



January 7, 2020

The Honorable Jerrold Nadler
Chair, Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Doug Collins
Ranking Member, Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

Re: SHIELD Act, H.R. 2896

Dear Chairman Nadler and Ranking Member Collins:

The National Association of Criminal Defense Lawyers (NACDL) urges you to oppose the Stopping Harmful Exploitation and Limiting Distribution (SHIELD) Act, H.R. 2896, which would create a new federal crime carrying a five year prison sentence for sharing intimate photos of a person without that person's consent. We recognize that this bill is well intentioned and addresses a serious public concern. However, we are concerned that the bill is overbroad, contains insufficient criminal intent requirements, contributes to potential overcriminalization, and will worsen the trial penalty that many criminal defendants—including many people who are actually innocent—face in our justice system.

The bill would criminalize using a means of interstate or foreign commerce to distribute an intimate visual depiction of an individual with knowledge of, or reckless disregard for, the lack of the consent of the individual depicted in the distribution; and the reasonable expectation of the individual that the depiction would remain private; and without an objectively reasonable belief that such distribution touches upon a matter of public concern. The bill carries a five year prison sentence, a fine, or both.

To begin, the criminal intent, or *mens rea*, requirement for this crime is inadequate. It allows a felony prosecution for a person who is merely reckless. This is a harsh, unfair, and insufficient criminal intent standard for this crime, a felony carrying five years' imprisonment, that also does not require a showing of intent to harm. This is particularly so when the conduct at issue, as here, involves actions that are intertwined with First Amendment-protected activities such as speech and use of the press. A person could be prosecuted under this law without actually knowing that the person depicted did not consent. This criminal intent requirement is too weak.

As mentioned above, the bill also contains no requirement that the defendant intended to harm the person depicted. This, combined with the fact that no knowledge of lack of consent is required, could criminalize innocent conduct. For example, if a person receives an intimate image from an acquaintance and in turn forwards the image to a friend or family member with an expression of surprise or displeasure, that person has arguably violated the statute. To the extent that this bill intends to criminalize the distribution of "revenge porn" which is intended to and does harm the person depicted, intent to harm should be a statutory requirement. Without that requirement, this bill is overbroad and threatens to sweep in instances like the hypothetical described above, potentially subjecting those persons to harsh criminal penalties.

This bill also provides insufficient protections for distributions of intimate images that are not only legitimate but socially important. The bill does allow an exception for people who share intimate images if they have an "objectively reasonable belief" that the distribution "touches upon a matter of public concern." However, this exception is insufficient for several reasons. First, reasonable people would surely disagree on whether any given issue is a matter of public concern. This leaves the term subject to the interpretation of prosecutors and opens the door for different definitions in different cases. There is a considerable risk that such a nebulous standard will be applied differently to those with minority or unpopular viewpoints, which is an unjust use of the criminal law and an infringement on First Amendment rights.

Second, the use of the "objectively reasonable" belief standard, sometimes known as a "reasonable person" standard, without any consideration of what the defendant actually, subjectively believed is deeply unfair. This standard is quite common in the civil law, most commonly in tort cases. However, it is rare in criminal cases, where what matters is the defendant's actual intent, not a jury or prosecutor's supposedly neutral conception of whether the defendant's intent fell into the legalistic and barely scrutable parameters of what a hypothetical "objectively" reasonable person would believe. Under this standard, a person may be guilty of a felony even if they honestly believed that their distribution of an image was a matter of public concern.

Finally, this bill would exacerbate the trial penalty and allow for coercive plea bargaining. Statutory provisions that increase sentences or allow stacking of charges contribute to the trial penalty, which is generally manifested by the significant difference in sentence

between what a defendant receives via plea bargain and what his or her sentence would be if convicted by a jury at trial. This trial penalty has virtually eliminated the constitutional right to a trial in the federal system.¹ It also contributes to the possibility of innocent people pleading guilty, because they fear the long and harsh sentence they would receive if convicted at trial, even if the chance of conviction is remote. This bill would potentially allow prosecutors to pile on charges for each person an image is distributed to and each additional image. This could have the effect of ratcheting up sentences, significantly exacerbating the trial penalty. For example, a person could be charged with allegedly forwarding a single image to 100 followers on a social media site with just one or two clicks of a mouse. The bill would potentially allow that person to face a 5 year prison sentence for each of those 100 followers, for a total potential sentence of 500 years. Even a person who is innocent might nonetheless be coerced to plead guilty to avoid the massive sentence they could face if convicted at trial.

Furthermore, the need for this federal “revenge porn” crime has not been demonstrated, as it is largely redundant with numerous existing state laws. Forty-six states and the District of Columbia already have criminal laws prohibiting the nonconsensual distribution of intimate images. Instituting a new, largely similar, federal provision will bring about the threat of duplicative prosecutions, which worsens the trial penalty, and raises policy concerns about the overfederalization of the criminal law.

While we understand that the SHIELD Act is well intentioned, its overbroad scope would worsen the trial penalty and overfederalization, place too much discretion in the hands of law enforcement and prosecutors for fair application, and potentially criminalize innocent conduct and chill speech on issues of public concern. We ask the House Judiciary Committee to refrain from taking any action that would move this bill toward becoming law. If you have further questions, feel free to contact Nathan Pysno at 202-465-7627 or npysno@nacdl.org.

Sincerely,

National Association of Criminal Defense Lawyers (NACDL)

¹ National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), <http://www.nacdl.org/trialpenaltyreport>.