



**Testimony for the House Judiciary Committee
March 27, 2018**

SB 769 - Criminal Law - Sextortion and Revenge Porn

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OPPOSE IN PART

The American Civil Liberties Union of Maryland (ACLU) opposes SB 769, which in significant part seeks to rewrite Maryland’s carefully crafted 2014 prohibiting so called “revenge porn,” or the non-consensual publishing of private, intimate photographs. Unfortunately, the rewriting in this bill ignores the limits imposed by the First Amendment, by significantly expanding the scope of speech made criminal by the bill to include clearly protected speech. The bill also expands the scope of the prohibited distribution beyond posting on the internet. We do not oppose that aspect of the bill.

The bill also seeks to amend Maryland’s extortion law to make clear that it covers extorted sexual contact and extorted nude photography or videos. While we support that clarification in principle, we are concerned that the breadth of prohibitions in this bill, coupled with the lack of a specific intent requirement found in other Maryland extortion provisions, sweeps too broadly, as detailed below. We think the problem can be fixed by adding a specific intent to coerce to the bill (in line with other provisions in Maryland’s extortion statute). We support the provision shielding the intimate evidence in such cases from public disclosure.

“Revenge Porn”

The existing statute, Crim. L. § 3-809, contains three elements that we believe are essential to ensuring that so-called “revenge porn” statutes do not become unconstitutional prohibitions on depictions of nudity. It has a specific intent requirement (requiring a specific intent to cause serious emotional distress), it requires that the person charged have actual knowledge that the subject did not consent to the distribution (which ensures that third parties who lack any knowledge of the source of the image, and thus any evil intent, are not turned into criminals), and it requires that the image have been created under circumstances where the subject had a reasonable expectation that the image would be kept private. This bill jettisons all that.

The bill makes it sufficient that the defendant “should have known” that that emotional distress would occur, p.5, lines 9-10. The bill also makes it sufficient that the defendant “should have known” that the subject did not consent to distribution, p. 5, lines 11-12, which can sweep in anyone who does not obtain affirmative consent, even if there is no practical way to do so. And the bill now drops any provision limiting application of the law to images created with the expectation that they would remain private, meaning it could apply to any photo or video containing nudity or sexual acts.

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Given the vastly expanded scope of the bill, a newspaper's publication of undeniably newsworthy, and constitutionally protected, images containing nudity, such as the famous photo of the girl fleeing the napalm attack in Vietnam, or the photographs of the abuse of prisoners at Abu Ghraib, would be subject to criminal prohibition. Similarly, the unwilling recipient of Anthony Weiner's explicit texts would have committed a crime by giving those same pictures to the press, as would the press by publishing them. The sharing or publication of all of these photographs is clearly, and indisputably, protected by the First Amendment, and such a broad prohibition is not necessary to criminalize the non-consensual sharing of intimate photos shared during a relationship. The carefully crafted provisions in the existing § 3-809, which were the product of extensive discussions with experts and advocates from all sides of this issue, should not be discarded.

Extortion Provisions

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We support, in principle, the goal of making clear that Maryland's criminal extortion law prohibits extorting persons to engage in sexual contact, or to appear nude in photographs or videos. However, because this bill makes it a crime to "cause" a person to engage in those activities by threatening to "inflict emotional distress," the bill could, unintentionally, turn relationship disputes into crimes. For example, a partner who says "if you won't have sex with me I'm leaving you," would be committing a crime. We presume that the intent of this provision is to criminalize those who coerce someone by threatening to disclose something private or embarrassing. However the other provisions in Maryland's extortion law that include as a possible element of illegal extortion the threat to inflict emotional distress all have a specific intent requirement as part of the elements of the offence. Crim. L. §§ 3-705 and 3-706, which prohibit verbal and written extortion, respectively, both require proof of the "intent to unlawfully extort money, property, labor, services, or anything of value." We believe a specific intent requirement could be added to the bill, identical to the provisions noted above, which would cure the problems with the otherwise broad language. We suggest amending the proposed § 3-709(b), p.2., line 13, as follows (new language is *UNDERLINED*): A PERSON MAY NOT, WITH INTENT TO UNLAWFULLY EXTORT ANOTHER, CAUSE ANOTHER TO:"