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Re: Annual Meeting Draft: Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act

Should the ULC adopt an Act that is likely unconstitutional?

Dear Commissioner,

On July 23, 2018, the above draft Act, which provides a civil remedy for the disclosure of nude images without the consent of the depicted person, will be before you for its final reading[1]. As a First Amendment litigator for over 40 years, I strongly believe that, were any State to enact the draft Act, it would be held unconstitutional for a number of reasons, including that the draft Act imposes liability upon persons who made a disclosure with neither malicious intent, nor actual knowledge of lack of consent, nor actual knowledge that the depicted person had a reasonable expectation of privacy. Prof. Raleigh Hannah Levine of Mitchell Hamline School of Law has submitted a summary of the constitutional problems. I understand that others believe that the draft Act would likely be held constitutional (though I must point out that no similar statute without a malicious intent component has been held constitutional).

This much is clear: There is serious disagreement about the constitutionality of the draft Act, and there is a significant risk that it would be held unconstitutional. There is thus a significant risk that the Act would not achieve its desired goals, and that a State would be held liable for legal fees and costs under 42 U.S.C. §§ 1983 and 1988 in a successful constitutional challenge to the Act. (A narrower, focused Act, holding liable only the "bad people" described in the Prefatory Note to the draft Act would be constitutional.)

1. The ULC's Responsibility to the State Legislatures When a Proposed Act Is of Doubtful Constitutionality

What is the responsibility of the Drafting Committee to the ULC, and what is the responsibility of the ULC to the State Legislatures, under these circumstances?

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[1] This letter is based on the June 14, 2018 draft for approval posted on the ULC website. Since June 14, 2018, the Drafting Committee has held meetings considering various modifications to the posted draft Act. As of the date of this letter, no modifications have been finalized or adopted by the Drafting Committee.

I believe that the Drafting Committee should not have proposed, and that the ULC should not adopt, a Uniform Act of doubtful constitutionality. (To the best of my knowledge, no Uniform Act has ever been held unconstitutional.[2]) Others may disagree because of the importance of the issue. But, at a minimum, ***if an Act of doubtful constitutionality is to be proposed by the ULC, the Drafting Committee has a responsibility to the ULC, and the ULC has a responsibility to State Legislatures, to fairly set forth that fact.*** Instead of doing so, the Prefatory Note pretends that the issue of constitutionality has been resolved, with statements that the Act is "constitutionally sound" and that "The Act is narrowly drafted to avoid infringing upon protected First Amendment expression."

If the ULC is to adopt the Act in this form, I suggest that this paragraph be added to the front of the Prefatory Note:

> *"SPECIAL NOTE: The proposed Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act provides a civil remedy for the disclosure of nude images without the consent of the depicted person. Because images, including non-obscene nude images, are a form of expression protected by the First Amendment, providing a civil remedy for this conduct raises serious questions of constitutionality. An effort has been made to draft the Act so that it does not infringe on expression protected by the First Amendment. However, there remains serious doubt as to the constitutionality of the draft Act—particularly because the draft Act imposes liability (1) whether or not the disclosure was done with malicious intent, (2) whether or not the defendant had actual knowledge of the lack of consent, and (3) whether or not the defendant had actual knowledge that the depicted person had a reasonable expectation of privacy. No similar law without a malicious intent component has been held constitutional when challenged. Legislatures considering the enactment of this Act should carefully consider the prospect that a constitutional challenge to the Act might be successful, with the result that the Act would not achieve its desired goals, and that the responsible State officers would be held liable, under 42 U.S.C. §§ 1983, 1988, for legal fees and costs in a successful constitutional challenge to the Act."*

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[2] See, Robert A. Stein, "Forming a More Perfect Union: A History of the Uniform Law Commission" (Matthew Bender/LexisNexis 2013) at 98.

2. The Prefatory Note and Comments Present a Misleading View of the Draft Act

Professor Levine's summary provides a clear, well-grounded analysis of the unconstitutionality of the draft Act. I will not review those issues in detail here. However, I believe it important to note that the Prefatory Note and the Comments distort the draft Act—in some instances masking its unconstitutionality and in other instances (if the draft Act were construed in connection with the Comments) exacerbating its unconstitutionality.

The Prefatory Note is misleading. Because malicious intent is not an element of the offense under the draft Act, it is likely that the vast majority of persons subject to liability under the draft Act will be persons who shared nude images "'with friends' without the intention 'to hurt' the person" depicted.[3] That is one of the principal reasons why the draft Act is unconstitutional. Instead of forthrightly discussing that fact, the Prefatory Note focuses on bad people using "hidden cameras or surreptitious photography," images obtained through "computer hacking," and "photographs and videos of sexual assaults." The Prefatory Note thus encourages enactment of the draft Act by focusing on a minority of persons who could properly be subject to liability under a well-focused, narrow Act, rather than on the majority of persons who would be subject to liability under this broad, unconstitutional Act. Similarly, the statement in the Prefatory Note that some images have "been published on over 10,000 websites" is not true. Rather the cited article says that there are 10,000 websites on which revenge porn images have been published.

The Comments to the draft Act are similarly misleading Three examples suffice:

- The Comment to Section 4 of the draft Act cites Restatement (Second) of Torts § 652D (1977) to support the position that private speech can be regulated because the publication of private facts tort is "compliant with the First Amendment." However, the Restatement contains a limiting special note (omitted in the Comment to the draft Act) that "[i]t has not been established with certainty that liability of this nature is consistent with the free-speech and

[3] According to a survey published by Cyber Civil Rights Initiative ("CCRI"), 79% of the respondents who reported disclosing nude images without consent stated that they did so "just to share 'with friends' without the intention 'to hurt' the person" depicted. Cyber Civil Rights Initiative, 2017 Nationwide Study of Nonconsensual Porn Victimization and Perpetration, a Summary Report (available at https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf)The general counsel of CCRI is the Reporter for the draft Act. I am not in a position to evaluate the reliability of this survey.

free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment. Pending further elucidation by the Supreme Court, this Section has been drafted in accordance with the current [*i.e.,* 1977] state of the common law of privacy and the constitutional restrictions on that law that have been recognized as applying."

- As a compromise between a requirement of actual knowledge of lack of consent and a negligence standard, the Drafting Committee included a reckless disregard standard in the draft Act. However the Comment to Section 3 states that "reckless disregard" should be understood as "recklessly" as defined in the Restatement (Third) of Torts, a totally different concept. For purpose of the draft Act, reckless disregard should not be determined by the tort standard of whether a reasonably prudent person would have disclosed or would have investigated before disclosing. Instead, in the draft Act, "reckless disregard" should mean that there is sufficient evidence to permit the conclusion that the discloser/defendant, in fact, (a) entertained serious doubts as to (i) whether the individual consented to the disclosure; and (ii) whether the image was created or obtained under circumstances in which the depicted individual had a reasonable expectation of privacy, or was made accessible through theft, bribery, extortion, fraud, false pretenses, voyeurism, or exceeding authorized access to property or to an account, message, file, device or resource; and (b) knew that the depicted individual is identifiable.

- The Comment to Section 2 of the draft Act states "[a] disclosure under the act includes providing a URL to a website that that features the intimate image." This is inconsistent with the terms of the draft Act, which defines "disclosure" to mean "transfer, publish or distribute to another person." Were the draft Act construed in accordance with the Comment, the unconstitutionality of the draft Act would be exacerbated; media that write about "revenge porn" and mention a revenge porn website URL (*e.g.* New York Magazine, July 21, 2013) would potentially be liable under the Act.

Commissioners, State Legislators, and citizens have a right to expect that statements of fact made in a Prefatory Note and Comments to a Uniform Act proposed by the ULC have been fully vetted, and are reliable. The Prefatory Note and Comments do not meet that standard. In fact, despite my repeated requests to review the Prefatory Note and Comments, and my proposed modifications to them, the Prefatory Note and Comments have never been discussed by the Drafting Committee.

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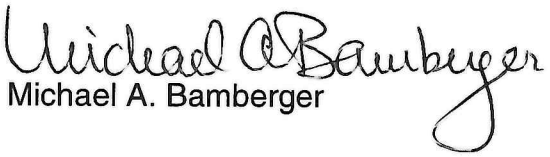
I submit that the Act is not ready to be considered for a final reading, and it should be voted down. Having worked for many years with the ULC, primarily as a member of the Joint Editorial Board on Uniform Unincorporated Organization Acts, I have developed an appreciation for the quality of the Uniform Acts and the work of the ULC. This Act does not meet the high standards of the ULC.

Sincerely,



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