



ACLU of New York

Legislative Affairs  
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## 2023 – 2024 Legislative Memorandum

**Subject: S.1042 (Hinchey) / A.3596 (Paulin) – Prohibits unlawful dissemination or publication of intimate images created by digitization and of sexually explicit depictions of an individual**

**Position: OPPOSE**

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The ACLU of New York **OPPOSES S.1042 / A.3596**, a bill that would amend New York’s existing revenge porn law to unconstitutionally criminalize publication of “intimate images created by digitization.” The bill is currently on the Senate Floor Calendar for today, May 10, 2023. We urge members to vote against it.

The bill violates the Constitution in several ways: First, assuming that, at its core, the bill would criminalize digitally-altered or faked images of a recognizable person engaged in lewd activity, it is analogous to a criminal defamation statute—a law that criminalizes one person’s false, damaging statement about another. However, criminal defamation statutes are generally disfavored, and the Supreme Court has held that, at least as to public figures—who are perhaps more likely to be victimized under this law than private individuals—a person cannot be convicted of criminal defamation without actual malice, *i.e.* here, knowledge that an image is fake or reckless disregard for an image’s false depiction.<sup>1</sup> The bill contains no such requirement.

Second, to the extent the bill would criminalize the dissemination of images that are misleading or deceptive, but not false outright—like parody or satire—the bill is *presumptively* unconstitutional, as it criminalizes expression protected by the First Amendment.

Lastly, even though Section 3 of the law, which isn’t depicted in the bill but can be found at N.Y. Pen. §245.15(3)(d), establishes an exception for “dissemination or publication of an intimate image made for a legitimate public purpose,” the phrase “legitimate public purpose” is—much like most of the bill—unconstitutionally vague in the context of a criminal statute, and likely to result in both uneven and arbitrary enforcement.

The ACLU of New York urges you to vote NO on **S.1042 / A.3596**.

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<sup>1</sup> *Garrison v. State of La.*, 379 U.S. 64, 67 (1964)