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TENNESSEE REVENGE PORN LAW: PROSECUTORIAL PROBLEMS AND POTENTIAL SOLUTIONS

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I. INTRODUCTION

Effective July 1, 2016, Tennessee enacted Tenn. Code Ann. § 39-17-318, entitled Unlawful Exposure.¹ The new law enshrined statutory language to prosecute nonconsensual pornography, commonly known as “revenge porn.” Nonconsensual pornography is the distribution of naked or sexually-charged images of persons without their consent.² In passing the Unlawful Exposure law, Tennessee joined the majority of other states by recognizing the crime’s existence and codifying elements for criminal prosecution.³ Currently, forty-eight states and the District of Columbia have enacted nonconsensual pornography laws.⁴

¹ TENN. CODE ANN. § 39-17-318 (2016).

² Danielle Keats Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

³ CCRI, *48 States + DC + Two Territories Now Have Laws against Nonconsensual Pornography*,

<https://www.cybercivilrights.org/nonconsensual-pornography-laws> (last visited January 15, 2022).

⁴ *Id.*

The statutory language of *Tennessee Code Annotated* Section 39-17-318 reads:

(a) A person commits unlawful exposure who, with the intent to cause emotional distress, distributes an image of the intimate part or parts of another identifiable person if:

(1) The image was photographed or recorded under circumstances where the parties agreed or understood that the image would remain private; and

(2) The person depicted in the image suffers emotional distress.

(b) As used in this section:

(1) “Emotional distress” has the same meaning as defined in § 39-17-315; and

(2) “Intimate part” means any portion of the primary genital area, buttock, or any portion of the female breast below the top of the areola that is either uncovered or visible through less than full opaque clothing.

(c) Nothing in this section precludes punishment under any other section of law providing for greater punishment.

(d) A violation of subsection (a) is a Class A misdemeanor.

Two terms are defined within the statute: “emotional distress” and “intimate part.” Emotional distress uses the same definition found in the Tennessee statute for Stalking where “‘Emotional distress’ means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.”⁵ Intimate parts are named as “any portion of” the primary sexual characteristics of males and females (i.e., sex organs), buttocks, and female breasts “below the top of the areola.”⁶

Prosecutorial problems emerged where certain published images qualified for the spirit of the law yet did

⁵ TENN. CODE ANN. § 39-17-315(a)(2) (2018).

⁶ TENN. CODE ANN. § 39-17-318(b)(2) (2016). This phrase also appears in legislative canon regarding “adult establishments;” see TENN. CODE ANN. § 67-4-1201 and § 57-4-204.

not meet the letter of the law. Two such cases presented in the 20th Judicial District of Tennessee (Davidson County). “Alex” was subjected to nonconsensual pornography when a former partner distributed a picture of her anus to her family and workplace.⁷ The judge expressed doubt during a preliminary hearing that the picture met the qualification of “identifiable person” as he believed the party must be identifiable within the four corners of the photograph.⁸ Thus, the picture of a lone body part was believed by the Assistant District Attorney handling the matter to represent a problematic issue because the victim’s face did not appear as an identifiable factor.⁹

The second case presented a reverse problem.¹⁰ “Blake” was prominently identifiable in the distributed picture. With her knowledge, the defendant had taken a private cell phone photo of the victim engaging in oral sex with him. The victim’s face was in full view, along with a portion of the defendant’s penis—however, Blake’s own intimate parts were covered.¹¹ The defendant openly referred to the victim in the caption when he shared this image via social media to his many followers. Implausibly, sexual acts are not expressly addressed under Tenn. Code Ann. § 39-17-318. A covered, but still identifiable, victim engaged in sexual activity does not meet the statutory language where his or her “intimate parts” are not strictly visible.

II. ELEMENTS OF THE CRIME

Tennessee Pattern Jury Instructions outline three essential elements for the crime of Unlawful Exposure:

- (1) Defendant intended to cause emotional distress through distributing an image of the

⁷ Email from Sarah Wolfson-Butler, Asst. Dist. Atty., to author (Apr. 3, 2018, 15:29 CT) (on file with author).

⁸ *Id.*

⁹ *Id.*

¹⁰ Email from author to Sarah Wolfson-Butler, Asst. Dist. Atty. (Apr. 4, 2018, 07:49 CT) (on file with author).

¹¹ Interview with Jude Santana, Asst. Dist. Atty., in Nashville, Tenn. (Apr. 3, 2018).

intimate part or parts of another identifiable person; and
(2) The image was created under circumstances where parties agreed or understood the image would remain private; and
(3) The person depicted in the image suffered emotional distress.¹²

Elements (2) and (3) are relatively straightforward and present little room for misinterpretation. The “emotional distress” piece of element (3) referenced in the statute has the same meaning as in Tenn. Code Ann. § 39-17-315 (Stalking).¹³ The “emotional distress” section of the Stalking statute reads:

Emotional distress” means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.¹⁴

Emotional distress is objectively measured by a reasonable person standard and subjectively where the victim did personally or *actually* experience significant mental suffering or distress.¹⁵ As a required element for Unlawful Exposure, the victim must establish she or he individually suffered significant mental suffering or distress, where the objective standard of reasonable person is largely static.

Element (2) does not have a statutory standard establishing under what circumstances both parties would agree or understand such images would remain private. The analogous nonconsensual pornography statute in Illinois includes a reasonable person standard. It states:

A person commits non-consensual dissemination of private sexual images when he or she:

¹² COMMITTEE ON PATTERN JURY INSTR., 7 TENN. PRAC. PATTERN JURY INSTR., 39.09.

¹³ TENN. CODE ANN. § 39-17-318 (2016).

¹⁴ TENN. CODE ANN. § 39-17-315 (2018).

¹⁵ *State v. Flowers*, 512 S.W.3d 161, 162 (Tenn. 2016).

...

(2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and

(3) knows or should have known that the person in the image has not consented to the dissemination.¹⁶

Tennessee does not include a reasonable person standard in its Unlawful Exposure statute. Thus, a victim must assert and articulate both parties' expectations of privacy to the trier of fact.

The most problematic language comes within Element (1) where a defendant "with intent to cause emotional distress, distributed an image of the intimate part or parts of another identifiable person."¹⁷ Parsing out the specific statutory language, phrases will be addressed below, accordingly.

A. "WITH INTENT TO CAUSE"

The word "intent" is defined within the jury instruction. It mirrors another Tennessee criminal statute which states:

"Intentional" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.^{18,19}

Within the Unlawful Exposure statute, the above language does not appear to address the intentional nature in publishing the image, but rather the intentional purpose

¹⁶ 720 ILL. COMP. STAT. ANN. 5/11-23.5 (2015).

¹⁷ JURY INSTRUCTIONS, *supra* note 12.

¹⁸ TENN. CODE ANN. § 39-11-106(a)(21) (2021).

¹⁹ The word "conscious" appears in the language for Tenn. Code Ann. § 39-11-106(a)(21). In the pattern jury instructions, the word "conscience" appears under T.P.I.-Crim. 39.09. The two words are not analogous in nature, rather they are homophonic. Ideally, the Tennessee General Assembly should choose the most accurate word for their plain and intended meaning.

of a conscious act or desire. To wit, the intentional act is to cause the victim emotional distress or the “revenge” piece of “revenge porn.” As a statutory requirement to intentionally cause emotional distress, the statute does not expressly address otherwise-covered images where revenge is not the motivating factor. The “revenge” part of nonconsensual pornography acts as a scapegoat, colorizing the criminal act with soap operatic flair. However, perpetrators of this crime may not know the victim in any meaningful capacity, thus rendering “revenge” as an inoperable qualifier. Amusement or other gratification, not maliciousness, can be the overriding factor in publishing intimate images.²⁰ Indeed, a survey of admitted perpetrators who disseminated sexually explicit images without consent indicated some did so for amusement between friends and had no collateral intention to hurt the depicted victim.²¹

Requiring an intention to inflict emotional distress as an essential element of Unlawful Exposure infuses motive into the criminal act.²² Assault, domestic assault, rape, and virtually all other victim crimes do not require motive as an element.²³ In these statutes, the *mens rea* term of “intentional” applies to the act itself, not the motivation behind the act. Even first degree murder, arguably the most egregious act that can be committed upon another, expressly disclaims a “culpable mental state” unless prosecuting as a premeditated and intentional killing.²⁴ Victim crimes, including Unlawful Exposure, should not force the victim to prove the motivations of the defendant—only that the act was committed intentionally, knowingly, or recklessly. Burdening a victim of nonconsensual pornography to prove a

²⁰ Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report*, CYBER C.R. INITIATIVE 11 (June 12, 2017), 4.

<https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>

²¹ *Id.* at 19.

²² Mary A. Franks, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators*, CYBER CIVIL RIGHTS, 7-8.

<https://www.cybercivilrights.org/guide-to-legislation> (last visited May 17, 2019).

²³ See TENN. CODE ANN. § 39-13-101 (2018); TENN. CODE ANN. § 39-13-111 (2018); TENN. CODE ANN. § 39-13-503 (2005).

²⁴ Tenn. Code Ann. § 39-13-202 (2019).

defendant's motive serves to undermine and trivialize protection from a crime into determining *why* the crime was committed.²⁵

B. "INTIMATE PART OR PARTS OF ANOTHER"

Unlawful Exposure defines "intimate parts" within the statutory language as:

[A]ny portion of the primary genital area, buttock, or any portion of the female breast below the top of the areola that is either uncovered or visible through less than fully opaque clothing.²⁶

A specific gap within the prosecution of the Tennessee law stems from failing to address the depiction of sexual acts in Unlawful Exposure. As in the case of "Blake," a readily identifiable victim engaged in a sexual act is not addressed by the current wording of the statute. The intimate part shown in the photograph (defendant's penis) was not "of another." A defendant can consent *ad nauseam* to publishing their own private parts. Beyond running afoul of other laws, there is no Unlawful Exposure restriction to sharing one's own sexually explicit or intimate pictures. Yet, victims can experience the "significant mental suffering" required by the statute even when the nudity is not their own. Victims can endure psychological impact from nonconsensual pornography through loss of opportunities (work, education, intimacy), trauma from threats or taunts, humiliation, and heightened risk of suicide.²⁷

The vast majority of states having nonconsensual pornography statutes include language covering the depiction of sexual acts under the umbrella of the law.²⁸

²⁵ Cynthia J. Najdowski, *Legal Responses to Nonconsensual Pornography: Current Policy in the United States and Future Directions for Research*, 23 PSYCHOL. PUB. POL'Y & L. 154, 155 (2017).

²⁶ TENN. CODE ANN. § 39-17-318(b)(2) (2016).

²⁷ Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1285 (2017).

²⁸ See ALA. CODE § 13A-6-240; ALASKA STAT. ANN. § 11.61.120; ARIZ. REV. STAT. ANN. § 13-1425; ARK. CODE ANN. § 5-26-314; CAL. PENAL CODE §

Many of those statutes expressly define specific sexual actions to protect against misunderstanding and attacks on vagueness. Here again, Illinois uses pointed language to include sexual acts, sexual activity, and visible ejaculate on the victim.

“Sexual act” means sexual penetration, masturbation, or sexual activity.

“Sexual activity” means any:

- (1) knowing touching or fondling by the victim or another person or animal, either directly or through clothing, of the sex organs, anus, or breast of the victim or another person or animal for the purpose of sexual gratification or arousal; or
- (2) any transfer or transmission of semen upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or another; or
- (3) an act of urination within a sexual context; or
- (4) any bondage, fetter, or sadism masochism; or
- (5) sadomasochism abuse in any sexual

647(j)(4); COLO. REV. STAT. ANN. § 18-7-107; CONN. GEN. STAT. ANN. § 53A-189C; DEL. CODE ANN. TIT. 11, § 1335; D.C. CODE ANN. § 22-3051; FLA. STAT. ANN. § 784.049; GA. CODE ANN. § 16-11-90; HAW. REV. STAT. ANN. § 711-1110.9; IDAHO CODE ANN. § 18-6609; 720 ILL. COMP. STAT. ANN. 5/11-23.5; IND. CODE ANN. § 35-45-4-8; IOWA CODE ANN. § 708.7; KAN. STAT. ANN. § 21-6101; KY. REV. STAT. ANN. § 531.120; ME. REV. STAT. tit. 17-A, § 511-A; MD. CODE ANN., CRIM. LAW § 3-809; MICH. COMP. LAWS ANN. § 750.145e; MINN. STAT. ANN. § 617.261; MO. ANN. STAT. § 573.110; MONT. CODE ANN. § 45-8-213; NEB. REV. STAT. ANN. § 28-311.08; NEV. REV. STAT. ANN. § 200.770; N.H. REV. STAT. ANN. § 644:9-a; N.J. STAT. ANN. § 2C:14-9; N.M. STAT. ANN. § 30-37A-1; N.Y. PENAL LAW § 245.15; N.C. GEN. STAT. ANN. § 14-190.5A; N.D. CENT. CODE ANN. § 12.1-17-07.2; OHIO REV. CODE ANN. § 2917.211; OKLA. STAT. ANN. TIT. 21, § 1040.13b; OR. REV. STAT. ANN. § 163.472; 18 PA. STAT. AND CONS. STAT. ANN. § 3131; 11 R.I. GEN. LAWS ANN. § 11-64-3; S.D. CODIFIED LAWS § 22-21-4; TEX. PENAL CODE ANN. § 21.16; UTAH CODE ANN. § 76-5b-203; VT. STAT. ANN. TIT. 13, § 2606; WASH. REV. CODE ANN. § 9A.86.010; W. VA. CODE ANN. § 61-8-28a; WIS. STAT. ANN. § 942.09; WYO. STAT. ANN. § 6-4-306.

context.²⁹

Forty-five states and the District of Columbia have included language that covers sexual acts under their respective nonconsensual pornography laws. Tennessee provides its citizenry, including “Blake,” no such protection.³⁰

C. “IDENTIFIABLE PERSON”

“Blake” performing a sexual act was unprotected by Tennessee’s Unlawful Exposure law despite her identifiability in the picture itself. However, “Alex” was reduced to a mere body part and not strictly identifiable within the four corners of the image. The defendant identified “Alex” when she was named in distributing the image to her family and workplace. Thus, “Alex’s” anus, pruriently published to her close community, was therefore no longer unidentifiable even where her face was not part of the picture.

The Unlawful Exposure law does not define “identifiable” within the statute. Other states include language that clarify identifying factors can occur from within the image itself or from information transmitted along with the image. The Illinois statute provides express language perceiving that an individual may be identified

²⁹ 720 ILL. COMP. STAT. ANN. 5/11-23.5(a) (2015).

³⁰ See ALA. CODE § 13A-6-240; ALASKA STAT. ANN. § 11.61.120; ARIZ. REV. STAT. ANN. § 13-1425; ARK. CODE ANN. § 5-26-314; CAL. PENAL CODE § 647(j)(4); COLO. REV. STAT. ANN. § 18-7-107; CONN. GEN. STAT. ANN. § 53A-189C; DEL. CODE ANN. TIT. 11, § 1335; D.C. CODE ANN. § 22-3051; FLA. STAT. ANN. § 784.049; GA. CODE ANN. § 16-11-90; HAW. REV. STAT. ANN. § 711-1110.9; IDAHO CODE ANN. § 18-6609; 720 ILL. COMP. STAT. ANN. 5/11-23.5; IND. CODE ANN. § 35-45-4-8; IOWA CODE ANN. § 708.7; KAN. STAT. ANN. § 21-6101; KY. REV. STAT. ANN. § 531.120; ME. REV. STAT. tit. 17-A, § 511-A; MD. CODE ANN., CRIM. LAW § 3-809; MICH. COMP. LAWS ANN. § 750.145e; MINN. STAT. ANN. § 617.261; MO. ANN. STAT. § 573.110; MONT. CODE ANN. § 45-8-213; NEB. REV. STAT. ANN. § 28-311.08; NEV. REV. STAT. ANN. § 200.770; N.H. REV. STAT. ANN. § 644:9-a; N.J. STAT. ANN. § 2C:14-9; N.M. STAT. ANN. § 30-37A-1; N.Y. PENAL LAW § 245.15; N.C. GEN. STAT. ANN. § 14-190.5A; N.D. CENT. CODE ANN. § 12.1-17-07.2; OHIO REV. CODE ANN. § 2917.211; OKLA. STAT. ANN. TIT. 21, § 1040.13b; OR. REV. STAT. ANN. § 163.472; 18 PA. STAT. AND CONS. STAT. ANN. § 3131; 11 R.I. GEN. LAWS ANN. § 11-64-3; S.D. CODIFIED LAWS § 22-21-4; TEX. PENAL CODE ANN. § 21.16; UTAH CODE ANN. § 76-5b-203; VT. STAT. ANN. TIT. 13, § 2606; WASH. REV. CODE ANN. § 9A.86.010; W. VA. CODE ANN. § 61-8-28a; WIS. STAT. ANN. § 942.09; WYO. STAT. ANN. § 6-4-306.

through other means than recognition within the picture itself:

(1) intentionally disseminates an image of another person:

...

(B) who is identifiable from the image itself or information displayed in connection with the image.³¹

As Tennessee does not define “identifiability” within its statute, the language does not clarify if the identifiable nature of the person must come from the image itself. An individual may be recognized by the characteristics of their face or other physical features, tattoos, piercings, scars, hairstyle, clothing, etc. Law enforcement have systematically used tattoo and trait data collection since the 1800s in England.³² What is unclear, and not within the four corners of the statute, is the use of extrinsic information to identify a person within a photograph.

If a disgruntled former intimate partner shares an image of a victim’s genitals, buttocks, or breasts as disembodied parts, there is generally little to identify them as belonging to a particular person. Attributes such as pigmentation, size, or other characteristics are not readily known to the general public or one’s social circle and would be unlikely to assert identifiability. However, should the same former partner include the caption, “That no good cheating rat, ex-boyfriend,” the identifiability factor increases significantly. Certainly one’s friends, family, work colleagues, neighbors, and other parties would have a much higher likelihood of determining the victim’s identity.

1. IDENTIFICATION BY OTHER MEANS

The most expedient way for Tennessee’s Unlawful Exposure statute to bolster the identifiable person factor is amending the statute to include “information disseminated with the image itself,” as Illinois and other states have codified. Barring such an amendment, a victim should be allowed to self-identify they are depicted in the image

³¹ 720 Ill. Comp. Stat. Ann. 5/11-23.5(b) (2015).

³² Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561, 1570 (2012).

distributed without their consent.

Crime scene and forensic photographs often show close-up views of injuries or body parts that are not strictly identifiable as a victim's from the image itself. Tennessee Rules of Evidence allow identification of evidence to be determined from authentication by a witness or an unbroken chain of custody.³³ "Testimony of a Witness with Knowledge" is expressly stated as an authentication example that conforms with the requirements of the rule.³⁴ Where a victim can authenticate the identity of stolen items as belonging to him, so too should a victim of Unlawful Exposure be able to authenticate he or she is shown in an intimate picture.³⁵ Within the Advisory Notes (7. Photographs) of Tenn. R. Evid. 901, a case is referenced regarding the admissibility of photographs and evidence of identity stating:

We . . . conclude that the jury appropriately could have considered the photographs as evidence of identity, despite the State's failure to present proof that the person in the photographs is the defendant. Photographs, such as those admitted in this case, have been described as recorded real evidence. Cohen, Paine & Sheppard, *Tennessee Law of Evidence*, § 401.9, p. 83 (2d Ed.1990). If properly authenticated, such recordings constitute real evidence from which a trier of fact is able to draw a firsthand sense impression of the facts, as opposed to evidence which serves merely to report to the trier of fact the secondhand sense impression of others. *Id.* at p. 82; see also Strong, 2 McCormick On Evidence, § 212, p. 3 (4th Ed.1992); Graham, *Handbook of Federal Evidence*, § 401.2, p. 147–48 (3rd Ed.1991).³⁶

Where photographs are authenticated as an accurate

³³ Tenn. R. Evid. 901

³⁴ *Id.*, at (b)(1)

³⁵ See *Sneed v. State*, 498 S.W.2d 626, 628 (Tenn. Crim. App. 1973); *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978).

³⁶ *State v. Williams*, 913 S.W.2d 462, 466 (Tenn. 1996).

portrayal by a witness, jurors may make a first-hand sense impression with the evidence at hand. Proving identifiability of the individual in the picture is not a requirement for a jury to weigh the evidence.

2. “IDENTIFIABLE PERSON” REMOVED FROM STATUTORY LANGUAGE

The term “identifiable person” is used alone in the language of Unlawful Exposure, orphaned from any additional context. However, a similar Tennessee statute exists on dissemination of private photographs which provides insight into the importance of language. Tenn. Code Ann. § 39-13-605, Photographs; Dissemination, provides similar protections for individuals whose images were taken unaware and without their consent (*i.e.*, hidden camera pictures). Unsuspecting victims of this crime were captured via concealed cameras. Such photographs would “offend or embarrass an ordinary person if such person appeared in the photograph.”³⁷ However, the original wording of the statute as created in 1994 stated the following:

As used in this section, unless the context otherwise requires, “photograph” means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission of any individual *so that the individual is readily identifiable* [emphasis added].³⁸

In 2010, the state legislature amended the wording of the statute noting:

SECTION 2. Tennessee Code Annotated, Section 39–13–605(b), is amended by deleting the words “so that the individual is readily

³⁷ TENN. CODE ANN. § 39-13-605(a)(1) (2018).

³⁸ INVASION OF PRIVACY, 1994 Tennessee Laws Pub. Ch. 970 (H.B. 2276).

identifiable”.³⁹

No discussion was saved within the Session Minutes as to why the change was enacted, but beginning January 1, 2011, the new statutory language erasing “readily identifiable” was enacted into state law.⁴⁰ The Bill Summary states:

Criminal Offenses - As introduced, deletes the requirement that a person being photographed must be readily identifiable in order for the offense of unlawful photographing to be committed. - Amends TCA Title 39.

Under present law, “photograph” means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission of any individual so that the individual is readily identifiable. This bill removes that requirement that the individual be “readily identifiable” from the definition of photograph for purposes of the above described offense.⁴¹

The main difference between Unlawful Exposure (“revenge porn”) and Photographs; Dissemination (“hidden camera”), predicates on who took the photograph and the consent of the victim. The expectation of privacy, capture of intimate photographs, and lack of prior consent to distribute are similar elements between the two statutes. The Tennessee General Assembly purposefully removed the “identifiable” language within the “hidden camera” statute. While this change does not provide a definition of what “identifiable” means for Tenn. Code Ann. § 39-17-318 (“revenge porn”), it does give weight that the legislature clearly intended to remove the identifiability factor from intimate pictures *taken* by another without consent. No realistic barrier exists where the same standard cannot be applied to consensual, intimate pictures that are *distributed*

³⁹ CRIMES AND OFFENSES--ABUSE--RESIDENTIAL CARE FACILITIES, 2010 Tennessee Laws Pub. Ch. 1124 (S.B. 3219).

⁴⁰ Tennessee Senate Journal, 2010 Reg. Sess. No. 50 (West).

⁴¹ Tennessee Bill Summary, 2010 Reg. Sess. S.B. 3219 (West).

without consent.

D. STATE AND FEDERAL STATUTES

A survey of the United States notes forty-eight states and the District of Columbia have enacted nonconsensual pornography laws in varying capacities.⁴² These state laws comprise a hodgepodge of different statutory language approaches and standards between them, with some states (notably Illinois) providing model standards for a robust, meaningful law. Two states without active nonconsensual pornography statutes are Massachusetts and South Carolina.⁴³ No Federal law currently offers protection for nonconsensual pornography victims.⁴⁴

III. CURING PROBLEM LANGUAGE IN UNLAWFUL EXPOSURE

As shown with Tennessee's "Hidden Camera" law, amendments can and should be made to statutory language as problems become evident. Three particular areas within Tennessee's Unlawful Exposure statute should be addressed to improve viability of the law and to provide more substantive protection to victims who currently fall outside the range of the plain language, such as "Alex" and "Blake."

A. "IDENTIFIABLE PERSON" STANDARD

As discussed in previous sections, Tennessee has an identity problem with the statutory language of "identifiable person" as a standalone phrase. With no definition within the law to support context, judges and juries must look to the plain language when weighing evidence. Where one judge has already found it problematic to determine the identity of the victim outside the four corners of the image, it is axiomatic other judges could find they are also limited. There are no appellate rulings to provide the context and contour of the law other than how it is written.

Self-identity and authentication of images under

⁴² CCRI., *supra* note 3.

⁴³ *Id.*

⁴⁴ Franks, *supra* note 27, at 1293-1294.

Tenn. R. Evid. 901 and previously noted case law could provide an avenue for judges to allow introduction of the evidence, but judges could also as easily determine plain statutory language trumps the evidentiary rule. Far better for an amendment to the Unlawful Exposure law clarify “identifiable person” and expand the language to include identifying information accompanying the distributed image. With such an expansion of the language, “Alex” and others in similar situations would be more likely to receive realistic protection under this law.

Co-opting the Cyber Civil Rights Institute’s (CCRI) Model State Law, the change from the current statutory language could be as simple as updating “identifiable person” to “another person who is identifiable from the image itself or information displayed in connection with the image.”⁴⁵ This adjustment would help ensure that random body parts and headless torsos in intimate images can identify victims without relying solely on the image itself, but also by the names or relationships established in words or symbols transmitted along with the picture.

B. EXPAND LANGUAGE TO INCLUDE SEXUAL ACTS

It is incomprehensible that sexual acts are markedly absent from the Unlawful Exposure language, however Tennessee is not the only state to lapse their duty to protect victims in this manner. Indeed, nearly all states who have nonconsensual pornography laws do include sexual acts and activity language, placing Tennessee in a tiny, ignominious minority along with Louisiana and Virginia.⁴⁶

As with the identifiable person factor, the addition of language to the statute is a comparatively easy change, but one which is absolutely vital. Tennessee’s unlawful exposure law currently has a huge gap where sexual acts are not expressly covered in the statute. CCRI’s Model State Law suggests “‘Sexual act’ includes but is not limited to masturbation; genital, anal, or oral sex; sexual penetration with objects; or the transfer or transmission of semen upon any part of the depicted person’s body.”⁴⁷

⁴⁵ *Id.*, at 10.

⁴⁶ *supra* note 28

⁴⁷ Franks, *supra* note 22, at 11.

C. *MENS REA* AND MOTIVE

Unlawful Exposure requires the victim prove a defendant's intent to cause significant emotional distress as an essential element. This element can be a prohibitive bar where a victim must substantiate a defendant's thoughts or intentions when distributing nonconsensual pornography. A victim should not be required to establish an emotional injury where the true harm is to their privacy. CCRI suggests a standard where the actor "knows or recklessly disregard[s] the risk that the depicted person has not consented to such disclosure."⁴⁸

Utah passed their original Distribution of an Intimate Image law in 2014.⁴⁹ In 2019, Utah passed an amendment curing the problematic "intentional" language. "This bill: changes the intent provisions for the crime of distribution of an intimate image from intent to cause emotional distress to knowing that the distribution would cause a reasonable person emotional distress."⁵⁰

Tennessee could amend the current Unlawful Exposure law with similar wording with either of the referenced changes above. That action would remove the burden of proving a defendant's "intent to harm," and retire the trope that victims must suffer in order to have their privacy violated.

IV. CONCLUSION

Tennessee has joined the majority of states providing some protection for nonconsensual pornography to victims. Victims have an avenue to pursue justice where they have been wronged by "revenge porn." However, many other victims are left without recourse where the statutory language simply does not cover their specific situations. Tennessee has the ability to cure these deficiencies in the law through the amendment process, and provide a robust, protective law that may give victims peace of mind and

⁴⁸ *Id.*

⁴⁹ U.C.A. 1953 § 76-5b-203 (2014).

⁵⁰ CRIMINAL CODE AMENDMENTS, 2019 Utah Laws H.B. 270 (West's No. 376)

defendants a healthy reason to pause before pushing send.

APPENDIX

Suggestions to amend *Tennessee Code Annotated* Section 39-17-318, relative to criminal offenses. Strikethrough text of original statutory language along with the italicized text of appended language.

(a) A person commits unlawful exposure who, ~~with the intent to cause emotional distress~~ *knowing that the distribution would cause a reasonable person emotional distress, knowingly or recklessly* distributes an image of the intimate ~~part or parts~~ of another identifiable person if:

- (1) *Where* the image was photographed or recorded under circumstances ~~where~~ the parties agreed or understood that the image would remain private; and
- (2) *Who is engaged in a sexual act or whose intimate part or parts are exposed. The person depicted in the image suffers emotional distress*

(b) As used in this section:

- (1) “Emotional distress” has the same meaning as defined in § 39-17-315; and
- (2) “Intimate part” means any portion of the primary genital area, buttock, *anus*, or any portion of the female breast below the top of the areola that is either uncovered or visible through less than fully opaque clothing.
- (3) “*Identifiable person*” is a person who is identifiable from the image itself or information displayed in connection with the image.
- (4) “*Sexual act*” includes but is not limited to masturbation; genital, anal, or oral sex; sexual penetration with objects; or the transfer or transmission of semen upon any part of the depicted person’s body

(c) Nothing in this section precludes punishment under any other section of law providing for greater punishment *or any applicable civil action*.

(d) A violation of subsection (a) is a Class A misdemeanor.

(e) *Exceptions: This section does not apply to*

- (1) *Images involving voluntary exposure in public or commercial settings; or Disclosures made in the public interest, including but not limited to the reporting of unlawful conduct, or the lawful and common practices*

of law enforcement, criminal reporting, criminal proceedings, or legitimate medical purpose.