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**Testimony Before the
Assembly Committee on Criminal Justice and Public Safety
on
Assembly Bill 71
March 26, 2019**

Mr. Chairman and members of the Committee, thank you for the opportunity to testify on AB 71, relating to possession of child pornography and providing a penalty. This bill was drafted at the request of the DOJ Division of Criminal Investigation.

Child sex crimes are some of the most heinous, deplorable acts in our society. Our children are the most innocent and most vulnerable members of our community. Unfortunately, there are those who seek to exploit children for their, and others', sexual gratification. In 2017 alone, the Internet Crimes Against Children Task Force made 537 arrests and Attorney General Kaul has signaled internet crimes against children are a top priority.¹

Under current law, an image or video must depict a child engaging in sexually explicit conduct to qualify as child pornography. Because current law requires depiction of sexually explicit conduct, predators are exploiting this loophole which allows them to create photos and videos with nearly-naked children in transparent clothing in a sexually suggestive manner.

This bill includes photos or videos of a child portrayed sexually suggestive manner in 948.12 (Possession of child pornography). Sexually suggestive manner is defined as:

- 1) Depicting a child's less than completely and opaquely covered genitals, pubic area, or intimate parts in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child;
- 2) Depicting any form of contact with a child's genitals, pubic area, or intimate parts in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or
- 3) Depicting a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value.

Please join Senators Jacque and Taylor and Representative Crowley and me in closing this loophole to protect our children. Thank you for your time. I am happy to answer any questions.

¹ Mal Meyer, *Wisconsin's attorney general: Budget would support modern approaches to crime fighting*, News8000.com (Mar. 25, 2019), <https://www.news8000.com/news/wisconsin-s-attorney-general-budget-would-support-modern-approaches-to-crime-fighting/1062266946>.



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*Testimony before the Assembly Committee on Criminal Justice and Public Safety
State Senator André Jacque
March 26th, 2019*

Chairman Spiros and Members of the Assembly Committee on Criminal Justice and Public Safety,

Thank you for holding this hearing and the opportunity to testify before you today in support of Assembly Bill 71. Rep. Tusler and I have introduced this legislation to combat a significant vulnerability within Wisconsin's child exploitation statutes at the request of prosecutors and Internet Crimes Against Children investigators.

Predators are using limited definitions of what is a sexually explicit video or image of children as a loophole, as present child pornography statutes only apply when the child is engaged in a sexual act. Investigators are now very commonly seeing predators taking images of nearly naked children in see-through clothing that are suggestively posed and inappropriately sexualized and intended for sexual gratification in order to get around charges for possession of child pornography.

To assist successful prosecution of these predators, this bill expands current definitions of a video or image as being child pornography if it depicts a child in a sexually suggestive manner in following ways:

1. A child's less than completely covered private areas, by means of posing or format, emits sensuality with sufficient impact to generate salacious interest on the child.
2. Any form of contact with a child's private areas in a manner that, by means of the posing or format, emits sensuality with sufficient impact to generate salacious interest on the child.
3. A child in any other way that is for the purpose of sexual stimulation or gratification of any person who may view the depiction when not for serious literary, artistic, political, or scientific value.

AB 71 will build upon previous legislative victories to protect our state's children by closing this loophole that has been utilized by predators seeking to continue sexually exploiting minors. Please join us in supporting this legislation to help ensure prior and future efforts to safeguard the next generation are truly effective. Thank you for your consideration of Assembly Bill 71.



March 26, 2019

**Testimony of ACLU of Wisconsin
In Opposition to Assembly Bill 71
Committee on Criminal Justice and Public Safety**

Chair Spiros and Members of the Committee:

Thank you for the opportunity to provide testimony on behalf of the American Civil Liberties Union of Wisconsin, a non-partisan, non-profit organization working to protect civil liberties—including the right to free speech. Because AB 71's effort to criminalize possession of representations of minors portrayed in a "sexually suggestive manner" poses serious First Amendment concerns, we respectfully urge the Committee to oppose this bill.

I. AB71 is unnecessary.

This bill is unnecessary because possession and distribution of child pornography is already illegal. Under 948.12, it is illegal for a person to knowingly: (1m) possesses, or accesses in any way with the intent to view any visual representation of a child engaging in sexually explicit conduct. "Sexually explicit conduct" is specifically defined by statute in 948.01 (7).

II. AB71 is vague and may criminalize children who take photos of themselves.

This bill, as drafted, is hopelessly vague. For example, how is an individual supposed to determine, on pain of imprisonment for up to twenty-five years, whether a representation of a child is "sexually suggestive"?

We have seen children in other states prosecuted under the current child pornography definition when minors take pictures of themselves with their cell phones and share them with each other. This bill would compound those problems further by increasing the universe of images people are prohibited from "possessing or accessing," and could affect the lives of countless minors who are foolishly sending one another images that fall within this overly broad definition. The way in which young people use social media like Facebook, Snapchat, or Instagram make them easy venues to inadvertently snare them in the criminal justice system.

Moreover, how is a publisher to determine whether the image "emits sensuality with sufficient impact to concentrate prurient interest on the child"? This is unclear, though this bill seems to criminalize the distribution of otherwise non-offending "sexually suggestive" content based on the intent or thoughts of the publisher/possessor who "uses" the image, even if the image was created by a photographer without any intent that it be used "to concentrate prurient interest on the child."

Similarly, this bill criminalizes images based solely on the thoughts of the possessor. This is problematic.¹ For example, two people take an identical photograph of high school gymnasts “partially clothed” as permitted during a gymnastics meet. One person is a sports photographer who takes the picture for the purpose of publishing it in a blog about gymnastics that is free to the public. The other person takes the same picture depicting the gymnasts “to concentrate prurient interest on the child.” Under the bill, to possess and distribute the first photograph, including to the public, is perfectly legal, but to possess and distribute the second is criminal. The photographs are indistinguishable, so this criminality is based solely on one’s supposed and subjective mindset.

III. AB71 criminalizes speech that is not obscene and is therefore protected under the First Amendment.

Child pornography and obscenity are unprotected and rightfully so; however, this bill would criminalize speech that is neither pornographic nor obscene.

Under the so-called *Miller* test developed in the 1973 case *Miller v. California*, three elements must be satisfied for a work to be deemed obscene and therefore unprotected under the First Amendment: (i) the average person, applying contemporary community standards, must find that the work, taken as a whole, appeals to prurient interest; (ii) the work must depict or describe, in a patently offensive way, sexual conduct or excretory functions as specifically defined by applicable state law; and (iii) the work, taken as a whole, must lack serious literary, artistic, political, or scientific value.

This bill would, on its face, criminalize publications that do not fit this definition, as it would include publications that (i) are not patently offensive, (ii) do not depict sexual conduct, and (iii) do not lack serious literary, artistic, political, or scientific value. Indeed, there is no First Amendment exception for “sexually suggestive.” Would Stanley Kubrick’s film adaptation of *Lolita* be criminally punishable as “sexually suggestive”? Would an episode of *Family Guy*? Or the 1980 film *The Blue Lagoon* that depicts a 14-year-old Brooke Shields partially naked? It could under this bill’s terms.

Given these ambiguities, it would be virtually impossible to draft a bill criminalizing “sexually suggestive content” in a way that was not either vague or in violation of the First Amendment. For these reasons, the ACLU of Wisconsin opposes AB71, and we respectfully urge members of this Committee to oppose this bill.

¹ See *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (“Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”; holding that the State did not have a governmental interest in the mere possession of obscenity in his home because doing so would “attempt to control a person’s private thoughts”).