PROFESSOR RALEIGH HANNAH LEVINE
RALEIGH.LEVINE@MITCHELLHAMLINE.EDU
(651) 290-7503

MITCHELL | HAMLINE
School of Law

July 19, 2018

Re: The Likely Unconstitutionality of the Draft Uniform
Civil Remedies for Unauthorized Disclosure of Intimate Images Act ("CRUDIIA")

Dear Commissioners of the National Conference of Commissioners on Uniform State Law:

I am a 1991 graduate of Stanford Law School and, since 2001, have been a professor of Constitutional, First Amendment, Media, and Tort Law at the Mitchell Hamline School of Law (formerly William Mitchell College of Law). I observed several meetings of the Uniform Law Commission's Drafting Committee on the CRUDIIA. I write to caution the Commissioners that if adopted by any state in its current form,[1] CRUDIIA will likely be subject to First Amendment challenges that, in my view, have a strong likelihood of success.[2]

The draft CRUDIIA creates a broad cause of action against anyone who discloses an image of an identifiable nude person, or even a partially nude (topless) female, without the depicted individual's affirmative consent. The Act would impose liability even when there is no proof of harm, even when the speaker acted without malicious intent, even when the speaker did not know that the depicted individual did not consent to the disclosure, and even when the speaker did not know that the depicted person had a reasonable expectation that the image would remain private. For example, as drafted, CRUDIIA could allow a woman who had sunbathed topless at a nude beach, in full view of the public, to recover a minimum of thousands of dollars in damages if a fellow sunbather posted a selfie on her Instagram account, and that selfie happened to show the topless woman and other beachgoers in the background – as long as a fact-finder concluded that the poster acted "recklessly" by not tracking down each of the individuals in the photo to ask for their affirmative consent to the posting.[3]

---

[1] This memo is based on the June 14, 2018, CRUDIIA draft. In post-June 14 meetings, the Drafting Committee has considered various changes to the June 14 draft. As of the July 19, 2018, date of this memo, the Drafting Committee has not finalized or adopted any of the post-June 14 amendments it has considered.

[2] I have been informed that one or more of my law professor colleagues has opined to some Committee members that under some plausible interpretations of the First Amendment, the draft CRUDIIA *could* be considered constitutional. Significantly, though, that is not the same as concluding that *under the United States Supreme Court's current precedents*, the law *would certainly* be upheld – or even that it *would more likely than not* be upheld. As I understand it, the ULC is not in the habit of proposing model laws as "test cases" for the overturning of current constitutional jurisprudence. It seems unreasonably risky for the Commissioners to endorse a model law that several First Amendment experts have said is more than likely *unconstitutional* -- especially when even the First Amendment experts who support it have conceded that they cannot say that the United States Supreme Court, and the lower courts that follow its precedents, would surely, or even probably, uphold the model law.

[3] Section 3(d) provides that a "depicted individual who does not consent to . . . the showing of the part of the body depicted in the intimate image of the individual retains a reasonable expectation of privacy even if the image was created when the individual was in a public place." Thus, the selfie-poster could be deemed liable if one of the topless sunbathers depicted decided that she did not consent to the disclosure of the image showing her breasts, even though she had consented to the original exposure, in public, of her breasts.

1. CRUDIIA IS A CONTENT-BASED SPEECH REGULATION THAT WILL MORE THAN LIKELY FAIL STRICT SCRUTINY.

Under decades of United States Supreme Court jurisprudence, CRUDIIA would undoubtedly be subject to – and in my opinion, would fail – the strict scrutiny test, which requires that the government hurdle the usually insurmountable obstacle of proving that a content-based regulation of speech, which is presumptively invalid, is nonetheless *both* necessary *and* narrowly tailored to serve a compelling governmental interest. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-17 (2000); *R.A.V. v. St. Paul*, 505 U. S. 377, 382 (1992).

CRUDIIA is a content-based speech regulation, in that it singles out particular content for liability: images that depict full or partial nudity or sexual conduct. *See, e.g., United States v. Stevens*, 559 U.S. 460, 468 (2010) (statute restricting display of specified images is content-based); *Playboy*, 529 U.S. at 811 (when speech is defined by its content, a law regulating it is content-based).[4] Any state that enacted CRUDIIA as drafted, then, would have the burden of proving that the law is both necessary and narrowly tailored to serve a compelling governmental interest.[5] While governments arguably have a compelling interest in protecting individuals from invasions of privacy caused by the knowing, malicious, harmful, and unauthorized disclosure of intimate images in which the depicted individual had a reasonable expectation of privacy – and thus governments could, for example, authorize compensation for depicted individuals who have been harassed, stalked, or threatened – the draft Act is not necessary and narrowly tailored to serve that interest, for several reasons.

2. UNDER FIRST AMENDMENT PRECEDENT, CRUDIIA MUST, BUT DOES NOT, REQUIRE KNOWLEDGE AND MALICIOUS INTENT. THE "RECKLESS DISREGARD" STANDARD IS NOT SUFFICIENTLY SPEECH-PROTECTIVE OUTSIDE THE DEFAMATION CONTEXT.

The draft CRUDIIA allows the depicted individual to recover substantial damages even though the speaker had no knowledge that disclosure of the image invaded another's privacy, and had no intent to cause any harm. In a wide variety of First Amendment cases, the Supreme Court has held that for speech to be penalized, the speaker must know or intend that her speech cause harm. *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (to avoid substantial constitutional questions, a statute that prohibits reproducing a visual depiction of a minor engaged in sexual activity should be read to require knowledge of the actor's minority and of the sexually explicit nature of the conduct);

---

[4]While some content-based regulations of sexual imagery are not subject to strict scrutiny, nude images that constitute neither obscenity, *see, e.g., Miller v. California*, 413 U.S. 15 (1973), nor child pornography, *see, e.g., New York v. Ferber*, 458 U.S. 747 (1982), *are* fully-protected speech – even if those images are private, offensive, embarrassing, or are otherwise deemed "low value" speech. *See, e.g., Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (images doctored to make them appear to show minors engaged in sexual activity are fully-protected speech); *Reno v. A.C.L.U.*, 521 U.S. 844, 864-68 (1997) (sexually-explicit images on the Internet that do not constitute obscenity or child pornography are fully-protected speech).

[5] Strict scrutiny applies whether the content-based regulation at issues imposes criminal or civil liability. *See, e.g., Snyder v. Phelps*, 562 U.S. 443 (2011) (applying strict scrutiny to statute that imposed civil liability for defamation, intentional infliction of emotional distress, and invasion of privacy, *inter alia*); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (strict scrutiny applies to "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content").

Hess v. Indiana, 414 U.S. 105 (1973) (for speech to be included in the less-protected category of incitement, it must be intended and likely to cause imminent violence).

In Section 3(b), the drafters have attempted to address the knowledge and intent requirements by limiting liability to those cases in which the speaker *either* knew of *or* "recklessly disregarded" the depicted individual's lack of consent, reasonable expectation of privacy, and identifiability. "Reckless disregard" is part of the test that the Supreme Court has adopted in public figure and public concern defamation cases, in which a speaker may not, constitutionally, be held civilly liable for causing reputational harm unless she either knew that the defamatory speech was false or "recklessly disregarded" its falsity: the "actual malice" test. Under the actual malice test, the speaker may not be held liable without proof that she actually, subjectively knew that her speech was false, or "in fact[] entertained serious doubts as to the truth" of her speech. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).[6]

For defamation law purposes, it is immaterial whether a reasonable person would have known the truth, or even would have investigated further, given the same facts. Rather, to avoid constitutional concerns, there must be evidence that allows the factfinder to infer that the speaker herself actually knew that the defamatory material was false, or actually had and ignored serious doubts about its truth. Generally, such evidence will establish that the speaker was presented with facts that would confirm falsity but made a "deliberate decision" to ignore them. *Harte-Hanks Communs. v. Connaughton*, 491 U.S. 657, 692 (1989).

In contrast, because the draft CRUDIIA defines consent in Section 2(1) as "affirmative, conscious, and voluntary authorization," the burden will be on the speaker to prove that the depicted individual *did* consent, and did *not* have a reasonable expectation of privacy, which will create a serious chilling effect – something that the actual malice standard was meant to *alleviate* in defamation cases. In intimate image cases, there generally will be no "outside" evidence of consent and expectations, unlike in defamation cases, where third parties can often produce "outside" evidence of the falsity of a defamatory statement, and can further provide show that they offered such evidence to the defendant, who deliberately ignored it. Thus, when the intimate image defendant is not sure that she can actually prove affirmative consent and/or the lack of a reasonable expectation of privacy, she will self-censor

[6] The draft CRUDIIA does not define "reckless disregard" in the text of the statute. The comment to Section 3 notes that "'[r]eckless disregard' should be understood as 'recklessly' is defined in the Restatement (Third) of Torts," i.e., that "'(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.'" However, the Supreme Court has made clear that the standard for civil-law recklessness is less rigorous than the standard for criminal-law recklessness, which "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). It is only the latter standard, requiring actual awareness of lack of consent, reasonable expectation of privacy, and identifiability, and not merely a failure to investigate whether the depicted individual consented, had a reasonable expectation of privacy, or was identifiable, that could, even theoretically, satisfy the First Amendment. *See, e.g., St. Amant*, 390 U.S. at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication.").

by not disclosing the image at issue in order to avoid potential liability, even though the disclosure would be fully protected under the First Amendment.

Reckless disregard is insufficiently speech-protective in this context, as opposed to in the defamation context, precisely because of the absence of objective "red flags" that would allow a factfinder fairly to conclude not that the defendant *should have known* that the plaintiff did not consent and/or had a reasonable expectation of privacy (a negligence standard), and not that the defendant merely *failed to investigate* (also a negligence standard), but that the *only* reason that the defendant did not know of the plaintiff's lack of consent and/or of her reasonable expectation of privacy was because the defendant willfully closed her eyes and ears and refused to see or hear the evidence that would have proved a lack of consent and/or a reasonable expectation of privacy. For those reasons, the statute should require knowledge *and* malicious intent, rather than knowledge *or* reckless disregard.[7]

3. UNDER FIRST AMENDMENT PRECEDENT, CRUDIIA MUST, BUT DOES NOT, REQUIRE THAT THE PLAINTIFF PROVE QUANTIFIABLE, LEGALLY-COGNIZABLE HARM IN ORDER TO RECOVER DAMAGES.

The draft CRUDIIA is also constitutionally deficient because it allows for liability not only without proof that the discloser *intended* harm, but even without proof that the plaintiff *suffered* any harm. For that reason, too, it is not necessary and narrowly tailored to serve the government's arguably compelling interest in preventing knowing, malicious, and harmful invasions of privacy. Per Section 6(a)(1)(B), the draft CRUDIIA allows a plaintiff to recover up to $10,000 in statutory damages from a

[7] I am told that one Committee member was concerned that if the Committee were to define the government's interest as "remedying the harm caused by unauthorized distribution of intimate images," then adding knowledge and/or intent requirements to the model law would make it too "narrow" to pass constitutional muster. However, if the government's compelling interest is properly defined as an interest in remedying the harm caused by the *intentional* and unauthorized distribution of intimate images, then the statute, with the recommended knowledge and intent requirements, would *not* be too underinclusive to survive strict scrutiny. Moreover, given the government's compelling, countervailing interest in free speech, its interest in restricting the unauthorized distribution of intimate images is compelling *only* when such distribution is made with malicious intent and with knowledge that the depicted individual did not consent to the disclosure, had a reasonable expectation that the image was private, and was identifiable in the image. By analogy, one could argue that the government's interest in defamation cases is in "remedying the reputational harm caused by the publication of false and defamatory material." Obviously, though, some of that harm goes unredressed in the many defamation cases in which the plaintiff cannot recover because he cannot prove both falsity and actual malice – that is, the defendant's knowledge or reckless disregard of falsity. One could thus argue that defamation laws that follow the Supreme Court's precedents are too "narrow" because there are many cases in which the government's interest in "remedying the reputational harm caused by the publication of false and defamatory material" will not be satisfied. Nonetheless, the Court has, of course, rejected that argument. Rather, it has consistently held that in public figure or public concern defamation cases, the governmental interest in "remedying the reputational harm caused by the publication of false and defamatory material" is *compelling* only when the plaintiff can prove both that the material was false and that the defendant had the necessary mens rea (knowledge of falsity or reckless disregard of the truth). Similarly, given the compelling, countervailing interest in free speech, here the governmental interest in "remedying the harm caused by the unauthorized distribution of intimate images" is *compelling* only when the plaintiff can prove that the disclosure was unauthorized; that the plaintiff had a reasonable expectation of privacy; that the plaintiff was identifiable in the image; *and* that the defendant had the necessary mens rea (knowledge of non-consent, reasonable expectation of privacy, and identifiability, and intent to harm).

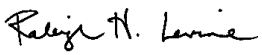
given defendant, even without proving by a preponderance of the evidence that she suffered quantifiable harm, whether economic or noneconomic. The Supreme Court, though, has consistently made clear that speech cannot constitutionally be punished, whether civilly or criminally, without proof of legally-cognizable harm. *E.g.*, *United States v. Alvarez*, 567 U.S. 709 (2012). Significantly, in a case in which the issue was whether a defendant could be held civilly liable for the invasion of privacy entailed by publishing the name of a rape victim, the Court held that the challenged statute violated the First Amendment because, *inter alia*, it would have allowed liability even where the plaintiff was not actually harmed by the disclosure. *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989).

3. THE LOWER COURTS HAVE STRUCK DOWN SIMILAR "REVENGE PORN" LAWS BECAUSE THEY DID NOT REQUIRE KNOWLEDGE AND MALICIOUS INTENT.

For the reasons stated above, the draft CRUDIIA is unlikely to survive judicial scrutiny. Indeed, some of the same constitutional infirmities in the draft Act discussed above were the basis of a 2014 constitutional challenge to an Arizona "revenge porn" statute. *Antigone Books LLC v. Brnovich*, 2:14cv02100 (D. Ariz.). That case resulted in a consent decree in which the court permanently enjoined the statute and deemed the plaintiffs the prevailing parties. *Id.* (Final Decree dated July 10, 2015). Moreover, in the very recent case *Ex parte Jones*, 2018 Tex. App. LEXIS 3439, the court similarly struck down a "revenge porn" law because it would have allowed for the punishment of a downstream distributor who did not know that the depicted individual had a reasonable expectation of privacy and who did not intend to harm the depicted individual, whose identity she may not have known.

While I am, of course, sympathetic to the very real harms that the intentional and malicious distribution of "revenge porn" can cause, I believe the ULC should be wary of endorsing an overbroad law that is neither necessary nor narrowly tailored to redressing such harms. A properly-drafted statute that was narrowly tailored to serve the governmental interest in preventing knowing, intentional, and malicious invasions of privacy – and that thus included as elements of the cause of action proof of (1) knowledge of non-consent, identifiability, and reasonable expectation of privacy, (2) intent to harass, stalk, threaten, or cause similar serious, actual harm, and (3) actual harm, due to the disclosure of an identifiable image taken in an intimate relationship, in violation of a reasonable expectation of privacy – would serve the governmental interest in compensating "revenge porn" victims without posing such a serious threat to speech that the First Amendment fully protects.

Sincerely,



Raleigh Hannah Levine[8]
Professor of Law
Mitchell Hamline School of Law
875 Summit Avenue
St. Paul, MN 55104
Raleigh.Levine@mitchellhamline.edu
651.290.7503

[8] The opinions expressed herein are mine alone and do not necessarily represent the opinions of the law school administration, faculty, students, or alumni.