

## Cyberflashing: Exposing Oklahoma’s Legal Loophole

*[R]eforming the criminal law must still be part of a project for change, to better recognise the harms of cyberflashing and offer victim-survivors options for redress.*

—Clare McGlynn & Kelly Johnson<sup>1</sup>

### *Introduction*<sup>2</sup>

In a nearly vacant theater auditorium, a stranger settled in near Ella.<sup>3</sup> Partway into the movie, the stranger exposed his genitals and masturbated.<sup>4</sup> While Ella sought help, the man slipped away through a fire exit.<sup>5</sup> Ella said, “It was only after it happened to me that I truly empathised with the feeling of complete powerlessness sexual harassment makes you feel.”<sup>6</sup>

Unfortunately, Ella was also targeted six months earlier when a stranger electronically sent sexually explicit images to her without consent, an act known as cyberflashing.<sup>7</sup> During a commute on public transportation, a fellow rider used AirDrop to instantly transmit sexually explicit content to Ella’s phone.<sup>8</sup> Ella could not identify the sender, but the cyberflasher was physically nearby, in range of her phone.<sup>9</sup> “I’d never used AirDrop so it took me a couple of seconds to work out exactly what was happening,” she

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1. CLARE MCGLYNN & KELLY JOHNSON, *CYBERFLASHING: RECOGNIZING HARMS, REFORMING LAWS* 6 (2021).

2. Trigger Warning: The following story contains descriptions of sexual harassment. In discussing cyberflashing and the broader continuum of sexual violence, statistics and personal accounts are heavily relied on throughout this Note.

3. Sophie Gallagher, *Cyber Flashing and Flashing Can Be Equally Harmful, Says Woman Who Experienced Both*, HUFFPOST (July 12, 2019), [https://www.huffingtonpost.co.uk/entry/cyberflashing-real-life-vs-flashing-online\\_uk\\_5bfe81ede4b030172fa8d278](https://www.huffingtonpost.co.uk/entry/cyberflashing-real-life-vs-flashing-online_uk_5bfe81ede4b030172fa8d278) [<https://perma.cc/W2N3-MJKV>]. Gallagher, an England-based reporter engaged in addressing technology-facilitated harassment, originally shared Ella’s story that is recounted here. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*; Dave Johnson & Kyle Wilson, *How to AirDrop a File Between Your iPhone, iPad, or Mac Computer*, BUS. INSIDER (Feb. 11, 2022, 10:25 AM), <https://www.businessinsider.com/guides/tech/how-to-airdrop> [<https://perma.cc/L9E5-PTWA>] (explaining how AirDrop is a quick way to share images between Apple devices using a “combination of both Bluetooth and Wi-Fi,” estimating that a sender must be within thirty feet of target to transmit images using AirDrop).

recounted.<sup>10</sup> She “thought about it quite a lot for a long time afterwards,” and her embarrassment “quickly turned to anger.”<sup>11</sup> Ella was a back-to-back target of both traditional indecent exposure and modern cyberflashing—yet only one of those was a reportable crime.

Ella noted that cyberflashing particularly rattled her, explaining that “because you don’t know who’s sent it, and you’re in a public space, that threat is never really eliminated.”<sup>12</sup> She described both experiences as a “complete invasion of your private space, whether physically or digitally, and both forms completely blindsides you.”<sup>13</sup> Research indicates that online harassment is not necessarily less damaging than in-person harassment.<sup>14</sup> Yet cyberflashing is prevalent: over half of the women in one United States survey reported being cyberflashed, and, in a United Kingdom survey, 75% of young adults reported experiencing cyberflashing.<sup>15</sup>

This Note proposes that the State of Oklahoma should address the modern proliferation of technology-facilitated sexual harassment by adopting a general-intent anti-cyberflashing statute.<sup>16</sup> A legislative response would provide legal recourse to cyberflashing victims and combat problematic sexual conduct and attitudes that infringe on consent and dignity. This Note contains four parts. Part I defines cyberflashing and identifies consent issues. Part II provides an anti-cyberstalking statutory-intent analysis and a review

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10. Gallagher, *supra* note 3.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*; see also Rikke Amundsen, ‘A Male Dominance Kind of Vibe’: Approaching Unsolicited Dick Pics as Sexism, 23 NEW MEDIA & SOC’Y 1465, 1465 (2021), <https://journals.sagepub.com/doi/epub/10.1177/1461444820907025> [<https://perma.cc/5Q3U-K6VW>] (describing being cyberflashed). One victim noted it was “quite an aggressive gesture, not a particularly pleasant one. . . . [T]hey’re more of a kind of controlling thing, like: ‘you now have to look at my penis, whether you like it or not.’” *Id.*

15. V. Karasavva et al., *Putting the Y in Cyberflashing: Exploring the Prevalence and Predictors of the Reasons for Sending Unsolicited Nude or Sexual Images*, 140 COMPUTS. IN HUM. BEHAVIOR, article no. 107593, Mar. 2023, at 1, 2, <https://doi.org/10.1016/j.chb.2022.107593>.

16. For a practical approach to drafting effective law, see RICHARD NEUMANN & J. LYN ENTRIKIN, *LEGAL DRAFTING BY DESIGN: A UNIFIED APPROACH* 405-06 (Rachel E. Barkow et al. eds., 2018). The authors give a brief overview of effective legislation drafting in, typically, five steps: (1) understand the issue and desired policy outcome of the statute (here, consent), (2) understand the current legal framework and identify where the gap is in regard to specific conduct left unaddressed, (3) determine if an amendment or a new statute is required, (4) explain the change in policy clearly and in a way that is accessible to the majority of readers, and (5) review, edit, and test whether drafted legislation fulfills the desired outcome by exploring it through a variety of perspectives. *Id.*

of what motivates cyberflashing behavior. It also highlights why the State of Oklahoma should adopt a general-intent-based law in response. Part III explores public policy issues related to cyberflashing, data on consent-related crimes in Oklahoma, and the need for a tailored legislative response and broader social shift. Part IV concludes with final thoughts on the law and building a safer community based on accountability and consent.

### *I. Contours of Cyberflashing*

Relative to other forms of sexual misconduct, cyberflashing may seem innocuous; however, understanding and addressing cyberflashing is important to lowering societal tolerance of all forms of sexually abusive behavior. While in-person indecent exposure is universally outlawed in the United States,<sup>17</sup> its technology-based counterpart—cyberflashing—is not.<sup>18</sup> The following section defines cyberflashing, its impact, and how lack of consent is the central factor in identifying cyberflashing perpetration.

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17. See generally *Public Indecency Law*, JUSTIA, <https://www.justia.com/criminal/offenses/sex-crimes/public-indecency/> (last visited Sept. 21, 2023). Note that some jurisdictions still require proving accused's intent even in traditional indecent exposure cases.

18. As of this writing, only four states—California, New Hampshire, Texas, and Virginia—have adopted law directly addressing cyberflashing, though bills have been introduced in several other states. California and Virginia each adopted a private cause of action against cyberflashing. See CAL. CIV. CODE § 1708.88 (West 2023); VA. CODE ANN. § 8.01-46.2 (West 2023). New Hampshire and Texas included anti-cyberflashing statutes under their criminal codes. See N.H. REV. STAT. ANN. § 645:1 (2023); TEX. PENAL CODE ANN. § 21.19 (West 2023).

Like other states, Wisconsin unsuccessfully proposed an anti-cyberflashing bill. See S.B. 821, 105th Leg., Reg. Sess. (Wis. 2022). Wisconsin's proposal was unique in that law enforcement would be responsible for administering written warnings and fines (e.g., adult offenders could be fined \$250 for the first offense and \$500 for offenses thereafter). Emilee Fannon, 'Cyber Flashing': Bill Would Penalize Those Who Send Unsolicited Sexual Images, CBS 58: WDJT - MILWAUKEE (Mar. 4, 2022, 3:51 PM), <https://www.cbs58.com/news/cyberflashing-bill-would-penalize-those-who-send-unsolicited-sexual-images>. This bill was bipartisan and seems to have failed due to timing (presented at end-of-session). *Id.*

Also noteworthy is that, perhaps without intending to address cyberflashing specifically, some states have statutes that may incidentally address it. For example, both Maine and South Carolina have robust statutory language prohibiting obscene communication by electronic means. See ME. REV. STAT. tit. 17-A, § 506 (2023); S.C. CODE ANN. § 16-17-430 (2023).

*A. Definition: What Cyberflashing Is and Is Not*

Cyberflashing is intentional, electronic transmission of unsolicited,<sup>19</sup> sexually explicit content without the recipient's consent.<sup>20</sup> It qualifies as sexual harassment, which is defined as "unwanted and unwelcome conduct of a sexual nature."<sup>21</sup> Cyberflashing is one example of technology-facilitated sexual harassment and has been conceptualized as its own form of "sexual intrusion."<sup>22</sup> In conflict with fundamental concepts of privacy and human dignity,<sup>23</sup> forced sexualized interaction is a psychological and emotional "inner world violation" and an "infringement of dignity," whether perpetrated in person or via technology.<sup>24</sup>

To be clear, cyberflashing is not sexting or consensual image-sharing.<sup>25</sup> As with rape versus sex, the difference is a matter of consent.<sup>26</sup> Cyberflashing

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19. Karasavva, *supra* note 15, at 4 (providing a clear definition for "unsolicited" in lay terms by using the explanation given to potential cyberflashers in a recent study: "even if they didn't ask for it or you didn't know they wanted one").

20. *Id.*

21. Nicola Henry & Anastasia Powell, *The Dark Side of the Virtual World: Towards a Digital Sexual Ethics*, in PREVENTING SEXUAL VIOLENCE: INTERDISCIPLINARY APPROACHES TO OVERCOMING A RAPE CULTURE 84, 89 (Nicola Henry & Anastasia Powell eds., 2014).

22. Clare McGlynn, *Cyberflashing: Consent, Reform and the Criminal Law*, 86 J. CRIM. L. 336, 341 (2022).

23. See Stuart P. Green, *To See and Be Seen: Reconstructing the Law of Voyeurism and Exhibitionism*, 55 AM. CRIM. L. REV. 203, 217, 241 (2018).

24. McGlynn, *supra* note 22, at 7.

25. Henry & Powell, *supra* note 21, at 86 n.6 (noting some ambiguity in the term "sexting" but generally refers to consensual technology-facilitated image-sharing).

26. Some dating platforms may have the reputation of being a place to exchange explicit sexual images, creating an assumption that registering to use the platform socially confirms implied consent. Perhaps such platforms not rely on implied consent. Instead, they could transform implied consent into explicit consent through opt-in options. For example, platforms could provide an option where users can check a box or uncheck a box at any time as to whether they are open to such exchanges or with specific users. Because of the damage risk when assumptions of consent are wrong, platforms should facilitate the practice of explicit consent. For helpful guidance for states, platforms, policymakers, and educators in developing and enforcing standards of "technology citizenship," see generally Philip J. Frankenfeld, *Technological Citizenship: A Normative Framework for Risk Studies* 17 SCI., TECH., & HUM. VALUES 459, 476 (1992) ("The concept may revitalize an appreciation of a number of key concepts of civic life: (1) boundaries, (2) community, (3) membership, (4) subjectivity and subjects, (5) equality of status, (6) rights, (7) obligations, (8) political community, and (9) social contract. This result would be welcomed by policymakers of every stripe.").

is conduct shaped by lack of consent, “thus situating itself well to the image-based sexual abuse paradigm”<sup>27</sup> and broader sexual harm continuum.

Cyberflashing is also distinguishable from another form of image-based sexual abuse called image exploitation (colloquially, but inaccurately, termed “revenge porn”<sup>28</sup>), wherein private or sexually explicit images or videos of the victim are shared without consent.<sup>29</sup> Image exploitation includes “nonconsensual creation, possession, or distribution” of images or videos “depicting victims nude, semi-nude, engaged in consensual sexual activity, or being sexually assaulted.”<sup>30</sup> In contrast, with cyberflashing, the offender typically sends an image or video of their own genitalia to the unsuspecting target.

Cyberflashing can occur in a variety of ways, including through AirDrop, messaging on social media platforms, texting and email, or by “ZoomBombing” (intrusively sharing graphic content over Zoom or other videoconferencing platforms to nonconsenting audiences).<sup>31</sup>

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27. Flora Oswald et al., *I’ll Show You Mine So You’ll Show Me Yours: Motivations and Personality Variables in Photographic Exhibitionism*, 57 J. SEX RES. 597, 598 (2020).

28. See Mary Anne Franks, Drafting an Effective “Revenge Porn” Law: A Guide for Legislators 2 (Aug. 17, 2015) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2468823](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823) [<https://perma.cc/H8SJ-PN4S>] (“The term ‘revenge porn’ is misleading in two respects. First, perpetrators are not always be [sic] motivated by vengeance. Many act out of a desire for profit, notoriety, or entertainment, including hackers, purveyors of hidden or ‘upskirt’ camera recordings, and people who distribute stolen cellphone photos. The term ‘revenge porn’ is also misleading in that it implies that taking a picture of oneself naked or engaged in a sexual act (or allowing someone else to take such a picture) is pornographic.”); Tia Hanifa, *Call a Spade a Spade: Why the Term “Revenge Porn” is Misleading*, GREEN NETWORK ASIA (Mar. 21, 2022), <https://greennetwork.asia/featured/call-a-spade-a-spade-why-the-term-revenge-porn-is-misleading/> [<https://perma.cc/JD58-N3WV>] (“‘Revenge’ also implies that the victim had incited the perpetrator and had done something deserving of an act of revenge. In this way, the term ‘revenge porn’ perpetuates the culture of victim-blaming.”).

29. Chance Carter, *An Update on the Legal Landscape of Revenge Porn*, NAT’L ASS’N OF ATTORNEYS GENERAL (Nov. 16, 2021), <https://www.naag.org/attorney-general-journal/an-update-on-the-legal-landscape-of-revenge-porn/>.

30. AEquitas, *Bringing Offenders into Focus: Prosecuting Image Exploitation*, YOUTUBE (Aug. 11, 2022), <https://www.youtube.com/watch?v=tNPV2DVuJ-Y&t=2s> (written video description) (explaining that image exploitation “exposes victims to immeasurable trauma of essentially infinite duration, permanently invading their autonomy and security”).

31. Taylor Lorenz, *‘Zoombombing’: When Video Conferences Go Wrong*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/03/20/style/zoombombing-zoom-trolling.html> [<https://perma.cc/9AQJ-UF4X>].

### B. Impact

Cyberflashing infringes on another's privacy and dignity and violates consent. Exposure through cyberflashing is harmful and a potential red flag of the sender's problematic consent views and exhibitionism.<sup>32</sup> As noted by Clare McGlynn, an authority on image-based sexual abuse and cyberflashing, "It is important to understand sexual offending on a continuum—all forms including flashing, rape and others, are all related and therefore their causes and harms are related."<sup>33</sup> Indeed, "[w]hile it's a crime to pull your pants down in the streets, there [is] nothing stopping anyone from exposing themselves in your DMs, texts, or other channels,"<sup>34</sup> and there is no digital-based, tailored statutory recourse in Oklahoma.

Indecent exposure and exhibitionism were once thought relatively harmless, but researchers recently explored the psychological impact of such conduct on victims' sense of dignity and emotional and physical safety.<sup>35</sup> One expert warned that "[t]he same factors that make us worry about physical flashing should make us worry about online cyber flashing."<sup>36</sup> Cyberflashing is one iteration of underlying deviance.<sup>37</sup>

Regardless of whether sexual harassment transitions to physical harm, technology-facilitated exhibitionism, indecent exposure, and forced consumption of sexually explicit content in the form of cyberflashing should

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32. See also Green, *supra* note 23, at 241 ("[L]aws prohibiting nudity or partial nudity have themselves often served to oppress traditionally disfavored groups; in particular, they have provided a means by which men have sought to control women's sexuality. If we are to keep such laws at all in a liberal, pluralistic society, we need to apply them with considerable care.").

33. Sophie Gallagher, 'He Was Staring at Me Across the Concourse, His Hands Were Shaking': Why Cyber Flashing Isn't Just a Digital Problem, HUFFPOST (July 12, 2019), [https://www.huffingtonpost.co.uk/entry/he-was-staring-at-me-across-the-concourse-his-hands-were-shaking-why-cyberflashing-isnt-just-a-digital-problem\\_uk\\_5ca1ca0de4b0bc0dacab0dd0](https://www.huffingtonpost.co.uk/entry/he-was-staring-at-me-across-the-concourse-his-hands-were-shaking-why-cyberflashing-isnt-just-a-digital-problem_uk_5ca1ca0de4b0bc0dacab0dd0) [<https://perma.cc/4JCF-BBP6>].

34. *Here's How to Help Ban Unsolicited Lewd Photos in Your State*, BUMBLE, <https://bumble.com/en-us/the-buzz/bumble-unsolicited-lewd-nude-images-virginia-texas> (last visited Sept. 21, 2023).

35. Gallagher, *supra* note 33.

36. *Id.*

37. See Shannon M. Bader et al., *Exhibitionism: Findings from a Midwestern Police Contact Sample*, 52 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 270, 273 (2008) (noting that while "[m]ore recent research . . . has suggested that those with a record of exhibitionism have also engaged in hands-on offenses," such risk should not be the sole grounds on which cyberflashing conduct is prohibited).

be addressed for being a nonconsensual sexual interaction.<sup>38</sup> The emphasis is not on the sexual nature of shared material but on the issue of consent. Yet, the pervasiveness of cyberflashing is met with silence throughout most state legislatures, increasing the risk of cyberflashing settling in as a social norm in our digital age.<sup>39</sup> While women have been particularly vocal about their distaste for cyberflashing, both men and women engage in it and insist that men in particular often do not know<sup>40</sup> their unsolicited pictures are unwanted, a paradox that “begs investigation.”<sup>41</sup>

Oklahoma should have a statutory response to all nonconsensual sexual conduct. Technology and digital communication are now integrated into everyday life, and Oklahoma should act with urgency to create updated, tailored legislation to the increasing methods cyberflashers use to target victims.<sup>42</sup>

### *C. Should Cyberflashing Be Tolerated Since It Is Not In-Person Conduct?*

To put the question in perspective, Dr. Christian Buckland responded that it is “like asking the question whether cyber bullying is not as bad as being

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38. Technology-facilitated sexual harassment and abuse is increasing worldwide. Education is a key component of prevention, as explained below:

Changing social attitudes and norms is the first step to shifting the way online abuse is understood as a serious challenge. Violence is not new, but cyber violence is, and the public needs to recognize this and address it as a priority issue. Sensitization to cyber [violence against women and girls] must include educating the next generation of . . . users, both boys and girls, through their parents, teachers and wider communities, as well as police authorities and the justice systems.

WORKING GRP. ON BROADBAND & GENDER, U.N. BROADBAND COMM’N, CYBER VIOLENCE AGAINST WOMEN AND GIRLS: A WORLDWIDE WAKE-UP CALL 3 (2015) at 3 [hereinafter CYAWG DISCUSSION PAPER], [https://www.broadbandcommission.org/wp-content/uploads/2021/02/WGGender\\_Executivesummary2015.pdf](https://www.broadbandcommission.org/wp-content/uploads/2021/02/WGGender_Executivesummary2015.pdf) [<https://perma.cc/T87N-WU36>].

39. See *supra* note 18 and accompanying text.

40. *Contra* Matthew Smith, *Four in Ten Female Millennials Have Been Sent an Unsolicited Penis Photo*, YOUgov UK (Feb. 15, 2018, 6:00 PM), <https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic> (highlighting that over 40% of millennial women surveyed received unsolicited images of a penis, and 55% of senders acknowledged women would likely describe the images as “gross”).

41. Rebecca M. Hayes & Molly Dragiewicz, *Unsolicited Dick Pics: Erotica, Exhibitionism or Entitlement?*, 71 WOMEN’S STUD. INT’L F. 114, 118 (2018).

42. See generally CYAWG DISCUSSION PAPER, *supra* note 38, at 4 (“As the Internet evolves and social media and networking tools increasingly become an intrinsic part of people’s lives around the globe, attitudes and norms that contribute to cyber [violence against women and girls] must be addressed with urgency.”).

bullied at school or work.”<sup>43</sup> The conclusion is that neither is acceptable and both cause “a great deal of psychological and emotional distress.”<sup>44</sup> While differences exist between in-person and technology-facilitated sexual harassment, the integration of technology in daily life means it is “important to avoid a false dichotomy between ‘offline’ and ‘online’ worlds,” as “our corporeal bodies are not entirely absent in technosocial contexts, and our physical selves . . . are increasingly dependent on ever-changing technosocial platforms.”<sup>45</sup> Online sexual harassment is increasing,<sup>46</sup> and it affects some victims’ daily lives. High-profile women are often targeted and compelled to dedicate part of their platforms, time, and energy to addressing the age of digital sexual harassment.<sup>47</sup> In some instances, serial cyberflashers perpetrated over 31% of image-based abuses.<sup>48</sup> It is important to acknowledge the danger and damage caused by sexual harm in all its forms, including cyberflashing. Through legislation, Oklahoma has an opportunity to clearly communicate to cyberflashers and their targets that Oklahoma does not stand for sexual harassment or abuse in any form.

Another concern is how cyberflashing may morph into an in-person-online hybrid act. At this stage, data is lacking. Absent large-scale studies, we rely on personal accounts and lived experiences to inform our understanding of cyberflashing’s impact.<sup>49</sup> There are many willing to share their stories.

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43. Gallagher, *supra* note 3.

44. *Id.*

45. Henry & Powell, *supra* note 21, at 92.

46. *Compared with 2017, Similar Share of Americans Have Experienced Any Type of Online Harassment – But More Severe Encounters Have Become More Common*, PEW RSCH. CTR. (Jan. 8, 2021), [https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/pi\\_2021-01-13\\_online-harrasment\\_0-01-1/](https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/pi_2021-01-13_online-harrasment_0-01-1/) [<https://perma.cc/7PNH-SQJQ>].

47. CTR. FOR COUNTERING DIGIT. HATE, HIDDEN HATE: HOW INSTAGRAM FAILS TO ACT ON 9 IN 10 REPORTS OF MISOGYNY IN DMs 11 (2022), <https://counterhate.com/wp-content/uploads/2022/05/Final-Hidden-Hate.pdf> [<https://perma.cc/PRH8-NJZP>] [hereinafter CTR. FOR COUNTERING DIGIT. HATE, HIDDEN HATE]. *See generally* CTR. FOR COUNTERING DIGIT. HATE, SUBMISSION TO THE WHITE HOUSE TASKFORCE TO ADDRESS ONLINE HARASSMENT AND ABUSE, TECHNOLOGY-FACILITATED GENDER-BASED VIOLENCE CONSULTATION (Sept. 2022), <https://counterhate.com/wp-content/uploads/2022/09/Submission-White-House-Taskforce-to-address-Online-Harassment-and-Abuse-TFGBV-Consultation-September-2022-1.pdf> [<https://perma.cc/4J9D-M3PH>].

48. CTR. FOR COUNTERING DIGIT. HATE, HIDDEN HATE, *supra* note 47, at 13.

49. *See* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* xii (1979) (noting that women must draw “evidence from women’s observations on their own lives”) (“When an outrage has been so long repressed, there will be few social codifications for its expression. . . . I therefore take immediate reflections on lived-through experiences as data.”).



One woman, Sophie Meehan, recounted a cyberflasher standing within feet of her on a train platform “as he repeatedly sent the [sexually explicit image]” through AirDrop.<sup>50</sup> “He made eye contact with me,” she described.<sup>51</sup> “I looked at his hands and they were shaking; his thumbs hovered over his phone waiting for my reaction.”<sup>52</sup>

Standing outside of a public restroom, Sophie waited for her dad, and, “to avoid looking alone, she called her mum, her voice breaking with nerves.”<sup>53</sup> She described being terrified and making this phone call for support.<sup>54</sup> All the while, Sophie said, “I could feel my phone vibrating against my ear as he sent me more images.”<sup>55</sup> The cyberflasher said nothing to her as he moved closer.<sup>56</sup>

Sophie’s dad returned, and the cyberflasher walked away, only to follow her to the train and watch as Sophie boarded.<sup>57</sup> Sophie was thankful that she was with her dad, but she was shaken: “Although it was in a public space, I felt very alone and vulnerable.”<sup>58</sup> As she explained, “[I]t’s not like flashing where everyone can see if it happens to you in public, and might intervene or try to help. It was more internalised—no one knew what was on my phone. I was singled out, I was being targeted, and it felt very personal.”<sup>59</sup>

Other women are targeted by acquaintances or online connections.<sup>60</sup> One woman described being suddenly bombarded by a genitalia image and video from someone she had “known years before, but had never spoken to.”<sup>61</sup> She said that she threw her phone across the room and now rarely uses the platform she was on anymore.<sup>62</sup> Cyberflashing also happens in the workplace and at school, and cyberflashers have become increasingly active in targeting

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50. Gallagher, *supra* note 33.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Sophie Gallagher, ‘Violated, Sick, Uncomfortable’: 10 Women on Being Sent Unsolicited Dick Pics, HUFFPOST (Oct. 26, 2018, 10:14 AM), [https://www.huffingtonpost.co.uk/entry/it-was-scary-not-knowing-who-might-follow-me-off-the-train-women-talk-about-how-it-feels-to-be-sent-unsolicited-dick-pics\\_uk\\_5bcec723e4b0d38b587baa52](https://www.huffingtonpost.co.uk/entry/it-was-scary-not-knowing-who-might-follow-me-off-the-train-women-talk-about-how-it-feels-to-be-sent-unsolicited-dick-pics_uk_5bcec723e4b0d38b587baa52) [https://perma.cc/LUS9-RJAY].

61. *Id.*

62. *Id.*

teenage girls.<sup>63</sup> One study showed that over 75% of girls ages twelve to eighteen reported experiencing cyberflashing.<sup>64</sup>

Whether perpetrated exclusively online or by a hybrid in-person-and-digital act, and whether by strangers, acquaintances, friends, classmates, or co-workers, cyberflashing has many of the same impacts as in-person indecent exposure and creates a dangerous, nonconsensual dynamic that affects individuals at an increasingly early age.<sup>65</sup>

In addressing the modern issue of cyberflashing, it is important to avoid repeating mistakes of early sexual assault law which shifted responsibility to victims. With technology-facilitated sexual harassment, many victims will predictably be met with advice “such as ‘just turn off the computer or phone,’” which “parallels earlier and problematic rape prevention strategies focused on victim responsibility and behaviour.”<sup>66</sup> This response is a deflection: the issue is not technology, as sexually harassing behavior “predates the Internet and mobile phone.”<sup>67</sup> Technology merely facilitates entrenched behaviors and attitudes,<sup>68</sup> serving as a means by which an offender exercises consent-violative, problematic behavior, which is not addressed by a victim restricting his or her own technology usage.<sup>69</sup> While certain safety measures are recommended, they are irrelevant to the root issue and the concerning behaviors a cyberflasher is showing his or her community.<sup>70</sup> When perpetrators show their red flags to their communities about their views on consent, having victims bury those flags by changing phone settings does nothing to address the root issue or prevent perpetrators from acting on their consent-violative views in *other* ways with *different* victims. Focusing solely on victim behavior is an approach that ignores the underlying danger—offender misconduct—and provides no intervention at the source of the problem. In this way, responses to harm that exclusively

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63. Jessica Ringrose, *Is There Hidden Sexual Abuse Going on in Your School?*, TES MAG. (Oct. 29, 2020, 11:52 AM), <https://www.tes.com/magazine/teaching-learning/general/there-hidden-sexual-abuse-going-your-school> [<https://perma.cc/CKQ3-PVQB>].

64. *Id.*

65. *Id.*

66. Henry & Powell, *supra* note 21, at 85.

67. *Id.* at 86.

68. *Id.* at 92.

69. *Id.* at 85-86.

70. However, because there is an opportunity to share information, there are sites offering tips for phone safety in abuse or harassment contexts. See generally *Survivors' Guide to Phones: Increasing Privacy & Responding to Abuse*, NAT'L NETWORK TO END DOMESTIC VIOLENCE: SAFETY NET PROJECT, <https://www.techsafety.org/12tipscellphones> (last visited Sept. 21, 2023) [<https://perma.cc/D7VA-6UXX>].

rely on lectures about individual safety measures operate to obscure the root problem, increasing community risk and oversimplifying the adaptive nature of perpetrators. The following proposes legislation that exclusively identifies and addresses the prohibited conduct and pursues accountability for the offender, not the target.

## *II. Closing Oklahoma's Legal Loophole with a General-Intent-Based Statute*

Across the United States, states statutorily prohibit indecent exposure, harassment, obscenity, and lewdness; however, like Oklahoma, most lack a statute tailored to the modern issue of cyberflashing and related technology-based sexual harassment.<sup>71</sup> Under the criminology theory of Situational Crime Prevention,<sup>72</sup> in terms of intervention, prevention, and accountability, it is important to address “highly specific categories of crime.”<sup>73</sup> For example, it is recommended to categorize burglary further by residential versus commercial.<sup>74</sup> Specificity is important because, despite similarities between crimes under broader categories, “the environmental settings of a specific category of crime can be different,” perhaps requiring particular statutory language or varied investigative techniques.<sup>75</sup>

Oklahoma should develop specific law confronting cyberflashing, which requires a unique approach that diverges from traditional indecent exposure, harassment, or related offenses.<sup>76</sup> Due to cyberflashers' varied motivations,

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71. See *supra* note 18 and accompanying text.

72. See *What Is Situational Crime Prevention?*, COLL. OF POLICING (Jan. 19, 2022), <https://www.college.police.uk/guidance/neighbourhood-crime/what-situational-crime-prevention> [<https://perma.cc/PV8P-FZ4D>] (“Situational crime prevention aims to increase risk and/or minimise reward, thus making either the commission of a criminal act too difficult, or the reward for committing the act too low to risk being caught.”).

73. Heemeng Ho et al., *Situational Crime Prevention (SCP) Techniques to Prevent and Control Cybercrimes: A Focused Systematic Review*, 115 COMPS. & SEC., article no. 102611, Apr. 2022, at 1, 3, <https://doi.org/10.1016/j.cose.2022.102611>.

74. *Id.*

75. *Id.*

76. The following related Oklahoma laws are unlikely specific enough to sufficiently address cyberflashing. First, indecent exposure includes offending in a public place or where others are present to be “offended or annoyed thereby,” suggesting an in-person crime. 21 OKLA. STAT. § 1021 (2023). While subsection (A)(3) does prohibit the exhibition of obscene material, it is overbroad, as anti-cyberflashing law seeks only to prohibit nonconsensual sharing of sexually explicit material. *Id.* § 1021(A)(3). Second, while the law against harassment includes electronic communication in its language, it requires a high intent bar

the State of Oklahoma should adopt a general-intent-based anti-cyberflashing statute, as specific intent is inherently ill-equipped to curb cyberflashing. Below is an overview of the legal meaning and types of intent and the categories of intent used in a contemporary cyberflashing law, an exploration of cyberflashers' motivations and how those should inform the law, and a proposal for Oklahoma to adopt a general-intent-based law.

#### *A. Specific Intent Versus General Intent*

In criminal and civil law, the following elements of culpability must be established to prove guilt or liability respectively: (1) *actus reus* (the physical conduct—a voluntary act or failure to act),<sup>77</sup> (2) *mens rea* (mental state),<sup>78</sup> and (3) causation (the reason something happened).<sup>79</sup> Traditionally, the *mens rea* element of U.S. law was written in terms of “specific intent” or “general intent” crimes.<sup>80</sup>

Commonly,<sup>81</sup> specific intent can mean two things.<sup>82</sup> First, it can refer to a crime requiring more than one level of intent, such as burglary. For burglary, prosecutors must show both the intent to enter a building and the intent to commit a second crime, such as theft.<sup>83</sup> Or specific intent may refer to a crime with “the two levels of *mens rea* in a *result* offense.”<sup>84</sup> That is, the first layer is the intentional act (such as firing a gun) and the second layer is the intent to cause a particular result (such as the death of another).<sup>85</sup> In contrast, a

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such as to “terrify, intimidate or harass, or threaten to inflict injury or physical harm.” *Id.* § 1172(A)(2). Lastly, Oklahoma’s law against obscenity prohibits certain conduct regardless of mutual consent, which is far removed from the purpose of a cyberflashing statute which has the purpose of highlighting consent as the determinative factor. *Id.* §§ 1021, 1040.8.

77. *Actus Reus*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/actus\\_reus](https://www.law.cornell.edu/wex/actus_reus) [<https://perma.cc/W3BX-VHNJ>] (last updated June 2022).

78. *Mens Rea*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/mens\\_rea](https://www.law.cornell.edu/wex/mens_rea) [<https://perma.cc/DL75-S3VU>] (last updated July 2023).

79. *Cause*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/cause> [<https://perma.cc/ZJ3Z-MYYH>] (last updated May 2020).

80. JENS DAVID OHLIN, *CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE* 155 (Rachel Barkow et al. eds., 2d ed. 2018).

81. Interpreting general and specific intent is “notoriously confusing” given that “they have different meanings and are used inconsistently by various judges, legislators, and lawyers.” *Id.*

82. *Id.* at 143 (“Unfortunately, the language of intent is fundamentally ambiguous because it is often unclear whether we are talking about intended actions or intended consequences.”).

83. *Id.* at 155.

84. *Id.*

85. *Id.*

general intent crime has only one level of intent—the intent to perform the act itself.<sup>86</sup> In a general intent crime, a plaintiff or prosecutor does not have to prove that the defendant intended or wished for the resulting consequences.

Mens rea is abstract and often requires speculation to determine what a defendant was thinking at the time of the illegal conduct.<sup>87</sup> To bring clarity to mens rea's varying definitions, ambiguities, and conflicting uses, the American Legal Institute streamlined mens rea concepts in its Model Penal Code (MPC).<sup>88</sup> The MPC defined four mental states under which defendants may have acted: (1) purposely, (2) knowingly, (3) recklessly, and (4) negligently.<sup>89</sup> Additionally, there are strict liability crimes where one's mental state is "largely irrelevant,"<sup>90</sup> such as possession or statutory rape, holding a defendant liable for the act regardless of intent.<sup>91</sup>

"Purposely" means acting with the "desire[] to commit the act or produce the relevant result."<sup>92</sup> Knowingly means acting while practically certain of the outcome of the conduct.<sup>93</sup> Recklessly means acting with conscious disregard of a "substantial and unjustifiable risk."<sup>94</sup> Negligently<sup>95</sup> means acting in a way that takes "substantial and unjustifiable risk," but where the defendant "*should have been aware* of the risk" regardless of whether the defendant actually was aware.<sup>96</sup> Of these, purposely is the only mens rea that falls squarely in the specific intent category. This Note recommends making the mens rea element for cyberflashing one of the latter three (knowingly, recklessly, negligently) or strict liability.

Regardless, if Oklahoma develops legislation on cyberflashing, it must clearly articulate with which mens rea or strict liability basis the law will operate. While the heightened mens rea requirement of specific intent is appropriate in some crimes, cyberflashing is not such a crime. To be

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86. *See id.*

87. *See id.*

88. *See id.*

89. *Id.* at 142.

90. *Id.* at 146.

91. *Strict Liability*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/strict\\_liability](https://www.law.cornell.edu/wex/strict_liability) [<https://perma.cc/YXA6-JJTT>] (last visited Sept. 24, 2023).

92. OHLIN, *supra* note 80, at 144.

93. *Id.* at 144-45.

94. *Id.* at 145 ("The difference between acting knowingly and recklessly is the likelihood that the prohibited result will occur.").

95. *Id.* (noting that the difference between acting recklessly and negligently is based on the awareness of the risk, not the level of the risk).

96. *Id.*

effective, a cyberflashing law must regulate the act of violating another's consent and acknowledge victim impact regardless of the perpetrator's supposed intended impact.<sup>97</sup>

*B. Interrogating Motivations: Why Do Cyberflashers Flash?*

In the first study to “quantitatively investigate heterosexual men’s motives for sending unsolicited genital images,” authors of *I’ll Show You Mine So You’ll Show Me Yours: Motivations and Personality Variables in Photographic Exhibitionism* provide insight into senders’ specific-level intent and motivations.<sup>98</sup> This psychological insight, when viewed through a legal lens, predicts the low efficacy of a law based on specific intent, as evidence indicates that a small minority of senders engage in cyberflashing for nefarious reasons.<sup>99</sup>

The primary reason study participants gave for sending unsolicited genital images was “the hopes of receiving either similar images or sexual interactions in return”—44% of recipients cyberflashed others in hopes of this outcome.<sup>100</sup> In comparison, about 17% hoped for feelings of shock, over 14% hoped for fear, nearly 11% hoped to elicit disgust, over 8% hoped for anger, 8% hoped for shame, and nearly 7% hoped recipients would feel devalued.<sup>101</sup> A small percentage (5.5%) of men studied held, “I don’t like feminism and sending dick pics is a way to punish women for trying to take power away from men,” and another 5.7% reported, “I feel a sense of dislike towards women and sending dick pics is satisfying.”<sup>102</sup>

Researchers concluded that “a significant minority of men reported sending dick pics with the intention of eliciting negative emotions in the recipients, primarily shock, fear, and disgust,” which means that the overwhelming majority of those studied could engage in cyberflashing

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97. A novel idea for dealing with consent’s historical “he-said, she-said” impasse is to look towards contract law’s framework when determining whether consent was obtained. While outside of the scope of this Note, using contract law principles in sexual assault cases might also be extended to sexual harassment incidents like cyberflashing. See Colin Colt, *Sexual Consent as a Common Law Doctrine*, 19 WYO. L. REV. 453, 476 (2019) (“While conditions of undue influence, fraud, and abuse of power are unsettled in sexual assault scholarship, they are bedrock principles of contract law. Accordingly, contract law provides a model of consent to which sexual assault law should and does aspire. While there will always be hard cases, contract law provides the best framework for adjudicating consent.”).

98. Oswald, *supra* note 27, at 607.

99. *Id.*

100. *Id.* at 604 tbl.5, 607.

101. *Id.* at 604 tbl.6.

102. *Id.* at 604 tbl.5.

consequence-free under a specific-intent law.<sup>103</sup> In addition to the majority of cases that would not be prosecutable under a specific-intent-based statute, other mens rea revealed in the study would fall outside of such a law: over 10% of participants agree that “sending dick pics gives me a feeling of control over the person that I have sent it to,” and over 12% reported, “I think it is funny to send dick pics to someone who didn’t request one.”<sup>104</sup>

Regardless of reasons given for their conduct, “men who sent dick pics reported higher levels of narcissism as well as ambivalent and hostile sexism.”<sup>105</sup> Researchers noted that, “[t]hough most men are not consciously motivated by sexism or hostility,” their conduct “contribut[es] to these forces (intentionally or unintentionally) by participating in the sending of unsolicited genital images.”<sup>106</sup> Notwithstanding cyberflashers’ intent, because of its impact, the conduct should be regulated.

An even more recent study included predominantly female participants (72% women, about 27% men, and about 1% non-binary).<sup>107</sup> In the sample of 816 undergraduates, nearly 42% of respondents reported sending an “unsolicited nude or sexual image to someone else at least once”—i.e., cyberflashing.<sup>108</sup> When asked if they expected a non-affirming response—defined as mockery, being ignored, or eliciting anger—over 40% of men agreed but only about 20% of women agreed.<sup>109</sup> The most common cyberflashing motivation was “partner hunting,” with only about 17% of cyberflashers admitting that they could have “misinterpreted the receiver’s sexual interest in them.”<sup>110</sup> That may indicate that cyberflashing presents a particular blind spot regarding the importance and assessment of confirming consent.

Researchers in the first study noted that, though some forms of cyberflashing are “accepted, to some degree, by the contemporary milieu,” there is a need for “[f]urther critical consideration of the dick pic phenomenon, particularly with regard to recipient experiences.”<sup>111</sup> Researchers held that “[t]he dick pic lies at the intersection of the zeitgeists surrounding consent, gender, sexuality, and technology, and further research

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103. *Id.* at 605.

104. *Id.* at 604 tbl.5.

105. *Id.* at 607.

106. *Id.*

107. Karasavva, *supra* note 15, at 3.

108. *Id.* at 5.

109. *Id.* at 6.

110. *Id.* at 8.

111. Oswald, *supra* note 27, at 607.

on the subject could provide insights into myriad contemporary topics such as online sexual harassment, online dating culture, and gender relations.”<sup>112</sup>

The study provided evidence that cyberflashing is “a form of sexual [harm and] harassment” and is sometimes explicitly “intended to harm or negatively affect women.”<sup>113</sup> However, conscious or sub-conscious reasoning for engaging in cyberflashing should not dictate whether a violation of another has occurred.

### C. Application: Specific-Intent Model

In November 2018, the New York City Council introduced a specific-intent-based bill.<sup>114</sup> The contemplated language provided: “It is unlawful for a person, with the *intent to harass, annoy or alarm* another person, to send by electronic device an unsolicited intimate image to such other person.”<sup>115</sup> Under this model, instead of a general-intent inquiry, the subjective intent of the sender controls.

An appeal of a specific-intent law is that it provides an extra guard against First Amendment challenges because obscene behavior with the added intent to harass, alarm, or annoy more likely falls outside of protected speech.<sup>116</sup> However, specific intent within anti-cyberflashing legislation likely creates both an unnecessary safeguard for defendants and a potentially insurmountable obstacle to plaintiffs or prosecutors. In Oklahoma, in-person indecent exposure has been treated as outside of First Amendment considerations unless the defendant explicitly asserts that their sexual misconduct involved artistic expression and provides evidence of such.<sup>117</sup>

An argument for specific-intent legislation is that the law “should focus not on the victim's response, but rather, on the offender's intent. In determining if the defendant should be held liable, we need to ask if he should have foreseen that his conduct was likely to cause the victim distress.”<sup>118</sup> However, barriers to proving heightened intent regarding sexual misconduct are increased in cultures where some perpetrators might disregard, or have

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112. *Id.*

113. *Id.* at 605.

114. N.Y.C. Council Int. No. 1244-2018 (N.Y. 2018), <https://legistar.council.nyc.gov/View.aspx?M=F&ID=6799635&GUID=4DB7D657-B8E3-4F36-841B-8FD5C0F6DA4E>.

115. *Id.* § 10-179(b) (emphasis added).

116. Brief of First Amendment Scholars as Amici Curiae in Support of Respondent at 3-4, *Counterman v. Colorado*, 600 U.S. 66 (2023) (No. 22-138).

117. *See Vanscoy v. State*, 1987 OK CR 50, ¶ 10, 734 P.2d 825, 828. However, while beyond the scope of this Note, it should be noted that a video or image of the same conduct may be less likely to fall squarely outside of First Amendment protections.

118. Green, *supra* note 23, at 256.



little understanding of, victim-impact considerations.<sup>119</sup> A specific-intent-based model provides unbalanced strength to affirmative defenses, to the extent that the law is likely dead-on-arrival as a legal recourse for cyberflashing victims.<sup>120</sup>

If only narrowly defined intent is criminalized, such as intent to harass, annoy, or alarm, a hypothetical response such as, “My humor might be off, but I only sent that as a joke,” is a full defense.<sup>121</sup> The futility of specific-intent-based laws to address cyberflashing is borne out by research exploring the subjective intent driving cyberflashers’ conduct. As previously discussed, only about 10% of cyberflashers studied explicitly intended to negatively affect their victims.<sup>122</sup> Does that mean, reasonably, 90% of cyberflashers’ conduct would fall outside of the purview of statutes that require cyberflashing be done with the intent to harass, alarm, or annoy?

Specific-intent-based laws could only hold a fraction of offenders accountable because intent-based laws create a loophole for an offender who says he or she meant no harm. This view is statistically confirmed, specifically regarding heterosexual men sending unwanted images of penises to women.<sup>123</sup>

A specific-intent-based model would not prohibit the act of cyberflashing generally. It would effectively communicate that cyberflashing is broadly permissible unless a narrowly defined specific intent underlies the decision to send the images. This model does not account for harm caused by cyberflashing despite the sender’s intent. The primary focus of specific-intent laws is on the nearly impossible-to-prove mental state behind why someone might cyberflash another. The emphasis is misdirected here, as the focus becomes merely “criminalising particular malign motives” not the conduct or victim impact, with “non-consensual conduct motivated by humour, for example, falling outside of this particular model.”<sup>124</sup>

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119. *Id.* at 257.

120. In terms of defendant rights, there are affirmative defenses available. *See* Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH L. REV. 1, 47 (2016). A defendant may seek to show that, while mistaken, he or she reasonably believed consent was obtained under the affirmative defense of mistake. *Id.* Or, the defendant is permitted to introduce evidence and argue that the act was consensual, removing liability or culpability. *Id.* In this way, the sender has additional opportunities to show no wrongdoing. *Id.*

121. McGlynn, *supra* note 22, at 339.

122. Oswald, *supra* note 27, at 604 tbl.5.

123. *See id.*

124. McGlynn, *supra* note 22, at 339.

Many recipients experience emotions of shock, alarm, and annoyance, regardless of the sender's intent. If the aim of anti-cyberflashing legislation is to deter the conduct of intentionally sending nonconsensual, explicit images, most cases would be unsuccessful under a specific-intent-based statute.<sup>125</sup> General intent remains the key to requiring consent when creating viable legal recourse for cyberflashing victims.<sup>126</sup>

*D. Application: General-Intent Model*

Responding to cyberflashing is an opportunity to reinforce consent law in Oklahoma. An adult sending explicit sexual images is, in a consensual context, entirely permissible; however, the “core wrong of cyberflashing lies in it being non-consensual sexual conduct.”<sup>127</sup> Because consent is central to the issue with cyberflashing, it should be central to its statutory language.

For example, Texas has a consent-based, anti-cyberflashing criminal statute titled “Unlawful Electronic Transmission of Sexually Explicit Visual Material.” Oklahoma could build from this example, depending on whether Oklahoma pursues a civil or criminal statute or both.<sup>128</sup> The criminal elements are:

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125. See Oswald, *supra* note 27, at 607.

126. Note that there are combination consent-intent models. For example, in combining consent with intent, Singapore provides a legislative example of a broader two-prong approach.

- (2) Any person (A) shall be guilty of an offence who —
- (a) for the purpose of obtaining sexual gratification or of causing another person (B) humiliation, alarm or distress, intentionally distributes to B an image of A's or any other person's genitals;
  - (b) intends that B will see A's or the other person's genitals; and
  - (c) does so without B's consent.

Penal Code 1871, SING. STATS. ch. 16, § 377BF(2) (2020 rev. ed.), <https://sso.agc.gov.sg/Act/PC1871?ProvIds=pr377BF->. This may be an acceptable alternative. However, including “for the purpose of obtaining sexual gratification” tags on a specific intent requirement, reducing the usability of such a law. *Id.*

127. McGlynn, *supra* note 22, at 339.

128. TEX. PENAL CODE ANN. § 21.19 (West 2023).

- (b) A person commits an offense if the person knowingly transmits by electronic means visual material that:
- (1) depicts:
    - (A) any person<sup>[129]</sup> engaging in sexual conduct or with the person's intimate parts exposed; or
    - (B) covered genitals of a male person that are in a discernibly turgid state; and
  - (2) is not sent at the request of or with the express consent of the recipient.<sup>130</sup>

Texas's statute may be overbroad as it relates to prosecuting minors, however, and Oklahoma could include an age limit so that minors are not caught up under the law meant to regulate adult image-sharing.<sup>131</sup> But Texas provides a solid framework for a general-intent-based law. A Texas case turns on the plaintiff's or state's ability to prove that (1) a sexually explicit image was knowingly, intentionally transmitted by the sender-defendant, (2) without the recipient's consent or sender's reasonable belief of such.<sup>132</sup> The evidence presented by either party should focus on whether consent was established.

Consent evidence can be reviewed without determining or weighing motive or purpose behind the sender's act.<sup>133</sup> It becomes only a question of whether one voluntarily and intentionally engaged in the prohibited act, regardless of intended impact. Oklahoma law retains dated language but requires the same standard—that general-intent crime be committed “willfully,” as defined under its Title 21 definition:

The term “willfully” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to

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129. Importantly, Texas' statute covers images not necessarily of the sender. *See also* MCGLYNN & JOHNSON, *supra* 1, at 95-96 (highlighting the significance of such broader language in their review of a similar Singaporean law, section 377BF Singapore Penal Code, as it “eschew[s] the largely insurmountable requirement of proof that [for example] the penis in the image belongs to the offender,” and thus stipulates that harm can be inflicted regardless of the original source of the image).

130. TEX. PENAL CODE ANN. § 21.19(b).

131. For example, New Hampshire set the age minimum at sixteen years old for prosecuting on its statute. *See* N.H. REV. STAT. ANN. § 645:1 (2023).

132. McGlynn, *supra* note 22, at 347 (proposing this outline under the idea of a “consent-based” law).

133. *Id.*

commit the act or the omission referred to. *It does not require any intent to violate law, or to injure another, or to acquire any advantage.*<sup>134</sup>

Under Texas's law, the element of specific intent is removed, such as the sender's intent to frighten or annoy the recipient.<sup>135</sup> In a criminal case, the state would be required to prove the elements that the defendant was the sender, the transmission was intentional, and the recipient did not consent.

There is no burden under Texas's statute to prove what was in the mind of the sender.<sup>136</sup> Eliminating specific intent also reduces mixed social messages to perpetrators, such as, hypothetically, "If you, cyberflasher, are truly just doing this to your target for fun, then you're free to continue doing it, as long as you are not doing it to frighten or annoy your target." Instead, a general-intent law establishes a clear line that certain nonconsensual conduct is prohibited. The importance of getting affirmative consent before engaging in sexual contact should be normalized as a reasonable expectation.

Oklahoma's Protection from Domestic Abuse Act offers alternative language in the context of harassment that might be considered for statutory language on cyberflashing.<sup>137</sup> The Act defines harassment as "directed at a specific person<sup>[138]</sup> which seriously alarms or annoys the person, and which serves no legitimate purpose."<sup>139</sup> Further, a reasonable person standard is built in, requiring that "[t]he course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial distress to the person."<sup>140</sup> Here, the law is focused on the impact of the prohibited conduct on the victim instead of the specific intent of the perpetrator. While the crime appears to be one of general intent only, it also requires a certain victim impact, without consideration of specific intent. This could be categorized as a general intent PLUS element. Oklahoma could either use the willful language (general intent), as defined in Title 21, section 92 of the Oklahoma Statutes, or categorize cyberflashing

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134. 12 OKLA. STAT. § 92 (2023) (emphasis added).

135. See TEX. PENAL CODE ANN. § 21.19 (West 2023).

136. *Id.*

137. 22 OKLA. STAT. §§ 60-60.20 (2023). This Act requires a certain relationship between the victim and defendant, which may not apply in cyberflashing cases, but the language is worth considering.

138. *Id.* § 60.1(5). Again, here, a person must fall under the domestic category of the Act (family member, household member, current or former dating partner). *Id.* § 60.1(2).

139. *Id.* § 60.1(5).

140. *Id.*

law based on a general intent PLUS, mirroring the language from its Domestic Abuse Act.<sup>141</sup>

*III. Time to Act: Oklahoma's High-Risk Environment and Insufficient Socio-Legal Response to Consent-Based Violations*

The State of Oklahoma should adopt anti-cyberflashing legislation as an urgent matter of public policy.<sup>142</sup> There is limited local research on cyberflashing, including rates of both sending and receiving unsolicited explicit images, as well as cyberflashing's impact on targets. However, several international surveys provide contemporary rates of cyberflashing, and a more general survey in the U.S. found that 41% of American adults experienced some form of online harassment, with 33% of women below the age of thirty-five and 11% of men below the age of thirty-five reporting sexually harassing online behavior in particular.<sup>143</sup> In a U.S. sample of 2,045 single women and 298 single gay or bisexual men, over 90% reported

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141. *Id.*

142. In developing anti-cyberflashing legislation in Oklahoma, there is an underlying question to first consider: which legal doctrine ought to guide potential legislation, particularly when considering possible punishments? While often blended, three commonly accepted theories are Utilitarian, Deontological, and Expressivism. OHLIN, *supra* note 80, at 25.

While beyond the scope of this Note, the following is a brief overview of what may motivate punishment-focused legislation and an additional decision of whether to form civil or criminal law, or both. Utilitarianism is forward-looking, driven by community values and attitudes towards offenders when it is perceived the offender's conduct harms not just his or her target but *community* safety and wellbeing. *Id.* It then seeks punishment that is best for society, with a focus on deterrence and rehabilitation assessments. *Id.* Deontological's foremost form is Retributivism, which is backward-looking. *Id.* It seeks to inflict tailored punishment commensurate with the offense without broader considerations of deterrence or societal improvements. *Id.* at 26. Lastly, Expressivism interprets harm against the victim as harm against the community, and punishment is viewed as society's collective opportunity to express its condemnation of the offensive conduct. *Id.* at 27. The punishment is viewed as a reflection of the community's values and aims to teach both the offender and everyone else of which conduct will not be tolerated. *Id.* Oklahoma's response to cyberflashing may be best informed by Expressivism.

143. See Smith, *supra* note 40; Oswald, *supra* note 27, at 605-06; Karasavva, *supra* note 15, at 4-7; Emily A. Vogels, *The State of Online Harassment*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/> [https://perma.cc/7FY6-VQ8N].

experiences consistent with cyberflashing.<sup>144</sup> There is no obvious reason Oklahoma would be an outlier from these rates. As Oklahoma's sex offense rates are higher than the national average, it is fair to infer that Oklahoma's cyberflashing rates are likely similar to—or exceed—those groups studied.<sup>145</sup> This, combined with the lack of protective legislation, leaves Oklahomans at an increased risk of suffering from the harms of cyberflashing.

To further undergird an anti-cyberflashing statute, the State of Oklahoma should pursue additional consent-related reform. There are signs of a fundamental consent issue in Oklahoma as reflected in its sexual assault rates, lack of widespread sex education,<sup>146</sup> and susceptibility to rape culture myths.<sup>147</sup> A related crime, sexual assault, is grounded in consent violation.<sup>148</sup> Oklahoma also has a higher-than-average reported abuse rate.<sup>149</sup> These violations include a lack of affirmative consent, freely given consent, or capacity to consent.<sup>150</sup> Oklahoma has multiple inter-related factors that undermine the social value of consent, leaving the state susceptible to sexual-based offenses, including cyberflashing. Despite this, there is a lack of intervention through sex and consent youth education.<sup>151</sup>

The failure to prioritize the development of a consent culture leaves communities, juries, perpetrators, victims, and a justice system susceptible

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144. Alexandra S. Marcotte et al., *Women's and Men's Reactions to Receiving Unsolicited Genital Images from Men*, 58 J. OF SEX RSCH. 512, 515-16 (2021).

145. See discussion *infra* Section III.B.

146. Oklahoma may be fertile ground for nonconsensual sexual conduct, including cyberflashing, due in part to its lack of mandatory consent-based sex education and susceptibility to rape culture. Cyberflashing exposes rape culture's continued, contradictory social influence: while sexual harm is now commonly condemned, many still view certain nonconsensual sexual conduct as acceptable, with cyberflashing as one example. Hayes & Dragiewicz, *supra* note 41, at 118.

147. See discussion *infra* Section III.B.

148. *Legal Role of Consent*, RAINN, <https://www.rainn.org/articles/legal-role-consent> [<https://perma.cc/95GM-SDP7>] (last visited Sept. 24, 2023).

149. *Sexual Violence Prevention*, OKLA. STATE DEP'T OF HEALTH, <https://oklahoma.gov/health/health-education/injury-prevention-service/sexual-violence-prevention.html> [<https://perma.cc/F5QR-N7J4>] (last visited Sept. 24, 2023).

150. *Legal Role of Consent*, *supra* note 148.

151. See discussion *infra* Section III.B.

to persistent rape myths<sup>152</sup> and rape culture,<sup>153</sup> which breeds weak perpetrator accountability and increased victim harm within communities.<sup>154</sup> These factors contribute to a high-risk environment

152. There are four categories of rape myths: (1) beliefs that blame the victim/survivor; (2) beliefs that cast doubt on allegations; (3) beliefs that excuse the accused; (4) beliefs that assume rape only occurs in certain social groups. Olivia Smith & Tina Skinner, *How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials*, 26 SOC. & LEGAL STUD. 441, 443 (2017). The table below elaborates on how such myths might be expressed in conversation:

| Types of rape myths   | Commonly discussed myths   |
|---|--|
| Beliefs that blame the victim/survivor                        | People who get voluntarily intoxicated are at least partly responsible for their rape<br>People provoke rape by the way they behave and dress<br>If the victim/survivor does not scream, fight or get injured, then it is not rape |
| Beliefs that cast doubt on allegations                        | False allegations are common, mostly because of revenge or regret<br>All victim/survivors will be visibly distressed in the aftermath of the rape and when giving evidence<br>Any delay in reporting the rape is suspicious        |
| Beliefs that excuse the accused                               | Rape is a crime of passion<br>Male sexuality is uncontrollable once 'ignited'  |
| Beliefs that assume rape only occurs in certain social groups | Rape only occurs between strangers in public places<br>Male rape only occurs between gay men<br>People working in prostitution cannot be raped   |

*Id.* (chart used with authors' permission).

While beyond the scope of this Note, an overview is warranted as rape myths are deeply imbedded in United States law and culture. For an overview of U.S. historical rape law, see SEX WITHOUT CONSENT: RAPE AND SEXUAL COERCION IN AMERICA (Merril D. Smith ed., 2001). For a comprehensive review of the criminal justice system's response to sexual assault and overview of victimology and perpetrator typologies, see SEXUAL ASSAULT: THE VICTIMS, THE PERPETRATORS, AND THE CRIMINAL JUSTICE SYSTEM (Frances P. Reddington & Betsy Wright Kreisel eds., 3d ed. 2017).

Today, myths manifest in law in such ways as holding that a victim's "passivity—regardless of whether it is due to sleep, incapacitation, or unconsciousness—can be sufficient to establish consent because the victim did not assert nonconsent." Leary, *supra* note 120, at 8. It persists that "[t]he burden is on the victim to ward off a sexual assault rather than on the perpetrator to ascertain the agreement of another to engage in a sexual act," which reflects rape culture. *Id.*

153. While "rape culture" is a buzzterm that often elicits defensive reactions—because few-to-none within a culture openly support rape—it is a term meant to capture the nuanced way in which particular, built up "beliefs, values, [and] attitudes" result in an unsatisfactory, unsafe response to sexual violence issues in a society. ANASTASIA POWELL & NICOLA HENRY, SEXUAL VIOLENCE IN A DIGITAL AGE 102-03 (2017).

154. Smith & Skinner, *supra* note 151, at 443.

requiring greater consent-focused regulation, including an anti-cyberflashing statute.

*A. Why Consent, Not Intent, Should Be Central in Oklahoma Law and Social Norms*

In crafting an anti-cyberflashing law, Oklahoma has an opportunity to help shift a maladaptive social norm on consent-violative conduct. A clear, legislative response to the community is needed. The lack of clarity on cyberflashing's acceptability and permissibility recently came to the forefront in response to an Oklahoma arrest. If online forums are any indication, there exists confusion and debate on whether someone can send a genital image to another without the recipient's consent in Oklahoma.

On Thursday, May 18, 2023, the Tulsa Police Department posted the following on its Facebook page: "AIRDROPPING NUDE PHOTOS TO STRANGERS – Man arrested for digital indecent exposure."<sup>155</sup> The post recounts how the suspect visited a complex to apply for an apartment unit. While the suspect was filling out an application, the complex employees received two AirDrop notifications. Upon accepting the requests, the employees found that the AirDrop content included images of the suspect "fully naked in front of a mirror, along with photos of his genitals."<sup>156</sup> Tulsa law enforcement arrested the suspect and called the act "digital indecent exposure."<sup>157</sup>

Predictably, debate was stirred in the post's comment section. One commenter simply wrote, "Whoa, whoa, whoa, this is against the law?"<sup>158</sup> There was a sentiment among a few posters that those who received the AirDrop notification gave their consent to receive explicit sexual images by accepting the transfer (before knowing what the content was).<sup>159</sup> Some

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155. Tulsa Police Dep't, *Airdropping Nude Photos to Strangers*, FACEBOOK (May 18, 2023, 10:02 AM), <https://perma.cc/S5UZ-TLYS>.

156. *Id.*

157. *Id.*

158. Robert Walrath, Comment to *Airdropping Nude Photos to Strangers*, FACEBOOK (May 27, 2023, 6:27 PM), <https://perma.cc/K8C7-JS7R>.

159. *E.g.*, Bryeane Del Taco Velveeta, Comment to *Airdropping Nude Photos to Strangers*, FACEBOOK (May 18, 2023, 10:26 AM), <https://perma.cc/U5SN-3U4T> ("[T]he individuals consented to viewing unknown messages from strangers.").



commenters mentioned that sending such images was *not* illegal in Oklahoma. There seemed to be confusion between sexting (consensual image-sharing), “revenge porn” (non-consensual sharing of another’s sexually explicit images), and traditional indecent exposure laws. Throughout the thread, two commenters repeatedly debated whether Oklahoma’s indecent exposure law applies in this case. One commenter wrote, “It’s not illegal to send nude photos so u [sic] illegally arrested this guy knowing charges will be dropped and blasted him all over [Facebook].”<sup>160</sup> Another commenter responded with a screenshot of Title 21, section 1021 of the Oklahoma Statutes, and Oklahoma law regarding indecent exposure,<sup>161</sup> to which the first responder wrote, “that’s exposing urself [sic] in a public place. This was online and not public. Plus she accepted it to view it.”<sup>162</sup>

A commenter shared a screenshot of an online answer to the question “Is Cyber Flashing Illegal?”<sup>163</sup> The answer notes, “Only two states, Texas and California, have cyber flashing laws.”<sup>164</sup> Presumably because Oklahoma is not on that list, the commenter suggested that makes the conduct legal in Oklahoma, writing “U [sic] should be getting upset that someone was arrested and blasted over something that is legal. If it happen [sic] to him it can happen to you.”<sup>165</sup>

Others suggested that cyberflashing could not be illegal because it is so commonplace and has existed without repercussion on many platforms. For example, one commenter wrapped up their argument by positing the following:

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160. Jamie Weaver, Comment to *Airdropping Nude Photos to Strangers*, FACEBOOK (May 18, 2023, 1:11 PM), <https://perma.cc/V6Q8-KCFT>.

161. Emmy Xandria, Comment to *Airdropping Nude Photos to Strangers*, FACEBOOK (May 18, 2023, 2:23 PM), <https://perma.cc/BZJ6-7TM3>.

162. Jamie Weaver, Comment to *Airdropping Nude Photos to Strangers*, FACEBOOK (May 18, 2023, 2:26 PM), <https://perma.cc/SE9Y-RDLR>.

163. Jamie Weaver, Comment to *Airdropping Nude Photos to Strangers*, FACEBOOK (May 18, 2023, 1:16 PM), <https://perma.cc/HD3N-LQ2L>.

164. *Id.*

165. Jamie Weaver, Comment to *Airdropping Nude Photos to Strangers*, FACEBOOK (May 18, 2023, 2:19 PM), <https://perma.cc/78X4-KCGS>.

Is TPD [Tulsa Police Department] also pursuing men that send unsolicited nudes on Facebook messenger or tinder?

The choice to arrest and press charges here seems excessive. If men aren't being charged for doing the same on tinder and Facebook messenger, wouldn't this be a violation against equal treatment under the law?<sup>166</sup>

Another comment stated, "Get all the guys in my Snapchat too."<sup>167</sup>

The suspect was, indeed, charged under Title 21, section 1021(A), which covers conduct such as indecent exposure and obscenity, to which the defendant pled not guilty.<sup>168</sup> Further, the State amended the charge to a violation of Oklahoma Computer Crimes Act, to which the defendant pled guilty.<sup>169</sup> While amending charges is common practice, perhaps straddling between traditional indecent exposure and computer crimes charges is an additional indication that an on-point statute for the common practice of cyberflashing may be useful.

With over three hundred responses, the Tulsa Police Department Facebook thread on this incident provides a preview of the debate that may surround an anti-cyberflashing statute proposal in Oklahoma, as well as a glimpse into the current, alarming state of confusion regarding affirmative consent. The responses also highlight confusion regarding how traditional obscenity and indecent exposure laws apply in the digital age. An anti-cyberflashing statute could clarify much of this. However, more than laws are needed to change attitudes on consent.

A proven method for shifting attitudes and social norms to be more protective is "[t]hrough the three-pronged approach of education, legal reform, and social stigma."<sup>170</sup> In confronting cyberflashing, Oklahoma's consent-based legal reform can stigmatize the act of sharing unsolicited sexually explicit

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166. Bryeanne Del Taco Velveeta, *supra* note 159.

167. Megan Taft, Comment to *Airdropping Nude Photos to Strangers*, FACEBOOK (May 18, 2023, 6:39 PM), <https://perma.cc/LMB3-5W4D>

168. *Counts: State of Oklahoma v. Helm, Staijeck Mark II (CF-2023-1579, Criminal Felony)*, OKLA. STAT. CTS. NETWORK (OSCN), <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=CF-2023-1579&cmid=3600684> (last visited Nov. 17, 2023).

169. *Id.*

170. Leary, *supra* note 120, at 37. See generally James C. Fell & Robert B. Voas, *Mothers Against Drunk Driving (MADD): The First 25 Years*, 7 TRAFFIC INJ. PREVENTION 195, 210 (2006).

material and influence a safer, healthier social norm in technology-based interactions.<sup>171</sup>

Oklahoma’s legal reform should be supported by educational initiatives and increased sharing of the conduct’s impact on victims. While “[n]orms are glacial—enormously powerful but slow-moving”—law is uniquely situated to influence norms, spark their examination, and reduce tolerance of harmful behaviors.<sup>172</sup> Developing sexual-conduct-related law on an affirmative-consent standard supports the development of a climate that is “more than just a change in the law but also a social movement that actually protects more victims through the tools of education, social paradigm shifts, and criminal law.”<sup>173</sup> Anti-cyberflashing law should be informed by four transformative components of affirmative consent:

First . . . all people engaging in sexual acts must obtain an affirmative, conscious, and voluntary agreement in words or actions by all parties to engage in sexual activity. Second, this standard must not be met by silence, a lack of protest, or a previous dating or sexual relationship. Third, it is also not met if

171. The table below illustrates the interconnected nature of societal change in confronting technology-facilitated sexual harm, based on micro-, meso-, and macro-level inputs, in which law is only one part. Henry & Powell, *supra* note 21, at 98 tbl.5.1 (chart used with permission of original author(s)).

|                                  | Micro-level  | Meso-level   | Macro-level   |
|----------------------------------|--|--|---|
| Reducing victim vulnerability    | Education-based strategies aimed at improving potential victims’ technical capabilities to protect themselves online.  | Service providers of online communities and social media networks providing easily accessed information on using privacy settings as well as how to document and report abuse.   | State legislative protections in place and effectively enforced.<br>Cross-jurisdictional consistency and cooperation to facilitate identification, investigation and prosecution of offenders globally. |
| Reducing offender motivation     | Education-based strategies aimed at potential perpetrators to promote commitment to a <i>digital sexual ethics</i> .   | Terms of use that ban hateful and/or harassing content in online communities and social media networks in place and effectively enforced by service providers.<br>Some service providers (such as online dating services) require that their members are identified and identities verified before they use the service. | Policy strategies directed at underlying causes of sexual violence, namely gender inequality and rape-supportive cultures.  |
| Promoting effective guardianship | Education-based strategies aimed at potential online guardians or ‘bystanders’ to promote a commitment to a <i>digital citizenship</i> and to participate in countering hate speech and harassing content. | Service providers of online communities and social media networks providing mechanisms for users to report hateful/harassing content, dedicating sufficient resources towards monitoring and removing such content, and participating in counter-speech.   |   |

172. Paul H. Robinson, *Criminalization Tensions: Empirical Desert, Changing Norms, and Rape Reform*, in *THE STRUCTURES OF CRIMINAL LAW* 186, 201 (R A Duff et al. eds, 2011). Make note about the risk of backlash if laws too far precede society’s willingness to shift attitudes and behaviors.

173. Leary, *supra* note 120, at 40.

the person is unconscious, asleep, incapacitated, or otherwise unable to consent. Fourth, consent can be withdrawn at any time.<sup>174</sup>

A culture of consent is useful to society and law, as it is “responsive to the social harm of unconsented-to sex by articulating a rule that is clearer to the parties.”<sup>175</sup> There are many nonconsensual crimes, yet sexual assault crimes are treated differently,<sup>176</sup> and their victims face unique social and legal barriers.<sup>177</sup> For example, in a property crime, the victim does not have to

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174. *Id.* at 8.

175. *Id.* at 32. Importantly, with a clear consent standard, “a potential offender knows what he must obtain to continue: an affirmative and voluntary agreement to engage in sexual activity from a conscious person who is not incapacitated.” *Id.* at 33. Further, law enforcement, prosecutors, jurors, and judges would have greater clarity. *See id.* at 32. “With the requirement of affirmative consent, an investigator would need to determine whether an affirmative act took place—for example, whether the person demonstrated voluntary consent—not the meaning of a failure to act.” *Id.* at 34. In response to critics of affirmative consent, Leary writes:

The short answer for those that suggest this will not be successful is that it has already been done. Decades ago, another highly destructive social problem was prevalent and socially acceptable: driving under the influence of alcohol. Since that time, the social and legal response has significantly shifted in ways unimaginable in previous decades. This Article advocates following the model of the anti-impaired driving movement as a blueprint for how to proceed.

*Id.* at 37. She continues:

[A] touchstone of the movement included a specific form of education that shared the experiences of those whose lives were catastrophically affected by impaired drivers. This action informally educated the public about the effects of alcohol abuse and driving. The public, in response, developed a growing social distaste for the activity.

*Id.* at 38. Despite early push-back against demonizing drunk driving, “[t]he movement . . . refocused attention not on these defendants but on the harm they caused.” *Id.* at 39. Similarly today, “people are being educated about the real risks to health resulting from sexual contact without consent and the harm inflicted on a person victimized in this way.” *Id.* at 40.

176. Leary explains that compared to other nonconsensual crimes (theft, unauthorized use of property, and identity theft), the law as it applies to “the personal crime of sexual assault . . . requires more to establish the same element of nonconsent.” *Id.* at 41. Additionally, rape myths breed a rape culture that often scrutinizes victims far more than perpetrators. *Id.* at 31 (“Research demonstrates that most victims know their perpetrators; that physical force is used less often than incapacitation and other forms of coercion; that physical injury is rarely caused; and that the harm of unconsented-to sex is long-term.”).

177. *See The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/95QA-VUW9>] (last visited Sept. 24, 2023). Based on sexual assault conviction rates reported herein, estimated at 2.5% when

prove an explicit demonstration of non-consent to the offender regarding the item being taken.<sup>178</sup> Instead, if a prosecutor presents sufficient evidence—generally through the victim’s testimony providing context—that the offender did not have permission, the element of non-consent is met.<sup>179</sup>

In contrast, in sexual-related crimes, the burden of proving non-consent has historically been raised, “namely, that the victim communicated externally to the offender that her sexual autonomy was not the offender’s to take.”<sup>180</sup> This disparate standard “singles out sexual assault perpetrators for more lenient treatment even though their violation is far more personal than the taking of property.”<sup>181</sup> A concern, likely rooted in a variation of the rape myth on false reporting,<sup>182</sup> is that affirmative consent as law would “turn normal interactions into sexual offenses.”<sup>183</sup> Again, that is the risk with any law, such as determining whether evidence points to a defendant having borrowed an item with permission or stolen the item—this concern is more a challenge to prosecutors’ discretion and ethics than the law.<sup>184</sup> Victims of sexual assault and sexual harassment are not requesting special treatment; they are asking for the same treatment as other crime victims, and the same standard against other defendants.

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compared to perpetration estimates, the law is and has historically failed survivors of sexual violence and sent a message to perpetrators that they are likely to get away with their crime. *Id.*

178. Leary, *supra* note 120, at 41.

179. *Id.*

180. *Id.*

181. *Id.*

182. The myth holds that there are many false rape reports, and that the real risk in cases is being falsely accused of rape, when rape is one of the lowest reported, investigated, or prosecuted crimes, with an even lower conviction rate, and has one of the lowest false-report percentages of all reported crimes. *See The Criminal Justice System: Statistics, supra* note 177.

183. Leary, *supra* note 120, at 44 n.388.

184. *See id.* at 49 (“[R]esearch points not to an over prosecution problem but to an attrition problem. While over prosecution of sexual assault is not documented, attrition of sexual assault cases is clearly documented at every level of investigation, prosecution, and judicial decision making.”). Leary points out that, despite all historical and current evidence to the contrary regarding the abysmal rates of sexual crimes prosecution, “prosecutorial discretion is seemingly singled out as inappropriate and highly risky in the sexual assault context.” *Id.* at 48.

### B. Oklahoma's Sexual Crime Rates

While Oklahoma lacks cyberflashing research,<sup>185</sup> there is evidence that Oklahoma has challenges with the central issue in all sexual violations: consent. Oklahoma has demonstrated issues with consent-based sexual violations, as evidenced by its own statistics.<sup>186</sup> While the national average for sexual assault victimization in one's lifetime is "17% of women and 3% of men,"<sup>187</sup> over the last ten years Oklahoma has had rates of rape and attempted rape of women that were 35% to 40% higher than the national average.<sup>188</sup> In 2018, Oklahoma reached a twenty-year peak in reports of rape and reported rape.<sup>189</sup> Under the Clery Act,<sup>190</sup> the state's college and university institutions are required to publish annual crime report statistics, which continue to show categories of sexual assault as among the most prevalently reported crimes between 2019-2021 on various campuses.<sup>191</sup> This likely does not reveal the depth of the issue,<sup>192</sup> as the National Sexual Violence Resource

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185. Smith, *supra* note 40 (reporting that studies indicate that about 40% of millennial women have been targeted in cyberflashing).

186. See *Sexual Violence Prevention in Oklahoma*, *supra* note 149. Beyond its abuse rates, Oklahoma is also ranked third highest nationally in teen pregnancy, which may further indicate failures in the state's sex education programming. *Oklahoma Data*, POWER TO DECIDE, <https://powertodecide.org/what-we-do/information/national-state-data/oklahoma> [<https://perma.cc/4HGM-WBQ3>] (last visited Sept. 24, 2023).

187. *Sexual Violence Prevention in Oklahoma*, *supra* note 149.

188. *Id.*

189. Whitney Bryen, *Rape Counts Keep Rising Even as Police Clear Fewer Cases*, OKLA. WATCH (Oct. 30, 2019), <https://oklahomawatch.org/2019/08/28/rape-counts-keep-rising-even-as-police-clear-fewer-cases/> [<https://perma.cc/Y3RW-2W7E>]. However, it is important to note, as mentioned in the article, "[I]t's unclear whether most of the increase came from a rise in sexual violence or a greater willingness to report the crime." *Id.*

190. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f).

191. UNIV. OF OKLA., ANNUAL SECURITY AND FIRE SAFETY REPORT 2022-2023, at 47 tbl.1 (2023), <https://ou.edu/content/dam/Tulsa/marcomm/docs/Annual%20Security%20and%20Fire%20Safety%20Report%202022-2023.pdf> [<https://perma.cc/3PQ2-4HCU>]; OKLA. STATE UNIV., SAFETY MATTERS: ANNUAL SECURITY REPORT 29 tbl.1 (2021), <https://safety.okstate.edu/police/documents/annual-security-reports/2021-safety-report-updated.pdf> [<https://perma.cc/S2CL-MT2T>].

192. Compounding the risks, without mandatory sex education in primary or secondary schools, many Oklahomans likely do not receive consent-based sex education until college, such as the University of Oklahoma's mandatory, first-year workshop, "The Consent Conversation." *GEC Trainings*, UNIV. OF OKLA. GENDER & EQUALITY CTR., <https://www.ou.edu/gec/trainings> (last visited Nov. 17, 2023). But many will not access this consent-based education, as less than 24% of Oklahomans attend college. See *Educational Attainment in*

Center states that rape is the most under-reported crime, as 63% of sexual assaults and 88% of child sexual-abuse incidents go unreported to authorities.<sup>193</sup> The rate and impact of sexual harm is ever-present in Oklahoma,<sup>194</sup> and more consent-focused legislation is needed to inform the conversation and shift values to restore dignity and safety.

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Oklahoma, STAT. ATLAS tbl.3, <https://statisticalatlas.com/state/Oklahoma/Educational-Attainment> (last visited Sept. 24, 2023). And all of this is despite the fact that 55% of U.S. males and females have already had sex by the age of 18. Press Release, Planned Parenthood, Planned Parenthood: New CDC Report on U.S. Teens' Sexual Behavior Illustrates Adolescents' Continued Need for Sex Education and Effective Birth Control (June 22, 2017), <https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-new-cdc-report-on-u-s-teens-sexual-behavior-illustrates-adolescents-continued-need-for-sex-education-and-effective-birth-control>. The window and power of early, preventative consent education is largely lost in Oklahoma currently. Sexual harm perpetrated outpaces Oklahoma's efforts to educate and protect, which leaves local communities particularly susceptible to rape myths otherwise addressed in consent-based curriculums.

193. *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR. (2015), [https://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media-packet\\_statistics-about-sexual-violence\\_0.pdf](https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf) [<https://perma.cc/CWB7-HB9T>].

194. While beyond the scope of this Note, two important obstacles to consent-based conduct in Oklahoma to consider are lack of consent-based education and, more generally, pervasive rape myths. Oklahoma could intervene long before young adulthood through mandated consent-based sex education classes in schools. The mandated curriculum could inform not only about biological features but also healthy relationships, safe technology-based interactions, boundaries, and a commitment to consent-based sexual conduct. *See generally* Seth Reiner, *Me Too? Incentivizing States to Adopt Consent-Based Sex Education*, 12 N.E. U. L. REV. 162, 165 (2020). Age-appropriate comprehensive sex education could be an important part of reducing sexual harassment and assault rates; however, despite its high abuse statistics and consent-violation crime rates, early intervention to educate youth has been rejected. *See discussion infra* Section III.B. Twenty-eight states and the District of Columbia mandate sex education in high schools. *See Sex and HIV Education*, GUTTMACHER INST. (Sept. 1, 2023), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> [<https://perma.cc/74Z3-FXWH>]. Oklahoma does not. Oklahoma has a statute approving sex education curriculum; however, it is non-mandatory. The statute reads:

Such curriculum, materials, classes, programs, tests, surveys or questionnaires shall include information about consent and shall have as one of its primary purposes the teaching of or informing students about the practice of abstinence. For the purposes of this section, "consent" shall have the same meaning as that provided by Section 113 of Title 21 of the Oklahoma Statutes.

70 OKLA. STAT. § 11-105.1 (2023).

#### IV. Conclusion

As scholar Catherine MacKinnon noted, “Intimate violation of women . . . [is so] pervasive in American society as to be nearly invisible.”<sup>195</sup> One of those “nearly invisible” violations is cyberflashing, and it impacts people of all ages and sexes. There is a high rate of sexual—and physical-based consent—violative crimes perpetrated in Oklahoma.<sup>196</sup> Cyberflashing specifically is a type of sexual harassment normalized to the point that it may be challenging to raise passionate legislative support among all the pressing social ills that need to be addressed. However, anti-cyberflashing law intervenes at an important point on the sexual-related harm continuum. This continuum “links sexual violence, sexual abuse, and sexual harassment in a continuum of behaviors that share a common etiology and cumulative impact that shapes people's everyday lives.”<sup>197</sup> Early intervention on that continuum is important for both re-directing perpetrator misconduct and protecting victims from harm.

Prevention is the best intervention, but Oklahoma has not implemented basic safeguards, from education to legislation. Legal reform is no replacement for early intervention and prevention,<sup>198</sup> but anti-cyberflashing legislation remains an important part of addressing technology-based offenses. Oklahoma should introduce legislation that communicates a higher community standard than currently exists. A tailored, on-point, general-intent statute prohibiting cyberflashing would clarify standards for the community, including law enforcement, judges, cyberflashers, and victims. The current system sets perpetrators and victims up for failure. For perpetrators, it is important to intervene early in ways that provide opportunities to learn and reform behavior before it repeats or escalates in other acts of nonconsensual sexual conduct. For victims, it is important that communities communicate that cyberflashers' conduct is unacceptable and what has happened to them is not OK. Legislating this response sends the message that cyberflashing victims no longer need to internalize or dismiss their experience of being targeted, and that they are no longer without legal recourse. As noted, legislation is only one measure of reform, and is best

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195. MacKinnon, *supra* note 49, at 1.

196. *Sexual Violence Prevention in Oklahoma*, *supra* note 149; see also *Intimate Partner Violence*, OKLA. STATE DEP'T OF HEALTH, <https://oklahoma.gov/health/health-education/injury-prevention-service/intimate-partner-violence.html> [https://perma.cc/Z9WV-5DRK] (last visited Sept. 25, 2023).

197. Hayes & Dragiewicz, *supra* note 41, at 117.

198. This is in part because it is largely reactive to harm already perpetrated. See generally CYAWG DISCUSSION PAPER, *supra* note 38.



supported through simultaneous educational and social influences, which nurture consent-minded communities—which also serves as the source for our juries, judges, law enforcement, and legislators. In an age where much of our lives are carried out through digital means, Oklahoma must be diligent and proactive in supporting the safety of that critical social and economic forum. Oklahoma must confront cyberflashing to have laws responsive to modern issues such as technology-based sexual harassment and exploitation. Our current system is silent on cyberflashing, which, to perpetrators especially, is all the greenlight needed for the targeting and harm to continue. Developing a cyberflashing statute would move the state towards increased mental, emotional, and physical protection of Oklahomans.

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