain types of online communication are prohibited. *See gener-*

intercourse.<sup>6</sup> Oddly, despite its breadth of coverage, the Improper Relationship Statute does not encompass such actions as improper photography and visual recording.<sup>7</sup> Additionally, a conviction solely under the Improper Relationship Statute does not necessarily include registration as a sex offender, which generally occurs as part of the punishment for sexual offenses.<sup>8</sup>

An obvious limit of this Comment is the lack of data available for discussion on the topic of the Improper Relationship Statute at the trial-court level. While the cases dealing with the Improper Relationship Statute are usually widely covered in local news outlets, there is no central database listing such trial-court information specifically. Even though the cases given here are not an exhaustive list, they provide relevant background information and context for the function of the Improper Relationship Statute within the Texas court system.

Despite its shortcomings, the Improper Relationship Statute's language can be improved to increase its effectiveness in reaching the class of offenders that it should target. Minor changes to the Improper Relationship Statute's language can also decrease the ability of prosecutors and juries to charge and convict those participating in consensual, adult relationships.

The recent case of Brittnei Colleps—a Kennedale school teacher found guilty under the Improper Relationship Statute and sentenced to five years in prison after having sex with multiple students that were all above the age of consent<sup>9</sup>—shows an example of a possible trend that could place adults engaging in consensual sexual activities in prison. While this arguably raises Constitutional issues relating to *Lawrence v. Texas*,<sup>10</sup> this Comment will not discuss those issues. That case is mentioned here to show that the Author understands that crafting a perfect statute is not realistic. On the one hand, the case demonstrates an example of a complete lack of professional behavior demonstrated by an educator. Regardless of one's moral, ethical, or religious convictions, almost everyone would likely agree that a teacher engaging in sexual activities with multiple students at the same time is improper behavior to say the absolute least, especially when one of the students is a student currently in that teacher's class-

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ally *Ex Parte Lo*, \_\_\_ S.W.3d \_\_\_, 2013 WL 5807802 (Tex. Crim. App. Oct. 20, 2013). The effect that this may have on the Improper Relationship Statute is discussed in Part III.B *infra*.

6. *See infra* Part II.B.

7. *See infra* Part II.C.

8. *Id.*

9. Deanna Boyd, *Ex-Kennedale Teacher Gets Five Years in Prison for Having Sex with Students*, STAR-TELEGRAM.COM (Aug. 17, 2012), <http://www.star-telegram.com/2012/08/17/4187869/jurors-began-deliberating-in-sex.html>.

10. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding a Texas statute making it a crime for two persons of same sex to engage in certain sexual conduct unconstitutional).

room. Most people would also likely agree that such behavior constitutes a legitimate reason for professional termination. However, determining when behavior changes from professionally improper to criminally punishable proves to be a difficult line to draw. Specifically in the case of Brittni Colleps, some people may reasonably argue that, because all the students involved were at or above the age of consent, no criminal penalties should be involved at all.

To further show the difficulty in drafting appropriate legislation, contrast the case of Brittni Colleps with the following hypothetical. A twenty-two year old, Sally, begins her first year of teaching at a middle school as a speech pathologist. While at a party of a mutual friend, she meets an eighteen-year-old male, John, who is in his final year of high school. Sally and John get to know each other and soon begin dating, which eventually turns into a sexual relationship. Under the current language of the Improper Relationship Statute, Sally could be charged and convicted of a felony and sentenced up to ten years in prison. Because a speech pathologist is covered under the language of the Improper Relationship Statute, all that is necessary for this hypothetical to be true is that John attends a school within the same school district that employs Sally and that she knows that John goes to that high school. Although the above example may be disregarded as extreme or merely theoretical, the fact that this scenario is directly covered within the language of the Improper Relationship Statute—and treated exactly the same as the scenario involving Brittni Colleps—shows the trouble with the Improper Relationship Statute’s current language. While some people may argue that a teacher engaging in sexual activities with multiple students at the same time is criminal behavior regardless of the students’ ages, many more people would likely say that a consensual relationship between a twenty-two year old and an eighteen year old does not warrant the same criminal culpability, if any at all.<sup>11</sup>

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11. Note that the only reason Sally’s behavior can be criminally punishable in this scenario is because of her profession. The same activity is not punishable under Texas statutory rape laws, which apply only when the alleged victim is “younger than 17 years of age.” TEX. PENAL CODE ANN. § 21.11 (West 2013). The biggest differences between the Improper Relationship Statute and the statutory rape law mainly involve the two laws’ punishments and not their requirements for culpability.

The examples given in this Comment discuss scenarios of a female “perpetrator” and a male “victim.” This is intentional. In reality, the number of females prosecuted under the Improper Relationship Statute is likely higher than males simply as a result of the fact that female primary and secondary educators outnumber male educators. *Teacher Trends*, Nat’l Ctr. Educ. Statistics (2010), <https://nces.ed.gov/fastfacts/display.asp?id=28> (“Among full-time and part-time public school teachers in 2007–08, some 76 percent of public school teachers were female.”). Without hard data—no comprehensive studies on the subject have been found by the Author—it is difficult to determine whether the appearance that more females are prosecuted than males is a result of the implicit difference in denominators (more female than male secondary-level teachers), a propensity of females to engage younger males, or simply the addi-

Until recent amendments, the Improper Relationship Statute contained no age-range exception that excludes from prosecution an employee that is within a certain number of years of age to the student. However, the largest shortcoming of the Improper Relationship Statute is that it contains no requirement of an abuse-of-authority relationship as an element to the crime. In fact, the language of the Improper Relationship Statute leaves out any requirement that the relationship between the student and the teacher be the result of the student's education other than that the student attends a school within the same school district in which the teacher works.

Although a detailed history of section 33.02 of the Texas Penal Code (the Online Solicitation Statute) will not be given here, its mention is important due to its relevance to the Improper Relationship Statute and in light of the Texas Court of Criminal Appeals' recent opinion that held part of the Online Solicitation Statute unconstitutional.<sup>12</sup>

## II. THE EVOLUTION OF SECTION 21.12 OF THE TEXAS PENAL CODE

Texas State Representative Helen Giddings originally sponsored the Improper Relationship Statute, House Bill 532, in the 78th Texas Legislature's 2003 Session.<sup>13</sup> Giddings originally intended the Improper Relationship Statute to apply only to relationships between teachers in positions of power and students sixteen years old and younger, but during the passage of the Bill, other legislators added amendments making it illegal for school employees to engage in sexual relationships with students of any age.<sup>14</sup> Aside from sponsoring

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tional media coverage of female teachers because those cases are perceived to provide a more "scandalous" story.

This gender dynamic is intriguing. While no numeric evidence supports the assertion, it seems that there is still, to some degree, a tangible difference in public sentiment when a male teacher has a relationship with a female student as opposed to a female teacher who has a relationship with a male student. Seemingly gone are the days when the Romeo-Juliet dynamic is romanticized. In fact, now the relationship seems to be quite the opposite, going from romantic to creepy. But the roles cannot be said to be reversed when the Juliet-figure is the older, female teacher. While public backlash still occurs when a female teacher sleeps with a male student, other males often brush it aside with a slap on the back and a why-wasn't-I-that-guy-in-school mentality. While this variable cannot likely be eliminated, its negative impact can be lessened with a better-written law that is narrow in scope and administration. Additionally, this dynamic is further stretched when homosexual teacher-student relationships are at issue.

12. § 33.02(b); *Ex Parte Lo*, \_\_\_ S.W.3d \_\_\_, 2013 WL 5807802 (Tex. Crim. App. Oct. 20, 2013).

13. See H.B. 532, 2003 Reg. Sess., 78th Leg. (Tex.), available at <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/78-0/HB532.PDF>.

14. Gerri L. Elder, *The Texas Law Tough on Sexual Relationships Between Teachers and Students*, TOTAL CRIM. DEF. BLOG, <http://www.totalcriminaldefense.com/news/articles/sex-crimes/teacher-student-sex/> (last visited Jan. 13, 2013).

the Bill, Giddings's later involvement with the Improper Relationship Statute is an interesting example of the problems that existed even at its enactment. One of the first people prosecuted under the new law was Amy McElhenney, a former Miss Texas contestant, for having a sexual relationship with an eighteen-year-old male.<sup>15</sup> In an ironic twist, Giddings became a supporter of the teacher after McElhenney was charged because Giddings did not intend the Improper Relationship Statute to criminalize consensual sexual activities between two otherwise-legal adults.<sup>16</sup> Although students of constitutional law may argue the importance of original intent as it applies to statutory interpretations, Giddings's support of the defendant in the case shows that the State diverged from the Improper Relationship Statute's original intent almost immediately upon its enactment.

A. *Version 1: Effective September 1, 2003, to August 31, 2007*

The Improper Relationship Statute has been amended three times in the eleven years since its enactment.<sup>17</sup> According to the Bill's supporters, a statute was necessary because sexual involvement between school employees and students was "becoming increasingly prevalent in schools," which constituted a "breach of public trust that should be punished as a criminal offense."<sup>18</sup> The supporters claimed that the Bill would ensure that any school employee who engaged in inappropriate sexual conduct with a seventeen- or eighteen-year-old student—an adult under Texas law—would be committing a criminal offense.<sup>19</sup> Additionally, the Bill allowed harsher penalties under other then-current laws if the child involved was under the age of seventeen.<sup>20</sup>

The supporters also claimed that the Bill took into account realistic hypothetical scenarios and did not punish those who should not be punished.<sup>21</sup> For example, the supporters stated that the Bill would allow for an employee, such as a nineteen-year-old groundskeeper, to offer an affirmative defense that a romantic relationship with a seventeen-year-old student was not criminal because the two were "close in age."<sup>22</sup>

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15. *Id.*

16. *Id.*

17. See *infra* Part II.A–D. For reference, Appendix A *infra* provides the full language of each version of the Improper Relationship Statute and indicates the amended language.

18. H.B. 532, 2003 Reg. Sess., 78th Leg. (Tex.), at 2, available at <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/78-0/HB532.PDF>.

19. *Id.*

20. *Id.*

21. See *id.*

22. *Id.* Interestingly, this age-exception language did not appear in the Improper Relationship Statute until years later, so arguably, the supporters' hypothetical would prove incorrect under the original language.

Additionally, the supporters stated that non-certified staff, including cafeteria workers and bus drivers, should be held to the same standards and criminal penalties as teachers, principals, coaches, and other similar professional staff.<sup>23</sup> The supporters stated that the Improper Relationship Statute's provisions also meant that certified teachers would face an additional consequence because the conduct under the Improper Relationship Statute would violate the educator's code of ethics, placing the teachers' certification in jeopardy.<sup>24</sup>

The Bill's opponents were concerned that the Bill was overly broad and could lead to false accusations by students against school employees.<sup>25</sup> Tellingly, the opponents worried that the Bill would apply to any school employee who had sexual contact with any student, even if that employee worked at a different school than the student attended.<sup>26</sup> Because of these fears, the opponents felt that the Improper Relationship Statute should apply only to teachers, principals, coaches, and other school personnel who had some sort of supervisory role over students.<sup>27</sup> The opponents reasoned that, because employees such as cafeteria workers and janitors are not placed in the same position of trust and authority over students, the non-professional employees should not be subject to the same punishment intended for those who have violated their position of trust and authority.<sup>28</sup> Some opponents also expressed the belief that the Bill was unnecessary because the educator's code of ethics includes stricter prohibitions against the same type of behavior, including the loss of licenses and certifications, which the opponents reasoned would be sufficient punishment for such behavior.<sup>29</sup>

#### B. *Version 2: Effective September 1, 2007, to August 31, 2009*

The 2007 amendments made two main changes: (1) protecting the identity of the student involved in the improper relationship and (2) adjusting to changing technology and forms of communication.<sup>30</sup>

First, House Bill 3659 amended the Improper Relationship Statute by prohibiting the name of the student from being released to the public.<sup>31</sup> The intent of the change was to protect the identity of the student from media scrutiny and undue harassment and attention by

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23. *Id.* at 2.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. See generally H.B. 3659, 2007 Reg. Sess., 80th Leg. (Tex.), available at <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/80-0/HB3659.PDF>; H.B. 401, 2007 Reg. Sess., 80th Leg. (Tex.), at 1, available at <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/80-0/HB401.PDF>; see also Appendix A, *infra*.

31. Tex. H.B. 3659, at 1.



specifying that the name of student was not public information and thus not subject to the Public Information Act.<sup>32</sup> This change was met with little opposition and passed unanimously within the bill committee.<sup>33</sup>

The second change to the Improper Relationship Statute, although it may be rendered moot by *Ex Parte Lo*, discussed in Part III.B *infra*, occurred via House Bill 401 and addressed the online solicitation of minors through email, text messages, and social media.<sup>34</sup> Section 33.021 of the Texas Penal Code had previously been amended to include text messages and email as ways in which online solicitation could be committed, and the Improper Relationship Statute was subsequently amended to account for the change in the online solicitation law.<sup>35</sup> Previously, the two laws were essentially mutually exclusive: it was a crime to use certain types of technology to solicit minors, and it was a separate crime for teachers to have sexual relationships with students.<sup>36</sup> The amendments expanded the offense of improper relationship between educator and student to add online solicitation as a way in which the Improper Relationship Statute could be violated, regardless of the age of the victim.<sup>37</sup>

According to supporters of the change, the amendment closed a loophole in the then-current law that did not list text messaging as one of the methods of communication that could define online solicitation of a minor.<sup>38</sup> The supporters reasoned that adults used text messaging to try to build relationships with minors and lure them into sexual relationships.<sup>39</sup> This revision allowed teachers to be charged with an offense before sexual contact occurred, which provided greater protection for students.<sup>40</sup>

The revision also caused a change in the Improper Relationship Statute's punishment. The improper-relationship crime was a second-degree felony, and some online-solicitation offenses were state jail or third-degree felonies.<sup>41</sup> Bringing online solicitation of minors into the offense of improper relationships between teachers and students allowed the activity to be punished as a second-degree felony.<sup>42</sup> Such a change, according to the supporters, would show that "the online so-

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32. *Id.*

33. *Id.*

34. Tex. H.B. 401, at 1.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 2.

39. *Id.* (citing an instance of a Texas student who received more than eighty explicit text messages from a teacher attempting to solicit her).

40. *Id.*

41. *Id.* at 3.

42. *Id.*

licitation of minors was an especially serious crime if it involved teachers and students.”<sup>43</sup>

However, opponents to the revision saw the changes as unnecessary because the actions were already illegal under various statutes and thus properly punished.<sup>44</sup> Opponents stated that the offense between educators and students was designed to cover only *physical* sexual acts between teachers and students and should be limited to offenses involving physical sexual contact and intercourse.<sup>45</sup> Additionally, opponents expressed concern that expanding the definition of the Improper Relationship Statute would be “confusing and an unwarranted enhancement of the penalty for solicitation.”<sup>46</sup>

C. *Version 3: Effective September 1, 2009, to August 31, 2011*

The 2009 amendment was a change to the Improper Relationship Statute mostly as a result of its placement among other statutes dealing with sexual offenses against children, rather than a change directed solely at the language of the Improper Relationship Statute.<sup>47</sup> The 2009 amendment established an affirmative defense to prosecution for certain sexual offenses (indecentcy with a child, sexual assault of a child, improper sexual relationships between educators and students, sexual assault against children, and improper sexual activity with a person under probation supervision) if the defendant was the spouse of the child at the time of the offense.<sup>48</sup> Supporters stated that the amendment was designed to eliminate “embarrassment and trauma” for victims and their families during the prosecution of some sex offenses against children and also prevent confusion among jurors.<sup>49</sup>

Until the amendment, prosecutors in cases involving sexual offenses against children needed to establish that the child and the defendant were not spouses.<sup>50</sup> They usually did so by asking the children, while they were testifying in court, whether they were married to the defendant, which often led to “confusion, stress, and trauma to the children, who may be quite young.”<sup>51</sup> Additionally, the supporters of the change stated that the amendment also eliminated embarrassment and confusion among the jurors, because jurors and victims’ families

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43. *Id.*

44. *Id.*

45. *Id.* (emphasis added).

46. *Id.*

47. See generally H.B. 549, 2009 Reg. Sess., 81st Leg. (Tex.), at 1, available at <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/81-0/HB549.PDF> (listing requirements of other sections of the Penal Code dealing with sexual offenses); see also *infra* Appendix A.

48. Tex. H.B. 549, at 2.

49. *Id.*

50. *Id.*

51. *Id.* at 2–3.

often did not understand why the question was being asked.<sup>52</sup> With the amendment, defendants could raise the affirmative defense, if applicable, without the child ever needing to be asked the embarrassing or confusing question.<sup>53</sup>

D. *Version 4: Effective September 1, 2011*

As of this writing, no committee report has been issued for the latest amendment that specifically addresses the purpose of enlarging the scope of the Improper Relationship Statute. Most notably, however, the Improper Relationship Statute's scope has been enlarged to prohibit relationships with students who are within the accused employee's same school *district*.<sup>54</sup>

The potential reach of this language is incredibly extensive. For example, Dallas Independent School District (DISD) contains twenty-one high schools and is the fourteenth-largest school district in the United States.<sup>55</sup> Two schools, Seagoville High School and W.T. White High School, both in DISD, are more than twenty-eight miles apart and are located on opposite north-south ends of the Dallas-Fort Worth (DFW) Metroplex.<sup>56</sup> If the intention of the Improper Relationship Statute is to prevent or punish educators and school employees from sexually preying on the students they come into contact with on a daily basis, this goal will not be met.

Using this geographic scenario, a situation that is likely to occur is one where a young—early twenties—employee from one of these schools and a student from the other meet randomly somewhere in the middle, such as at NorthPark Mall, a Texas Rangers baseball game, a Dallas Mavericks basketball game, or one of hundreds—if not thousands—of other places for entertainment in DFW. If the two enter into a consensual sexual relationship with one another, the teacher is in violation of the letter of the law, regardless of the circumstances that led to the couple's relationship, innocent as they may be. Language from committee reports indicates that this is not the type of relationship the Improper Relationship Statute was enacted to prevent, but this type of relationship is directly covered under its language.

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52. *Id.*

53. *Id.*

54. TEX. PENAL CODE ANN. § 21.12(2)(b) (West 2013); *see also infra* Appendix A.

55. *About Dallas ISD*, DALLAS ISD, <http://www.dallasisd.org/domain/48> (last visited Feb. 12, 2013).

56. *See generally Get Directions*, GOOGLE MAPS, <https://maps.google.com> (last visited Dec. 28, 2013) (using Seagoville High School and W.T. White High School as destinations).

### III. SCOPE OF THE IMPROPER RELATIONSHIP STATUTE

#### A. *Who the Improper Relationship Statute Covers*

The Improper Relationship Statute applies to employees of public or private primary or secondary schools if the employee holds a certain certificate or permit, or is required to hold a certain license under the Texas Education Code.<sup>57</sup> In addition to “traditional” teachers who are classroom instructors, teaching interns and trainees, librarians, educational aides, administrators, educational diagnosticians, and counselors are all required to be licensed under the pertinent section of the Education Code and are thus subject to the Improper Relationship Statute.<sup>58</sup> Subchapter B, Chapter 21 of the Education Code includes those listed above but mainly provides additional ways of certification for educators or school employees.<sup>59</sup>

#### B. *What the Improper Relationship Statute Covers*

The Improper Relationship Statute covers two “classes” of activities: (1) physical sexual activities and (2) sexually explicit communications or solicitation.<sup>60</sup> The first class of activities covers an employee who “engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a student.”<sup>61</sup> These activities are defined more specifically in § 21.01.<sup>62</sup> 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.”<sup>63</sup> Sexual intercourse is defined as any penetration of the female sex organ by the male sex organ.<sup>64</sup> Deviate sexual intercourse is defined as “any contact between any part of the genitals of one person and the mouth or anus of another person or the penetration of the genitals or the anus of another person with an object.”<sup>65</sup>

The second class of activities covered by the Improper Relationship Statute—sexually explicit communications or solicitation—has been somewhat altered following the Texas Court of Criminal Appeals’ ruling in *Ex Parte Lo*.<sup>66</sup> In addition to physical sexual activities, the Improper Relationship Statute states that another way an employee commits an offense under the Improper Relationship Statute is if the employee “engages in conduct described by Section 33.021 [of the

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57. PENAL § 21.12.

58. EDUC. § 21.003.

59. *Id.* § 21(b).

60. PENAL § 21.12.

61. *Id.*

62. *Id.* § 21.01.

63. *Id.*

64. *Id.*

65. *Id.*

66. See *Ex Parte Lo*, \_\_\_ S.W.3d \_\_\_, 2013 WL 5807802 (Tex. Crim. App. Oct. 20, 2013).

Texas Penal Code],” which is the Online Solicitation Statute.<sup>67</sup> The Online Solicitation Statute contains two main provisions: Subsection (b), which prohibits sexually explicit communication, and Subsection (c), which prohibits solicitation of a minor to engage in sexual conduct.<sup>68</sup>

*Ex Parte Lo* upheld Subsection (c) of the Online Solicitation Statute, noting that virtually all states have similar solicitation-based laws that are routinely upheld as constitutional because “offers to engage in illegal transactions such as sexual assault of a minor are categorically excluded from First Amendment protection.”<sup>69</sup> The Court noted that “the *conduct* of requesting a minor to engage in illegal sexual acts that is the gravamen of the offense” in Subsection (c) as opposed to sexually explicit *speech*, which is the focus of Subsection (b).<sup>70</sup>

Unlike Subsection (c), the Court found that Subsection (b) was an overly broad prohibition on protected speech.<sup>71</sup> The Court emphasized that although the State has a compelling interest in “protecting children from sexual predators,” Subsection (b) was not “narrowly drawn to achieve that legitimate goal.”<sup>72</sup> Ultimately, the Court held that Subsection (b) of Section 33.021 was unconstitutional, stating that “it is conduct designed to induce a minor to commit an illegal sex act with titillating talk that may be proscribed, not the titillating talk itself.”<sup>73</sup>

Without more data on the number of guilty convictions based upon sexually explicit communications, the true impact that the *Ex Parte Lo* decision will have on the Improper Relationship Statute is uncertain, although prosecutors have already dropped at least one case as a result of the Court’s decision in *Ex Parte Lo*.<sup>74</sup> However, the case makes

67. § 21.12(a)(3).

68. *Id.* § 33.021(b)–(c).

69. *Ex Parte Lo*, 2013 WL 5807802, at \*2.

70. *Id.* (emphasis in original).

71. *Id.* at \*4.

72. *Id.* at \*3. The Court went on to say:

Subsection (b) covers a whole cornucopia of “titillating talk” or “dirty talk.” But it also includes sexually explicit literature such as “*Lolita*,” “*50 Shades of Grey*,” “*Lady Chatterley’s Lover*,” and Shakespeare’s “*Troilus and Cressida*.” It includes sexually explicit television shows, movies, and performances such as “*The Tudors*,” “*Rome*,” “*Eyes Wide Shut*,” “*Basic Instinct*,” Janet Jackson’s “*Wardrobe Malfunction*” during the 2004 Super Bowl, and Miley Cyrus’s “*twerking*” during the 2013 MTV Video Music Awards. It includes sexually explicit art such as “*The Rape of the Sabine Women*,” “*Venus De Milo*,” “*the Naked Maja*,” or Japanese *Shunga*. Communications and materials that, in some manner, “relate to” sexual conduct comprise much of the art, literature, and entertainment of the world from the time of the Greek myths extolling Zeus’s sexual prowess, through the ribald plays of the Renaissance, to today’s Hollywood movies and cable TV shows.

*Id.* (internal citations omitted).

73. *Id.* at \*7.

74. Sean Williams, a thirty-one-year-old teacher in Everman ISD, was arrested in 2012 after admitting that he sent sexually explicit text messages to one of his thirteen-

clear that although sexual *conduct* is still prohibited, whether the conduct physically occurs or is solicited to occur, sexually explicit speech alone is not prohibited. Although, as the Court indicates, sexually *obscene* communications and materials may be prohibited under other sections of the Texas Penal Code, mere “dirty talk” will not give rise to criminal prosecution under the Improper Relationship Statute.<sup>75</sup>

### C. *What the Improper Relationship Statute Does Not Cover*

Interestingly, by its express language the Improper Relationship Statute does not include improper photography or visual recording—an actionable sexual offense under another section of the Texas Penal Code.<sup>76</sup> While this is arguably unsurprising given the type of activity covered by the Improper Relationship Statute—physical contact between a school employee and a student—it is surprising given the purpose of the Improper Relationship Statute: keeping the position of trust between school employees and students. Taking into consideration recent news stories like that of a Georgia substitute teacher caught taking pictures of unaware students during class, the Improper Relationship Statute may be amended to account for such actions.<sup>77</sup> Because of the increasing occurrences of similar stories of improper photography, it would appear to be only a matter of time before the Legislature adds these activities to the list of prohibited activities, much like it did in 2007 with the addition of the “sexting” laws. However, in light of the recent ruling in *Ex Parte Lo*, the Legislature must take particular care to write the language narrowly enough to avoid constitutional infringement issues.

### D. *Punishment*

Notably, the Improper Relationship Statute is not a “reportable conviction or adjudication” under Article 62 of the Texas Code of Criminal Procedure, which means that a person convicted under the Improper Relationship Statute does not have to register as a sex of-

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year-old students. Brandon Todd, *Court: Alleged Sexting Between Teacher, Minor is Free Speech*, MYFOXDFW.COM (Feb. 24, 2014, 9:26 PM), <http://www.myfoxdfw.com/story/24811328/court-case-of-teacher-accused-of-sexting-minor-falls-under-free-speech>. After the *Lo* decision was handed down, prosecutors were forced to drop the case against Williams. *Id.* The article also notes that the District Attorney’s office was considering whether it was necessary to reexamine older cases and re-indict them under a different statute. *Id.*

75. *Ex Parte Lo*, 2013 WL 5807802, at \*3.

76. See Improper Photography or Visual Recording, § 21.15. That section has also recently been held unconstitutional as an infringement upon free speech. *Ex parte Thompson*, 414 S.W.3d 872 (Tex. App.—San Antonio 2013, pet. granted).

77. Andres Jauregui, *Georgia Teacher Fired After Allegedly Posting “CreepShots” Photo of Student to Reddit*, HUFFPOST EDUC. (Sept. 27, 2012), [http://www.huffingtonpost.com/2012/09/27/creepshots-georgia-teacher-fired-photos-student-reddit-video\\_n\\_1919732.html](http://www.huffingtonpost.com/2012/09/27/creepshots-georgia-teacher-fired-photos-student-reddit-video_n_1919732.html).

fender.<sup>78</sup> However, a violation of the Improper Relationship Statute is punished as a second-degree felony, which means that a person convicted under it is punished by imprisonment for any term of not more than twenty years or less than two years.<sup>79</sup> In addition to imprisonment, a fine of no more than \$10,000 may be levied against a person guilty of a second-degree felony.<sup>80</sup> Article 42 of the Texas Code of Criminal Procedure also allows a judge to suspend the imposition of a sentence and place the defendant on community supervision (probation) or impose a fine and place the defendant on community supervision if the judge deems it to be “in the best interest of justice, the public, and the defendant.”<sup>81</sup> Additionally, section 21.058 of the Texas Education Code allows for persons convicted under the Improper Relationship Statute to lose their teaching certification and be terminated from employment.<sup>82</sup>

#### IV. THE IMPROPER RELATIONSHIP STATUTE IN THE COURTS: SELECTED APPELLATE CASES

##### A. *Ex Parte Morales*

One of the first Texas Appellate Court cases decided under the Improper Relationship Statute, *Ex Parte Morales*, involved a teacher, Santiago Morales, Jr., who was employed at San Marcos Baptist Academy in Hays County, Texas.<sup>83</sup> Morales was indicted under the 2006 version of the Improper Relationship Statute for intentionally and knowingly engaging in deviate sexual intercourse with a male Academy student who was not his spouse.<sup>84</sup> The district court found that the Improper Relationship Statute was unconstitutional and dismissed the indictment.<sup>85</sup> Although Morales made several constitutional challenges, the case is important for a discussion of the Improper Relationship Statute for two of its main holdings: (1) adult consensual sex activity was not a fundamental right (and thus the State needed to show only that its actions were rationally related to a legitimate government purpose, which the State did); and (2) the Improper Relationship Statute was not unconstitutionally vague.<sup>86</sup>

The Austin Court of Appeals held that the Improper Relationship Statute did not violate Morales’s due process rights because it was rationally related to a legitimate state interest—protecting students

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78. TEX. CODE CRIM. PROC. ANN. art. 62.001 (West 2013).

79. TEX. PENAL CODE ANN. § 12.33 (West 2013).

80. *Id.*

81. CODE CRIM. PROC. art. 42.12.

82. EDUC. § 21.058.

83. *Ex parte Morales*, 212 S.W.3d 483, 486 (Tex. App.—Austin 2006, pet. ref’d).

84. *Id.* at 487.

85. *Id.* at 486.

86. *Id.* at 493, 500.

from sexual abuse and exploitation.<sup>87</sup> The court focused on the fact that the public vested school employees with great trust and reasoned that the Improper Relationship Statute furthered that trust by “unequivocally prohibiting school employees from misusing their access to students as a conduit for sex.”<sup>88</sup> The court also reasoned that the Legislature could have rationally determined that sexual relationships between students and school employees would undermine the school’s learning environment, which would also create a rational basis for the state to protect that environment.<sup>89</sup>

On the vagueness question, the court held that the Improper Relationship Statute was not vague because a criminal statute is not vague, by definition, if the statute “gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited and it provides sufficient notice to law enforcement to prevent arbitrary or discriminatory enforcement.”<sup>90</sup> The court stated that the provisions of the Improper Relationship Statute were “clear and unequivocal,” and thus it did not fit the definition of unconstitutional vagueness.<sup>91</sup>

Morales also argued that the Improper Relationship Statute violated his equal protection guarantee because it prohibits sexual conduct between school employees and students, but it exempts employees and students who are married.<sup>92</sup> Because Texas does not recognize marriage between persons of the same gender, Morales contended that the Improper Relationship Statute impermissibly discriminated against homosexuals.<sup>93</sup> The court, after referring to its earlier analysis of fundamental rights and suspect classes in the context of constitutional analysis, reiterated that equal protection challenges based on discrimination because of sexual orientation are analyzed under a rational basis standard.<sup>94</sup> The court then dismissed Morales’s equal protection argument and stated that the Improper Relationship Statute does not discriminate against or target homosexuals as a class because it “prohibits primary and secondary school employees from engaging in sexual conduct with *any* student—male or female, heterosexual or homosexual—to whom they are not married.”<sup>95</sup>

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87. *Id.* at 503.

88. *Id.* at 496.

89. *Id.* at 498.

90. *Id.*

91. *Id.* It is important to again note that the language of the Improper Relationship Statute at issue in *Morales* was not the same as the current version. Although the language might still not be found void on vagueness grounds, in light of the expansion of its scope, a challenge on whether the Improper Relationship Statute is overly broad may be successful.

92. *Id.* at 500.

93. *Id.*

94. *Id.* at 501.

95. *Id.* at 502 (emphasis in original).



B. *In re Shaw*

Shelly Kasandra Shaw was charged under the original (2003) version of the Improper Relationship Statute for engaging in prohibited sexual contact with a seventeen-year-old student of the secondary school where she was employed.<sup>96</sup> Shaw challenged the Improper Relationship Statute on grounds that it was overly broad and vague, among others.<sup>97</sup> Shaw argued that it was overly broad because it applied to “all ‘employees’ of school districts . . . [and] all students (persons enrolled), regardless of age.” Therefore, Shaw argued, the Improper Relationship Statute infringed upon her right to engage in private sexual conduct between consenting adults and criminalized what other adults could do “freely and without restraint.”<sup>98</sup> The court rejected Shaw’s argument, saying that it was not impermissibly broad when “judged in relation to the Improper Relationship Statute’s plainly legitimate sweep.”<sup>99</sup>

The court focused on the fact that the primary scope of the Improper Relationship Statute was to cover employees and students in primary and secondary schools because the vast majority of students in those schools were not adults.<sup>100</sup> The court ultimately determined that even if the record contained data about what percentage of secondary school students affected by this statute are adults, and if the Improper Relationship Statute could “be said to infringe on fundamental First Amendment rights of those students and employees who are of age,” it ultimately rejected Shaw’s contention that the Improper Relationship Statute was overly broad because there was no evidence indicating that the Improper Relationship Statute “reach[ed] a substantial amount of constitutionally protected conduct.”<sup>101</sup>

Shaw based her vagueness argument on the fact that the Improper Relationship Statute lacked a requisite mental state, did not define “employee” or “student,” and that its title was misleading.<sup>102</sup> The court acknowledged that the Improper Relationship Statute did not have a mental state, but stated that even if the definition of an offense does not list a culpable mental state, then intent, knowledge, or recklessness suffices to establish criminal responsibility.<sup>103</sup> The court also rejected the contention that the title was vague by stating that the substance of the Improper Relationship Statute controlled over its ti-

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96. *In re Shaw*, 204 S.W.3d 9, 13 (Tex. App.—Texarkana 2006, pet. ref’d); Faith Huffman, *Charges Filed Against Teacher*, SULPHUR SPRINGS NEWS-TELEGRAM (Oct. 30, 2004), <http://www.myssnews.com/news/2004/october/nt103004teacher.htm> (stating that the student in question was seventeen).

97. *In re Shaw*, 204 S.W.3d at 13–14.

98. *Id.* at 14.

99. *Id.* at 15.

100. *Id.*

101. *Id.*

102. *Id.* at 16.

103. *Id.* (citing TEX. PENAL CODE ANN. § 6.02(c) (West 2012)).

tle and that a statute's title only needed to give fair notice to a person of the contents of the Improper Relationship Statute.<sup>104</sup>

The court also declined to find the Improper Relationship Statute vague because of its lack of defining terms by paraphrasing the Improper Relationship Statute to read: "[E]mployees of primary or secondary schools may not engage in sexual contact, sexual intercourse, or deviate sexual intercourse with a person, not his or her spouse, enrolled as a student at the school where the employee works."<sup>105</sup> Under such a reading, the court stated, "people of common intelligence need not guess as to this statute's meaning."<sup>106</sup>

Like *Morales*, *Shaw* was decided before the most recent change to the Improper Relationship Statute, which enlarged the scope of its prohibitions to include students within the same school district as the employee, not simply the same school. While no Texas appellate court has yet ruled on the overly broad or vagueness questions for the new language, the language in *Shaw* seems to suggest that the new language is problematic. For instance, *Shaw's* paraphrase of the Improper Relationship Statute includes language about the victim being a student at the employee's school, adding language that is not included in the original. Even though this language is taken from the older version of the Improper Relationship Statute, *Shaw* used it to show that people of common intelligence could understand the Improper Relationship Statute's meaning. Considering this meaning is arguably not so clear currently, a challenge on the subject might be successful.

#### V. THE IMPROPER RELATIONSHIP STATUTE IN THE COURTS: SELECTED LOCAL CASES

While statewide information on Improper Relationship cases at the trial court level is not available, since the law's enactment in 2003, a dozen or so cases have been prosecuted in Tarrant County. The following paragraphs provide a short summary of some of the cases that occurred.

In November 2008, Julianna Christine Sauls, a former algebra teacher at Azle Christian School, was arrested in Tarrant County for having improper sexual conduct with an eighteen-year-old student.<sup>107</sup> A month later, she turned herself in to Parker County authorities on two separate warrants: one was related to allegations involving the eighteen-year-old student in Tarrant County, and the other was related to allegations involving a seventeen-year-old student in Parker

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104. *Id.* at 17.

105. *Id.* at 16.

106. *Id.*

107. Deanna Boyd, *Former Azle Teacher Faces New Sex Allegations in Parker County*, STAR-TELEGRAM.COM (Dec. 4, 2008), <http://www.star-telegram.com/2008/12/04/1074650/former-azle-teacher-faces-new.html#storylink=cpy>.

County.<sup>108</sup> In June 2009, Sauls pleaded guilty to the Tarrant County charge in exchange for probation for five years, including 180 days in jail.<sup>109</sup> A few days after her Tarrant County plea, she pleaded guilty to the charges in Parker County and received shock probation and six months in prison.<sup>110</sup>

In October 2009, Rudolpho Anthony Garza, a former Western Hills High School teacher and coach, was convicted of having an improper relationship with an eighteen-year-old student and was sentenced by a jury to probation for 10 years.<sup>111</sup> Garza was also ordered to serve six months in prison as part of his probation.<sup>112</sup> In addition to the student for whom Garza was convicted, evidence was heard during trial that showed Garza also had sex with a student from Dallas five months before the Western Hills student.<sup>113</sup> No charges have apparently been filed for that alleged incident.

In January 2012, Jennifer Riojas pleaded guilty to having an improper relationship with a sixteen-year-old male student.<sup>114</sup> Riojas was a ninth-grade science teacher at Carter-Riverside High School.<sup>115</sup> The student came forward because he was worried that he could be the father of Riojas' unborn child.<sup>116</sup> In exchange for her plea of guilt, she received six years deferred-adjudication probation.<sup>117</sup>

In March 2012, Chad Eric Bearden, a former drama teacher in the Keller school district's Hillwood Middle School, was cleared of charges that he had sex with a seventeen-year-old student when the jury declined to indict him.<sup>118</sup> Bearden was arrested in January 2012 for having a relationship with a seventeen-year-old student from a different school.<sup>119</sup> At the time, Bearden told school officials that he was

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108. *Id.*

109. *Id.*

110. *Id.* In June 2011 Sauls's probations were revoked in both counties in the past fourteen months on accusations that she had sex with fellow probationers while fulfilling required community service and was kicked out of ordered sex-offender treatment. Christine Coyne, *Teacher In Trouble For Sex Again*, WEATHERFORD DEMOCRAT (June 22, 2011), <http://weatherforddemocrat.com/top-news/x1110911636/Teacher-in-trouble-for-sex-again>. As a result, Sauls was sentenced to three years in prison in Tarrant County and to six years in prison in Parker County. *Id.*

111. Stacy Morrow & Frank Heinz, *Daily Police Blotter: Teacher Sentenced for Improper Relationship*, NBCDFW.COM (Oct. 29, 2009), <http://www.nbcdfw.com/news/local/Daily-Police-Blotter—Oct—29-2009-67222332.html>.

112. *Id.*

113. *Id.*

114. Elvira Sakmari, *Former Teacher Pleads Guilty to Improper Relationship with a Student*, NBCDFW.COM (Jan. 17, 2012), <http://www.nbcdfw.com/news/local/Former-Teacher-Pleads-Guilty-to-Improper-Relationship-With-a-Student-137538723.html>.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Former Keller ISD Teacher Cleared of Sex Charges*, CBSDFW.COM (Mar. 26, 2012), <http://dfw.cbslocal.com/2012/03/26/former-keller-isd-teacher-cleared-of-sex-charges/>.

119. *Id.*

not aware he was committing a crime because the girl was seventeen and did not attend the school where he taught.<sup>120</sup> This case shows the shortcomings of the Improper Relationship Statute that occur outside of a hypothetical scenario. Although the details of the reasons for charges being brought in this case are unknown, the prosecutor was well within the law to levy charges against the teacher for his actions even though the student was a legal adult in Texas and did not attend the school in which Bearden taught. Except for Bearden's occupation as a teacher at a completely different school, he did nothing wrong under Texas law by having a relationship with the student.

In June 2012, Tiffanie Kay Bedinger, a former Richland High School cheerleading coach and business education teacher, pleaded guilty to having an improper relationship with a male student who was seventeen at the time of the relationship.<sup>121</sup> She was the student's teacher during his junior and senior years at the school.<sup>122</sup> Bedinger was sentenced to five years deferred-adjudication probation.<sup>123</sup> However, if she successfully completes her probation, the case will not show as a conviction on her record.<sup>124</sup>

In January 2013, a Tarrant County grand jury indicted Tonya Flink, a former Haltom High School computer-science teacher, on a charge of improper relationship between an educator and a student.<sup>125</sup> According to an arrest affidavit, Flink had sex with at least four of her students during the 2010–2011 school year.<sup>126</sup> The parents of one of the students contacted the police in September 2011 after their son told them that he was living with Flink and that he had been dating her since he was a senior in high school.<sup>127</sup> During the investigation, Haltom City detectives determined that, in addition to the student who first came forward, Flink had sexual relationships with three other students, two of whom refused to cooperate with authorities.<sup>128</sup> In October 2013, Flink pleaded guilty and was sentenced to four years' probation.<sup>129</sup>

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120. *Id.*

121. Domingo Ramirez, Jr., *Former Richland High Teacher Gets Probation for Having Sex with a Student*, STAR-TELEGRAM.COM (June 13, 2012), <http://www.star-telegram.com/2012/06/12/4027542/former-richland-high-teacher-gets.html>.

122. *Id.*

123. *Id.*

124. *Id.*

125. Domingo Ramirez Jr., *Former Haltom High Teacher Accused of Having Sex with 4 Students*, STAR-TELEGRAM.COM (Jan. 17, 2013), <http://www.star-telegram.com/2013/01/17/4555614/former-haltom-high-teacher-accused.html#storylink=cpy>.

126. *Id.*

127. *Id.*

128. *Id.*

129. Andres Jauregui, *Tonya Flink, Texas Teacher Who Had Sex with Students, Marries One Victim and Gets Probation*, HUFFINGTON POST (Oct. 2, 2013, 4:25 PM), [http://www.huffingtonpost.com/2013/10/02/tonya-flink-teacher-sex-marries-student\\_n\\_4031904.html](http://www.huffingtonpost.com/2013/10/02/tonya-flink-teacher-sex-marries-student_n_4031904.html). Flink has since married one of the students involved in the incident.  
*Id.*

## VI. SUGGESTED LANGUAGE IMPROVEMENTS

The language of the Improper Relationship Statute can be adjusted to better reach only those offenders who use their positions of authority to take advantage of vulnerable students. One adjustment is that the language should require that the employee holds a position of authority over the involved student. "Position of authority" can be defined as "a relationship where the employee directly and routinely exercises, or has directly and routinely exercised in the past, a degree of control over the education, counseling, or well-being of students." Some examples may be added for clarity, such as: "A 'position of authority' includes positions such as principals, classroom teachers, coaches, and other similar positions, but does not include positions such as cafeteria workers, school bus drivers, or custodians." This language narrows the scope of the Improper Relationship Statute to reach those employees who occupy positions of authority, i.e., those employees who society has entrusted to oversee and assist the educational upbringing of young people.

If the purpose of the Improper Relationship Statute is to protect students who are particularly susceptible to exploitation, that susceptibility to exploitation should be implicated directly in the language. Absent other factors, occupation alone is not a sufficient reason to prohibit a relationship. For example, the fact that Sally happens to teach twelfth-grade math for a living does not mean that any relationship that she enters into with John—who happens to be a student at another school—will be predatory or abusive in nature. While this type of relationship may demonstrate poor judgment on the part of Sally or John, or both, it does not breach the relationship of trust that exists between a student and his own math teacher. This type of relationship should be prohibited only where a position of trust existed and was abused. The proposed language is directed mostly to address two general situations where this abuse-of-authority exists: (1) where the employee holds a position of authority and enters into a sexual relationship with a current student at the school where that employee currently works, and (2) where the employee once held a position of authority over a particular student and subsequently entered into a relationship with that student after either the employee or the student moved schools or grade levels.<sup>130</sup>

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130. An unfortunate reality of the current Improper Relationship Statute, even including these proposed changes, is that the language does not prohibit a "grooming" scenario where the employee begins to initiate a relationship with the student while the student is still enrolled. In this scenario, the employee may wait until the student's graduation before engaging in any conduct that might otherwise be actionable. Although this scenario could potentially cause as much mental and physical harm as a relationship while the student is in school, legislating in this area proves difficult, if not impossible.

The reason for prohibition in the first situation is straightforward: if employees in positions of authority enter into sexual relationships with students that they teach, coach, counsel, etc. on a regular basis; mental or physical harm to the student as the result of the relationship is almost guaranteed. In the second situation, if an employee in a position of authority uses his or her position to initiate, continue, or in some way bring about the improper relationship—even if the student involved is not under the employee’s direct control—the potential for mental or physical harm to the student as a result of the relationship is just as high as the former situation.

The Improper Relationship Statute includes an age-range provision, similar to various statutory rape laws, that allows an exception when the alleged perpetrator and victim are within a certain number of years in age of each other. While this could bring clarity to the earlier example of the scenario with a student who is a soon-to-be-freshman in college entering into a relationship with an employee who is soon to be graduating, or recently has graduated, from college, it still lacks an abuse-of-trust component. Because of this shortcoming, an age-related exception alone is not as desirable as a combination of the two; however, it is certainly a step in the right direction and cuts down on the wide prosecutorial discretion currently allowed. Although the suggested revisions may fall short of perfection, adding the requirements that a relationship of authority existed and was abused brings clarity and certainty to the Improper Relationship Statute.

## VII. CONCLUSION

Those who prey, attack, warp, and exploit the minds of vulnerable young people deserve to face the punishment and consequences of their actions, whether those consequences are imprisonment, probation, fines, loss of a teaching certificate, or all of the above. However, the courtroom is not a place to put on display the various intimacies of the sexual relationships between consenting adults, even if it is done under the guise of protecting students. Furthermore, subjecting certain individuals to possible prosecution solely because of the way they make their living misses the mark of the original purpose of the law—protecting students from educators who use their positions of authority to lure students into sexual relationships. Though it is no easy task, adding an abuse-of-authority component to the language of the Improper Relationship Statute will increase its effectiveness in preventing and punishing predatory relationships.

APPENDIX A<sup>131</sup>**2003 Version.**

(a) An employee of a public or private primary or secondary school commits an offense if the employee engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works and who is not the employee's spouse.

(b) An offense under this section is a felony of the second degree.

(c) If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or both sections.

**2007 Version**

(a) An employee of a public or private primary or secondary school commits an offense if the employee engages in:

(1) sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works and who is not the employee's spouse; or

(2) conduct described by Section 33.021, with a person described by Subdivision (1), regardless of the age of that person.

(b) An offense under this section is a felony of the second degree.

(c) If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or both sections.

(d) The name of a person who is enrolled in a public or private primary or secondary school and involved in an improper relationship with an educator as provided by Subsection (a) may not be released to the public and is not public information under Chapter 552, Government Code.

**2009 Version**

(a) An employee of a public or private primary or secondary school commits an offense if the employee engages in:

(1) sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works ~~and who is not the employee's spouse~~; or

(2) conduct described by Section 33.021, with a person described by Subdivision (1), regardless of the age of that person.

(b) An offense under this section is a felony of the second degree.

(b-1) It is an affirmative defense to prosecution under this section that the actor was the spouse of the enrolled person at the time of the offense.

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131. Emphasis added by the Author. Certain changes that were merely stylistic are not noted.

(c) If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or both sections.

(d) The name of a person who is enrolled in a public or private primary or secondary school and involved in an improper relationship with an educator as provided by Subsection (a) may not be released to the public and is not public information under Chapter 552, Government Code.

**2011 Version (Current)**

(a) An employee of a public or private primary or secondary school commits an offense if the employee engages in:

(1) engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works;

(2) holds a certificate or permit issued as provided by Subchapter B, Chapter 21, Education Code, or is a person who is required to be licensed by a state agency as provided by Section 21.003(b), Education Code, and engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person the employee knows is:

(A) enrolled in a public primary or secondary school in the same school district as the school at which the employee works; or

(B) a student participant in an educational activity that is sponsored by a school district or a public or private primary or secondary school, if:

(i) students enrolled in a public or private primary or secondary school are the primary participants in the activity; and

(ii) the employee provides education services to those participants; or

(3) engages in conduct described by Section 33.021, with a person described by Subdivision (1), or a person the employee knows is a person described by Subdivision (2)(A) or (B), regardless of the age of that person.

(b) An offense under this section is a felony of the second degree.

(b-1) It is an affirmative defense to prosecution under this section that:

(1) the actor was the spouse of the enrolled person at the time of the offense; or

(2) the actor was not more than three years older than the enrolled person and, at the time of the offense, the actor and the enrolled person were in a relationship that began before the ac-



tor's employment at a public or private primary or secondary school.

(c) If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or both sections.

(d) The name of a person who is enrolled in a public or private primary or secondary school and involved in an improper relationship with an educator as provided by Subsection (a) may not be released to the public and is not public information under Chapter 552, Government Code.

### **Proposed Version**

(a) An employee that holds a position of authority in a public or private primary or secondary school commits an offense if the employee:

(1) engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person enrolled in the public or private primary or secondary school in which the employee works; or

(2) engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person enrolled in a public or private primary or secondary school and over whom the employee directly and routinely exercised a degree of control over the education, counseling, or well-being of that person; or

(3) engages in conduct described by Section 33.021(c) of the Texas Penal Code, with a person described by Subdivision (1) or (2) above.

(a-1) For purposes of Section (a), a "position of authority" is one where the employee directly and routinely exercises a degree of control over the education, counseling, or well-being of students. "Position of authority" includes, but is not limited to, positions such as principals, classroom teachers, coaches, but does not include, nor is limited to, positions such as cafeteria workers, school bus drivers, or custodians.

(b) An offense under this section is a felony of the second degree.

(b-1) It is an affirmative defense to prosecution under this section that:

(1) the actor was the spouse of the enrolled person at the time of the offense; or

(2) the actor was not more than three years older than the enrolled person and, at the time of the offense, the actor and the enrolled person were in a relationship that began before the actor's employment at a public or private primary or secondary school.

(c) If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or both sections.

(d) The name of a person who is enrolled in a public or private primary or secondary school and involved in an improper relationship with an educator as provided by Subsection (a) may not be released to the public and is not public information under Chapter 552, Government Code.