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COMMENTS ON 17-H 5304
RELATING TO ELECTRONIC IMAGING DEVICES
February 14, 2017

The ACLU of Rhode Island recognizes the legitimate and serious privacy issues that are implicated by so-called "revenge porn." We agree that there should be meaningful remedies available for victims of this conduct. The question is whether the adoption of *criminal* penalties is the best way to address this issue. For a number of reasons, the ACLU believes that this type of misconduct belongs in the civil, not criminal, courts. Even assuming the need for a criminal law, for the reasons expressed by the Governor last year in vetoing this bill, the legislation before you is overly broad and constitutionally problematic.

First, it is worth emphasizing that despite allegedly being aimed at "revenge porn," the key component of this bill doesn't even attempt to limit its reach to those circumstances. There is absolutely no requirement in this bill that the images be disseminated or received with any intent to harass a person. Similarly, there is no requirement that the images actually cause harm or emotional distress of any sort to somebody. In short, revenge has nothing to do with what is made a crime under this bill. Rather, at its core, a person could face a criminal record and prison time for disseminating an image that everybody acknowledges was taken knowingly and consensually, and that was not intended to cause, and did not cause, any harm.

Even more problematic, a person can be convicted of a crime under this bill merely because he or she "should have known" that the other person had a "reasonable expectation of privacy." But it is often very difficult to parse out when an expectation of privacy is reasonable once the person has agreed to have the conduct photographed in the first place. When prison hangs in the balance, a person should not have to guess at the answer. In many instances, this will put judges and juries in the position of having to decide – often in the context of an intimate relationship gone sour and months or years after the fact – at what point the dissemination of a consensually taken photo, and one that may even have initially been disseminated by the "victim," impinged on that person's "expectation" of privacy.

Consider some of the conduct made a crime under this bill. The hacking of nude photos of Jennifer Lawrence and other celebrities was understandably troubling. But under this bill, any teenager or adult who looked for and shared any of those photos would be a criminal. The same would be true for some of the more graphic infamous Anthony Weiner photos; once he indicated he objected to their further dissemination, it would be a crime for anybody to share them. On a more newsworthy level, think of the haunting Vietnam War photo of the "napalm girl," or some of the disturbing images from Abu Ghraib. The dissemination of these photos would theoretically become a crime were this bill to pass.

In an attempt to avoid the many constitutional issues raised by this, the bill states that "constitutionally protected activity" is not covered. But that goes without saying, and does nothing to rein in the broad reach of this bill or to prevent people from being wrongfully charged for this offense.

As we stated at the beginning, we wish to emphasize that, by raising these concerns, we are not suggesting that a person can disseminate intimate photos for malicious reasons with no consequences, but only that the criminal law is not necessarily the place for it. Current state privacy laws and other tort remedies are clearly already available to address this type of conduct. If there is a concern that those laws are not sufficient, we would welcome consideration of a separate tort action to address this problem. However, this misconduct does not belong in our criminal justice system, and particularly in the broad way that this legislation envisions. For all these reasons, the ACLU opposes this bill.