



**Testimony for the House Judiciary Committee  
January 28, 2014**

**HB 43  
Criminal Law – Harassment – Revenge Porn**

AMERICAN CIVIL  
LIBERTIES UNION  
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**OPPOSE**

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The ACLU of Maryland understands the devastating impact that revenge pornography has had on the lives of individuals, especially women, in Maryland. The ACLU of Maryland also values the privacy interests that legislators seek to protect in enacting criminal laws to curb revenge pornography. Because criminal laws addressing the publicizing of intimate pictures target the sharing of lawful images – expression protected by the First Amendment – they must be carefully crafted to avoid chilling the online marketplace of ideas or criminalizing lawful communications.

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In order to pass constitutional muster, five principles must be adhered to when crafting such ‘revenge porn’ laws. First, the law must require proof of an intent to cause harm. Second, the law must require that actual harm be caused. Third, the law must apply only to the person in the relationship who violated an understanding of confidentiality regarding the images, not third party recipients who further disseminate the images. Fourth, the statute must clearly and narrowly define what images will create criminal liability. Fifth, there must be an exception for depictions related to matters of public concern.

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We appreciate having had the opportunity to work with Delegate Simmons on the crafting of this bill, with the goal of resolving constitutional concerns. And while we were able to address many of those concerns, unfortunately, there are still three areas that raise first amendment issues – third party liability, the reasonable expectation of confidentiality, and the absence of an actual harm element. As a result, we must oppose the bill.

**The Bill must include an element of Actual Harm**

Laws that infringe on the First Amendment must be narrowly tailored to meet a compelling government interest in order to pass Constitutional muster. *Boos v. Barry*, 485 U.S. 312, 321 (1988). A law that sweeps too broadly will be found unconstitutional. *United States v. Stevens*, 559 U.S. 460, 480 (2010) (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly”). HB 43 is not narrowly tailored because it does not require that harm be caused for criminal liability to apply. Without the element of harm, the bill sweeps in many other individuals and instances that could be – but should not be – criminalized.

For example, consider a mother who shares a compromising image of her college-age child with the child's father, so that together they may address the issue with their child. Although the mother did not actually cause any harm to her child, she would be criminalized under this bill. Consider also a teacher who receives and shares a compromising image of her student with the student's parent. This teacher would be criminalized because the bill does not require that harm actually be caused to the subject.

### **Third Party Liability**

The bill, as drafted, would criminalize third parties who receive and distribute the images. There is nothing in the bill that limits criminal liability to the person who is actually doing the 'revenge'—that is, the person who either took or received the image. The only limitation is that the person intentionally disclose a compromising photograph "if the other person has not consented to the disclosure." Third party recipients may not be aware of whether the person in the image "consented to the disclosure." Third parties may not even know the subject personally and may even believe the image to be professional photography or legal pornography. Therefore, it creates an unreasonable and undue burden to expect third parties to know and demonstrate that the image was taken or shared consensually.

Criminal liability cannot follow the image; it can only apply to the person who violated the understanding of confidentiality. The Supreme Court has repeatedly held that third parties may not constitutionally be barred from publishing even illegally acquired information, as long as the publisher had no hand in the illegal acquisition.<sup>1</sup> In other words, a criminal law can likely target the person responsible for breaching the reasonable expectation of privacy, but cannot target all subsequent persons who receive and share the photograph, who made no such promise, and as to whom there is no reasonable expectation of privacy.

In addition, criminalizing third parties has the potential to criminalize unintended actors. For example, consider a workplace context in which employees receive an explicit image of a coworker. One employee shares the image with the manager, seeking to report the coworker's improper behavior and thereby cause the coworker to be terminated. The reporting employee could be criminalized under this bill as currently drafted. Even worse, this bill would criminalize the many news outlets that publicized the photographs former Representative Anthony Weiner sent to random women.

### **Reasonable Expectation of Confidentiality**

In its current form, the bill does not require that the subject have a reasonable expectation of confidentiality in the image; the bill simply requires that the subject not consent to the disclosure. There must be an understanding or an

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<sup>1</sup> See for example, *Pearson v. Dodd* (Court found in favor of newspaper columnists who published information contained in stolen copies of documents) *Pearson v. Dodd* (D.C. Cir. 1969) 410 F.2d 701; *FMC v. ABC Inc.* (First Amendment entitled ABC station to retain copies of documents in its possession and to disseminate information in them, even though the original documents were stolen). *FMC Corp. v. Capital Cities/ABC, Inc.* 915 F.2d 300 (7th Cir. 1990).

agreement of confidentiality. Plus, that understanding must be reasonable. Without an understanding that the image is to be kept confidential, individuals are left guessing whether they are going to be subject to a criminal sanction, thus chilling not only the publication at issue here, but legitimate First Amendment-protected expression. Two examples again illustrate the importance of having the reasonable expectation of confidentiality element.

First, consider an individual who has shared his HIV-positive status with a support group. That individual retained a reasonable expectation of confidentiality in that information only because members of the support group had an agreement of confidentiality.<sup>2</sup> Conversely, when former New York Congressman Anthony Weiner sent the embarrassing photographs to women online, he may not have thought they would become public, but he was not objectively reasonable in expecting the images to remain confidential. Under HB 43, as written, the women who shared those photos of Congressman Weiner could be criminalized because they probably knew he wouldn't consent to their disclosing the photographs.

In 2013 California enacted a bill to criminalize revenge pornography, limiting the law's application to, "circumstances where the parties agree or understand that the image shall remain private."<sup>3</sup> Such language would suffice to eliminate these concerns.

For the foregoing reasons, the ACLU of Maryland opposes HB 43.

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<sup>2</sup> *Multimedia WMAZ, Inc. v. Kubach*, 212 Ga. App. 707, 720-21 (App. Ct. Ga 1994).

<sup>3</sup> Cal. Penal Code § 647 (West)