OPEN SEASON: STREET HARASSMENT AS TRUE THREATS

OPEN B. SHAH

Women in public places—streets, parks, and buses—are often victims of harassment and sexual misconduct by strangers. Street harassment (or sex hassling, as it is sometimes known) is a longstanding and pervasive phenomenon that has only recently entered the public consciousness. It remains largely undocumented and underexplored in academia. This Article defines the contours of the problem and its harms, and evaluates its fit within the current legal framework. Even though street harassment falls within the definition of many types of illegal conduct, it remains unrecognized by law enforcement and courts.

Part I describes street harassment and its context. Part II details its harms in a legally cognizable way under current statutes prohibiting, inter alia, assault, harassment, and disorderly conduct. In Part III, I analyze cases to explain why these laws do not successfully capture many instances of street harassment. I also argue that street harassment falls within the underdeveloped but promising “true threat” exception to the First Amendment right to free speech, and further contend that providing legal redress for these verbal assaults merely extends current protections against harmful speech to women. Part IV proposes a tort remedy, drawing from Title VII of the Civil Rights Act, to address such harassment in two locations: 1) public work sites (e.g., construction areas) and 2) public transportation. I also advocate for a complementary social movement to reduce the incidence of harassment, since the prevalence of street harassment often undermines women’s legal claims.

Today’s women suffer many kinds of grievous harm, including rape and sexual assault. Verbal violence is the very foundation of a system that condones and perpetuates gender-based physical aggression. As long as these assaults against women continue daily on our streets, unrecognized and unpunished, stopping other attacks that occur in homes and workplaces will be challenging if not impossible.

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INTRODUCTION

I’d decided to brave the run across the street to the little bodega anyway because I’d been out of dishwasher soap and milk and coffee filters for three days. As I walked up the steps to the entrance, two men walked out. Because I’m a woman who’s been trained by society not to look strange men in the eye when it’s dark out and they look potentially threatening, I didn’t. But they stopped in the doorway and came up close to me, speaking far louder than was necessary. “Whoa mama, look at those tits.” “Daaaaamn. Naw like really dog, daaaaaaaamn.” One started masturbating and pushed up close to my face as I stared at the ground, trying to navigate around them. He rubbed himself and licked his lips as he undressed me with his eyes and loudly proclaimed what he’d do to me. “Guys, stop it[.]” I said in my tired, exasperated and slightly pissed off voice.

They were pissed. One pushed me into the doorframe as I tried to pass. Both started screaming at me – “You f—ing ugly a— b—!” “Who the f— you think you are?!” “You’ll take it and like it!!”

. . . .

. . . I was paralyzed with fear.

They had screamed awfully loudly at me. What if they were waiting for me outside? What if they jumped me from behind the stairs as I came down? I’m carrying my house keys and my wallet – my wallet with my ID, which clearly says I live exactly across the street. What if they simply walked up behind me with a knife or a gun and forced me to open my front door for them? What then?

Women are sexually harassed on the street and in other public places by men who are strangers. This street harassment includes sexually explicit comments, catcalls, whistles, leering, sexist remarks, kissing, other offensive noises, and public masturbation. This Article focuses mainly on the speech-only aspects, though their inextricability from street harassment’s other components—groping, assault, public masturbation—is itself telling; this verbal violence is part

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1 Contributor, Street Harassment Is About Power, STOP STREET HARASSMENT (May 16, 2013), http://www.stopstreetharassment.org/2013/05/harassedatcornerstore/.
of the same “transaction.” Though this behavior is prevalent, as the viral YouTube video “10 Hours of Walking in NYC as a Woman” revealed, it is widely underrepresented in legal and social science research. Surveys conducted by non-profit groups suggest that more than eighty percent of women in the United States experience street harassment, yet only a handful of studies have been conducted since the 1980s. Other studies suggest this is a worldwide problem for women and LGBTQ individuals. Rarely is a social problem with such high rates of penetration accompanied by such low levels of documentation. Street harassment is yet another example of a recurring theme in feminist scholarship: that women’s experiences are consistently trivialized in today’s male-dominated legal culture and their injuries remain unrecognized and uncompensated. This “brush-off”—the gap between women’s experiences and community attention—is unacceptable.

Grassroots organizations have recently coalesced around this issue, aiming to stop the behavior by documenting women’s stories in the public sphere and enlisting allies of all genders. Hollaback!, the organization behind the “10 Hours of Walking in NYC as a Woman” YouTube video, along with Collective Action for Safe Spaces and Stop Street Harassment have provided space for women to document their experiences. Since 2008, thousands of women have posted on blogs, Twitter (hashtags include #shoutingback and #stopstreetharassment), and other social media sites. Community advocates and artists have taken up the cause: Tatyana Fazlalivezdeh is a Brooklyn-based artist whose paintings show women responding to gender-based street harassment.

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2 10 Hours of Walking in NYC as a Woman, YOUTUBE (Oct. 28, 2014), https://www.youtube.com/watch?v=b1XGPvBw0A (showing a woman walking through the streets of New York City while being catcalled and harassed).


6 “Feminists generally agree—it should go without saying—that women suffer in ways which men do not, and that the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture.” Robin L. West, The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 15 WIS. WOMEN’S L.J. 149, 150 (2000).

ment. Though awareness increased enormously after the Hollaback! YouTube video’s release, mentions of street harassment in U.S. news sources had been generally increasing since 2009, going from just two mentions in 2009 to sixty-three mentions in 2013. The number increased 465 percent to 356 mentions in 2014, largely driven by the release of the Hollaback! video. Mentions year-to-date in 2015, when annualized, are projected to exceed even last year’s. This is in stark contrast with earlier years—indeed, there was only one mention during all of 2000.

Street harassment is intimately tied to traditional forms of physical violence against women. First, the speech often accompanies physical harm or invasion. An online survey of over 800 women found sex-hassling—sexist comments, vulgar gestures, sexually explicit comments—is often related to physical harms such as being followed, having one’s path blocked, and being groped or assaulted. In addition, street harassment is often a precursor to legally cognizable and severe harms, including stalking, sexual assault, battery, and rape, according to hundreds of personal stories. For example, scholar Dorothy Roberts reports that a woman in her neighborhood “was raped by two men on her way home from the supermarket after she ignored their comments.” A woman in San Francisco was stabbed in the face and arm “after she rebuffed” a man who harassed her on the street. Some rape perpetrators use street harassment to choose rape victims, called “rape-testing.”

Sexual violence continues to be a serious problem in the United States; nearly one in five women reported being the victim of rape or attempted rape. Given the number of unreported rapes, the actual figure is probably higher. One in six women has experienced stalking in her lifetime; one in four women has been placed in fear by potential stalking. An online survey in 2008 found that 75 percent of female respondents have been followed by an unknown stranger in public; 62 percent say a man has purposely blocked their path; and 57 percent reported being touched or grabbed in a sexual way by a stranger in public. Despite strong evidentiary support for the


9 The numbers on the mentions of “street harassment” were complied from a full-text search for “street harassment” in Factiva’s database of English language United States news sources (including republicating) from January 1, 2000 to December 31, 2015. This year’s number was annualized using mentions year-to-date as of April 24, 2015. Search, FACTIVA, http://global.factiva.com/sh/default.aspx?NAPC=S (last visited Apr. 24, 2015).


13 H. Kearl, Groping: The Sex Crime No One Talks About, STOP STREET HARASSMENT (Feb. 8, 2012), http://www.stopstreetharassment.org/2012/02/gropingcosmo/ (quoting Martha Langelan, former Executive Director of the Washington, D.C. Rape Crisis Center).


15 Id. at 2, 29 n.2.

16 Statistics–Stop Street Harassment Studies, supra note 10.
link between street harassment and sexual violence, we cannot draw an official correlation because the Department of Justice unfortunately does not track street harassment incidents.

Victims of street harassment overwhelmingly report feeling fearful, unsafe, threatened, and intimidated, even when no physical action accompanied a particular incident of harassment.\(^\text{17}\) Research shows stranger harassment has a more consistent and significant impact on women’s fears than non-stranger harassment: for example, it inspires fear while “walking alone at night [and] using public transportation.”\(^\text{18}\) Because verbal harassment and physical assault are so frequently linked, the possibility of physical harm and rape is ever-present and embedded in each stranger’s insult or sexual comment. Given the prevalence of rape and serious sexual assault, that is a reasonable fear for women to have.\(^\text{19}\) Any young woman can probably rattle off the warnings she frequently receives from family and friends: “don’t walk alone at night,” “don’t go through the park, or past this street, even in the daytime.” Such admonitions would not be commonplace if the threat were not real.

In addition to these direct harms, street harassment excludes women from certain public spaces and public resources, confining them to the “private sphere,”\(^\text{20}\) and preventing them from achieving full citizenship. Women report taking the long way to work, avoiding the direct route to their homes, or choosing to exercise at home or in private gyms instead of jogging or running outside.\(^\text{21}\) Other women eschew public transportation to avoid harassment, forcing them to pay more money for a cab ride. Some of these daily behavior changes inhibit women’s ability to participate fully in public life. A 2008 survey found sixty-nine percent of women avoid making eye contact in public because of this issue.\(^\text{22}\) Women probably avoid speaking, assembling, protesting, and expressing themselves fully as well. A Hobbesian perspective is helpful to understand street harassment’s harms and the obligations of the state: a number of laws are intended to protect people from a lawless existence and the fear it engenders. By failing to protect women in the quintessential public place—the street—the state leaves women to fend for themselves in a vestige of the state of nature. The woman’s version of the street is lawless, providing no refuge, and preventing them from equal citizenship.

As a ubiquitous pattern of conduct, sex hassling creates and perpetuates a society in which rape, assault, and other forms of sexual or gender-based violence are easier. In a parallel

\(^{17}\) See Emily Smith, Hey Baby! Women Speak Out Against Street Harassment, CNN (Oct. 6, 2012, 2:02 PM), http://www.cnn.com/2012/10/06/living/street-harassment (explaining that “[a]gressive or sexual comments alone can instill terror”).


\(^{19}\) “Since, for women, rape is a potential outcome of any face-to-face victimization, it may be a primary source of anxiety.” Id. at 343.


\(^{21}\) Twenty-four percent of women reported avoiding outside exercise for fear of street harassment. There are women-only gyms. Soraya Chemaly, Do You Exercise Inside Because You Don’t Want to Be Harassed?, THE HUFFINGTON POST BLOG (Nov. 9, 2012 5:25 PM), http://www.huffingtonpost.com/soraya-chemaly/street-harassment_b_2094307.html.

context, Professor Mari Matsuda concludes that “an absolutist first amendment response to hate speech has the effect of perpetuating racism,” and that hate speech is intimately tied to hate crimes. Similarly, the law’s recognition and prohibition of street harassment—sexist speech—is necessary to effectively deter and punish violence against women. People in other countries have recognized the link between harassment and male sexual aggression: following a gruesome rape of a woman on a Delhi bus, thousands of people flooded the streets to protest “eve-teasing,” a term for street harassment. Ignoring this harassment perpetuates a world where women feel their bodies are not their own. Furthermore, the speakers sometimes intend these consequences: a video documentary survey of men who harassed women on the street found that a significant percentage intended to harm or insult them, and the majority of harassers had not given a single thought to how the harassed woman would feel. The remarks are delivered by all races and classes of men, alone and in groups. Men will almost never harass a woman when she is with a man, suggesting that (1) harassers know that this type of comment is not a normal, friendly greeting; (2) harassers likely have more respect for men traversing in public spaces; and/or (3) the intended harm or fear is less likely to occur when another man is present. Without a reasonable restriction on this type of public harassment, it is hard to imagine eradicating gender-based crimes or sexual violence against women.

I will focus on female victims for the purpose of this piece, though LGBTQ individuals are also targets of this behavior. A 2001 survey found that gay and transgender people suffer high rates of verbal and physical harassment in public spaces. One-half of LGBT respondents avoid


25 Many women express that unsolicited comments such as “you should smile more” or “hold your head up, don’t be ashamed of your a**” represent an invasion of their body, tantamount to psychic rape. See Muriel Dimen, Surviving Sexual Contradictions: A Startling and Different Look at a Day in the Life of a Contemporary Professional Woman 3 (1986). See also Fatma El-Nahry, She’s Not Asking For It: Street Harassment and Women in Public Spaces, GENDER ACROSS BORDERS (March 20, 2012 3:00 PM), http://www.genderacrossborders.com/2012/03/20/shes-not-asking-for-it-street-harassment-and-women-in-public-spaces/.


29 EMPIRE STATE PRIDE AGENDA, ANTI-GAY/LESBIAN DISCRIMINATION IN NEW YORK STATE 3-4 (May 2001) (on file with Author) (finding that more than fifty percent of LGBTQ respondents felt the need to conceal
public places in the European Union (EU) and Croatia for fear of being assaulted, threatened, or harassed by others, according to a new study by the EU Agency for Fundamental Rights. They overwhelmingly identified the “street, square, car parking lot/public place” as the most recent site of physical/sexual attack or threat. I hope the outcome of this project makes public places more welcoming for all.

I. STREET HARASSMENT’S FIT WITH CURRENT LEGAL HARMS

This Article identifies a range of behaviors that all properly fall under the general heading of street harassment, but that may receive different treatments at law in different jurisdictions. As described above, street harassment exists on a continuous spectrum of behavior, from sexist and potentially threatening comments to more explicitly violent and obscene verbal and physical aggression, with corresponding degrees of intimidation. Some street harassment resembles the conduct prohibited by a number of current statutes and tort laws. Women who are harassed on the street could arguably proceed with a suit for assault, indecent exposure, an offense against public order, intentional infliction of emotional distress, and violations of the exercise of their civil rights. In fact, women who were sexually harassed in the workplace before Title VII was passed attempted to sue under longstanding tort law, though recovery was generally denied.

Some torts applicable to street harassment are discussed briefly below. However, very few cases deal with street harassment and even fewer convictions have been upheld. And underreporting is a problem, as is the case with many sexually-based offenses against women. Women are discouraged from bringing street harassment suits because of the futility of recovery: many offenders are transient or damage-proof, police are unlikely to take such crimes seriously, and precedent weighs against them. An analysis of the sparse case law suggests the obstacles preventing success in a courtroom include but is not limited to:

(1) judicial reluctance to punish or impose liability for speech alone;
(2) the pervasiveness of street harassment, which undermines its severity in the eyes of the law (though in other contexts ubiquity usually amplifies the need for a remedy);

their sexual orientation on the street out of fear of harassment).

30 Patrick McNeil, Half of LGBT Members of the EU Community Avoid Public Places Because of Harassment, STOP STREET HARASSMENT (May 17, 2013), http://www.stopstreetharassment.org/2013/05/eustudy/.

31 Id.

32 Title VII of the Civil Rights Act of 1964 prohibits unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is a condition of employment, used in employment decisions, or is meant to or does create a hostile work environment. 42 U.S.C. §§ 2000e -2000e-17 (1988).


35 A woman who was harassed, threatened, and chased by a man on the street called the police. The dispatcher and officer who arrived on the scene were “nonchalant and unhelpful.” HOLLY KEARL, STOP STREET HARASSMENT: MAKING PUBLIC PLACES SAFE AND WELCOMING FOR WOMEN 49 (2010).

36 A dissenting judge in one of these rare convictions stated the court ran the risk of “criminalizing generally accepted behavior” because women are frequently harangued with catcalls and sexual requests. He also as-
I will attack these reasons by illustrating the discriminatory application of the First Amendment and exposing how inappropriate the reasonable man standard is in these contexts. I will also suggest modifications to the legal regime and alternative social strategies to reduce the prevalence of street harassment. The torts discussed below only capture the problem in piecemeal: some instances of street harassment could be legal assaults, some could qualify for intentional infliction of emotional distress, and others might fall under states’ definitions of indecent exposure or lewd and lascivious conduct. It is no accident that “no recognized legal category has been applied with any regularity to the entire fact pattern of sexual harassment,” a phenomenon Professor Catherine MacKinnon attributes to “the conceptual inadequacy of traditional legal theories to the social reality of men’s sexual treatment of women.”

That said, the most egregious instances of street harassment could and should be covered by some of these torts. Other incidents involving employees and common carriers could be proscribed by civil liability in the same way Title VII prohibited the sexual harassment of women in the workplace.

A. Example Statutes

New York’s criminal statute for harassment may provide a model law for other states:

A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.

One issue with this statute is that it appears to require repetition. One interpretation would be that the same individual would have to harass the victim multiple times. (Though the “repeatedly” associated with the third prong of harassing behavior (“committing acts”) seems oddly redundant with the initial requirement.) A Georgia statute prohibiting disorderly conduct asserted that the propositioning male did not violate the anti-harassment statute because women are frequently subjects of unwanted sexual propositions—though the statute itself only required the intent to harass, annoy, or alarm another and a course of conduct that served no legitimate purpose. Duncan, 363 A.2d at 809 (Hoffman, J., dissenting). For the Pennsylvania harassment statute, see 18 Pa. Cons. Stat. Ann. § 2709 (West).

States’ stalking (and some harassment) statutes require repeated instances of following.


Other statutes that capture some street harassment conduct, e.g., stalking, open lewdness, and aggravated harassment, are included in the Appendix. A future research project could include a comprehensive survey of state and/or municipal laws potentially proscribing street harassment conduct.

N.Y. PENAL LAW § 240.25 (McKinney).
provides another example:

(a) A person commits the offense of disorderly conduct when such person commits any of the following:

(1) Acts in a violent or tumultuous manner toward another person whereby such person is placed in reasonable fear of the safety of such person’s life, limb, or health . . .

(3) Without provocation, uses to or of another person in such other person’s presence, opprobrious or abusive words which by their very utterance tend to incite to an immediate breach of the peace, that is to say, words which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person in such other person’s presence, naturally tend to provoke violent resentment, that is, words commonly called “fighting words”; or

(4) Without provocation, uses obscene and vulgar or profane language in the presence of or by telephone to a person under the age of 14 years which threatens an immediate breach of the peace.

(b) Any person who commits the offense of disorderly conduct shall be guilty of a misdemeanor.41

Many instances of street harassment would be captured by the first prong (“[a]cts in a . . . tumultuous manner toward another person”). I will discuss the third prong, “fighting words,” infra Part II. Street harassment of girls under age 14 could be covered by the fourth prong. Note also that the Georgia statute has no intent requirement for the harasser.

The Model Penal Code also provides provisions against harassment and disorderly conduct:

A person commits a petty misdemeanor if, with purpose to harass another, he:

(1) makes a telephone call without purpose of legitimate communication; or

(2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or

(3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or

(4) subjects another to an offensive touching; or

(5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.42

41 GA. CODE ANN. § 16-11-39 (West).
A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) engages in fighting or threatening, or in violent or tumultuous behavior; or

(b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or

(c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

“Public” means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.43

The fifth prong of the harassment provision and parts (b) and (c) of the disorderly conduct provision appear most helpful in preventing street harassment. The disorderly conduct statute also encompasses reckless, not just intentional, behavior. The “no legitimate purpose” phrase in both provisions may also aid in this project; remember that many men who were asked why they harass did not provide persuasive answers. Like the Georgia statute, some parts of the Model Penal Code use a similar “fighting words” test for speech that is proscribed harassment: words that would incite a reasonable person (read: man) to violence or a breach of the peace. My analysis in Part II will show that this standard is unacceptably gendered and must be reconceptualized to extend equal protections to women. I also suggest that “true threat” doctrine is a promising starting point to justify restrictions on this type of speech.

1. Assault

Statutes and courts define assault as placing in another the reasonable fear of imminent danger, and street harassment often meets this test.44 For example, comments such as “I would f**k you” or “I’m going to f**k you” provide a basis for a reasonable fear that rape might occur. Since the likelihood a woman will experience rape or attempted rape during her lifetime is 20 percent to 25 percent, even without correction for underreporting,45 and approximately 22 percent of sexual violence is committed by a stranger,46 a reasonable woman (whether cognizant of those statistics or not) is and should be afraid when targeted and yelled at by a male stranger. Therefore, she would have a case for tortious assault.

42 MODEL PENAL CODE § 250.4.
43 MODEL PENAL CODE § 250.2.
44 Nearly all street harassment anecdotes surveyed for this paper mention fear of physical harm as an immediate response.
45 CENTERS FOR DISEASE CONTROL AND PREVENTION, supra note 14.
2. Indecent Exposure

Like the example described in the introduction, some street harassment situations include exposure of the harasser’s genitals. In most states, exposure of the genitals in a public place is a criminal offense punishable by fines, imprisonment, and/or sex offender registrations and restrictions. In other states, simple nudity is legal but intent to shock, arouse, or offend others may make the conduct prohibited. One could argue that if genitalia are exposed during a street harassment incident, as when some men publicly masturbate while watching women walk past, intent to shock, arouse, or offend the harassed is arguably present. And the words that often accompany these actions are further evidence of intent to do at least one if not more of those things.

3. False Imprisonment

False imprisonment, an intentional tort, is the “unlawful restraint by one person of the physical liberty of another.”47 Prominent jurist Sir William Blackstone stated, “[e]very confinement of a person is an imprisonment . . . even by forcibly detaining one in the public street.”48 Numerous women report having their path intentionally blocked by street harassers: for instance, where a man (or a group of them) stands directly in a woman’s path or corners her in a bus or a subway car. Some states, such as Connecticut, say that “[a]ny period of restraint, no matter how brief in duration, is sufficient to constitute a basis for liability.”49 Some street harassment offenders could be prosecuted under false imprisonment without dealing with any aspects of sexual intent (e.g., whether the advance was “unwanted”), which many courts are ill equipped to do. In fact, courts have found false imprisonment elements to be separate from verbal sexual harassment in workplace and employment cases. For example, a woman alleged that her manager “confined her in a walk-in cooler where he made sexual advances toward her.”50 A court could then deal with that allegation separately, asking only whether someone intentionally confined someone else and ending the inquiry there. This is perhaps another aperture into combating street harassment.

4. Intentional Infliction of Emotional Distress

Women harassed on the street could obtain redress through the civil remedy of intentional infliction of emotional distress (“IIED”). The Second Restatement of Torts reads “[o]ne 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.”51 As one author noted, “[i]n most states, the tort of [IIED] requires three elements: the conduct must 1) be extreme and outrageous; 2) be intentional or reckless; and 3) cause severe emotional distress.”52 Furthermore, “[i]n the words of the Restatement, ‘[t]he lia-
bility clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."

As discussed supra Part I, courts have difficulty determining whether instances of street harassment are “extreme and outrageous” since the conduct is so pervasive. But some sexual harassment cases indicate leeway to erode this standard based upon a subjective and community-based assessment of outrageous conduct instead of an amateur estimate of how common it is. The Wyoming Supreme Court reversed a lower court’s finding that a coworker’s sexual misconduct (staring, touching, hugging, following, and rubbing a coworker’s leg with his crotch) was not outrageous enough to present to a jury. The Wyoming court determined instead that such misconduct could be considered “outrageous” enough to give rise to a claim of IIED. Even under a stricter standard for civil remedies—such as the Third Circuit’s requirement that there be a “plus factor” of retaliation (some sort of professional harm, for example) for turning down sexual propositions in the employment context for an IIED claim—some instances of street harassment would be illegal. For instance, many women report verbal and behavioral escalation after initial harassing words are ignored, such as following, confinement, groping, or threats. Those could count as retaliatory measures.

Victims of street harassment have reported the severe emotional distress required by courts. Emotional distress includes “all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” Plaintiffs in employment sexual harassment cases have prevailed in IIED cases by showing diagnoses for post-traumatic stress disorder associated with the incidents. A vast majority of female victims of sexual violence, rape, or stalking report symptoms of post-traumatic stress disorder. Women who are harassed on the street report severe feelings of distress, depression, and fear, not only immediately after the harassment but also sometimes lasting for weeks or months. Many women blog about being afraid to step outside, avoiding public places, and becoming more and more introverted as a result of being harassed on the street. Repeat harassment is likely even more distressing, and the street harassment of rape and sexual assault survivors could be devastating to their psychological well-being.

5. Punishable Violations of Others’ Civil Rights

Street harassment arguably curbs women’s right to travel in public spaces. Though the

53 Id. at 738 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).
56 RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).
57 See, e.g., Kanzler, 937 P.2d at 1340.
58 NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, supra note 14, at 56.
60 Id. at 47.
Supreme Court has never directly considered a right to intrastate travel, some courts have found one, stating: “[t]he constitutional right to travel between states implies a correlative constitutional right to travel within a state, and the right of intramunicipal travel, as a basic human right.”

Women already report limiting their travel and restricting their public movements to protect themselves, avoiding construction sites and bus stops or switching subway cars. Therefore, under the following California statute, some forms of street harassment could be punished as “intimidating” women in the “free exercise or enjoyment” of their right to travel in certain public places on the basis of gender, a “perceived characteristic["]:

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

B. Summary

Some forms of street harassment are generally prohibited by the statutes and ordinances discussed above (even if the law is not properly enforced specifically in street harassment situations or at all), while some forms remain permitted. For example, the frequent and insidious admonition for women to “smile more” is probably currently legal. And even when street harassment cases come before courts as violations of current law, new interpretations are necessary to extend the law’s protection to victims. Statutes prohibiting harassment such as “smile more” would be novel, and are likely to be challenged on First Amendment grounds. However, I argue in the next Part that the First Amendment is not necessarily at odds with statutes that would ban speech-only versions of street harassment, because such prohibitions could fit into the “true threat” exception to First Amendment protection.

Similar to laws prohibiting obscenity and incitement, laws against “true threats” enjoy exceptional protection from First Amendment scrutiny because of their special public purposes. But slightly different issues are raised by the “true threats” doctrine. Laws against true threats, as explained in one seminal Supreme Court case, are enacted to protect individuals from the coercion engendered by threats of physical violence and the fear that such threats engender, whereas laws against incitement are enacted to prevent public disorder and conflict. Laws against cross
burning as a form of intimidation, for example, need not be justified on the grounds that the activity is likely to lead to retaliatory violence; rather, the act of cross-burning reveals a hateful intention to place another in mortal fear. It is therefore illegal. However, an exploration of the gendered origins of the First Amendment incitement doctrine can help explain why street harassment remains uncaptured by “fighting words” and can assist us in anticipating difficulties in applying even the “true threat” doctrine. But perhaps the undertones in some of the “true threat” cases, including a special concern about race-based violence, provide hope that prevention of gender-based violence may legitimately motivate prohibitions against “true threats” targeted towards women, making up for the ground lost by the “fighting words” doctrine.

II. THE GENDERED FIRST AMENDMENT

Critics allege criminalizing or holding people liable for street harassment threatens to chill freedom of expression—this country’s prize right. However, I argue that the legal tradition of the First Amendment is deeply and unfairly rooted in a male-dominated conception of public spaces and therefore does not recognize the harms inflicted on women from street harassment. I will support this generalization through two specific examples: the “fighting words” doctrine and the homosexual advance defense. Freedom of speech is not absolute—public speech men perceive as harmful is protected whereas words that harm women are not. This is because “reasonable” women typically do not—and cannot, for physical safety reasons—respond to insult or injury with explosive violence. I will also suggest an aperture into First Amendment protection for street harassment using the “true threat” doctrine, which does not require a violent response from the listener in order to justify proscription.

The American commitment to free speech has never been universal. As Professor Mari Matsuda states, “[t]he American doctrine recognizes a few limited categories of speech that take on qualities beyond expression.” Perjury, extortion, conspiracy, and false warranties are punished, despite being purely speech. Courts have subordinated our commitment to free speech in favor of national security, “functioning of government,” public safety and order, privacy, reputation, and decency.

The priority of public safety and order, as it is currently applied, only protects speech harmful to the male half of the population. The “fighting words” doctrine provides that words that are likely to bring the average recipient—a man—to blows are unprotected by the First Amendment. The Supreme Court defined such speech as words “which by their very utterance

67 See Virginia v. Black, 538 U.S. 343, 347 (2003) (finding that cross-burning carried out with the intent to intimidate may be banned).
69 Matsuda, supra note 23, at 2351.
71 Matsuda, supra note 23, at 2355.
72 See Chaplinsky, 315 U.S. at 571-72 (noting limited classes of unprotected speech, including insults that provoke violence).
inflit injury or tend to incite an immediate breach of the peace.”73 Also included are “threatening, profane, or obscene revilings.”74 By definition, the “fighting words” doctrine privileges male responses to verbal harassment and leaves women unprotected. Words that “incite” a breach of the peace are probably only spoken to men, since they are the ones most likely to react with explosive and disruptive violence. This doctrine is rooted in a boy-and-man-centric conception of the public street, where they yell at each other and fight. Women, for a number of reasons, including an eminently reasonable fear of retaliation and physical harm, are unlikely to “breach the peace” after even the most obscene, offensive, or harmful insults.

Street harassment, much of which is just as offensive as other “fighting words,”75 remains permissible because of mere differences in average size and aggression between the genders. Many women report feeling enraged, angry, and infuriated after such encounters. But because street harassment does not occur with two persons of equal power, the reaction of an average woman is flight rather than fight: avoiding eye contact, walking faster, or leaving the location entirely. This is a reasonable, self-preserving reaction, given the prevalence of sexual violence and the intuitive connection between verbal and physical assault. Women who respond to the offensive words verbally at all, even politely, say the harassment can quickly escalate to violence.76 Even those who do not respond are also met with violence.77 It is absurd to imagine a female victim throwing a punch in response to a male stranger’s harassment, no matter how sexually explicit and offensive his comments are. In addition to the size difference between the average man and average woman, street harassment often occurs with multiple men and one woman target, where initiating a fight would be highly irrational from her perspective. Therefore, a woman’s fear, desire to keep the peace, or self-restraint, however sensible or noble, means these words are coded as legally inactionable. In other words, the lack of violent responses from harassed women excludes them from the potential protection from speech categorized as an incitement to violence or a disturbance of the peace. The “fighting words” men utter at women on the street are sufficient to incite in them a very real (and reasonable) fear of physical violence—a “fight” they would likely lose—but do not inspire them to escalate the conflict.

Another example of the legal privilege given to male explosive violence is the “homosexual advance defense.” The law treats unwanted sexual advances upon men very differently than unwanted sexual advances upon women: targeted men could use the defense to reduce a charge of murder, but the law did not recognize an equivalent for women. The “homosexual advance defense” appeared in courts starting in 1967 and allowed (male) defendants to raise homosexual panic as an insanity defense to homicide prosecutions.78 Though it is no longer recognized

73 Id. at 572.
74 Id. at 573.
75 The Court determined that “damn racketeer” and “damn Fascist” were fighting words. Id. at 574.
76 For example, a woman told a harassing man to “please leave [her] alone” on the Metro. Stranger on a Train: I Would Fucking Kill You Bitch', JEZEBEL (Sept. 9, 2012 6:30 PM), http://jezebel.com/5941463/stranger-on-a-train-i-would-fucking-kill-you-bitch. He then punched the walls and doors of the train and stared at her face while screaming, “IF I HAD A GUN I’D SHOOT YOU” and “I WOULD FUCKING KILL YOU BITCH” in her face. Id.
77 Niki’s Story: When Her Street Harassing Stalker Escalated to Physical Violence, She Had to Involve the Police and Court System for Protection, HOLLABACK! (Jan. 21, 2013, 5:11 PM), (on file with the author).
in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* and is no longer a full defense, vestiges persist.\(^79\) Some courts have allowed mere words and a non-violent act from one man to another to reduce a charge of murder.\(^80\) On the other hand, unwanted sexual advances toward women are only legally recognized in certain settings, such as the workplace, and many of those cases are ultimately unsuccessful. Even when the unwanted sexual advance is factually similar to those in homosexual advance defense cases, courts refuse to rule in the woman’s favor or recognize the initiator’s conduct as legally significant.\(^81\) It appears unwanted sexual advances upon women must meet a higher threshold before they are sufficient to provide their recipients with redress or legal recognition—perhaps in part because women do not usually respond with violence.

Even if women did respond to street harassment and unwanted sexual advances with violence, courts might not respond favorably. For example, in 2006, seven black lesbians in Greenwich Village were sexually propositioned by a man who followed them down the street, yelling obscene remarks and grabbing his genitals.\(^82\) When the women confronted him, he threw a cigarette and spat on them.\(^83\) A physical altercation followed, during which a woman stabbed and injured him.\(^84\) The sentencing judge identified the women as the aggressors because the man had just been uttering words beforehand, and maintained that the women should have walked away from the situation.\(^85\) Harassed women are faced with a lose-lose situation; even though the “fighting words” doctrine punishes women for reacting without violence, courts may still be unforgiving in the rare instances where women are unafraid to use force. Nevertheless, this case supports the idea that street harassment may be “fighting words,” as the intended targets were incited to violence.

The “true threats” doctrine, which is related but not identical to the “fighting words” doctrine,\(^86\) may be a powerful First Amendment exception to combat street harassment\(^87\) for a few

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\(^80\) In *Mills v. Shepherd*, the defendant voluntarily accompanied the victim to a cave after the victim offered him $20 to commit a homosexual act. 445 F. Supp. 1231, 1234 (W.D.N.C. 1978). The victim grabbed the defendant’s privates and made a pass at him, after which the defendant pushed him out of the car, chased, and then kicked him to death. *Id.* The trial court allowed jury instruction for voluntary manslaughter and the defendant was convicted of this lesser charge. *Id.*

\(^81\) See, e.g., Meriwether v. Carauster Packaging Co., 326 F.3d 990, 992-93 (8th Cir. 2003) (finding that a plaintiff did not demonstrate “severe or pervasive” harassment where her co-worker grabbed her buttock “with force, not merely a pinch, but a hold near her upper thigh”).


\(^83\) *Id.*


\(^85\) *Id.*

\(^86\) The Supreme Court stated that threats of violence are outside of First Amendment protection.
reasons: (a) there is no expectation of a violent response from the listener; (b) some courts do not substitute the “reasonable man” for the “reasonable listener;” (c) pervasiveness of the conduct matters less (an “extreme and outrageous” requirement is not directly written into some statutes); and d) the jurisprudence is relatively undeveloped and unentrenched. The exact boundaries of the “true threat” doctrine remain open, as “even though the Supreme Court has made clear that true threats are punishable, it has not clearly defined what speech constitutes a true threat.”88

The Court suggested a few factors for courts to consider, but no rule exists and no subsequent Supreme Court case has elaborated upon them. They are: “(1) whether or not the speech constitutes political hyperbole; (2) the overall context in which the statement is made; (3) the reaction of the listeners; and (4) whether or not the statement was conditional, especially if it was conditional on an event that was unlikely to occur.”89

Street harassment could be a true threat, according to those factors. The Supreme Court has found that specific categories of speech do not warrant First Amendment protection because they are “of such slight social value as a step to truth that any benefit that may be derived from [them] is clearly outweighed by the social interest in order and morality.”90 The Court is especially hesitant to restrict political speech, as evidenced by the first factor in the list. But among the hundreds of verbal ejaculations hurled at women that I read for this Article, I did not find one that contained political content or ideas.91 Potentially threatening speech protected by the Constitution has included content decidedly more political or ideological in nature than sexually explicit comments.92 Even unlike the words in some other threat cases, street harassment utterances have no expressive idea value. Thus, suppressing street harassment would not mean the suppression of ideas with social value or political significance.93

In addition, usually only the target or a handful of people hears the harassment; it does not and is not meant to reach a broad audience or the community at-large. The context of the statement is not a political rally or a demonstration, it is usually made to a woman walking alone. Further, men who harass do not intend to start a dialog

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R.A.V., 505 U.S. at 388 (listing the reason as “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur”).

87 Jennifer Elrod, Expressive Activity, True Threats, and the First Amendment, 36 CONN. L. REV. 541, 547 (2004) (“Over the course of the twentieth century, the Supreme Court has declared in several cases that true threats remain beyond the circle of protected speech under the First Amendment.”).

88 Jennifer E. Rothman, Freedom of Speech and True Threats, 25 HARV. J.L. & PUB. POL’Y 283, 288 (2001). Other courts have determined that true threats are punishable as well. See, e.g., United States v. Kelner, 534 F.2d 1020, 1026 (2d Cir. 1976) (finding that penalizing specific threats of physical injury is a valid aspect of government’s “constitutional responsibility to ensure domestic tranquility”). See also California v. Mirmirani, 636 P.2d 1130, 1138 n.10 (Ca. 1981) (“Although the Legislature may constitutionally penalize threats, even though they are pure speech, statutes which attempt to do so must be narrowly directed only to threats which truly pose a danger to society.”).

89 Rothman, supra note 88, at 295; see Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) (finding a statute punishing threats to the life of the president to be “constitutional on its face”).

90 Chaplinsky, 315 U.S. at 572.

91 See sources cited supra note 7.

92 See Watts, 394 U.S. at 706-08.

93 In R.A.V. v. City of St. Paul, the Court prohibited a restriction on speech because it was a broad restriction on the expression of racist or sexist ideas. To be valid, the Court noted, the restriction would have to be based on the mode of expression, rather than the content. 505 U.S. at 393-94.
with their targets. Professor Laurence Tribe writes: “[i]t is not plausible to uphold the right to use words as projectiles where no exchange of views is involved.”

Not only does street harassment exist outside the political, intellectual, and ideological discourse of society, but it also lacks any redeeming social, literary, or artistic value. A Tumblr site found no women who enjoyed the attention of street harassers. Some men who harass women on the street say they do it for fun or out of boredom. No men interviewed on the street said they wanted to advance an ideological or political agenda or begin a meaningful discussion about gender and male-female relationships.

Even if some men who street-harass intend to convey an idea, the expressive value is far outweighed by women’s interests in physical safety and their right to be present in public spaces. Arguably, some men intend to convey that women in public are available to them (almost like property) and can be objectified without consequence. The rationale for exempting true threats from First Amendment protection may give powerful hope to those who want legislation against street harassment. According to the Supreme Court, there are at least three justifications for the “true threats” doctrine: “(1) to protect people from the fear of violence; (2) to prevent the disruption that this fear engenders; (3) to incarcerate people who have identified themselves as likely to carry out a threatened crime before they have the opportunity to perpetrate the crime.”

The first two do the most work against street harassment. Studies and my survey of anecdotes for this paper indicate fear, sometimes debilitating, is a nearly universal (and reasonable) reaction to street harassment. Even when harassment occurs in a public place or during the daytime, it could easily escalate into violence, or the offender could follow the woman until she is alone and harm her. With example after example of harassment escalating into physical violence or stalking in highly-trafficked areas during peak travel hours, it is hard to identify a safe or harmless context for street harassment. Women have no way of knowing whether a particular interaction will become violent, and there is always a significant possibility that it will. Therefore, fear is a reasonable response for most women during and after most instances of street harassment.

In addition to the original fear the harassment engenders, it causes a significant disruption in the individual woman’s life: many women pay a psychic fear tax. As mentioned earlier, harassed women avoid going outside and making eye contact, undergo psychological counseling, and sometimes even stop working.

Furthermore, given the high incidence in the population of

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95 “Other areas of the law, such as obscenity law, allow speech to be protected not only if it has serious political value, but also if it has literary, social, or artistic value.” Rothman, supra note 88, at 330.


97 Kearl, supra note 35, at 132.

98 Rothman, supra note 88, at 290-91 (noting four reasons); see R.A.V., 505 U.S. at 388. The Supreme Court has also held that prohibiting a particular “subset of intimidating messages” was permissible because it was among “those forms of intimidation that are most likely to inspire fear of bodily harm,” and thus “‘consist[ed] entirely of the very reason the entire class of speech at issue is proscribable.’” Virginia v. Black, 538 U.S. at 361-63 (quoting R.A.V., 505 U.S. at 388).


100 See, e.g., Kathryn Stamoulis, “Hey Baby” Hurts: The Psychological Implications of Street
female victims of sexual assault and rape, street harassment can exacerbate previous pain, causing an even larger disruption. Protecting half the population from the fear of violence and protecting individuals and our society from this type of disruption is arguably important enough to curtail some speech that lacks redeeming social value.\footnote{An intersection of “true threat” doctrine with obscenity or explicitly offensive speech may work to take a chunk out of the problem—perhaps the most extreme or vulgar comments could be more easily prosecuted as well. See Elisabeth Muckala, \textit{Speech Prohibition: How Far Is Too Far? The First Amendment Implications of Virginia v. Black}, 30 OKLA. CITY U. L. REV. 397, 400 (2005).}

The flexibility of the “true threat” intent requirement may allow for broader prosecution of street harassment. In \textit{Virginia v. Black}, the Supreme Court plurality did not require that the speaker intend to carry out the threat,\footnote{Virginia v. Black, 538 U.S. 343, 359-60 (2003).} but the Court’s minimal guidance on this issue means circuit courts vary in their attention to the speaker’s intent. Most do not require an intent to threaten, though “[s]ome judges on the Ninth and Fourth Circuits think that courts and juries should, in certain circumstances, consider the speaker’s intent,” and the Second Circuit requires imminence.\footnote{Rothman, \textit{supra} note 88, at 302.} Many instances of street harassment would pass even those stricter tests; at least fifteen percent of men in one survey intended to demonstrate power over their targets,\footnote{Kearl, \textit{supra} note 35, at 131-32.} arguably equivalent to an intent to threaten. In addition, some also harass with the intent to choose rape victims.\footnote{See Kearl, \textit{supra} note 13, and accompanying text.}

Rather than limitations on street harassment working against First Amendment interests, the true spirit of the First Amendment can be a useful tool in this project. The street is the apex of the polity and First Amendment rights—the site of public movement, visibility, and speech. It is a powerful place. But it has historically been a very male-oriented space, from childhood onward. Whether boys are playing kickball in the street or men are leaning against a fence, the street is dominated by their words and actions. Current laws structuring public life, including the exceptions to First Amendment protections, privilege traditionally male behavior and communication. Pervasive street harassment limits women from entering public spaces and participating fully in public life due to both actual and expected hostility. There are even economic consequences; women take cabs instead of public transportation, take the longer route to work and miss out on hourly wages, or pay gym fees and buy home exercise equipment because they cannot run outside. The state’s refusal to recognize these harms results in a double-injury; women are disproportionately harmed by speech in the street and then not compensated for it by the state in the same ways that men are.

Professor Catherine MacKinnon channels Hobbes to argue for state intervention in order to protect women from private harm in private places.\footnote{See generally CATHERINE A. MACKINNON, \textit{TOWARD A FEMINIST THEORY OF THE STATE} 161 (1989).} I argue state intervention is necessary to protect women from private harm in public places. Today’s streets are remnants of the untamed...
Hobbesian state of nature for women: nasty, brutish, and with the fear of violence ever-present: a modern war zone. This is unacceptable in a modern society. Restricting street harassment will serve the ends of the First Amendment in allowing and encouraging women to fully contribute their voices in all spaces, public and private. As scholar Jennifer Elrod states, “[t]rue threats are the antithesis of the speech clause’s central principle that favors wide-ranging, robust debate and discussion of a broad variety of subject matter.”¹⁰⁷ Indeed, that central principle supports legal action against street harassment. Creating public discourse is not always passive; for example, preserving freedom of expression once meant court-ordered police escorts for the Ku Klux Klan to prevent public interference with their demonstration.¹⁰⁸ By restricting street harassment, a category of utterances with very low or nonexistent social value, women will be able to participate more fully in public debate, express themselves, access public resources, and travel freely. The fabric of public life—the actual debates on public policy, community causes, and the economy—will be richer with more voices.

### III. PROPOSED REMEDIES

I will outline both legal and non-legal solutions to this problem. Though the list is by no means exhaustive, the goal is to remove slices of the pie chart that represents all street harassment. If we can reduce the prevalence of street harassment, the likelihood that courts will view the conduct as “extreme and outrageous” within their jurisdictions increases.

#### A. Legal Strategies

A piece of legislation like Title VII of the Civil Rights Act could provide a starting point for legal remedies, including tort small claims against a) any corporation whose employees are on the street in the performance of their job duties and harass women and b) common carriers, who owe a higher duty of care to their passengers. Small claims court could quickly resolve these issues (especially with new video technology allowing for recordings of these incidents). I suggest that venue only for expediency and to avoid the more stringent requirements for criminal penalties, but certainly not to trivialize the harms from street harassment. Once the prevalence decreases, perhaps courts will be more willing to see the conduct as intolerable and worthy of penalty.

Company plaintiffs may be more efficacious, since they solve significant problems with typical individual offenders, including anonymity, mobility, and lack of income. The tort would encompass corporations whose employees work on or use the street in the performance of their occupational duties: for example, construction companies, building cleaners, trucking companies, and delivery services.¹⁰⁹ I envision a sanitized “construction place.” The regime could draw directly from Title VII’s “hostile environment” principles: unwelcome sexual conduct that creates a hostile, intimidating, or offensive situation.¹¹⁰ Though that legislation does not currently apply to non-employees outside the workplace, it could provide a framework for liability to protect women

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¹⁰⁷ Elrod, supra note 87, at 547.


¹⁰⁹ Anecdotes indicate truck drivers frequently harass women in cars and on the street, and recent news articles show taxicabs are another common venue. Construction sites are “perennial problems.” Bowman, supra note 20, at 529.

harassed by “men at work.” My proposal could be an amendment to Title VII or a separate statute modeled off its framework. The statutory language could read:

Verbal utterances or physical gestures of a gender-specific sexual nature directed at consumers or passers-by from employees working in or traversing through public places or employees of common carriers during the performance of their job duties which could cause a reasonable fear of bodily injury or harm in a person of any gender are prohibited.

To trigger employer liability under the statute, the harassment must occur while the harasser is acting in his capacity as employee and is in a public place. For instance, the harassing conduct of a construction worker walking home after his work shift would not fall under the statute. But liability would not be limited to harassment originating at the construction site; a construction worker running an errand related to the job during his shift—picking up plywood from a supplier, for example—would be responsible (as would his employer) for any of his harassing conduct that occurred in public.

After meeting that initial test, employers would be vicariously liable for the street harassment of their employees if they (a) failed to tell their workers initially that conduct was unacceptable during training or other corporate introduction, (b) lacked a reporting/complaint mechanism, or (c) failed to take post-complaint remedial action. Many companies already have internal reporting mechanisms in place created by Title VII, so marginal costs to the business may be small. Complying with section (b) could be as easy as adding a phone number for a reporting hotline to the corporation’s advertisement at a construction site. This proposal also leverages the corporation’s profit interest. The Equal Employment Opportunity Commission collected $52.3 million in penalties for sexual harassment violations in fiscal year 2011. A 1988 survey suggested that sexual harassment costs the typical Fortune 500 company $6.7 million annually due to losses in employee productivity, not including damage awards and litigation costs. The possibility that these costs could increase by even a fraction may incentivize a company to properly train their public-facing employees. In addition, many businesses value potential customer and community goodwill.

The victim of harassment could sue the employee and employer for compensatory and punitive damages. Compensatory damages would pay victims for “out-of-pocket expenses” (e.g., any psychological counseling sought) and also for emotional harm suffered (“such as mental anguish, inconvenience, or loss of enjoyment of life”). The court could also award punitive dam-


113 See Reporting Harassers, STOP STREET HARASSMENT, http://www.stopstreetharassment.org/strategies/reporting/ (last visited May 21, 2013) (arguing that businesses “will not want employees harassing potential customers” or having their business get a bad reputation).

ages to punish an individual or employer for “especially malicious” acts. In addition, the court could require the employer to improve employee training or monitoring mechanisms to stop such conduct in the future. As under Title VII, there could be limits on compensatory and punitive damages based on employer size to assuage concerns about the impact on small businesses.

Public transportation is another common site for street harassment. Seventy-two percent of Bay Area respondents believed sexual harassment and assaults on public transportation were a problem. Both Japanese and Brazilian governments segregated subway riders by gender in 2005 and 2006 to shield women from unwanted sexual behavior. Remedies against both private and municipal common carriers may allow victims to more easily obtain redress. Courts characterize the duty to passengers as the “highest duty of care,” “extraordinary diligence,” or the “utmost care and diligence.” Carriers can include buses, subways, taxis, escalators, toll bridges, ships, elevators, and even ski lifts. Women who are harassed by transit employees or even by other riders could sue if the employees have been negligent or reckless in their protection of passengers. Indeed, some courts have held that the higher duty of common carriers applies to assault or battery or other harms committed by a fellow passenger. In many relevant anecdotes, women are harassed on public buses and trains in front of conductors, who take no action (e.g., removing or reporting the harasser). Some women even report being harassed by the conductors themselves. Such a regime for public transportation could prevent such scenarios from occurring through deterrence and, at the very least, compensate victims. Some major municipal transportation authorities—such as DC’s WMATA and Philadelphia’s SEPTA—have paired with anti-street harassment organizations for public service announcements, indicating that common carriers are beginning to recognize that a problem exists.

New technology can assist in bringing these suits. For example, camera phones or mobile video can more easily document instances of harassment and identify harassers. Bystanders can

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115 Id.
116 Id.
118 Fairchild & Rudman, supra note 18, at 341.
119 Some jurisdictions exclude private carriers from the higher standard of care. See 73 A.L.R. 2d 346 (originally published in 1960).
120 I MODERN TORT LAW: LIABILITY AND LITIGATION § 3:55 (2d ed.).
121 Id. at § 3:56 (2d ed.) (citations omitted).
collect evidence in cases where victims feel their safety would be threatened by taking photos or video. Cell phone photos and videos are admissible in civil courts— for example, people can currently obtain a temporary restraining order with a cell phone video.

Again, though harassment by employees on the street and on common carriers is only part of the problem, eliminating these instances could be the first legal steps. If this strategy reduces the behavior’s prevalence, judges may have a harder time asserting the conduct is “commonplace” and therefore should not be prohibited or criminalized.

B. Social Movement

A second, non-legal strategy using on-the-ground mobilization could also serve this goal. Through raising public awareness and engaging individuals in community debate, the incidence of street harassment may go down even further. A few women who stood up to their harassers reported positive behavior change. For example, a street harasser whose catcalls were ignored followed a woman down the street and accused her of being prejudiced (he was black and she was white). She answered yes, but explained that she was only biased “against men who stand on street corners shouting at women.” The woman recalled, “[h]is shocked expression changed to one of thoughtfulness and as he turned away he said, ‘I’m going to think about what you just said.’” Technology can be leveraged as part of the social movement as well; cell phone cameras, videos, and social networking sites allow people to upload photos in real-time. Women could take pictures or videos of their harassers, tag the pictures or videos with geolocation technology, and post them virtually on the internet or even in hard copy (on street signs or lampposts). Men who harass may see or hear of the public shaming and change their behavior. Perhaps snapping a cell phone camera in a harasser’s face could be the less risky equivalent of a “fight” incited by fighting words, allowing a woman to respond instead of being forced into silence.

Social movements have succeeded in creating legal change in other contexts. Parallel grassroots social movements were helpful in advancing gay rights in the Massachusetts and Vermont court systems, for example. In addition, courts acknowledged that changes in societal perceptions and norms led them to prohibit sexual misconduct— “suggestive remarks[, ] derogatory comments or direct demands for sex”— in the workplace. For example, the Utah Supreme Court stated, in finding the harassment of a woman’s co-workers sufficient to support the objective conduct requirement of IIED:


It is worth stating forcefully that any other conclusion would amount to an intolerable refusal to recognize that our society has ceased seeing sexual harassment in the workplace as a playful inevitability . . . and has awakened to the fact that sexual harassment has a corrosive effect on those who engage in it as well as those who are subjected to it and that such harassment has far more to do with the abusive exercise of one person’s power over another than it does with sex.\textsuperscript{131}

Preliminary research and the burgeoning social movement against street harassment indicate it also has a corrosive effect on individuals in our streets and public places. It is not an effective method of “sexual play.” In my survey of street harassment stories, none have resulted in a productive social relationship between the harasser and the victim. It turns on fear and intimidation rather than play or banter, and has more to do with abuse of male power and dominance toward women who dare venture out into public.

\textbf{IV. CONCLUSION}

I am hopeful that our society can evolve to extend the legal protections it granted women in the workplace to women in public spaces. A less gendered conception of the First Amendment and a more complete understanding of what street harassment is—a “true threat”—can grant full public participation and rights to women. Through the legal and social solutions I propose in this paper—leveraging sexual harassment law to pluck some low-hanging fruit and using technology and community education to capture as many one-off instances of street harassment as possible—we can reduce the number of street harassment incidents and begin a virtuous cycle whereby courts unhesitatingly recognize the grievous harms and costs imposed on harassment victims.

Measures to reduce gender-based verbal violence may also advance the goals of the First Amendment. If the “reasonable woman” no longer had to worry about being raped or sexually assaulted in public places, communication between men and women in public forums could be freer and healthier. Without the violent subordination of women, a more egalitarian society would ultimately mean a more expressive one.

\textsuperscript{131} Retherford v. AT&T Comms. of Mountain States, Inc., 844 P.2d 949, 978 (Utah 1992).
V. APPENDIX

These statutes could also be read to proscribe street harassment.

NEW YORK PENAL LAW § 240.26:
HARASSMENT IN THE SECOND DEGREE

A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:
1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
2. He or she follows a person in or about a public place or places; or
3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose . . . .

Harassment in the second degree is a violation.\(^{132}\)

NEW YORK PENAL LAW § 120.45:
STALKING IN THE FOURTH DEGREE

A person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct:
1. is likely to cause reasonable fear of material harm to the physical health, safety or property of such person . . . ; or
2. causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact with such person . . . and the actor was previously clearly informed to cease that conduct . . . .

Stalking in the fourth degree is a class B misdemeanor.\(^{133}\)

MODEL PENAL CODE § 251.1: OPEN LEWDNESS

A person commits a petty misdemeanor if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.\(^{134}\)

\(^{132}\) N.Y. PENAL LAW § 240.26 (McKinney 2014).
\(^{133}\) N.Y. PENAL LAW § 120.45 (McKinney 2014).
\(^{134}\) MODEL PENAL CODE § 251.1.