

Government of the District of Columbia

UNIFORM LAW COMMISSION



September 19, 2023

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
The John A. Wilson Building,
1350 Pennsylvania Avenue, NW
Washington, DC 20004

RE: Request for introduction of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act of 2023.

Dear Chairman Mendelson:

Pursuant to Rule 401(b)(1) of the Rules of Organization and Procedure for the Council, this is to request, on behalf of the District of Columbia Uniform Law Commission, that you introduce the proposed “Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act of 2023.”

This Uniform Act complements the Criminalization of Non-Consensual Pornography Act of 2014, D.C. Law 20-275, D.C. Code §§ 22-3051 to 22-3057, which criminalizes the unauthorized disclosure of a sexual image of another person. The Uniform Act creates a civil cause of action for victims of unauthorized disclosure of private, intimate images. It provides for actual damages, statutory damages, punitive damages, and disgorgement of profits. Moreover, it authorizes the court to grant the victim attorney’s fees and other relief, such as injunctive relief. It also provides procedures to enable victims of such disclosures to protect their identity in court proceedings.

The Uniform Act was completed by the National Conference of Commissioners on Uniform State Laws in 2018 and has been enacted, thus far, in nine states and has been introduced in an additional two states.

A proposed “Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act of 2023.” is being filed with this letter. In addition, the following documents have been filed: (1) a summary of the Uniform Act; (2) a statement as to why the Uniform Act should be adopted; and (3) the official version of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act with comments.

I would be pleased to answer any questions and to provide any additional information requested.

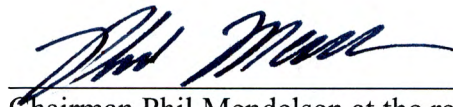
Sincerely,

A handwritten signature in blue ink that reads "James C. McKay, Jr." The signature is written in a cursive style with a large initial 'J'.

James C. McKay, Jr.
Chair
D.C. Uniform Law Commission

cc: Uniform Law Commissioners

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Chairman Phil Mendelson at the request of the
District of Columbia Uniform Law Commission

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To enact the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act, to create a civil cause of action for victims of unauthorized disclosure of private, intimate images, to provide for actual damages, statutory damages, punitive damages, and disgorgement of profits, to authorize the Superior Court to grant the victim attorney's fees and other relief, such as injunctive relief, to provide procedures to enable victims of such disclosures to protect their identity in court proceedings, and for other purposes.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act of 2023".

Sec. 1. Short title.

This act may be cited as the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act.

Sec. 2. Definitions.

In this act:

(1) "Consent" means affirmative, conscious, and voluntary authorization by an individual with legal capacity to give authorization.

(2) "Depicted individual" means an individual whose body is shown in whole or in part in an intimate image.

36 (3) “Disclosure” means transfer, publication, or distribution to another person. “Disclose”
37 has a corresponding meaning.

38 (4) “District means the District of Columbia.

39 (5) “Identifiable” means recognizable by a person other than the depicted individual:

40 (A) From an intimate image itself; or

41 (B) From an intimate image and identifying characteristic displayed in connection
42 with the intimate image.

43 (6) “Identifying characteristic” means information that may be used to identify a depicted
44 individual

45 (7) “Individual” means a human being.

46 (8) “Intimate image” means a photograph, film, video recording, or other similar medium
47 that shows:

48 (A) The uncovered genitals, pubic area, anus, or female post-pubescent nipple of
49 a depicted individual; or

50 (B) A depicted individual engaging in or being subjected to sexual conduct.

51 (9) “Person” means an individual, estate, business or nonprofit entity, public corporation,
52 government or governmental subdivision, agency, or instrumentality, or other legal entity.

53 (10) “Sexual conduct” includes:

54 (A) Masturbation;

55 (B) Genital, anal, or oral sex;

56 (C) Sexual penetration of, or with, an object;

57 (D) Bestiality; or

58 (E) The transfer of semen onto a depicted individual.

59 Sec. 3. Civil action.

60 (a) In this section:

61 (1) “Harm” includes physical harm, economic harm, and emotional distress
62 whether or not accompanied by physical or economic harm.

63 (2) “Private” means:

64 (A) Created or obtained under circumstances in which a depicted
65 individual had a reasonable expectation of privacy; or

66 (B) Made accessible through theft, bribery, extortion, fraud, false
67 pretenses, voyeurism, or exceeding authorized access to an account, message, file, device,
68 resource, or property.

69 (b) Except as otherwise provided in section 4, a depicted individual who is identifiable
70 and who suffers harm from a person’s intentional disclosure or threatened disclosure of an
71 intimate image that was private without the depicted individual’s consent has a cause of action
72 against the person if the person knew or acted with reckless disregard for whether:

73 (1) The depicted individual did not consent to the disclosure;

74 (2) The intimate image was private; and

75 (3) The depicted individual was identifiable.

76 (c) The following conduct by a depicted individual does not establish by itself that the
77 individual consented to the disclosure of the intimate image which is the subject of an action
78 under this act or that the individual lacked a reasonable expectation of privacy:

79 (1) Consent to creation of the image; or

80 (2) Previous consensual disclosure of the image.

81 (d) A depicted individual who does not consent to the sexual conduct or uncovering of
82 the part of the body depicted in an intimate image of the individual retains a reasonable
83 expectation of privacy even if the image was created when the individual was in a public place.

84 Sec. 4. Exceptions to liability.

85 (a) In this section:

86 (1) "Child" means an unemancipated individual who is less than 18 years of age.

87 (2) "Parent" means an individual recognized as a parent under law of the District
88 other than this act.

89 (b) A person is not liable under this act if the person proves that disclosure of, or a threat
90 to disclose, an intimate image was:

91 (1) Made in good faith in

92 (A) Law enforcement;

93 (B) A legal proceeding; or

94 (C) Medical education or treatment;

95 (2) Made in good faith in the reporting or investigation of:

96 (A) Unlawful conduct; or

97 (B) Unsolicited and unwelcome conduct;

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

99 (4) Reasonably intended to assist the depicted individual.

100 (c) Subject to subsection (d), a defendant who is a parent, legal guardian, or individual
101 with legal custody of a child is not liable under this act for a disclosure or threatened disclosure
102 of an intimate image of the child.

103 (d) If a defendant asserts an exception to liability under subsection (c), the exception does
104 not apply if the plaintiff proves the disclosure was:

105 (1) Prohibited by law other than this act; or

106 (2) Made for the purpose of sexual arousal, sexual gratification, humiliation,
107 degradation, or monetary or commercial gain.

108 (e) Disclosure of, or a threat to disclose, an intimate image is not a matter of public
109 concern or public interest solely because the depicted individual is a public figure.

110 Legislative Note: In subsection (c), a state should insert the appropriate term for an individual
111 with legal custody other than a parent.

112 Sec. 5. Plaintiff's privacy.

113 In an action under this act:

114 (1) The court may exclude or redact from all pleadings and documents filed in the action
115 other identifying characteristics of the plaintiff;

116 (2) A plaintiff to whom paragraph (1) applies shall file with the court and serve on the
117 defendant a confidential information form that includes the excluded or redacted plaintiff's name
118 and other identifying characteristics; and

119 (3) The court may make further orders as necessary to protect the identity and privacy of
120 a plaintiff.

121 Sec. 6. Remedies.

122 (a) In an action under this act, a prevailing plaintiff may recover:

123 (1) The greater of:

124 (A) Economic and noneconomic damages proximately caused by the
125 defendant's disclosure or threatened disclosure, including damages for emotional distress
126 whether or not accompanied by other damages; or

127 (B) Statutory damages not to exceed \$10,000 against each defendant
128 found liable under this act for all disclosures and threatened disclosures by the defendant of
129 which the plaintiff knew or reasonably should have known when filing the action or which
130 became known during the pendency of the action. In determining the amount of statutory
131 damages under subsection (a)(1)(B), consideration must be given to the age of the parties at the
132 time of the disclosure or threatened disclosure, the number of disclosures or threatened
133 disclosures made by the defendant, the breadth of distribution of the image by the defendant, and
134 other exacerbating or mitigating factors;

135 (2) An amount equal to any monetary gain made by the defendant from disclosure
136 of the intimate image; and

137 (3) Punitive damages.

138 (b) In an action under this act, the court may award a prevailing plaintiff:

139 (1) Reasonable attorney's fees and costs; and

140 (2) Additional relief, including injunctive relief.

141 (c) This act does not affect a right or remedy available under law of the District other
142 than this act.

143 Sec. 7. Statute of limitations.

144 (a) An action under section 3(b) for:

145 (1) An unauthorized disclosure may not be brought later than four years from the
146 date the disclosure was discovered or should have been discovered with the exercise of
147 reasonable diligence; and

148 (2) A threat to disclose may not be brought later than four years from the date of
149 the threat to disclose.

150 (b) In an action under section 3(b) by a depicted individual who was a minor on the date
151 of the disclosure or threat to disclose, the time specified in subsection (a) does not begin to run
152 until the depicted individual attains the age of majority.

153 Sec. 8. Construction.

154 This act must be construed to be consistent with the Communications Decency Act of
155 1996, 47 U.S.C. § 230.

156 Sec. 9. Uniformity of application and construction.

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

159 Sec. 10. Fiscal impact statement.

160 The Council adopts the fiscal impact statement in the committee report as the fiscal
161 impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act,
162 approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3))

163 Sec. 12. Effective date.

164 This act shall take effect following approval by the Mayor (or in the event of veto by the
165 Mayor, action by the Council to override the veto), a 30-day period of Congressional review as
166 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December

167 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
168 Columbia Register.



THE UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

- A Summary -

The disclosure of private images of nudity or sexual conduct without consent and for no legitimate purpose can cause severe and often irreversible harm. Intimate images are disclosed without the depicted individual's consent for a variety of reasons. Some are disclosed for recreation or profit, without any purpose to harm the depicted individual. Others are disclosed as part of an effort to control, punish, extort, or otherwise inflict harm on current or former intimate partners. Once an intimate image of a victim is made available on a website or social media platform, it can become accessible to anyone with internet access, any of whom could download, forward, share, and copy it. Additionally, some victims find their personal safety is at heightened risk after an unauthorized disclosure is made. Incidents of disclosing intimate images without consent are increasing nationally. States had adopted criminal laws to address this issue; however, most states do not have civil laws providing the victim a civil remedy, and the existing laws differ considerably in their definitions, scope, effectiveness, and remedies. This lack of uniformity creates confusion and inefficiency and leaves victims without a clear means to stop the harm or seek redress. A uniform law will provide victims and disclosers with a uniform remedy and defense. In response to this issue, the Uniform Law Commission promulgated the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act (UCRUDIIA) in 2018.

Section 3 of the UCRUDIIA creates a cause of action for the unauthorized disclosure of intimate images. The basic elements of this cause of action are:

- (1) an intentional disclosure or threat to disclose;
- (2) a private;
- (3) intimate image;
- (4) of an identifiable individual;
- (5) without the consent of the depicted individual;
- (6) by a person who has the requisite awareness that:
 - (a) the depicted individual did not consent to the disclosure,
 - (b) the intimate image was private, and
 - (c) the depicted individual was identifiable; and
- (7) the disclosure harms the depicted individual.

Two options for the requisite awareness that may give rise to civil liability are offered in the act: (1) the discloser knew or (2) the discloser knew or acted with reckless disregard.

Section 4 provides for exceptions to liability for disclosures made in good faith in law enforcement, legal proceedings, medical education or treatment, or reporting or investigation of unlawful or unwelcome conduct. Section 4 also provides exceptions to liability for disclosures related to a matter of public concern or public interest, or reasonably intended to assist the depicted individual. Section 4 further provides that a discloser who is a child's parent, legal



guardian, or individual with legal custody of the child, is not liable under the Act for the disclosure or threatened disclosure of an intimate image, unless the disclosure was prohibited by law other than this act or made for the purpose of sexual arousal, sexual gratification, humiliation, degradation, or monetary or commercial gain.

Section 5 protects the privacy of a plaintiff. This section allows the plaintiff to use a pseudonym and otherwise protect his or her identity. Section 5 further permits the court to exclude or redact other identifying characteristics of the plaintiff from all pleadings and documents filed in the action. To exercise this right, a plaintiff must file with the court a confidential information form that includes the plaintiff's real name and other information and serve a copy of this form on a defendant.

Section 6 provides various remedies for victims. A prevailing plaintiff may recover actual damages, statutory damages, and, where appropriate, punitive damages, and attorney's fees. A plaintiff may also recover an amount equal to the gain made by the defendant from disclosure of the intimate image if applicable. Section 6 does not affect a right or remedy available under other law.

Section 7 addresses statutes of limitations. Under this section, an action for the unauthorized disclosure of intimate images must be brought no later than four years from the date the unauthorized disclosure was discovered or should have been discovered with the exercise of reasonable diligence. Actions brought under the act for a threat to disclose an intimate image must be brought no later than four years from the date of the threat to disclose. The act also incorporates relevant state tolling statutes. For actions brought by individuals who are minors, this section provides states with an optional provision allowing the statute of limitations to begin running on the date the depicted individual attains the age of majority. This section is drafted to allow states to choose a different period of limitation if desired.

Section 8 provides that the Act must be construed consistently with federal law, which exempts interactive computer service providers from liability for material disclosed by users. This section also provides that the Act does not alter state law on sovereign or governmental immunity.

For further information about the UCRUDIIA, please contact ULC Legislative Counsel Kaitlin Wolff at (312) 450-6615 or kwolff@uniformlaws.org.



WHY YOUR STATE SHOULD ADOPT THE UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (UCRUDIIA) addresses an increasingly common form of abuse that can cause immediate and in many cases irreversible harm: the disclosure of private images of nudity or sexual conduct without consent. Unauthorized disclosures frequently cause emotional distress as well as depression, anxiety, difficulty maintaining intimate relationships, or post-traumatic stress disorder. Some victims have been stalked, harassed, threatened with sexual assault, terminated from employment, or expelled from their schools. Below are some of the features of the UCRUDIIA:

- ***The UCRUDIIA creates a civil cause of action.*** Most states that have addressed this issue only have a criminal statute. The uniform act creates a civil cause of action for the unauthorized disclosure of private, intimate images.
- ***The UCRUDIIA protects victims' identities.*** The fear of further notoriety or abuse deters many victims from pursuing legal remedies. Section 5 of the Act mitigates this fear by providing clear procedures allowing victims to use pseudonyms.
- ***The UCRUDIIA provides various remedies.*** Some of the potential remedies outlined in the Act include actual damages, statutory damages, punitive damages, and disgorgement of profits. The court may also grant the victim attorney's fees and other relief, such as injunctive relief.
- ***The UCRUDIIA contains clear exceptions.*** Section 4 of the Act provides limited exceptions for certain disclosures, including those made during legal proceedings, medical treatment, or investigations of misconduct. There is also an exception for disclosures relating to matters of public concern or public interest.
- ***The UCRUDIIA recognizes the federal protection of interactive computer service providers.*** Section 8 of the Act recognizes the federal protection of interactive computer service providers found in the Federal Communications Decency Act.

For further information about the UCRUDIIA, please contact ULC Legislative Counsel Kaitlin Wolff at (312) 450-6615 or kwolff@uniformlaws.org.

UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR
LOUISVILLE, KENTUCKY
JULY 20 - JULY 26, 2018

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

January 22, 2019

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 126th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

**DRAFTING COMMITTEE ON UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED
DISCLOSURE OF INTIMATE IMAGES ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

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Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
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**UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE
OF INTIMATE IMAGES ACT**

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UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

PREFATORY NOTE

The Civil Remedies for Unauthorized Disclosure of Intimate Images Act addresses an increasingly common form of abuse that can cause severe and often irreversible harm: the disclosure of private, sexually explicit images without consent. Much of the abuse is carried out electronically through internet websites, social media, email, or text messages, making it an interstate problem that is particularly suited for treatment by uniform state laws. This act provides a uniform, comprehensive, clear, fair, and constitutionally sound definition of this harmful conduct and remedies for the harm it causes.

Some intimate images disclosed without consent were originally created with consent or obtained within a confidential relationship. In other cases, the images were originally created or obtained without consent through surreptitious recording devices or other forms of voyeurism, or through theft, computer hacking, coercion, bribery, fraud, or force.

Intimate images are disclosed without the depicted individual's consent for a variety of reasons. Some are disclosed for recreation or profit, without any purpose to harm the depicted individual. Others are disclosed as part of an effort to control, punish, extort, or otherwise inflict harm on current or former intimate partners. Some disclosers seek to destroy the reputation of professional or personal rivals; others attempt to discourage victims of domestic violence or sexual assault from reporting abuse. No matter what the source of the image or purpose of the disclosure, unauthorized disclosures of intimate images occur with surprising frequency.¹

The exposure of intimate images can wreak havoc on an individual's personal, professional, educational, and family life.² Once an intimate image of a victim is made available on a website or social media platform, it can become accessible to anyone with internet access, any of whom could download, forward, share, and copy it within seconds. A single image can quickly dominate the first several pages of internet search engine results for a victim's name, reducing the victim's online reputation to a scroll of salacious links. Intimate images are

¹ According to a recent nationally representative study, one in eight adult social media users has been victimized or threatened with the unauthorized distribution of private, sexually explicit images or videos. Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report* 11 (CYBER CIVIL RIGHTS INITIATIVE, June, 2017). See also DATA & SOC'Y RESEARCH INST., *NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN"* 4 (2016) (using a narrower definition of victimization requiring a nude or near-nude depiction with the intent to hurt or embarrass).

² See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 9 (2009); *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014); *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012); *United States v. Sayer*, 748 F.3d 425 (1st Cir. 2014).

sometimes directly transmitted to the victim's family, employers, co-workers, and peers through email, text message, and other means.

Unauthorized disclosures frequently cause emotional distress as well as depression, anxiety, agoraphobia, difficulty maintaining intimate relationships, or post-traumatic stress disorder.³ Some victims have been stalked, harassed, threatened with sexual assault, defamed as sexual predators, terminated from employment, expelled from their schools, or forced to change their names. Some victims have committed suicide.⁴ As evidenced by profit-seeking "revenge porn" websites and the surreptitious exchange of photos on social media platforms, technology has greatly facilitated the demand for and access to this content.

Considerable progress has been made to address this problem through criminal legislation.⁵ Beginning in 2013, many state legislatures enacted specific criminal prohibitions aimed at addressing this problem. As of January 2019, forty-two states and the District of Columbia had such laws.

While criminal law can serve as an important deterrent and expression of social condemnation, civil law is better suited to compensate victims for the harm they have suffered. However, existing civil remedies, such as copyright, invasion of privacy, defamation, and intentional infliction of emotional distress, are often insufficient to address the problem. While copyright claims can provide partial relief in some cases, these claims are available only to victims who created the images themselves. The elements of invasion of privacy tort actions vary from state to state, and, because the disclosures transcend state borders, victims frequently have little sense of whether and how such actions may apply to their experiences. Because negligent tort actions usually require physical harm, such actions are of little help where the harm suffered is emotional distress. Intentional infliction of emotional distress claims often fail due to the vagueness of the standard of "extreme outrageous conduct."

Accordingly, a specific civil remedy for this form of harm is desirable. By December 2018, only a dozen or so states had enacted legislation to provide a civil remedy. These civil remedies differ considerably in their definitions, scope, effectiveness, remedies, and constitutional implications. This lack of uniformity, especially in light of the borderless nature of the disclosures, creates confusion and inefficiency and leaves victims without a clear means to stop the harm or seek redress. A uniform law will provide victims and disclosers with a uniform remedy and defense.

Despite the desire for uniformity, this act defers to state statutes and court rules where there is already a well-developed body of law. For example, this act defers to state law on the use of a pseudonym by a plaintiff in a civil action and on whether an action survives the death of the

³ Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, *Feminist Criminology* (2017) Vol. 12(1) 22-42, 38-39.

⁴ See Mary Anne Franks, *Revenge Porn Reform: A View from the Front Lines*, 69 *FLA. L. REV.* 1251 (2017).

⁵ See *id.* at 1259.

harmed individual.

Like many existing privacy laws, this act applies only to sensitive content created or obtained under circumstances in which the individual had a reasonable expectation of privacy. Also similar to existing privacy laws, the act includes limited exceptions for certain disclosures, including those made in the course of law enforcement, legal proceedings or education, medical treatment, or investigations of misconduct. This act also includes an exception for disclosures relating to matters of public concern or public interest and disclosures reasonably intended to assist the victim. The act further notes federal statutory limitations on the liability of providers and users of interactive computer services. The act is narrowly drafted to avoid imposing liability on a discloser who lacks the requisite awareness of any of these elements: (1) that the image was created or obtained under circumstances in which the individual had a reasonable expectation of privacy or that the image was obtained through theft, bribery, false pretenses, voyeurism, or other wrongful acts, (2) that the individual shown in the image did not consent to the disclosure, or (3) that the individual shown was identifiable.

Existing state and federal laws protect the right of individuals to keep a wide array of private information out of the public eye, including medical records, social security numbers, student educational records, drivers' license information, genetic information, biometric data, geolocation data, and even video rental information. Some of these laws are very broad in scope, some impose serious criminal as well as civil penalties, and many permit the imposition of liability based on negligence as well as recklessness, knowledge, and purpose. This act recognizes that sexually explicit imagery is a form of private information deserving of similar protection.

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

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform 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 with legal capacity to give authorization.

(2) “Depicted individual” means an individual whose body is shown in whole or in part in an intimate image.

(3) “Disclosure” means transfer, publication, or distribution to another person. “Disclose” has a corresponding meaning.

(4) “Identifiable” means recognizable by a person other than the depicted individual:

(A) from an intimate image itself; or

(B) from an intimate image and identifying characteristic displayed in connection with the intimate image.

(5) “Identifying characteristic” means information that may be used to identify a depicted individual.

(6) “Individual” means a human being.

(7) “Intimate image” means a photograph, film, video recording, or other similar medium that shows:

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

(B) a depicted individual engaging in or being subjected to sexual conduct.

(8) “Person” means an individual, estate, business or nonprofit entity, public corporation,

government or governmental subdivision, agency, or instrumentality, or other legal entity.

(9) “Sexual conduct” includes:

- (A) masturbation;
- (B) genital, anal, or oral sex;
- (C) sexual penetration of, or with, an object;
- (D) bestiality; or
- (E) the transfer of semen onto a depicted individual.

Comment

The definition of consent as “affirmative, conscious, and voluntary authorization” makes clear that consent cannot be tacit or coerced. While consent need not be in writing, it cannot be inferred solely from silence or lack of protest.

Consent must be given “by an individual with legal capacity to give authorization.” This clarifies that individuals without the requisite legal decision-making capacity cannot consent to the disclosure of their intimate images. The laws of each state regarding legal capacity will determine which individuals are capable of giving consent under the act.

Consent is also context-specific. For example, consent to disclose an intimate image to an intimate partner is not consent to disclose to others, or to the general public. “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).

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

“Individual” is meant to be distinguished from the broader definition of “person,” which includes non-human entities.

The definition of “intimate image” is limited to an actual visual representation of an individual, such as a photograph, video, and other similar forms of reproduction. It does not include a painting, drawing, or other figurative representation. While such representations are also capable of causing harm, the harm is of a different nature than the privacy harm this act aims to address. Where appropriate, such representations may be addressed by existing causes of action such as defamation, false light, misappropriation of image, or intentional infliction of emotional distress.

The word “uncovered” in the definition of “intimate image” in paragraph (7)(A) means visible, that is, not obscured by clothing, censor bars, or similar coverings. The list of body parts in paragraph (7)(A)—genitals, pubic area, anus, or female post-pubescent nipple—does not include every part of the body that might be considered intimate. Many consider the buttocks and parts of the female breast other than the nipple to be intimate parts of the body, but as it is not uncommon for buttocks and parts of the female breast other than the nipple to be displayed in public (for example, at beaches and nightclubs), the definition of “intimate image” is purposefully restricted here.

SECTION 3. CIVIL ACTION.

(a) In this section:

(1) “Harm” includes physical harm, economic harm, and emotional distress whether or not accompanied by physical or economic harm.

(2) “Private” means:

(A) created or obtained under circumstances in which a depicted individual had a reasonable expectation of privacy; or

(B) made accessible through [theft, bribery, extortion, fraud, false pretenses, voyeurism, or exceeding authorized access to an account, message, file, device, resource, or property].

(b) Except as otherwise provided in Section 4, a depicted individual who is identifiable and who suffers harm from a person’s intentional disclosure or threatened disclosure of an intimate image that was private without the depicted individual’s consent has a cause of action against the person if the person knew [or acted with reckless disregard for whether]:

(1) the depicted individual did not consent to the disclosure;

(2) the intimate image was private; and

(3) the depicted individual was identifiable.

(c) The following conduct by a depicted individual does not establish by itself that the individual consented to the disclosure of the intimate image which is the subject of an action

under this [act] or that the individual lacked a reasonable expectation of privacy:

- (1) consent to creation of the image; or
- (2) previous consensual disclosure of the image.

(d) A depicted individual who does not consent to the sexual conduct or uncovering of the part of the body depicted in an 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.

Legislative Note: *A state should insert appropriate terms under state statutes for the terms in subsection (a)(2)(B).*

Comment

Like many other privacy laws, this act is concerned with the unauthorized disclosure of private information. Various state and federal laws protect the right of individuals to keep a wide array of private information out of the public eye, including copyrighted material, trade secrets, medical records, social security numbers, student educational records, drivers' license information, genetic information, biometric data, geolocation data, and even video rental information. Some of these laws are very broad in scope; some impose serious criminal as well as civil penalties. This act provides civil remedies for the unauthorized disclosure of another important type of private information—intimate images.

The elements giving rise to liability under this act are:

- (1) an intentional disclosure or threat to disclose;
- (2) a private;
- (3) intimate image;
- (4) of an identifiable individual;
- (5) without the consent of the depicted individual;
- (6) by a person who has the requisite awareness that:
 - (a) the depicted individual did not consent to the disclosure,
 - (b) the intimate image was private, and
 - (c) the depicted individual was identifiable; and
- (7) the disclosure harms the depicted individual.

Two options for the requisite awareness that may give rise to civil liability are offered in the act: (1) the discloser knew or (2) the discloser knew or acted with reckless disregard.

An image is “private” under subsection (a)(2)(A) if the individual has a “reasonable expectation of privacy.” A reasonable expectation of privacy is fact specific. An intimate image created by a photograph taken on a public nude beach or at a topless demonstration on Fifth Avenue is not obtained under circumstances in which the depicted individual had a reasonable expectation of privacy, while a photograph taken surreptitiously of a naked person entering the

shower in her own home or other private location would be. Similarly, a depicted individual has a reasonable expectation of privacy in a topless selfie (self-taken photograph) sent confidentially by the depicted individual to the depicted individual's intimate partner. If that image is disclosed by the intimate partner to another person without the depicted individual's consent, the disclosure is actionable under this section if the other elements of subsection (b) are met.

The definition of harm in subsection (a)(1) recognizes a broad range of harms. Harm can be physical, as when the disclosure of the intimate images leads to sexual or other physical assault. Harm can also be economic, in the form of job loss, relocation costs, legal fees, and the costs of psychological counseling or therapy. Harm can also include emotional distress and psychological harm, including agoraphobia, anxiety, depression, difficulty maintaining intimate relationships, suicidal ideation, and post-traumatic stress, stemming either directly from the disclosure or indirectly from the stalking and harassment that sometimes follow in its wake.

Subsection (b) provides that disclosing persons are liable if they “knew (1) the depicted individual did not consent to the disclosure; (2) the intimate image was private; and (3) the depicted individual was identifiable.” An alternative mental awareness standard is provided for a state which desires broader coverage under this act. Under this alternative standard, a disclosing person could be liable even if the discloser did not “know” the above three elements were present, but knew enough facts that in disclosing the image, the discloser “acted with reckless disregard for whether” the three elements were met. The phrase “reckless disregard” has been interpreted in the context of defamation as meaning “in fact entertained serious doubts,” and its use in the act is meant to incorporate that interpretation. See *St. Amant v. Thompson* 390 U.S. 727, 731 (1968). To meet this standard, the discloser must in fact have serious doubts about consent, privacy, and identifiability.

Under either mental awareness standard, this act should survive constitutional challenge. While subsection (b) regulates images that may be generally protected by the First Amendment as a form of speech (see *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-814 (2000) (pictures); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures); *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011) (video games)), the United States Supreme Court has never suggested that privacy laws as such, even privacy laws that impose liability on the basis of a lesser mental awareness standard than provided in this act, violate the First Amendment. See Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 Wm. & Mary L. Rev. 1501, 1505 (2015) (noting that “[d]espite calls from industry groups and a few isolated academics that these laws somehow menace free public debate, the vast majority of information privacy law is constitutional under ordinary settled understandings of the First Amendment”). However, no matter how carefully crafted, any statute regulating speech can be challenged on First Amendment grounds. As a result, a state assumes some risk that it may incur costs in defending the act against constitutional challenges and, if all or part of the act is struck down, the costs of those challenging the act as well. The “knew or acted with reckless disregard for whether” standard would allow redress for more forms of harmful conduct, but it would also increase the risk to an enacting state that the act might be challenged and that all or part of the act may be struck down as unconstitutional. Our analysis is that under current Supreme Court precedent, the “acted with reckless disregard for whether” language is constitutional.

Subsection (d) addresses situations where the intimate image is created in a public place, but where the depicted individual had no control over the intimate nature of the image. Examples include situations such as when an injured party's clothes are torn from her body in a car accident, a person's dress is forcibly yanked down in public without her consent, or a sexual assault is committed in a public space.

Finally, this act does not address the issue of whether a cause of action under the act survives the death of the depicted individual. That issue is left to other applicable state law.

SECTION 4. EXCEPTIONS TO LIABILITY.

(a) In this section:

(1) "Child" means an unemancipated individual who is less than [18] years of age.

(2) "Parent" means an individual recognized as a parent under law of this state other than this [act].

(b) A person is not liable under this [act] if the person proves that disclosure of, or a threat to disclose, an intimate image was:

(1) made in good faith in:

(A) law enforcement;

(B) a legal proceeding; or

(C) medical education or treatment;

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

(A) unlawful conduct; or

(B) unsolicited and unwelcome conduct;

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

(4) reasonably intended to assist the depicted individual.

(c) Subject to subsection (d), a defendant who is a parent, legal guardian, or [individual with legal custody] of a child is not liable under this [act] for a disclosure or threatened disclosure of an intimate image, as defined in Section 2(7)(A), of the child.

(d) If a defendant asserts an exception to liability under subsection (c), the exception does not apply if the plaintiff proves the disclosure was:

(1) prohibited by law other than this [act]; or

(2) made for the purpose of sexual arousal, sexual gratification, humiliation, degradation, or monetary or commercial gain.

(e) Disclosure of, or a threat to disclose, an intimate image is not a matter of public concern or public interest solely because the depicted individual is a public figure.

Legislative Note: *In subsection (c), a state should insert the appropriate term for an individual with legal custody other than a parent.*

Comment

Section 4(b)(1) and (2) make an exception for good faith reporting of wrongful conduct. Subsection (b)(1) permits disclosure in connection with law enforcement, a legal proceeding, or medical education or treatment. Subsection (b)(2) permits disclosure to facilitate investigation of unlawful or unsolicited and unwelcome conduct. For example, an employee who received an otherwise protected image from a harassing supervisor would not be liable under this act for forwarding the image to the company's human relations department.

Subsection (b)(3) makes an exception for matters of "public concern or public interest." Subsection (e) clarifies that an intimate image does not fall within this exception solely because the depicted individual is a public figure.

The "public concern" exception is intended to ensure compliance with the First Amendment. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Supreme Court noted that "matters of public concern" are "at the heart of the First Amendment's protection" while "speech on matters of purely private concern is of less First Amendment concern." 472 U.S. 749, 758–59 (1985) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). While the dividing line between the two is not crystal clear, this exception provides the courts with an opportunity to determine the level of First Amendment protection through an independent and detailed examination of the content, form, and context of the speech as revealed by the whole record. See *Snyder v. Phelps*, 562 U.S. 443, 452, 454 (2011).

In subsection (d)(1), "prohibited by law other than this act" refers to federal and state laws regarding child exploitation and pornography that may apply to the disclosure.

SECTION 5. PLAINTIFF'S PRIVACY.

Alternative A

In an action under this [act] a plaintiff may proceed using a pseudonym in place of the true name of the plaintiff under [applicable state law or procedural rule].

Alternative B

In an action under this [act]:

(1) the court may exclude or redact from all pleadings and documents filed in the action other identifying characteristics of the plaintiff under [applicable state law or procedural rule];

(2) a plaintiff to whom paragraph (1) applies shall file with the court and serve on the defendant a confidential information form that includes the excluded or redacted plaintiff's name and other identifying characteristics; and

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

End of Alternatives

***Legislative Note:** If a state's rules of civil procedure do not provide for the possibility of a plaintiff to use a pseudonym in a civil action, use Alternative B.*

Comment

The fear of further notoriety or abuse deters many victims from pursuing legal remedies. This fear can be mitigated by clear procedures allowing victims to use pseudonyms. Recognizing that some procedures already exist and vary widely among states, this section leaves the particulars of the process to other applicable state law.

SECTION 6. REMEDIES.

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

(1) the greater of:

(A) economic and noneconomic damages proximately caused by the

defendant's disclosure or threatened disclosure, including damages for emotional distress whether or not accompanied by other damages; or

(B) statutory damages not to exceed \$[10,000] against each defendant found liable under this [act] for all disclosures and threatened disclosures by the defendant of which the plaintiff knew or reasonably should have known when filing the action or which became known during the pendency of the action. In determining the amount of statutory damages under subsection (a)(1)(B), consideration must be given to the age of the parties at the time of the disclosure or threatened disclosure, the number of disclosures or threatened disclosures made by the defendant, the breadth of distribution of the image by the defendant, and other exacerbating or mitigating factors;

(2) an amount equal to any monetary gain made by the defendant from disclosure of the intimate image; and

(3) punitive damages [as allowed under law of this state other than this [act]].

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

(1) reasonable attorney's fees[and costs]; and

(2) additional relief, including injunctive relief.

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

Legislative Note: *A state should include the reference to costs in subsection (c)(1) if other state law does not provide for recovery of costs.*

Comment

Many victims are deterred from initiating legal action by the psychological toll and the financial cost of litigation. Victims of privacy invasions, especially those involving nudity or sexual activity, are often reluctant to subject themselves to further exposure through the court system. Victims of sexual abuse often find the prospect of having to recount their experiences in detail traumatizing. What is more, the process of seeking legal redress often forces victims to

confront negative, judgmental, and malicious attitudes, resulting in what is often referred to as the “secondary victimization” of sexual abuse victims.

Providing the possibility of reasonable attorney’s fees and costs to prevailing plaintiffs will encourage victims who could not otherwise sustain the financial burden of litigation to seek a civil remedy. The possibility of statutory damages provides an opportunity for victims to recover for harms they have suffered without requiring them to testify in invasive detail about those harms.

The statutory damages provision is unusual in that it suggests a range of damages rather than a fixed amount, and is limited to one statutory recovery for all disclosures by the defendant occurring within a certain time period. This is due to the unique nature of the problem addressed by this act. Technology makes it possible for the number of unauthorized disclosures of intimate images to range in the thousands, even millions. This potential for vast proliferation makes it advisable to establish upper and lower boundaries. The range recommended in the provision is meant to balance the policy concerns of redress for the plaintiff and fairness to the defendant. Because the statutory damages are a range rather than a fixed amount, subsection (a)(1)(B) requires the consideration of several factors to determine the appropriate amount.

“Gain” in this section means net gain. For example, if a discloser spends \$1,000 to create and disclose an image in violation of this act and earns \$10,000 from this disclosure, the net gain is \$9,000.

SECTION 7. STATUTE OF LIMITATIONS.

(a) An action under Section 3(b) for:

(1) an unauthorized disclosure may not be brought later than [four] years from the date the disclosure was discovered or should have been discovered with the exercise of reasonable diligence; and

(2) a threat to disclose may not be brought later than [four] years from the date of the threat to disclose.

(b) [Except as otherwise provided in subsection (c), this] [This] section is subject to [the tolling statutes of this state].

[(c) In an action under Section 3(b) by a depicted individual who was a minor on the date of the disclosure or threat to disclose, the time specified in subsection (a) does not begin to run until the depicted individual attains the age of majority.]

Legislative Note: *A state should include subsection (c) if other state law does not provide an applicable tolling provision for minors.*

Comment

The nature of internet communication complicates the determination of an appropriate statute of limitations for the unauthorized disclosure of intimate images. While some victims are quickly made aware of the defendant’s disclosure of their intimate images, many victims do not discover the disclosure for a long period of time. The images may be distributed on websites or social media platforms not visited by the victim, or they may be sent to someone the victim does not know. Thus, many years could pass before a victim discovers the unauthorized disclosure or suffers harm. In addition, even after discovering the disclosure, a reasonable person might not initially bring suit because of the resulting emotional trauma, the fear that bringing suit will bring more attention to the existence of the images, the costs and risks of litigation, and the hope that the disclosure might not receive a great amount of attention.

The statute of limitations balances these concerns with the public interest in promoting prompt filing of claims to allow parties to access relevant evidence and mitigate damages.

SECTION 8. CONSTRUCTION.

[(a)] This [act] must be construed to be consistent with the Communications Decency Act of 1996, 47 U.S.C. Section 230.

[(b) This [act] may not be construed to alter the law of this state on [sovereign] immunity.]

Legislative Note: *If a state includes subsection (b), a state that requires a statutory reference to sovereign immunity or governmental immunity should include the reference.*

Comment

This section emphasizes that Section 230 of the federal Communications Decency Act (CDA) may preempt certain state law claims. Section 230(c)(1) provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Section 230(c)(2) prohibits holding providers or users of interactive computer services civilly liable on the basis of good faith restrictions in accessing objectionable material or for making information about the technical means of restricting access to such material. Section 230(e)(3) provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

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

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

SECTION 11. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

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