

Toward a Socially Responsible Application of the Criminal Law to the Problem of Street Harassment

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Repository Citation

Maeve Olney, *Toward a Socially Responsible Application of the Criminal Law to the Problem of Street Harassment*, 22 Wm. & Mary J. Women & L. 129 (2015), <https://scholarship.law.wm.edu/wmjowl/vol22/iss1/6>

TOWARD A SOCIALLY RESPONSIBLE APPLICATION
OF THE CRIMINAL LAW TO THE PROBLEM
OF STREET HARASSMENT

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INTRODUCTION

Street harassment is a common occurrence in the lives of women in the United States. In the last two decades, scholars have discussed how best to define the phenomenon, which essentially involves men publicly commenting on the physical appearance and presence, in public space, of women they do not know. This Note begins from the premise that street harassment is not just a precursor to sexual violence, but is itself a violent act on a continuum of gender-based and sexual violence against women. The Note then explores existing legal frameworks, both civil and criminal, through which victims of street harassment may seek redress. These existing frameworks largely fail to redress the harms suffered by victims of street harassment because of the uniquely stranger-based feature of the act, the requirement of a perpetrator's intent to harm, and the gendered nature of both the act and its harms.

Criminal law could be the most effective method of reducing street harassment, but existing criminal laws fail to adequately remedy the harms suffered by victims. In support of this proposition, this Note analyzes current criminal laws in six U.S. states with major cities. This method of analysis is based on the fact that street harassment is most likely to occur in urban areas. This Note concludes with a policy proposal based on a recent anti-street harassment ordinance enacted in Kansas City, Missouri. The proposal is designed to minimize the

collateral consequences of involvement with the criminal processing system while providing redress for victims of street harassment.

I. FEMINIST PERSPECTIVES ON STREET HARASSMENT

A. Definition

Street harassment is a term of art that describes a variety of “verbal and nonverbal behavior[s]” conducted by one stranger and directed at another.¹ Street harassment violates what sociologists define as the “normal relationship between strangers on [a] street”—the norm of “civil inattention.”² In other words, social norms dictate that strangers typically ignore each other in public space. Those who street harass, however, engage in a variety of behaviors to give attention not normally given to strangers. Street harassment occurs primarily in urban areas, but is not divided by a North/South or other geographic line.³ The urban concentration of this behavior makes sense given that cities, unlike rural areas, have sidewalks and public transit that allow people to move through public space instead of remaining within the—relatively private—confines of an automobile.

A variety of verbal behaviors may constitute street harassment, including, but not limited to, catcalls, comments—sexual or non-sexual—on a woman’s physical appearance or her presence in public (e.g., “Hey baby”), vulgar suggestions, threats, other crude language, innuendos, and sexist comments.⁴ Nonverbal behaviors may also constitute street harassment; these include, but again are not limited to, whistling, leering, making vulgar/crude gestures, groping, pinching, staring, and following.⁵ The “pervasive myth[.]” that street harassment is perpetrated solely by men of “low” social class against women with a certain appearance or style of dress is not supported by empirical

1. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 523 (1993).

2. LAURA BETH NIELSEN, LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH 31 (Austin Sarat ed., 2004) (citing ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE [sic] (1963)).

3. Bowman, *supra* note 1, at 529.

4. NIELSEN, *supra* note 2, at 44; Bowman, *supra* note 1, at 523; Kavita B. Ramakrishnan, *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, 26 BERKELEY J. GENDER L. & JUST. 291, 318 (2011); Bunkosal Chhun, Note, *Catcalls: Protected Speech or Fighting Words?*, 33 T. JEFFERSON L. REV. 273, 276 (2011); Tiffanie Heben, Article, *A Radical Reshaping of the Law: Interpreting and Remediating Street Harassment*, 4 S. CAL. REV. L. & WOMEN’S STUD. 183, 187–88 (1994).

5. Bowman, *supra* note 1, at 523; Janet K. Swim et al., *Everyday Sexism: Evidence for Its Incidence, Nature, and Psychological Impact from Three Daily Diary Studies*, 57 J. SOC. ISSUES 31, 37 (2001); Chhun, *supra* note 4, at 277; Heben, *supra* note 4, at 187–88.

research.⁶ Women may be harassed on the street regardless of their clothing or physical appearance,⁷ by men of any race or social class.⁸ Street harassment is rarely about the harasser's genuine interest in developing a relationship with the target.⁹ Even if it was, it is an ineffective, and counterproductive way to display affection because, as explained below, most targets react negatively and experience harm as a result of the harassment.¹⁰

Street harassment is a "gender-specific injury."¹¹ A defining characteristic of street harassment is that harassers are male, and targets (those to whom the harassing behavior is directed) are female.¹² This means that street harassment is performed so that women are harmed in ways that men are not.¹³ Street harassment is an expression of male dominance over women.¹⁴ It is linked to a "broader hierarch[y]"

6. CAROL BROOKS GARDNER, *PASSING BY: GENDER AND PUBLIC HARASSMENT* 89 (1995).

7. Chhun, *supra* note 4, at 282. Thompson notes, the idea that street harassment is the result of a women's provocative dress harms women by controlling what they are socially permitted to wear, and harms men by perpetuating the falsehood that they cannot control themselves, or their sexual urges. Deborah M. Thompson, "The Woman in the Street." *Reclaiming the Public Space from Sexual Harassment*, 6 *YALE J.L. & FEMINISM* 313, 317 (1994).

8. Cheryl Benard & Edith Schlaffer, *The Man in the Street: Why He Harasses*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 72 (Alison M. Jaggar & Paula S. Rothenberg eds., 2d ed. 1984); GARDNER, *supra* note 6, at 109.

9. See MARTHA J. LANGELAN, *BACK OFF! HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS* 40 (1993).

10. *Id.* at 39.

11. Deborah Tuerkheimer, *Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm*, 12 *WIS. WOMEN'S L.J.* 167, 168 (1997).

12. HOLLY KEARL, *STOP STREET HARASSMENT: MAKING PUBLIC PLACES SAFE AND WELCOMING FOR WOMEN* 11 (2010) (noting that over 99 percent of the 811 female respondents to her informal survey "had experienced some form of street harassment . . ."); Bowman, *supra* note 1, at 523; Ross Macmillan, Annette Nierobisz & Sandy Welsh, *Experiencing the Streets: Harassment and Perceptions of Safety Among Women*, 37 *J. RESEARCH, CRIME & DELINQUENCY* 306, 307 (2000); Olatokunbo Olukemi Laniya, *Street Smut: Gender, Media, and the Legal Power Dynamics of Street Harassment, or "Hey Sexy" and Other Verbal Ejaculations*, 14 *COLUM. J. GENDER & L.* 91, 101 (2005) (citing Elizabeth Arveda Kissling, *Street Harassment: The Language of Sexual Terrorism*, 2 *DISCOURSE & SOC'Y* 451, 453 (1991)); see also Heben, *supra* note 4, at 186–87 (stating that "[s]treet harassment occurs when one or more unfamiliar men accost one or more women" (emphasis added) (quoting Michaela di Leonardo, *Political Economy of Street Harassment*, *AEGIS*, Summer 1981, at 51)). Age, socioeconomic status, race, and education of the harasser are not correlated with whether men harass women on the street, but younger men may be louder and/or more aggressive about their harassing behavior than older men. Benard & Schlaffer, *supra* note 8, at 72 (emphasis added); Bowman, *supra* note 1, at 531.

13. See Deirdre Davis, *The Harm that Has No Name: Street Harassment, Embodiment, and African American Women*, 4 *UCLA WOMEN'S L.J.* 133, 144–45 (1994). This may explain why men underestimate how frequently women are street harassed. See NIELSEN, *supra* note 2, at 78.

14. See Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 *ACAD. OF MGMT. REV.* 641, 641 (2007). Berdahl suggests

of sex and gender,¹⁵ and is, like other forms of sexual harassment, an expression of power.¹⁶ In particular, street harassment conveys the message that women are persons open for male commentary.¹⁷ That men feel comfortably entitled to make lewd and unwelcome comments at women who are strangers to them reinforces the notion that women are perceived as less worthy of respect than men, are held in lesser regard than men, and occupy a lower social status than men on the basis of their sex.¹⁸

While street harassment is primarily a gender-based harm, race also shapes targets' reactions to it.¹⁹ Women of all races are targeted by street harassers, but may be targeted differently or may interpret harassment differently on the basis of the target's race.²⁰ For Black women in particular, street harassment involves an intersection of race and gender.²¹ This stems from the history of oppression that is unique to Black women's experiences with sexual victimization and violence within the slavery context.²² White male slave-holders fabricated characterizations of Black women as sexually promiscuous to justify the sexual subordination and abuse of enslaved women.²³ Today, Black women may be stereotyped as "sexually accessible" and may feel this stereotype reinforced when strangers, especially men, make sexualized comments or gestures to them in public,²⁴ particularly when White men's sexual comments are combined with racist statements.²⁵ In sum, "when African-American women are harassed

that while all sexual harassment is an expression of male dominance over women, "[m]en who endorse male dominance are more likely than others to sexually harass and those who challenge male dominance are more likely to be harassed." *Id.* at 641 (internal citation omitted). In other words, women whom men perceive as posing a threat to gender-based power are more likely to be targets of harassment. *Id.* See also di Leonardo, *supra* note 12, at 55.

15. NIELSEN, *supra* note 2, at 17.

16. LANGELAN, *supra* note 9, at 38.

17. See Elizabeth Arveda Kissling & Cheris Kramarae, *Stranger Compliments: The Interpretation of Street Remarks*, 14 WOMEN'S STUD. COMM. 75, 75 (1991) (citing Carol Brooks Gardner, *Passing by: Street Remarks, Address Rights, and the Urban Female*, 50 SOC. INQUIRY 328-56 (1980)).

18. Pam McAllister, *Wolf Whistles and Warnings*, 6 HERESIES 37, 39 (1978). Kissling and Kramarae argue that "[e]ven ostensibly complimentary remarks . . . and violations of personal space can remind a woman of her gender identity as woman, subject to evaluation as a sexual object in a way that men are not, and vulnerable to invasions of privacy and physical space." Kissling & Kramarae, *supra* note 17, at 76 (internal citation omitted).

19. Bowman, *supra* note 1, at 532.

20. *Id.*

21. Davis, *supra* note 13, at 162.

22. *Id.* at 163; Ramakrishnan, *supra* note 4, at 320.

23. Davis, *supra* note 13, at 166-67.

24. Ramakrishnan, *supra* note 4, at 319-20.

25. Heben, *supra* note 4, at 197-98.

on the street, the experience evokes a long history of disrespect, degradation, and inhumane sexual mistreatment to which Black women have been subjected over the years.”²⁶

The intersection of race and gender with respect to street harassment is not limited to the experiences of Black women. Race may also affect White women’s perceptions of safety when they are street harassed;²⁷ Heben notes that “the myth of the [B]lack rapist influences the way in which [W]hite women interpret sexual harassment from men of color.”²⁸ Additionally, Asian women may view street harassment as a reminder of the stereotype of Asian female submissiveness.²⁹ Race and gender thus intertwine to shape women’s experiences with street harassment.

B. Social and Psychological Harm

Street harassers may view their behavior as complimentary or trivial.³⁰ Men who harass women on the street provide a variety of explanations for their behavior. For example, in Benard and Schlaffer’s study of street harassment, male survey respondents said that they call out to women on the street because it is “fun,” because it “doesn’t hurt anybody,” because it alleviates their boredom, because discussing women with other men facilitates bonding and friendship, and/or because they believe that women find the attention complimentary.³¹ Some men could not articulate an explanation for their behavior.³² Only about fifteen percent of respondents reported that they were actually intending to anger, hurt, or harass women, but these respondents tended to be the ones who had engaged in threats or graphic

26. Bowman, *supra* note 1, at 533–34. Heben adds that “[f]or African American women, hundreds of years of domination add meaning to the sexual comments of [W]hite men; those same words would not have the same meaning for [W]hite women.” Heben, *supra* note 4, at 196.

27. See Heben, *supra* note 4, at 196.

28. *Id.* at 197. Stated differently, the stereotype that Black men are sexually violent may cause White women to experience greater fear of being victimized by Black harassers than by White harassers. *Id.* at 196.

29. *Id.* at 196.

30. Benard & Schlaffer, *supra* note 8, at 70; McAllister, *supra* note 18, at 37. Harassers’ sense that street remarks are complimentary may be bolstered by anecdotal evidence that some women feel the same way. See, e.g., Nikki Gloudeman, *Confession: I’m a Feminist Who’s Flattered by Catcalling*, HUFFINGTON POST (Jan. 24, 2015, 9:33 AM), http://www.huffingtonpost.com/nikki-gloudeman/feminist-flattered-by-catcalling_b_6488382.html [<http://perma.cc/QT6U-CBA8>] (describing how the author’s experiences with being catcalled boosted her self-esteem and body image). Harassers may use stories of women who claim to enjoy the attention of catcallers to support their own belief that their behavior is not harmful to the women they target.

31. Benard & Schlaffer, *supra* note 8, at 71; McAllister, *supra* note 18, at 37.

32. Benard & Schlaffer, *supra* note 8, at 71.

commentary when calling out to women.³³ Men may also street harass women to display their masculinity.³⁴ Because “[g]ender, unlike sex, is not biologically determined,”³⁵ and people generally feel that they must behave in certain ways to demonstrate or “prove” their gender identity to others,³⁶ street harassment may serve as a way for men to prove that they are male.³⁷

Despite what harassers believe to the contrary, street harassment creates a variety of harms for those who are harassed. Being unique to women, who occupy a lower power status within the socially constructed “gender hierarchy,”³⁸ the harms of street harassment are not obviously visible in a culture dominated by masculine norms.³⁹ Street harassment is nevertheless a form of gender-motivated sexual violence,⁴⁰ which represents one point on a continuum of violence against women.⁴¹ While some scholars have suggested that “sexual approach forms of harassment are motivated by” the harasser’s sexual desire, as opposed to gender-based harassment being motivated by sexism and animosity,⁴² this perspective is problematic because it fails to create a unified understanding of both forms of harassment, each expressed in street remarks, as a form of violence that serves to keep women in a subordinate position relative to men.⁴³

Scholars have conceptualized the social harms of street harassment in different ways, but typically agree that it is a form of violent social control. For example, Davis argues that street harassment, like rape, is “a violent act of power occurring in a context limited to particular individuals or situations,”⁴⁴ establishes male dominance over women,⁴⁵ and is a mechanism by which men invade women’s privacy.⁴⁶ Similarly, di Leonardo argues that street harassment is an intrusion on a woman’s attention,⁴⁷ a way for men to define women as sexual objects,⁴⁸ and a way for men to force unwanted interactions

33. *Id.*

34. KEARL, *supra* note 12, at 130.

35. *Id.*

36. *Id.*

37. *See id.*

38. Tuerkheimer, *supra* note 11, at 172.

39. *Id.*

40. *See* Benard & Schlaffer, *supra* note 8, at 72; Kissling & Kramarae, *supra* note 17, at 88, 89.

41. Heben, *supra* note 4, at 202.

42. Berdahl, *supra* note 14, at 643.

43. *Id.*

44. Davis, *supra* note 13, at 140.

45. *Id.* at 143.

46. *Id.* at 144.

47. di Leonardo, *supra* note 12, at 52.

48. *Id.*

on women.⁴⁹ Kissling argues that street harassment creates an environment of fear and “sexual terrorism,” where, much like political terrorists, the perpetrators use fear to control their targets.⁵⁰

Street harassment oppresses women by denying them the ability to move about in public space free from commentary or intrusion by others and from fear of victimization and male violence.⁵¹ It forces women to alter their behavior to cope with the harassment of others in ways that men need not do.⁵² Women’s behavioral alterations are often a response to their fear of violence, particularly rape.⁵³ “[F]ear of rape is [not] universal among women,” but it does “significantly restrict the activities of women.”⁵⁴ For example, the fear of rape stemming from public harassment by strangers may restrict women’s movements in public by altering where they feel safe to go.⁵⁵ One legal effect of this phenomenon is arguably a deprivation of women’s liberty in public spaces if they no longer feel free to exercise their right to travel.⁵⁶ At least one court has recognized that women may

49. *Id.* (“[H]arassing men seek to force women to show them deference—if they don’t receive ‘friendliness’ they will exact fearfulness.”).

50. Elizabeth Arveda Kissling, *Street Harassment: The Language of Sexual Terrorism*, 2 DISCOURSE & SOC’Y 451, 456 (1991) (noting that street harassment is not a product of a culture of gender-based control but instead works to create that culture and “[a]n environment of fear”) (emphasis omitted); accord Kissling & Kramarae, *supra* note 17, at 76 (internal citations omitted).

51. Davis, *supra* note 13, at 144–45.

52. *Id.* For example, in their study of how the gender of a survey respondent and of a potential aggressor may influence the respondent’s perceptions of danger, Harris and Miller found that female respondents reported a “greater degree of fear” with respect to “being attacked by a stranger,” and believed that their risk of such an attack was higher, than did men. Mary B. Harris & Kari C. Miller, *Gender and Perceptions of Danger*, 43 SEX ROLES 843, 857 (2000).

53. See Bowman, *supra* note 1, at 535. A woman doesn’t know which of her harassers might turn into her rapist. *Id.*

54. Mark Warr, *Fear of Rape Among Urban Women*, 32 SOC. PROBS. 238, 248, 249 (1985).

55. See Kimberly Fairchild & Laurie A. Rudman, *Everyday Stranger Harassment and Women’s Objectification*, 21 SOC. JUST. RESEARCH 338, 354 (2008). Kissling also argues that women frame their responses to street harassment in terms of their fear of rape, which is created by the street harassment itself. Kissling, *supra* note 50, at 456. Warr found that “[f]ear of rape . . . appears to affect women most by dictating where and how . . . they travel” but that there was no statistically significant effect of women’s fear of rape on the likelihood that they would take precautionary measures to make their homes safer. Warr, *supra* note 54, at 248. In other words, the fear of rape affected only women’s precautionary behaviors in public spaces. *Id.*

56. See Thompson, *supra* note 7, at 343 n.191. The Supreme Court held in *Kent v. Dulles* that “[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law . . .” 357 U.S. 1113, 1118 (1958). Of course, one limitation of the “right to travel” argument with respect to street harassment is that no state action exists where a woman feels deprived of the right to travel solely because of street harassment by private actors.

have stronger reasons than men to fear sexual violence.⁵⁷ Though that case did not address street harassment, the court noted that “women are disproportionately victims of” sexual violence and thus “have a stronger incentive” than men to be concerned with the potential threat posed by others’ unwanted sexual behavior toward them.⁵⁸

Street harassment, thus, serves to reinforce socially constructed gender roles and gender differences, as well as the gender-based power hierarchy where women are viewed as subordinate to men and men exert gender-based and sexual control over women.⁵⁹ Street harassment is not only a “personal problem” for the target, but a “social problem” affecting power dynamics between men and women.⁶⁰ When men street harass women, they send the message that women are not welcome in the public sphere and that public spaces are within men’s exclusive control.⁶¹ Women’s very presence in public is seen as a grant of permission for men to make public commentary on that presence, their bodies, their sexuality, or their appearance.⁶² Unfortunately, the legal system may reinforce this sense of male entitlement over women’s bodies as well. For example, a District of Columbia judge recently dismissed criminal charges against a man arrested for taking “upskirt” photos of women sitting on the steps of the Lincoln Memorial,⁶³ reasoning that because the defendant did not go to great

57. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

58. *Id.*; see also Heben, *supra* note 4, at 211 (discussing *Ellison* and adding that “[r]efusing to recognize that women hold legitimate claims and are under the constant threat of sexual violence that affects their perspectives only serves to force women to endure further victimization”); Thompson, *supra* note 7, at 321 (noting that because “[W]omen have no way” to determine which strangers have “friendly” intentions and which have “harmful” ones, some women assume that all men who approach them on the street may threaten their safety).

59. See Berdahl, *supra* note 14, at 645 (noting that sex-based harassment may result from a motivation to preserve the gender hierarchy); di Leonardo, *supra* note 12, at 56; McAllister, *supra* note 18, at 37.

60. NIELSEN, *supra* note 2, at 78. In one study, 75 percent of respondents said that they believed that “sexually suggestive comments between strangers in public places constitute[d] a social problem.” *Id.* This included 70 percent of male respondents and 78 percent of female respondents. *Id.* Both male and female respondents connected sexually suggestive public speech to the subordination of women. *Id.* at 79–80. Only 26 percent of respondents, however, thought that “sexually suggestive speech is the most serious social problem . . .” *Id.* at 83. On this measure, 74 percent of respondents thought that racist public speech outranked sexually inappropriate public speech. *Id.*

61. See Bowman, *supra* note 1, at 526. Street harassment may make women feel unwelcome and unsafe in public because once in public they are subjected to harassment in ways that men are not. See *id.*; Laniya, *supra* note 12, at 107. Stranger harassment has a consistent negative impact on women’s perceptions of safety in public. Macmillan, Nierobisz & Welsh, *supra* note 12, at 319.

62. Chhun, *supra* note 4, at 281.

63. Order to Suppress Physical Evidence and Statements at 2–3, *United States v. Cleveland* (D.C. Super. Ct. 2014) (No. 13-DVM 001341).

lengths to procure those images, the photographed women did not have a reasonable expectation of privacy because the view up their skirts was already, in effect, on public display.⁶⁴

Women who are street harassed may also experience physical and psychological harms as a result of this behavior.⁶⁵ Physical responses to street harassment may include nausea, vomiting, irregular breathing, shaking, muscle tension, numbness, dizziness, increased heart rate, and other physical stress responses.⁶⁶ Some of the psychological responses include anxiety, stress, humiliation, fear, shame, embarrassment, lowered self-esteem,⁶⁷ vulnerability, and a decreased sense of personal safety.⁶⁸ Street harassment may also trigger post-traumatic stress from flashbacks to a previous sexual trauma,⁶⁹ and cause women to experience future sexual dysfunction and dissatisfaction as a result of “self-conscious body monitoring, [and] body-based shame and anxiety”⁷⁰

Street harassment stems in part from male objectification of women;⁷¹ in turn, objectification may cause psychological damage to women.⁷² Sexual objectification is a form of gender oppression,⁷³ through which a woman is made to feel reduced to a sexual object.⁷⁴ In sum, “[s]exual objectification occurs whenever a woman’s body, body parts, or sexual functions are separated out from her person, reduced to the status of mere instruments, or regarded as if they were capable of representing her”⁷⁵ Women may internalize harassers’ perceptions of their bodies, articulated through sexual comments and gestures, and begin to see themselves the way they perceive that men see them.⁷⁶ Street harassment, as an explicit expression of male objectification of women, has the following effect:

64. *Id.*; see also Kate Dries, *Judge: Lincoln Memorial Upskirt Photographer Didn't Break the Law*, JEZEBEL (Oct. 10, 2014, 11:10 AM), http://jezebel.com/judge-lincoln-memorial-upskirt-photographer-didnt-brea-1644766545?utm_campaign=socialflow_jezebel_twitter&utm_source=jezebel_twitter&utm_medium=socialflow [<http://perma.cc/8F5C-8GQ7>].

65. See Heben, *supra* note 4, at 201; see also Tuerkheimer, *supra* note 11, at 189–90.

66. Heben, *supra* note 4, at 201.

67. Tuerkheimer, *supra* note 11, at 186, 189–90.

68. See Macmillan, Nierobisz & Welsh, *supra* note 12, at 309; see also Bowman, *supra* note 1, at 539; di Leonardo, *supra* note 12, at 56; McAllister, *supra* note 18, at 37.

69. Bowman, *supra* note 1, at 536.

70. Barbara L. Fredrickson & Tomi-Ann Roberts, *Objectification Theory: Toward Understanding Women's Lived Experiences and Mental Health Risks*, 21 PSYCHOL. OF WOMEN Q. 173, 189–90 (1997).

71. See *id.* at 173–74.

72. *Id.*

73. *Id.* at 174.

74. Heben, *supra* note 4, at 202.

75. Fredrickson & Roberts, *supra* note 70, at 175 (citation omitted).

76. Swim et al., *supra* note 5, at 49.

“When we are harassed on the street a ‘simple’ comment barely masks an explicit assertion of dominance. He says: ‘I like those legs.’ We hear: ‘I am male, therefore, I have the power to dissect you and evaluate your parts, and that is what I am now doing.’”⁷⁷

Street harassment is not a “harmless nuisance,”⁷⁸ but is instead a form of gender-based sexual violence with observable physical, psychological, and social harms.⁷⁹ The dominant group (men) has framed the effects of street harassment differently—in terms of flattery, compliments, and positive attention—than have its targets—women, who describe it as fear-inducing harmful behavior.⁸⁰ The dominant group’s construction ignores the physical and psychological harms that result from objectification.⁸¹ Women who are street harassed are dehumanized, devalued, and “taught . . . to associate emotions of humiliation and powerlessness with [their] identity as . . . sexual being[s]. Thus, a woman is taught to accept, and silently endure, injuries as a definitional part of her sexuality.”⁸² Comparisons between injuries suffered by street-harassed women and those suffered by men who are insulted on the street are problematic because they eliminate discourse about the harms of street harassment regarding sexual subordination, gender-based power hierarchies, and women’s oppression.⁸³

II. NON-LEGAL ATTEMPTS TO ADDRESS STREET HARASSMENT

On an individual level, women may adopt any number of strategies to cope with street harassment. One is to purposefully ignore or avoid an individual harasser.⁸⁴ Fairchild and Rudman found that passive coping strategies like avoidance or ignoring are more prevalent among targets than are active coping strategies like confrontation.⁸⁵ Women may also use other adaptive, nonconfrontational strategies

77. Tuerkheimer, *supra* note 11, at 186.

78. NIELSEN, *supra* note 2, at 16.

79. See Heben, *supra* note 4, at 201–02.

80. Mary Anne Franks, *How to Feel Like a Woman, or Why Punishment Is a Drag*, 61 *UCLA L. REV.* 566, 599 (2014) (“When a man claims that he would be delighted if the roles were reversed in harassment, he is not actually thinking of what it is like to be a woman walking down the street—he is thinking of what it is like to be a man walking down the street, with all the physical security and social privilege that comes with being a man, enjoying the compliments of what must surely be, in this scenario, women he does not find repulsive or threatening.”).

81. Laniya, *supra* note 12, at 103.

82. *Id.*

83. Tuerkheimer, *supra* note 11, at 181.

84. Bowman, *supra* note 1, at 537; Vicki J. Magley, *Coping with Sexual Harassment: Reconceptualizing Women’s Resistance*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 930, 930 (2002).

85. Fairchild & Rudman, *supra* note 55, at 353–54.

like being “on guard” and constantly assessing the surroundings to determine the likelihood of being street harassed in a particular place.⁸⁶ Some women may wish to avoid addressing the issue altogether and instead dismiss any individualized instance of street harassment as annoying behavior.⁸⁷

Other women may address street harassment by confronting their harassers or men who they observe harassing other women. They may do so alone or with the support of an antiharassment organization such as Hollaback!: A Non-Profit and Movement to End Street Harassment.⁸⁸

Women may adopt a variety of confrontational strategies to address street harassers directly. They may, for example, use non-violent confrontational techniques that tell the harasser that the behavior is unwanted and that avoid swearing, sarcasm, or insults.⁸⁹ The target may also ask the harasser to explain his behavior in an attempt to disarm him, regain control of the situation, and feel more empowered.⁹⁰ Women may also use an active bystander approach to address street harassment of which they are not the direct target.⁹¹ Stop Street Harassment, a Virginia non-profit organization, suggests several methods for bystanders to intervene when they notice somebody else being street harassed.⁹² These methods include asking the person being harassed: (1) if she is okay, (2) if she would like

86. KEARL, *supra* note 12, at 112. Being “on guard” may mean crossing the street to avoid a potential harasser, wearing a blank or angry facial expression, avoiding eye contact, talking—or pretending to talk—on a cell phone, wearing headphones, or choosing an alternate route or method of transportation if the planned path or transit service appears to include a harasser. *Id.* at 114, 120. Women may also seek the protection of a male escort. Harris & Miller, *supra* note 52, at 859. This method, however, forces women to rely on men—ironically, for protection from other men—and reiterates a system of gender-based power. di Leonardo, *supra* note 12, at 56.

87. Heben criticizes society taking this approach as keeping the status quo of gender-based subordination of women intact. Heben, *supra* note 4, at 205.

88. Founded in 2009, Hollaback! encourages women to fight back against street harassment using primarily non-legal methods, such as confronting the harasser and reporting harassing behavior via the organization’s mobile application. See Kaelyn Forde, *Hey Baby! Anti-catcalling Crusade Gains Ground in New York City*, AL JAZEERA AMERICA (Sept. 8, 2014), <http://america.aljazeera.com/articles/2014/9/8/catcalling-womennewyork.html> [<http://perma.cc/H4YM-UK8K>]. Hollaback!’s official website is <http://www.ihollaback.org>.

89. MARTY LANGELAN, *Put a Stop to Sexual Harassment*, in 50 WAYS TO IMPROVE WOMEN’S LIVES: THE ESSENTIAL WOMEN’S GUIDE FOR ACHIEVING EQUALITY, HEALTH, AND SUCCESS 120 (National Council of Women’s Organizations ed., 2005).

90. *Id.*; see also GARDNER, *supra* note 6, at 213–16; Tuerkheimer, *supra* note 11, at 195.

91. Talia Hagerty et al., *Know Your Rights: Street Harassment and the Law*, STOP STREET HARASSMENT 11 (Dec. 2013), <http://www.stopstreetharassment.org/wp-content/uploads/2013/12/SSH-KnowYourRights-StreetHarassmentandtheLaw-20131.pdf> [<http://perma.cc/P99D-VNNR>].

92. The use of active bystander strategies is not limited to women; any person, male or female, may use these strategies to confront a person who is engaging in street harassment, regardless of whether the target is known to the bystander.

help, and (3) what, if anything, she would like for the bystander to do, as well as confronting the harasser and telling him that his actions are unacceptable.⁹³ Male bystanders may be particularly helpful in such intervention techniques because male street harassers may “look to other men for approval” of their behavior.⁹⁴

Traditional and social media have helped activists raise awareness of street harassment. For example, photojournalists have catalogued women’s accounts of what strange men have yelled to them on the street,⁹⁵ while other women have walked around with hidden cameras and microphones to capture their own experiences with street harassment on film.⁹⁶ While neither street harassment nor media attention of public harassment of women is a new phenomenon,⁹⁷

93. Hagerty et al., *supra* note 91, at 11; *see also* KEARL, *supra* note 12, at 140.

94. Hagerty et al., *supra* note 91, at 11; *see also* KEARL, *supra* note 12, at 140.

95. *See, e.g.*, Hannah Price, *City of Brotherly Love*, <http://www.hannahcprice.com/cityofbrotherlylove.html> [<http://perma.cc/N8ZS-LCRU>] (portraits of men who catcalled the photographer on the streets of Philadelphia, taken shortly after the photographer was harassed); Alanna Vagianos, *These Are the Things Men Say to Women on the Street*, HUFFINGTON POST (Aug. 8, 2014, 10:55 AM), http://www.huffingtonpost.com/2014/08/08/things-men-say-to-women-on-street-harassment_n_5659877.html [<http://perma.cc/59KQ-MS7>] (showing photographs of women holding signs with quotes from men who have street harassed them).

96. *See, e.g.*, Rob Bliss Creative, *10 Hours of Walking in NYC as a Woman*, YOUTUBE (Oct. 28, 2014), <https://www.youtube.com/watch?v=b1XGPvbWn0A> (last visited Nov. 4, 2015) [<http://perma.cc/UCA2-2TZ3>]. Rob Bliss Creative released this video, featuring Shoshana B. Roberts, which received over 23 million views. To record the men who harassed her as she walked in a variety of Manhattan neighborhoods, Roberts attached a hidden video camera to the backpack of an assistant who walked in front of her. *Id.* Roberts recorded over 100 instances of men she did not know making lewd, suggestive, or otherwise unwelcome comments to her as she passed by. *Id.* One man even walked beside her for over five minutes after she ignored a comment he made to her. *Id.* After this video went viral, Roberts received numerous rape threats. Andrea Peterson, *Woman in Viral Street Harassment Video Now Facing Rape Threats Online*, WASH. POST (Oct. 29, 2014), <http://www.washingtonpost.com/news/the-switch/wp/2014/10/29/woman-in-viral-street-harassment-video-now-facing-rape-threats-online> [<http://perma.cc/L8KT-AFSH>].

97. In the early 20th century, Seattle would sentence men who harassed women in the street to work in chain gangs. Knute Berger, *The Surprising Way Seattle Used to Deal with Street Harassment*, CROSSCUT (Oct. 9, 2014), <http://crosscut.com/2014/10/09/history/122052/chain-gang-4-hobo-culture-street-harassment> [<http://perma.cc/66PY-JN9V>]. Many articles about street harassment were published in popular print media in the 1970s and 1980s. Bowman, *supra* note 1, at 528. This coincided with an increase in the number of women entering the workforce, a rising first-marriage age, a rising divorce rate, an increase in the number of women delaying childbirth, an increase in women participating in outdoor fitness, an increase in public acceptance of women traveling alone, and a rising unemployment rate (which meant that more men were able to be out in public and on the street where they could harass women, instead of being at work). *Id.* In the mid-1980s and early 1990s, the media reported on organizers’ efforts to highlight street harassment in Washington, D.C. *See, e.g.*, Emily Bernard, *Black Women and the Backwash of Harassment*, WASH. POST, Aug. 12, 1990, at C8; Carol Dana, *Talking Back to Street Harassers*, WASH. POST, Aug. 19, 1986, at C5; Cristina Del Sesto, *Our Mean Streets: D.C.’s Women Walk Through Verbal Combat Zones*, WASH. POST, Mar. 18, 1990, at B1; I. Rajeswary, *Anti-Rape Week Will Target Verbal Abuse*, WASH. POST, Sept. 20, 1985, at C2. Some scholars suggested that at this time there was no consensus on what behaviors

the subject seems to be receiving a lot of attention in contemporary media. For example, in 2014, *The Daily Show with Jon Stewart* aired several segments featuring comedian Jessica Williams's commentary on how women are impacted by fear of violence generally,⁹⁸ and street harassment in particular.⁹⁹

Commentary from pundits, bloggers, editorialists, and other writers have highlighted a social debate about the effects of street harassment. In 2008, CNN published an article in which the author considered women's conflicting views on street harassment as either "creepy or a compliment[]." ¹⁰⁰ In August 2014, a panel of Fox News commentators discussed whether men calling to women on the street is acceptable behavior, generally agreeing that it is acceptable because men intend it as a compliment and that women can do nothing to stop this behavior.¹⁰¹ Other outlets have similarly suggested that women should not be bothered by street harassment, or should accept it as a compliment.¹⁰² However, many authors have written about

actually constituted street harassment, or whether it should even be called street harassment or something else. *See, e.g.,* Kissling, *supra* note 50, at 457. Even into the 2000s, media coverage of street harassment rarely examined "the complex motivations of . . . harassers." Laniya, *supra* note 12, at 120.

98. The Daily Show with Jon Stewart, *The Fault in Our Schools*, COMEDY CENT. (June 25, 2014), <http://thedailyshow.cc.com/videos/z2b627/the-fault-in-our-schools> [<http://perma.cc/RX23-VQ5K>] (satirical piece discussing men's and women's differing perspectives on sexual assault victimization); *see also* Eliana Dockterman, *Watch The Daily Show Get Hilariously Real About Campus Sexual Assault*, TIME (June 27, 2014), <http://time.com/2930987/daily-show-campus-sexual-assault> [<http://perma.cc/WS4M-AF8U>]; Alanna Vagianos, *The Daily Show's Jessica Williams Shuts Down News Commentator Who Thinks Catcalling Is Great*, HUFFINGTON POST (Sept. 3, 2014, 2:59 PM), http://www.huffingtonpost.com/2014/09/03/jessica-williams-catcalling-daily-show_n_5759772.html [<http://perma.cc/QK9T-XHDY>].

99. The Daily Show with Jon Stewart, *Masters of Sexism—Claps and Catcalls*, COMEDY CENT. (Sept. 2, 2014), <http://thedailyshow.cc.com/videos/v7vq7r/masters-of-sexism---claps-and-catcalls> [<http://perma.cc/BQ4J-XJ6E>] (pointing out that women walking on public sidewalks are "not performing for men"); The Daily Show with Jon Stewart, *Jessica's Feminized Atmosphere*, COMEDY CENT. (Oct. 2, 2014), <http://thedailyshow.cc.com/news-team/jessica-williams/5ndnit/jessica-s-feminized-atmosphere> [<http://perma.cc/98QD-MFZG>] (interviewing women about their experiences with street harassment in New York City); *see also* Sarene Leeds, *Jessica Williams Continues Her War Against Catcalls on 'The Daily Show,'* WALL ST. J.: SPEAKEASY BLOG (Oct. 3, 2014, 7:30 AM), <http://blogs.wsj.com/speakeasy/2014/10/03/jessica-williams-continues-her-war-against-catcalls-on-the-daily-show> [<http://perma.cc/P52Z-VC2N>].

100. Anna Jane Grossman, *Catcalling: Creepy or a Compliment?* CNN.COM (May 14, 2008, 10:14 AM), <http://www.cnn.com/2008/LIVING/personal/05/14/lw.catcalls/index.html> [<http://perma.cc/XKJ6-D6ZV>].

101. *See* Catherine Taibi, *These Female Fox News Hosts Think Catcalling Is Perfectly Fine*, HUFFINGTON POST (Aug. 29, 2014, 7:59 AM), http://www.huffingtonpost.com/2014/08/29/catcalling-fox-news-outnumbered-sexist_n_5731174.html [<http://perma.cc/L2JF-AW2R>] (includes video of relevant Fox News segment).

102. *See, e.g.,* Doree Lewak, *Hey, Ladies—Catcalls Are Flattering! Deal with It*, N.Y. POST (Aug. 18, 2014, 10:38 PM), <http://nypost.com/2014/08/18/enough-sanctimony-ladies>

women's negative personal experiences with street harassment, adding anecdotal evidence to their calls for reform.¹⁰³ One recent article in a college newspaper placed an anti-street harassment mobile application in the same category as apps designed to prevent and address other forms of sexual violence, including intimate partner violence and stranger rape, indicating a recognition of street harassment as a form of sexual violence.¹⁰⁴ This variety of recent media commentary has coincided with a rise in a national discussion, and debate, of other women's issues, including the birth control mandate,¹⁰⁵ states' attempts to limit abortion access,¹⁰⁶ and the pay gap between men and women.¹⁰⁷

-catcalls-are-flattering [<http://perma.cc/EH25-MGD9>] (suggesting that street remarks incite feelings of euphoria and higher self-esteem).

103. See, e.g., Charing Ball, *The Very Real Dangers of Street Harassment*, MADAME NOIRE (Oct. 10, 2014), <http://madamenoire.com/476864/the-very-real-dangers-of-street-harassment> [<http://perma.cc/T8N7-4BQS>]; Laura Bates, *Women Should Not Accept Street Harassment as 'Just a Compliment'*, THE GUARDIAN (Feb. 28, 2014, 3:00 PM), <http://www.theguardian.com/lifeandstyle/womens-blog/2014/feb/28/women-street-harassment-power-control-violence> [<http://perma.cc/GDC2-RF3F>]; Caitriona Pagni, *Walk This Way: Female Students Subjected to Sexual Harassment by Construction Workers*, GEORGETOWN VOICE (Oct. 2, 2014), <http://georgetownvoice.com/2014/10/02/walk-this-wayfemale-students-subjected-to-sexual-harassment-by-construction-workers> [<http://perma.cc/SHWG-UPWR>]; Caroline Posner, *POSNER: A New Frontier for Sexual Respect*, YALE DAILY NEWS (Sept. 4, 2014), <http://yaledailynews.com/blog/2014/09/04/posner-a-new-frontier-for-sexual-respect> [<http://perma.cc/7DG9-YVPL>]; Dana Reszutek, *Catcalling Epidemic Must Be Recognized*, WASH. SQUARE NEWS (Oct. 8, 2014), <http://www.nyunews.com/2014/10/08/reszutek> [<http://perma.cc/YV2Z-SK6J>].

104. Katie Grimesey & Timothy Petraco, *A Look at the Six Student Council-Endorsed Safety Mobile Apps*, THE CAVALIER DAILY (Oct. 5, 2014, 11:36 PM), <http://www.cavalierdaily.com/article/2014/10/a-look-at-the-six-student-council-endorsed-safety-focuses-mobile-apps> [<http://perma.cc/788Y-BVF4>].

105. See, e.g., *Burwell v. Hobby Lobby*, 134 S. Ct. 2755 (2014); Adam Liptak, *Supreme Court Rejects Contraceptives Mandate for Some Corporations*, N.Y. TIMES (June 30, 2014), <http://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html> [<http://perma.cc/7N88-E2KE>]. Compare Robert Jeffress, *Hobby Lobby Ruling: Why Supreme Court Got It Right*, FOXNEWS.COM (June 30, 2014), <http://www.foxnews.com/opinion/2014/06/30/hobby-lobby-ruling-why-supreme-court-got-it-right.html> [<http://perma.cc/RF8G-8U9C>] with Lisa Bloom, *Why the Hobby Lobby Decision Is a Stunning Setback for Women's Rights*, HUFFINGTON POST (Sept. 6, 2014, 5:59 AM), http://www.huffingtonpost.com/lisa-bloom/why-the-hobby-lobby-decis_b_5565115.html [<http://perma.cc/7PSC-X8XN>].

106. For example, Texas has recently experienced intense debate about the extent to which the government may restrict abortion access. Recent state legislation has forced many Texas facilities to stop offering abortion services. See Jon Herskovitz, *Abortion Rights Groups Ask Supreme Court to Halt Texas Restrictions*, BUS. INSIDER (Oct. 6, 2014, 8:20 PM), <http://www.businessinsider.com/r-abortion-rights-groups-ask-supreme-court-to-halt-texas-restrictions-2014-10> [<http://perma.cc/A2D5-7XZ8>].

107. Some media outlets have recently paid attention to pay disparities between men and women. See, e.g., Anna Bernasek, *Two Numbers: The Gender Pay Gap*, NEWSWEEK (Sept. 30, 2014, 1:06 PM), <http://www.newsweek.com/2014/10/10/two-numbers-gender-pay-gap-274363.html> [<http://perma.cc/5TU4-4PUB>]; Jessica Meyers, *Wage Gap for Women*

There are, however, several problems with addressing street harassment solely by non-legal means. First, relying on individual women—targets—to solve the problem of street harassment by confronting each individual harasser ignores the fact that women are a diverse group who may respond to street harassment differently based on personality, sexual orientation, race, socioeconomic status, prior experiences, the location, the content of the harassing remark(s), or the identity of the harasser.¹⁰⁸ Second, an individual-level confrontational approach to reducing street harassment reflects a “perpetrator perspective” instead of a “violence against women” perspective.¹⁰⁹ A “perpetrator perspective” considers each instance of street harassment an isolated annoyance instead of a systemic form of maltreatment of and violence against women.¹¹⁰

Third, ignoring the harasser may lead targets to feel powerless, even if ignoring allows a target not to admit that she feels powerless.¹¹¹ Finally, and perhaps most importantly, confronting a street harasser can escalate the situation and increase the likelihood of physical harm perpetrated against the target.¹¹² Gender is one of the most important factors in likelihood of aggression.¹¹³ Since street harassers are strangers, women have limited information from which to determine whether the particular harasser poses a threat to their physical safety.¹¹⁴ Thompson argues that high rates of violence against women make it logical for a woman to assume that all men who give her unwanted sexual attention on the street might become violent.¹¹⁵ Indeed, there have recently been several reported cases of physical attacks on women who rebuffed street harassment.¹¹⁶

Persists, Despite Some Progress, BOSTON GLOBE (Sept. 28, 2014), <http://www.bostonglobe.com/news/nation/2014/09/27/massachusetts-sits-core-national-debate-over-gender-pay-gap/SmEvXBIH5aaZiPiFby4oVL/story.html> [<http://perma.cc/5RMF-2Q3H>].

108. Heben, *supra* note 4, at 189; Tuerkheimer, *supra* note 11, at 168 n.1.

109. Heben, *supra* note 4, at 203–04.

110. *Id.*; Laniya, *supra* note 12, at 119.

111. See Bowman, *supra* note 1, at 537; Thompson, *supra* note 7, at 313.

112. See Chhun, *supra* note 4, at 291 (noting that using counteraggression to defend against catcalls may escalate the harasser’s aggression).

113. See Harris & Miller, *supra* note 52, at 843.

114. See KEARL, *supra* note 12, at 151.

115. Thompson, *supra* note 7, at 320–21.

116. In Queens, New York, a stranger slashed a woman’s throat after she refused to go on a date with him. Tara Culp-Ressler, *This Week, Two Incidents of Street Harassment Escalated into Violent Attacks Against Women*, THINKPROGRESS (Oct. 9, 2014, 2:52 PM), <http://thinkprogress.org/health/2014/10/09/3578215/street-harassment-escalates> [<http://perma.cc/N5EA-AWFH>]. In Detroit, a woman was shot and killed in a mass shooting that injured five others, allegedly committed by a man unknown to the victim who relentlessly harassed her, asking for her name and number before escalating the situation to grabbing her, hitting her, and eventually shooting her when her fiancé tried to intervene. Kate Abbey-Lambertz, *Woman Shot, Killed After Saying No to a Man’s Advances, Detroit Police Say*, HUFFINGTON POST (Oct. 8, 2014, 1:59 PM), <http://www.huffingtonpost.com/2014>

The problems with non-legal methods of addressing street harassment may be exacerbated by an apparent paradox in how the legal system responds to women who confront their harassers. Often, “[j]udges and juries as well as the general public continue to believe that assertive responses, such as confronting or reporting the harasser, are most appropriate”¹¹⁷ But courts have also been known to chastise women for fighting back when confronted by strangers on the street,¹¹⁸ perhaps reflecting a sense that women should be passive and just walk away from a street harasser.¹¹⁹ The following sections of this Note will examine legal attempts to address street harassment.

III. LEGAL FRAMEWORKS FOR ADDRESSING STREET HARASSMENT

Historically, few lawsuits dealt with the issue of stranger harassment of women in public places. In a case unusual for its time, the Wisconsin Supreme Court upheld an award of damages against a train conductor who sexually harassed a female train passenger and kissed her without her consent.¹²⁰ This case echoed court rulings in nineteenth century criminal cases imposing fines and short jail sentences on men who frightened women in public or otherwise subjected them to vulgar, unwanted attention.¹²¹ Women continued to struggle

/10/07/mary-spears-killed-detroit_n_5945518.html [http://perma.cc/J9TD-MJ8A]; *Mass Shooting Kills Mother of Three, Wounds Five Others*, FOX 46 CHARLOTTE (Oct. 8, 2014, 11:22 PM), <http://www.fox46charlotte.com/story/26719319/mass-shooting-kills-mother-of-three-wounds-five-others> [http://perma.cc/G25J-GG7B]. In San Francisco, a man who street harassed a woman by asking her to perform oral sex on him slashed her face and stabbed her arm with a knife when she ignored his request. Mike Aldax, *Brute Slashes Woman for Refusing Sexual Advances in Tenderloin*, THE SAN FRANCISCO EXAMINER (Jan. 8, 2013), <http://www.sfexaminer.com/sanfrancisc/brute-slashes-woman-for-refusing-sexual-advances-in-tenderloin/Content?oid=2319617> [http://perma.cc/3LJZ-E775]; Katie J.M. Baker, *SF Street Harassment Stabbing Is a Great Reminder that Catcalling Isn't a Joke*, JEZEBEL (Jan. 8, 2013, 5:15 PM), <http://jezebel.com/5974261/sf-street-harassment-stabbing-is-a-great-reminder-that-catcalling-isnt-a-joke> [http://perma.cc/5P5C-ZJ7Z]; *FUBU-Clad Man Hits on Woman, Then Stabs Her*, THE SAN FRANCISCO APPEAL (Jan. 8, 2013, 10:19 AM), <http://sfappeal.com/2013/01/fubu-clad-man-hits-on-woman-then-stabs-her> [http://perma.cc/Y7MJ-JP98]. These stories are not the only reported instances of physical violence used against women who rebuffed street harassment.

117. Magley, *supra* note 84, at 943 (internal citations omitted).

118. See Ramakrishnan, *supra* note 4, at 327–28. For example, a New York judge criticized three women convicted of gang assault after a jury rejected their self-defense claim that they were fending off an attack motivated by sexual orientation bias; Anemona Hartocollis, *Four Women Are Convicted in Attack on Man in Village*, N.Y. TIMES (Apr. 19, 2007), <http://www.nytimes.com/2007/04/19/nyregion/19attack.html> [http://perma.cc/DW7V-93T4].

119. See Ramakrishnan, *supra* note 4, at 327–28; see also Hartocollis, *supra* note 118.

120. *Craker v. Chicago & Nw. Ry. Co.*, 36 Wis. 657, 659, 679 (1875).

121. See KERRY SEGRAVE, *BEWARE THE MASHER: SEXUAL HARASSMENT IN AMERICAN PUBLIC PLACES, 1880–1930*, 118–19 (2014).

to win civil judgments against public harassers through the mid-twentieth century; for example, in 1951, a Pennsylvania court refused to grant an invasion of privacy cause of action to a plaintiff to whom the defendant addressed “obnoxious words” in public.¹²² The court found that the woman could press criminal charges of disorderly conduct or pursue a civil remedy under a slander theory.¹²³

In sum, few early civil suits focused on stranger-perpetrated public harassment of women. Over time, the majority of sexual harassment plaintiffs have instead worked to address workplace sexual harassment.¹²⁴ Modern courts have, in a victory for women’s rights, advanced the notion that women should be free from unwanted sexual attention in the workplace.¹²⁵ However, these court decisions have had little impact on women’s legal rights and protections with respect to street harassment.

At least one court has recognized that just because sexually harassing behavior is “commonplace” does not mean it is acceptable, and that the broader social context in which such behavior occurs is relevant in judging the “objective severity” of the sexual harassment.¹²⁶ That said, street harassment, by definition, occurs in a particular context—in public places, not the woman’s workplace.¹²⁷ While the law may draw from the policy considerations of gender equality, anti-discrimination principles, and elimination of the public/private sphere dichotomy that have shaped workplace harassment law, street harassment is a discrete problem that requires its own distinct legal treatment.¹²⁸ Modern legal approaches to addressing street harassment have included both civil and criminal liability schemes and have faced strong criticism on First Amendment grounds.

A. *First Amendment Considerations*

Any attempt, civil or criminal, to provide legal relief for victims of street harassment may face First Amendment challenges.¹²⁹ Some

122. *Christie v. Greenleaf*, 78 Pa. D. & C. 191, 191 (1951).

123. *Id.* at 192. The court found that the line demarcating invasion of privacy had to do with whether the offender made declarations *about* the plaintiff to the general public, rather than *to* her while in a public sphere, with only the former being actionable under an invasion of privacy theory. *Id.*

124. *See, e.g., Hampel v. Food Ingredients Specialties*, 729 N.E.2d 726, 736 (Ohio 2000).

125. *Id.* at 737.

126. *Id.* at 736.

127. di Leonardo, *supra* note 12, at 51–52.

128. *See* Deborah M. Chalfie, *Your Legal Options: Sexual Harassment and the Law*, in *BACK OFF!: HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS* 357 (Martha J. Langelan ed., 1993) (“Paradoxically, although the street is where sexual harassment occurs most often and can be most threatening, it is also the place where women have the fewest legal remedies.”).

129. *See* NIELSEN, *supra* note 2, at 20.

scholars have suggested that anti-street harassment statutes would survive First Amendment review.¹³⁰ Despite opposition, grounded in free speech concerns, to such statutes,¹³¹ these statutes might fall within established First Amendment exceptions for low-value speech,¹³² fighting words,¹³³ and secondary effects.¹³⁴

The Supreme Court has held that “[s]exual expression which is indecent but not obscene is protected by the First Amendment”¹³⁵ The Government may nonetheless impose restrictions on constitutionally protected speech if those restrictions satisfy strict scrutiny.¹³⁶ Under this standard, the Government must show that any content-based restriction on speech, such as a hypothetical restriction on street harassment, is the least restrictive means of furthering a compelling state interest.¹³⁷

The protection of women’s liberty, equality, and security in public space is a compelling state interest.¹³⁸ Greenawalt proposes four justifications “for suppressing abusive language”: (1) lessening the danger of violence, (2) preventing the psychological injury that is inflicted on the target of such language, (3) addressing the general social offense or outrage that such language is used, and (4) the “destructive long term effects from the attitudes reinforced by abusive remarks.”¹³⁹ As previously noted, street harassment reinforces the destructive attitude of male superiority and social acceptance of violence against women.¹⁴⁰ Proponents of an anti-street harassment restriction on speech would, however, need to demonstrate that such a restriction is the most narrowly tailored way of remedying the problem.¹⁴¹

130. *Id.* at 28 (explaining that, according to one view, “offensive speech may fall into an unprotected category” as offensive speech “undermines productive political debate”).

131. *See id.* (citing the argument that “almost all restrictions on speech” should be prohibited in order to “protect democratic deliberation”).

132. *E.g.*, commercial speech. *See id.* at 20.

133. *Id.* at 23.

134. *See id.* at 27 (“Courts seem to be responsive to efforts to restrict speech (1) where there is empirical evidence . . . about harm . . .”).

135. *Sable Commc’ns of Cal., Inc. v. Fed. Commc’ns Comm’n*, 492 U.S. 115, 126 (1989).

136. *Id.*

137. *Id.*

138. Bowman, *supra* note 1, at 546; Chhun, *supra* note 4, at 288. The state has an interest in protecting and promoting gender equality through ensuring that women may move through public space (e.g., use public transportation and shop in public stores) with the same degree of personal security as men. In 2013, the United States ranked 5th on the United Nations’ Human Development Index but ranked 47th on the UN’s Gender Inequality Index, indicating that there is greater gender inequality in the United States than in other similarly developed countries. UNITED NATIONS DEVELOPMENT PROGRAMME, *Table 4: Gender Inequality Index*, HUMAN DEV. REPORTS, <http://hdr.undp.org/en/content/table-4-gender-inequality-index> [<http://perma.cc/5UYW-8UPP>].

139. Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 294 (1990).

140. di Leonardo, *supra* note 12, at 53.

141. *See* Greenawalt, *supra* note 139, at 298.

In *Brandenburg v. Ohio*, the Supreme Court held that speech may be regulated because of the harm it produces only when it can be shown that the speech is “directed to” produce imminent, “extremely likely” harm.¹⁴² However, in *Hess v. Indiana*,¹⁴³ the Court “rejected the notion that this showing can be made by linking a class of harm with a class of speech”¹⁴⁴ It is insufficient to claim that street harassment may be regulated under *Brandenburg* for two reasons: one, research shows that, although street harassment produces harm for its targets, harassers rarely *direct* their remarks with the purpose of causing harm,¹⁴⁵ and two, not all targets experience the same harms from being street harassed.¹⁴⁶ Accordingly, the “least restrictive means” or “narrow tailoring” prong might be difficult to satisfy.

For these reasons, advocates might have more success arguing that street harassment falls within an established exception to First Amendment protection. This argument may take a number of forms. In the first place, “threats, verbal violence, and vulgarity” are not given absolute First Amendment protection: federal courts have consistently enforced regulations against these types of speech, which are often included in street harassment.¹⁴⁷ Second, while one purpose of the First Amendment is to protect speech on matters of public concern, street harassers’ remarks on women’s appearances do not generally constitute “matter[s] of public concern.”¹⁴⁸ Third, and perhaps most instructive, some jurisdictions have rejected defendants’ free speech claims in response to workplace sexual harassment claims under Title VII.¹⁴⁹

142. 395 U.S. 444, 447 (1969); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602 (1986).

143. 414 U.S. 105, 105 (1973).

144. Sunstein, *supra* note 142, at 602.

145. Benard & Schlaffer, *supra* note 8, at 71.

146. The social gender- and power-based harms that affect women as a group occur consistently when women are street harassed, but individual women may experience different psychological or emotional harms when they are victimized. See Fredrickson & Roberts, *supra* note 70, at 174.

147. Thompson, *supra* note 7, at 338, 338 n.156–58 (internal footnotes omitted).

148. The Fourth Circuit has held that “[s]peech involves a matter of public concern when it involves an issue of social, political, or other interest to a community.” *Snyder v. Phelps*, 580 F.3d 206, 220 (4th Cir. 2009) (quoting *Kirby v. City of Elizabeth City, N.C.*, 388 F.3d 440, 446 (4th Cir. 2004)). Arguably, a man’s sexualized remarks on a woman’s physical features would not fall within this definition; by contrast, the public concern might actually be the *perpetration* of street harassment, not the remarks themselves.

149. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (holding that sexually oriented verbal harassment is not protected speech); *Jew v. Univ. of Iowa*, 749 F. Supp. 946, 961 (S.D. Iowa 1990) (upholding Title VII violation arising from false rumors of a sexual relationship between female professor and male department chair); Thompson, *supra* note 7, at 337 n.152; see also *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 853 (Cal. 1999) (holding that the right to free speech is not absolute and enjoining defendants from using racial epithets in the workplace). Note,

Street harassment may also be regulated as “low-value” speech. Through its First Amendment doctrine, the Supreme Court has determined that some kinds of speech are of lower value than others.¹⁵⁰ Though the Court has never articulated an exact definition of “low-value” speech, its decisions concerning which speech restrictions to uphold and which to reject indicate that the Court engages in “harm-based analysis of this sort of speech which allows its regulation only upon a demonstration that the speech in question is in fact likely to produce unlawful action.”¹⁵¹ Sunstein suggests four factors for determining when speech is “low-value.”¹⁵² These include whether the speech is relevant to public affairs, whether the speech is cognitive or non-cognitive, whether the speaker’s purpose is to send some kind of message or impart some knowledge, and whether the Government has a legitimate reason to regulate the speech.¹⁵³

Street harassment almost certainly qualifies as low-value speech. Catcalls force unavoidable communication between harasser and target that has the strong potential to instill shock in the target and harm her physically and emotionally.¹⁵⁴ The communication is purely upsetting and insulting, so it is not a socially or politically valuable form of dialogue.¹⁵⁵ Street harassment is also in no way political speech.¹⁵⁶ Finally, through their remarks, street harassers have no intention of imparting knowledge upon or beginning a cognitive dialogue with targets.¹⁵⁷ The value of the speech contained within street harassment is therefore low and may theoretically be subject to regulation.

Street harassment may also fall within the fighting words exception to the First Amendment. “Fighting words” statutes, which “prohibit the use of abusive language that tends to incite a breach of the peace,”¹⁵⁸ have typically been upheld against First Amendment challenges.¹⁵⁹ These statutes focus less on the speaker’s intent and more on the receiver’s probable reaction to the words.¹⁶⁰ The Supreme Court defines “fighting words” as “what men of common intelligence

however, that the *Aguilar* court found that no actionable harassment has occurred where there is only isolated, sporadic, or trivial instances of offensive conduct. *Id.* at 851.

150. Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 298 (1995).

151. *Id.* at 299.

152. Sunstein, *supra* note 142, at 603.

153. *Id.* at 603–04.

154. Chhun, *supra* note 4, at 289.

155. *Id.*

156. Bowman, *supra* note 1, at 545–46.

157. *Id.* at 546.

158. *Id.* at 558–59.

159. *Id.* at 559.

160. *Id.*; Chhun, *supra* note 4, at 292.

would understand would be words likely to cause an average addressee to fight”¹⁶¹ Where the chance of responsive violence is high, courts have generally upheld restrictions on speech under the fighting words doctrine.¹⁶²

The fighting words doctrine arose to prevent men from dueling in response to spoken insults.¹⁶³ It is justified on grounds of the need to prohibit general offensiveness: while the Supreme Court has held that the offensiveness of language alone cannot justify its prohibition,¹⁶⁴ the Court has upheld restrictions on offensive speech in particular contexts, like school assemblies,¹⁶⁵ and radio stations.¹⁶⁶

The argument could be made that in these situations the listener could simply leave the assembly or switch the radio station to avoid offensive remarks. However, women walking in public cannot simply leave the situation to escape the harassment, because street harassment by definition involves unplanned, unwanted interactions with strangers—not voluntary tuning into a radio station or attendance at an assembly.¹⁶⁷ So if the Court is willing to uphold prohibitions on offensive speech in those situations, it should also be willing to uphold a prohibition on offensive, vulgar, derogatory speech aimed by strangers at women in public spaces.

There are, however, some serious problems with applying the fighting words doctrine to street harassment. First, women have not usually been socialized to respond to insult by fighting.¹⁶⁸ Second, the reasonable man standard reflects a White male bias and is inappropriate to address street harassment because White men are rarely the targets of street harassment.¹⁶⁹ Third, the doctrine focuses on

161. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942).

162. See Greenawalt, *supra* note 139, at 295.

163. See Chhun, *supra* note 4, at 289. This history does not properly conceptualize modern gendered responses to unwanted and harmful verbal communications on the street because it conceives only of a world in which men physically fight each other in response to insults and in which no one reacts differently than that. *Id.* at 290–91.

164. See *Cohen v. California*, 403 U.S. 15, 16–17 (1971) (overturning the conviction of a man who wore a jacket bearing the words “Fuck the Draft” into a courthouse on the grounds that his message was a form of political commentary and that he did not intend for the words to personally insult any viewer).

165. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

166. *Fed. Comm’n Comm’n v. Pacifica Found.*, 438 U.S. 726, 750 (1978); see also Greenawalt, *supra* note 139, at 301.

167. See Greenawalt, *supra* note 139, at 301.

168. Bowman notes that the fighting words doctrine “presupposes an encounter between two persons of relatively equal power who have been socialized to respond to insults with violence.” Bowman, *supra* note 1, at 560–61. Street harassment perpetuates and implies an unequal power dynamic where the harasser is more powerful than the target. Even though women may not have been socialized to react to insult with violence, they are still harmed by catcalls and it does not make them “less injured” when they do not respond by fighting. Chhun, *supra* note 4, at 290–91.

169. Bowman, *supra* note 1, at 560–61; Hagerty et al., *supra* note 91, at 12. A reasonable man’s reaction to street harassment may be very different from a reasonable

verbal interactions, ignoring nonverbal forms of harassment, and focuses on the disruption of public peace rather than the real injury of street harassment—a violation of the female target's privacy and liberty and the subordination of women.¹⁷⁰ Finally, at least one court has refused to categorically apply fighting words statutes to stranger sexual harassment.¹⁷¹ Despite these problems, the fighting words doctrine may provide the most effective shield against claims that street harassment regulations violate the First Amendment because few would argue that the First Amendment should in all cases protect words that constitute or might incite violence.

A final First Amendment doctrine that may apply to street harassment is the secondary effects doctrine. The Government generally may not engage in content-based regulation of speech,¹⁷² such regulations are, as previously noted, subject to strict scrutiny.¹⁷³ However, if the secondary effects of speech are harmful enough, the government may impose content-based regulations on that speech if the regulation is based on those secondary effects and not on restricting the content itself.¹⁷⁴ One could argue that street harassment regulations may survive First Amendment scrutiny under this doctrine if the point of such statutes is not to regulate what men say so much as it is to regulate the various harms that women experience as a result of those words.

B. Tort Remedies

The rationale behind a tort cause of action for street harassment is that “[i]ncreasing the cost of a behavior, by making it possible to challenge the behavior legally, is thought to decrease its frequency.”¹⁷⁵

woman's reaction.

170. Bowman, *supra* note 1, at 562.

171. See *Lamar v. Banks*, 684 F.2d 714, 715 (11th Cir. 1982) (affirming that a state's fighting words statute was not invalid on its face but reversing and remanding its application against a defendant taxicab driver who made unwelcome sexual advances, both verbal and physical, upon a female passenger, for an evidentiary hearing on the defendant's argument that the statute was unconstitutional as applied to his case; the court noted that on remand the issue would be whether the defendant's words would tend to provoke his passenger to violence).

172. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (striking down an ordinance prohibiting display of a symbol which one knows or has reason to know might incite anger, resentment, or other negative feelings in others on the basis of race, religion, or gender on the ground that the statute prohibited speech on the basis of the ideas it expressed).

173. See, e.g., *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989).

174. See, e.g., Thompson, *supra* note 7, at 338 (“A content based regulation does not violate the First Amendment if it is ‘justified without reference to the content of the regulated speech . . . [and is] aimed not at the content of the [speech], but rather at [its] secondary effects.’” (quoting *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986)).

175. Heben, *supra* note 4, at 206.

Tort remedies empower victims to rid themselves of the sense of powerlessness, victimization, and helplessness that street harassment creates.¹⁷⁶ Tort remedies also allow only those women who feel harmed by street harassment to recover; women who view street remarks as compliments are not required to file suit.¹⁷⁷ The tort action allows a street harassment target to judge her own need for legal recourse and recognition of the harm done to her by the harasser.¹⁷⁸ Three tort causes of action may theoretically be invoked by a target seeking to sue her harasser. These are invasion of privacy,¹⁷⁹ intentional infliction of emotional distress,¹⁸⁰ and assault.¹⁸¹

The tort of invasion of privacy is premised on the notion that “disrespect and mistreatment of individuals causes harm and makes them feel as though they are less than full citizens.”¹⁸² The cause of action should, then, provide relief to victims of street harassment who have been subordinated, disrespected, and therefore harmed by unwanted male intrusions on their existence in public spaces. The intentional infliction of emotional distress cause of action should also theoretically provide street harassment victims with redress for the psychological harms they suffer.¹⁸³ Finally, the tort of assault, in theory, provides the most effective civil remedy for victims of street harassment, regardless of whether their harassers physically touch them. Since the tort requires harmful or offensive contact or an imminent apprehension of that contact, its elements seem to mirror the ways in which many street harassers interact with their targets.¹⁸⁴

These tort remedies, however, are fraught with practical limitations on their effectiveness at addressing street harassment. First, a street harassment victim will likely find it difficult to name a defendant in a civil lawsuit because street harassment is almost always perpetrated by a stranger to the victim.¹⁸⁵ Second, many potential

176. *Id.* at 206–07.

177. *Id.* at 208.

178. *Id.*

179. Defined in relevant part as “unreasonable intrusion upon the seclusion of another.” RESTATEMENT (SECOND) OF TORTS § 652A(2)(a) (1997).

180. “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

181. The tort of assault requires two elements: (1) an actor acts “intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact,” and (2) the other person experiences “such imminent apprehension.” RESTATEMENT (SECOND) OF TORTS § 21(1) (1965).

182. Heben, *supra* note 4, at 209.

183. Bowman, *supra* note 1, at 564.

184. Bowman, *supra* note 1, at 549–50.

185. Heben, *supra* note 4, at 212.

plaintiffs would be unable to afford an attorney and would not have the time or resources to investigate the harasser's identity.¹⁸⁶ Third, emotional injuries like those caused by street harassment are invisible and may therefore be taken less seriously by judges and juries.¹⁸⁷

Doctrinally, the tort actions of invasion of privacy, intentional infliction of emotional distress, and assault are problematic when applied to street harassment.¹⁸⁸ This is due to the intent requirement and "reasonable person" standard that applies to these tort causes of action.¹⁸⁹ A harasser's behavior may not satisfy the intent requirement because, as previously noted, many harassers view their behavior as complimentary or trivial.¹⁹⁰ Few street harassers intend to harm the women to whom they direct their attention.¹⁹¹ It would therefore be difficult for a plaintiff suing her street harasser to demonstrate the requisite intent for torts like assault and intentional infliction of emotional distress. Moreover, much as the fighting words doctrine is problematic with respect to street harassment, the "reasonable person" standard applicable to tort causes of action, especially assault and invasion of privacy, fails to account for the highly gender-specific experience of street harassment victimization.¹⁹²

Finally, the over-representation of men in legislative bodies makes it unlikely that a new tort remedy that specifically addresses street harassment will emerge; if men are not victimized by street harassment or do not view it as harmful, they are less likely to provide a cause of action to redress the harm it causes.¹⁹³ Because of these limitations of tort actions, it is necessary to explore the use of the criminal law as a remedy to the problem of street harassment.

C. Eliminating Street Harassment Through the Criminal Law

1. What States Are Currently Doing

State law typically prohibits harassment, assault, and other forms of forced, unwanted interactions.¹⁹⁴ In theory, criminal laws

186. *Id.*

187. *Id.* at 207.

188. *Id.* at 208–11; Laniya, *supra* note 12, at 126; *see also* Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1318 (1992).

189. *See* Hagerty et al., *supra* note 91, at 12; Heben, *supra* note 4, at 211.

190. Benard & Schlaffer, *supra* note 8, at 71; McAllister, *supra* note 18, at 37.

191. *See* Benard & Schlaffer, *supra* note 8, at 71.

192. *See* Heben, *supra* note 4, at 209; *see also* Bowman, *supra* note 1, at 560–61; Hagerty et al., *supra* note 91, at 12.

193. Heben, *supra* note 4, at 207.

194. To explore the basic forms that such laws take, I will rely on the statutory provisions of six American states: New York, California, Illinois, Texas, Pennsylvania, and

proscribing such conduct would apply to street harassment. In many ways, however, the criminal law fails to address the unique characteristics of street harassment and thus fails to provide a remedy for victims.¹⁹⁵

State criminal laws prohibiting unwanted or otherwise offensive interpersonal interactions can generally be categorized as follows: verbal harassment, following, groping, unwanted filming and photography, indecent exposure, and hate crimes.¹⁹⁶ Verbal harassment charges may include disorderly conduct,¹⁹⁷ harassment,¹⁹⁸ intimidation,¹⁹⁹ obstruction of movement,²⁰⁰ loitering,²⁰¹ and prostitution (including solicitation).²⁰² “Following” may encompass a variety of proscribed behaviors, including stalking and assault.²⁰³

Georgia. These states are geographically diverse but are each home to at least one major city. In 2013, Stop Street Harassment—a non-profit organization that attempts to document and eliminate street harassment—released a report that compiled the criminal laws of all 50 states that could possibly pertain to street harassment. This report and its categorization by offense type provided the basis for this analysis. *See* Hagerty et al., *supra* note 91.

195. Hagerty et al., *supra* note 91, at 287.

196. *See id.* at 1–2, 7.

197. *See, e.g.*, CAL. PENAL CODE § 647 (West 2013), *amended by* 2014 Cal. Legis. Serv. Ch. 71 (S.B. 1304) (West), 2014 Cal. Legis. Serv. Ch. 710 (A.B. 1791) (West), 2014 Cal. Legis. Serv. Ch. 714 (S.B. 1388) (West), and 2014 Cal. Legis. Serv. Ch. 863 (S.B. 1255) (West); GA. CODE ANN. § 16-11-39 (1995); 720 ILL. COMP. STAT. 5/26-1 (2013), *amended by* Ill. Legis. Serv. P.A. 99-180 (H.B. 2755) (West); N.Y. PENAL LAW § 240.20 (McKinney 1965); 18 PA. CONS. STAT. ANN. § 5503 (West 1973); TEX. PENAL CODE ANN. § 42.01 (West 2013).

198. *See, e.g.*, CAL. PENAL CODE § 640 (West 2013) (harassment on public transportation); N.Y. PENAL LAW § 240.26 (McKinney 1994) (harassment in the second degree); 18 PA. CONS. STAT. ANN. § 2709 (West 2014) (harassment).

199. *See, e.g.*, 720 ILL. COMP. STAT. 5/12-6 (2011) (intimidation).

200. *See, e.g.*, CAL. PENAL CODE § 647c (West 1968) (obstruction of street, sidewalk, or other place open to public); TEX. PENAL CODE ANN. § 42.03 (West 1994) (obstructing highway or other passageway).

201. *See, e.g.*, CAL. PENAL CODE § 653b (West 2010) (loitering at or near a public school); CAL. PENAL CODE §§ 407–409 (West 1969) (unlawful assembly, defined in part in § 407 as whenever two or more people gather together to do some “lawful act in a violent, boisterous, or tumultuous manner”); GA. CODE ANN. § 16-11-36 (1980) (loitering or prowling); N.Y. PENAL LAW § 240.35 (McKinney 2010) (loitering); 18 PA. CONS. STAT. ANN. § 5506 (West 1973) (loitering and prowling at nighttime). Texas does not include loitering in its penal code. *See Jones v. State*, 172 Tex. Crim. App. 100, 100 (1962).

202. *See, e.g.*, CAL. PENAL CODE § 266i(a)(1) (West 2011) (pandering; notably, this statute does not cover solicitation of a prostitute); GA. CODE ANN. § 16-6-9 (2001) (prostitution); 720 ILL. COMP. STAT. 5/11-14.1 (2015) (solicitation of a sexual act); N.Y. PENAL LAW § 230.00 (McKinney 1969) (prostitution); N.Y. PENAL LAW § 240.37 (McKinney 1976) (loitering for the purpose of engaging in a prostitution offense); 18 PA. CONS. STAT. ANN. § 5902(b)(4) (West 2012) (prostitution, soliciting a prostitute); TEX. PENAL CODE ANN. § 43.02 (West 2013) (prostitution).

203. *See, e.g.*, CAL. PENAL CODE § 646.9 (West 2008) (stalking); GA. CODE ANN. § 16-5-90 (2000) (stalking); 720 ILL. COMP. STAT. 5/12-1 (2011) (assault); 720 ILL. COMP. STAT. 5/12-7.3 (2013) (stalking); N.Y. PENAL LAW § 240.25 (McKinney 1994) (harassment in the first degree; prohibits following a person for the purpose of intentionally and repeatedly harassing them); N.Y. PENAL LAW §§ 120.45 (McKinney 2014), 120.50 (McKinney 1999), 120.55

Similarly, “groping” may include various forms of battery and criminal sexual contact.²⁰⁴

The provisions of these laws, however, often fail to account for the interactions common within a street harassment encounter.²⁰⁵ For example, indecent exposure statutes may punish some street harassers, but only those whose harassment includes inappropriate exposure of their bodies.²⁰⁶ Similarly, laws prohibiting unwanted filming and photography would apply only to street harassers who engage in that specific behavior against their targets.²⁰⁷ Laws prohibiting groping, battery, and other forms of unwanted physical and/or sexual contact do not protect women whose harassers only call out to them or engage in other non-contact behaviors (e.g. whistling, leering, or gesturing).²⁰⁸ Hate crime legislation typically requires that the perpetrator act based on some type of prejudice;²⁰⁹ with respect

(McKinney 2008), 120.60 (McKinney 2000) (stalking); 18 PA. CONS. STAT. ANN. § 2709(a)(2) (West 2014) (harassment by means of following a person); 18 PA. CONS. STAT. ANN. § 2709.1 (West 2003) (stalking); TEX. PENAL CODE ANN. § 42.072 (West 2013) (stalking).

204. See, e.g., CAL. PENAL CODE § 243.4(e) (West 2003) (sexual battery); GA. CODE ANN. § 16-5-23 (2015) (simple battery); GA. CODE ANN. § 16-6-22.1 (2006) (sexual battery); 720 ILL. COMP. STAT. 5/12-3 (2011) (battery); 720 ILL. COMP. STAT. 5/11-1.50 (2011) (criminal sexual abuse); N.Y. PENAL LAW § 130.52 (McKinney 2003) (prohibiting forcible touching of sexual or intimate parts of another person, including by squeezing, grabbing, or pinching); 18 PA. CONS. STAT. ANN. § 3126 (West 2006) (indecent assault, prohibiting certain non-consensual contact); TEX. PENAL CODE ANN. § 22.01 (West 2013) (assault). *But see* N.Y. PENAL LAW § 240.30 (McKinney 2014) (aggravated harassment in the second degree, prohibiting certain types of offensive contact with the intent to harass, annoy, or alarm the other person), *held unconstitutional* by *People v. Golb*, 15 N.E.3d 805, 813–14 (N.Y. 2014) (holding that § 240.30 was unconstitutionally broad and vague).

205. See Hagerty et al., *supra* note 91, at 287.

206. See, e.g., CAL. PENAL CODE § 314 (West 1982); GA. CODE ANN. § 16-6-8 (1996) (public indecency); 720 ILL. COMP. STAT. 5/11-30 (2011); N.Y. PENAL LAW § 245.00 (McKinney 1968) (public lewdness); N.Y. PENAL LAW § 245.01 (McKinney 1984) (exposure of a person); 18 PA. CONS. STAT. ANN. § 3127 (West 1995) (indecent exposure); 18 PA. CONS. STAT. ANN. § 5901 (West 1973) (open lewdness); TEX. PENAL CODE ANN. § 21.08 (West 1994) (indecent exposure); TEX. PENAL CODE ANN. § 42.01(a)(10) (West 2013) (Texas’s disorderly conduct statute covers some forms of indecent exposure, including exposure of one’s anus or genitals in a public place).

207. See, e.g., 720 ILL. COMP. STAT. 5/26-4 (2012) (unauthorized video recording and live video transmission); N.Y. PENAL LAW § 250.45 (McKinney 2014) (unlawful surveillance in the second degree); 18 PA. CONS. STAT. ANN. § 7507.1(a)(1) (West 2006) (Pennsylvania’s invasion of privacy statute includes non-consensual filming without the subject’s knowledge or consent “for the purpose of arousing or gratifying the sexual desire of any person”). *But see* TEX. PENAL CODE ANN. § 21.15 (West 2007), *held unconstitutional* by *Ex parte Thompson*, 442 S.W.3d 325, 351 (Tex. Crim. App. 2014) (holding that photographs and visual recordings are expressive and therefore protected by the First Amendment).

208. See Hagerty et al., *supra* note 91, at 287.

209. See, e.g., CAL. PENAL CODE § 422.6 (West 2005), *limitation recognized* by *People v. Lindberg*, 190 P.3d 664, 665 (Cal. 2008) (holding that to convict a defendant of a hate murder where multiple concurrent motives exist, the defendant’s prohibited bias must have been a substantial factor in the crime); 720 ILL. COMP. STAT. 5/12-7.1 (2013) (requiring

to street harassment, a victim might have to prove that the harasser targeted her *because* of his bias against women.²¹⁰ Finally, as with tort remedies that require a showing of intent on the part of the tortfeasor, any criminal statute that requires proof of the harasser's intent to harm, harass, or otherwise interfere with the target will provide little assistance in combating street harassment.²¹¹ This is in part because proving such intent can be difficult,²¹² and in part because many harassers do not believe that their behavior is harmful to their targets.²¹³ Many of the existing criminal laws, at least in the states with major cities, fail to adequately address the problem of street harassment.²¹⁴

One additional and perhaps overlooked area of the criminal law that could apply to some street harassment interactions is Stand Your Ground. Stand Your Ground laws generally authorize the use of deadly physical force in self-defense where a person reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself.²¹⁵ The critical feature of Stand Your

that the perpetrator's motive be based on actual or perceived race, national origin, sexual orientation, religion, color, creed, or disability); N.Y. PENAL LAW § 485.05(1)(b) (McKinney 2010) (requiring that the offender intentionally target the victim on the basis of "race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation").

210. Hagerty et al., *supra* note 91, at 7. This would be difficult to do, particularly if a harasser could articulate some nonprejudicial reason for his behavior (e.g. trying to compliment the target). See Benard & Schlaffer, *supra* note 8, at 70–71; McAllister, *supra* note 18, at 37.

211. See Hagerty et al., *supra* note 91, at 287.

212. See Benard & Schlaffer, *supra* note 8, at 70–71; McAllister, *supra* note 18, at 37.

213. See KEARL, *supra* note 12, at 37 ("Men who claim that they would love to have women harass them . . . tend to ignore the context in which street harassment occurs. Around the world, men are more powerful than women, and street harassment is one more manifestation of that power.").

214. Tuerkheimer, *supra* note 11, at 199.

215. As of this writing, 22 states have Stand Your Ground laws. See ALA. CODE § 13A-3-23 (1975); ALASKA STAT. ANN. § 11.81.335 (West 2013); ARIZ. REV. STAT. ANN. § 13-405 (2010); FLA. STAT. ANN. § 776.012 (West 2014); GA. CODE ANN. § 16-3-21 (West 2001); GA. CODE ANN. § 16-3-23.1 (West 2006); IND. CODE ANN. § 35-41-3-2(c) (West 2013); KAN. STAT. ANN. § 21-5230 (West 2011); KY. REV. STAT. ANN. § 503.050 (West 2006) (providing for the justified use of deadly force "when the defendant believes that such force is necessary to protect himself against . . . sexual intercourse compelled by force or threat" among other threats to life and bodily safety); LA. REV. STAT. ANN. § 14:20(C) (2014); MICH. COMP. LAWS ANN. § 780.972 (West 2006); MISS. CODE ANN. § 97-3-15(4) (West 2006); MONT. CODE ANN. § 45-3-110 (West 2009); NEV. REV. STAT. ANN. § 200.120 (West 2015); N.H. REV. STAT. ANN. § 627:4 (2011); N.C. GEN. STAT. ANN. § 14-51.3 (West 2011); OKLA. STAT. ANN. tit. 21, § 1289.25(D) (West 2011); 18 PA. CONS. STAT. ANN. § 505 (2.3) (West 2011) (specifying the threat of forced sexual intercourse as one threat to which one may respond with deadly force without a duty to retreat); S.C. CODE ANN. § 16-11-440(C) (2006); S.D. CODIFIED LAWS § 22-18-4 (2006); TENN. CODE ANN. § 39-11-611(b)(1) (West 2012); TEX. PENAL CODE ANN. § 9.31(e) (West 2007); W. VA. CODE ANN. § 55-7-22 (West 2008).

Ground is the elimination of the duty to retreat.²¹⁶ This is a departure from the common-law rule (still followed in many states) that a person must retreat before using deadly force against another if he can do so “with complete safety.”²¹⁷ Stand Your Ground laws also typically apply wherever a person is lawfully permitted to be and do not limit the no “duty to retreat” provision to one’s home or vehicle.²¹⁸

Stand Your Ground laws would theoretically apply only to the most serious street harassment encounters, such as those where the harasser uses or credibly threatens to use physical force against the target. However, because male and female defendants invoking Stand Your Ground outside of the street harassment context have faced drastically disparate treatment in the legal system,²¹⁹ and because Stand Your Ground would only apply to the most extreme street harassment encounters, scholars express skepticism that Stand Your Ground will ever be a generally effective remedy for street harassment.²²⁰ Additionally, proponents of Stand Your Ground laws have failed to encourage use of the laws by women who experience street harassment, despite the fact that women are more likely to experience threats and violence in this form than, for example, stranger rape.²²¹

Stand Your Ground laws do not provide an adequate solution to street harassment for several reasons.²²² First, at least two states with large urban populations have not adopted Stand Your Ground laws.²²³ Second, to rely solely on Stand Your Ground laws—which justify the use of physical force only when a person reasonably fears the imminent use of force against herself—to address street harassment is to ignore the vast majority of street harassment interactions, where the harasser makes no explicit threat of violence against the target.²²⁴ Third, the reasonable person standard of Stand Your

216. Ebonie R. Rocio, *Flip a Coin: Heads, Stand Your Ground Is Good Law . . . Tails, Stand Your Ground Is Bad Law*, 40 T. MARSHALL L. REV. 1, 4–5 (2014).

217. Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women’s Syndrome, and Violence As Male Privilege*, 68 U. MIAMI L. REV. 1099, 1104 (2014).

218. Rocio, *supra* note 216, at 5.

219. For example, George Zimmerman, infamous for shooting Trayvon Martin, an unarmed Black teenager, in a Florida suburb, successfully invoked that state’s Stand Your Ground law and was acquitted of all charges, while Marissa Alexander, a Florida woman who fired a “warning shot” in the air to fend off her “abusive ex-husband,” was sentenced to 20 years in prison despite not actually injuring him. *See* Franks, *supra* note 217, at 1103.

220. *See* Franks, *supra* note 217, at 1099 (arguing that Stand Your Ground laws “actually reinforce and exacerbate existing gender divides in self-defense law that disproportionately harm women”).

221. *See id.* at 1110.

222. *See id.* at 1108–09.

223. Neither California nor New York has enacted a Stand Your Ground law. CAL. PENAL CODE § 197(3) (West 1963); N.Y. PENAL LAW § 35.15(2)(a) (McKinney 2004).

224. *See* Chhun, *supra* note 4, at 276.

Ground may present the same doctrinal problem as the reasonable man standard of the fighting words doctrine,²²⁵ in that reasonable men may not experience the fright from street harassment that reasonable women would be likely to feel.²²⁶ Finally, the use of Stand Your Ground to address street harassment fails to consider targets' potential unease or discomfort in confronting their harassers; many victims, for a variety of reasons, feel most comfortable paying no direct attention to the harasser at all in the moments during and just after the encounter.²²⁷

2. Model Locality Approaches

A few cities have recently begun to address street harassment through means such as public forums, non-legal awareness campaigns, surveys, and legislative proposals.²²⁸ For example, an Iowa City college student frustrated by her own experience being street harassed, and by others' unsupportive responses to her frustration, organized a public forum at a city library so that others could share their similar experiences in a supportive environment.²²⁹ One goal of the forum was to educate people about their legal rights against street harassment.²³⁰

In New York City, the Metropolitan Transit Authority (MTA) has taken non-legal steps to address street harassment on subways and buses.²³¹ This move follows a 2007 report on street harassment and sexual assault in the city's subway system,²³² which found that victims rarely sought assistance from either the New York Police Department or the MTA,²³³ the perceived threat of sexual victimization was "pervasive" in the subway system, and actual sexual harassment and assault were common.²³⁴ The report recommended that the MTA consider establishing a hotline for victims to report instances

225. Discussed in Part III.A, *supra*.

226. Bowman, *supra* note 1, at 560–61, 62; Hagerty et al., *supra* note 91, at 12–13.

227. Bowman, *supra* note 1, at 537.

228. Scott M. Stringer, *Hidden in Plain Sight: Sexual Harassment and Assault in the New York City Subway System*, N.Y. TIMES (July 2007), http://www.nytimes.com/packages/pdf/nyregion/city_room/20070726_hiddeninplainsight.pdf [<http://perma.cc/825H-8UUB>]; Alison Sullivan, *Ending Street Harassment: Iowa City Forum Aims to Stop Threats, Catcalls*, THE GAZETTE (Sept. 2, 2014, 6:54 PM) <http://thegazette.com/subject/news/ending-street-harassment-iowa-city-forum-aims-to-stop-threats-catcalls-20140902> [<http://perma.cc/HLG7-KZ9S>].

229. Sullivan, *supra* note 228. Forum organizers hope to implement bystander intervention training to teach people how to stand up for others who are being street harassed. *Id.*

230. *Id.*

231. Stringer, *supra* note 228, at 22.

232. *Id.* at 8.

233. *Id.* at 14–15.

234. *Id.* at 17.

of sexual harassment on the subway, adding more police presence to the subway system, and installing better lighting, public phone access, and cellular phone service in subway cars and stations.²³⁵ The MTA recently announced its plans to install cameras in more than 900 subway cars²³⁶ and create an online reporting mechanism for victims of subway sexual harassment.²³⁷

While the Iowa City and New York City responses demonstrate that cities are beginning to take the problem of street harassment seriously, the legislative response to street harassment in Kansas City, Missouri represents one of the only attempts to modify the criminal law to address the particular characteristics of street harassment.²³⁸ The Kansas City ordinance, passed unanimously by the City Council, protects bicyclists, walkers, and other travelers on public sidewalks—including those in wheelchairs and those waiting for public transit—from street harassment.²³⁹ The ordinance is based on a Columbia, Missouri ordinance, passed in 2009, that prohibits anyone from harassing a cyclist, walker, or wheelchair user verbally, by throwing objects, or by any other threatening behavior.²⁴⁰ Those convicted under the ordinance face criminal sanctions, including fines and possible jail time.²⁴¹

3. Policy Proposal

The law theoretically provides a mechanism for victims of street harassment to confront their harassers without having to risk their

235. *Id.* at 18–20.

236. Andrew Mei, *MTA to Increase Surveillance in Subway Cars*, WASH. SQ. NEWS (Oct. 7, 2014), <http://nyunews.com/2014/10/07/surveillance-2> [<http://perma.cc/ZC4H-YCAV>]. Before this announcement, no MTA subway cars were equipped with cameras. See Wendy Joan Biddlecombe, *Activists, Public Advocate, Announce New MTA Measures to Curb Sexual Harassment on Mass Transit*, METRO (Oct. 1, 2014), <http://www.metro.us/newyork/news/local/2014/10/01/activists-public-advocate-announce-new-mta-measures-curb-sexual-harassment-mass-transit> [<http://perma.cc/VH9E-4RL6>].

237. Salla Huusko, *New York City Launches Campaign to End Sexual Harassment on the Subway*, AL JAZEERA AMERICA (Oct. 6, 2014, 5:00 PM), <http://america.aljazeera.com/articles/2014/10/6/new-york-city-launchescampaigntoendsexualharassmentonthesubway.html> [<http://perma.cc/6E4D-B55T>].

238. Kansas City, MO, Ordinance No. 140777, § 50-205 (2014); see also Mike Hendricks, *KC Considers Law Against Street Harassment of Walkers, Cyclists, and Others*, KANSAS CITY STAR (Sept. 12, 2014), <http://www.kansascity.com/news/government-politics/article/2107031.html> [<http://perma.cc/DYM3-Z9VE>]; *KCMO Council Passes Amended Pedestrian, Bicycle Harassment Ordinance*, KSHB KANSAS CITY (Oct. 2, 2014), <http://www.kshb.com/news/local-news/kcmo-council-passes-amended-pedestrian-bicycle-harassment-ordinance> [<http://perma.cc/LWZ6-URRJ>].

239. Hendricks, *supra* note 238.

240. *Id.*

241. Melissa Stern, *Cyclists, Pedestrians Gain Protection with Passage of Anti-Harassment Ordinance*, FOX4KC.COM (Oct. 7, 2014, 10:55 PM), <http://fox4kc.com/2014/10/07/cyclists-pedestrians-gain-protection-with-passage-of-anti-harassment-ordinance> [<http://perma.cc/7PLY-ML2H>].

personal safety.²⁴² Yet much like their tort law counterparts, current criminal law frameworks largely fail to account for the unique characteristics of street harassment.²⁴³ For this reason, an effective way to prevent and address street harassment would be to incorporate it into a new criminal law, much like the one adopted on the municipal level in Kansas City.

A law prohibiting street harassment may serve an “expressive function” by signaling that public harassment of women will no longer be tolerated as a social norm.²⁴⁴ As has happened with other existing violence-prevention laws,²⁴⁵ outlawing street harassment would convey a public disapproval of the behavior in an attempt to deter its occurrence. It would reframe the issue and upset the status quo by declaring that street harassment is a social problem worthy of the legal system’s attention and not merely a problem between individual harassers and their targets.²⁴⁶

Cities and states already regulate many kinds of public space behaviors, but very few have ordinances against street harassment.²⁴⁷ A law against street harassment could take the same form as other state or municipality regulations on public space behavior in terms of offense level and punishment. Bowman provides a framework from which states and localities could model a criminal law approach to street harassment.²⁴⁸ She proposes a model statute that makes street harassment a misdemeanor, punishable by a \$250 fine.²⁴⁹ Her proposed statute excludes the harasser’s intent and the woman’s

242. “[P]ursuing legal strategies can be seen as just a more formal way of confronting sexual harassment. By naming the harasser’s behavior as sexual harassment, asserting . . . women’s legal rights, and holding the harasser publicly accountable for his actions, [the law] accomplish[es] many of the same objectives as direct, verbal confrontation.” Chalfie, *supra* note 128, at 340; *see also* Chhun, *supra* note 4, at 291 (noting that defending oneself against catcalls may anger the harasser and escalate his aggressive behavior); Tuerkheimer, *supra* note 11, at 195 (supporting the notion that direct confrontation of a harasser may endanger the target).

243. Tuerkheimer, *supra* note 11, at 199.

244. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996) (arguing that law may make a statement “designed to change social norms”).

245. *See, e.g.*, Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 42 U.S.C.) (addressing domestic and sexual violence perpetrated against women); Adam Walsh Child Protection and Safety Act, 42 U.S.C.A. § 16901 (2006) (enacted as a response to “vicious attacks [against children] by violent predators . . .”).

246. *See* Kennedy, *supra* note 188, at 1324.

247. There are examples of regulations imposed by municipalities include ordinances prescribing the rules for dog control, bicycling, and pedestrian traffic. Benard & Schlaffer, *supra* note 8, at 70.

248. Bowman, *supra* note 1, at 575.

249. *Id.*

appearance from the elements of the offense and provides examples of language and gestures that would be unlawful.²⁵⁰

While Bowman's suggested statute provides a valuable starting point for legislatures to address street harassment, a better approach might be for legislatures to categorize the offense as a violation (or the jurisdictional equivalent), similar to a traffic offense, rather than a misdemeanor. Doing so would prevent those convicted under the statute from experiencing the aftereffects and collateral consequences of a criminal conviction.²⁵¹ The purpose of an anti-street harassment ordinance should not be to shame or harm harassers, but instead to change social norms about the appropriate treatment of women, reduce the power imbalance between the sexes, and make women safer and more welcome in public spaces. A criminal sanction at the level of a traffic offense effectuates this goal by formally condemning street harassment while minimizing the social and economic harm that criminal convictions can create for offenders.

In addition, a more socially responsible punishment for street harassment than the one proposed by Bowman might be to impose a fine that is not a fixed flat rate but is instead proportional to the offender's ability to pay. If a person convicted under an anti-street harassment statute could not pay the applicable fine, he would likely be incarcerated for a period of time.²⁵² Incarceration generally threatens family²⁵³ and economic stability²⁵⁴ for offenders, and since

250. *Id.* at 575–76. The model language encompasses the various forms of street harassment discussed in Part I, *supra*.

251. Periman uses three broad categories to define the collateral consequences of criminal convictions: (1) "impaired access to, or enjoyment of, the ordinary rights and benefits associated with citizenship or residency, such as voting or driving," (2) "impaired economic opportunity," and (3) "increased severity of sanctions in any subsequent criminal proceeding brought against the offender." Deborah Periman, *The Hidden Impact of a Criminal Conviction: A Brief Overview of Collateral Consequences in Alaska*, UAA JUSTICE CTR. 2 (Dec. 2007), <http://justice.uaa.alaska.edu/occasionalpapers/op01.collateral.pdf> [<http://perma.cc/Z7Q2-XZHH>].

252. The Supreme Court held in *Bearden v. Georgia* that if an offender makes all reasonable efforts to pay court costs and fines but, through no fault of his own, cannot do so, the State cannot incarcerate him automatically without determining if alternative methods of punishment are available. 461 U.S. 660, 671–72 (1983). Notwithstanding this rule, the American Civil Liberties Union has found an increase in rates of incarceration for failure to pay fines and court fees. See AM. CIVIL LIBERTIES UNION, *In for a Penny: The Rise of America's New Debtors' Prisons*, ACLU REPORT 5 (Oct. 2010) https://www.aclu.org/files/assets/InForAPenny_web.pdf [<http://perma.cc/RW4U-T6A9>] [hereinafter ACLU REPORT].

253. See Creasie Finney Hairston, *Family Ties During Imprisonment: Important To Whom and For What?*, 18 J. SOC. & SOC. WELFARE 87, 88 (1991) (noting that both spousal and parent-child relationships are "vulnerable during incarceration.").

254. See Becky Pettit & Christopher J. Lyons, *Incarceration and the Legitimate Labor Market: Examining Age-Graded Effects on Employment and Wages*, 43 L. & SOC'Y REV.

American prisons are already overcrowded,²⁵⁵ there seems to be little to be gained from incarcerating more people for failure to pay court-ordered fines.²⁵⁶ A fine proportional to a harasser's ability to pay would ensure that the punitive and deterrent functions of the criminal law address the harm caused by the harasser's behavior by imposing some cost on that behavior. A proportional fine would accomplish this function without creating additional harm for the offender or increasing the incarcerated population.

Ending street harassment through the use of criminal law would not be without its challenges.²⁵⁷ First, average citizens may be unwilling to support legal restrictions on speech.²⁵⁸ They may oppose legal regulation because they do not feel that street harassment is a problem, or, even if they do feel it is a problem, because they do not feel addressing it is a good use of the legal system's time and resources.²⁵⁹ They may also be wary of additional law enforcement involvement in the lives of everyday citizens.²⁶⁰ Second, the under-representation of women in legislative bodies,²⁶¹ may impact legislative impetus to

725, 746 (2009) ("incarceration appears to have important consequences for employment and wage outcomes regardless of when individuals are admitted to prison.").

255. In 2013, more than 2.2 million adults were incarcerated in state and federal prisons in the United States. Lauren E. Glaze & Danielle Kaeble, *Correctional Populations in the United States, 2013*, BUREAU OF JUSTICE STATISTICS 2 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> [<http://perma.cc/G678-57C8>]. Seventeen states have a prison population that exceeds the capacity of state prison facilities. Reid Wilson, *Prisons in These 17 States Are Over Capacity*, WASH. POST (Sept. 20, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/20/prisons-in-these-17-states-are-filled-over-capacity> [<http://perma.cc/5NLQ-4TAQ>].

256. See ACLU REPORT, *supra* note 252, at 9 (noting that incarcerating those who fail to pay fines further "diminishes [the offender's] ability" to pay his debts).

257. Bowman, *supra* note 1, at 571–72 (explaining the various difficulties of approaching street harassment through existing criminal sanctions).

258. NIELSEN, *supra* note 2, at 97 (noting that only 12 percent of survey respondents "favored legal regulation" of racist and sexist speech in public, despite a much higher percentage reporting a belief that these types of speech are problematic).

259. *Id.* at 97.

260. *Id.*

261. Women hold only 19.4 percent of seats in the 114th United States Congress. Of the 100 Senate seats, women hold just 20, and of the 435 seats in the House of Representatives, women occupy a mere 84. CENTER FOR AMERICAN WOMEN AND POLITICS, *Fact Sheet: Women in Elective Office 2015*, <http://www.cawp.rutgers.edu/women-elective-office-2015> [<http://perma.cc/F6BH-4YSY>]. Women are also dramatically under-represented in state legislatures, holding only 24.2 percent of state legislative seats nationwide. NAT'L CONFERENCE OF STATE LEGISLATURES, *Women in State Legislatures for 2014* (Apr. 1, 2014), <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2014.aspx> [<http://perma.cc/VPA7-ADDL>]. Three of the six states with the six largest cities have a higher percentage of women in their state legislatures than the national average, including Arizona (35.6 percent), California (26.7 percent), and Illinois (31.1 percent). Three have percentages lower than the national average: Texas (21.5 percent), Pennsylvania (17.8 percent), and New York (21.1 percent). *Id.* See also

pass anti-street harassment regulations. As previously noted, because men are highly unlikely to experience street harassment as targets,²⁶² male legislators may, at a minimum, underestimate the impact that a legislative response could have in reducing the behavior, or, worse, may not deem the problem worthy of a legislative response at all.²⁶³

Third, any legislative response to street harassment will likely face vehement opposition on First Amendment grounds.²⁶⁴ Those who object to government regulation of speech may argue that street harassment is of concern only to individuals who are harassed, not to the broader community, or that it is a “minor inconvenience . . . that [is] momentarily annoying.”²⁶⁵ But as discussed in Part III.A, a variety of recognized exceptions to the First Amendment’s free speech clause could apply to criminal prohibitions on street harassment that would protect such statutes from First Amendment scrutiny.²⁶⁶

Fourth, as with civil remedies, the anonymous nature of harasser-target interactions may render it difficult for women to press criminal charges against the men who street harass them.²⁶⁷ This may, however, be remedied (at least in part) through observations of law enforcement officials, who may intervene when they observe harassment in progress. The presence of law enforcement may itself prevent street harassment: deterrence theory would suggest if criminal liability were to attach to the act, harassers might refrain from engaging in the behavior in the presence of police, where punishment would theoretically be more certain.²⁶⁸

Another serious concern with criminalizing street harassment is the disproportionate impact that approach may have on racial

U.S. CENSUS BUREAU, *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2013 Population: April 1, 2010 to July 1, 2013—United States—Places of 50,000+ Population* (May 2014), <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [<http://perma.cc/JSE8-GYE4>]. This is significant because street harassment is most likely to occur in urban environments, so a legislative response to the problem might be most needed in those states. See Bowman, *supra* note 1, at 529.

262. Women may and sometimes do harass men. GARDNER, *supra* note 6, at 14, 15. This, however, is not the typical street harassment dynamic. See Kissling, *supra* note 50, at 453 (discussing some of the male-female dynamics of street harassment); Laniya, *supra* note 12, at 101.

263. KEARL, *supra* note 12, at 28; Heben, *supra* note 4, at 207.

264. See, e.g., NIELSEN, *supra* note 2, at 112 (noting that survey respondents frequently objected to legal restrictions on “offensive public speech.”).

265. *Id.* at 30.

266. Thompson, *supra* note 7, at 338.

267. See Franks, *supra* note 80, at 582.

268. See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013) (noting that substantial evidence supports the idea that increased police visibility can deter criminal behavior by increasing the perceived risk of apprehension).

minorities.²⁶⁹ Because of heavier policing of minority communities,²⁷⁰ we should be concerned with the prospect that law enforcement will disproportionately target men of color when enforcing any street harassment regulations.²⁷¹ The liberation of women from the oppressive nature of street harassment should not come at the cost of oppression of racial minorities, particularly when minorities are already over-represented in criminal processing.²⁷²

CONCLUSIONS

Every day in the United States, women experience a form of gender-based oppression when men they do not know call out to them on the street.²⁷³ Though street harassment encounters vary in severity of both the harasser's behavior and the risk of physical harm to the target, street harassment inflicts serious personal and social harms every time it occurs.²⁷⁴ Most important of these is the reinforcement of a gender-based power hierarchy, which is underscored each time a man feels entitled to comment publicly on a strange woman's body, sexuality, or mere presence in public space.²⁷⁵ As they currently exist, civil and criminal legal remedies largely fail to address this form of abuse.²⁷⁶ For this reason, states and localities should enact legislation outlawing street harassment in its various forms. Such legislation would likely withstand First Amendment scrutiny,²⁷⁷ and

269. See Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1185–86 (2011) (arguing that higher arrest and incarceration rates in minority communities result from police departments' discretion in a variety of areas, including putting police in particular communities, a practice known as "geographic deployment").

270. *Id.*

271. Proving that this phenomenon has taken place would be difficult for most defendants. To prevail on a selective enforcement claim, a defendant must show that "similarly situated defendants of other races could have been prosecuted, but were not . . ." *United States v. Armstrong*, 517 U.S. 456, 469 (1996). Selective enforcement claims rarely succeed because this is a difficult standard to meet. Sekhon, *supra* note 269, at 1184.

272. For example, approximately 13 percent of the United States population identifies as Black, yet 40 percent of the incarcerated population is Black. U.S. CENSUS BUREAU, *State & County QuickFacts: USA* (2015), <http://quickfacts.census.gov/qfd/states/00000.html> [<http://perma.cc/6AQK-5YX6>]; Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLICY INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/rates.html> [<http://perma.cc/RD6K-SCVM>].

273. Bowman, *supra* note 1, at 522–23 (describing the commonality of street harassment and its various forms).

274. *Id.* at 524 (describing the effects of street harassment on the target).

275. See Berdahl, *supra* note 14, at 645 (noting that sex-based harassment may result from a motivation to preserve the gender hierarchy).

276. Bowman, *supra* note 1, at 571–72 (concluding that current legal approaches to curbing street harassment are largely failing).

277. Thompson, *supra* note 7, at 338.

would serve the expressive function of condemning these uniquely harassing behaviors. Because certain issues may arise with criminal sanctioning of this type,²⁷⁸ any criminal sanction should account for the social and collateral consequences of conviction and should seek to minimize harm to the offender. Nevertheless, reform is necessary because the current state of the law grossly under-appreciates the harms experienced by women when they are street harassed, as well as the social harms perpetrated when men exert power over women in this way.

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278. For example, the American Civil Liberties Union has found an increase in rates of incarceration for failure to pay fines and court fees as a result of such criminal sanctions. See ACLU REPORT, *supra* note 252, at 5.

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