

# “The Woman in the Street:”† Reclaiming the Public Space from Sexual Harassment

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*I was walking to lunch with a partner, an associate, and another summer associate. The lawyers were male and the other summer associate was female. We walked past a construction site and the men working there made comments about me which I'm sure the partner (and everyone else) heard. I instantly went from feeling professional and in control to feeling powerless and embarrassed. I hate that a lewd comment from a construction worker has the power to make me feel that way so easily.<sup>1</sup>*

*I was walking down the street the other day, wearing nothing revealing. This man was flicking his tongue at me and asked me if I tasted as good as I looked. There is nothing you can do about it. What if you get someone mad? You don't know who they are, and you might end up raped or killed.<sup>2</sup>*

*Recently I found myself in midtown and decided to take a walk through Bryant Park . . . . [Within moments one man] invited me to take my clothes off and . . . another . . . wanted to know why I wasn't smiling . . . . [There] were perhaps 50 men, strolling, ambling, striding along eating hot dogs, sitting on benches and reading the paper or trading illegal substances as though they had all the time in the world—and 3 women, all walking quickly and grimly, as I was now doing, as though late for an appointment with the dentist.<sup>3</sup>*

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† I use the phrase “the woman in the street” in contrast to the traditional notion of “the man in the street” which is familiar in American law and politics. As Cheryl Benard and Edit Schlaffer explain:

The “man in the street,” a phrase dear to the media and politicians, is a synonym for the citizen, the voter, the average person, and at the same time the male. There is no “woman in the street” in our language; only a streetwalker, or an intruder who can be treated like one.

Cheryl Benard & Edit Schlaffer, *The Man in the Street: Why He Harasses*, in FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN 70 (Alison M. Jaggar & Paula S. Rothenberg eds., 2d ed. 1984). This Article aims to explain and ameliorate the experience of “the woman in the street.”

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1. Response to Street Harassment Survey, conducted in Professor Ralph Brown's Defamation Class, Yale Law School (Nov. 29, 1993).

2. *Are People Rude on the Street?*, USA TODAY, July 19, 1991, at A11 (comment of Kristin Anderson, New Haven, CT).

3. Katha Pollit, *Hers*, N.Y. TIMES, Dec. 12, 1985, at C2.

In recent years, feminist legal scholars have focused increasing attention on the problem of "street harassment" as a pervasive harm that, although ignored by the law, has profound impacts on women's consciousness, physical well-being, liberty, and fundamental rights.<sup>4</sup> The purpose of this Article is to expand the current social understanding of street harassment and contribute to the conversation about potential legal remedies for the problem.

Part I begins by bringing together a variety of legal and nonlegal sources to define street harassment, demonstrate its cumulative ramifications for women, and explore its causes. Part II reviews and critiques existing proposals to make street harassment a criminal misdemeanor and offers a series of more narrowly tailored alternative legal remedies through which women may reclaim the public spaces most commonly plagued by sexual harassment.<sup>5</sup> Although any legal solution to street harassment may prove administratively cumbersome, a targeted approach may provide a practical and symbolic way to raise public consciousness about a harm to women that is far too often trivialized or ignored.

## I. STREET HARASSMENT: ITS MEANING AND EFFECTS

Street harassment represents perhaps the most common and frequent type of sexual harassment encountered by women in the United States and throughout the world.<sup>6</sup> Although street harassment is a pervasive phenomenon, surprisingly little sociological study or scholarly analysis has been conducted to explore the dynamics of the behavior and to determine the cumulative impact of public sexual harassment on women and society. As with many other harms to women, street harassment is too often dismissed as a trivial and natural fact of life that women must simply tolerate. This Part draws on scholarly works and anecdotal evidence found in newspapers and women's magazines<sup>7</sup> to define street harassment, to explain its effects on women's

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4. This Article was inspired by Cynthia Grant Bowman's *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993). See also Deirdre Davis, *The Harm that Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN'S L.J. 133 (1994); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 106-08 (1987). Other scholars have recognized street harassment as a serious harm to women, but have not explored the issue with as much depth. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 865 (1990) ("Women use consciousness-raising when they publicly share their experiences as victims of . . . street hassling, and other forms of oppression and exclusion, in order to help change public perceptions about the meaning to women of events widely thought to be harmless or flattering."); Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminist*, 75 CORNELL L. REV. 644, 647 (1990) (quoting West on street harassment).

5. Bowman argues, "In order to participate as equal citizens in the polis, women must reclaim the public space. . . . We must either fashion new legal concepts equal to this task or reformulate existing legal categories to make them apply to the experience of street harassment." Bowman, *supra* note 4, at 521 (emphasis added).

6. For an article describing street harassment overseas, see Lindsay Van Gelder, *The International Language of Street Hassling*, MS., May 1981, at 15 (describing street harassment experiences while travelling abroad).

7. As Catharine MacKinnon points out, "Scholars who look down upon such popular journalistic forays

autonomy, safety, mobility, and economic opportunity, and to explore its implications for society as a whole.

### A. Defining Street Harassment

Most women, especially those who live in urban environments, can offer vivid definitions of street harassment<sup>8</sup> by sharing stories similar to those reproduced in the introduction of this Article. When a woman walks into the public world, she is often subjected to overt observation, evaluation, and verbal commentary by male strangers. As Cheryl Benard and Edit Schlaffer have noted, street harassment exists only in the “genuinely *public* world” where people are strangers to one another.<sup>9</sup> Similarly, Cynthia Grant Bowman explains, “[I]f someone exists for you as an individual, you are less likely to harass her—a fact reflected in the proto-typical question used to confront harassers: ‘Would you want someone to treat your sister (or wife, or mother) this way?’”<sup>10</sup>

Elizabeth Kissling and Cheri Kramarae, professors of speech communication, describe street harassment as “markers of passage” for women in public places.<sup>11</sup> They explain that “the rules of conduct guiding women’s and men’s public passage through urban areas are asymmetrical.”<sup>12</sup> Whereas men may treat other men who are strangers to them with the “norm of civil inattention,” women are open persons in public places, “subjected to verbal and nonverbal markers of passage from men that men seldom receive from women or from other men.”<sup>13</sup> These “markers of passage” consist of both verbal and nonverbal behaviors, including “wolf-whistles, leers, winks, grabs, pinches, catcalls, and rude comments. The remarks typically comment on the

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into policy research (especially by ‘women’s magazines’) should ask themselves why *Redbook* noticed sexual harassment before they did.” CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 247 n.1 (1979).

8. Throughout this Article, I follow the convention of using the term “street harassment” as shorthand for “sexual harassment in public places.” I prefer the phrase “sexual harassment in public places” to describe the phenomenon to emphasize that if similar behavior occurs in a workplace or educational setting, legal redress is available. Although ignored by the law, sexual harassment takes place in many other arenas besides institutional or industrial settings. As two British feminists argue,

Sexual harassment involves men “doing power over” women using sexual and many other means of doing so; and its location in the workplace is but one location among thousands, for sexual harassment can and certainly does occur to women in as many times and places as there are times and places.

SUE WISE & LIZ STANLEY, *GEORGIE PORGIE: SEXUAL HARASSMENT IN EVERYDAY LIFE* 45 (1987). For other views on the proper terminology for street harassment, see Bowman, *supra* note 4, at 519 n.7.

9. Cheryl Benard & Edit Schlaffer, *The Man in the Street: Why He Harasses*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 72 (Alison M. Jaggar & Paula S. Rothenberg eds., 2d ed. 1984).

10. Bowman, *supra* note 4, at 530-31.

11. Elizabeth A. Kissling and Cheri Kramarae, *Stranger Compliments: The Interpretation of Street Remarks*, 14 *WOMEN’S STUD. IN COMM.* 75, 75 (1991) (compiling comments made during informal discussion of street harassment conducted on university computer system over period of one month).

12. *Id.*

13. *Id.*

woman's physical appearance or her presence in public, and are often sexual in nature."<sup>14</sup>

Although street harassment includes a wide range of verbal and nonverbal behavior, it has some defining characteristics. As Cynthia Bowman enumerates:

(1) [T]he targets of street harassment are female; (2) the harassers are male; (3) the harassers are unacquainted with their targets; (4) the encounter is face to face; (5) the forum is a public one, such as a street, sidewalk, bus, bus station, taxi, or other place to which the public generally has access; but (6) the content of the speech, if any, is not intended as public discourse. Rather, the remarks are aimed at the individual (although the harasser may intend that they be overheard by comrades or passers-by), and they are objectively degrading, objectifying, humiliating, and frequently threatening in nature.<sup>15</sup>

Borrowing from the work of Patricia Williams, Deirdre Davis defines street harassment as "spirit murder."<sup>16</sup> Spirit murder consists of many "micro aggressions, '[h]undreds, if not thousands of spirit injuries and assaults—some major, some minor—the cumulative effect of which is the slow death of the psyche, the soul and the persona.'"<sup>17</sup> Defining street harassment as spirit murder captures the powerfully damaging effects of sexually harassing behavior on the street. In isolation, each comment and leer may seem like nothing more than a trivial annoyance, a fact of life in a boorish urban environment. But when multiplied by man after man, day after day, week after week, year after year, street harassment profoundly affects a woman's life and liberty.

Street harassment is not trivial. "It is *because* of their frequency, their constancy, and their banality that the sexual threats expressed on the street are so effective, and so foundational. They shrink us, rather than enrage us."<sup>18</sup> Robin West provides a powerful portrait of the threatening and intimidating nature of street harassment:

Sexual assaults and batteries on the street are threatening ("Come sit on my face, bitch. *Hey bitch, I said come sit on my face!* HEY BITCH, I MEAN YOU. . ."), constant (most white men have experienced only a few street assaults by strangers. Many women—perhaps most

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14. *Id.* at 75-76.

15. Bowman, *supra* note 4, at 523-24 (citations omitted). Although my analysis focuses on street harassment of women, harassment of gay men is also a common problem. See GARY D. COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 141-44 (1991) (reporting experiences of verbal harassment).

16. Davis, *supra* note 4, at 176.

17. *Id.* (quoting Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151 (1987)).

18. West, *supra* note 4, at 107.

women who live in urban areas—have experienced hundreds), criminal (they are assaults, and when accompanied by touchings, they are batteries), frightening (look down, cut across the street, shrink into your coat, let your mind go blank, don't look up), unacknowledged (look down, hope it stops, hope no one else hears, hope no one else sees), disorienting and self-alienating (smile so he might stop . . . learn to smile—to *show pleasure*—when you are frightened), uncompensated (of course), and unpunished (ditto).<sup>19</sup>

Some women may experience *hundreds* of street harassment incidents within a few days or weeks. Maggie Hadleigh-West set out to document the pervasiveness of street abuse in a documentary film entitled *War Zone*.<sup>20</sup> Dressed in “a black tank top, a midhigh-length black skirt and opaque black leggings,” Hadleigh-West traversed the East Village and Wall Street areas of New York City.<sup>21</sup> During a span of seven and a half hours, she reported facing street abuse from 112 men of different races. The abuse ranged from gawking and leers to comments such as: “How are you doing, healthy?”; “Let me see what you got up there!”; and “Be a fucking bitch, all I said was hello.” The abuse also included touchings: strangers pinched her breasts and slapped her buttocks.<sup>22</sup>

Provocative dress is often proffered as an explanation for street harassment. However, in a sequel to *War Zone*, Hadleigh-West wore jeans, a shirt, and a jacket and was still harassed numerous times.<sup>23</sup> Hadleigh-West therefore rejects the argument that women who wear revealing clothing are “asking for” harassment. This argument perpetuates the myth that men cannot control themselves.<sup>24</sup> To test the notion that women “ask” for harassment by wearing revealing or provocative clothing, *Glamour* magazine sent seven staffers into the streets wearing various styles of clothing. All seven women were harassed.<sup>25</sup> Street harassment cannot and should not be explained or justified by women's style of dress.

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19. *Id.* at 106.

20. Karen Avenoso, *Capturing Harassment on Camera*, TIMES-PICAYUNE, Sept. 8, 1993, at E1.

21. *Id.*

22. See Avenoso, *supra* note 20; see also Cathryn Creno, *Lewd Remarks on the Street Lead Film Maker Into a War of Words*, ARIZ. REPUBLIC, Dec. 21, 1993, at E1; Marco R. della Cava, *A Camera's-eye View of Street Harassment*, USA TODAY, June 15, 1993, at 5D.

23. Avenoso, *supra* note 20.

24. See *Sonya Live* (CNN television broadcast, Sept. 1, 1993) (transcript on file with the *Yale Journal of Law and Feminism*) (interview with Hadleigh-West and others regarding street harassment).

25. See Elizabeth Kuster, *Don't "Hey Baby" Me: How to Fight Street Harassment*, GLAMOUR, Sept. 1992, at 310 (describing strategies women use to escape hecklers including avoiding certain clothing, avoiding activities such as bike riding or running in the park, planning routes to avoid construction sites or “men's hang-outs,” wearing sunglasses or headphones to “hide,” and crossing the street rather than passing a stationary man or group of men).

B. *Street Harassment's Invasion of Women's Personal and Public Space*

Space in the form of territory is associated with high-status individuals. Larger and better space is associated with higher status and power.<sup>26</sup>

1. *Autonomy*

Street harassment is an invasion of women's privacy, an intrusion into personal space perpetrated without consent.<sup>27</sup> As one woman in Kissling and Kramarae's study of street harassment wrote, "Strangers making personal comments are rude. Whether the comment is positive or negative, sexual or not, it is still rude and an invasion of privacy."<sup>28</sup> Another woman in the study draws an analogy between wolf-whistles and a stranger forcing his way into one's living space:

Women have traditionally been considered weak and vulnerable, thus it is safe to intrude on their privacy. The reason I hate to be whistled at is I feel like that person is forcing his way into my space, whether I like it or not. Imagine if someone just walked into your apartment and complimented you on how nice it was. Chances are you would be more offended by his intrusion than flattered by his compliment. Same goes for whistling.<sup>29</sup>

Many women who engage in outdoor athletic activities hoping to relieve stress express particular outrage that sexual harassment ruins their peaceful relaxation. One female runner explained the frightening, debasing, and limiting effect of heckling on women runners, and demanded equal rights for women runners so they "can run unmolested" like their male counterparts.<sup>30</sup> Another woman described how she became frustrated by her options during lunch-time walks for exercise and relaxation along the Northern Virginia Bike Trail by her office: "If I head in one direction, I am verbally assaulted by construction workers. If I go the other way, I am subject to unbelievable vulgarities and obscenities hurled from the corner of the playground by the boys at the Sunrise Valley Elementary (!) School."<sup>31</sup>

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26. IRENE H. FRIEZE ET AL., *WOMEN AND SEX ROLES: A SOCIAL PSYCHOLOGICAL PERSPECTIVE* 326 (1978).

27. See Bowman, *supra* note 4, at 535.

28. Kissling & Kramarae, *supra* note 11, at 82.

29. *Id.* at 83.

30. Tina Kanagaratnam, *Taking Back the Streets*, *RUNNER'S WORLD*, Feb. 1994, at 22. Kanagaratnam argues that street harassment is about power, and thus female runners are common targets. She explains: "A running woman is a strong woman. She is not easily subordinated or squeezed into somebody else's preconceived idea of what she should be. That fact alone still threatens too many men, and heckling is the tool they use to restore her to her proper place." *Id.*

31. Letter to the Editor, *Street Harassment of Women*, *WASH. POST*, Mar. 26, 1990, at A10 (letter of Ruth S. Blau, Arlington, VA).

Most men do not realize the extent of the intrusiveness of street harassment. As Robin West has recognized, when women are accompanied by men, the harassment usually stops.<sup>32</sup> To gain a better understanding of the daily life experience of the other's gender, a man and woman, a New York City couple, disguised themselves as members of the opposite sex.<sup>33</sup> The man, Simon, realized that "being a woman means being continually noticed and assessed."<sup>34</sup> In one instance, when Simon refused a peddler's wares, the peddler commented, "Ooh, sexy voice!" Simon suddenly felt "a flash of anger that a simple exchange of remarks [had] to be made into something sexual."<sup>35</sup> When Simon took the train home during rush hour, a man sat down next to him with his legs apart, crowding Simon's space. And on public streets, Simon "noticed men's eyes drifting toward [his] breasts," so he decided to wear a jacket to cover them.<sup>36</sup> On the other hand, Simon's wife, Sheila, in her disguise as a man, "enjoyed the anonymity of not being stared at for a change."<sup>37</sup> She concluded that the best part about being a man "was the sense of being able to take up space."<sup>38</sup>

In addition to its intrusiveness, street harassment may have a devastating impact on women's self-esteem. The street harasser forces women to perceive themselves as he does, mere body parts or sexual objects existing for his pleasure. Robin West describes how, for young girls, street harassment is the earliest and defining lesson in the source of female disempowerment:

If they haven't learned it anywhere else, street hassling teaches girls that their sexuality implies their vulnerability. It is damaging to be pointed at, jeered at, and laughed at for one's sexuality, and it is infantilizing to know you have to take it. . . . She is an object of his pleasure, his contempt and his disposal. . . . It always made me feel—still makes me feel—like a helpless and guilty child.<sup>39</sup>

Similarly, another woman writes:

The first time a man walked toward me, opened his mouth, began panting and jerked his crotch, I didn't feel the least bit affirmed or desirable. I did feel embarrassed, humiliated, furious—and helpless. I also didn't relish having strange men ostentatiously compare notes on

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32. West, *supra* note 4, at 94.

33. Sheila McDevitt & Simon Brooking, *Trading Places: One Couple Tries a Sex-Role Switch*, LADIES HOME J., Jan. 1994, at 90.

34. *Id.* at 92.

35. *Id.*

36. *Id.* As a result of this experiment, Simon vowed "to be more careful about how [he] look[s] at women in the future." *Id.*

37. *Id.* at 93.

38. *Id.*

39. West, *supra* note 4, at 106.

my figure, turning me into their own private centerfold. . . . It made me feel vulnerable and defenseless, as if I didn't really have control over my own flesh.<sup>40</sup>

## 2. *Safety*

Street harassment can be a threatening and frightening experience. The fear of rape and violence constantly lurks in the female consciousness. Current crime statistics reveal that there are at least 105,000 rapes annually in the United States and perhaps more than 630,000.<sup>41</sup> At minimum, these statistics translate into "292 rapes each day of the year, or 12 rapes every hour, or 1 rape every 5 minutes."<sup>42</sup> Of course, not every incident of harassment or verbal violence on the street leads to an actual physical assault.<sup>43</sup> But women's fears are based on the stereotypical—and often real—rapist: a strange man who jumps his victim from behind a bush or in a dark alley. While most rapes are committed by someone known to the victim, a sizable percentage of rapes are committed by strangers. Estimates of the percentage of stranger rapes include thirty percent,<sup>44</sup> twenty-two percent,<sup>45</sup> seventeen percent,<sup>46</sup> and fifteen percent<sup>47</sup> of total reported rapes. The possibility of becoming a victim of such a violent and traumatic crime is real and immediate and cannot be ignored by women.

American women live in a society plagued with domestic violence, sexual harassment in the workplace, and pornographic depictions (sometimes brutal) of female bodies in advertising, movies, and television. The prevalence of such images of violence against women contribute to a "rape culture."<sup>48</sup> By forcing women to endure sexual humiliation, degradation, and intimidation, street harassment contributes to sexual violence in our society. It reminds women that they are not completely safe in public places and reinforces their feelings of vulnerability. One woman has described street harassment as a "nightmare," stating that she feels "afraid everyday that a verbal assault is going to turn into

40. Gwenda Blair, *Street Hassling: Putting Up With Put-Downs*, MADEMOISELLE, July 1984, at 119.

41. EMILIE BUCHWALD ET AL., *TRANSFORMING A RAPE CULTURE* 9 (1993) (citing F.B.I., U.S. DEPT. OF JUSTICE, *CRIME IN THE UNITED STATES*, 1991, (Aug. 30, 1992) (compiling data from over 16,000 law enforcement agencies covering 96% of the nation's population)); NATIONAL VICTIM CENTER AND THE CRIME VICTIMS RESEARCH AND TREATMENT CENTER, *RAPE IN AMERICA, A REPORT TO THE NATION*, (Apr. 23, 1992) [hereinafter *RAPE IN AMERICA*].

42. BUCHWALD ET AL., *supra* note 41, at 7.

43. Cristina Del Sesto, *Our Mean Streets: D.C.'s Women Walk Through Verbal Combat Zones*, WASH. POST, March 18, 1990, at B1 ("It's very infrequent that a verbal harassment turns into a physical assault, but it does happen.") (quoting statement by Denise Snyder, Director of D.C. Rape Crisis Center).

44. BUCHWALD ET AL., *supra* note 41, at 8.

45. *Id.* (citing statistics from *RAPE IN AMERICA*, *supra* note 41.)

46. Peg Tyre & Michelle Parente, *Rape: Still a Secret Crime*, NEWSDAY, Apr. 19, 1994, at A5.

47. JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 51 (1993).

48. "We will continue to live in a rape culture until our society understands and chooses to eradicate the sources of sexual violence . . ." BUCHWALD ET AL., *supra* note 41, at 9.

a physical one."<sup>49</sup> Similarly, several respondents in the Kissling and Kramarae study expressed "an unexplored connection between stranger compliments and rape."<sup>50</sup> Another woman explained: "I always have in the back of my mind that little part of me that questions motives and looks for escape routes. If I didn't I would have been raped more than once by now."<sup>51</sup>

As the United States Court of Appeals for the Ninth Circuit recognized in *Ellison v. Brady*,<sup>52</sup> women have stronger incentives to be concerned with seemingly innocuous sexual behavior because women are disproportionately victims of rape and sexual assault:

Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.<sup>53</sup>

Women have no way of determining whether strangers have friendly or harmful motives. Therefore, some women "view all gestures from men on the street as potential threats."<sup>54</sup>

In some instances, verbal harassment does in fact escalate to a physical assault. Rapists may harass women on the street to determine which women are likely to be easy targets, a process called "rape-testing."<sup>55</sup> Martha Langelan, a past president of the D.C. Rape Crisis Center, explains that some rapists carefully size up their prey, using sexual harassment to select targets that seem unlikely to fight back in an assault.<sup>56</sup> If the target

is passive and timid when harassed, [rapists] assume she will be passive and terrified when attacked. So this kind of rapist moves in on his potential victims, standing too close to one at a bus stop, using verbal harassment with another, to see how each of the women will respond.<sup>57</sup>

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49. Del Sesto, *supra* note 43, at B1.

50. Kissling & Kramarae, *supra* note 11, at 84.

51. *Id.* at 84.

52. 924 F.2d 872 (9th Cir. 1991).

53. *Id.* at 879 (adopting a reasonable victim standard for hostile environment claims).

54. Emily Bernard, *Black Women and the Backwash of Harassment*, WASH. POST, Aug. 12, 1990, at C8. See also Kanagaratnam, *supra* note 30, at 22 ("We worry that the catcall might be a precursor to violence. It usually isn't, but we still fear the risk of physical harm, however remote.")

55. See Del Sesto, *supra* note 43, at B1.

56. MARTHA J. LANGELAN, BACK OFF! HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS 45 (1993).

57. *Id.*

Some evidence supports this theory. 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."<sup>58</sup>

### 3. *Mobility*

Street harassment restricts women's mobility and geographical freedom by causing them to go blocks out of their way and deters them from appearing alone in public places.<sup>59</sup> In public spaces, the "'norm' of mobility is perceived . . . as a male prerogative."<sup>60</sup> Street harassment is an everyday reminder to women that men control their safety and rights to passage through public space.<sup>61</sup> One woman explained the effect of street harassment in this way: "You tend to dress differently, not to maybe expose your shape. [Harassment] will cause you not to want to go out at night by yourself or walk on streets where you know construction workers and city workers will harass you."<sup>62</sup> Women may forego favorite activities, such as biking or jogging, to escape harassment.<sup>63</sup> The daily commute to work, walk to school, or casual stroll through the community becomes a burdensome ordeal as women continually are subjected to the gauntlet of public sexual harassment. Women are thereby denied their right to equal enjoyment of public resources for which they pay taxes, such as public transportation, sidewalks, streets, and parks. As Bowman argues, street harassment accomplishes "an informal ghettoization of women—a ghettoization to the private sphere of hearth and home."<sup>64</sup>

Central to the freedom to be at ease in public spaces is the capacity to pass through them while retaining a certain zone of privacy and autonomy—a zone of interpersonal distance that is crossed only by

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58. Dorothy Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 378 n.95 (1993).

59. "It is a violation of my natural external freedom, not to be able to go where I please . . . My personality is wounded by such experiences, because my most immediate identity rests in my body." G.W. FREDRICH HEGEL, *TEXTE ZUR PHILOSOPHISCHEM PROPÄDEUTIK*, quoted in Benard & Schlaffer, *supra* note 9, at 70.

60. Jos Boys, *Women and Public Space*, in *MAKING SPACE: WOMEN AND THE MAN-MADE ENVIRONMENT* 35, 41 (Matrix Book Group eds., 1985). Feminist architects have studied the way in which traditional urban design and planning can diminish the safety of women in public places. Their work can be useful to feminist legal scholars concerned with legal remedies for street harassment because they emphasize the need for urban planners to design public spaces and to allocate public resources in a manner that is safe, accessible, and equitable for women. See also *WOMEN AND THE AMERICAN CITY* (Catharine R. Stimpson et al. eds., 1981).

61. Boys, *supra* note 60, at 41, 51.

62. *Are People Rude on the Street?*, USA TODAY, July 19, 1991, at 11A (readers' responses to July 17, 1991 column by Janet Singleton, comments of Alisha Gravett of San Pedro, CA).

63. See Kanagaratnam, *supra* note 30, at 22 (explaining how female runners "dress defensively to deflect unwanted attention [or] change [their] favorite running routes" to deflect harassment); *The Open Road: Women and Sexual Harassment*, BICYCLING, May 1982, at 160 (describing a woman cyclist who gave up cycling shorts and now wears long pants because she "got so tired of obscene remarks."); see also Kuster, *supra* note 25, at 308, 310.

64. Bowman, *supra* note 4, at 520.

mutual consent. If, by contrast, women are subject to violation of that zone of personal privacy when they enter public areas, that very invasion of privacy effectively drives women back into the private sphere, where they may avoid such violations. Thus, by turning women into objects of public attention when they are in public, harassers drive home the message that women belong only in the world of the private.<sup>65</sup>

#### 4. *Economic Opportunity*

Street harassment also impedes women's attempts to earn a living in the street. The very idea of women *working* in the street connotes criminal activities such as prostitution.<sup>66</sup> Many women have attempted to pursue careers in traditionally male occupations which involve working in outdoor public spaces, such as street vending<sup>67</sup> or construction work.<sup>68</sup> This venture into the sphere of traditionally male jobs forces women to contend with severe sexual harassment, including street harassment "on the job."<sup>69</sup> One study of women street vendors found that "women vendors were faced with hostile and threatening sexual remarks and actions [from customers and men on the streets] that made the streets a sexually demeaning work environment."<sup>70</sup> For example:

Elaine, a very young white woman, said, "I never wear jeans or tight clothes because men have literally come up behind me and tried to feel my ass . . . and it's not only the creeps but real respectable-looking ones, too." Celeste, another white woman in her early thirties, agreed that it was mainly the customers and other men passing by who made

65. *Id.* at 526-27.

66. *See, e.g.*, ELEANOR M. MILLER, *STREET WOMAN* (1986) (study of the criminality of women, particularly prostitution).

67. *See* Roberta M. Spalter-Roth, *Vending on the Streets: City Policy, Gentrification, and Public Patriarchy*, in *WOMEN AND THE POLITICS OF EMPOWERMENT* 272 (Ann Bookman & Sandra Morgen eds., 1988) (case study of women street vendors in Washington D.C. describing vendors' efforts in dealing with city policy and sexual harassment, including street harassment).

68. *See* HARD-HATTED WOMEN: *STORIES OF STRUGGLES AND SUCCESS IN THE TRADES* (Molly Martin ed., 1988); J. SCHROEDEL, *ALONE IN A CROWD: WOMEN IN THE TRADES TELL THEIR STORIES* (1985); MARY L. WALSHOK, *BLUE-COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER* (1981).

69. For a discussion of the hostile work cultures of traditionally male jobs, see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750, 1832-39 (1990). Shultz writes, [W]omen in male-dominated occupations are more likely to be subjected to harassment than are women in other occupations. . . . Harassment is also driving the small number of women in nontraditional jobs away. Blue-collar tradeswomen report that women are leaving the trades because they cannot tolerate the hostile work cultures . . . .

*Id.* at 1834; *see also* Suzanne C. Carothers & Peggy Crull, *Contrasting Sexual Harassment in Female- and Male-dominated Occupations*, in *MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME: EVERYDAY TRIALS AND TRIUMPHS OF WOMEN WORKERS* 219, 224 (Karen B. Sacks & Dorothy Remy eds., 1984) (reporting more severe sexual harassment of women in outdoor or blue-collar workplaces).

70. Spalter-Roth, *supra* note 67, at 280 (citations omitted).

“grabs at women all the time.” Jackie, a twenty-five-year old Black woman said, “Men try to hustle you all the time, both customers and other men—you have to be cool and unfriendly.”<sup>71</sup>

Additionally, men who work in the street often use harassment to drive away women who attempt to work alongside them. Women street vendors are “both physically and verbally harassed by male vendors whose actions let the women know that they should not be working on the streets.”<sup>72</sup> Similarly, male vendors often “insist[] that they ha[ve] a right to a woman’s spot, and . . . threaten or intimidate her until she move[s].”<sup>73</sup> Male vendors also harass women vendors by comparing them to prostitutes. One male vendor told a female vendor: “If you’re going to sell on the street, why don’t you sell something expensive like your pussy and really make some money.”<sup>74</sup> Construction workers who harass women passers-by also create a sexist environment that objectifies and degrades women. In this sense, harassers perpetuate the invidious stereotype that blue-collar jobs are male turf on which women will be subjected to sexual ridicule for the amusement of male workers. Such an environment fosters the false norm that blue-collar jobs are for men only, thereby discouraging women from pursuing such occupations in the first place and narrowing women’s range of possible career choices.<sup>75</sup>

Street harassment by men at outdoor workplaces can also affect women’s economic advancement in less obvious ways. As the story of the summer associate at the beginning of this Article demonstrates, street harassment can instantly shatter a woman’s feelings of confidence, professionalism, and control, leaving her with feelings of embarrassment, helplessness, and anger. As one woman writes:

A professional woman on her way to work in the morning, perhaps trying to psych herself for a difficult meeting, can’t escape from the deep-down truth of the matter: that no matter how hard she works for credibility, she is at bottom perceived just like any other woman on the planet, as merely “meat on the market.”<sup>76</sup>

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71. *Id.*

72. *Id.* at 280-81.

73. *Id.* at 281. One woman vendor said that male vendors “frequently set up right on top of you and try to crowd you back into the wall. They only do this to women because another man would punch the shit out of them.” *Id.*

74. *Id.*

75. *Cf. Schultz, supra* note 69 (arguing that hostile work cultures of male-dominated occupations may explain why women “lack interest” in nontraditional jobs).

76. Dorothy Nixon, *Male “Right” to Dominate is Reinforced*, THE GAZETTE (Montreal), Aug. 31, 1994, at B2. Of course, working women are not the only women subjected to confidence-shattering public harassment. Street harassment crosses socio-economic boundaries. However, I was unable to locate any study or discussion of how street harassment affects women who live or work in the street, such as homeless women or prostitutes.

These distracting and degrading intrusions may interfere with women's ability to concentrate once at work thereby affecting their job performance.

### 5. Political Community

Most arguments against regulating street harassment are based on the idea that such regulations will stifle public discourse or interfere with dialogue between the sexes.<sup>77</sup> These arguments presuppose an interchange free from coercion; however, as Catharine MacKinnon argues, "[R]ights to speak involve relations of power between private individuals."<sup>78</sup> Promoting the public speech rights of a particular group without recognizing these power relationships only facilitates the domination and silencing of women by men.<sup>79</sup> Street harassment itself silences women, inhibits dialogue, and promotes sexual oppression.<sup>80</sup> Street harassment does not contribute to political discourse or meaningful conversation. On the contrary, when harassed in the street, most women react with suspicion and silence and pretend to ignore the harasser.<sup>81</sup> When women respond to street harassment with counter-aggression, the violence and abuse often escalate.<sup>82</sup> Some men claim that street harassment is merely "sexual courtship" behavior or harmless flirting. But, as Langelan points out, "As a means of generating sexual interest on the recipient's part, it is not only ineffective, but consistently counterproductive: women react with disgust, not desire, with fear, not fascination."<sup>83</sup>

77. See, e.g., *Sonya Live*, *supra* note 24, at 9-10, 12 (comments of Laurence Lacey, National Organization for Men).

78. CATHARINE MACKINNON, *Not a Moral Issue*, in FEMINISM UNMODIFIED 146, 155-56 (1987). See also Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 380 ("[T]he speech of women and of other groups is not free but is actually the result of social forces beyond their control.").

79. MACKINNON, *supra* note 78, at 155-56.

80. Legal scholars have described a similar relationship between racist speech and the perpetuation of racial stereotypes and oppression. See, e.g., Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-39 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 457-76; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2300, 2326-40 (1989).

81. LANGEAN, *supra* note 56, at 98 ("Ignoring street harassment is the single most common response middle-class girls in the United States are taught, and it is the standard behavioral strategy for women in many different cultures."). But, Langelan notes, "[W]omen never really ignore harassment. . . . [They] must deal with all the emotional repercussions of victimization: fear, humiliation, feelings of powerlessness, rage." *Id.*

82. *Id.* at 100-01. Another woman illustrates the ineffectiveness of standard responses to street harassment:

If I tried to ignore the lewder comments and sounds, that only seemed to provoke more harassment; if I attempted to buy off the men involved with a nod or slight smile, they increased their efforts fivefold; and if I told them to knock it off, they got downright unpleasant, sometimes dangerously so.

Blair, *supra* note 40, at 119.

83. LANGEAN, *supra* note 56, at 39.

*C. Explaining Street Harassment: Power, Gender, Race, and Class Dynamics*

Although the collective effect of street harassment is to drive women from the public sphere, it is unlikely that individual harassers are implementing an elaborate political agenda. To date, no academic study or comprehensive analysis exists which explores the reasons men engage in street harassment or the complex gender, socioeconomic, racial, or ethnic dynamics underlying street harassment. However, several informal surveys have been conducted by women who interviewed their harassers.

Cheryl Benard and Edit Schlaffer interviewed sixty men about their intentions after they were harassed by them on the street.<sup>84</sup> The researchers discovered that most men were initially at a loss to explain their behavior. When the women pressed their harassers for an answer, the most common responses included: "It alleviates boredom, it gives them a feeling of youthful camaraderie when they discuss women with other men; it's 'fun' and it 'doesn't hurt anybody'. . . ."<sup>85</sup> When Benard and Schlaffer pressed the harassers further for an explanation of their behavior, they found that "[t]he notion that women dislike this [harassment] was a novel idea [to] most men, not because they had another image of the woman's response but because they had never given it any thought at all."<sup>86</sup> A minority of men actually believed that women enjoyed receiving their attention. "One 45-year-old construction worker portrayed himself as a kind of benefactor to womanhood and claimed to specialize in older and less attractive women to whom, he was sure, his display of sexual interest was certain to be the highlight in an otherwise drab existence."<sup>87</sup>

Approximately twenty percent of the men in Benard and Schlaffer's survey stated that they only engage in street harassment when they are in the company of other men, supporting "the explanation that the harassment of women is a form of male bonding, of demonstrating solidarity and joint power."<sup>88</sup> A minority of men, approximately fifteen percent, "explicitly set out to anger or humiliate their victims." This same group often used graphic commentary and threats.<sup>89</sup> Similarly, Maggie Hadleigh-West created a documentary in which

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84. Benard and Schlaffer note that responding to harassment by conducting a survey "genuinely and predictably disarms the harassing male, so if you want to transform a lewdly smirking man into a politely confused one within a matter of seconds, you need only pull a mimeographed questionnaire out of your bag and inform him that he is part of a research project." Benard & Schlaffer, *supra* note 9, at 71. They note that this method is rather time-consuming.

Benard and Schlaffer's short study on this topic is the only one to date. More comprehensive research into the reasons men engage in street harassment behavior is needed. Martha Langelan keeps harassment surveys in her briefcase and has interviewed numerous men who have sexually harassed her on the street in Washington, D.C., but this data has not yet been organized in a statistically significant manner. Telephone Interview with Martha J. Langelan, Senior Economist, U.S. Dept. of Transportation (Oct. 1993).

85. Benard & Schlaffer, *supra* note 9, at 71.

86. *Id.*

87. *Id.*

88. *Id.* at 71-72.

89. *Id.* at 71.

she interviewed men who leered or jeered at her in public places. The men's responses "ranged from violent rebuffs to arrogant denials to a few admissions of wrongdoing and the rare apology."<sup>90</sup> Some men believe "with firm conviction that women enjoy receiving their attention."<sup>91</sup> Other men claim street harassment is "just harmless flirting."<sup>92</sup>

Although many men may view street harassment as harmless fun, on a deeper level, sexual harassment of women in public places reflects the power differential between the genders. Martha Langelan divides harassers into three categories: predatory harassers, dominance harassers, and strategic/territorial harassers.<sup>93</sup> Each of these types of harassers draws upon the male prerogative to subordinate women in various ways.

Predatory harassers find sexual excitement in the act of harassment itself, or use coercive harassment as a means to obtain sexual services.<sup>94</sup> Even though a predatory harasser may never touch his victims, "he freely uses them for his sexual purposes, without their consent and without regard for the damage his behavior produces."<sup>95</sup> Dominance harassers harass "not for sexual access but for motives of personal sexual power—as a way to bolster their egos (at women's expense), assert their status, and reassure themselves that their masculinity commands respect and female deference."<sup>96</sup> Dominance harassment is most frequently encountered by women on the street and, on an aggregate level, can be very damaging.

On a societal level, the actions of millions of harassers who are meeting their emotional needs at women's expense add up to something much larger: a daily, hourly, unrelenting enforcement mechanism that restricts women's freedom, maintains the social structure of male supremacy, and enforces the overall social norm of male dominance and female submission.<sup>97</sup>

Strategic harassers deliberately intimidate women to maintain a particular social, economic, or political privilege. Similarly, territorial harassers use harassment to guard privately owned institutions by making them hostile, sexist environments. In publicly owned space, such as parks or public streets, territorial harassers may attempt to define the territory as distinctly male turf, inhospitable to the presence of women. In short, strategic and territorial

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90. Avenoso, *supra* note 20, at E1.

91. Benard & Schlaffer, *supra* note 9, at 71.

92. Kanagaratnam, *supra* note 30, at 22 (quoting comment from male friend).

93. LANGELAN, *supra* note 56, at 41-42.

94. *See id.* at 41-45.

95. *Id.* at 42.

96. *Id.* at 45. In other words, Langelan writes, "[H]e is looking for an ego-boost, not necessarily an erection." *Id.* at 46.

97. *Id.* at 47.

harassment have “relatively little to do with sexual arousal per se, and everything to do with power, gender, and women’s freedom.”<sup>98</sup>

Langelan’s three-part categorization of harassers reveals that harassment is not a uniform phenomena with a single cause. Yet by dividing harassers into only three categories without accounting for racial, ethnic, and class differences, Langelan may obscure some of the complexities involved in street harassment. Most stories describing street harassment do not identify the race, socioeconomic status, or age of the woman or the harasser. In their studies of street harassment, Kissling and Kramarae have found that “women who do find street remarks disturbing, disgusting, or dangerous evidently hear them as more sexist than racist or classist.”<sup>99</sup>

To date, Deirdre Davis’ work is the only in-depth analysis examining how street harassment affects women of a particular background based on historical and social complexities. Davis argues that street harassment of African-American women by white men is particularly invidious because it perpetuates the false “Jezebel” image of the African-American sexual temptress used historically to justify the sexual subordination and abuse of slave women.<sup>100</sup>

Street harassment is a forum that allows white men, in the absence of slavery, to maintain the boundaries of their relationship with black women and to perpetuate the image of African American women as “blackwomen.” The legal and cultural invisibility of street harassment gives white men a way of oppressing African American women that replaces the historical slave/master structure.<sup>101</sup>

The dynamics and wider political implications of other forms of inter- and intra-racial street harassment are topics deserving of more thorough scholarly study and analysis. For example, men in marginalized groups may engage in street harassment to make themselves feel more powerful and less oppressed.<sup>102</sup> Benard and Schlaffer state that “[s]ome migrant laborers or construction workers, selecting a well-dressed, middle-class woman, insult not so much the woman as the snobbish privileged class she symbolizes to them.”<sup>103</sup> When a homeless man sexually harasses a woman in the street he

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98. *Id.* at 48.

99. Kissling & Kramarae, *supra* note 11, at 90. Meredith Tax writes: “You can say what you like about class and race. Those differences are real. But in this everyday scenario, any man on earth, no matter what his color or class is, has the power to make any woman who is exposed to him hate herself and her body.” Meredith Tax, *Woman and Her Mind: The Story of Everyday Life*, in *RADICAL FEMINISM* 23, 28 (Anne Koedt et al. eds., 1973).

100. Davis, *supra* note 4, at 166-67.

101. *Id.* at 163-64.

102. Davis, *supra* note 4, at 171 (citing Virginia R. Harris & Trinity A. Ordoña, *Developing Unity Among Women of Color: Crossing the Barriers of Internalized Racism and Cross-Racial Hostility*, in *MAKING FACE, MAKING SOUL: HACIENDO CARAS* 304, 308 (Gloria Anzaldúa ed., 1990)).

103. Benard & Schlaffer, *supra* note 9, at 71. Although this type of street harassment may arguably hint at a political message, the behavior at issue nevertheless assaults and threatens the victim.

may be grasping at the only strand of power he has left in a highly stratified society—his maleness. One woman describes this dynamic as follows:

I can understand that these men are responding in the only way they know how to their sense of isolation in this society. I see that unemployed black men, in particular, feel abandoned by the world and, in a typically human response, they try to oppress those they see as weaker—often a black woman. At the root of their efforts to get my attention may be a simple need to remind me that they are here, alive in the world, although the world often seems to forget it. Powerless and ignored, they are saying, “not only am I here, but I can hurt you.”<sup>104</sup>

In discussing and developing potential legal remedies, feminists should remain sensitive to the complexities of race, ethnicity, and socioeconomic background that may influence street harassment. In addition to silencing women and fostering the patriarchal structure of our society, street harassment may implicate more complex forms of oppression based on race, ethnicity, or class.

## II. ALTERNATIVE LEGAL REMEDIES: TARGETING CRUCIAL PUBLIC SPACES

Street harassment causes serious harm to women—a harm for which the law provides no adequate remedy. Bowman explores several areas of the law that would seem to cover street harassment, including the tort of assault under civil law,<sup>105</sup> anti-harassment ordinances,<sup>106</sup> fighting words statutes,<sup>107</sup> the tort of intentional infliction of emotional distress,<sup>108</sup> and the tort of invasion of privacy.<sup>109</sup> Bowman concludes, however, that none of these doctrines provides a workable remedy for street harassment.<sup>110</sup>

Because current law fails to address the injuries caused by street harassment, Bowman proposes the passage of statutes or ordinances crafted to address street harassment. She provides a model criminal statute that makes street harassment a misdemeanor, punishable by a fine of up to \$250.<sup>111</sup> First

104. Bernard, *supra* note 54, at C8.

105. Bowman, *supra* note 4, at 549-55.

106. *Id.* at 555-58.

107. *Id.* at 558-63.

108. *Id.* at 563-67.

109. *Id.* at 567-69.

110. Most of these remedies fail because they contain an intent requirement and are judged by a reasonable *man* standard. Bowman explains that women cannot successfully use a “fighting words” remedy because it presupposes a person who has “been socialized to respond to insults with violence.” *Id.* at 561. Women, however, have not been socialized to fight. In the average street harassment incident, the female target “is likely to react with fear, to freeze, and to pretend to ignore what is happening to her.” *Id.*

111. Bowman’s proposed statute provides:

*Street harassment:* It shall be a misdemeanor, punishable by a fine of \$250, to engage in street harassment. 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

time offenders would be required to watch an educational video "that focuses on the effects of street harassment and attempts to alter the behavior of harassers by evoking empathy with their targets."<sup>112</sup> In addition, Bowman urges women to mount a massive litigation campaign to redefine the torts of assault, intentional infliction of emotional distress, and invasion of privacy so that they do encompass street harassment and incorporate a reasonable woman standard.<sup>113</sup>

Bowman's statute would validate the experience of many women and provide a strong symbolic message that street harassment is a systemic social problem that requires a collective societal response. I do not believe, however, that a blanket criminal prohibition of street harassment is the best solution. First, a blanket prohibition of street harassment is not likely to withstand First Amendment scrutiny.<sup>114</sup> Second, a criminal approach involves the problem of prosecutorial discretion. Police and prosecutors, who are already overburdened with work, may not take the crime of street harassment seriously and may fail to bring charges. Third, a criminal remedy presents the danger that charges may be brought against a limited population, evolving into nothing more than a tool with which the police can harass the homeless, powerless, or otherwise oppressed.<sup>115</sup> As Dorothy Roberts notes:

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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. The harasser's intent, except his intent to say the words or engage in the conduct, is not an element of this offense. This section does not apply to any peaceable activity intended to express political views or provide public information to others.

A woman's dress and prior sexual history are irrelevant to the issue whether the harassment was welcome or unwelcome to her.

A 'public place' is any place to which the public generally has access, including but not limited to streets, sidewalks, alleys, public buildings, public accommodations such as hotels, theaters, taverns, and restaurants, and common carriers such as trains, buses, and taxis.

A person who engages in street harassment while operating a motor vehicle is subject to revocation or suspension of his license to operate a motor vehicle or his chauffeur's license.

Any person aggrieved under this statute shall have a private cause of action for damages.

Punitive damages shall also be available without proof of actual damages.

*Id.* at 575-76.

112. *Id.* at 576. An educational video "would be similar to the alternative sentence meted out to traffic offenders upon a first moving violation in Chicago, who are often offered the choice of watching a movie about safe driving instead of paying a fine." *Id.* at 576 n.297.

113. *Id.* at 577-79.

114. Bowman recognizes that her proposed statute may be unconstitutional under current First Amendment doctrine. Bowman, *supra* note 4, at 546-48.

115. Bowman notes that a criminal law approach has the advantages of "the provision of a free attorney by the state and the imprimatur of collective disapproval of the prohibited conduct," but notes that police, states' attorneys, and judges have not always vigorously investigated or prosecuted cases of sexual assault. Alternatively, enforcement may discriminate "against poor people and minorities." *Id.* at 548.

Women's fear of strangers on the street is complicated by the deeply-embedded image of the dangerous Black man. In the South, a Black man's glance at a white woman signified a threat of rape. I am not sure that efforts to combat street harassment through criminal statutes could ever successfully overcome this powerful racial stereotype.<sup>116</sup>

Some legal remedy for street harassment, however, is desperately needed. The law may be an indirect and clumsy instrument for dealing with the problem of street harassment, but the serious injuries that such abuse inflicts on women's freedom, safety, and fundamental rights deserve and require legal intervention. The true value of any legal remedy for street harassment lies in its symbolic value and potential to raise the public consciousness about street harassment's significant harm to women.<sup>117</sup>

This Part expands on the conversation sparked by Bowman by identifying the crucial public spaces in which women have reportedly experienced the most prevalent and severe street harassment. I divide these public spaces into three categories: first, outdoor workplaces, such as construction sites, company trucks,<sup>118</sup> and taxis;<sup>119</sup> second, transportation systems;<sup>120</sup> and third, public parks. These spaces could be transformed into empowering "hassle-free zones."<sup>121</sup> Regulations prohibiting street harassment in these limited areas would be more likely to withstand First Amendment scrutiny.<sup>122</sup> In the sections that follow, I discuss these remedial schemes in greater detail.

Of course, such targeted remedies will not solve the problem of street harassment immediately or completely. Yet, because these remedies focus on

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116. Roberts, *supra* note 58, at 378.

117. Bowman argues that the possibility that courts might reject such ordinances should not deter women from working to pass them, because "[t]he process of introducing legislation and campaigning for its passage would provoke public discussion and raise consciousness about the harms of street harassment, even if the ordinance were ultimately overturned." Bowman, *supra* note 4, at 577.

118. The 1991 movie *THELMA AND LOUISE* vividly brought this type of harassment to life. The two female protagonists confront the harasser and blow up his oil truck. At this point in the film, audiences usually cheer. *See id.* at 530.

119. *See* Bowman, *supra* note 4, at 530 n.63 (citing cases of verbal sexual abuse and physical violence by taxi drivers).

120. *See* Bowman, *supra* note 4, at 566 n.258; LANGELAN, *supra* note 56, at 241.

121. I borrow the "hassle-free zone" idea from the campaign of the D.C. Rape Crisis Center and other women's groups to make Washington, D.C. a "Hassle-Free Zone." The primary purpose of the program was to raise men's consciousness about street harassment, not actually to declare certain streets as hassle-free zones. *See* Carol Dana, *Talking Back to Street Harassers*, WASH. POST, Aug. 19, 1986, at C5; I. Rajeswary, *Anti-Rape Week Will Target Verbal Abuse*, WASH. POST, Sept. 20, 1985, at C2. The groups organized speakouts on street harassment in public parks and at subway stations. Additionally, "[t]hey photographed and tape-recorded harassers and reported them to the police." LANGELAN, *supra* note 56, at 332-33. Although they never got a case to court, they educated the police about the issue, and "scared some harassers." *Id.* at 333.

122. For example, narrowly tailored prohibitions on panhandling in subway systems have been upheld as reasonable time, place, and manner restrictions, *Young v. N.Y. City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990), while blanket prohibitions on begging have not withstood scrutiny, *see, e.g., Loper v. N.Y. City Police Dep't*, 802 F. Supp. 1029 (S.D.N.Y. 1992) (invalidating New York statute prohibiting loitering in public place for purpose of begging); *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991) (invalidating California statute prohibiting begging in "any public place").

the areas most commonly plagued with street harassment, they will significantly diminish the problem. More importantly, targeted remedies can accomplish the primary purpose of a legal campaign against street harassment—sparking public discussion and raising consciousness about the harms women endure every day “in the street.”

#### A. *Outdoor Workplaces*

The yellow cautionary sign “Men at Work” at construction sites implies far more for women than it does for men. For men, it may mean, “Beware of falling objects” or “Lower your speed.” For women, it also warns, “Shrink into your coat,” “Look straight ahead,” and “Brace yourself” for a cascade of sexually vulgar comments and gestures.<sup>123</sup> Construction sites are infamously hostile environments for female passers-by.<sup>124</sup>

These hostile environments are analogous in their patterns and effects to those already prohibited by Title VII.<sup>125</sup> Title VII of the Civil Rights Act of 1964 makes it unlawful for employers “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .”<sup>126</sup> Although harassment is not expressly prohibited by the statute, the Supreme Court has recognized that sexual harassment in the

123. For an inside look at street harassment by construction workers, see Phil McCombs, *Stare Masters: Every Day at Noon, They Sit and Watch Their Dreams Go By*, WASH. POST, Aug. 11, 1993, at D1. The reporter visited a group of construction workers during their lunch hour. He romanticized their sexual harassment of women, and reported their evaluative comments of female passers-by such as, “You can damn near set a beer can on top of that”; “She does aerobics. You can tell.”; “Make a good wife”; “Lord ‘a mercy. I like it when they get close to 40 . . . Career women, you know.” *Id.* The article begins:

Every day at noon, the men sit on the wall and watch. They eat, and watch. They talk about Harleys and how much cognac they drank over the weekend and the baseball stats, and women. Mostly they talk about women. Because the women are walking by right in front of them, right down Vermont Avenue, with their heels clicking and their skirts flaring and their ID cards bouncing on their blouses, and they look good. Damn they look good, the big ones and little ones and young ones and old ones and black ones and white ones and ones in between—they all look good, you bet. Because they are a dream, and the men are dreamers, these men who get up at 3 or 4 in the morning somewhere way far out in the counties and saddle up and get in here at 6 to work on this big renovation job at the Department of Veterans Affairs, and at noon they get a lunch half-hour and they wipe off the sweat and dust and get a cold drink and sandwich at the concession truck and walk over and sit on the low granite wall across the street and eat, and smoke, and watch. They watch the women going by and they talk about them because, in the end, a man’s fantasy, his life and his purpose and his dream, comes down somehow to a woman, one way or another. It’s just the way it is.

*Id.* This article provoked a tremendous reaction from readers of the *Washington Post*. See, e.g., Jason Vest, *Oglers Get the Evil Eye; Men Against Rape Protest at Work Site*, WASH. POST, Aug. 17, 1993, at C4 (describing protest by D.C. Men Against Rape who gathered in front of construction site and demonstrated against sexual harassment by construction workers); *Romanticizing the “Stare Masters,”* WASH. POST, Aug. 21, 1993, at A19 (letters to the editor expressing readers’ outrage at the article).

124. Although a construction workers represent the stereotypical street harasser, they are not the only men who harass women on the street. The reason harassment by construction workers seems more pervasive and severe “may be just a matter of location and access.” LANGEAN, *supra* note 56, at 236.

125. 42 U.S.C. § 2000e *et seq.* (Supp. IV 1992).

126. 42 U.S.C. § 2000e-2(a)(1).

workplace violates Title VII's proscription against sex discrimination.<sup>127</sup> In *Meritor Savings Bank v. Vinson*, the Court explained that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination."<sup>128</sup> Rather, "[t]he phrase 'terms, condition, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."<sup>129</sup> Drawing on the guidelines issued by the Equal Employment Opportunity Commission (EEOC), the Court defined sexual harassment to include "[u]nwelcome sexual advances, requests for sexual favors, and other *verbal or physical conduct of a sexual nature*."<sup>130</sup> Where such sexual misconduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment," it violates Title VII.<sup>131</sup>

Congress enacted Title VII "to achieve equality of employment opportunities"<sup>132</sup> and to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."<sup>133</sup> Because "[w]omen who know that they will be subject to harassment will be deterred from joining the work force or accepting certain jobs,"<sup>134</sup> the Court has extended Title VII to proscribe such harassment. The hostile environment doctrine was designed to ensure that no person be forced to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."<sup>135</sup> As the Third Circuit explained in *Andrews v. City of Philadelphia*,<sup>136</sup> "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women."<sup>137</sup>

In addition to promoting equality of employment opportunity and ridding the workplace of sexual abuse, some courts have recognized that Title VII raises consciousness and therefore serves the broader societal goal of abolishing invidious prejudices in settings outside the workplace. In *Davis v. Monsanto Chemical Company*, the Sixth Circuit recognized that "[b]y

127. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). Courts have recognized two different forms of sexual harassment. In *quid pro quo* cases, "employers condition employment benefits on sexual favors." *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991) (citation omitted). In hostile environment cases, "employees work in offensive or abusive environments." *Id.*

128. *Meritor*, 477 U.S. at 64.

129. *Id.* (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978), quoting *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

130. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)) (emphasis added).

131. *Id.* (quoting 29 C.F.R. § 1604.11(a)(3)).

132. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

133. *Id.* at 431.

134. *Andrews v. City of Phila.*, 895 F.2d, 1469, 1483 (3d Cir. 1990).

135. *Hensen v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

136. 895 F.2d 1469 (3d Cir. 1990) (holding that pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of hostile environment).

137. *Id.* at 1483; *see also* *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991) ("Congress did not enact Title VII to codify prevailing sexist prejudices.").

informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society."<sup>138</sup>

Title VII thus evinces a strong public policy to protect working individuals from sexual discrimination and to promote equality of employment opportunity. Individuals may challenge sexual harassment by people "on the job," however, only when their harassers are employers or co-workers within the same office. Ideally, the societal commitment to the prevention of sexual abuse and the promotion of equality should be extended to all women, working or non-working. Unfortunately such a broad expansion of Title VII itself seems unlikely. Nevertheless, the same legal principles that prohibit sexual harassment in the workplace provide a framework for new legislation that would protect public passers-by who come into contact with harassers at work in outdoor "offices."

Some companies, especially in traditional blue-collar occupations such as construction or truck driving, have an "office" that moves from place to place and is located outdoors in the public space. Therefore, harassers "at work" have the ability to harass women in the public space as well. Since Title VII actions may be brought only by other employees, these women suffer sexual abuse without recourse, and the workers who harass them are not accountable for their actions. The same behavior that, under Title VII, would be deemed sexually discriminatory and harmful in the workplace is considered by the law to be trivial and tolerable in the public arena.<sup>139</sup>

Such conduct is neither trivial nor tolerable. It interferes with a woman's right to walk freely throughout her community, an interference that similarly situated men do not encounter. Moreover, although such harassment usually does not cause severe psychological damage to an individual victim, it does alter the conditions of her day, causing extra stress, anxiety, and fear. In short, sexual harassment invades a woman's privacy, threatens her sense of safety, and often forces her to alter her path as she performs her daily tasks.<sup>140</sup>

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138. 858 F.2d 345, 350 (6th Cir. 1988).

139. See, e.g., *Andrews*, 895 F.2d at 1485 ("[P]ervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment"); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1508, 1515 (9th Cir. 1989) (finding hostile working environment where hotel's male chief of engineering frequently made sexual comments and sexual advances to maids, and where female supervisor called her female employees "dog[s]" and "whore[s]"); *Lipsett v. University of P.R.*, 864 F.2d 881, 888, 896-98 (1st Cir. 1988) (Title IX case applying *Meritor*) (noting that plaintiff complained that male residents "rated" women in front of her on the basis of physical attributes and sexual desirability); *Davis*, 858 F.2d at 369 (noting that harassment included insults because of gender and unwanted sexual innuendos, including comments about women's clothing); *Henson v. City of Dundee*, 682 F.2d 897, 899 (11th Cir. 1982) (noting that plaintiff was subjected to "numerous harangues of demeaning sexual inquiries and vulgarities"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493-1502 (M.D. Fla. 1991) (describing pervasive pornography and severe verbal harassment in plaintiff's work environment).

140. See *supra* part I.B.

Additionally, street harassment by workers at outdoor jobs can be more severe and pervasive in its scope than sexual harassment in the workplace. Since many outdoor jobs can remain in the same place for a prolonged period of weeks or months, the same workers may harass the same women every time they enter or exit their home or office or pass by on the street. And, since "the public street is his workplace, [the man at the outdoor worksite] has access to a much larger number of women. If one in five engineers harasses, he may insult three women a day; if one in five construction workers is a harasser, he may insult three hundred."<sup>141</sup>

Finally, street harassment of public passers-by by employees at outdoor workplaces may indirectly affect societal efforts to promote equality of employment opportunity. A sexist environment that objectifies and degrades women at outdoor workplaces fosters the stereotypical notion that "offices" located in the public sphere are male turf. Street harassment transforms outdoor professions, such as street vending or construction work, into sexually demeaning work environments for women.<sup>142</sup> As Vicki Schultz has argued, hostile work cultures of traditionally male jobs may explain why many women "lack interest" in such jobs in the first place, or why women who venture into such professions ultimately become frustrated and leave.<sup>143</sup>

The failure of the law to provide a remedy to members of the public who are harassed by employees at outdoor workplaces creates an anomalous situation in which all-male work crews are beyond the reach of the public policy intended to prevent sexual abuse and to promote equality between the sexes. Women who do not work, or who are not at work, are denied the protective power of the law. Although a female employee of the outdoor workplace may have a cause of action if her co-workers engage in street harassment,<sup>144</sup> the primary victim of the harassment—the woman who, perhaps daily, passes by the worksite and silently endures the abuse—has no formal legal means by which to redress this behavior. The degradation she suffers, regardless of how intrusive or threatening, is currently considered trivial and harmless under the eyes of the law.

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141. LANGELAN, *supra* note 56, at 236.

142. *See supra* part I.B.4.

143. *See* Schultz, *supra* note 69.

144. Several courts have recognized a category of actionable conduct under Title VII including "behavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex." *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991); *see also* *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985), *aff'd sub nom.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) ("Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive."). There is additional support for this proposition in the analogous context of racial harassment. *See, e.g.*, *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 n.2 (11th Cir. 1982) (noting that black plaintiff may state claim under Title VII when racial epithets were directed at black customers and other employees, but not specifically at plaintiff); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (holding that Hispanic employee could recover under hostile environment doctrine where employer gave discriminatory service to Hispanic clientele).

The fact that street harassment by working men is analogous in its patterns and effects to "hostile environment" sexual harassment should destroy the notion that street harassment by working men is trivial and harmless. While Title VII was never intended to apply outside the workplace, its hostile environment principles provide a useful framework from which to develop a liability regime to protect all women who are street harassed by "men at work." This regime would hold employers vicariously liable for public sexual harassment by their employees if the employer failed to warn workers that street harassment is intolerable, failed to implement a system by which members of the public could formally file a complaint, or failed to take remedial action when members of the public complained about harassment by their employees.<sup>145</sup>

It would be relatively easy to develop a complaint procedure for street harassment. For example, instead of signs on the back of company trucks that read, "How's my driving, call 1-800-555-1212," trucks and taxis could display signs that read, "If the driver of this vehicle harasses you, call 1-800-555-1212." Similarly, at construction sites, there should be a number for women to call to complain about harassment by workers.<sup>146</sup> Such a "Harassment Hotline" would be a first step in ending the hostile environment of outdoor workplaces. It would send a valuable message that a particular company cares about its image and does not tolerate workers who invade and bombard communities with sexual harassment. Some companies have already recognized that preventing street harassment by their employees is not only good social policy but also good business strategy. For example, in order to close a deal with a women's college in Cambridge, one British construction company

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145. Drawing on the EEOC Guidelines, 29 C.F.R. § 1604.11(c) (1994), the Supreme Court rejected absolute employer liability for employers for Title VII violations and instead suggested that courts look to agency principles. *Meritor*, 477 U.S. at 71-72. The *Meritor* Court quoted the following passage from the *Amici Curiae* Brief for the United States and EEOC, explaining that in a hostile environment case, agency principles lead to:

[a] rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e.g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.

*Id.* at 71 (quoting Brief for United States and EEOC as *Amici Curiae* at 26); see also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1528 (M.D. Fla. 1991) (noting that employer who ratifies harassing conduct by failure or refusal to act to remedy valid complaint is "surely as culpable as if the employer actively participated"); *Davis v. United Steel Corp.*, 779 F.2d 209, 212 (4th Cir. 1985) (noting that employer's liability is derived from duty to exercise reasonable care in controlling employees).

146. Of course, if the company phone number is on the placard, women should take advantage of this number when harassed. The number should be large enough for passers-by to see.

formally agreed in its contract that its workers would not harass students by ogling, leering or shouting at them.<sup>147</sup>

Upon receiving a complaint, the company would be required to take remedial action designed to end the harassment. Following the Title VII model, the new regime would hold an employer liable for sexual harassment by an employee "unless it can show that it took immediate and appropriate corrective action."<sup>148</sup> The remedy should be "reasonably calculated to end the harassment."<sup>149</sup> In the case of street harassment, a verbal or written warning instructing the employee to stop the harassment or face suspension would probably be effective in most instances.<sup>150</sup> If workers know that their employer condemns street harassment and that their job security or earnings may be threatened by such behavior, they will be more likely to stop harassing women on the street. This new regime would therefore serve two purposes: by sanctioning employee street harassment, the regime may change the false perception that street harassment is harmless fun and help ensure the safety, liberty, and equality of women on the street.

Some may argue that workers have a First Amendment right to harass women who walk past their worksite.<sup>151</sup> But courts that have considered similar First Amendment defenses to Title VII claims have rejected such arguments.<sup>152</sup> First Amendment defenses should be rejected here as well. First, the law would only target street harassment perpetrated at the worksite and workplace speech is already heavily restricted.<sup>153</sup> Therefore, an

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147. *Construction Company Agrees to Stop Workers' Wolf Whistles*, BALTIMORE SUN, Sept. 20, 1994, at 2A.

148. 29 C.F.R. § 1604.11(d) (1994).

149. *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

150. For analogous Title VII cases, see *Swentek v. US Air, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987) (holding employer properly remedied sexual harassment by fully investigating the allegations, issuing written warnings to refrain from discriminatory conduct, and warning the offender that a subsequent infraction would result in suspension) and *Barrett v. Omaha National Bank*, 726 F.2d 424, 426 (8th Cir. 1984) (holding employer properly remedied hostile working environment by fully investigating incident, reprimanding harasser for grossly inappropriate conduct, placing offender on probation for ninety days, and warning offender that further misconduct would result in his discharge).

151. Some commentators argue that Title VII "hostile environment" liability violates the First Amendment. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO L.J. 481 (1991); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. REV. 1791 (1992).

152. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534-37 (M.D. Fla. 1991) (holding that sexually-oriented verbal harassment is not protected speech); *Jew v. University of Iowa*, 749 F. Supp. 946, 961 (S.D. Iowa 1990) (upholding Title VII violation arising from false rumors of a sexual relationship between female professor and male department chair); see also Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990) (arguing that restrictions on sexist speech in the workplace are consistent with the First Amendment).

153. See *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir.), cert. denied, 111 S. Ct. 147 (1990) (holding casual chit-chat while working is not protected speech); *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1110 (7th Cir. 1986) (stating that because "workplace is for working," employer may prevent employees from engaging in expressive activities). Public employee speech cases, which balance the employee's speech rights against the employer's interests in maintaining discipline and order in the workplace, provide analogous support. See, e.g., *Finch v. City of Vernon*, 877 F.2d 1497, 1502 (11th Cir. 1989) (holding that "public employee's speech on matters of public concern is protected by First Amendment [and] requires balancing between interests of employee in commenting on matters of public concern and interests of city in maintaining discipline and order in [the] workplace."); see also *Robinson*

employee's right to engage in recreational expressive activities in the workplace is not particularly compelling. Second, "[p]otentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."<sup>154</sup> A content based regulation does not violate the First Amendment if it is "justified without reference to the content of the regulated speech . . . [and is] aimed not at the content of the [speech], but rather at [its] secondary effects."<sup>155</sup> Because street harassment inflicts special harms on women's autonomy, safety, mobility, and economic opportunity distinct from communicative impact, the regime I propose may fall within this secondary effects exception. Moreover, in many instances, street harassment involves threats,<sup>156</sup> verbal violence,<sup>157</sup> and vulgarity,<sup>158</sup> all forms of speech that are not entitled to absolute constitutional protection. Third, the law would be a narrowly tailored means to serve the compelling governmental interest in eradicating discrimination against women.<sup>159</sup> In sum, the societal interest of promoting the privacy, safety, mobility, and equality of women should outweigh the desire of employees to engage in recreational sexual harassment while on the job.

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v. Jacksonville Shipyards, 760 F. Supp. 1486, 1536 (holding that court may, "without violating the First Amendment, require that a private employer curtail the free expression in the workplace of some employees in order to remedy the demonstrated harm inflicted on other employees.").

154. *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984); *see also Robinson*, 760 F. Supp. at 1535 (holding that nude pictures and verbal harassment in the workplace are not protected speech because they create hostile work environment).

155. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986).

156. *Cf. United States v. Shoulberg*, 895 F.2d 882, 886 (2d Cir. 1990) (holding that intimidation of witnesses not protected); *Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987) (holding that threat to kill President not protected by First Amendment).

157. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("[t]he First Amendment does not protect violence."); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem . . . [including] the lewd and obscene, the profane, the libelous, and the insulting or fighting words."); *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941) ("[U]tterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."); *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . .").

158. *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (recognizing that speech that is "vulgar", "offensive," and "shocking . . . is not entitled to absolute constitutional protection under all circumstances").

159. *See Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (holding that eliminating discrimination against women is compelling governmental interest); *Roberts*, 468 U.S. at 625-26 (holding that government has compelling interest in removing barriers to economic advancement and to political and social integration that have historically plagued women); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) ("The eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling governmental interest.").

## B. *Administrative Control of Specific Public Places*

### 1. *Transportation Systems*

I think lots of women and girls have probably had the experience of men using [a] . . . crowded-bus situation to feel us up—once a guy slid his hand up under my skirt, real quick, all the way up to my crotch. Gross! I was so shocked I just stood there. Usually, my friends and I just try to move away as fast as we can, to get out of the creep's reach, although it can be hard to get away when the bus is jammed full.<sup>160</sup>

Sexual harassment on transportation systems exacts a price on the daily lives of women. For economic reasons, more women workers use public transportation than men.<sup>161</sup> Women pay taxes and fares that support buses and subways. Yet, sexual harassment impedes their right to equal use and enjoyment of these resources. City governments and transit authorities should recognize this significant injury to female passengers and enact regulations, similar to Bowman's proposed statute, that prohibit sexual harassment on public transportation systems.

Administering a system by which women could report harassers and hold them accountable for their behavior would not be easy. Therefore, the primary purpose of such regulations would be to raise consciousness about the severity of the problem of harassment on transportation systems and to deter men from engaging in it. Additionally, women will realize that they need not tolerate such abuse with feelings of embarrassment and isolation. Regulations would enlighten harassers and empower women, hopefully decreasing the overall incidence of harassment on public transportation.

It would be relatively simple to raise public awareness of the prohibition. Transit authorities could add posters explaining the anti-harassment regulations next to the signs that read "No pets," "No loud radios," and "No eating or drinking." Developing a complaint procedure would be more difficult. But even if transit officers issued citations for those few incidents of harassment they actually observed, the goal of public education would still be served if newspapers reported these incidents and monitored their frequency.

Regulations that prohibit harassment on public transportation systems could withstand First Amendment scrutiny. First, public transportation is not a traditional public forum. In maintaining and operating the transportation system, the government acts in a proprietary manner.<sup>162</sup> Thus, cities should

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160. LANGELAN, *supra* note 56, at 21.

161. See Gerda R. Wekerle, *Women in the Urban Environment*, in *WOMEN AND THE AMERICAN CITY*, *supra* note 60, at 185, 202 ("The evidence from studies conducted in a larger number of North American cities shows that the proportion of female workers using public transit is consistently twice and three times that of male workers using it.")

162. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (holding that city as a

be afforded greater discretion in prohibiting harassment on public transportation systems to protect the safety and comfort women passengers. In *International Society for Krishna Consciousness v. Lee*, the Supreme Court upheld regulations that prohibited face-to-face solicitation in airports.<sup>163</sup> The Court noted that although the burdens of solicitation seemed small, the incremental effects of the conduct caused passengers to alter their paths, thereby disrupting the normal flow of terminal traffic. The Court explained, "Where the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."<sup>164</sup> Because governments act in a proprietary manner in maintaining the smooth operation of public transportation systems, they should be permitted to redress the disruptive effects of sexual harassment on passengers, including interference with free mobility, direct intimidation, harassment, degradation, and actual batteries of passengers.<sup>165</sup> The common law concept of common carrier liability can also be applied to this analysis.<sup>166</sup>

Second, the captive audience doctrine, which also implicates the riding comfort of passengers, may support passenger anti-harassment regulations. The captive audience doctrine permits government regulation of expressive activity when "substantial privacy interests are being invaded in an essentially intolerable manner."<sup>167</sup> For example, in *Frisby v. Schultz*, the Supreme Court upheld an ordinance banning picketing on the public sidewalks in front of residences.<sup>168</sup> The primary purpose of the ban was to preserve the "well-being, tranquility, and privacy" of the home.<sup>169</sup> In passing the ordinance, the town government had considered the "harassing" effects of picketing, such as "emotional disturbance and distress to the occupants."<sup>170</sup> Additionally, the ordinance promoted "public safety" by prohibiting interference with "the

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commercial actor has discretion to make reasonable choices about the type of advertising on public transportation); *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding postal service regulation prohibiting solicitation on post office property based on proprietary role of government).

163. 112 S. Ct. 2701 (1992).

164. *Id.* at 2705; see also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).

165. The Court in *International Society* noted the risk of duress and coercion present in face-to-face solicitation. 112 S. Ct. at 2708.

166. Bowman discusses the special liability of common carriers and public utilities for certain insults by their agents. Bowman, *supra* note 4, at 566 (citing RESTATEMENT (SECOND) OF TORTS § 48 ("A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment.")). A common carrier's responsibility to protect passengers from harassment may also extend to situations in which the harasser is another passenger, rather than an employee. In 1921, a state court ordered a street railway company to pay \$500 in damages to a female passenger when a conductor failed to protect her from harassment by a fellow passenger. Bowman, *supra* note 4, at 567 (citing *Liljegren v. United Rys.*, 227 S.W. 925, 926 (Mo. Ct. App. 1921)).

167. *Cohen v. California*, 403 U.S. 15, 21 (1971) (overturning conviction for wearing "Fuck the Draft" jacket in courthouse, in part because those offended could simply avoid looking at the jacket).

168. 487 U.S. 474 (1988).

169. *Id.* at 477.

170. *Id.*

free use of public sidewalks and public ways of travel.”<sup>171</sup> The Court upheld the ordinance stating, “The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”<sup>172</sup>

Similarly, the captive audience doctrine has been applied to uphold noise ordinances. In *Kovacs v. Cooper*,<sup>173</sup> the Court stated that “[a] state or city may prohibit acts or things reasonably thought to bring evil or harm to its people.” The Court explained, “The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.”<sup>174</sup>

Women using public transportation are a captive audience. They must use transportation systems to travel from home to work, school, political meetings, and other places in society. In the relatively confined area of a bus or subway car, they may not “effectively avoid further bombardment of their sensibilities simply by averting their eyes.”<sup>175</sup> In *Lehman v. City of Shaker Heights*, the Supreme Court used a similar captive audience argument in upholding a transit regulation that banned political advertising.<sup>176</sup> The Court explained that “[t]he streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.”<sup>177</sup> Therefore, the legislature may permissibly regulate perceived evils on the transit system that interfere with the rights of other passengers.<sup>178</sup>

Anti-harassment restrictions on public transportation are analogous to the panhandling prohibitions upheld by the Court of Appeals for the Second Circuit in *Young v. New York City Transit Authority*.<sup>179</sup> The *Young* court upheld the ordinance at issue under the four-pronged test enunciated in *United States v.*

171. *Id.*

172. *Id.* at 487.

173. 336 U.S. 77, 83 (1949) (upholding ordinance forbidding the use or operation on public streets of a “sound truck” or any instrument which emits “loud and raucous noises”).

174. *Id.* at 88; *cf.* *Madsen v. Women’s Health Ctr.*, 114 S. Ct. 2516 (1994) (upholding injunction providing buffer zone around abortion clinic to ensure access to clinic and setting noise restrictions to ensure the health and well-being of clinic patients).

175. *Cohen*, 403 U.S. at 21.

176. 418 U.S. 298 (1974).

177. *Id.* at 302 (plurality opinion) (quoting *Public Utilities Comm’n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).

178. In his concurring opinion in *Lehman*, Justice Douglas offered language which may aptly apply to an anti-harassment regulation:

In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

*Id.* at 307 (Douglas, J., concurring).

179. 903 F.2d 146 (2d Cir. 1990).

*O'Brien*.<sup>180</sup> The court found that the transit authority “has a broad statutory mandate to promulgate rules ‘governing the conduct and safety of the public as it may deem necessary, convenient or desirable, . . . including without limitation rules relating to the protection or maintenance of such facilities [and] the conduct and safety of the public.’”<sup>181</sup> Additionally, the court found that “the City has an obvious interest in providing [citizens] with a reasonably safe, propitious and benign means of public transportation.”<sup>182</sup> The words “sexual harassment” can easily be substituted for the court’s use of “begging and panhandling” in the following passage:

A majority of the subway’s over three million daily passengers perceive [sexual harassment] to be “intimidating”, “threatening”, and “harassing”. [sic] The conduct often involves “unwanted touching [and] detaining” of passengers. . . . [Sexual harassment] is “inherently aggressive” to the “captive” passengers in the close confines of the subway atmosphere. Based on these facts, it is fair to say that whether intended as so, or not, [sexual harassment] in the subway often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger. Additionally, [sexual harassment] in the subway raises legitimate concerns about public safety. The conduct “disrupts” and “startles” passengers, thus creating the potential for a serious accident in the fast-moving and crowded subway environment. In short, the TA’s judgment that [sexual harassment] is alarmingly harmful conduct that simply cannot be accommodated in the subway system is not unreasonable.<sup>183</sup>

Even if one disagrees with the result in *Young* as it applies to bans on begging,<sup>184</sup> the *Young* analysis can be applied to support anti-harassment regulations on public transit systems. Indeed, sexual harassment presents a more compelling case for regulation. Sexual harassment is a verbal assault on

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180. 391 U.S. 367 (1968). Under *O'Brien*, “a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* at 377.

181. *Young*, 903 F.2d at 158 (quoting N.Y. Pub. Auth. Law § 1204 (5-a) (McKinney Supp. 1994)).

182. *Id.*

183. *Id.* The court is quoting results from a study conducted by the transit authority on “quality of life problems” experienced by subway passengers. See also *id.* at 149-50 (discussing TA’s study of problems faced by riders in using New York subway system).

184. See, e.g., Charles Feeney Knapp, Comment, *Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?*, 76 IOWA L. REV. 405, 415 (1991) (“In begging, beggars impliedly express that society is not adequately caring for its less fortunate, that our economic and political system has moral failings, and that certain individuals in our cities need assistance merely to survive.”); see also Helen Hershkoff and Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 898 (1991) (“Begging is speech that adds to both societal and individual enlightenment: it provides information about poverty and the lives of poor people.”).

a person *because of* her sex. For this reason, sexual harassment—being evaluated or verbally abused on the basis of one’s sex—is at least as frightening, debilitating, and infuriating as being asked for spare change. The “message” perceived by female targets of street harassment is a threatening and degrading one. And this message is not political. As discussed previously, surveys of harassers have revealed that men engage in street harassment for recreational, rather than political, reasons.<sup>185</sup>

Finally, an anti-harassment regulation could be supported by the fundamental right to travel.<sup>186</sup> Although the Supreme Court originally conceived of the right to travel as a right to *interstate* travel,<sup>187</sup> many lower courts and scholars have agreed that the right also encompasses *intrastate* travel including the right to move freely about one’s neighborhood or town.<sup>188</sup> As one court held, “[T]he right to move freely about one’s neighborhood or town . . . is indeed ‘implicit in the concept of ordered liberty’ and ‘deeply rooted in the Nation’s history.’”<sup>189</sup> The right to travel can be protected from both private and governmental infringement.<sup>190</sup>

In other contexts, the Supreme Court has long recognized that the “[f]reedom of movement is basic in our scheme of values.”<sup>191</sup> It is an attribute of individual liberty “as close to the heart of the individual as the choice of what he eats, or wears, or reads.”<sup>192</sup> By forcing women to change their travel patterns, avoid certain public places, and alter their behavior to deflect intrusions, street harassment hinders women’s rights to move

185. See *supra* text accompanying notes 97-105.

186. The right to travel argument is equally applicable to prohibitions on street harassment at outdoor worksites and public parks.

187. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down statute denying welfare assistance to residents who had not resided in a state for at least one year on grounds such requirement penalized interstate travel).

188. See *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (holding that right to travel includes right to move locally through public spaces and roadways and that anti-cruising ordinance constituted reasonable time, place, and manner restriction on that right); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1579 (S.D. Fla. 1992) (holding anti-sleeping ordinances “may burden [homeless persons’] fundamental right to travel even if the effect on freedom of movement occurs only intrastate”). See also Paul Ades, *The Unconstitutionality of “Antihomless” Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 609-13 (1989); Stewart A. Baker, Comment, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129, 1145-46 (1975) (arguing failure to include intrastate travel in fundamental right to travel could produce irrational results).

189. *Lutz*, at 268 (citation omitted).

190. See *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (holding right to travel without restraint, along with other constitutional rights, infringed when private parties committed racially motivated assault on public highway); *United States v. Guest*, 383 U.S. 745, 757-59 (1966) (upholding indictment against private defendants who conspired to oppress, threaten, and intimidate African-American citizens in the free exercise and enjoyment of their fundamental right to travel on public highways between states).

191. *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (holding that right to travel is part of liberty of which citizen cannot be deprived without due process under Fifth Amendment). See also *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (holding that arresting individuals for loitering or wandering on public streets without identification “implicates consideration of the constitutional right to freedom of movement.”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (noting that wandering or strolling “have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity”).

192. *Kent*, 357 U.S. at 126.

throughout their community free from sexual threats, intimidation, and degradation.

## 2. *Public Parks*

Like public transportation, public parks are often the site of severe street harassment. Street harassment transforms the early morning jog, the lunch hour on a sunny day, or the peaceful weekend stroll through the park into a frightening and disempowering event.<sup>193</sup> As previously discussed, many women avoid exercising or eating lunch in parks because of the prevalence of street harassment.<sup>194</sup> To ensure equitable access to these valuable public resources, ordinances, similar to Bowman's proposed statute, prohibiting street harassment in public parks should be enacted.

Admittedly, a remedial system to monitor street harassment in public parks would be even more difficult to administer than a system implemented on public transportation systems. Additionally, an anti-harassment ordinance for public parks has the greatest potential of all of my suggested schemes to turn into a device to harass homeless persons, as parks often serve the role of living space. Despite these problems, a remedy for harassment in public parks deserves thorough consideration because of the value of this public resource in the urban environment. Harassment has an exclusionary impact on women, thereby denying them the equal right to enjoy public parks. The primary purpose of establishing and publicizing such a prohibition should, again, be symbolic since the prohibition would raise public consciousness about the problem of public sexual harassment.

Under traditional First Amendment doctrine, parks are classified as public forums.<sup>195</sup> Thus, in order "[f]or the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."<sup>196</sup> Although this is a stricter standard than that applied to public transportation, anti-harassment ordinances in parks can survive First Amendment scrutiny, for even in public forums, freedom of speech is not absolute. As Justice Roberts

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193. See LANGELEN, *supra* note 56, at 227 (describing harassment of woman walking through New York City park). In a telephone interview, Martha Langelan explained to me that the Mall in Washington, D.C. is a prime example of harassment in public parks. The D.C. Rape Crisis Center went with a camera crew from a local news station during one lunch hour to research the harassment problem on the Mall. Time after time, when a woman sat down to enjoy her lunch peacefully, she was sexually harassed within minutes. Telephone Interview, *supra* note 84.

194. See *supra* text accompanying notes 30-31; 63-64.

195. *Hague v. Comm'n for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion) (stating that public streets and parks are traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

196. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (holding that right to access to public property and standard by which limitations upon right are evaluated differ depending on character of property).

wrote in the seminal public forum case, *Hague v. Committee for Industrial Organization*,

The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order.<sup>197</sup>

The Supreme Court has explicitly recognized that a state's interest in "assuring its citizens equal access to publicly available goods and services" is unrelated to suppression of expression and serves "compelling interests of the highest order."<sup>198</sup> Therefore, an anti-harassment ordinance designed to ensure women access to public parks should withstand First Amendment scrutiny. Civil rights law may also support such an ordinance. In *Roberts v. United States Jaycees*, the Court upheld a state Human Rights Act which made it an unfair discriminatory practice "[t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex."<sup>199</sup>

Federal courts have construed "public facility" under similar federal civil rights provisions to include public parks.<sup>200</sup> Federal civil rights law makes it a federal crime for a person to act "by force or threat of force" willfully to injure, intimidate, or interfere with another person's use of a public facility because of her "race, color, religion or national origin."<sup>201</sup> The federal government recently brought civil rights charges under this statute against Lemrick Nelson, Jr., who was previously acquitted of the murder of Yankel Rosenbaum during the Crown Heights riots in Brooklyn, New York.<sup>202</sup> The Nelson case presents novel legal theories, contending that a city street is a "public facility" under the federal civil rights law and, therefore, walking down a city street is a fundamental civil right protected by the constitutional right to travel freely within a state.<sup>203</sup> Although the statute at issue does not include the term "sex," the outcome of this case may have significant implications for potential street harassment remedies if it advances the

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197. 307 U.S. at 496, 515-16. Cf. *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) ("[T]he government may act to protect even traditional public forums such as city streets and parks from excessive noise.").

198. *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984).

199. *Id.* at 615 (quoting MINN. STAT. §363.03, subd. 3 (1982)).

200. See *United States v. Franklin*, 704 F.2d 1183, 1192 (10th Cir. 1983).

201. 18 U.S.C. § 245 (1988).

202. See *The Right to Walk a Brooklyn Street*, N.Y. TIMES, Aug. 13, 1994, at A20.

203. See Frances A. McMorris, *Extend Bias Laws' Reach, Hynes Urges*, N.Y.L.J. at 1C (Oct. 14, 1993).

argument that the ability to walk freely down a city street or through a public park is a fundamental civil right.

In *Jaycees*, the Supreme Court held that the state of Minnesota had a compelling interest in eradicating discrimination against women and could therefore force the Jaycees to accept female members without violating First Amendment associational freedoms.<sup>204</sup> The Court noted that gender discrimination in places of public accommodation "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."<sup>205</sup> To insure personal dignity and the equal right to use public resources, the Court urged that "[a] State enjoys broad authority to create rights of public access on behalf of its citizens."<sup>206</sup>

*Jaycees* provides support for the notion that states and local governments may fashion street harassment ordinances to promote the compelling governmental interest of providing wide access to the benefits of public accommodations without violating First Amendment interests. By turning parks into degrading and sexually threatening environments where women do not feel safe to walk or relax, street harassment effectively hangs a "keep out" sign at the entrance to the park, thereby discriminating against women's equal right to enjoy public resources.

In addition to the state's compelling interest in promoting equal access to public parks, regulations prohibiting sexual harassment in parks could be advanced as reasonable time, place, and manner restrictions narrowly tailored to insure that all citizens can enjoy the parks without assaultive interference. Sexual harassment transforms parks into blighted environments, forcing women to stay away. Although this is a weaker constitutional argument, the Supreme Court has held that "municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."<sup>207</sup> The Court recognized in *Clark v. Community for Creative Non-Violence* that the government has a "substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them . . ."<sup>208</sup> The Court elaborated that "[a]ll those who would resort to the parks must abide by

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204. See also *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987) (holding that California's Unruh Act, which entitles all persons, regardless of sex, to full and equal accommodations in all business establishments, did not violate the First Amendment by requiring Rotary Club to admit women).

205. 468 U.S. at 625.

206. *Id.* at 625; see also *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 80-88 (1980) (holding owner of private shopping center had no right to exclude public, and State could constitutionally guarantee public access to such property for First Amendment activity).

207. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984) (upholding regulation prohibiting posting of signs on public property). See also *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (upholding power of legislature to remove blighted housing, calling it "an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn").

208. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (holding application of regulation permitting camping only in designated campgrounds to prevent demonstrators from sleeping in symbolic tents on the Mall and in Lafayette Park did not violate First Amendment).

otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace."<sup>209</sup>

Although First Amendment doctrine perceives parks as public forums where people may make political speeches, historically parks were intended to serve many purposes besides that of a public forum. Parks were created "to right the imbalances of industrialization and urbanization," by providing places for physical exercise and mental refreshment.<sup>210</sup> Today, parks are often the only urban oases in which to enjoy lunch, athletic activities, and the beauty and peace of nature. The argument that women can simply *avoid* the parks to escape harassment denies women their fundamental right to use a valuable public resource and imposes a heavy burden if women must refrain from outdoor relaxation or go blocks out of their way to reach their destination. Such a result turns women into captives—forced to eat lunch at their desk on a sunny day, exercise indoors, or travel the long or non-scenic route. Galen Cranz, a feminist urban architect, urges women to take a more active role in the planning of urban parks to meet their personal needs. She writes, "In trying to change the status of women in the social structure, we must not overlook the function of the physical environment in reinforcing the desired social changes."<sup>211</sup> First Amendment doctrine should adapt to the modern reality that public parks and public spaces no longer serve the historical role of "public forums."

As Owen Fiss explains, traditional First Amendment case law "presupposes a world that no longer exists and that is beyond our capacity to recall."<sup>212</sup> The maintenance of traditional notions about "free speech" without recognition of complex social forces, such as street harassment, that foster asymmetrical rights to speak in the public world permit some groups to dominate the conversation while other groups suffer in silence. As Fiss concludes, "to serve the ultimate purpose of the First Amendment we may sometimes find it necessary to 'restrict the speech of some elements of our society in order to enhance the relative voice of others.'"<sup>213</sup> Indeed, "unless the [Supreme] Court allows, and sometimes even requires, the state to do so, we as a people will never truly be free."<sup>214</sup>

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209. *Id.* at 298.

210. Galen Cranz, *Women in Urban Parks*, in *WOMEN AND THE AMERICAN CITY*, *supra* note 60, at 76. Cranz explains how, throughout the history of urban park planning,

The plans made for women's use of the parks involve them primarily as means to an end rather than as ends in themselves. Park leaders have used women to help solve contemporary urban problems. They designed females' roles in parks to help protect and stabilize the family, to improve the physical fitness of the working-class population, to keep up morale during the Depression, to keep recreational and other municipal agencies running during the world wars, and to keep cash flowing through the department stores of central business districts. Seldom have women advocated the kind of service they wanted for themselves in their own interests.

*Id.* at 91.

211. *Id.* at 92.

212. Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1425 (1986).

213. *Id.*

214. *Id.*

## CONCLUSION

I dream of a world in which women can safely walk down the street, without fears of being sexually harassed or raped. I dream of a world in which men and women communicate with each other in a manner that is mutually respectful, friendly, non-threatening—a world that fosters the true values of the First Amendment because no one is intimidated into silence. Before such a world can ever be achieved, the problem of street harassment must be tackled. As women struggle against street harassment and all forms of sexual harassment, we should remember that the law, although powerful, is an indirect and clumsy instrument. The key to changing the behavior of harassers is enlightenment. This Article is an effort to contribute to that consciousness-raising conversation.