

To the Chair, Vice Chair, Drafting Committee Members, associated ULC persons, Reporter and Observers:

The following are my thoughts with respect to the May 29 and 31 Drafts of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act:

**1. The Drafting Committee's Responsibility to the ULC re: Constitutionality.**

As I have previously stated, were any state to enact to enact the Draft Act into law, I believe that it would be held unconstitutional for a number of reasons. For example, it does not require malicious intent and, with respect to subsequent disclosers, and it does not require actual knowledge of lack of consent and actual knowledge of a reasonable expectation of privacy. I understand that others believe that the Draft Act is constitutional. This much is clear: There is serious doubt about the constitutionality of the Draft Act, and there is significant risk that the Act 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, under 42 U.S.C. §§ 1983, 1988, for legal fees and costs in a successful facial challenge to the Act.

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?

I believe that the ULC should not adopt a Uniform Act of doubtful constitutionality. Others may disagree because of the importance of the issue. But, at a minimum, if an Act of doubtful constitutionality is to be proposed, the Drafting Committee has a responsibility to the ULC, and the ULC has a responsibility to State Legislatures, to fairly set forth the issue. Instead of doing so, the Prefatory Note pretends that the issue of constitutionality has been resolved, with the statement that "The Act is narrowly drafted to avoid infringing upon protected First Amendment expression."

If the Drafting Committee is to propose the Draft Act in this form, I suggest that this first paragraph be added to 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 nude images, are a form of expression protected by the First Amendment, providing a civil remedy for this conduct raises serious questions of constitutionality. The Drafting Committee has endeavored to draft the Act so that it does not infringe on expression protected by the First Amendment. However, the Drafting Committee recognizes that 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. To the knowledge of the members of the Drafting Committee, 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 well 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."*

## **2. Reckless Disregard of the Facts**

At the last conference call, members of the Drafting Committee raised questions as to the meaning of "reckless disregard of the facts" and, assuming that that standard remains in the Draft Act, whether it should be defined. We were told in the May 29 email that "after discussions with several tort law experts, Mary Anne determined that the existing common law sufficiently defined 'reckless disregard' to mean what we intend it to mean." Then, in the revised comments sent out on May 31, it is suggested that "'reckless disregard' should be understood as 'recklessness' as defined in the Model Penal Code," followed by the lengthy and, in my view, not very helpful definition.

Recklessness is *not* the same as reckless disregard of the facts. Applying the two standards to a single set of facts can reach different results. In the speech tort area, for example, simple failure to inquire or investigate does not constitute reckless disregard of the facts. "Reckless disregard of the facts" is a key concept of the Draft Act. Some members of the Drafting Committee think that this knowledge standard is what makes the Draft Act constitutional. I submit that there should be a Committee discussion to reach a consensus as to its meaning, and that the phrase should then be defined in the draft Act for the benefit of those who consider its enactment. If "reckless disregard" is not going to be defined in the draft Act, the Comment offering a definition should be deleted, because recklessness for tort and criminal law purposes is a less rigorous standard than reckless disregard, and, in my understanding, a definition of reckless disregard that is identical to recklessness as defined in the Model Penal Code does not reflect the views of the Committee.

## **3. The Prefatory Note and Comments**

For months I have been requesting that the Drafting Committee discuss the prefatory note and comments, which were embarrassingly defective. I have sent my comments and suggested changes, most recently on May 14 (a copy of which attached), and understood that there was to be such a discussion. There has not been such a discussion and on May 31 we received a revised note and comments which grudgingly incorporate some of my suggestions.

To put it bluntly, even after these changes the prefatory note is argumentative and, in some respects, misleading. While finally acknowledging that, according to the report of CCRI, a vast majority of the persons subject to suit under CRUDIIA are persons who shared "the image with my friends and didn't intend to hurt the person," the Note focuses on bad people disclosing photos obtained using hidden cameras, stolen and misused photos, and recordings of sexual assaults. Again, the statement in the Note that it is a common misperception that the intimate images were initially obtained or created with consent is doubtful. See, e.g. Mary Ann Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 Fla. L. Rev. 1251, fn 35 (2017). Certainly, the Act is not narrowly tailored to the problem as it is characterized in the Prefatory Note. And the statement 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 some revenge porn images have appeared. The former leads readers to believe that certain images have been

published more than 10,000 times; the latter says nothing about whether the same images have been published multiple times.

Commissioners, State Legislators, and citizens have a right to expect that statements of fact made in a Prefatory Note 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.

As to the Comments, my understanding of the purpose of comments to uniform laws is to assist practitioners in applying a Uniform Act. However, the Comments in the Draft Act read, in many respects, more like an argumentative brief for the Draft Act and for an expansive reading of the Draft Act. Some of the Comments are not even supported by the language of the draft Act itself (e.g., the first paragraph of the Comment to section 3); others are not supported by the authorities they cite. An example of the latter is, as I have previously pointed out, the citation to the Restatement (Second) of Torts section 652D, which is truncated and leaves out the Special Note before that section which stated:

"The Section provides for tort liability involving a judgment for damages for publicity given to true statements of fact. It has not been established with certainty that liability of this nature is consistent with the free-speech and 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 to expansiveness inconsistent with the draft and never discussed by the Committee, the last paragraph of the Comment to section 2 is an example. It would put at risk anyone who, writing in the media about revenge porn refers to a URL alleged to include revenge porn. The author, were this Comment correct, would be subject to suit under the Draft Act by each of the persons whose images were on the website. (See, e.g. [nymag.com/news/features/sex/revenge-porn-2013-7/](http://nymag.com/news/features/sex/revenge-porn-2013-7/))

#### **4. Next Steps**

This draft is not ready to be submitted to the ULC. Scrambling to correct its many problems in the next few days will not make it into something that the ULC can proudly present to the states. I urge that the final reading be deferred so that the draft can be improved.

June 1, 2018

Michael A. Bamberger

CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE  
OF INTIMATE IMAGES ACT

PREFATORY NOTE

~~[This is a partial draft of the Prefatory Note. The reporter will update commentary as the project proceeds.]~~

The Civil Remedies for Unauthorized Disclosure of Intimate Images Act addresses a growing form of abuse that causes immediate and in many cases irreversible harm. According to a nationally representative 2017 study conducted by the Cyber Civil Rights Initiative, more than 1 in 8 American adult social media users has been victimized or threatened with the unauthorized distribution of private, sexually explicit images or videos, and over 1 in 20 adult social media users have engaged in such distribution.<sup>1</sup>

A single intimate image can quickly dominate the first several pages of search engine results for the victim's name, as well as being emailed or otherwise exhibited to the victim's family, employers, co-workers, and peers. Victims have been fired from their jobs, expelled from their schools, and forced to move from their homes. They have been threatened with sexual assault, stalked, and harassed. Victims have developed post-traumatic stress disorders, depression, anxiety, agoraphobia, and difficulty maintaining intimate relationships. Some victims have committed suicide.<sup>2</sup>

Intimate images include footage obtained by hidden cameras, consensually exchanged images within a confidential relationship, stolen photos, and recordings of sexual assaults. ~~While the vast majority of unauthorized disclosures are made to share with friends without the intent to harm, there can be~~ There are many malicious motives for unauthorized disclosure, including discouraging domestic violence victims from reporting abuse; punishing former intimate partners for exiting the relationship; further humiliating or extorting sexual assault victims; or profiting from voyeuristic "entertainment." The Internet has greatly facilitated the rise of nonconsensual pornography, as dedicated "revenge porn" sites and other forums openly solicit private intimate images and expose them to millions of viewers, while allowing the posters themselves to hide in the shadows. Some victims' private intimate images have been published on over 10,000 websites, in addition to being widely distributed through social media, blogs, emails, and texts.

Comment [Dentons1]: This description of consequences may well be true, but it goes far beyond what is documented in the sole source cited, the Citron & Franks article. This must be carefully reviewed so that it is limited to documented events.

Comment [Dentons2]: An important fact from the CCRI Report cited below, which makes it clear that a majority of the persons captured by the Act as presently drafted are persons who intended no harm. Is this the intent of the Committee and the ULC?

Comment [Dentons3]: Is there evidence for this statement?

<sup>1</sup> The study recruited 3,044 adults using a stratified sampling technique in the form of a Facebook poll shown to equal numbers of men and women in each of the 50 states in the United States. The number of subjects polled in each state was proportional to the representation of each state in the total population of the nation. The study addressed all nonconsensual, sexually explicit disclosures. Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report*, CYBER C.R. INITIATIVE 11 (June 12, 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>

<sup>2</sup> See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014).

1 The key features of this Act are (1. Creating a cause of action for the unauthorized  
2 disclosure of private, intimate images; (2. Prescribing remedies for the depicted individual,  
3 including actual damages, \$ 10,000 statutory damages, reasonable attorney's fees payable to  
4 successful plaintiffs, punitive damages, and disgorgement of profit made by the wrongful act;  
5 and (3. Allowing depicted individuals to protect their identity in court proceedings.

6  
7 The Act provides for liability only when an image is created applies only to images  
8 created under circumstances in which the depicted individual had a reasonable expectation of  
9 privacy, was harmed by the disclosure, did not consent to the disclosure, and when the person  
10 disclosing the image had knowledge of or recklessly disregarded the fact of lack of consent and  
11 reasonable expectation of privacy. It also exempts disclosures that are made in the ordinary  
12 course of law enforcement; legal proceedings; or medical education or treatment; are made in the  
13 reasonable reporting or investigation of unlawful conduct, or unsolicited and unwelcome  
14 conduct; are matters of public concern or public interest; or are reasonably intended to assist the  
15 depicted individual. The Act notes that the liability for providers and users of interactive  
16 computer services for content provided by another party a is restricted by federal law.

Comment [Dentons4]: This paragraph is modified to conform it to what the Act says

17  
18 The majority of states have passed criminal legislation addressing the problem within the  
19 last few years, but such legislation does not generally compensate victims for the harm they have  
20 suffered. Only a dozen or so states have enacted specific civil legislation to address the problem.  
21 What is more, the criminal and civil laws that have been passed by the several states differ  
22 considerably in their definitions, scope, form, remedies, and constitutionality. This lack of  
23 uniformity creates confusion and inefficiency, especially given the frequently "borderless"  
24 nature of the wrongful act.

25  
26 This Act provides a clear and comprehensive definition of the abuse that is broad enough  
27 to protect the right to intimate privacy and narrow enough to respect the First Amendment right  
28 to freedom of speech.

Comment [Dentons5]: As drafted the Act is arguably unconstitutional.



**CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE  
OF INTIMATE IMAGES ACT**

**SECTION 1. SHORT TITLE.** This [act] may be cited as the Civil Remedies for  
Unauthorized Disclosure of Intimate Images Act.

**SECTION 2. DEFINITIONS.** In this [act]:

(1) "Consent" means affirmative, conscious, and voluntary authorization by an individual  
who is capable of giving authorization.

(2) "Consistent caretaker" means an individual who, without expectation of  
compensation: lived with the child for a significant period of time, ordinarily not less than 12  
months; consistently exercised care of a child; made decisions regarding the child solely or in  
cooperation with a parent or other custodian or as a result of a complete failure or inability of any  
legal parent to perform parenting functions; and established a bonded and dependent relationship  
with the child with the explicit or tacit support of a parent of the child.

**Comment [Dentons6]:** This definition effectively excludes all non-custodial relatives, such as an uncle sending a cute picture to all grandparents. Is this the intent?

**Comment [Dentons7]:** Or?

(3) "Depicted individual" means an individual whose body or portion thereof is shown in  
an intimate image.

(4) "Disclose" means to transfer, publish, or distribute to one or more persons.

(5) "Harm" includes physical harm, economic harm, and emotional distress whether or  
not accompanied by physical or economic harm.

(6) "Identifiable" means that an individual is identifiable from an image itself or from the  
image and identifying characteristics displayed in connection with the image.

(7) "Identifying characteristic" means information that may be used to identify a depicted  
individual.

(8) "Individual" means a human being.

(9) "Intimate image" means a photograph, film, or video which shows:

(A) the uncovered genitals, pubic area, anus, or female post-pubescent nipple of the depicted individual; or

(B) the depicted individual engaging in sexual conduct.

(10) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(11) "Sexual conduct" means:

(A) masturbation;

(B) genital, anal, or oral sex;

(C) sexual penetration with an object;

(D) bestiality; or

(E) the transfer of semen onto the depicted individual.

#### Comment

The definition of consent as "affirmative, conscious, and voluntary authorization" is meant to exclude the possibility of implied, tacit, or coerced consent. While consent need not be in writing, it cannot be inferred from silence or lack of protest, nor can it be obtained through coercion.

~~Consent is also disclosure specific. For example, eConsent to disclose an intimate image to an intimate partner is not consent to disclose to the general public. Thus the scope of the consent is relevant. "There is an obvious and substantial difference between the disclosure of private facts to an individual—a disclosure that is selective and based on a judgment as to whether knowledge by that person would be felt to be objectionable and the disclosure of the same facts to the public at large." *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126–27 (9th Cir. 1975). When the nature or scope of consent is ambiguous, it is the responsibility of the would-be discloser to obtain clarification before disclosing.~~

[The definition of harm is intended to recognize that the unauthorized disclosure of intimate images may causes a broad range of harms. ~~This harm can be physical, as when depicted individuals are sexually or otherwise physically assaulted.~~ It can be economic, as when depicted individuals are fired from their jobs, expelled from their schools, or forced to move from their homes. ~~It can be physical or emotional. In almost all cases, the disclosure causes emotional and psychological, including~~ agoraphobia, anxiety, depression, difficulty maintaining

**Comment [Dentons8]:** Under tort causation principles, such types of physical injury would not constitute compensable harm without specific intent.

**Comment [Dentons9]:** Is there documentation of victims being expelled from their schools or forced to move from their homes? The same is true of the other items cited.

intimate relationships, and post-traumatic stress, ~~stemming either directly from the disclosure or from the stalking and harassment that follows in its wake.~~ In some cases, individuals whose intimate images have been disclosed without consent have committed suicide. ~~As one federal court expressed the harm of a stolen sex tape, “[t]he injury inflicted is therefore to the plaintiffs’ ‘human dignity and peace of mind.’” noting in addition that in the case of disclosures made accessible online, “[t]he nature of the Internet aggravates the irreparable nature of the injury.”~~ *Michaels v. Internet Entm’t Grp., Inc.*, 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998)

**Comment [Dentons10]:** Is there evidence for this statement? The Citron-Franks article cites one suicide.

Identifying characteristics can include the depicted individual’s face, birthmarks, tattoos, or other physical identifiers.

The specification of “individual” is used to distinguish from the broader definition of “person,” which can include non-human entities and people who are deceased.

The definition of “intimate image” is limited to images of individuals that are actual visual representations. It does not include paintings, drawings, or other figurative representations of an individual.

~~Images that are not and would not be mistaken for actual representations of an individual do not impose the severe privacy harm that is the focus of this act; such representations enjoy extensive First Amendment protection. See *Hustler v. Falwell* (485 U.S. 46 (1988)).~~

[While the unauthorized disclosure of intimate images that are virtually indistinguishable from actual representations of an individual, e.g. those created through sophisticated digital manipulation, causes harm similar to the unauthorized disclosure of actual intimate images, this conduct is doctrinally distinct from an invasion of privacy. Such conduct is more appropriately addressed by causes of action such as defamation, false light, or misappropriation of image.]

~~The definition of disclosure includes providing a URL to a website that features the intimate image.~~

### SECTION 3. CIVIL ACTION.

(a) Except as otherwise provided in Section 4, a depicted individual who has been harmed by the disclosure or threatened disclosure of an intimate image of the individual created under circumstances in which the depicted individual had a reasonable expectation of privacy, or 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 has a cause has a cause of action against a person that intentionally disclosed or threatened to disclose the

**Comment [Dentons11]:** The restructuring of this section is necessary to address several problems. For example, otherwise, there would be liability if a person disclosed an image where there had been actual consent, but the discloser acted with reckless disregard of whether there had been consent.



intimate image of the individual without the individual's consent if the person knew or showed reckless disregard for whether:

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(1) the individual did not consent to the disclosure that is the subject of the action;

(2) the intimate image

(A) was created ~~or obtained~~ under circumstances in which the depicted individual had a reasonable expectation of privacy, or

(B) 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

(3) the depicted individual is identifiable.

(b) Consent by a depicted individual to the creation of an intimate image, or previous confidential disclosure of the image by the depicted individual does not establish by itself that the depicted individual (1) consented to the disclosure that is the subject of the action, or (2) had no reasonable expectation of privacy.

(c) An individual who does not consent to the sexual act or the viewing of the body parts depicted in the intimate image, such as in a sexual assault, retains a reasonable expectation of privacy even if the individual is in a public place.

**Legislative Note:** States should consult appropriate state law for specific definitions of "voyeurism" referenced in 3(a)(2)(B).

Comment [Dentons12]: If this is necessary/appropriate, shouldn't there also be references to state law for theft, bribery, extortion, etc.?

#### Comment

It is the intent of the Committee that the question whether a cause of action under this act survives the death of the depicted individual should be left to the states.

#### SECTION 4. EXCEPTIONS TO LIABILITY.

(a) A person is not liable under Section 3 if the disclosure of or threat to disclose the intimate image is:

(1) made in good faith in the ordinary course of:

(A) law enforcement;

(B) legal proceedings; or

(C) medical education or treatment; or

(2) made in good faith in the reporting or investigation of

(A) unlawful conduct; or

(B) unsolicited and unwelcome conduct; or

(3) related to a matter of public concern or public interest; or

(4) reasonably intended to assist the depicted individual.

(b) A parent, guardian, legal custodian of a minor, or consistent caretaker is not liable under Section 3 if the disclosure of an intimate image of the minor is

(1) not prohibited by law, and

(2) not made for the purpose of sexual arousal, gratification, humiliation, degradation, or monetary or commercial gain.

(c) That a depicted individual is a public figure by itself does not establish that the disclosure of an intimate image is a matter of public concern or public interest.

#### Comment

An unauthorized disclosure of an intimate image under the aAct can only give rise to liability if the individual was harmed by the disclosure, has not consented to the disclosure, the depiction was created 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, the act of disclosure is intentional (as opposed to accidental) and the depicted individual is identifiable either from the image itself or an identifying characteristic

Comment [Dentons13]: Again, modified to conform to what the Act says.

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1 displayed in connection with the image. In addition, a person must know or recklessly disregard  
2 the fact that the individual has not consented to the disclosure and that the image was either  
3 created or obtained under circumstances in which the depicted individual had a reasonable  
4 expectation of privacy or that the image was made accessible through theft, bribery, or a similar  
5 unauthorized means.

6 The following examples can help illustrate the scope and applicability of this aAct.  
7

8 Example 1. A gives B an identifiable, sexually explicit image of herself during their  
9 intimate relationship with the understanding that it would remain private between the couple.  
10 After A and B end their relationship, B uploads the image of A to a website accessible to the  
11 public without A's consent. Because B knows that A did not consent to this disclosure, knows  
12 that A has a reasonable expectation of privacy with regard to the image, and knows that A is  
13 identifiable in the image, assuming no other relevant facts B ~~can~~ would be liable under the aAct.

14 Example 2. B finds an identifiable, sexually explicit image of A, a person B does not  
15 know, on a mainstream adult pornographic website featuring nude and sexually explicit photos.  
16 B forwards the link to the website image to C without A's consent. Assuming no other relevant  
17 facts, B would not be ~~is likely not~~ liable under the Aact, as A would not be able to show that B  
18 knew or recklessly disregarded the fact that A did not consent to the disclosure or had a  
19 reasonable expectation of privacy, solely based on given the fact that A's image was displayed  
20 on a mainstream pornographic website featuring nude and sexually explicit photos.

21  
22 Example 3. B finds an identifiable, sexually explicit image of A, a person B does not  
23 know, on a "revenge porn" website that clearly indicates that the material displayed on the site is  
24 private and disclosed without consent by the individuals depicted. B forwards the link to the  
25 image to C without A's consent. B is likely liable under the act, as it would appear that B either  
26 knew or recklessly disregarded the fact that A had a reasonable expectation of privacy based on  
27 the clear description of the content of the "revenge porn" website.

28  
29 Example 4. B finds an identifiable, sexually explicit image of A, a person B knows  
30 slightly, on a "revenge porn" website featuring nude and sexually explicit photos. B forwards  
31 the link to this image to A to alert her that her image appears on the site so that A can take steps  
32 to remove it. B is not liable because B's actions are reasonably intended to assist A.

33  
34 The burden of proving an exemption under subsection (c) should be on the defendant.

35 In determining what is a matter of public concern or public interest, the Supreme Court  
36 recently gave guidance in *Snyder v. Phelps*, 562 U.S. 443 (2011). The Court held that even if  
37 speech meets the elements of the tort of intentional infliction of emotional distress, a tort  
38 requiring malicious intent, it is not subject to liability if it was on a matter of public  
39 concern. The Court "articulated some guiding principles, principles that accord broad protection  
40 to speech to ensure that courts themselves do not become inadvertent censors." The opinion then  
41 cites several cases to define what is a matter of public concern. In the government employee  
42 context, protected speech is "[W]hen it can 'be fairly considered as relating to any matter of  
43 political, social, or other concern to the community,' *Connick, supra*, at 146, 103 S.Ct.  
44 1684." More generally, protected speech is "when it 'is a subject of legitimate news interest;

Comment [Dentons14]: How a website is marketed should not be a red flag triggering an obligation to investigate. Like images on other websites held out as transgressive sexual fantasies (harassment, sex in public, or student/teacher sex), I understand that images marketed or held out as nonconsensual are, in fact, often of professional adult models. Liability should be imposed based on facts, not untested assumptions.

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1 that is, a subject of general interest and of value and concern to the public.” citing *City of San*  
2 *Diego*. *City of San Diego* dealt with the limitations on speech of a public employee, a discrete  
3 area where the scope of First Amendment protection is less comprehensive and the burden is  
4 reversed. The *Snyder* opinion quotes *San Diego* to the effect that the boundaries of the public  
5 concern test are not well-defined. It does not address whether homemade sexual imagery  
6 generally exemplified purely private matters. In *City of San Diego*, the sexual images were  
7 commercially distributed by the depicted individual. The Court added that “inappropriate or  
8 controversial character of a statement is irrelevant to the question whether it deals with a matter  
9 of public concern.”

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10 The Court concluded by instructing lower courts that they must review the content, form,  
11 and context of the speech as revealed by the whole record. The review must be an independent  
12 examination to ensure that the judgment does not violate the First Amendment. Finally, “in  
13 considering content, form and content, no factor is dispositive, and it is necessary to evaluate all  
14 the circumstances of the speech, including what was said, where it was said, and how it was said.

15 The act’s “public concern” exception allows for the possibility that a disclosure of a  
16 private, sexually explicit image might be a matter of public concern. In *Dun & Bradstreet, Inc. v.*  
17 *Greenmoss Builders, Inc.*, the Supreme Court distinguished between speech on “matters of  
18 public concern” and “matters of purely private concern,” noting that it is the former that is “at the  
19 heart of the First Amendment’s protection” while “speech on matters of purely private concern is  
20 of less First Amendment concern.” 472 U.S. 749, 758–59 (1985) (quoting *First Nat’l Bank of*  
21 *Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)). In *City of San Diego v. Roe*, the Court stated that the  
22 distribution of homemade sexually explicit material “does not qualify as a matter of public  
23 concern under any view.” 543 U.S. 77, 84 (2004) (per curiam). In *Snyder v. Phelps*, the Supreme  
24 Court reaffirmed this longstanding principle that while speech on public matters deserves  
25 rigorous protection in order to prevent the stifling of debate essential to democratic self-  
26 governance, speech about purely private matters receives less vigorous protection because the  
27 threat of liability would not risk chilling the “meaningful dialogue of ideas.” The Court pointed  
28 to *San Diego v. Roe* to make the point that homemade sexual imagery exemplified the sort of  
29 “purely private matters” that deserve less heightened protection under the First Amendment, and  
30 that the prohibition of unauthorized disclosure of such material poses “no threat to the free and  
31 robust debate of public issues; there is no potential interference with a meaningful dialogue of  
32 ideas.” *Snyder*, 562 U.S. at 452 (quotation omitted).

33  
34 The “publication of private facts” tort also provides some helpful elaboration of the  
35 concept. The tort is widely accepted by the majority of courts as compliant with the First  
36 Amendment, although the Supreme Court has yet to rule explicitly on the constitutionality of this  
37 tort with regard to matters not of public record. According to the Restatement (Second) of Torts  
38 § 652D (1977), the offense involves giving “publicity to a matter concerning the private life of  
39 another is subject to liability.... if the matter publicized is of a kind that (a) would be highly  
40 offensive to a reasonable person, and (b) is not of legitimate concern to the public.” An  
41 explanatory comment further notes that “[i]n determining what is a matter of legitimate public  
42 interest, account must be taken of the customs and conventions of the community; and in the last  
43 analysis what is proper becomes a matter of the community mores. The line is to be drawn when  
44 the publicity ceases to be the giving of information to which the public is entitled, and becomes a  
45 morbid and sensational prying into private lives for its own sake, with which a reasonable



1 member of the public, with decent standards, would say that he had no concern. The limitations,  
2 in other words, are those of common decency, having due regard to the freedom of the press and  
3 its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of  
4 the individual and the harm that will be done to him by the exposure.”

5 **SECTION 5. PLAINTIFFS’ PRIVACY.** In an action under this [act]:

6  
7 (1) a plaintiff may proceed using a pseudonym in place of the true name of the plaintiff in  
8 accordance with [applicable state law or procedural rule];

9 [(2) the court may exclude or redact from all pleadings and documents filed in the action  
10 other identifying characteristics of the plaintiff [as provided by statute or court rule]; and

11 (3) a plaintiff who proceeds using a pseudonym, or excluding or redacting identifying  
12 characteristics as provided in this section shall file with the court and serve upon the defendant a  
13 confidential information form that includes the excluded or redacted plaintiff’s name and other  
14 identifying characteristics.

15 (4) the court may make further orders as necessary to protect the identity and privacy of a  
16 plaintiff.]

17 *Legislative Note: If a state’s rules of civil procedure does not provide for the possibility of*  
18 *plaintiffs to use pseudonyms, the bracketed language above can serve as a guideline.*

19  
20 **Comment**

21 The fear of further notoriety or abuse deters many victims from pursuing legal remedies.  
22 This fear can be mitigated by clear procedures allowing victims to use pseudonyms.

23  
24 **SECTION 6. REMEDIES.**

25 (a) In an action under this [act], a court may award a prevailing plaintiff:

26 (1) (A)(i) economic and noneconomic damages proximately caused by  
27 defendant’s disclosure or disclosures, including damages for emotional distress whether or not  
28 accompanied by other damages, [, subject to the limitation specified in [insert citation to statute  
29 that limits recoverable noneconomic damages]] and (ii) punitive damages [if economic or

1 noneconomic damages are awarded under this paragraph,] subject to the limitation specified in  
2 [insert citation of statute that limits recoverable punitive damages]; or

3 (B) statutory damages [not to exceed][in the amount of] \$10,000 against  
4 each defendant found liable under this [act] for all disclosures of which the plaintiff reasonably  
5 should have had knowledge when filing the action or which came to light during the pendency  
6 of the action;

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7 (2) an amount equal to the profit made by the defendant from the disclosure of the  
8 intimate image;

9 (3) reasonable attorney's fees and costs; and

10 (4) additional relief, including injunctive relief.

11 (b) This [act] does not affect a right or remedy available under law of this state other  
12 than this [act].

#### 13 Comment

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15 Many victims are deterred from initiating legal action both by the psychological toll and  
16 the financial cost of litigation. According to attorneys who deal with these cases, a typical  
17 "revenge porn" case can cost between \$10,000 and \$60,000 and involve an average of 500 hours  
18 of labor on the part of the victim. Many victims will already be in financial straits due to loss of  
19 employment, therapy, relocation expenses, or other typical harms that flow from the exposure of  
20 private intimate imagery. As many defendants will be judgment proof, there are few incentives  
21 for victims to risk financial ruin along with the potential for increased exposure of their private  
22 material. Providing reasonable attorney's fees and costs to prevailing plaintiffs will encourage  
23 some victims who could not otherwise sustain the financial burden of litigation to bring claims.  
24 The possibility of statutory damages provides an opportunity for victims to recover for harms  
25 they have suffered without being forced to testify in intimate detail about those harms.

Comment [Dentons15]: This is equally true of all tort cases when the defendant is not insured.

26  
27 **SECTION 7. STATUTE OF LIMITATIONS.** An action under this [act] may be  
28 brought not later than [ ] years from the date the unauthorized disclosure was discovered, or

1 | should have been discovered, by the depicted individual with the exercise of reasonable  
2 | diligence.

### 3 | **Comment**

4 | The nature of the Internet can complicate the determination of the appropriate length of  
5 | the statute of limitations for the unauthorized disclosure of intimate images. While some victims  
6 | are quickly made aware of the disclosure of their images, whether by being directly informed by  
7 | the defendant or alerted by a third party, many victims do not discover that their images have  
8 | been disclosed for a long period of time. The images may be distributed on websites or social  
9 | media platforms that the victim is not in the habit of visiting, or sent to someone the victim does  
10 | not know. Thus, many years could pass before a victim discovers the unauthorized disclosure.

11 | ~~What is more, even after discovering the disclosure, a reasonable person might not~~  
12 | ~~initially undertake the cost and risk of litigation in the hopes that the disclosure might go largely~~  
13 | ~~unnoticed. For example, a plaintiff might reasonably decide, upon discovering that such a~~  
14 | ~~disclosure was made, not to file an action if the disclosure does not appear at the time to have a~~  
15 | ~~wide audience. Years later, however, if the image goes “viral” or appears to be about to do so~~  
16 | ~~(e.g., because the plaintiff is about to embark on a political campaign or has achieved recent~~  
17 | ~~celebrity status), she may wish to initiate an action.~~

**Comment [Dentons16]:** The same is true of many defamation cases. Nevertheless most states have one or two year limitations periods for defamation.

### 19 | **SECTION 8. LIMITATIONS.**

20 | (a) This [act] may not be construed to alter or conflict with 47 U.S.C. Section 230.

21 | (b) This [act] may not be construed to alter or conflict with the law of this state on  
22 | sovereign immunity.

### 23 | **Comment**

24 | This section responds to the specific language of the Communications Decency Act and  
25 | is intended to avoid preemption of state law under that federal legislation. According to CDA  
26 | Section 230(c)(1), “No provider or user of an interactive computer service shall be treated as the  
27 | publisher or speaker of any information provided by another information content provider.”  
28 | CDA 230(c)(2) prohibits holding providers or users of interactive computer services civilly liable  
29 | on the basis of good faith restrictions in accessing objectionable material or for making  
30 | information about the technical means of restricting access to such material. CDA 230(e)(3)  
31 | provides that “[n]o cause of action may be brought and no liability may be imposed under  
32 | any State or local law that is inconsistent with this section.”  
33 |  
34 |

1       **SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

2   applying and construing this uniform act, consideration must be given to the need to promote  
3   uniformity of the law with respect to its subject matter among states that enact it.

4       **[SECTION 10. SEVERABILITY.** If any provision of this [act] or its application to any  
5   person or circumstance is held invalid, the invalidity does not affect other provisions or  
6   applications of this [act] which can be given effect without the invalid provision or application,  
7   and to this end the provisions of this [act] are severable.]

8   *Legislative Note: Include this section only if this state lacks a general severability statute or a*  
9   *decision by the highest court of this state stating a general rule of severability.*

10  
11       **SECTION 11. REPEALS; CONFORMING AMENDMENTS.**

12       (a) . . . .

13       (b) . . . .

14       (c) . . . .

15       **SECTION 12. EFFECTIVE DATE.** This [act] takes effect . . . .