TENNESSEE REVENGE PORN LAW: PROSECUTORIAL PROBLEMS AND POTENTIAL SOLUTIONS

by

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Abstract:

In 2016, Tennessee joined the majority of states incorporating a version of “revenge porn” laws on its books. The relatively new law currently has no appellate-level guidance to assist in the plain language of T.C.A. 39-17-318 (Unlawful Exposure). Problems in effective prosecution under this law have presented, narrowing the scope of the crime and excluding certain victims. A closer look at the language within the state reveals concerns when applied to real world situations. An in-depth survey of other states’ statutory language offers ideas and options for curing Tennessee’s current statutory language via amendment. Approaching the challenges with what works in other states may produce a more effective “revenge porn” statute for both prosecution and victim protection.

Introduction:

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

² Danielle Keats Citron and Mary Anne Franks, Criminalizing Revenge Porn, 49 Wake Forest L. Rev. 345, 346 (2014).
⁴ Id.
The statutory language of T.C.A. § 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 fully 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.”

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.”

Prosecutorial problems have emerged where certain published images which should qualify for the spirit of the law did not meet the letter of the law. Two such cases presented in the 20th Judicial District of Tennessee (Davidson County). “Alex was subjected to

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nonconsensual pornography when a former partner distributed a picture of her anus to her family and workplace.\textsuperscript{7} The judge who initially ruled on the merits of the case expressed doubt the picture met the qualification of “identifiable person” as he believed the party had to be identifiable within the four corners of the photograph.\textsuperscript{8} Thus, the picture of a lone body part was believed by the Assistant District Attorney handling the matter to represent a “losing case” because the victim’s face did not appear as an identifiable factor.\textsuperscript{9} 

The second case presented a reverse problem.\textsuperscript{10} “Blaine” 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 her body parts were covered.\textsuperscript{11} The defendant openly referred to the victim in caption when he shared this picture via social media to his thousands of followers. Yet, sexual acts are not expressly covered under the Unlawful Exposure statute. A covered but identifiable victim engaged in sexual activity does not meet the statutory language where his or her “intimate parts” are not strictly visible.

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 distribution of the intimate part or parts of another identifiable person; and

\textsuperscript{7} Email from Sarah Wolfson, Asst. Dist. Atty., to author (Apr. 3, 2018, 15:29 CT) (on file with author).  
\textsuperscript{8} Id.  
\textsuperscript{9} Id.  
\textsuperscript{10} Email from author to Sarah Wolfson, Asst. Dist. Atty. (Apr. 4, 2018, 07:49 CT) (on file with author)  
(2) The image was created under circumstances where parties agreed or understood the image would remain private; and


Elements (2) and (3) are relatively straightforward and present little room for misinterpretation. The “emotional distress” piece of element (3) referenced in the Unlawful Exposure statute has the same meaning as in Tenn. Code Ann. § 39-17-315 (Stalking).\footnote{13}{Tenn. Code Ann. § 39-17-318 (2016).} The “emotional distress” section of the Stalking statute states:

“Emotional distress” means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.\footnote{14}{Tenn. Code Ann. § 39-17-315 (2018).}

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.\footnote{15}{State v. Flowers, 512 S.W.3d 161, 162 (Tenn. 2016).} As a required element of the crime of Unlawful Exposure, the victim must establish she or he subjectively suffered significant mental suffering or distress, where the objective standard of a 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 porn criminal statute in Illinois includes a reasonable person standard. It states:

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

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

\footnote{13}{Tenn. Code Ann. § 39-17-318 (2016).}
\footnote{14}{Tenn. Code Ann. § 39-17-315 (2018).}
\footnote{15}{State v. Flowers, 512 S.W.3d 161, 162 (Tenn. 2016).}
(3) knows or should have known that the person in the image has not consented to the dissemination.\textsuperscript{16}

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

The most problematic language comes within Element (1) where “defendant intended to cause emotional distress through distribution of the intimate part or parts of another identifiable person.”\textsuperscript{17} Parsing out the specific statutory language, phrases will be addressed below accordingly.

\textbf{“Intended to cause”}

The word “intentional” is defined within another Tennessee criminal statute stating:

\textit{“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.”}\textsuperscript{18}

Within the Unlawful Exposure statute, the above language appears to not address the intentional nature of publishing the image, but rather the intentional purpose of a conscious objective or desire. To wit, the intentional act of causing 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 porn acts as a scapegoat, colorizing the act with a soap operatic flair. However, perpetrators of this crime may not know the victim in any

\textsuperscript{17} T.P.I.—Crim.39.09 Unlawful Exposure, 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 39.09
\textsuperscript{18} Tenn. Code Ann. § 39-11-106(a)(18)
meaningful capacity, thus rendering “revenge” as an inoperable qualifier. Amusement or other gratification, not maliciousness, can be the overriding factor in publishing intimate images.19

Indeed, a survey of admitted perpetrators who disseminated sexually explicit images without consent indicated they did so for amusement between friends and had no intention to hurt the depicted victim.20 Laws requiring an intention to inflict emotional distress, as Tennessee’s Unlawful Exposure requires as an essential element, infuse a motive into the criminal act.21 Assault, Domestic Assault, rape, and virtually all other victim crimes do no require motive to prove an element.22 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.23 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. Requiring a victim of nonconsensual porn to bear the burden of showing the defendant’s motive serves to undermine and trivialize a crime committed into determining why the crime was committed.24

20 Id. at 19.
“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.\(^{25}\)

One of the specific gaps within the prosecution of the Tennessee law stems from lack of addressing the depiction of sexual acts in Unlawful Exposure. As in the case of “Blaine,” 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) is not “of another.” A defendant can consent \textit{ad nauseam} to publishing their own private parts. Barring running afoul of any other laws, there is no Unlawful Exposure restriction to sharing one’s own sexually explicit or intimate pictures.

Yet, victims can suffer the significant emotional distress required by the statute even when the nudity is not their own. Victims can suffer psychological impact from nonconsensual porn through loss of opportunities (work, education, intimacy), trauma from threats or taunts, humiliation, and heightened risk of suicide.\(^{26}\)


\(^{26}\) Mary Anne Franks, "Revenge Porn" Reform: A View from the Front Lines, 69 Fla. L. Rev. 1251, 1285 (2017).
The majority of states having nonconsensual porn statutes include language covering the
depiction of sexual acts under the umbrella of the law. 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 context.

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Thirty-nine states and the District of Columbia have included language that covers sexual acts under nonconsensual porn laws. Tennessee provides its citizenry, including “Blaine,” no such protection.\(^{29}\)

**“identifiable person”**

Although “Blaine” performing a sex act is unprotected by Tennessee’s Unlawful Exposure law despite her identifiability in the picture itself, “Alex” has been reduced to a mere body part and is not strictly identifiable within the four corners of the image. However, the sender identified “Alex” when he named her upon 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 makes clear the identifying factor can come from within the image itself or from information transmitted along with the image. Here again, the Illinois statute provides express language recognizing an individual may be identified by 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.\(^{30}\)

As Tennessee does not define “identifiability” within this statute, the language does not clarify if the identifiable nature of the person comes from the image itself. An individual may be arguably recognized by the characteristics of the picture by their face or other physical features, tattoos, body piercings, scars, hairstyle, clothing, etc. Law enforcement have systemically used tattoo

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\(^{29}\) See, supra note 27.

and trait data collection since the 1800s in England.\textsuperscript{31} 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 a picture of an intimate image of the aggrieved party’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 social circle, and would be unlikely to assert identifiability on their own. However, should the same former partner share the same picture with the caption, “That no good cheating rat ex-boyfriend,” the identifiability factor increases significantly. Certainly one’s friends, family, work colleagues, neighbors, and others would have a much higher likelihood of determining the victim’s identity.

\textbf{Identification by other means}

The most expedient way for Tennessee’s Unlawful Exposure statute to bolster the identifiable person factor is to amend the statute to include information disseminated with the image itself, as Illinois and other states have codified. Barring an amendment, a victim should be allowed to self-identify they are depicted in the image 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 the 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.\textsuperscript{32} “Testimony of a Witness with Knowledge” is expressly stated as an authentication example that conforms with the requirements of the rule.\textsuperscript{33} Where a victim

\textsuperscript{32} Tenn. R. Evid. 901
\textsuperscript{33} Id., at (b)(1)
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.\textsuperscript{34}

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 & Sheppeard, \textit{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 first-hand 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. \textit{Id}. at p. 82; see also Strong, 2 McCormick On Evidence, § 212, p. 3 (4th Ed.1992); Graham, \textit{Handbook of Federal Evidence}, § 401.2, p. 147–48 (3rd Ed.1991).\textsuperscript{35}

Where photographs are authenticated as an accurate 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.

\textbf{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 (\textit{i.e.} hidden camera pictures). Victims of this crime are unsuspecting they were being hunted via camera. Such photographs would “offend or embarrass an ordinary person if such person appeared in the


\textsuperscript{35} \textit{State v. Williams}, 913 S.W.2d 462, 466 (Tenn. 1996)
photograph.\(^{36}\) 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\(^{37}\).

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 identifiable”\(^{38}\).

No discussion is saved within the Session Minutes as to why the change was enacted, however beginning January 1, 2011 the new statutory language erasing “readily identifiable” was enacted into state law\(^{39}\). 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 amend 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\(^{40}\).

The main difference between Unlawful Exposure (“revenge porn”) and Photographs; Dissemination (“hidden camera”), is predicated on who took the photograph and consent of the


\(^{37}\) INVASION OF PRIVACY, 1994 Tennessee Laws Pub. Ch. 970 (H.B. 2276)

\(^{38}\) CRIMES AND OFFENSES--ABUSE--RESIDENTIAL CARE FACILITIES, 2010 Tennessee Laws Pub. Ch. 1124 (S.B. 3219)

\(^{39}\) Tennessee Senate Journal, 2010 Reg. Sess. No. 50 (West)

\(^{40}\) Tennessee Bill Summary, 2010 Reg. Sess. S.B. 3219 (West)
victim. The expectation of privacy, 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. There seems no realistic barrier as to why the same standard cannot be applied to consensual intimate pictures that are distributed without consent.

State and Federal statutes

A survey of the United States notes forty-three states and the District of Columbia have enacted nonconsensual porn laws in some capacity or other.\textsuperscript{41} New York has passed legislation that is scheduled to be enacted later in 2019, bringing the state total to forty-four. Seven states without active statutes are Indiana, Massachusetts, Mississippi, Nebraska, Ohio, South Carolina, and Wyoming.\textsuperscript{42} Of these holdouts, both Indiana and Ohio have sponsored bills trying to break through the legislation process.\textsuperscript{43} There is currently no Federal law offering protection for nonconsensual pornography victims.\textsuperscript{44}

The state laws are a hodgepodge of different language and standards between them, with some states (notably Illinois) providing model standards for a robust, meaningful law.\textsuperscript{45} In six

\textsuperscript{41} CCRI, \textit{supra} note 3.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Franks, \textit{supra} note 26, at 1293-1294.
\textsuperscript{45} CCRI. Seven Reasons Illinois is Leading the Fight Against Revenge Porn. https://www.cybercivilrights.org/seven-reasons-illinois-leading-fight-revenge-porn (last visited 05/17/2019).
states, nonconsensual porn laws constitute felony action against defendants (Arizona, Hawaii, Illinois, New Jersey, Texas, also the District of Columbia). 46

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 or, even more appropriately, before language becomes problematic. Four particular areas within Tennessee’s Unlawful Exposure statute need to be addressed to improve the viability of the law and provide more substantive protection to victims who currently fall outside the range of the plain language, such as “Alex” and “Blaine” did.

1. “Identifiable person” standard
2. Expand language to include sexual acts
3. Clarify mens rea element to remove appearance of motive
4. Felony charge option

1. “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 to the plain language. There are no appellate rulings to provide the context and contour of the law other than how it was written.

46 Franks, supra note 21, at 4.
Self-identity and authentication of images under 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 to 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:

“identifiable person” to

“another person who is identifiable from the image itself or information displayed in connection with the image.”

This minor change would help ensure that random body parts and headless torsos in intimate images can be identified without relying solely on the image itself, but also by the names or relationships established in words or symbols transmitted along with the picture.

2. Expand language to include sexual acts

It seems incomprehensible that the inclusion of sexual acts is 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, thirty-nine states do include sexual acts and activity language in their nonconsensual porn laws, placing Tennessee in an ignominious minority along with Lousiana and Virginia.

47 \textit{Id.}, at 10.
48 \textit{supra} note 27
As with the identifiable person factor, the addition of language to the statute would be a comparatively easy change, but one that is absolutely vital. Unlawful Exposure currently has a huge gap in the law 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.49

3. Mens rea and motive

Unlawful Exposure requires as an essential element the victim to prove defendant’s intent to cause significant emotional distress. It is virtually impossible for a victim to prove a defendant’s thoughts or intent when distributing nonconsensual porn. Neither should a victim be required to establish emotional injury when the real harm is to the victim’s 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.”50

Utah passed their original Distribution of an Intimate Image law in 2014.51 They recently passed an amendment curing the problematic “intentional” language to go into effect imminently.

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.52

49 Franks, supra note 21, at 11.
50 Id.
52 CRIMINAL CODE AMENDMENTS, 2019 Utah Laws H.B. 270 (West's No. 376)
Tennessee could amend the current Unlawful Exposure law with similar wording to either of the referenced language above. Remove the burden of proving the defendant’s intent to harm, and retiring the trope that victims must suffer in order to have their privacy violated.

4. Felony charge option

Six states (plus D.C.) currently make nonconsensual porn an outright felony under most circumstances. Still other states, such as Alabama, Georgia, and Oregon provide subsequent convictions under their statutes can rise to the felony level. Tennessee does not state any aggravating factors such as subsequent acts or monetization of the images. Appending a “bigger bite” to the law may well give potential actors a more significant reason to refrain from pressing send on that intimate picture distribution. Indeed, a survey of former perpetrators of sharing nonconsensual images indicated the more impactful the consequences, the more likely they would have been to not distribute. Of the respondents 96% indicated having to register as a sex offender and 81% if potentially charged with a state felony would have stopped their action before reaching the distribution stage.

Conclusion

Tennessee has joined the majority of states providing some protection for nonconsensual porn 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

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53 Franks, supra note 21, at 4.
55 Eaton et al. supra note 19, at 22.
56 Id.
deficiencies in the law through the amendment process, and provide a robust, protective law that may give victims peace of mind and defendants a healthy reason to pause before pushing send.