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Smartphones, Nude Snaps, and Legal Loopholes: Why Pennsylvania Needs to Amend its Revenge Porn Statute

Vanessa Nicholle Griffith*

“Everyone put away your smartphones and put your shirts back on. Your dirty Snapchats can not only be screenshot, they may end up being posted to Facebook as well.”¹

INTRODUCTION

UGotPosted.com, SnapSext.com, SnapGFs.com, snapchatleaked.com, Huntermoore.tv, etc., are websites where you do not want to find your picture. These websites are nonconsensual pornography websites. If you do unexpectedly find an intimate image of yourself on one of these websites—or any other porn website for that matter—your best legal recourse is through your state’s revenge porn law. However, if your state has yet to enact one, you might have to fight a legal battle in a notoriously grey area of the law. Pennsylvania recently enacted a revenge porn statute in 2014.² But, prior to the adoption of 18 Pa. Cons. Stat. § 3131, entitled “Unlawful Dissemination of Intimate Image,” Pennsylvania residents had to navigate through the grey area of legal recourse, such as arguing one’s case under Pennsylvania’s Invasion of Privacy Statute.³ This new area of sexual harassment through high-tech means proved to be growing and could no longer be ignored by state legislatures.

The anti-revenge porn movement in the United States pressured more than 25 states to adopt revenge porn statutes, including Pennsylvania.⁴ States took one major step forward in the government’s battle in keeping up with technology by adopting revenge porn legislation. However, it should be acknowledged that as technology continues to forge ahead, so should our laws. Adopting initial revenge porn legislation is a major feat, but legislatures should not consider it a battle won. As

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¹ Alexis Kleinman, *Snapchat Nudes Are Being Screenshot and Secretly Posted on Facebook*, THE HUFFINGTON POST (May 28, 2013, 5:28 PM), http://www.huffingtonpost.com/2013/05/28/snapchat-nudes_n_3348145.html.

² 18 PA. CONS. STAT. § 3131 (2016).

³ *Id.* § 7507.1.

⁴ *27 States Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, <http://www.endrevengeporn.org/revenge-porn-laws/> (last visited Apr. 1, 2016).

issues with the new legislation arise, state legislatures need to prove flexible enough to address those issues and amend the revenge porn statutes. This Article explores the relationship between Snapchat and nonconsensual pornography, analyzes statutes in other states nationwide—particularly New Jersey, California, and Illinois—and aims to identify ways in which the Pennsylvania statute could be improved.

Part III of this Article argues that the Pennsylvania legislature should seek to close significant legal loopholes in the current revenge pornography statute with a new amended statute. At present, Pennsylvania’s statute only protects certain types of revenge pornography victims, and leaves others vulnerable and without a clear and direct legal remedy.⁵ Part III advocates for the broadening of 18 Pa. Cons. Stat. § 3131 in order to expand its coverage of revenge pornography victims. Part III argues that the Pennsylvania statute be amended to eliminate its intent element and broaden the class of persons to whom the statute’s protections extend.

This Article uses the term “nonconsensual pornography” instead of “revenge porn” because “revenge porn” is misleading; it assumes all perpetrators have the same single motivation: vengeance.⁶ In reality, perpetrators are motivated by a variety of factors, such as entertainment, desire for profit, or notoriety.⁷ Additionally, and perhaps most importantly, victims prefer the term “nonconsensual pornography”⁸ because it demonstrates that victims were unwilling to be used for sexual entertainment.⁹ For the purposes of this Article, “nonconsensual

⁵ 18 PA. CONS. STAT. § 3131 (2016).

⁶ Mary Ann Franks, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators*, CYBER CIVIL RIGHTS INITIATIVE 2 (Nov. 2, 2015), http://www.endrevengeporn.org/main_2013/wp-content/uploads/2013/09/Guide-for-Legislators-6.18.15-1.pdf.

⁷ *Id.*

⁸ *Id.*

⁹ *Frequently Asked Questions: What is revenge porn?*, CYBER CIVIL RIGHTS INITIATIVE, <http://www.cybercivilrights.org/faqs/> (last visited Sept. 12, 2016).

pornography”¹⁰ will be defined as “sexually explicit¹¹ depictions of a person including images, video, and audio that are disseminated by another to an outside audience without the subject’s express consent.”¹²

Part I of this Article briefly analyzes the background of the issue of nonconsensual pornography, including a broad overview of its inception and growth, and provides an in-depth analysis of the current relationship between Snapchat and nonconsensual pornography. Part II discusses the two states, New Jersey and California, which have forged the path for nonconsensual pornography legislation. Part III demonstrates why Pennsylvania should amend its current statute by analyzing the elements of an effective nonconsensual pornography law and analyzing Illinois’s successful drafting of a nonconsensual pornography statute, Pennsylvania’s current nonconsensual pornography law and its loopholes, and what an amended Pennsylvania statute should look like. Part IV summarizes this Article’s argument and provides a discussion of recent developments on the issue.

I. THE START AND GROWTH OF “REVENGE PORN”

“Ubiquitous smartphones and cheap data packages mean such intimacies are easier to share than they used to be—and more often betrayed after a relationship is ended.”¹³

¹⁰ Other definitions of “nonconsensual pornography” include: “the non-consensual publication online of explicit images,” see Michelle Daniels, *Chapters 859 & 863: Model Revenge Porn Legislation or Merely a Work in Progress?*, 46 MCGEORGE L. REV. 297, 299 (2014)[], “distribution of sexually explicit images of an individual where at least one of the individuals depicted did not consent to the dissemination”; Sarah Bloom, Note, *No Vengeance for “Revenge Porn” Victims: Unraveling Why This Latest Female-Centric, Intimate-Partner Offense Is Still Legal, and Why We Should Criminalize It*, 42 FORDHAM URB. L.J. 233, 237 (2014)[], and “a more accurate term is nonconsensual pornography (NCP), defined as the distribution of sexually graphic images of individuals without their consent”; *About*, CYBER CIVIL RIGHTS INITIATIVE, <http://www.endrevengeporn.org/welcome/> (last visited Sept. 12, 2016).

¹¹ Sexually explicit material involves “the intimate body parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates.” Alexis Fung Chen Pen, Note, *Striking Back: A Practical Solution to Criminalizing Revenge Porn*, 37 T. JEFFERSON L. REV. 405, 410 (2015).

¹² *Id.*

¹³ *Misery Merchants*, THE ECONOMIST (July 5, 2014), <http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be>.

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A. The Growth of “Revenge Porn”

Smartphones have changed the interaction and use of technology and the Internet in our daily lives, including its usage within the dating world and its intimate aspects.¹⁴ Sexting¹⁵ among cell phone owners has increased in two years—from 6 to 9 percent for cell owners claiming to have sent a sext, and from 15 to 20 percent for cell phone owners claiming to have received a sext.¹⁶ A Pew Research Report, *Couples, the Internet, and Social Media*,¹⁷ states that age is the strongest demographic predictor of sexting;¹⁸ “cell owners ages 18-24 are the most likely to say they receive sexts (44%),¹⁹ while those in their mid-twenties through mid-thirties are more likely than older adults to say they send sexts (22%).”²⁰ According to another Pew Research Report, age is also a strong predictor for usage of photo and video sharing applications, such as Instagram and Snapchat.²¹ These types of apps appear to be most popular²² with 18–29 year olds.²³ The correlation between the popularity of photo and video sharing apps and sexting amongst 18 to 30 year olds cannot be ignored—and as addressed below—may play a part in the success of certain apps.

Technology and pornography have each played a role in the other’s growth and widespread success.²⁴ Smartphones have impacted the pornography industry by altering the way consumers choose to watch pornography, “according to statistics from PornHub.com the majority of porn in the United States is now viewed using

¹⁴ Amanda Lenhart & Maeve Duggan, *Couples, the Internet, and Social Media*, PEW RES. CTR. (Feb. 11, 2014), <http://www.pewinternet.org/2014/02/11/main-report-30/>.

¹⁵ Sexting is the “receiving, sending, or forwarding [of] sexually suggestive photos or videos via cell phones” *Id.*

¹⁶ *Id.* (“Some 9% of cell phone owners have sent a suggestive picture or video, while 20% have received one. These are both statistically significant increases from the last time we asked about these behaviors in 2012 when 6% of cell owners had sent a sext and 15% had received one.”).

¹⁷ This report only covers 66% of Americans, all of whom identified themselves as being either married, living with a partner, or not in a committed relationship. *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (noting that 44% is a significant increase from 2012, when only 26% of those in the 18–24 age group said they received a sext).

²⁰ Lenhart & Duggan, *supra* note 14.

²¹ Maeve Duggan, *Photo and Video Sharing Grow Online*, PEW RES. CTR. (Oct. 28, 2013), <http://www.pewinternet.org/2013/10/28/additional-analysis/>.

²² Most popular when comparing adult age groups. *See id.*

²³ *Id.*

²⁴ Taylor Linkous, *It’s Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn*, 20 RICH. J.L. & TECH. 14 (2014).

smartphones.”²⁵ The combination of the technological advancements, such as the smartphone,²⁶ easy accessibility, and do-it-yourself (DIY) porn trend, has led to the rise in the “revenge porn” subcategory of pornography.²⁷

The public’s sudden attention to nonconsensual pornography is attributable to a relatively “sudden” change in the pornography trend, which in turn has created gaps in statutes and laws around the world. Signs of this new genre of pornography outlined above emerged in the 2000s.²⁸ By 2008, the first websites and blogs completely dedicated to nonconsensual pornography started to materialize.²⁹ One year later, in 2009, the Philippines became the first country to criminalize nonconsensual pornography.³⁰ In 2010, New Zealand sentenced the first person to prison for posting nonconsensual pornography.³¹ Also in 2010, the most popular nonconsensual pornography site, IsAnyoneUP.com, was established.³² IsAnyoneUP.com received 10,000 image submissions³³ within its first three months, and the site was generating \$8,000 in advertising revenue per month.³⁴ IsAnyoneUP.com was shut down in April of 2012, due to an influx of child pornography submissions and the legal pressures the child pornography caused.³⁵ Undeterred by the shutdown of IsAnyoneUp.com, the pornographic category of nonconsensual pornography continues to grow online. “At least 3,000 porn websites around the world feature the revenge genre, and the number is rising.”³⁶ This timeline

²⁵ *Id.*

²⁶ Lenhart & Duggan, *supra* note 14 (“The rise in sexting also correlates with the growing popularity of smartphones, which make it easy to take and share pictures and videos.”).

²⁷ Linkous, *supra* note 24.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Franks, *supra* note 6, at 3.

³¹ Linkous, *supra* note 24 (“This person was Joshua Ashby and he was found guilty of distributing an ‘indecent model or object’ to the public when he posted a picture of his naked ex-girlfriend on Facebook.”).

³² *Id.* This website was established by Hunter Moore, who was deemed by Rolling Stone to be “the most hated man on the internet.” Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113>.

³³ Submission of pictures asked for the person in the image’s name, link to their Facebook or Twitter page, and other personal information. Linkous, *supra* note 24.

³⁴ Submission of pictures asked for the person in the image’s name, link to their Facebook or Twitter page, and other personal information. Linkous, *supra* note 24.

³⁵ *Id.*

³⁶ *Misery Merchants*, *supra* note 13.

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conveys how recent of a development nonconsensual pornography is and the urgent need to fix this problem.³⁷

The victims of this growing segment of cybercrime are real people who are re-victimized every time someone views nonconsensual pornographic material of him or her. The Cyber Civil Rights Initiative (CCRI)³⁸ is contacted by an average of 20 to 30 victims each month.³⁹ In a survey conducted by CCRI,⁴⁰ 61 percent of respondents said they had taken a nude photo/video of themselves and shared it with someone else.⁴¹ Twenty-three percent of respondents said they were victims of nonconsensual pornography.⁴² According to Mary Anne Franks, a professor at University of Miami School of Law and leading advocate in the fight against nonconsensual pornography, 90 percent of nonconsensual pornography victims are women, and 57 percent of victims said ex-partners posted their images.⁴³ These statistics articulate the harm that is being done due to nonconsensual pornography.

B. Nonconsensual Pornography: The Black-Market Snapchat Business

A vast number of American millennials grew with the warning that anything posted on social media was in the cyber world permanently and those images can come back to haunt them one day. To counter this fear, Evan Spiegel and Bobby Murphy developed a photo-sharing app with expiring data: Snapchat.⁴⁴ Snapchat allows app users to send photos, videos, or messages to others, and the sent data will disappear forever once the snap is viewed by the receiver.⁴⁵ Users can determine how many seconds the intended recipient of an image, video, or message may view it.⁴⁶ If the recipient of the image takes a screenshot of the snap, the sender is notified.⁴⁷ Co-founder Spiegel commented regarding the relationship between the Internet and

³⁷ *Id.* (“In Japan the number of cases reported to police more than tripled, to 27,334, between 2008 and 2012.”).

³⁸ See *Our Services*, CYBER CIVIL RIGHTS INITIATIVE, <http://www.cybercivilrights.org/our-services/> (last visited Mar. 21, 2016).

³⁹ Franks, *supra* note 6, at 2.

⁴⁰ This survey had a total of 1,606 respondents and 361 victims. *Id.* at 10.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Billy Gallagher, *No, Snapchat Isn't About Sexting Says Co-Founder Evan Spiegel*, TECH CRUNCH (May 12, 2012), <http://techcrunch.com/2012/05/12/snapchat-not-sexting/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

permanency: “It seems odd that at the beginning of the Internet everyone should stick around forever. . . . I think our application makes communication a lot more human and natural.”⁴⁸

Snapchat, developed in 2011, currently has 100 million daily users.⁴⁹ On its website, Snapchat advertises that “more than 60% of U.S. 13–34 year-old smartphone users are Snapchatters.”⁵⁰ Although Spiegel denies the app was created to make sexting easier, he does admit to being “partially inspired” by the Anthony Weiner scandal when developing the idea to create it.⁵¹ Snapchat makes sending images to others more casual because of its disappearing data feature,⁵² which is appealing to sexters. Snapchat makes sending a naked picture feel nonchalant, casual, and seemingly secure. But, this false sense of security leaves users vulnerable to exploitation.⁵³

Snapchat addresses this false sense of security through its Privacy Policy,⁵⁴ which explicitly states:

[Y]ou should understand that users who see your message or any other content you provide can always save them, either by taking

⁴⁸ *Id.*

⁴⁹ *The World’s Billionaires*, FORBES, <http://www.forbes.com/profile/evan-spiegel/> (last visited Mar. 21, 2016).

⁵⁰ SNAPCHAT, <https://www.snapchat.com/ads> (last visited Mar. 21, 2016).

⁵¹ Gallagher, *supra* note 44. *See Congress, Lewd Photos, and NYC’s Mayoral Race: An Anthony Weiner Timeline*, CNN POLITICS, <http://www.cnn.com/2013/07/24/politics/weiner-timeline/> [hereinafter *Congress, Lewd Photos, and NYC’s Mayoral Race*] (last updated July 24, 2013, 9:37 AM) (brief overview of the Anthony Weiner scandal through a timeline). *See also* Christine Hauser, *Anthony Weiner’s Latest Sexting Scandal: Here’s What We Know*, N.Y. TIMES (Aug. 29, 2016), http://www.nytimes.com/2016/08/30/us/politics/anthony-weiners-latest-sexting-scandal-heres-what-we-know.html?_r=0. Anthony Weiner has been involved in three public sexting scandals since 2011. He has repeatedly sent lewd messages and photographs to women online. After the third incident in August 2016 Weiner’s wife, Huma Abedin (a top Hillary Clinton aide), announced she will be separating from her husband.

⁵² *Id.*

⁵³ *See* Miles Klee, *The New Era of Revenge Porn has Begun on Snapchat*, THE DAILY DOT (Apr. 3, 2015, 9:00 AM), <http://www.dailydot.com/lifestyle/snapchat-revenge-porn-consent-postsmash-college-photos/> (“[T]he Federal Trade Commission followed up on a complaint that Snapchat’s privacy claims were misleading.”).

⁵⁴ *Privacy Policy*, SNAPCHAT, <https://www.snapchat.com/privacy> (last updated Oct. 28, 2015) [hereinafter *Privacy Policy*]; *see also Terms of Service*, SNAPCHAT (Mar. 29, 2016), <https://www.snapchat.com/terms> [hereinafter *Terms of Service*] (In Snapchat’s Terms of Service, it has a disclaimer which states, “SNAPCHAT TAKES NO RESPONSIBILITY AND ASSUMES NO LIABILITY FOR ANY CONTENT THAT YOU, ANOTHER USER, OR A THIRD PARTY CREATES, UPLOADS, POSTS, SENDS, RECEIVES, OR STORES ON OR THROUGH OUR SERVICES. YOU UNDERSTAND AND AGREE THAT YOU MAY BE EXPOSED TO CONTENT THAT MIGHT BE OFFENSIVE, ILLEGAL, MISLEADING, OR OTHERWISE INAPPROPRIATE, NONE OF WHICH SNAPCHAT WILL BE RESPONSIBLE FOR”).

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a screenshot or by using some other image-capturing technology (whether that be software or even something as old-fashioned as a camera take a photo of their device's screen). If we're able to detect that a recipient took a screenshot of a message you sent, we'll try to notify you. But the same common sense that applies to the Internet at large applies to Snapchat as well: Don't send a message that you wouldn't want someone to save or share.⁵⁵

Snapchat is telling its users that if they send material and it ends up being saved and distributed without their consent, they have been warned and Snapchat cannot help them.⁵⁶ Independent third-party apps are being used to secretly capture these private snaps without the sender's knowledge.⁵⁷ Snapchat defines third-party apps as any application that is a non-official Snapchat application, "but uses your Snapchat login information (username and password) to access Snapchat services. A plugin (or tweak) is an add-on that creates additional functionalities that are not included in the official Snapchat application."⁵⁸ In October 2014, about 200,000 private Snapchat photos were leaked via one of the many Snapchat third-party apps.⁵⁹ Snapchat banned these unauthorized third-party apps amongst its users,⁶⁰ but these efforts appear insufficient in comparison with the endless creation of new apps.⁶¹

These third-party apps are used to capture private images and then post those images onto different nonconsensual forums, such as SnapSext.com and SnapGFs.com.⁶² Websites like these have galleries of "intercepted selfies and personal videos," and some sites stress the fact that these are unauthorized images obtained through deceitful means.⁶³ Sometimes the nonconsensual pornographic material is easily identified because the snaps contain captions like, "for your eyez

⁵⁵ See *Privacy Policy*, *supra* note 54; see also *Terms of Service*, *supra* note 54.

⁵⁶ The privacy policy also does not guarantee that your sent material will be deleted within a specific time frame. See *Privacy Policy*, *supra* note 54.

⁵⁷ Damon Beres, *Snapchat Threatens to Lock Accounts That Use Third-Party Apps*, THE HUFFINGTON POST (Nov. 14, 2014, 5:57 PM), http://www.huffingtonpost.com/2014/11/14/snapchat-apps_n_6161204.html.

⁵⁸ *Third-Party Applications and Plugins*, SNAPCHAT, <https://support.snapchat.com/en-US/a/third-party> (last visited Sept. 12, 2016).

⁵⁹ *Id.*; see also EJ Dickson, *This Third-Party App Is Taking Responsibility for the Massive Snapchat Leak*, THE DAILY DOT (Oct. 13, 2014, 2:27 PM), <http://www.dailydot.com/technology/snapchat-hack-snapping/>.

⁶⁰ Beres, *supra* note 57.

⁶¹ Six months after *Snapchat Threatens to Lock Accounts That Use Third-Party Apps* was published, another article was published which highlights the continual usage of third-party apps and its role in nonconsensual pornography. See Klee, *supra* note 53.

⁶² *Id.*

⁶³ *Id.*

only” or “Show anyone and i will kill you.”⁶⁴ These captions demonstrate the sender’s expectation of privacy regarding the image.

Snapchat has helped to dull the stigma surrounding the sending of nude photos. This has increased the number of sexts, which has, in turn, increased the amount of nonconsensual pornography being created through these Snapchat black market apps and websites. Thus, this increase in nonconsensual pornography has developed a need for legislation to address this cybercrime.

II. NEW JERSEY AND CALIFORNIA FORGE THE PATH FOR NONCONSENSUAL PORNOGRAPHY LEGISLATION

The first two states to enact nonconsensual pornography statutes were New Jersey and California and each state addressed this problem differently. The New Jersey statute⁶⁵ is an invasion of privacy statute and was enacted to target the broader category of cyber-bullying, but provides prosecutors with a direct legal method for prosecuting nonconsensual pornography cases.⁶⁶ The New Jersey statute, adopted in 2004, “criminalizes the non-consensual observation, recording, or disclosure of pornographic images or videos, each action constituting its own offense, chargeable as either a third or fourth-degree crime.”⁶⁷ The statute penalizes defendants who distribute materials taken by the victim that were sent to the defendant in confidence.⁶⁸

Critics claim the New Jersey statute is overly broad and is vulnerable to a First Amendment challenge.⁶⁹ For example, there is no provision in the statute that would allow for photographs of potential interest to the public to be released without criminal penalty.⁷⁰ A public interest provision would come into play for a sexting

⁶⁴ *Id.*

⁶⁵ The nonconsensual pornography part of the statute states: c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image . . . of . . . another person who is engaged in an act of sexual penetration or sexual contact . . . or . . . another person whose intimate parts are exposed . . . unless that person has consented to such disclosure. N.J. STAT. ANN. § 2C:14-9(c) (West 2015).

⁶⁶ Rachel Budde Patton, Note, *Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, 16 GEO. J. GENDER & L. 407, 430 (2015).

⁶⁷ *Id.* at 430.

⁶⁸ See N.J. STAT. ANN. § 2C:14-9(c) (West 2015) (“For the purposes of this subsection, ‘disclose’ means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer.”).

⁶⁹ Patton, *supra* note 66, at 433.

⁷⁰ *Id.*

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scandal involving a political figure,⁷¹ such as the one that former Congressman Anthony Weiner endured.⁷² The person who released the nonconsensual material of Weiner would be protected under a public interest provision. Despite its critics, the New Jersey statute has been successfully used to prosecute nonconsensual pornography cases.⁷³ New Jersey is currently in the process of amending its invasion of privacy statute to better address the problem of “upskirting,”⁷⁴ which is the unauthorized act of filming⁷⁵ up a woman’s skirt,⁷⁶ and to broaden the definition of “disclose.”⁷⁷

California’s statute was the first statute in the United States to specifically target nonconsensual pornography.⁷⁸ Enacted on October 1, 2013,⁷⁹ the original statute was drafted with a narrow scope in an effort to comply with First Amendment protections.⁸⁰ Two key loopholes in the original California statute were that it excluded “selfies,” or photographs captured by the subject in the photo, and also had an intent element.⁸¹ The exclusion of selfies was a grave concern for nonconsensual pornography activists, as 80 percent of the nonconsensual victims captured the at-issue material themselves.⁸² The intent element required the prosecution to prove the

⁷¹ See *Congress, Lewd Photos, and NYC’s Mayoral Race*, *supra* note 51.

⁷² Patton, *supra* note 66, at 430.

⁷³ See *State v. Parsons*, 2011 WL 6089210, 3 (N.J. Super. Ct. App. Div. Dec. 8, 2011) (Defendant was found guilty of violating subsection (c) of New Jersey’s invasion of privacy statute and the trial court decision was affirmed on appeal.).

⁷⁴ For a Pennsylvania story on upskirting, see P.J. D’Annunzio, *Pennsylvania lawyer suspended after ‘upskirt’ conviction*, PITTSBURGH POST-GAZETTE (Sept. 16, 2013, 12:00 AM), <http://www.post-gazette.com/business/legal/2013/09/16/Pennsylvania-lawyer-suspended-after-upskirt-conviction/stories/201309160191>.

⁷⁵ Definition is not just restricted to videos, but also photographs. See N.J. STAT. ANN. § 2C:14-9 (2016).

⁷⁶ See D’Annunzio, *supra* note 74.

⁷⁷ Press Release, New Jersey Assembly Democrats, Tucker, Vainieri Huttler, Quijano, Wimberly & Mosquera Bill Criminalizing ‘Upskirting’ Heads to Gov’s Desk (Mar. 15, 2016), <http://www.assemblydems.com/Article.asp?ArticleID=10872> (press release providing an overview of the changes made to the statute and the reasons for doing so).

⁷⁸ Bloom, *supra* note 10.

⁷⁹ Linkous, *supra* note 24.

⁸⁰ Patton, *supra* note 66, at 431.

⁸¹ CAL. PENAL CODE § 647 (West 2013) (“[A]ny person who photographs or records by any means the image of the intimate part or parts of another identifiable person . . . with the intent to cause serious emotional distress . . . with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress”) (*amended by Stats. 2014 ch. 863 § 1.7 (S.B. 1255)*).

⁸² Patton, *supra* note 66, at 431.

defendant intended to cause serious emotional distress.⁸³ An intent requirement creates a loophole for defendants because they could claim their intent was not to cause serious emotional distress, but rather monetary compensation or even that the defendant had no intent.⁸⁴

The current California Disorderly Conduct statute is a much stronger statute; it includes material taken by the victim (i.e. selfies),⁸⁵ provides an exception for distributing material to report unlawful activity,⁸⁶ and contains no intent element.⁸⁷ California's statute makes posting nonconsensual pornography a misdemeanor,⁸⁸ in contrast to New Jersey—under its sexual offense chapter—its invasion of privacy statute makes disseminating nonconsensual porn a third degree felony.⁸⁹

III. PENNSYLVANIA'S CURRENT STATUTE AND THE NEED FOR CHANGE

*"But these [anti-revenge porn] efforts, Mr. Randazza says, may end up producing nothing more than 'chicken-soup laws—they make everyone feel a little bit better but they don't really do anything.'"*⁹⁰

A. Elements of an Effective Nonconsensual Pornography Law

The first step to drafting an effective nonconsensual pornography statute is to establish a level of *mens rea*, or state of mind, that a defendant must have for the

⁸³ Bloom, *supra* note 10, at 267.

⁸⁴ *Id.*

⁸⁵ "Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress." CAL. PENAL CODE § 647(j)(4)(A) (West 2015).

⁸⁶ "It shall not be a violation of this paragraph to distribute an image described in subparagraph (A) if any of the following applies: (i) The distribution is made in the course of reporting an unlawful activity. (ii) The distribution is made in compliance with a subpoena or other court order for use in a legal proceeding. (iii) The distribution is made in the course of a lawful public proceeding." CAL. PENAL CODE § 647(j)(4)(D) (West 2015).

⁸⁷ CAL. PENAL CODE § 647 (West 2015).

⁸⁸ *Id.*

⁸⁹ N.J. STAT. ANN. § 2C:14-9 (West 2015).

⁹⁰ *Misery Merchants*, *supra* note 13.

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state to prosecute.⁹¹ An effective *mens rea* level—which balances the need to justly punish individuals, but which does not set an insurmountably high bar for the prosecution—would be a knowing standard.⁹² The defendant must knowingly disclose sexually explicit materials. This knowing standard protects individuals who make inadvertent disclosures or who had no way of knowing that the person depicted did not consent to the disclosure of the material.⁹³ Legislatures drafting a nonconsensual porn statute need to remember not to confuse a *mens rea* element with a motive or intent element, such as: intent to harass or intent to cause emotional distress.⁹⁴ Effective nonconsensual porn statutes should resist any efforts to include an intent element,⁹⁵ because “motive requirements ignore the reality that many perpetrators are motivated not by an intent to distress but a desire to entertain, to make money, or achieve notoriety.”⁹⁶ Drafting a motive element into a nonconsensual pornography statute would make it more difficult for a prosecutor to prove every element of the crime beyond a reasonable doubt.

Secondly, an effective statute should contain a narrow exception for material that is disclosed in order to benefit the public interest.⁹⁷ This exception would allow for images, such as those exposed during the Anthony Weiner scandal, to be disclosed without fear of prosecution. Thirdly, the statute should include a severability clause, therefore if any provision of the statute is declared invalid the rest of the statute will remain effective.⁹⁸ The statute should also govern low-tech forms of material such as DVDs and photographs, because nonconsensual photography can take many different forms.⁹⁹ However, it should not be drafted so broadly as to include drawings, which would set up the statute to be deemed unconstitutional under the First Amendment freedom for limiting freedom of expression.¹⁰⁰ Lastly, an effective nonconsensual pornography statute would ideally be placed within the section of a state’s code that relates to sexual offenses, following

⁹¹ Franks, *supra* note 6, at 5.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 5–6.

⁹⁶ *Id.* at 6.

⁹⁷ *Id.* at 5.

⁹⁸ *Id.*

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.* at 7–8; see also Fung Chen Pen, *supra* note 11, at 420–21 (Discusses potential legal defenses to a nonconsensual pornography charge. The First Amendment is listed as the first legal defense. “The government cannot censor free speech because the subject matter is offensive or distasteful.”).

New Jersey’s precedent. Placing it in another section, such as disorderly conduct—which is where California currently has its statute located¹⁰¹—would minimize the severity of this issue, and in turn would likely not deter as many people from disseminating nonconsensual pornography.¹⁰²

There are also a number of provisions a nonconsensual pornography statute should not include. The statute should *not* require that the material at issue be taken by someone other than the victim—as California’s original statute did.¹⁰³ Doing so would exclude a major category of nonconsensual pornography images, such as selfies. Eighty-three percent “of revenge porn victims said they had taken nude photos/videos of themselves and shared it with someone else.”¹⁰⁴ The statute should not be drafted to only cover material that contains nudity.¹⁰⁵ Nonconsensual pornographic material does not require the existence of the victim’s nudity in order to be deemed sexually explicit.¹⁰⁶ An example of sexually explicit material that does not contain an exposed part of the victim’s body would be an image or video where the victim is completely clothed and performing oral sex on someone. This image would be just as damaging, if not more, as a nude image of the victim.

Additionally, the statute should not be limited to conduct solely carried out by current or former intimate partners.¹⁰⁷ Doing so assumes that nonconsensual pornography is truly a form of “revenge,” which implies a motive.¹⁰⁸ However, in a Snapchat society where sending sexts is becoming more causal than ever before, one cannot assume there will always be a motive. Finally, an effective statute should not broaden immunity for online entities beyond what is already provided to them in the Communication Decency Section 230,¹⁰⁹ which protects online entities from liability only to the extent that they function solely as intermediaries for third-party consent. This allows for online entities to be prosecuted under state criminal law if they act as co-developers or creators of the pornographic content.

¹⁰¹ CAL. PENAL CODE § 647 (West 2015).

¹⁰² Bloom, *supra* note 10, at 278–79.

¹⁰³ *What Makes an Effective Revenge Porn Law*, C.A. GOLDBERG, <http://www.cagoldberglaw.com/what-makes-an-effective-revenge-porn-law/> (last visited Sept. 12, 2016).

¹⁰⁴ Franks, *supra* note 6, at 10.

¹⁰⁵ *What Makes an Effective Revenge Porn Law*, *supra* note 103.

¹⁰⁶ Franks, *supra* note 6, at 8.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 47 U.S.C. § 230 (2012).

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A current state statute that demonstrates all of these qualities and has proven to be effective is Illinois' Non-consensual Dissemination of Private Sexual Images statute.¹¹⁰ Subsection (b) of that statute reads:

(b) A person commits non-consensual dissemination of private sexual images when he or she: (1) intentionally disseminates an image of another person: (A) who is at least 18 years of age; and (B) who is identifiable from the image itself or information displayed in connection with the image; and (C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part, and (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.¹¹¹

It is clear from this section that motive does not matter, as there is no intent element in the Illinois statute. Section (a) provides the necessary definitions for the statute.¹¹² These definitions follow the above guidelines for creating an effective nonconsensual pornography statute.¹¹³ For example, the Illinois statute's definition for "image"¹¹⁴ includes both low-tech and high-tech forms.¹¹⁵ Also, the statute allows for the image in question to include either the victim's exposed intimate parts¹¹⁶ or a victim who is engaged in a sexual act.¹¹⁷ This adheres to the notion that sexually explicit material does not require intimate parts of the body to be exposed. The statute also includes four exemptions, one being the advised exemption of material disclosed for public interest purposes.¹¹⁸

The placement of the Illinois statute, and the punishment it prescribes, demonstrate that the state's legislature takes this crime seriously. The Illinois legislature placed the statute in Subdivision 20. Pornography Offenses, in Article 11

¹¹⁰ 720 ILL. COMP. STAT. 5/11-23.5 (2016).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See supra* Part III.A.

¹¹⁴ "'Image' includes a photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body." 720 ILL. COMP. STAT. 5/11-23.5 (2016). Here a videotape or printed pictures would be considered low-tech forms.

¹¹⁵ *Id.*

¹¹⁶ "'Intimate parts' means the fully unclothed, partially unclothed or transparently clothed genitals, pubic area, anus, or if the person is female, a partially or fully exposed nipple, including exposure through transparent clothing." *Id.*

¹¹⁷ *Id.* at 5/11-23.5 (The statute's definition of "Sexual act" includes the more broad definition of "sexual act").

¹¹⁸ *Id.* at 5/11-23.5(c).

of the Illinois Code, which is the article pertaining to sex offenses.¹¹⁹ The statute classifies this crime as a Class 4 felony, making it punishable by one to three years in prison, fines up to \$25,000 and restitution to victims.¹²⁰ Imposing a strong punishment (assuming the law is enforced) will help to deter individuals from disseminating such intimate material. Overall, Illinois' Non-consensual Dissemination of Private Sexual Images statute is a great example to other state legislatures seeking to draft or amend their code on how to implement the elements that make up an effective nonconsensual porn statute.

B. Pennsylvania's Current Statute, its Loopholes, and How the Amended Pennsylvania Statute Should Look

"I know if we don't get the language right, it's not going to be helpful."¹²¹

Pennsylvania's nonconsensual pornography law went into effect on September 7, 2014.¹²² It is currently located in Chapter 31, which is the Sexual Offenses section of the Pennsylvania Crimes Code.¹²³ Subsection (a) of the current statute states:

... a person commits the offense of unlawful dissemination of intimate image if, with intent to harass, annoy or alarm a current or former sexual or intimate partner, the person disseminates a visual depiction of the current or former sexual or intimate partner in a state of nudity or engaged in sexual conduct.¹²⁴

The definitions for "nudity," "sexual conduct," and "visual depiction" are located in Section 5903(e) and 6321 of 18 Pa. Cons. Stat.¹²⁵ This crime is graded as a second-degree misdemeanor or a first-degree misdemeanor if the victim is a minor.¹²⁶ If a victim is over the age of 18, then punishment for a convicted individual would be a

¹¹⁹ 720 ILL. COMP. STAT. 5/11-23.5 (2016).

¹²⁰ *Id.* at 5/11-23.5(f).

¹²¹ John Kopp, *Lawmakers Seek Wider Net for Pennsylvania's 'Revenge Porn' Law*, PHILLY VOICE (Aug. 17, 2015), <http://www.phillyvoice.com/lawmakers-changes-revenge-porn-law/> (quoting Pennsylvania State Senator Judith Schwank).

¹²² *Pennsylvania Lawmakers Seek Expansion of "Revenge Porn" Law*, REHMEYER & ALLATT ATT'YS AT LAW (Sept. 29, 2015), <http://www.arjalaw.com/blog/pennsylvania-lawmakers-seek-expansion-of-revenge-porn-law/>.

¹²³ 18 PA. CONS. STAT. § 3131 (2014).

¹²⁴ *Id.* § 3131(a).

¹²⁵ *Id.* § 3131(g).

¹²⁶ *Id.* § 3131(c).

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maximum two-year prison sentence and a \$5,000 fine.¹²⁷ If the victim is a minor, then the punishment is a maximum five-year prison sentence and a \$10,000 fine, along with additional penalties for other child pornography violations.¹²⁸ Statewide statistics on how many people have been charged under 18 Pa. Cons. Stat. § 3131 are lacking. However, statistics gathered by certain county officials do provide evidence that individuals are being prosecuted under the statute.¹²⁹

There are two major loopholes in Pennsylvania’s nonconsensual pornography statute: the requirement that the victim and perpetrator be current or former sexual or intimate partners, and the intent element. Both of these elements would leave many nonconsensual pornography victims without a direct legal remedy. The reality of nonconsensual porn is, “you are going to have lots of cases where people involved don’t actually know each other.”¹³⁰ Pennsylvania legislators falsely assumed that the dissemination of nonconsensual pornography is done by a jilted ex-lover—hence why public awareness about the issue is important.¹³¹ In reality, 37 percent of revenge porn victims claim someone other than an ex-boyfriend or girlfriend posted the explicit materials of them.¹³² The current Pennsylvania statute is excluding a significant number of victims from its protection.

The second loophole, requiring the prosecutor to prove beyond a reasonable doubt that there was an intent to “harass, annoy, or alarm” the victim, leaves victims without legal redress if the prosecutor cannot prove intent.¹³³ This intent loophole allows for a defendant to simply argue that he or she did not have the required motive to be convicted under 18 Pa. Cons. Stat. § 3131. Criminal laws are not required to have intent elements and most do not include them.¹³⁴ The “intent to harass, annoy, or alarm” was placed in the statute due to the fact that this was drafted as a *revenge*

¹²⁷ *Id.*

¹²⁸ *Pennsylvania Lawmakers Seek Expansion of “Revenge Porn” Law*, *supra* note 122.

¹²⁹ See Kopp, *supra* note 121; see also Megan Guza, *Pa. Prosecutors Quick to Put ‘Revenge Porn’ Law to Work*, TRIB LIVE (May 30, 2015, 10:40 PM), <http://triblive.com/news/allegheeny/8277459-74/law-photos-revenge#axzz3iXp6N8Z8>.

¹³⁰ Kopp, *supra* note 121 (quoting Mary Anne Franks, a University of Miami School of Law professor).

¹³¹ See *id.* (Franks recommends a media or marketing campaign to bring awareness to Pennsylvania residents about nonconsensual pornography).

¹³² Franks, *supra* note 6, at 10 (“57% of victims said their material was posted by an ex-boyfriend, 6% said it was posted by an ex-girlfriend, 23% said it was posted by an ex-friend, 7% said it was posted by a friend, 7% said it was posted by a family member”).

¹³³ 18 PA. CONS. STAT. § 3131(a) (2014).

¹³⁴ Franks, *supra* note 6, at 5.

porn statute.¹³⁵ However, dubbing these statutes as “revenge porn” statutes ignores the realities of the issue.¹³⁶ Revenge motives are just one of the many different type of motives for why nonconsensual porn perpetrators disseminate these images. Other motives include, as previously stated, a desire to entertain, to make money, achieve notoriety, or simply no motive at all.¹³⁷ For example, ex-revenge porn website operator, Craig Brittain, articulates his motive for procuring nonconsensual photographs and disseminating them: “I call it entertainment. . . . We don’t want anyone shamed or hurt we just want the pictures there for entertainment purposes and business. I would say our business goal is to become big and profitable.”¹³⁸ Therefore, having this intent element weakens the law by providing the defendant with a potential argument for why he or she should not be convicted of this crime.

There has already been one major public scandal in Pennsylvania that demonstrates the weakness of 18 Pa. Cons. Stat. § 3131. On June 8, 2015—almost nine months after Pennsylvania adopted its statute—news sources reported that the fraternity Kappa Delta Rho was expelling 38 of its Penn State chapter members¹³⁹ from the university for the dissemination of nonconsensual pornographic images. Fraternity members posted photographs of nude women—or as the Vice President of Student Affairs for Penn State stated, “photographs of women in extremely compromising positions”—onto a private Facebook page.¹⁴⁰ The women in these photographs appeared to be unconscious or asleep.¹⁴¹ A former member of Kappa Delta Rho, who was suing the fraternity for hazing in an unrelated incident, alerted

¹³⁵ See Charles Thompson, ‘Revenge Porn’ bill passes Pa. Senate Committee without opposition, PENNLIVE (Jan. 14, 2014, 6:36 PM), http://www.pennlive.com/midstate/index.ssf/2014/01/revenge_porn_bill_passes_penns.html.

¹³⁶ Brian Maass, ‘Revenge Porn’ Website Operator Says He’s Done, CBS DENVER (May 29, 2013, 11:13 PM), <http://denver.cbslocal.com/2013/05/29/revenge-porn-website-operator-says-hes-done/>.

¹³⁷ Franks, *supra* note 6, at 6.

¹³⁸ Maass, *supra* note 136.

¹³⁹ Tyler Kingkade, *Kappa Delta Rho Fraternity Expels 38 Penn State Members as Whistleblower Sues*, THE HUFFINGTON POST (June 8, 2015, 2:05PM), http://www.huffingtonpost.com/2015/06/08/kappa-delta-rho-penn-state_n_7536272.html; see also Barbara Miller, *Kappa Delta Rho Fraternity Expels 38 of Its Members in Wake of Penn State Scandal*, PENNLIVE (June 8, 2015, 11:24 AM), http://www.pennlive.com/midstate/index.ssf/2015/06/kappa_delta_rho_fraternity_exp.html.

¹⁴⁰ *Id.*

¹⁴¹ Miller, *supra* note 139.

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authorities to the Facebook pages.¹⁴² The Penn State incident demonstrates a real life situation in which the Pennsylvania statute would most likely fail.¹⁴³

Assuming the fraternity members did not have consent to post these photographs, the Penn State scandal demonstrates the weakness with 18 Pa. Cons. Stat. § 3131. The first problem authorities had was determining whether the victims had previous or current sexual relations with the perpetrators. The only cases Pennsylvania can prosecute are those where the victim and perpetrator did have the requisite relationship as defined by 18 Pa. Cons. Stat. § 3131. If the victim did have a previous sexual relationship with the perpetrator, the prosecution is faced with a bigger hurdle: proving intent. The main issue in this situation is that the fraternity brothers were posting the images on a private Facebook page. It would be difficult to prove beyond a reasonable doubt that the fraternity members who posted these photographs did so with the intent to harass, annoy, or alarm the women in the images. The Facebook page was an invitation-only page, which suggests it was not intended that the victims—or anyone outside of the fraternity—would view the images.¹⁴⁴ Therefore, the perpetrators could argue that they did not intend to harass annoy or alarm the victims. An anonymous Kappa Delta Rho member claimed, “It wasn’t malicious whatsoever. It wasn’t intended to hurt anyone. It wasn’t intended to demean anyone. It was an entirely satirical group and it was funny to some extent.”¹⁴⁵ Even the whistleblower who exposed the group stated that he did not know the motive behind the Facebook page.¹⁴⁶ Therefore, the prosecution would have a difficult time proving the perpetrators had the requisite intent. Alternatively, the state could bring charges under its invasion of privacy statute, because the women in the picture were unconscious and most likely did not consent to the photographs being taken.¹⁴⁷ But the offense at issue is far more than an invasion of privacy and should be treated appropriately as a sexual offense.

¹⁴² Kingkade, *supra* note 139.

¹⁴³ The women whose photographs were posted on this Facebook page chose not to press charges. *See id.*

¹⁴⁴ Sarah Kaplan, ‘Everybody Fools Around,’ *Penn State Frat Member Says of Lewd Facebook Group*, THE WASH. POST (Mar. 19, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/03/19/everybody-fools-around-penn-state-frat-member-says-of-lewd-facebook-group/?tid=a_inl.

¹⁴⁵ *Id.*

¹⁴⁶ Susan Snyder & Erin McCarthy, *Update: PSU Prez: Could Be Time to Review Frat System*, PHILLY.COM (Mar. 20, 2015), http://articles.philly.com/2015-03-20/news/60291185_1_fraternity-facebook-photos.

¹⁴⁷ 18 PA. CONS. STAT. § 7507.1 (2016).

Incidents, such as the one at Penn State, highlight why the Pennsylvania legislature needs to amend 18 Pa. Cons. Stat. § 3131. A proper amendment modeling the Illinois statute must eliminate any language regarding current or formal sexual or intimate partners because. Such language unjustly excludes certain victims who deserve to have a direct legal remedy. Additionally, it is crucial that the amendment remove any intent language, as motive requirements ignore the reality that most perpetrators, such as the Kappa Delta Rho members, are not motivated by an intent to harass.¹⁴⁸ But, to effectively protect individuals who were unaware that the person depicted did not consent and individuals who make inadvertent disclosures, the legislators can draft the amended statute to better articulate an appropriate *mens rea* level of knowingly.

Modeling itself after Illinois' statute, the new language of the amended Pennsylvania statute should state:

(a) a person commits the offense of unlawful dissemination of intimate image if the person intentionally disseminates a visual depiction of another individual in a state of nudity or engaged in sexual conduct, and had obtained this visual depiction under circumstances in which a reasonable person would know or understand that the image was to remain private.

The statute should insert a subsection with exemptions, such as those in 720 Ill. Comp. Stat. 5/11-23.5.¹⁴⁹ Pennsylvania statute currently does not have a consent element, and the amended statute should continue to exclude a consent requirement. This proposal would effectively eliminate the current loopholes in Pennsylvania's Unlawful Dissemination of Intimate Image Statute and better protects nonconsensual pornography victims.

IV. CONCLUSION

Pennsylvania's current nonconsensual pornography statute is a step forward in addressing this relatively new legal grey area. However, only certain types of cases could be prosecuted under the current statute, allowing this legal area to remain grey for other victims who deserve an unambiguous and unobstructed path to legal retribution. The loopholes of gravest concern are: 1) its requirement that the victim and perpetrator have either a former or current intimate or sexual relationship, and 2) its intent element. Fortunately, other Pennsylvanians are aware of the weaknesses embedded in 18 Pa. Cons. Stat. § 3131. Democratic Senators Judith Schwank¹⁵⁰ and

¹⁴⁸ Franks, *supra* note 6, at 6.

¹⁴⁹ 720 ILL. COMP. STAT. 5/11-23.5 (2016).

¹⁵⁰ *Pennsylvania Lawmakers Seek Expansion of "Revenge Porn" Law*, *supra* note 122.

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Vincent Hughes¹⁵¹ are currently spearheading legislative efforts to amend Pennsylvania’s nonconsensual pornography statute. Although, no draft has not been submitted to the legislature, many remain hopeful that a new bill will eliminate the problematic language in the current statute and seal up the aforementioned loopholes. Victims deserve an unambiguous and unobstructed path to legal retribution, so in Senator Schwank’s words, “We’ve got to get it right.”¹⁵²

¹⁵¹ Kopp, *supra* note 121.

¹⁵² *Id.*