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Street Harassment: The Need for Criminal Remedies

Sonja Arndt*

Just half a mile, I can do this. As I head out the door, I double check that everything is set. Nothing hanging from my bag to attract attention. Huge, oversized coat on, so nothing I wear is “asking for it.” Hopefully I go unnoticed today. Headphones in, volume off. I want to act like I do not hear them, but I want to make sure I can hear someone coming if they run up behind me. Hopefully today is not the day where mere words turn into actions. Hopefully today is not the day where years of comments become a physical realistic nightmare. Do not smile—do not do anything to make them think the comments are welcome. Just half a mile and I will be safe indoors. Ready . . . set . . . go . . .

87 PERCENT OF AMERICAN WOMEN between the ages of 18-64 have BEEN HARASSED by a male stranger; and over one half of them experienced “extreme” harassment including being touched, grabbed, rubbed, brushed or followed by a strange man on the street or other public place.¹

AMONG MEN, 25% HAVE BEEN STREET HARASSED (a higher percentage of LGBT-identified men than heterosexual men reported this) and their most common form of harassment was homophobic or transphobic slurs (9%).²

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1. *Oxygen/ Markle Pulse Poll Finds: Harassment of Women on the Street is Rampant; 87% of American Women Report Being Harassed on the Street by a Male Stranger*, PR NEWS WIRE (June 22, 2000, 1:00 PM), <http://www.prnewswire.com/news-releases/oxygenmarkle-pulse-poll-finds-harassment-of-women-on-the-street-is-rampant-87-of-american-women-report-being-harassed-on-the-street-by-a-male-stranger-73669892.html> (emphasis added).

2. Holly Kearl, STOP STREET HARASSMENT, UNSAFE AND HARASSED IN PUBLIC SPACES: A NATIONAL STREET HARASSMENT REPORT, STOP STREET HARASSMENT (2014), <http://www.stopstreetharassment.org/wp-content/uploads/2012/08/2014-National-SSH-Street-Harassment-Report.pdf> (last visited Feb. 5, 2017) (emphasis added).

100 PERCENT OF THE 54 WOMEN ASKED IN THE BAY AREA HAVE BEEN THE TARGET OF OFFENSIVE OR SEXUALLY-SUGGESTIVE REMARKS at least occasionally: 19 percent said every day, 43 percent said often, and 28 percent said sometimes.³

Street harassment is out there and it impacts millions of Americans.⁴ The question is: where are the laws protecting the victims?

I. OVERVIEW

Street harassment encompasses a wide array of terms, such as catcalling or verbal harassment, which are often used interchangeably. This paper calls for the proper definition and categorization of street harassment within the criminal justice system, asking the system to distinguish between the different levels of street harassment by weighing six factors in a totality of the circumstances analysis. By properly defining and categorizing the different types of harassment, it allows lawmakers to create laws that proportionately punish the act, resulting in accountability and justice. Furthermore, proportionate punishment avoids the over or under criminalization of defendants. If street harassment is going to be stopped, it starts by clearly defining and distinguishing the types of street harassment and creating laws and penalties that appropriately criminalize the offense.

Sections two and three of this article focus on current definitions and laws that address street harassment. Additionally, they discuss the shortcomings of existing definitions and laws. Section four outlines why we need criminal remedies for street harassment. Section five discusses a legislative proposal dividing street harassment into three categories: catcalling, public sexual harassment, and public sexual assault, in addition to proposing penalties for those offenses. Section six considers issues that arise from the implementation of street harassment laws, and argues for limited intent requirements. Section seven briefly shines light on future obstacles regarding the reasonable person standard.

II. HOW STREET HARASSMENT IS CURRENTLY DEFINED

A substantial issue with combating street harassment is that the term street harassment does not have a clear definition. Although some organizations offer definitions for street harassment, which provide a starting point when defining the term, some of those definitions fail to acknowledge all street harassment victims. While other definitions are overly broad, resulting in the failure to distinguish between the different severity levels of street harassment.

Without a clear definition for street harassment, it makes it difficult for legislatures to create laws, and almost impossible for prosecutors to hold

3. LAURA BETH NIELSEN, *LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH* 43 (Princeton Univ. Press 2004) (emphasis added).

4. Hannah Levintova, *Now We Know How Many Women Get Groped by Men in Public*, MOTHER JONES (June 6, 2014, 6:00 AM), <http://www.motherjones.com/media/2014/06/street-harassment-survey-america>.

accountable the people who violate them. This paper will first examine three broadly accepted, by both academic and advocate communities, street harassment definitions, and discuss why the definitions cause challenges when bringing forth justice.

A. STREET HARASSMENT IS NOT ONLY A MALE-ON-FEMALE OFFENSE

One of the most accepted definitions of street harassment was created by a leading researcher on the topic, Cynthia Bowman. According to Bowman:

Street harassment occurs when one or more unfamiliar men accost one or more women in a public place, on one or more occasions, and intrude or attempt to intrude upon the woman's attention in a manner that is unwelcome to the woman, with language or action that is explicitly or implicitly sexual. Such language includes, but is not limited to, references to male or female genitalia or to female body parts or to sexual activities, solicitation of sex, or reference by word or action to the target of the harassment as the object of sexual desire, or similar words that by their very utterance inflict injury or naturally tend to provoke violent resentment, even if the woman did not herself react with violence.⁵

Although this provides a good starting point, the definition is limited to opposite sex interactions and fails to acknowledge all street harassment victims. Despite people believing that street harassment is limited to male-on-female interactions, a 2014 national study conducted by Stop Street Harassment (hereinafter “SSH Study”) found this to be untrue. The SSH Study revealed that three minority groups face street harassment at disproportionate rates: women, persons of color, and members of the LGBT community.⁶

The SSH Study further found that although men disproportionately commit the offense of street harassment, men can also be victims, citing that men who are part of the LGBT community often face street harassment by other males.⁷ Thus, street harassment is not limited to a male-on-female offense.⁸ In fact, male-on-male street harassment tends to be more severe than male-on-female harassment.⁹ Most men who are victims of street harassment face with derogatory slurs such as *fag* or *dyke*, while the largest percentage of women victims face someone whistling or making sounds at them.¹⁰ Bowman’s findings confirm this testament, noting “lesbians are subjected to a uniquely offensive experience, as they are both ‘punished’ for being women and assumed to be what they are not—heterosexual. On the other hand, if it is obvious that they are lesbian, men harass them for that

5. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 524 (1993), <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1141&context=facpub>.

6. Kearl, *supra* note 2, at 6.

7. *Id.* at 15.

8. *Id.*

9. *Id.* at 16.

10. *Id.* at 16.

status as well.”¹¹ To constrain street harassment as a gendered crime fails to acknowledge that both men and women can be victims of the offense.

B. STREET HARASSMENT IS NOT LIMITED TO SEXUAL COMMENTS ABOUT THE PRIVATE BODY

A second working definition of street harassment defines street harassment as an act that: (1) occurs in public, (2) involves unacquainted members of the opposite sex, (3) is a comment that is unacceptable to the harassee (the victim of the harasser), (4) the remarks involve parts of the body not available for public examination, and (5) the comments are often derogatory.¹² This definition raises the same concern as noted above, in that it limits street harassment to opposite sex interactions. Furthermore, this definition limits street harassment to remarks that involve *parts of the body that are not available for public examination*. This provides two problems. First, the definition fails to address the fact that street harassment does not have to involve a part of the body. Take for example a harasser calling a harassee a *whore*. Second, the definition fails to acknowledge that a perpetrator can engage in sexual acts, which, in addition to words, can result in street harassment. Take for example someone following their victim and making sexual thrusting motions.

The SSH Study confirms that street harassment is restricted to comments about the private body. The study found that less than one-fourth of women and one-tenth of men were harassed by someone talking about their body parts.¹³ Furthermore, the SSH Study revealed that people are harassed in various ways, such as being subjected to homophobic slurs, a person touching or brushing against someone in an unwelcome way, or being called sexually explicit names.¹⁴ People are also harassed when no words are spoken, for example when someone whistles or goes *Pssst* at them.¹⁵ Other forms of documented and non-verbal street harassment includes stalking.¹⁶ In short, street harassment comes in different forms and impacts different types of people, both male and female. If a universal definition of street harassment is created, it must include (1) all victims and (2) all forms of harassment.

C. A CATCH-ALL DEFINITION CAN NEGATIVELY IMPACT DEFENDANTS

The nonprofit, Stop Street Harassment (SSH), defines street harassment as “unwanted interactions in public spaces between strangers that are motivated by a person’s actual or perceived gender, sexual orientation, or gender expression and make the harassee feel annoyed, angry, humiliated, or

11. Bowman, *supra* note 5, at 531–32.

12. Deirdre Davis, *The Harm That Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN'S L.J. 133, 138–40 (1994), <http://escholarship.org/uc/item/83b9f21g#page-1>.

13. Kearl, *supra* note 2, at 16.

14. *Id.*

15. *Id.*

16. Kearl, *supra* note 2, at 16.

scared.”¹⁷ This definition broadly defines street harassment by addressing that gender can be both actual and perceived, and noting that although gender is a motivating factor, it is not a constricting factor in categorizing the harasser/harasee relationship.¹⁸ Although it is key to include all victims when defining street harassment, a catch-all definition regarding the act itself can have an adverse impact on defendants.

By broadly defining street harassment as actions or words that “annoy, anger, humiliate, or scare,” it places all acts of street harassment on an equal playing field.¹⁹ This can result in harassers receiving the same punishment, even though their actions are significantly different. Take for example a harasser saying: “How you doing, beautiful?” verses a harasser telling someone: “I hope someone rapes you.” Clearly these statements are not the same. By creating a catch-all definition, harassing acts may be punished uniformly resulting in the overcharging of some defendants. This concern has lead advocacy groups to advocate for the non-criminalization of catcalling.²⁰ However, these groups fail to acknowledge that street harassment is not limited to mere catcalling.

Furthermore, a catch-all definition of street harassment is unjust to the victim. It provides a victim who is annoyed the same level of redress as a victim who fears for her life. This tells the victim that annoyance and fear are interchangeable, and as a result fails to acknowledge the different levels of damage done by the harasser, resulting in a lack of justice for the victim. If the criminal justice system is going to address street harassment, there must be a street harassment definition that brings fairness to both defendants and victims. This can only be accomplished by creating a street harassment definition that acknowledges the different severity levels of street harassment.

D. THE DIFFERENT SEVERITY LEVELS OF STREET HARASSMENT

Tiffanie Heben illustrates the different spheres of street harassment by outlining three concrete circles of street harassment.²¹

The outermost circle includes all cross-gender [and same gender] comments made in the public sphere. The middle circle contains all comments which most women [or men] consider harassment. In the inner most circle are comments which can be reached by a legal remedy.²²

This article seeks to explore both the middle and inner circles, looking where to draw the line between “comments which most women [or men]

17. Kearnl, *supra* note 2, at 5.

18. *Id.*

19. *Id.*

20. Lizzie Crocker, *Street Harassment Shouldn't Be a Crime*, DAILY BEAST (Oct. 29, 2014, 6:13 AM), <http://www.thedailybeast.com/articles/2014/10/29/street-harassment-shouldn-t-be-a-crime.html>.

21. Tiffanie Heben, *A Radical Reshaping of the Law: Interpreting and Remediating Street Harassment*, 4 S. CAL. REV. L. & WOMEN'S STUD. 183, 186 (1994).

22. *Id.*

consider harassment, and “comments which can be reached by a legal remedy.” This line is drawn by creating three subcategories of street harassment.

Street harassment should be separated into three categories, two of which have criminal remedies. The three categories are: (1) catcalling, (2) public sexual harassment, and (3) public sexual assault. Catcalling is the least severe form of street harassment, and does not have a criminal remedy due to First Amendment protections.²³ Public sexual harassment is a middle-level street harassment offense, which results in a victim feeling anger, humiliation, or anxiety. The most severe offense of street harassment is public sexual assault. Public sexual assault results in a victim fearing for their own safety. This article argues that both public sexual harassment and public sexual assault should be criminalized within our justice system; however, before discussing the implementation of this within the criminal justice system, it is important to examine what street harassment laws presently exist.

III. CURRENT LAWS PROHIBITING STREET HARASSMENT

Several states use non-street harassment laws in an attempt to combat street harassment.²⁴ For example, some states apply disorderly conduct or public nuisance laws to acts of street harassment.²⁵ Other states have broad harassment laws that directly address street harassment, and also encompass other serious crimes such as stalking and battery.²⁶ Presently, there are no federal laws that directly and solely criminalize street harassment.²⁷ The lack of street harassment laws is an issue because (1) it fails to protect victims' basic human rights, and (2) it fails to hold accountable sexual predators.

A. ISSUES OF CONSTITUTIONAL AND HUMAN RIGHTS

Florida attempts to combat street harassment under its “breach of the peace; disorderly conduct” law under Title XLVI, Chap. 877.03.²⁸ Florida's statute states:

Whoever commits such acts as are of a nature to corrupt the public

23. Bunkosal Chhun, *Catcalls: Protected Speech or Fighting Words?*, 33 T. JEFFERSON L. REV. 273, 276 (2011).

24. See *Street Harassment and the Law*, STOP STREET HARASSMENT, <http://www.stopstreetharassment.org/strategies/sshlaw/> (providing a full list of laws that address street harassment in all 50 states) (last visited Mar. 22, 2017).

25. FLA. PEN. CODE § 877.03 (2017), http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0800-0899/0877/Sections/0877.03.html.

26. GA. CODE ANN. § 16-5-90 (2010) (“A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person”), <http://law.justia.com/codes/georgia/2010/title-16/chapter-5/article-7/16-5-90>.

27. Amanda Roenius, *My Name Is Not “Beautiful,” And No, I Do Not Want to Smile: Paving The Path For Street Harassment Legislation In Illinois*, 65 DEPAUL L. REV. 831, 832 (2016).

28. FLA. PEN. CODE, Tit. XLVI, Chap. 877.03 (2016), http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0800-0899/0877/Sections/0877.03.html.

morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree.²⁹

By addressing street harassment under disorderly conduct laws, which also include acts like bar brawls or blowing an air horn in public, it whitewashes the seriousness of street harassment. This is an issue because street harassment, unlike blowing an air horn in public, is a sexual offense.³⁰ Furthermore, the absence of direct street harassment laws result in society ignoring the devaluation of ones' constitutional and human rights.

One of the main symptoms that street harassment victims face, is that they live in fear.³¹ This fear can result in victims changing their lives and constraining their free movement to avoid or stop street harassment. As noted by the SSH Study:

The most common change was for harassed people to constantly assess their surroundings as a result of harassment (47% of women and 32% of men). Going places in a group or with another person instead of alone was another common response for women (31%). On the more extreme end, 4% of all harassed persons said they made a big life decision like quitting a job or moving neighborhoods because of harassers.³²

Constraining a person's ability to freely walk the streets violates their constitutional and human rights.

The U.S. Constitution states: "[W]e the People of the United States, in order to secure a more perfect union . . . secure the blessings of liberty."³³ Liberty is legally defined as the "freedom from arbitrary or undue external restraint."³⁴ To prevent a person from walking in public, or forcing them to change where they live or work, via the external restraints of fear, is a violation of that person's constitutional right to liberty. As outlined by Amanda Roenius, "street harassment: the easiest way to debilitate a person's liberty to walk the streets without fear."³⁵ Roenius further articulates this point when arguing,

Protecting individuals' liberty is one of the most fundamental aspects of our legal system. In 1690, political theorist John Locke defined liberty as "[being] free from restraint and violence from others; which cannot be, where there is no law." Unfortunately, because no uniform law currently exists to protect individuals from many types

29. FLA. PEN. CODE, Tit. XLVI, Chap. 877.03 (2016).

30. Bowman, *supra* note 5, at 519 (stating that street harassment is sexual harassment in public places committed by strangers).

31. Kearn, *supra* note 2, at 10.

32. *Id.* at 6.

33. U.S. CONST. pmb1.

34. *Liberty*, BLACK'S LAW DICTIONARY (10th ed. 2014).

35. Roenius, *supra* note 27, at 831.

of street harassment, the fundamental rights to mobility and bodily integrity are not being met.³⁶

Additionally, the Universal Declaration of Human Rights (hereinafter “the Declaration”) is also clear on the protection of liberty and free mobility. Under section 3, the Declaration states “everyone has the right to life, liberty, and security of person.”³⁷ Furthermore, under section 13 the Declaration states, “[e]veryone has the right to freedom of movement and residence within the borders of each state.”³⁸ Consequently, by placing street harassment under criminal remedies like public nuisance or disorderly conduct, our legal system fails to directly acknowledge and combat street harassment. This is alarming because, as noted above, street harassment is a constitutional and human rights issue.

B. OVER-INCLUSIVE HARASSMENT LAWS CAN RESULT IN UNDERCHARGING SERIOUS OFFENDERS

Hawaii outlines street harassment, under Title 37 §711-1106, as an act that “insults taunts, or challenges another person in a manner likely to provoke an immediate violent response or that would cause the other person to reasonably believe that the actor intends to cause bodily injury. . . .”³⁹ Although the statute defines harassment, under section (b), in part as an act that “insults, taunts, or challenges another person,” the statute also includes several other serious offenses.⁴⁰ Hawaii’s harassment statute includes battery under section (a), and stalking actions under sections (c) and (d).⁴¹

Over-inclusive statutes can be alarming because they can lead to criminals being undercharged for serious offenses. Take for example a woman walking home alone at night. A man starts to verbally harass her and escalates to kicking her. If a state has its own street harassment statute, the perpetrator could be charged under two counts: (1) street harassment and (2) battery. If a state has a general harassment statute that encompasses acts of both verbal harassment and battery, there is a chance the perpetrator will only be charged under one count of harassment. In a state like Hawaii, that only results in petty misdemeanor.⁴²

This is disconcerting for two main reasons. First, the crime can be disproportionate to the punishment. Under Hawaii’s harassment statute, a person who batters or stalks another person is only subject to a petty misdemeanor.⁴³ Other petty misdemeanors in Hawaii include things like

36. Roenius, *supra* note 27, at 831.

37. UNIVERSAL DECLARATION OF HUM. RTS, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

38. *Id.*

39. HAW. REV. STAT. § 711-1106 (2013), http://www.capitol.hawaii.gov/hrscurrent/vol14_ch0701-0853/hrs0711/hrs_0711-1106.htm.

40. *Id.*

41. *Id.*

42. HAW. REV. STAT. § 711-1106.

43. *Id.*

excessive speeding,⁴⁴ theft under \$100,⁴⁵ and disorderly conduct.⁴⁶ It is hard to accept that stalking and battery are equal to stealing something under \$100. Second, by charging someone under a general harassment statute, it fails to adequately address the conduct at issue, which is that street harassment is a type of hate crime.⁴⁷ Street harassment disproportionately impacts minority groups such as people of color, women, and members of the LGBT community.⁴⁸ By failing to address that sexual orientation is a driving force for those who commit street harassment, Hawaii's law fails to directly protect minority victims. Laws that directly prohibit street harassment are needed not only to hold perpetrators accountable, but also to adequately protect minority groups from hate crimes.

C. THERE ARE NO CURRENT LAWS DIRECTLY COMBATING STREET HARASSMENT

The real issue with street harassment laws within the United States is that they do not exist.⁴⁹ As noted above, street harassment is indirectly addressed through other laws or general harassment statutes. As a result, the United States is falling behind other nations that have criminalized street harassment.⁵⁰

In 2009, a city in Mexico made it illegal for individuals to catcall after realizing the harm it caused victims . . .

In 2012, the British Prime Minister and the Council of Europe's Convention on Violence Against Women recommended legislation to criminalize and impose sanctions for "unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment . . .

In March 2014, Belgium passed a law that would make many forms of sexual harassment, including street harassment, a criminal offense punishable by fines or imprisonment of up to one year . . .

On June 12, 2013, the City of Brussels imposed a fine for street harassment and, within three months of enacting the ordinance, issued sixty-nine fines . . .

44. HAW. REV. STAT. § 291C-105 (2013), http://www.capitol.hawaii.gov/hrs2006/Vol05_Ch0261-0319/HRS0291C/HRS_0291C-0105.htm.

45. HAW. REV. STAT., § 708-833 (2013), <https://law.justia.com/codes/hawaii/2013/title-37/chapter-708/section-708-833>.

46. HAW. REV. STAT. § 711-11-1 (2013), http://www.capitol.hawaii.gov/hrscurrent/vol14_Ch0701-0853/HRS0711/HRS_0711-1101.htm.

47. Elahe Izadi, *Street Harassment of Women Just Became a Hate Crime in this County*, WASH. POST: WORLDVIEWS (July 14, 2016), https://www.washingtonpost.com/news/world-views/wp/2016/07/14/harassing-women-on-the-street-just-became-a-hate-crime-in-this-county/?utm_term=.b60c3d9f4eec.

48. Kearl, *supra* note 2, at 13.

49. Roenius, *supra* note 27, at 841.

50. *Id.* at 840.

In 2015, Peru passed a bill that defines harassment as any act "impacting the freedom and dignity of movement and the right to physical and moral integrity" and a violation of this bill "could potentially condemn an aggressor up to 12 years."⁵¹

As one of the leaders of the free world, the United States should strive to take the lead in protecting its citizens from harassment and discrimination, which can be accomplished through criminalizing street harassment.

IV. WHY STREET HARASSMENT LAWS ARE NEEDED

When society creates laws prohibiting an act, the legal system increases the cost of the behavior, which in turn decreases the frequency of the offense.⁵² This tells members of society what is expected of them, and as a result changes the attitudes of what is deemed acceptable behavior.⁵³ Furthermore, street harassment laws "(1) serve as a deterrent to street harassers; (2) provide street harassment victims with adequate legal remedies; and (3) protect victims' fundamental liberty rights of mobility and bodily integrity."⁵⁴ It is uncontested that street harassment exists, the question is why do we as a society continue to accept it? The answer is: We should not.

Street harassment is examined by many as a tool of oppression,⁵⁵ serving as a vehicle for sexism, racism, and homophobia.⁵⁶ Furthermore, street harassment is a vehicle for the dehumanization of others.⁵⁷ This dehumanization, paired with self-objectification, which is directly linked to street harassment, results in harasses believing that their bodies are objects for the pleasure and desire of others.⁵⁸ This in turn leads to an array of emotional injuries, including depression, anxiety, and even post-traumatic stress disorder.⁵⁹ However, street harassment victims are not limited to emotional injury.

Victims of street harassment are more likely to endure higher costs of living to avoid street harassment, like by joining a gym or taking a taxi home.⁶⁰ This negative economic impact further impedes harasses, who are

51. Roenius, *supra* note 27, at 840 (relying on Hillary Ojeda, *Peru: Street Harassment To Be Condemned up to 12 Years in Prison*, LIVING IN PERU (Mar. 5, 2015), <http://www.peruthisweek.com/news-peru-street-harassment-to-be-condemned-up-to-12-years-in-prison-105452>).

52. Heben, *supra* note 21, at 206.

53. *Id.*

54. Roenius, *supra* note 27, at 834.

55. Heben, *supra* note 21, at 205.

56. *Id.* at 206.

57. Roenius, *supra* note 27, at 849.

58. *Id.*

59. Rachael Rettner, *6 Ways Sexual Harassment Damages Women's Health*, LIVE SCIENCE: HEALTH (Nov. 9, 2011, 9:48 AM), <http://www.livescience.com/16949-sexual-harassment-health-effects.html> (noting depression, PTSD, increase blood pressure, sleep problems, suicide, and neck pain).

60. Holly Kearl, *More Research Needed to Help Prevent Street Harassment*, INST. FOR WOMEN'S POL'Y RES. (Apr. 8, 2011), <https://femchat-iwpr.org/2011/04/08/more-research-needed-to-help-prevent-street-harassment/>.

predominately minority of groups, from societal equality.⁶¹ Furthermore, street harassment is tied to traditional forms of physical violence against women.⁶²

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.⁶³

Most alarming is an article from 1981 by Micaela di Leonardo that illustrates that street harassment will get worse as women strive for equality.⁶⁴ Leonardo points out that “women are experiencing more street harassment because men are retaliating against their perceived lowered status and the loss of women’s services,” both domestic and emotional.⁶⁵ Furthermore, “men’s increased harassment of women functions as one of the many controlling institutions of capitalist patriarchy.”⁶⁶ Leonardo goes further to point out that street harassment “frightens women, just as rape does, into limiting their geographic mobility whenever possible. But most of all it keeps women from relaxing in the public world, from claiming it as their own.”⁶⁷ This article was published over 35 years ago, but disturbingly still applies today. This begs the question: Why are no legislators doing anything? If society is serious about equality and protecting minorities, street harassment must be criminalized.

V. PROPOSING LEGAL REMEDIES

A. DEFINING STREET HARASSMENT.

The issue with street harassment is that it comes in various degrees of severity. If society wants to have a general definition of street harassment for academic purposes, Stop Street Harassment, as cited above, provides a strong inclusive definition that acknowledges (1) various victims, (2) various forms of harassment, and (3) varying degrees, as noted through victim impact. However, if the criminal justice system wants to define street harassment, the definition needs to acknowledge the different forms of street harassment to ensure fairness to defendants and victims. Before discussing the differences between the different forms of street harassment (catcalling, public sexual harassment, and public sexual assault), it is important to first outline the similarities among the three subcategories.

First, all forms of street harassment need to occur in a public place.

61. Kearl, *supra* note 60, at 2.

62. Sopen B. Shah, *Open Season: Street Harassment As True Threats*, 19 U. PA J.L. & SOC. CHANGE 377, 380 (2016).

63. Shah, *supra* note 62, at 380.

64. Michaela di Leonardo, *Political Economy of Street Harassment*, AEGIS: MAGAZINE FOR ENDING VIOLENCE AGAINST WOMEN (1981), <http://www.stopstreetharassment.org/wp-content/uploads/2011/04/PoliticalEconomyofStHarassment.pdf>.

65. *Id.* at 55.

66. *Id.* at 56.

67. Leonardo, *supra* note 64, at 56.

Second, street harassment is not limited to gender. Although, as cited above, the act of street harassment disproportionately impacts certain genders, races, and sexual affiliates, it is not limited to one victim group, such as women. Third, the harassing words or actions need to be explicitly or implicitly sexual. This third element is distinguished from Roenius's definition of street harassment, which fails to note that street harassment is a sexually motivated crime.⁶⁸ As outlined by Roenius:

Street Harassment occurs when one or more persons accost an individual, or group of individuals, of any sex, gender, *race*, or sexual orientation in a public place by means of intruding, or attempting to intrude on, the individual's liberty rights to bodily integrity and mobility in an unwelcomed manner. The means of which include: (1) sexually explicit language directed at the individual; (2) comments, remarks, or noises meant to sexualize an individual's body or evaluate an individual's physical appearance; (3) comments regarding an individual's sexual orientation or *race*; (4) profanities based on gender or sex; (5) sexually explicit gestures; and (6) catcalls (whistles meant as a way of attracting attention to oneself for purposes of sexual objectification or gratification).⁶⁹

By placing other motivating factors, such as race, under street harassment, it takes away from street harassment's core principal. The core principal of street harassment is that the act is sexually motivated either by desire or discrimination. This is not to say that there should not be criminal remedies for racially motivated speech; however, those remedies already exist. By creating statutes that overlap with one another, it causes confusion for law enforcement who are faced with arresting and prosecuting offenders of these crimes. Take for example someone making a racially motivated comment to a person in public, is the harasser charged for a hate crime or street harassment? Or both? If both, then a person who says the exact same racially motivated comment in private would face significantly lesser penalties. As a result of this ambiguity, a street harassment statute must start with a focused definition targeting the issue at hand. The issue is that street harassment is driven by implicit or explicit sexual desires or sexual discrimination.

Fourth, the harassing act, either words or action (hereinafter "harassing act"), needs to be unwelcome to the point at which the "very utterance [or act] inflict injury or naturally tend to provoke violent resentment (i.e., 'fighting words')." ⁷⁰ "Violent resentment" is words or actions that result in the "target's likely *reactions* . . . provok[ing] the hearer to violence and thus a breach of the peace."⁷¹ This threshold, as noted by Bowman, is needed in order for street harassment statutes to avoid First Amendment complications.

The First Amendment protects a person's freedom of speech, but it has

68. Roenius, *supra* note 27, at 859.

69. *Id.* (italics added).

70. Bowman, *supra* note 5, at 575.

71. *Id.* at 559.

its limitations.⁷² Categories of speech such as obscenity, defamation, and “fighting words” can be regulated without violating the First Amendment.⁷³ As outlined by Bowman:

[S]peech involved in street harassment often falls within established exceptions to the First Amendment. In some cases - if a harasser shouts “You whore” at a woman in the presence of an overhearing passerby, for example - the harassment may constitute defamation. In other cases, street harassment may constitute obscenity, or it may be regulated as “fighting words.”

Third, street harassment is . . . “low-value speech” [in reference to obscenity] and is thus subject to minimal scrutiny under the First Amendment.⁷⁴

In order for street harassment laws to be consistent with the First Amendment, the harassing act must be “lewd and obscene, the profane, the libelous, and the insulting or fighting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁷⁵ Most types of street harassment fall within this realm since street harassment (1) inflicts injury on its victims, and (2) elicits violent resentment.

Some groups claim there is relatively little injury incurred by street harassment victims, while others state that people find street harassment to be flattering.⁷⁶ Although this may be true for some, this does not change the fact that most street harassment victims suffer substantial injuries as a result of being harassed.⁷⁷ To argue that because *not all* people suffer injuries, street harassment should not be criminalized, is like saying because *not all* people who speed get into car accidents, we should allow speeding. Not only does this methodology cause a significant public safety risk, but it also ignores the rights of victims.

The infliction of injury is monumentally present for most street harassment victims.⁷⁸ Street harassment sexually objectifies its victims, which can bring about severe emotional distress, anxiety, stress, paranoia, loss of motivation, and anger.⁷⁹ Second, harassers attack a person’s self-esteem, which can result in depression, eating disorders, and even suicide.⁸⁰ Third, it can result in post-traumatic stress disorder, with street harassment victims experiencing increased heart rates and extreme fear and anxiety.⁸¹ So is there harm? The answer is undoubtedly yes.

72. U.S. CONST. amend. I.

73. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 377 (1992).

74. Bowman, *supra* note 5, at 543–45.

75. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

76. Bowman, *supra* note 5, at 562.

77. *Id.*

78. Bowman, *supra* note 5, at 562.

79. *Id.* at 538.

80. Rettner, *supra* note 59.

81. Soraya Chemaly, *Why We Need to Take Street Harassment Seriously*, WASH. POST: ON PARENTING (Sept. 28, 2015), https://www.washingtonpost.com/news/parenting/wp/2015/09/28/why-we-need-to-take-street-harassment-seriously/?utm_term=.a745e8c8e594.

Furthermore, when assessing the scope of damage, most street harassment victims are harassed more than once.⁸² Street harassment starts at a young age, with 80% of women and 68% of men experiencing street harassment starting at the age of 13.⁸³ Therefore the injury that street harassment causes is not limited to one incident, but can build upon years of constant harassment. Because street harassment causes both short-term and long-term injuries to its victims, there needs to be a zero-tolerance policy within our criminal justice system.

Regarding violent resentment, most forms of street harassment elicit violent resentment in its victims, or *provokes the hearer to violence*. As stated by Bowman, street harassment falls within the 'fighting words' statute in that it "encompass[es] personal, face-to-face insults that cannot possibly be described as political discourse; they apply to 'threatening, profane or obscene revilings'; and they turn upon the reaction of the hearer rather than upon the intent of the speaker or harasser."⁸⁴ The courts agree; "women have in fact obtained convictions in street harassment cases under the Georgia fighting words statute."⁸⁵ However, as noted below, not all forms of street harassment reach this violent resentment threshold.

Temporarily setting aside First Amendment concerns, the following are all commonalities found within various forms of street harassment: (1) it occurs in a public place; (2) it occurs between two or more people; (3) it includes words or actions; that (4) are implicitly or explicitly sexual; which (5) inflict injury upon another person; or (6) provoke violent resentment (i.e., "fighting words"). Now it is time to distinguish between the different forms of street harassment.

B. DISTINGUISHING DIFFERENT FORMS OF STREET HARASSMENT

1. Catcalling

Catcalling has been defined as:

[t]he use of crude language, verbal expression, and non-verbal expression that takes place in public areas such as streets, sidewalks, or bus stops. Examples of catcalling as verbal expression include name-calling, propositioning, wolf-whistles, or comments evaluating physical appearance. Examples of catcalling as non-verbal expression include leers, winks, physical gestures, or the use of signs to rate physical appearance.⁸⁶

The issue with the cited definition is that it fails to distinguish itself from other, more severe forms of street harassment. However, the definition does successfully address the fact that catcalling can be both verbal and non-verbal.⁸⁷ For purposes of this legal proposal, catcalling is defined as words

82. Kearl, *supra* note 2, at 18-19.

83. *Id.*

84. Bowman, *supra* note 5, at 559 (quoting *State v. Chaplinsky*, 18 A.2d 754, 762 (N.H. 1941)).

85. *Id.*

86. Chhun, *supra* note 23, at 276.

87. *Id.* at 276.

or actions that occur in a public space between two or more people that annoy the harassee. Examples of catcalling are: whistling, winking, waving, words like: “Pssst,” “Hey beautiful,” “How are you doing?” “Let me see a smile”—and other moderate forms of unwelcome comments that annoy the harassee.

Acts of catcalling are likely protected under the First Amendment. As cited by Chhun, unless the ‘fighting words’ doctrine is expanded, moderate forms of street harassment, such as catcalling, are protected speech.⁸⁸

[t]he fighting words doctrine needs an update to protect women against gender-specific injuries, like catcalling, that degrade and objectify. Currently, the fighting words doctrine fails to address certain gender-specific harms. Expanding the fighting words doctrine to include catcalling would correct the doctrine's inherent bias towards typical male behavior.

Granted, it is true that unwelcome advances should not occur in our society, the First Amendment supersedes these concerns. As a result, and for purposes of this article, moderate forms of street harassment, such as catcalling, should not be criminalized.

2. Public Sexual Harassment

Public sexual harassment is defined as words or actions that are explicitly or implicitly sexual, intended for a specific person in a public space. Furthermore, the very act or utterance must inflict injury on the harassee, or naturally tend to elicit violent resentment in the harassee. Examples of public sexual harassment are: someone brushing up against and grazing a person’s breast or other parts of their body, someone making sexual gestures such as thrusting motions within inches of their victim, statements like: “come here and let me f*ck you,” and all sexually derogating terms such as, *bitch* or *whore*. In short, public sexual harassment punishes unwelcome comments that make someone feel anger, humiliation, and or discomfort and unease, but falls short of the victim fearing for their own safety.

3. Public Sexual Assault

Public sexual assault is the most severe form of street harassment and makes a victim fear for their own safety. Within the state of California, assault is defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”⁸⁹ The issue with street harassment is that some acts fall short of general assault statutes; however, the act still causes a victim to reasonably fear that they are in danger. As a result, street harassment needs its own assault statute. Take for example someone walking behind you, yelling, “I hope you get raped and killed.” This would fall short of actions prohibited under present assault statutes to the extent that the person did not say “I am going to rape and kill you.” However, the statement can still make a harassee fear that that person may

88. Chhun, *supra* note 23, at 276.

89. CAL. PENAL CODE § 240 (West 2017).

rape or kill them. Of greater concern is that some harassers use a harassee's reaction to these comments as a *rape test*.⁹⁰ As outlined by Kearnl, men "may attempt rape depending on how a woman responds to street harassment. If she is assertive and forceful, they will leave her alone, but if she cowers, freezes, or humors them, they may escalate the harassment to rape."⁹¹

For purposes of this proposal, public sexual assault is words or actions that are explicitly or implicitly sexual and are intended for a specific person in a public space. Furthermore, the very act or utterance must inflict injury on the harassee, or elicit violent resentment in the harassee, to the point where the harassee fears for their own safety, even if a direct threat is not made. Thus, the harasser does not have to intend to cause fear within the harassee; the harasser just needs to intend for his words or actions to target a specific person.

C. ESTABLISHING PROPORTIONAL PENALTIES.

Establishing proportional penalties is key when ensuring justice. Broad laws sometimes get put into place that fail to acknowledge the varying degrees of a crime, resulting in the same, sometimes overly severe, penalties. Take for example California's Sex Offender Registry. A person who rapes a minor is placed on the same registry as someone who urinates in public.⁹² Although neither should be tolerated, to have the same penalties for those two acts is unjust to the person who committed the lesser offense. This can result in some defendants facing disproportionate, and thus unjust penalties.⁹³

Under Iowa's antiharassment law under Title XVI, Subtitle 1, Chap. 708 §708.7 there are varying degrees of punishments under section 2(b), 3(b), and 4(b).⁹⁴ Harassment in the first-degree, under section 2(b), results in an aggravated misdemeanor when the harasser either threatens to commit a serious felony, such as battery.⁹⁵ Harassment in the second-degree, under section 3(b), results in a serious misdemeanor and occurs when the harasser threatens to commit bodily injury.⁹⁶ Harassment in the third-degree, under section 4(b), is a simple misdemeanor outside of first and second-degree harassment.⁹⁷

Distinguishing penalties, like Iowa does, is important for both defendants and victims. Distinguishing penalties allows defendants to be punished proportionately to the crime that they commit, avoiding unjust over

90. Holly Kearnl, *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).

91. *Id.*

92. Erin Fuchs, *7 Surprising Things That Could Make You A Sex Offender*, BUSINESS INSIDER (Oct. 9, 2013, 6:53 PM), <http://www.businessinsider.com/surprising-things-that-could-make-you-a-sex-offender-2013-10>.

93. Fuchs, *supra* note 92.

94. IOWA CODE ANN. § 708.7 (2009), <http://coolice.legis.iowa.gov/cool-ice/default.asp?category=billinfo&service=iowacode&input=708.7>.

95. IOWA CODE ANN. § 708.7 (2009).

96. *Id.*

97. *Id.*

penalization. On the other side, it ensures victims that their harassers are held accountable for their actions and avoids unjust low penalties, like Hawaii's harassment statute, which results in a maximum penalty of a petty misdemeanor.

D. PROPOSED LEGISLATIVE LANGUAGE.

(1) A person commits the offense of public sexual harassment, when he/she intends to target a specific person [the harassee] in a public space, using words or actions upon the harassee that are explicitly or implicitly sexual, which through the act or utterance inflict injury, or naturally tend to provoke violent resentment, by or upon the harassee.

(a) Public sexual harassment is a general misdemeanor;

(2) A person commits the offense of public sexual assault, when he/she intends to target a specific person [the harassee] in a public space, and uses words or actions upon the harassee that are explicitly or implicitly sexual, which through the act or utterance inflict injury, or naturally tends to provoke violent resentment, by or upon the harassee with the result of the harassee fearing for his or her own safety.

(a) Public sexual assault is an aggravated misdemeanor.

VI. UPHOLDING STREET HARASSMENT LAWS

After speaking with a group of public defenders and prosecutors regarding street harassment, the issue was not the law itself, but how the law would be enforced. The conversation raised concerns as to the harasser's intent and the victim's interpretation of the harassment. Questions were asked such as: does the harasser need to intend to harass the victim? If so, would not all harassers claim their intention was to merely get someone's attention, not harass them? Other questions included: does the victim's interpretation of the harassment decide if the act is harassing? If so, what about a victim's potential racial or socioeconomic biases towards a specific harasser? These questions bring to light some of the many challenges that come with creating first time street harassment laws.

A. HARASSER'S INTENT

Bowman's proposed street harassment "law explicitly rejects an intent requirement, except to require proof that the harasser meant to 'say the words or engage in the conduct.'"⁹⁸ This is based on the fact that almost all perpetrators would claim that they intended to compliment the harassee, not harass them.⁹⁹ As a result, a specific intent requirement, requiring the harasser intended to harass the victim, is ill-fitted when establishing street harassment laws.

This proposal in part aligns with Bowman insofar that the courts should evaluate the intent of the harasser to the extent that the harasser intended to speak the words they did or take certain actions.¹⁰⁰ However,

98. Heben, *supra* note 21, at 212.

99. *Id.*

100. *Id.*

courts should also require that the harasser intended the act for a specific person in the same public space. This is to prevent people who mumble to themselves, or who argue with someone on the phone, from unintended and unjust street harassment prosecution.

In short, any street harassment statute should have a two-part intent requirement: (1) that the harasser intended to say the words or engage in the specific harassing conduct; and (2) the act was intended for a specific person in the same public space as the harasser. The next question is: what standard of review should be applied in determining if an act reaches the point of public sexual harassment or public sexual assault?

B. HARASSEE'S INTERPRETATION

There are several risks in determining public sexual harassment or public sexual assault based on the harassee's interpretation of the words and or actions. As outlined by Heben, there are multiple factors that can impact a harassee's interpretation of someone else's words or actions.¹⁰¹ Take for example race. As stated by Heben:

For African American women, hundreds of years of domination add meaning to the sexual comments of white men; those same words would not have the same meaning for white women. For Asian American women, stereotypes about their submissiveness influence both how they are seen and how they interpret harassment. Comments by white men are often combined with racist comments. In addition, the myth of the black rapist influences the way in which white women interpret sexual harassment from men of color.

Sexualized comments by white men to African American women can be traced from both the history of slavery, where rape was common, as well as the tradition of domestic work, where sexual harassment was, and is, considered part of the job. As a result, street harassment by white men evokes "a long history of disrespect, degradation, and inhumane sexual mistreatment."¹⁰²

Should a person's race be a factor in determining if a harasser's words and or actions reach the level of public sexual harassment or public sexual assault? There are two dangers associated with this. First, "racist attitudes, even subconscious ones, are likely to influence white women's perceptions that more black men harass."¹⁰³ Second, centuries of oppression and racism can lead to a harassee's misinterpretation of race-neutral words, such as *whore*. This same concern of bias is present when examining a harasser's class. As stated by Heben, "while men of all classes engage in harassing behavior, women are more likely to interpret behavior as 'complimentary' when it comes from a well-dressed or attractive man from their own or a higher social class."¹⁰⁴

101. Heben, *supra* note 21, at 192.

102. *Id.* at 194–97 (quoting Bowman, *supra* note 5, at 534.).

103. *Id.* at 199.

104. *Id.* at 200.

If courts are to solely rely on the harassee's interpretation of the harassing act, there is a risk that low-income, minority defendants would be disproportionately charged in comparison to affluent, white defendants who commit the exact same acts. Because of these potential biases, the harassee's interpretation of the act cannot be the sole determination in evaluating street harassment. As a result, this paper calls for a six-part evaluation to determine if the harasser's acts results in public sexual harassment or public sexual assault.

C. A SIX-PART HARASSMENT TEST

This proposal outlines a six-part test to determine if a harasser's actions result in public sexual harassment or public sexual assault. The factors that should be weighed are: (1) the harasser's tone used to make the statement (i.e., is the harasser mumbling or is he directly yelling at someone); (2) the harasser's body language (i.e., is the harasser passed out on the street or standing over someone blocking their path); (3) the use of derogatory terms (i.e., is the harasser using terms such as "beautiful" verses "f*cking whore"); (4) physical movements and actions by the harasser (i.e., is the harasser following the harassee or making obscene gestures, which could escalate mere catcalling); (5) where and when the harassing act took place (i.e., is it dark outside or is the harasser alone in an alley with the harassee); and (6) the statement itself. These factors consider the totality of the circumstances, limiting conscious and subconscious biases based on race or socioeconomic standing. As a result, this evaluation allows jurors and judges to determine if the words, paired with the harasser's body language and actions given the time of day and location, result in criminal street harassment.

VII. FUTURE OBSTACLES

Even with the above proposal, there are still challenges that exist with creating and implementing street harassment laws. When street harassment laws go into place, these laws will face the many challenges that areas of domestic violence laws face; where women are the primary target of the crime.¹⁰⁵ Take for example the reasonable person standard.¹⁰⁶ Would a straight male harassed in public feel the same level of fear as a woman or a gay man? The answer is likely no. People process things differently and a large part of how one processes fear is based on a person's circumstances, such as their race, gender, and sexual orientation.

The reasonable person standard when applied to domestic violence causes an array of problems for women who have male jurors or judges assessing if a *reasonable person* (i.e., a man) would have taken the same actions. As stated in *State v. Wanrow*,

[c]are must be taken to assure . . . women the right to have their

105. See Heidi Robinson, *Reasonable Women Can Differ*, OR. ST. B. BULL., July 2000, at 37.

106. See *Hall v. State*, 448 Md. 318, 331 (2016) (applying the reasonable person standard, which is an objective test in which the conduct of the accused is compared to that of a reasonable person under similar circumstances, to a criminal child abuse case).

conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.¹⁰⁷

This statement is not limited to women, but also applies to people of color and LGBTQ community members. Until the criminal justice system, through jurors and judges, consider other factors, such as race and sex, when assessing what a *reasonable person* would have done, minority groups will continue to face challenges when attempting to obtain justice within the criminal justice system.

VIII. CONCLUSION

Street harassment has been an issue for centuries and impacts millions of Americans.¹⁰⁸ However for the first time ever, thanks to Stop Street Harassment, there is a national study that provides concrete information and data showing how widespread and harmful street harassment is.¹⁰⁹ Three years have passed since the study was published; it is time U.S. legislators design laws to stop this pandemic from spreading. The time has come for the United States to join other countries in criminalizing street harassment, and allow minority groups, like women and members of the LGBT community, to move freely in public without being sexually harassed.

Ready . . . set . . . go . . .

107. *State v. Wanrow*, 88 Wash. 2d 221, 240 (1977).

108. Levintova, *supra* note 4.

109. Kearl, *supra* note 2.