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Norma Oshynko

Department of Law
The University of British Columbia
Vancouver, Canada

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ABSTRACT

Street harassment, or the verbal and non-verbal behaviours, gestures or comments that men make to women they do not know in public places, is extremely disturbing to some women. Although it affects women of different social locations in different ways, it is generally accepted that street harassment harms women. Not only does it teach men and women that women are to be afforded less respect in public, it reminds women that they exist as sexual objects to serve men. Street harassment can cause women to feel insecure in public places, resulting in an informal system of ghettoization. Many feminists feel that street harassment can best be understood as an integral part of a system of sexual terrorism which allows men to dominate and control women. Street harassment wreaks havoc on its individual victims (that is, the women who feel fear, rage and disgust) and on women as a group. The fact that our legal system fails to address the problem of street harassment is indicative of a disturbing trend in law: incidents that harm only women are often ignored or trivialized.

In this thesis, I seek to determine if we should create a criminal law that would prohibit street harassment. After examining the impact that street harassment has on women of different social locations, I study the way current laws fail to address this form of sexual terrorism. I conclude that there are several drawbacks to regulating street harassment using the law. However, despite the practical difficulties and the concerns of civil libertarians and feminists, it is imperative to criminalize street harassment. Until our society uses law to condemn street harassment, it will be a socially acceptable practice that is trivialized and ignored.
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Chapter 1

Almost Always
Katharyn Howd Machan

Almost always it’s the men
in cars – “Hey baby! Nice
ass!” – the ones who can escape
quickly, laughing, tires a squeal
of conquerors’ delight as we
keep standing or walking, trying
not to listen or care or shout back
motherfucking bastards (those words
we’ve learned to make feel so good
in our throats even though they
are also about hating women),
the men who drink beer, hang
out in afternoon and evening
clusters, slapping shoulders, passing jokes,
comparing wheels and engines, riding
along thin streets like lords
looking for us, passing judgment, running
away in a snort of oily dust
before they have to speak with us,
before we are people, before we become
the women who will easily say no.

Introduction

I'm walking to the store on a beautiful evening in July. A man (or boy – it is difficult to tell his age, but I would estimate him to be around 18) passes me and announces "Hey beautiful – I'm having a party at my apartment. Why don't you drop by?". I nervously shift my gaze to the pavement in front of me, careful to avoid eye contact with him, hoping my passivity will make me invisible. It doesn't. My aggressor turns hostile. "Hey, bitch, I was talking to you." I keep walking, hoping he'll lose interest. He doesn't. He has now stopped on the sidewalk. He yells, "Nice tits - You know that it looks like your tits are going to fall out of your top." My anger surges and, with my heart pounding, I reply "Fuck off and leave me alone". This further incenses my aggressor, who counters with "Why don't you come over here and say that, bitch? I'll kick your fucking ass." He continues his verbal assault, threatening me until I duck into the nearest store. Near tears, I call my boyfriend and ask him to pick me up. I describe the encounter and explain that I do not know if the man is still outside, waiting. My boyfriend berates me for talking back, for making it worse.

I am studying law at the University of Saskatchewan, which is undergoing renovations. While walking to class through the food mall, the construction workers I pass stop what they are doing and stand up to watch me. One comments, "Those are some nice breasts. I bet those aren't fake." Deeply shaken, I relate the story to my boyfriend who laughs and says "They were complimenting you; you should feel flattered." From then on, I walk the long way to class.

I am a lawyer in Saskatoon, using my lunch break to run errands. A group of 5 or 6 boys, ranging in age from 5 to 8, pass me. As they do, one of them puts his hand between my legs and says "Hey bitch, do you want to fuck?" His friends laugh and they continue walking beside me, touching me until I stop and turn to confront them. They run away, laughing.

Do these passages shock or disturb you? If you're a woman, they probably sound like situations you have experienced in the past; variations on a theme. In fact, you may be wondering why I chose to focus on these particular stories out of countless other incidents. While it is true that these passages do not represent the worst harassment scenarios that I have faced, each of the incidents affected me deeply. This is no doubt
because each of the above occurrences happened at a time when I was feeling powerful, safe, and comfortable with myself and my surroundings. The harassment stood in stark contrast to this sense of reality. It presented a powerful juxtaposition between my self-identity (as citizen, student, lawyer) and how I was viewed by those around me (as punching bag, sex object, source of male bonding). It was a jarring reminder that, despite my achievements, first and foremost I was an object to be evaluated and commented on by men; no matter what my place in life or station in society, I was at the mercy of the men around me.\footnote{I note that I am not the only woman to experience this juxtaposition. A white lawyer in her mid-thirties commented: “No sooner had I left [my office] when some guy seemed to, well, come after me. He was saying things, you know, under his breath, I don’t remember what, and laughing dirty at me, and I just couldn’t seem to get away from him. It was awful. And it was just such a contrast: I’d just headed a board meeting and done a great job...So many good feelings – then to come outside, and poof! it’s all gone.” See C. Gardner, \textit{Passing By: Gender and Public Harassment} (Berkeley: University of California Press, 1995) at 51[hereinafter \textit{Public Harassment}].}

Perhaps more important, I felt powerless to confront this objectification. If I remained passive in response to harassment, the harassment would escalate. If I responded to the harassment, the harassment would escalate. The reactions that I got from those that I told my stories to indicated that the escalation, if not the harassment itself, was my fault. I shouldn’t be passive – passivity is what harassers prey upon. I shouldn’t challenge the harasser – common sense should tell you that an assertive woman will provoke a harasser.

Of course, I quickly learned that there was nothing I could do, or refrain from doing, to stop these attacks. I also came to the realization that there was nothing \textit{anybody} could do to put an end to this harassment. Symbolically, the palpable void in a labyrinth of laws designed to redress the smallest harms meant that the harassment that affected me
so deeply wasn’t harmful. Realistically, it meant that every time a harasser confronted me, it was up to me alone to deal with the problem, which I viewed as societal.

My thesis addresses the issue of street harassment and how the Canadian legal system fails to address it. Overall, I seek to answer the question, “Should we create a law that prohibits street harassment?” This, the first chapter, provides a brief overview and describes the theoretical framework with which I am working. I go on to summarize the existing literature on street harassment and to differentiate my research from this literature. Chapter two examines the problem of street harassment in greater detail. I define and explore the phenomenon of street harassment in order to explain the harm it causes. In chapter three, I canvass the legal response (or lack thereof) to street harassment and look at how the void in law affects women. Chapter four of my thesis explores solutions that may help to alleviate this harassment. In chapter five, I analyze the possible problems of using the legal system to address street harassment. My final chapter summarizes my research and arguments.

**Methodology**

Because my work explores the law as it now exists and the direction in which I think it should move, I have employed both a doctrinal and reformist form of inquiry in parts of my paper. However, the theoretical framework that I rely on throughout my thesis is that of feminist legal theory. I chose to explore the topic through this lens in part
because I am a feminist and in part because the subject matter of my thesis deals with a problem that overwhelmingly affects women and not men.\(^3\)

Of course, in a day and age in which the term “feminist” is subject to a multitude of interpretations, I would be remiss if I did not better explain what I believe the phrase feminist legal theory signifies. For me, feminist legal studies aims to substantively improve women’s social condition by ending gender subordination. The methodology employed to reach this end is of such importance that the means themselves could be considered to be inseparable from the overall goal.

Feminist legal scholars emphasize the importance of methodology because they believe that women have been excluded from the creation of legal norms and that this exclusion has placed women at a disadvantage. Traditionally, legal rules have been fashioned by the elite groups of society. Thus, the laws have been based on the experiences of white, heterosexual men. By necessity, this knowledge is partial and biased. Despite this fact, the rules are universally applied as abstract, rational truths regardless of how they fit with the experiences of other groups.\(^4\)

Many feminist legal scholars believe that, as a result of the gender subordination that runs rampant in our culture, the legal system has failed to take account of women’s experiences and needs. Feminist legal studies represent an attempt to remedy this

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\(^3\) Of course, men who are not part of the power elite also suffer from street harassment. For instance, Gary Comstock’s study reveals that 91% of gay men have been the victim of anti-gay verbal harassment (G. Comstock, *Violence Against Lesbians and Gay Men* (New York: Columbia University Press, 1991) at 141). Laura Beth Nielsen’s study suggests that people of colour are almost as likely to be harassed with race-related speech as women are to be harassed with sexually suggestive speech (L. Nielsen, “Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment” (2000) 34 *Law and Society Review* 1055 at 1067, 1069). By focussing on sexually suggestive street harassment that is aimed at women, I do not wish to downplay the severity of other forms of verbal harassment. However, I have decided to focus on sexually suggestive street harassment because I am personally affected by it and because I have a story to tell about it.
situation by introducing the varied experiences of women to legal analysis. Feminist legal theorists examine, among other things, whether or not the law has taken the unique positions of women into account and the gender implications and assumptions underlying the law.\(^5\)

At the same time, many feminist legal scholars have become cognizant of the fact that attempts to include women in the law have themselves been exclusionary. These scholars argue that, because most feminist theorists have been white and privileged, the “women’s” experiences that most feminist academics seek to introduce into the law are the experiences of white and privileged women. The theorists who are critical of the traditional feminist approach are worried that partial and biased experiences have been applied universally to what is considered to be a homogenous group: women. Thus some scholars believe that, just as men have excluded women from the creation of law, feminists have been guilty of “white solipsism”, or excluding women who are not white from feminist legal theory.\(^6\)

Feminist legal scholars have attempted to resolve this contradiction in a number of different ways, some of them as problematic as white solipsism itself. Some feminist scholars have sought to include the voices of nondominant groups of women into feminist theory using an “additive approach”. These theorists have attempted to relate to nondominant groups by defining them as women with “extra” oppressions. For instance, women of colour would be seen to face the same problems that white women face, while

\(^5\) Ibid. at 837.
\(^6\) Ibid. at 847.
also having to cope with the issues of racism; their problems are seen as the sum of racism plus sexism.\(^7\)

This additive approach is problematic for a number of reasons. First, compartmentalizing facets of an individual's identity will not portray an accurate picture of that individual. Most people have multifaceted identities that are interrelated, inseparable and interdependent. For instance, racism and sexism simultaneously victimize a woman of colour. These oppressions intersect with one another so that sexism exists in the context of racism and vice versa. A woman of colour cannot be expected to pick one aspect of herself (for example, being a woman) and present it as a meaningful whole. To do so would cause her to deny other important identities (for example, being black). It is important to remember that women of colour do not necessarily suffer an additional burden to white women, but instead suffer differently from white women.\(^8\)

The additive approach is also problematic because it assumes that the norm against which all women should be measured is the white, privileged, heterosexual, able-bodied woman. The approach supposes that all women suffer, first and foremost, as the feminist archetype (that is, white, privileged woman) does. Any variations are described as deviations from this archetype. Of course, this approach overlooks the fact that white women are no better able to define the condition of women than any other group.\(^9\)

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\(^7\) D. Davis, "The Harm that Has No Name: Street Harassment, Embodiment, and African American Women" (1994) 4 U.C.L.A. Women's Law Journal 133 at 157.

\(^8\) Ibid. at 159-60.

The additive approach has not been the only method feminists have used to try to overcome the problem of white solipsism. Elizabeth Spelman suggested that the solution lay in labeling each woman using as much detail as possible. For instance, I would label myself a white, able-bodied, heterosexual, privileged woman. Spelman hypothesized that using these labels would keep feminists from universalizing their experiences to other women who existed in different social locations. However, this approach also has its problems. First, it is a cumbersome technique. Second, it focuses so intently on the differences between each woman that it may be difficult to find the similarities that are necessary to theorize in a meaningful way. Perhaps most important, the labeling technique is, in itself, exclusionary. For instance, when I labeled myself a white, able-bodied, heterosexual, privileged woman, I did not mention that I was in my late twenties or that I was of Ukrainian descent. Because there are innumerable categories, the risk of solipsism is ever present.

Thus, feminist legal theorists are faced with a dilemma. We must try to make sense of the experience of women in order to support our claim that women are oppressed. However, we cannot theorize about women as a whole without silencing the important differences that exist between us. In order to accommodate these seemingly incongruous objectives and make sense of the phenomenon of street harassment, I have tried to present the perspectives of a variety of individual women. I have then attempted to tie these women’s experiences together using some generalities.

11 Bartlett, supra note 4 at 848.  
12 Some may criticize my thesis on the grounds that I assume street harassment is a “gendered” phenomenon, or one that women suffer from universally. As I later explain, I would never assume that all women are affected in the same way by street harassment. I agree that women of colour, for instance, may
Using quotations to allow their stories to be told in their own voices, it is my hope that the exploration of different truths will help me to make sense of how individual women experience street harassment. Thus chapter two of my paper, which focuses on the impact that street harassment has on the lives of women, is divided into numerous categories representing sub-groups of women. I discuss the unique effect that street harassment has on these diverse groups of women and, at the end of the chapter, explore some commonalities among the women. In this way, I am able to search out similarities in experiences while acknowledging that diversity exists among women.

While the technique I utilize allows for some level of abstraction, it is not without its drawbacks. Using categories to define the women I am representing is problematic. Being the author of the work, I have used my power of definition to establish the classification system. Therefore, I have been able to divide women according to the similarities and differences that I feel are relevant and significant.\textsuperscript{13} In so doing, I may have left out characteristics that the women themselves feel are important to their identities, resulting in solipsism.

Moreover, a categorical approach assigns similarities to women within the group, making them appear homogenous. It also forces differences between the women of the group and the women outside of the group. The result may be an "oversimplified caricaturized conception of social identity."\textsuperscript{14} On a similar note, using categories is reminiscent of an additive approach. When I divide groups of women according to their

\begin{footnotes}
\item[13] Iyer, supra note 9 at 184-85.
\item[14] Ibid. at 204.
\end{footnotes}
race, class, age and sexual orientation I am unable to appreciate how these identities may intersect for some women.

Having noted the difficulties inherent in my approach, I would like to take a moment to justify the method I have adopted in order to make sense of different women’s experiences of street harassment. First, the experiences of street harassment that have been related in this thesis were not gathered first hand. Instead, they were collected via a literature review. The works in which they originally appeared almost never identified the multiple, intersecting identities of the women in question. Thus, it was impossible for me to know if a woman who was identified as “African American” by an author was also well educated, heterosexual, or able-bodied. Second, many authors who wrote their papers on street harassment with the specific aim of countering the problem of white solipsism used a method similar to my own. This makes me feel comfortable that, while my approach has difficulties, it may be less problematic than other methods I could have used.

**Literature Review**

Perhaps not surprisingly, the existing academic literature on street harassment mirrors the treatment that the problem has been afforded by the law. Indeed, the scant amount of research done on the topic could be characterized as a virtual vacuum. This void says as much or more than any article on street harassment could ever express; the

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harassment of women in public is considered trivial and is all but invisible in our society.\textsuperscript{16}

Women have, for the most part, produced the literature that has been published on the subject of street harassment. These writings fall into one of three categories: popular works, social science research, or legal literature. First, a lot of material on street harassment can be found in popular, non-academic works like women’s magazines and newspapers. Although some academics consider such literature to be unworthy of scholarly attention, the accounts these works provide are invaluable insofar as they document women’s experiences with public harassment. A researcher would be remiss if she ignored these writings for a number of reasons. First, neglecting these works would be tantamount to discounting the stories of women who are affected by street harassment, yet lack access to academia. Moreover, as Catherine MacKinnon pointed out, “[s]cholars who look down upon such popular journalistic forays into policy research (especially by ‘women’s magazines’) should ask themselves why Redbook noticed [workplace] sexual harassment before they did.”\textsuperscript{17}

The second collection of literature on the subject of street harassment could be classified as sociological or psycho-linguistic. These works address the problem of the public harassment of women in an academic fashion without providing any significant analysis of the legal system. Many of these writings focus on why street harassment occurs. For instance, Carol Gardner hypothesized that males comment upon a woman walking in a public space because she is considered to be an “open person”; because she

is acting outside of her proper societal role, her appearance is public information and she is worthy of attention. Men’s constant evaluation of women indicates that women are not entitled to the courtesies extended to more advantaged members of society and, at the same time, communicates male ownership of public territory.

Gardner also noted that many men and women tend to romanticize street harassment. For instance, harassing behaviour is often interpreted as complimentary or flattering. The notion that street harassment is romantic and not political often keeps women from confronting their harassers. Ironically, when women do respond to the harassment, they are the ones who are thought to be acting outside of their feminine roles by having breached the norm of civil inattention. As a result, women rarely acknowledge their harassers, which reinforces the norm of female passivity.

Micaela di Leonardo speculated that street harassment has risen recently. She theorized that the increase in harassment came about as a result of women’s increased participation in public life, the growth of publicly displayed pornography and male backlash to women’s increased power in society.

\[20\] Ibid. at 160.
\[22\] Note that this assumption was nothing more than an “observation” and was not based on any empirical data. M. Di Leonardo, “Political Economy of Street Harassment” (1981) *AEGIS* 51 admits, at p. 53 “These observations are based on my personal experience, and on the experiences of dozens of women with whom I discussed the issue. No controlled studies of street harassment exist.” Obviously, her assertion that street harassment has increased is controversial. It is possible that these experiences seem more numerous only because women are more willing to talk about them.
\[23\] Ibid. at 55. This speculation is also controversial: it is equally possible that women’s improved status has caused many men to become more sensitive to women’s situations and has led to empathy instead of resentment.
survey in which they asked men to explain why they harassed women on the streets. They discovered that men harassed for a variety of reasons; to alleviate boredom, to bond with other males, to have fun, and to anger or humiliate women.\textsuperscript{24} Other theorists have hypothesized that men harass women to sexually coerce them and to maintain sexual and economic dominance over them.\textsuperscript{25} Di Leonardo speculated that street harassment is on the rise because men are threatened by women's new status and the loss of women's services, because women are increasingly mobile and because of the growth of pornography in society.\textsuperscript{26}

Much has also been written on how women and men interpret harassment. Jaclyn Packer studied male and female reactions to harassment and found that the females surveyed believed that women who were harassed were likely to feel angry and unsafe, but also believed that the harasser did not mean to cause harm. By contrast, fewer males thought that women who were harassed would feel upset. Interestingly, however, the men were more likely to think that the harassers intended to offend or upset the women in question.\textsuperscript{27}

Elizabeth Kissling and Cheris Kramarae analyzed a discussion about street harassment that occurred in an Internet chat room.\textsuperscript{28} They found that much of the discussion centered on blaming the victim of the harassment for being offended by trivial

\textsuperscript{25} M. Langelan, Back Off! How to Confront and Stop Sexual Harassment and Harassers (New York: Simon & Schuster, 1993) at 42-47.
\textsuperscript{26} Di Leonardo, supra note 22 at 55.
\textsuperscript{27} J. Packer, “Sex Differences in the Perception of Street Harassment” (1986) 5 Women and Therapy 331 at 336.
\textsuperscript{28} E. Kissling and C. Kramarae, “Stranger Compliments: The Interpretation of Street Remarks” (1991) 14 Women’s Studies in Communication 77 [hereinafter “Stranger Compliments”].
remarks or for dressing provocatively. 29 Many of the female participants felt that their dignity, privacy and safety were threatened by street harassment. 30

Some scholars have studied the effect that street harassment has on female vendors who work on the street. Spalter-Roth and Zeitz noted that male customers, passersbys, vendors and police officers sexually harass female vendors, in part to establish male control of the streets. In response to the harassment, the women adopted a number of strategies, including acting aggressive, dressing to look unattractive, and seeking male protection. 31

Several scholars have studied the harms of street harassment on women. Theorists like Mazey and Lee; Leach, Lesiu and Morton; Gordon, Riger, LeBailly and Heath; Leonardo; and Jos Boys have all commented on the "zones of hostile space" that exist in public for women. These academics have studied the fear that women experience in the urban environment and have noted that women will alter their patterns of behaviour in the attempt to protect themselves. They conclude that women's fear has acted as a form of geographic and social control because women effectively deny themselves access to many areas of public life as a result of their apprehension. 32 In this way, street harassment reinforces both the behaviour and the locations considered appropriate for women.

29 Ibid at 79, 81.
30 Ibid. at 87.
Other feminist theorists have picked up on the theme of social control and street harassment. Most prominent in this field are Elizabeth Kissling, Cheris Kramarae, Pam McAllister and Barbara Houston. These theorists hypothesize that street harassment exists on a continuum with other forms of “sexual terrorism”, all of which have been used to control women, construct gender difference and hierarchy, and reinforce women’s traditional roles. Thus, through harassment, women learn that we exist to be sexually enjoyed by men, that our place is in the home, that our looks are of the utmost importance, that women are to be addressed as though they occupy a lower social standing, and that we are, at all times, at the mercy of men.

On a similar note, Sandra Lee Bartky theorizes that being perceived by others in a sexual light when such a perception is inappropriate not only serves to maintain the dominance of men, but also results in the psychological oppression of women. When women are harassed, we are made into sexual objects. More important, we are forced to see ourselves as our harassers see us. As a result, we learn to value our worth by how attractive we are and are alienated from other essential attributes of our personhood. The

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resulting psychological oppression breaks our spirit and causes us to internalize the
system of dominance that has been instituted to keep us in our place.\footnote{35}

Muriel Dimen has focussed on a specific type of harm that harassment creates. In
her book, \textit{Surviving Sexual Contradictions}, she describes how street harassment acts to
reinforce what women are taught throughout their lives; men are active sexual beings, but
women must remain passive objects who do not "want", but instead "want to be wanted".
Additionally, Dimen postulates that harassment causes a woman to realize that she is a
"Subject-as-Object", a "self who does not belong to herself".\footnote{36} The result is a type of
schizophrenia with which all women must live:

[Women] know, as subjects, that they must recognize that they are treated
as objects, into which they must sometimes also transform themselves. In
order to live from day to day, they must both accept and reject what they
know, that they are and are not people...and this contradiction is what [a
woman] is supposed to swallow with a smile on her face.\footnote{37}

Micaela di Leonardo also comments on the psychological toll that harassment
takes on women. Women who are harassed are forced to do "emotion-work", the process
of forcing one's emotions to correspond to what is expected. Thus, a woman may feel
the need to smile and acknowledge her harasser, pretend to ignore her harasser, or fight
back. In each case, the harasser successfully claims the woman's time and energy and
invades her privacy.\footnote{38}

Surprisingly, few non-legal academics have offered solutions to combat street
harassment. In her book \textit{Back Off!}, Martha Langelan attempts to fill this void by

\footnote{35} S. Bartky, "On Psychological Oppression" in S. Bishop & M. Weinzeig, eds., \textit{Philosophy and Women}
\footnote{36} M. Dimen, \textit{Surviving Sexual Contradictions: A Startling and Different Look at a Day in the Life of a
suggesting that women confront their harassers in a non-violent fashion. Langelan believes that refusing to play into the situation that the harasser has created will act to disrupt the abuse of power and confound the social pattern of male dominance and female passivity.39

Lastly, a scant body of literature on street harassment and the law exists. Of course, most legal work done on the harassment of women studies workplace related harassment.40 The first notable reference to street harassment in legal literature appeared in 1987 in an article authored by Robin West.41 In the article, West focussed on gender-specific suffering and posited that the unique ways in which women suffer are invisible to the male legal culture. Because suffering that is experienced solely by women is rarely named or described, there is little empathy or understanding of it in dominant society.42

This lack of understanding allows the law to ignore gender-specific harms and, perhaps more importantly, causes women to deny their pain. Instead, women alter their behaviour in response to the injuries society has taught them to perceive as trivial. For instance, a woman may capitulate to unwanted sexual advances in order to avoid having sex forced upon her. She may enter into a monogamous relationship that she is not interested in to seek the protection of a man.43 In the instance of the gender-specific problem of what West terms “street hassling”, a woman may turn off her thoughts and

37 Ibid. at 5.
38 Di Leonardo, supra note 22 at 52.
39 Langelan, supra note 25 at 82.
40 See, for example, MacKinnon, Sexual Harassment, supra note 17.
42 Ibid. at 82.
43 Ibid. at 85, 93.
feelings, separate her sexual appearance from her subjective self and “give away” her sexuality for visual consumption in order to avoid having it taken from her.\textsuperscript{44}

West concludes that feminists must work to name, describe and communicate injuries that are specific to women.\textsuperscript{45} Until both men and women are able to fully appreciate these harms, the law will continue to ignore them and women will continue to bear the burden of the assaults:

Now the sexual assaulter on the street – who is not punished for the criminal assault, who is not liable for the tortious assault, and who has no expectation whatsoever of being either punished or held liable – is not a criminal and he is not a tortfeasor; rather, he is a sovereign....The woman who is sexually assaulted on the street – continually, daily – with no expectation that she will be compensated for her injury and with no expectation that the assaulter will be held accountable for the assault, does not experience the assault as a criminal or tortious assault.... She experiences it as another lesson in her subjection to – her subordination to – the whims of a superior political power, namely the sexual man.... She absorbs the assault rather than resists it.\textsuperscript{46}

In 1993, Cynthia Bowman published the first piece of legal literature to focus solely on the phenomenon of street harassment.\textsuperscript{47} She, too, lamented the fact that street harassment and its resulting harms were not visible to the legal culture. After reviewing criminal and tort law as it existed in the United States at the time, Bowman concluded that it was not able to sufficiently address the problem of street harassment. As a result, Bowman recommended that governments adopt a new law specifically aimed at deterring street harassment. The law would prohibit men from accosting women in a sexual

\textsuperscript{44} Ibid. at 107.
\textsuperscript{45} Ibid. at 86.
\textsuperscript{46} R. West, “Pornography as Legal Text: Comments from a Legal Perspective” in S. Gubar & J. Hoff, eds., \textit{For Adult Users Only: The Dilemma of Violent Pornography} (Indianapolis, Indiana University Press, 1989) 108 at 111.
\textsuperscript{47} Bowman, \textit{supra} note 16.
manner in public places. At the same time, she urged feminists to work to redefine existing criminal and tort law so the system could better address women’s reality.

In 1994, Tiffanie Heben added to the discussion of street harassment and law reform. In her article, she classified harassment into three distinct categories depending on its severity. The most severe forms included physical acts, sexually explicit references and racial or homophobic slurs. Moderately severe harassment included sexual innuendoes. Finally, the least severe form encompassed stares and unnecessary comments. Heben was careful to note that a woman’s interpretation of harassment and the injury suffered is determined by the severity of the attack as well as the woman’s social position. She believed that, despite the drawbacks of legal remedies, they were “necessary to establish that society will no longer tolerate street harassment.” Thus, she concluded that the most severe forms of street harassment should be addressed by criminal law, while tort law could address lesser forms.

Concerned that the experiences of African American women and street harassment were not adequately represented in the legal literature, Deirdre Davis published an article on the subject in 1994. Davis agreed with Bowman and West that street harassment was a form of psychological oppression and sexual terrorism and that the problem was trivialized in dominant culture. She emphasized that women would experience harassment differently based on the race, class and sexual orientation of

48 Ibid. at 575.
49 Ibid. at 577.
50 Heben, supra note 15.
51 Ibid. at 187-88.
52 Ibid. at 190-200.
53 Ibid. at 206.
54 Ibid. at 219.
55 Davis, supra note 7.
themselves and their harassers. For instance, the harassment of African American women often invokes the memory of slavery. Thus, women of colour are often characterized as Jezebels, temptresses, pieces of property, or non-humans who can be taken with impunity.\textsuperscript{56} Similarly, the experience of African American men who harass women is shaped by their historical oppression; having absorbed the sexist socialization of their American culture, they attempt to assert their dominant status over women in order to achieve the power they are normally denied.\textsuperscript{57} Davis concluded that it is important to name the harms that all women suffer as a result of street harassment in order to make it more visible to the legal culture and women themselves.\textsuperscript{58}

Soon after Davis's article was published, Deborah Thompson entered into the discussion on street harassment and the law.\textsuperscript{59} Again, Thompson voiced the concern that law did not adequately address the public harassment of women. Thompson concluded that while a law prohibiting street harassment may not alleviate the problem altogether, it would have symbolic value and would raise the issue in public consciousness. However, she disagreed with Bowman's proposed anti-harassment law, believing it limited free speech to such an extent that it would not survive constitutional scrutiny. Instead, Thompson recommended a more narrowly tailored law aimed at creating "hassle-free zones" in places where women were subject to large amounts of harassment; namely outdoor workplaces, transportation systems and public parks.\textsuperscript{60}

\textsuperscript{56} Ibid. at 161-67.
\textsuperscript{57} Ibid. at 167-73.
\textsuperscript{58} Ibid. at 178.
\textsuperscript{59} D. Thompson, "The Woman in the Street: Reclaiming the Public Space from Sexual Harassment" (1994) 6 Yale Journal of Law and Feminism 313.
\textsuperscript{60} Ibid. at 330-31.
In 1997, Deborah Tuerkheimer published an article in which she carefully scrutinized the benefits and drawbacks of using the law to address the problem of street harassment.\textsuperscript{61} Tuerkheimer expressed concern that the legal system tends to individualize social problems and has been unable to recognize gender-specific injury in the past. Moreover, legal categorization can hinder a woman’s ability to tell her story; often, victims must conform to the expectations of authorities in order to achieve justice. Finally, Tuerkheimer worried that defining women solely as victims may further disempower them.\textsuperscript{62}

Tuerkheimer also felt that using the legal system to address street harassment could be beneficial to women. Currently, “the failure of the legal system to respond to women’s gender-specific injuries constructs these harms as not only different from but also less important than other types of injury.”\textsuperscript{63} Thus, prohibiting street harassment would validate women’s suffering by affirming that harassment is injurious. Additionally, it would send the message that women are important citizens whose wrongs should be addressed. Finally, outlawing street harassment could strengthen the identity of women as a group; by asserting an unwillingness to tolerate subordination, women’s consciousness could be reshaped.\textsuperscript{64}

Most recently, Laura Beth Nielsen conducted a study in which she examined public sentiment regarding the legal regulation of offensive public speech. Her results indicated that the public, in general, opposes such regulation, albeit for very different

\textsuperscript{62} Ibid. at 201-03.
\textsuperscript{63} Ibid. at 199.
\textsuperscript{64} Ibid. at 200-01.
reasons. Most women opposed banning offensive speech on the basis that the law tends to undermine self-sufficiency.\textsuperscript{65}

My thesis draws upon all three of the above categories of literature on street harassment. Each of the sources contributes valuable information regarding women's experiences in the so-called public sphere. Each presents a perspective of a woman who has suffered the humiliation, pain and fear of being harassed on the street. Taken as a whole, the authors call upon women to speak up and declare that street harassment, which has traditionally been thought of as trivial (if it was thought of at all), is injurious and wrong.

Overview

In this thesis, I examine whether or not the legal system should attempt to prohibit street harassment. On one level, my thesis represents simply another voice attempting to redefine a commonplace practice as a violation of the dignity of women. In doing so, it is my hope to strengthen a growing movement. At the same time, I want to spark some dialogue amongst academics and non-academics, as well as between those who live on the margins of society and those who consider themselves to be mainstream theorists. This will help to draw attention to the issue and, hopefully, raise women's awareness that others suffer as they do.

Second, it is my hope to produce a more inclusive picture of street harassment than has been provided in the past. Some of the authors who have written on the subject do a good job of presenting the issue from the differing perspectives of multiple groups

\textsuperscript{65} Nielsen, \textit{supra} note 3 at 1072-74.
of women. Unfortunately, many works ignore the experiences of women who are not white, middle-class, and heterosexual, or deal with them in a problematic fashion. Thus, the second chapter of my thesis attempts to address how street harassment impacts women of a variety of intersecting oppressions.

Finally, my thesis is written in answer to the articles on street harassment written by feminist legal theorists. While I recognize the value of the works of these pioneers, I believe I have something to add to the debate. Specifically, my thesis presents a critique of street harassment within the Canadian legal framework. Thus, I expect my conclusions will vary quite radically from the feminist legal theorists who have written on the subject, all of who have been American. This difference will likely occur because the United States and Canada have distinct criminal and tort laws and, more importantly, have divergent bodies of jurisprudence regarding free speech.
Chapter 2

Naming Street Harassment

It is important to name the phenomenon that I term street harassment for a number of reasons. First, a name helps women to discuss their experiences. Without a name and a definition, it is possible that women would not be able to recognize the injuries they suffer as a result of street harassment. Naming a social problem allows its victims to describe “what may be resisted or complained about, said aloud, or even felt.”¹ Second, it is almost certain that the injuries street harassment inflicts on women will not be addressed by male culture until they become visible. Naming and communicating these experiences is a crucial step in alerting society to the problem at hand. Until the phenomenon is named, it will continue to be trivialized or, worse, ignored.²

Elizabeth Kissling has pointed out that the act of choosing a label for a phenomenon is not a neutral process. When an individual uses his or her discretion to name an experience or occurrence, that individual’s biases are reflected in the label chosen.³ Different theorists have called the phenomenon that I have labeled “street harassment” many things. For instance, Muriel Dimen refers to the occurrence as “street hassling”.⁴ Gardner, Kissling and Kramarae refer to it as “street remarks”.⁵

¹C. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979) at 57 [hereinafter Sexual Harassment].
I have settled on the term street harassment for a number of reasons. First, most of the feminist legal theorists who have written on the subject have used the term street harassment. Because I intend to enter into a dialogue with these authors, I feel it is important that we use a common language. Second, I believe that the terms “street hassling” and “street remarks” are not as evaluative as the phrase “street harassment”. As such, I think they trivialize the damage done to women when harassment occurs. Third, like Cynthia Bowman, I believe that using the word “harassment” ties the experience to the sexualization of women in the workplace, which is a similar form of sexual terrorism and for which the law provides a remedy.

Having justified the term I have chosen, it is important to recognize that the term “street harassment” will influence how the phenomenon is viewed by my audience. It may, as Kissling and Kramarae worry, exclude women who find the experience “pleasant, or at least not unpleasant”. I would like to emphasize that I have labeled the


6 Kissling and Kramarae dislike the term street harassment. They believe that, because some women find the experience pleasant, naming the phenomenon street harassment is too evaluative; “Stranger Compliments”, supra note 5 at 92, endnote 1. I recognize that some women would not consider the behaviors discussed in my paper to be harassing in nature. However, like Tiffanie Heben, I feel it is necessary to legitimize the experiences of women who do find the phenomenon problematic; T. Heben, “A Radical Reshaping of the Law: Interpreting and Remedyng Street Harassment” (1994) 4 South California’s Review of Law and Women’s Studies 183 at 186, footnote 12.


experience out of necessity, but that this should not dissuade my audience and other women from naming their own experiences as they see fit.¹⁰

Street Harassment Defined

Again, street harassment has been defined differently by a number of theorists. For instance, Di Leonardo defined the experience as one in which at least one strange man accosts a woman in a public place and “through looks, words or gestures, the man asserts the right to intrude on the woman’s attention, defining her as object”.¹¹ Langelan borrowed her definition from the African-American Women’s Committee for Community Education, who defined harassment as “the use of words, gestures, bodily actions or other means of verbal and nonverbal communication to insult, degrade, humiliate, or otherwise dehumanize women.”¹² Kissling and Kramarae have defined harassment as consisting of “both verbal and nonverbal behaviors, including ‘wolf-whistles, leers, winks, grabs, pinches, catcalls, and rude comments. The remarks typically comment on the woman’s physical appearance or her presence in public, and are often sexual in nature.”¹³

Kissling and Kramarae’s thorough definition has been adopted by a number of the legal theorists, including Cynthia Bowman, who went on to add:

Although street harassment encompasses a wide variety of behaviors, gestures, and comments, it has some defining characteristics: (1) the targets of sexual harassment are female; (2) the harassers are male; (3) the harassers are unacquainted with their targets; (4) the encounter is face to

¹⁰ Ibid
¹² M. Langelan, Back Off! How to Confront and Stop Sexual Harassment and Harassers (New York: Simon & Schuster, 1993) at 32.
¹³ Kissling and Kramarae, “Stranger Compliments”, supra note 5 at 75-76.
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. 

Because this definition has been adopted by a number of the other feminist legal theorists who have written in the area, this is the definition that I propose to use for my thesis.

**Differences and Similarities**

Not all women are harassed in the same way. The position that a woman holds in society determines not only how, why, when and by whom she is harassed, but also how she will interpret that harassment. The experiences that I, a young, white, heterosexual, able-bodied, middle-class female encounter may vary markedly from those of women who do not share the advantages to which I have been privy. The phenomenon is further complicated by the position of a woman's harasser. The harasser's social standing influences his motives for harassing and also affects how the women that he harasses perceive the experience. 

At the same time, common threads run throughout the experiences women share when they are harassed on the street. For instance, Gardner’s work suggests that no matter what their locus in society, most women have been sexually objectified by a male that they do not know in a public place. Commonalities such as this are crucial to understanding the phenomenon of street harassing and how best to address it.

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14 Bowman, *supra* note 7 at 523-24. Of course, in rare instances, a harasser may intend to make a political statement by denigrating individual women in public. Thus, it is possible that a street harasser intends his comments to be considered part of public discourse. My proposed law, set out in chapter 4, would ban all forms of sexual street harassment, regardless of the harasser’s motivation.


Most theorists who have written on the subject of street harassment have focussed on the common threads that link women’s experiences. While this is a necessary step, I worry that emphasizing similarities may cause us to downplay the unique experiences and harms suffered by women in different social locations. Such a focus may, in turn, lead to the exclusion of some women’s stories.

For instance, of the theorists who have written extensively in the area of street harassment, few consider the unique experiences that women of colour encounter. Perhaps more important, these theorists do not acknowledge this void. The resulting silence gives the audience the impression that the totality of women’s experiences has been portrayed accurately by the authors. In this way, the specific sufferings of women of colour are rendered invisible. Street harassment, an occurrence that is deeply influenced by both race and sex, can come to be seen as a colour-blind phenomenon.

Some theorists deal with the experiences of women who are not white, middle-class and heterosexual as though these women’s identities can be parcelled into distinct forms of oppression. For instance, Carol Gardner examines the impact that street harassment has on a lesbian woman of colour by studying how that individual’s femaleness, blackness and lesbian identity have been injured. Again, this stance is problematic as it attempts to parcel out important parts of a woman’s identity and deal with each part on a separate basis. The result is an acontextual and inaccurate understanding of how a woman experiences her interdependent identities.

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18 Gardner, Public Harassment, supra note 15 at 229.
Gardner's approach is also problematic because it emphasizes the experiences of white, middle class, heterosexual women and simply "tacks on" the experiences of women who do not fit this mold. While less problematic than ignoring the topic altogether, this stance implies that one type of woman is to be used as a standard against which all other women are to be measured. Needless to say, this presumption is flawed and deeply problematic.

In order to avoid similar pitfalls, I intend to begin my exploration of street harassment by presenting varied accounts of women of different social locations. I will then conclude by examining the similarities between these women's stories. It is my hope that this strategy will serve to remind both my audience and myself that women are not a homogenous group that can be adequately represented by a single voice and that white women are not the norm from which all others deviate.

Unfortunately, the literature on street harassment and women with intersecting oppressions is oftentimes sparse. For instance, I have been unable to find any work relating to the experiences of indigenous women or transsexuals and street harassment. To avoid appropriating the voices of these groups, I have chosen not to hypothesize about the unique effect that street harassment has on them. Instead, I wish to point out that such a void exists and to encourage women of all locations to continue to come forward with their stories of harassment. These stories are valuable and stand to enrich the lives of all women. Of course, there are other difficulties with the approach that I have adopted, which are addressed in chapter 1 of my thesis.
A. Race and Street Harassment

We live in a racialized world. As a result, women of different races experience street harassment in distinct ways. This is so because women of different ethnicities are subject to very diverse forms of street harassment. Additionally, the race of the woman and the race of her harasser may colour the woman’s interpretation of the incident.

It goes without saying that white women are accorded more status and respect in our culture than are women of colour. Racism is prevalent and impacts the experiences of all women in our society. For instance, due to the particular historical context of black women, they are sometimes viewed as sexual temptresses, pieces of property or insatiable and wanton sex objects. Asian women are considered by many to be submissive. At least one study has confirmed that these racist stereotypes make these women of colour subject to street harassment more often than white women:

I speak with a very specific voice, that of a dark-skinned African American (Black) woman...The most consistent, overt sexual violation, in my life, comes from white men: on the street, in the workplace, on the telephone, applying for a job, dining out, driving my car, checking into hotels, traveling on business. Anytime, anyplace....It was clear to me that white men - walking-down-the-street-store-owning-police-officer-car-driving-everyday white men – were dangerous to me.

A 37-year-old Black lesbian feminist reported “Men have approached me for sex while I stood at bus stops or in the stacks of large libraries – anywhere and any time I am out of my house and alone...Am I a piece of meat? Am I an enemy?” A young Asian

19 Davis, supra note 2 at 164-65.
20 Nielsen discovered that nearly 25% of women of colour reported that they received sexually suggestive comments from strangers in public places every day. Only 14% of white women received similar remarks on a daily basis; L.Nielsen, “Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment” (2000) 34 Law and Society Review 1055 at 1067, 1069.
22 T.L. Jewel, “How to Teach One Dog a New Trick” Sumrall & Taylor, eds, supra note 21, 136 at 137.
American woman indicated that “...this [harassment] happens to me all the time, everytime I go out.”\textsuperscript{23}

The stereotypes and social location of women of colour definitely mean that the street harassment these women face is different from the harassment white women encounter. When African American or Asian women are harassed on the street, for example, they are often sexualized in a racist manner:

Black women share with other women the experience of being referred to and treated as “cunts,” “beavers,” or “piece.” Yet for Black women those insults are sometimes prefaced with “Black,” or “nigger,” or “jungle.”\textsuperscript{24}

He was after my ass because I’m an Oriental boy toy, or so he thought. I’ve had this happen before. White boys think that’s all I’m good for.\textsuperscript{25}

Women of colour may also be compared to white women in an unfavourable way. For instance, Gardner tells the story of an Asian woman who was fondled by a white man, who then laughed, “Don’t get mad, honey, you haven’t got enough to be excited about. Most white women have a lot more.”\textsuperscript{26} Women of colour, then, may be deemed unworthy of sexual harassment because they look different from the white standard of beauty.

Needless to say, the interpretations that women attribute to street harassment and the injuries they incur as a result are also dependent on their race. For example, sexualized comments to African American women invoke images of slavery and a time when slave women were pieces of property to which white men had free sexual access. Street harassment defines African American women as sexual animals or temptresses.

\textsuperscript{23} Gardner, \textit{Public Harassment}, supra note 15 at 119.
\textsuperscript{24} K.W. Crenshaw, “Race, Gender, and Sexual Harassment” (1992) 65 \textit{S. Cal. L. Rev.} 1467 at 1469.
\textsuperscript{25} Gardner, \textit{Public Harassment}, supra note 15 at 140.
\textsuperscript{26} \textit{Ibid.}
This same belief flourished during slavery in order to justify the dehumanized treatment of female slaves and to distinguish slaves from white women, who were to be accorded respect. Thus, as Deirdre Davis articulates, "Street harassment forces African American women to realize that the ideologies of slavery still exist.... 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" 27

It should be obvious, then, that women of colour can suffer a unique form of psychological harm from street harassment. For African American women, street harassment serves to remind them that, although slavery has been abolished, many white men maintain a slavery mentality and continue to define them as sexual objects. 28

The interpretation of street harassment is also dependent on the race of the harasser. Gardner notes that most women expect to be harassed by men who do not share their racial identity. 29 Given this expectation, it should not come as a surprise that white women are often more offended by the comments of men of colour. Indeed, Gardner reported that white women were more likely to characterize street harassment as complimentary if it came from a white man. 30 The fear that white women feel when addressed by African American men is no doubt fueled by racist stereotypes which have portrayed black men as animals with insatiable sexual desire for white women. 31

African American women also interpret street harassment differently depending on whether it originates from white men or from men with a similar ethnicity. When

27 Davis, supra note 2 at 163-64.
28 Ibid.
30 Gardner noted that the socioeconomic status and age of the harasser also impacts how women interpret their advances; Gardner, ibid. at 117.
white men harass African American women, racist stereotypes are commonly invoked, bringing to mind a history of inhumanity and degradation. However, when an African American man harasses an African American woman, the event will be construed quite differently. Some authors theorize that black women may not be offended by street harassment from black men because it replicates a cultural phenomenon known as “rapping”. Rapping consists of a black man approaching a woman and commenting on her features or otherwise indicating sexual interest. The woman is expected to respond aggressively and may either return the interest or rebuke the male. The existence of rapping has led some theorists to conclude that African American women are not as offended when approached on the street by their male counterparts.

Whether or not this conclusion is accurate has been the subject of debate in feminist circles. Many feminist theorists are quick to point out that it is the male who initiates the “rap” session and that the women may feel pressure to answer back in an aggressive fashion in order to avoid confrontation. Davis argues that presenting street harassment as an African American cultural phenomenon simply serves to justify the oppressive treatment of African American women.

The stories that African American women tell about being harassed on the street by African American men suggest that at least some of these women are offended by rapping. These stories reflect an uneasy alliance between women and rapping. As one woman articulated in a letter to the editor in the Washington Post:

31 Some women believe that black men harass white women in order to indirectly challenge the status of white men; Heben, supra note 6 at 196,198-99.
32 Davis, supra note 2 at 164; Bowman, supra note 7 at 534.
33 See, for example, Bowman, supra note 7 at 533.
34 Davis, supra note 2 at 172-73.
I come from the South. Where I'm from, black men and women address each other on the street. Those who don't are considered rude, ill-bred and hateful of black tradition. So I once had no qualms about speaking to men on the street.

But in the past few months of living in Washington, I have lost the ability to discriminate between men who are being friendly and those who wish to do me harm. Now I view all gestures from men on the street as potential threats. All the car honks and “hey-baby” comments that I once considered just annoying are now ominous and alarming.

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.”

It is easy to discuss these ideas sympathetically over dinner or on paper, but when a woman unexpectedly encounters a man on the street who, she feels instinctively, would like to harm her, she suddenly loses her interest in theory. Survival becomes the overriding issue. She learns eventually that the only men she is safe from are the ones who smile and keep walking.35

A Washington Post columnist shared a similar sentiment:

Whatever black men may think of the attention they pay to women wearing shorts or skirts, the effect has nothing to do with complimenting them. Your lewd invitations and crude commands may seem funny to you, but the truth is that nothing comes closer to the slave-era mentality of white men toward black women.

Young black men yell at women who are mothers, “Come here, girl!” They whistle at women as if calling dogs. Even black children are not immune. I heard a grown man tell a 12-year-old, “I’ll be back when you get a little older, baby.”

God forbid that he should live that long.

The black man who shows contempt for a black woman lets the world know that he has no respect for himself, and therefore is not worthy of it from anybody else.\textsuperscript{36}

Some African American women suffer even greater injuries when harassed by black men than when they are harassed by white men. One woman relates a sense of loss:

Black men were my men – my brothers, my cousins, my godfather, my minister, my friends, even my father. I had always felt safe with them. Until that moment my battle had been with the occasional demented white man who invaded community and serenity without warning or reason. It had not been necessary to be on guard with Black men. This was a betrayal. My safety zone was gone. In truth it never existed. I began to realize that being Black and female meant there were no safe places, unless we created them ourselves.\textsuperscript{37}

Theorists like Deirdre Davis have commented upon the link between the powerlessness of African American men and the street harassment of African American women. Davis contends that African American men have internalized the stereotypical images of African American women. In order to obtain the position of authority that white men possess and to feel less marginalized, these men assert their male status and engage in the oppression of African American women.\textsuperscript{38}

\textbf{B. Sexual Orientation and Street Harassment}

The unique impact that street harassment has on lesbian and bisexual women is complicated by the fact that it is difficult for their harassers to discern their sexual identity with certainty. As a result, these women are often subject to different forms of harassment depending on the femininity of their appearance. When lesbian and bisexual

\textsuperscript{36} C. Milloy, "The Ugly Sounds of Summer" \textit{The Washington Post} (31 May 1990) DC1.

\textsuperscript{37} Featherstone, \textit{supra} note 21 at 74.
women adopt a traditionally feminine style of dress, they are assumed to be heterosexual. The street harassment these women are subject to is then similar to the harassment most heterosexual women face; men presume that they have sexual access to them.\textsuperscript{39}

Of course, the injuries suffered by lesbian and bisexual women as a result of street harassment differ radically from those incurred by their heterosexual sisters. Lesbian and bisexual women continually face the presumption that all women are heterosexual. Street harassment is simply one example of this presumption, which denies the sexual identity of homosexual women. When lesbian and bisexual women are defined as sexual objects that are accessible to men, they are fragmented from an important part of themselves.\textsuperscript{40} Street harassment and the presumption of heterosexuality also serves as a constant reminder that they deviate from “real” women and that they do not fit in to our society.

When women adopt a style of dress that is more masculine or otherwise indicate that they are unavailable to men, street harassment can become hostile or violent.\textsuperscript{41} 86% of lesbians surveyed by theorist Gary Comstock reported that they had been the victims of anti-lesbian verbal harassment as a result of their sexual orientation. This harassment included name-calling, insults and threats of violence. Women of colour were even more likely to be subjected to this harassment than were white women.\textsuperscript{42}

Because our society is anti-gay and the street harassment of homosexual women can escalate into violence, lesbian and bisexual women may view street harassment as more threatening than heterosexual women may. As one woman articulated, “Because

\textsuperscript{38} Davis, \textit{supra} note 2 at 168-69.
\textsuperscript{39} Interestingly, Gardner found that many gay men sexually harass women in order to fit in with their heterosexual counterparts: \textit{Public Harassment, supra} note 15 at 160.
\textsuperscript{40} Bowman, \textit{supra} note 7 at 531-32.
\textsuperscript{41} Gardner, \textit{Public Harassment, supra} note 15 at 231.
lesbians do get attacked, sometimes killed, by strangers. That makes a wolf-whistle because you got a short skirt on look pretty harmless."  

C. Class and Street Harassment

Like race and sexual orientation, the socioeconomic location of women influences how they are harassed and how they interpret this harassment. Theorists have noted that men who work in blue-collar occupations like construction and truck driving often harass well-dressed, affluent looking women.  

This class-based phenomenon probably occurs as the result of a number of factors. First, men with blue-collar occupations typically work outside more than men with white-collar jobs do. Thus, they have easy access to women who pass them by. Second, it is possible that economically disadvantaged men harass affluent women in order to express hostility at the privilege that these women represent. Finally, Gardner has noted that women are more likely to interpret sexual remarks to be complimentary when they come from well-dressed businessmen. Therefore, it is possible that the street harassment that more affluent men engage in goes unnoticed by women and, in turn, by academics that have studied the issue.

Women who work on the street are also the targets of street harassment. Spalter-Roth has studied the impact of harassment on female vendors. She noted that women who sell goods on the street are hassled by male customers, vendors, police officers and

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43 Gardner, Public Harassment, supra note 15 at 229.  
44 Langelan, supra note 12 at 61.  
46 Langelan, supra note 12 at 61.
passerbys. The resulting sexually demeaning environment forces many women to either quit their jobs or to adopt coping strategies like seeking male protection or modifying their behaviour or dress.48

Unfortunately, little has been written about the street harassment that extremely poor women, homeless women, or prostitutes face. It is likely that the injuries these women suffer from harassment are intensified because they have few resources to protect them from male aggression. Indeed, they cannot escape the streets in order to avoid the sexual scrutiny of men and, as such, may be considered to be easy targets.

D. Disability and Street Harassment

Very little has been written about how women with disabilities experience street harassment. Certainly, those who are not able bodied are subject to insults and taunts from strangers. The Roeher Institute reports that one disabled individual felt that the climate of insult is present “all the time, every day”. A man with a visible disability expressed his displeasure at “the persistent, ongoing violation of dignity, paternalism, lack of privacy and rudeness [that] can happen on an hourly basis if one is out on the street”.49

47 Gardner, Public Harassment, supra note 15 at 117.
49 Roeher Institute, Harm’s Way: The Many Faces of Violence and Abuse Against Persons with Disabilities (North York, Ontario: Roeher Institute, 1995) at 65.
Gardner has noted that women with disfigurements are often negatively evaluated in public. Given society’s obsession with female beauty, it is not surprising that men feel entitled to comment on women who do not live up to traditional standards. Perhaps as a result of the negative attention these women normally receive, Gardner reports that women with disabilities are less likely to be offended when they are the recipients of positive street remarks. Instead, some women welcome being praised instead of insulted or ignored.

Of course, there are a number of disabled women who consider street harassment to be a threatening experience. One woman became frightened when a good looking man passed her by, grabbed at a breast and said, “Nice jugs!”

E. Age and Street Harassment

The age of the woman being harassed as well as the age of the harasser is likely to influence how she experiences street harassment. For instance, some older women feel flattered that they are capable of being sexualized at a time in their lives when men typically overlook them. Gardner reports that one white middle-aged office worker considered “pinches, and pokes, and grabs” to be compliments. Younger girls may also enjoy the sexual attention they receive from men, finding it empowering. One woman indicated that when she was harassed at the age of 14, she felt “divinely desirable”.

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51 Ibid. at 236.
52 Ibid.
53 Ibid. at 171.
Another noted that “my first pat on the derriere is the first and best thing that happened to me in public.”\footnote{Gardner, \textit{Public Harassment}, supra note 15 at 108.}

However, many older women and young girls find street harassment to be a decidedly unpleasant experience with harms specific to their situations. Older women may feel robbed of the respect that is supposed to accompany old age. Unfortunately, as Gardner wryly noted after her own 91-year-old mother was grabbed and kissed by a man in his forties, “Whatever old age holds for women, it does not hold public respect.”\footnote{Ibid at 41.}

This sentiment was common among older women. After being harassed by a group of junior high school boys, a 63-year-old proclaimed, “What shocks me is that they can still bother me. They rob the peace that somehow I’d come to believe I was entitled to at sixty-three.”\footnote{M. Nelson, “Chemical Fall-Out” in Sumrall & Taylor, eds., \textit{supra} note 21, 194 at 196.}

For young girls, street harassment can be particularly devastating. Robin West notes:

Street hassling is also the earliest – and therefore the \textit{defining} – lesson in the source of a girl’s 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.\footnote{West, \textit{supra} note 17 at 106.}

The recollections of many female authors confirm West’s theory:

I am in the eighth grade. It is 1959. I feel less and less comfortable walking alone in the streets. Guys drive by in cars and shout rude comments. Men in trucks make “appreciative noises.” I tell my mother. She says to remember that I am a lady. I am above such things. Pretend you don’t even hear them, she says. I learn to walk slightly slumped over to hide my breasts; to duck my head a bit so no one can look directly into
my face, to keep my hips still and make sure that my bottom doesn’t sway from side to side. I have learned to walk like a victim.59

Another woman recalls:

By the time I was eleven I knew what it was like to stand on the sidewalk and be asked by a man with a luring voice if my name was Peaches and Honey. At the age of twelve I knew what it was like to be followed in and out of shops and to be asked by a forty-year-old man if I wanted to go to bed with him. At fifteen I knew what it was like to walk down the street and be asked if I was wearing a bra by a man in passing.60

The age of the harassers also affects how women experience street harassment.

Some women do not feel as threatened when targeted by older men or young boys.61

Others find verbal abuse emanating from children, who are expected to show respect for their elders, to be particularly disgusting62:

...a boy not much older than 14 yelled at me, “Hey, bitch, how much for head?” I told my mother and sister what happened – they laughed and said, “He’s just being a normal boy.” My reaction? I’ve never felt so violated or outraged in my life.63

Another woman relates:

If I head in one direction, I am verbally assaulted from by construction workers [sic]. 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...Somehow I find it less offensive that construction workers whistle and comment loudly than that 10 to 12-year-old boys can be so foulmouthed.64

59 J. L. Mickelson, “And if I Speak... What Then?” in Sumrall & Taylor, eds., supra note 21,184 at 185.
62 Ibid at 118; Kissling and Kramarae, “Stranger Compliments” supra note 5 at 83.
64 R. Blau, Letter to the Editor, The Washington Post (26 March 1990) A10. This trend is even more disturbing when one begins to theorize about what causes boys to harass grown women. Langelan asserts that young boys test their developing power over women. If they succeed in intimidating their victims,
F. Women Who Enjoy Street Harassment

As the proceeding discussion indicates, street harassment is interpreted differently by different women. While the severity of the attack will certainly influence this interpretation, the social location of the woman involved also plays a role in how the harassment impacts her. The event is often considered to be a demeaning and negative experience.

It would be remiss, however, to suggest that all women feel that street harassment is humiliating and threatening. Indeed, some women have described some less severe forms of street harassment as flattering and empowering: "When guys stare at me or say things like "nice ass," it makes me uncomfortable. But I don't mind being whistled at. And if a guy says, "Nice dress," that's a compliment; always felt like it was fun. Didn't think anyone would harm us. They were just following us around because we were such wonderfully good-looking women"; "When I've had a hard day, if a guy surprises me with 'Hi gorgeous,' I'm more likely to perk up and smile discreetly than get on my ERA soapbox."

In the past, theorists have swept these women's experiences under the rug, explaining their reactions as symptomatic of false consciousness. For instance, Carol Gardner dismisses the women who enjoy harassment by characterizing them as apolitical and traditional women who view harassment as a form of romantic courtship. Robin West theorizes that women will convince themselves they enjoy being harassed in order

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66 Kissling, “Language of Sexual Terrorism”, supra note 3 at 452.
68 Gardner, Public Harassment, supra note 15 at 238.
to avoid the pain that comes from having one's sexuality wrested away.\textsuperscript{69} Kramarae has speculated:

Women are taught to look, speak and in all other ways behave as proper women in order to receive sex-linked compliments from men; not surprisingly some women consider street remarks flattering if they are ostensibly positive evaluations. Men's compliments, we are taught, are the highest compliments we, socially and economically their inferiors, can receive.\textsuperscript{70}

Non-academic authors have shared this sentiment: "A woman who enjoys being yelled at on the street is a woman who has been socialized to think that she is valued and defined by her sexuality."\textsuperscript{71}

These feminist theorists raise valid concerns about women who find harassment pleasant. It is possible that some women find mild forms of harassment enjoyable because they have internalized traditional concepts of femininity; others may convince themselves they enjoy the experience because they know they must endure it. However, the theorists who label women who enjoy harassment as victims of false consciousness fail to value the truths that these women present. In so doing, they negate the feminist tenet that experience is an important source of knowledge. Instead, these theorists seem to suggest that women's experiences will only be considered valid if they accord to the expectations and values of the theorists themselves. The women who find harassment pleasant simply cease to exist.

As a feminist who is determined to be inclusive of all women's voices, I do not believe that women who enjoy harassment should be dismissed so easily. It may be that, in the final analysis, the benefits these women garner from street harassment cannot

\textsuperscript{69} West, \textit{supra} note 17 at 107.
\textsuperscript{70} Kramarae, "Speech Crimes", \textit{supra} note 5 at 89.
compare to the injuries suffered by other women. However, it is important to at least consider their experiences when crafting a solution. After all, the aim of feminism is to attempt to improve the lives of all women.

**Common Threads**

Women interpret street harassment in a number of different ways. The injuries they suffer as a result of the harassment also vary markedly depending on their social location. However, the stories that most women tell reveal a pattern. From this pattern, theorists have discerned that street harassment often functions to socialize women and men to their gender roles, to sexually terrorize women, to objectify women, and to murder the spirits of its victims.

**A. Socialization**

The fact that street harassment occurs speaks volumes about the social position of women. Addressing strangers with familiarity when passing them by represents what theorists call a “breach of civil inattention”. Normally, strangers adopt a studiously indifferent attitude towards people in public places. Many theorists interpret this attitude as a sign of respect for people’s privacy and space. The demeanor of indifference is rarely shed. However, the norm of civil inattention will lapse when a passerby constitutes a member of a group who, because of the lack of respect they command, may

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71 Kuster, *supra* note 65 at 309-310.
72 Bowman, *supra* note 7 at 534, footnote 81 asserts “...the fact that some women are greatly harmed by harassment on the street...surely outweighs the pleasure others may profess to feel from this attention.”
73 It is possible that the norm of civil inattention is inspired by feelings other than respect. For instance, it may connote fear or a sense of alienation from our peers. Whatever the reason behind this façade of
be approached at will. Thus, street harassment reminds women on a daily basis that they are not worthy of common courtesies afforded to other members of the populace.74

As Pam McAllister comments:

The assumption is that all women can be spoken to intimately and informally even though they are strangers. This presumptuous intimacy stems from and reinforces an internalized hierarchy which implies a lesser regard and lower status of women in general.... There is judgment in a tradition that sanctions a nonreversible male-to-female familiarity.75

Often characterized as an intrusion of privacy, this familiarity reminds women of their lower social status. One woman commented in a website chat room: “...it is a power that women do not have over men: the right to address unknown members of the opposite sex in public places.” Another woman added, “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.”76

Street harassment also advises women that public space is male space. Women are considered worthy of attention in the public sphere, in part, because they are trespassers out of their proper place; the private sphere. Thus, a woman’s appearance in the street is part of public information and is deserving of comment.77

Oftentimes, the violent and sexual content of the harassment reminds women of the potential punishment for their trespass.78 As Thompson has noted, “Street harassment

indifference, it is important to realize that the way men interact with women on the street tells women that they are to be treated differently from, and, in the case of street harassment, worse than, men.

74 C. Gardner, “Passing By: Street Remarks, Address Rights, and the Urban Female” (1980) 50 Sociological Inquiry 328 [hereinafter “Street Remarks”].
75 MacAllister, supra note 17 at 39.
76 Kissling and Kramarac, “Stranger Compliments”, supra note 5 at 83.
77 Gardner, “Street Remarks”, supra note 74 at 341.
78 Kissling, “Language of Sexual Terrorism”, supra note 3 at 454.
is an everyday reminder to women that men control their safety and rights to passage through public space."

Even non-violent harassment makes women feel uncomfortable in public places because it subjects them to public (that is, male) scrutiny. Many women avoid areas of the public as a result of the discomfort they feel. In a very real way, then, street harassment serves to limit women’s mobility and geographical freedom. The result is what Bowman has called an “informal ghettoization of women.” Women forego activities and avoid certain areas, all to escape the gauntlet of public sexual harassment.

In short, street harassment teaches women that the public sphere is truly male. Women must simply scurry through these “zones of hostility” attempting not to be noticed. Needless to say, because street harassers make women uncomfortable in public spaces and, as a result, influence women’s activities and locations, the public harassment of women denies them choices and negatively impacts their autonomy.

Street harassment also teaches women that one of their primary functions is to exist as sexual objects to serve men. Constantly subject to male observation and criticism, this “reinforces the notion that men are the lookers, the evaluators, the judges, the people who set the standards of acceptance and recognition”. Men are the actors in the public sphere, while women are expected to be the passive recipients of their

79 D. Thompson, “‘The Woman in the Street’: Reclaiming the Public Space from Sexual Harassment” (1994) 6 Yale Journal of Law and Feminism 313 at 322.
80 Bowman, supra note 7 at 520.
82 Davis, supra note 2 at 145.
affections. Men are the people who “want”; women exist “to be wanted.” Women’s sole function in public life is to appear feminine and attractive, a charming adjunct to our male companions.

Finally, street harassment reinforces traditional gender roles by punishing women who do not fit the mold of a feminine lady. Visibly independent women are often the target of street harassment. Women who are unescorted by men or women who engage in traditionally male activities like running or cycling receive a large amount of verbal abuse:

I am also an excellent runner, and I can pass by most of the male joggers I see, leave them huffing and puffing. Every time I do this, and I do mean every time, the man I leave eating my dust does one of two things. Either he tries valiantly to pass me in turn (and he usually can’t) or he starts harassing me: Who do I think I am? Am I some kind of stuck-up showoff?

I am a bicyclist. It is my transportation. Every day as I am riding, some man will stick his head out a car window and shout some offensive comment. “Wooo Baby! Hey Cutie, nice tits, oh yeah, pump it on that bike. Wooo Hoo, hey baby, wanna party? Nice ass, hey bitch, come here. Hey sweetheart come and sit on daddy’s face. Check her out!” Sometimes they just stare as they lick their lips or tap their friend to “check me out.” …None of these men ever treat me with the respect I deserve.

On a similar note, masculine and feminine gender roles are reinforced by the prototypical occurrence of street harassment. Men pursue women in an aggressive fashion without fear of repercussions. Women are expected to respond meekly, or not

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83 MacAllister, supra note 17 at 36.
84 Dimen, supra note 4 at 4.
85 Kramarae, “Everyday Life”, supra note 5 at 108.
86 Ibid. at 113.
87 Gardner, Public Harassment, supra note 15 at 144.
89 Langelan, supra note 12 at 58.
at all because “throughout our gendered lives, we have been socialized to keep silent (rather than confront); to be polite (rather than be rude)' to get help from men (rather than help ourselves); to be passive (rather than aggressive)....”

Each time a woman is harassed and remains silent, the structure of power that defines women as subordinate sex objects is reinforced. If women do react in an aggressive, unfeminine fashion, their aggressors may punish them: “Women know that when we respond to street harassment with counter-aggression, the violence and abuse often escalate.”

Street harassment also encourages women to seek male protection. Women are not subject to the verbal abuse of passing men when other men escort them. As a result, women are sometimes forced to assume traditional heterosexual gender roles in order to avoid being targeted on the streets.

In sum, then, street harassment effectively regulates women’s behaviours, punishing them for acting outside of their traditional roles. It acts to ensure that:

women will not feel at ease, that we will remember our role as sexual beings, available to, accessible to men. It is a reminder that we are not to consider ourselves equals, participating in public life with our own right to go where we like when we like, to pursue our own projects with a measure of security.

90 Tuerkheimer, supra note 2 at 192.
91 Ibid.
92 West, supra note 17 at 85; Di Leonardo, supra note 11 at 56.
93 Houston, supra note 17 at 45.
B. Sexual terrorism

The term sexual terrorism was coined by Carole Sheffield, who defined it as “the system by which males frighten, and by frightening, dominate and control females.”\(^{94}\) For Sheffield, sexual terrorism included actual and implied violence and consisted of a continuum of behaviour. Sexual harassment is part of this continuum and helps to create a culture of terror in which “All females are potential victims – at any age, any time, or any place, and through a variety of means: rape, battery, incest, sexual abuse of children, sexual harassment, prostitution, and sexual slavery.”\(^{95}\)

Other women have noticed this continuum in their stories of harassment:

Most men would take offense at me lumping a complimentary car honk with attempted rape. What they don’t understand is that rape, verbal and physical battering, and economic discrimination all create a climate where a “compliment” can be perceived as a threat...When looks are used as an excuse for rape or abuse (“she was dressed like a whore – she was asking for it”), compliments that focus on a woman as a sexual object become a form of intimidation, a way of maintaining domination.\(^{96}\)

Sexual terrorism allows men to control and punish women sexually. Taken as a whole, it reinforces women’s subordinate status, thus perpetuating the gender hierarchy.\(^{97}\)

Street harassment plays an important role in this system; it creates fear in women and serves to remind them that they are constantly vulnerable to sexual attacks by men. “I’m walking along minding my own business and suddenly some gross, scary man...comes

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\(^{95}\) Ibid.

\(^{96}\) S. Karas, “A Continuum” in Sumrall & Taylor, eds., supra note 21, 144 at 147.

\(^{97}\) Sheffield, supra note 94 at 171.
along and reminds you that you are vulnerable to anything someone stronger than you wants to do to you.\textsuperscript{98}

This fear is not an overreaction. As many theorists have pointed out, women must respond to male attention as a potential threat because they are unable to predict whether male behavior will escalate to violence.\textsuperscript{99}

We keep our knees together, our legs crossed, our faces neutral. Somewhere in our minds we are always aware that any man - every man - can, if he wants to, use the weapon of rape against us.

And men know it too. The man who mutters obscenities at us in the street knows it, the local greengrocer who insists on calling us love...knows it, the wolf-whistling building workers know it, the man reading page three on the tube and grinning at us knows it.\textsuperscript{100}

Thus, it is not unusual to come across women who tell of incidents of street harassment that escalated into rape.\textsuperscript{101} Indeed, it is so common that some theorists posit that many rapists use harassment as form of “rape-testing”; if the victim of the harassment responds in a meek fashion, the rapist knows he has secured an easy target.\textsuperscript{102}

Even when street harassment does not escalate to sexual assault, the fear it elicits in women can have a debilitating effect on them. Because women must “view all gestures from men on the street as potential threats”, many women who fear street harassment appear symptomatic of agoraphobia.\textsuperscript{104}

\textsuperscript{98} Tuerkheimer, \textit{supra} note 2 at 187.
\textsuperscript{99} Langelan, \textit{supra} note 12 at 41.
\textsuperscript{100} West, \textit{supra} note 17 at 96.
\textsuperscript{101} L. Tanaka, “Street Music” in Sumrall & Taylor, eds., \textit{supra} note 21, 267 tells the story of an incident of harassment that ends in being grabbed, pushed into back alley and raped.
\textsuperscript{102} Bowman, \textit{supra} note 7 at 536; Langelan, \textit{supra} note 12 at 45.
\textsuperscript{103} Thompson, \textit{supra} note 79 at 321.
\textsuperscript{104} Gardner, \textit{Public Harassment, supra} note 15 at 38.
C. Sexual Objectification

Sexual objectification occurs when a person’s sexual parts are separated from the rest of her personality and regarded as if they were capable of representing her. In our society, women are “compulsively sexualized”: they are habitually perceived in a sexual light, despite the fact that this perception may be inappropriate. Thus, a woman’s sexuality is extended to every area of her experience. Street harassment provides just one example of how women are considered to be, first and foremost, sexual objects:

My body is no longer mine. On the street my body is theirs. I can define myself all I want, but in their eyes I am a body on the street, two tits and no head and a big ass. My body becomes a cunt, and although I’m not physically raped, psychically I am, and I ache from it.

Sexual objectification is problematic for a number of reasons. First, it acts to oppress women economically and politically. Needless to say, women are not taken seriously in the workforce or in the political sphere when they are considered simply as objects for male sexual pleasure. Perhaps more important, objectification oppresses women psychologically, as well. Theorist Sandra Bartky defines psychological oppression as the internalization of intimations of inferiority. Psychological oppression works by negatively impacting the victim’s self-esteem, breaking her spirits and leading her to believe that the system of oppression is neutral and natural.

Objectification works as an effective tool of psychological oppression because it encourages women to view their bodies as mere things. Thus, it “feeds an essentially

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106 Ibid. at 37.
107 Dimen, supra note 4 at 3.
infantile narcissism". At the same time, objectification harms women's self esteem because society informs us that we will never quite measure up:

Not only must we continue to produce ourselves as beautiful bodies, but the bodies we have to work with are deficient to begin with. Even within an already inferiorized identity (i.e., the identity of one who is principally and most importantly a body), I turn out once more to be inferior, for the body I am to be, never sufficient unto itself, stands forever in need of plucking or painting, of slimming down or fattening up, of firming or flattening.\(^110\)

Finally, sexual objectification is harmful because it causes a woman to experience a sort of schizophrenia in which she is both an active agent or "subject" and a passive recipient or "object". The resulting "Subject-as-Object" episode is anything but pleasant:

It is a fine, spring day, and with an utter lack of self-consciousness I am bouncing down the street. Suddenly I hear men's voices. Catcalls and whistles fill the air. These noises are clearly sexual in intent and they are meant for me; they come from a group of men hanging about a corner across the street. I freeze. As Sartre would say, I have been petrified by the gaze of the Other. My face flushes and my motions become stiff and self-conscious. The body which, only a moment before, I inhabited with such ease now floods my consciousness. I have been made into an object. While it is true that for these men I am nothing but, let us say, a "nice piece of ass," there is more involved in this encounter than their mere fragmented perception of me. They could, after all, have enjoyed me in silence. Blissfully unaware, breasts bouncing, eyes on the birds in the trees, I could have passed by without having been turned to stone. But I must be made to know that I am a "nice piece of ass"; I must be made to see myself as they see me. There is an element of compulsion in this encounter, in this being-made-to-be-aware of one's own flesh; like being made to apologize, it is humiliating.\(^111\)

Theorist Muriel Dimen explained the Subject-as-Object experience as follows:

[Women] know, as subjects, that they must recognize that they are treated as objects, into which they must sometimes also transform themselves. In order to live from day to day, they must both accept and reject what they

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\(^{108}\) Bartky, supra note 105 at 37.

\(^{109}\) Ibid. at 34.

\(^{110}\) Ibid. at 38.

\(^{111}\) Ibid. at 37.
know, that they are and are not people. A person is someone whom others treat with a respectful awareness of personal boundaries and dignity, to whom an address, for example, is a request, not a demand, for attention. According to this definition, then, a woman is not a person. At the same time, this is what she is supposed to be, and this contradiction is what she is supposed to swallow with a smile on her face. 112

Robin West has theorized that the pain of existing as a Subject-as-Object causes women to dissociate from their own bodies, hiding the subjective identity deep within and devaluing their own objective sexuality:

As you do so, you learn self-deception and self-belittlement – you learn to smile when you are in pain. And finally, you learn to hate that which forces this violent rupture of subjective self and objective sexuality, and it is your sexuality which forces it. 113

D. Spirit Murder

Deirdre Davis was the first feminist legal theorist to identify spirit murder as a potential effect of street harassment. For Davis, spirit murder is the cumulative effect of both major and minor assaults that lead to the “slow death of the psyche, the soul and the persona.” 114 While street harassment is only one form of spirit murder, it is an effective one:

When I am subjected to street harassment, I experience many emotions. I am angry, frustrated, confused, humiliated. No matter how hard I try to subvert the harasser’s intent to cause me harm by being strong and dismissing the comment, the effect persists. I replay the interaction in my mind, create alternative endings, i.e., saying something that hurts him as much as it hurts me. On good days, I think about it for only a few minutes. But on other days, I fume. By disregarding my right to use my energy as I deem appropriate, the harasser has caused me to suffer a spirit murder. 115

112 Dimen, supra note 4 at 5.
113 West, supra note 17 at 107.
114 Davis, supra note 2 at 176.
115 Ibid. at 176-77.
In addition to fear, street harassment can cause a distinct form of psychic trauma. Micaela di Leonardo recognized that street harassment “makes a claim on [a woman’s] time and energy, proving to her that [a man] can force her to respond to him whether or not she wishes to.” Thus, harassment causes women to engage in “emotion-work”, which is the process of forcing one’s emotions to correspond to what is expected. Not only is emotion-work exhausting, it usually forces women to act within their socially approved gender roles:

Our culture expects women to be friendly. Flight attendants and waitresses are supposed to remain friendly when pawed; secretaries, when pinched and running for the boss’s coffee; women on the street, when “hassled like a piece of meat.” In each of these cases, friendliness is the result of the woman’s emotion-work, her acquiescence to her fear of being fired, being hurt – to her fear of men.

The emotion-work required of women is at no time more obvious than when harassers enjoin women to smile. A common example of street harassment, the commandment or request to smile is a blatant attempt to control women emotionally. The order will often come at a time when women are preoccupied with their own thoughts and emotions. For instance, Deirdre Davis was enjoined to smile by two different men on the day she found out that her grandmother had died. Because she is a woman, she was expected to make her appearance in public enjoyable for the men around her, no matter what her mindset. As a result, she was unable to experience the emotions that were necessary to cope with her loss.

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116 Tuerkheimer, supra note 2 at 119.
117 Di Leonardo, supra note 11 at 53.
118 Kramaræ, “Everyday Life”, supra note 5 at 105.
119 Davis, supra note 2 at 143.
Street harassment also causes feelings of disempowerment amongst its victims, which contribute to the murder of their spirits. Kissling and Kramarae report that most women write about harassment as something that happens to them, “as something they can’t control or take action on.” These sentiments stem from the fact that women often feel they are unable to respond to the harasser:

Women who are harassed on the street typically do not respond to the harasser but instead try to ignore him, or, more accurately, pretend to ignore him...They freeze; they put on a blank face; they try to pretend that nothing is happening. When women take these evasive actions in an effort to mask feelings of invasion, anger, humiliation, and fear, they suffer a psychological beating in the form of emotional distress and feelings of disempowerment.

Women often feel unable to confront their harassers for a number of reasons. First, women are socialized to be passive and demure. Second, most women are cognizant that responding to male aggressors can be dangerous. Finally, as Gardner explains, many incidents of street harassment are intentionally designed to throw women off balance so they do not know how to respond. Recently, for instance, a man exclaimed enthusiastically to me “Those are some fine legs – I’ll bet you don’t fall down a lot on those!”

Women pay a hefty price psychologically no matter how they choose to respond to street harassment:

A harassed woman works on herself: if she wants to believe that he is “just being friendly,” she batters down her fear, smiles and says “hello,” trying to ignore his degrading micro-interactional signals; if she practices the strategy of ignoring the harasser, she stiffens all over and tells herself that she isn’t upset; if she chooses to fight back, she pumps up her adrenaline.

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120 Kissling and Kramarae, “Stranger Compliment” supra note 5 at 85.
121 Bowman, supra note 7 at 537.
and prepares to act against an entire lifetime’s socialization not to make a scene, then leaves the interaction feeling like a survivor of a car wreck.\textsuperscript{123}

In summary, women who find harassment to be an unpleasant experience suffer from a wide array of injuries when they are harassed, no matter what their social location. When harassed, these women suffer from feelings of stress, fear, humiliation, embarrassment and powerlessness, to name but a few.\textsuperscript{124} It is no wonder, then, that these women may also react physically when they are harassed:

Physical reactions to street harassment range from increased muscle tension, stopped breathing, numbness, dizziness, nausea, constriction of the throat, trembling, rise of bile in the throat and pounding heart. Women may involuntarily cover some part of their body that has been commented upon or touched. In addition, some women have experienced dissociation and selective amnesia.\textsuperscript{125}

It is not difficult to imagine that when a single incident of harassment elicits such severe responses, the cumulative effect can be devastating. For most women, simply the anticipation of street harassment is able to negatively impact the quality of their lives.\textsuperscript{126} As one woman lamented, “Every time I approach a group of men, I feel my stomach twist into a big knot...I know what’s coming, and there’s nothing I can do about it. They’ll say something, and I’ll be devastated.”\textsuperscript{127}

\textsuperscript{123} Di Leonardo, supra note 11 at 53.
\textsuperscript{124} Bowman, supra note 7 at 538.
\textsuperscript{125} Heben, supra note 6 at 201.
\textsuperscript{126} Ibid. at 204.
\textsuperscript{127} Blair, supra note 54 at 119.
Chapter 3

Current Laws and Street Harassment

Both the *Criminal Code* and tort law discourage the most severe forms of street harassment. For example, both areas of law censure incidents that involve unwanted physical touching or threats to bodily integrity. Section 265 of the *Criminal Code* makes it an offence to apply force intentionally or to threaten to apply force to another person without that person’s consent.\(^1\) In civil law, the tort of battery punishes those who directly and intentionally physically interfere with another person.\(^2\) While these laws are capable of punishing the most extreme street harassers, they do little to assist women with the more commonplace forms of harassment discussed in previous chapters. Few incidents of street harassment involve touching. Moreover, while many women may feel threatened by street harassment, it is doubtful that a police officer or a court of law would interpret the common street harasser’s words or gestures to constitute a threat to apply force to that woman.

In this chapter, I explore how the law is currently unable to address incidents of street harassment. I review both criminal and tort laws that might be used to apply to more typical forms of street harassment and then discuss the limitations that keep these laws from addressing the problem. First, however, it is necessary to briefly canvas the reasonable person standard. As we shall see, this standard arises in both the criminal and tort contexts and can work to exclude women’s experiences from the law.

\(^1\) *Criminal Code*, R.S.C. 1985,c. C-46, s. 265.
The Reasonable Person

The concept of the reasonable person arose from the “reasonable man” standard, a legal device used to express an objective standard of behaviour. Developed at a time when women were invisible in the public sphere, the reasonable man standard was based on a hypothetical male who used sound, rational judgment to make sense of his experiences. Described as “the man who takes the magazines at home and in the evening pushes the lawn mower in his shirtsleeves”, there was little doubt that the prototype was based on the male gender.3

When the law began to recognize that women were legal persons with rights of their own, courts became more sensitive to the exclusionary language of the reasonable man standard. In order to remedy the situation, the gender neutral standard of the “reasonable person” was born. Despite the fact that this modern-day standard appears to be more inclusive than the reasonable man paragon, many feminists remain wary of the concept. These scholars are fearful that the reasonable person standard continues to be based on male reality, but is applied universally. As a result, some feminist theorists worry that a woman’s conduct is evaluated against a male stereotype: any woman who fails to measure up to the male standard and does not react the way that a man would in the same situation is, by definition, unreasonable.4

It makes sense that the reasonable person paradigm compounds the problems of women of colour, women with disabilities, poor women and lesbians and bisexual

women. If, as some theorists maintain, the "reasonable man" standard was based largely on the experience of white, able bodied, well-to-do, heterosexual men, the people who are furthest from this standard will be more likely to be judged "unreasonable". While the common law may slowly change to incorporate the experiences of women who are most similar to these men, it will be a long time before women in the margins of our society are represented by this standard.

The exclusion of many women from the reasonableness standard is problematic because the concept is so prevalent in our legal system. It arises in both criminal and tort law. As we shall see, the Crown must sometimes prove that a victim's fear was reasonable in order to prove that a crime has been committed against her. In tort law, a plaintiff may have to show that she had a reasonable apprehension of harm to show that she suffered a wrong.

This "mirror-image" logic has been criticized by feminists for good reason. It has, in the past, had a negative impact on women harassed on the street. In the United States, a court refused to hold a man liable for assault when he used "mere words" against a woman:

Suppose a bawd should solicit a man upon a public street to have sexual intimacy with her; he certainly could not maintain a civil action against her. If an action could be maintained by a woman against a man for such solicitation, the same right to maintain one would exist in his favor.

6 Reed v. Maley, 74 S.W. 1079 at 1081 (Ky, 1903).
In the current day and age, the law is more willing to take a woman’s perspective into account. However, there are indications that the reasonableness standard is not totally inclusive of the female experience. For instance, in *R. v. Martynkiw*, the accused was charged with criminal harassment after continually staring at and taking pictures of a woman and her 12 year old daughter. Because the accused’s conduct occurred in the midst of an ongoing dispute between neighbours, the court held that his conduct was not reasonably capable of causing the complainant to fear for her own or her daughter’s safety. The court determined that, although the accused’s conduct was “rude, vexatious, annoying and invasive” and “aggravating and disconcerting”, it was not harassing:

As socially undesirable as Mr. Martynkiw’s conduct was, however, it was not criminal: Viewed objectively, the conduct was not reasonably capable of causing Ms. Johnson to fear for her daughter’s safety. At most it could give rise to a fear of being unable to enjoy her property in privacy. Being stared at by one’s neighbour where there has been no threat of harm, verbal or otherwise, and where there has been no trespass or any other indication of an intent or desire to harm, does not give rise reasonably to a fear for safety. Taking photographs in addition to staring adds nothing significant.

Similarly, in *R v Ducey*, a woman’s classmate followed her in his car for a 40-minute period. In acquitting the accused of criminal harassment, the court held that other than following the complainant, there were no factors from which it could be reasonably concluded that the accused might have intended to harm the complainant:

There must exist a factual foundation for the conclusion arrived at upon which any trier, properly applying an objective test to the same set of facts, would conclude that it was reasonable for the complainant, in all of the circumstances, to fear for her safety.

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7 For instance, in *R. v. Stagmita*, [2000] O.J. No. 3024, the Ontario Superior Court of Justice held that a court must take the victim’s gender into account when determining if his or her fear was reasonable in the circumstances. The Court did not mention the importance of considering a woman’s race, sexuality or class.

Other than the repeated following from place to place there were no additional circumstances from which it could be concluded that Mr. Ducey might harm Ms. Brake. Examples of such circumstances may include persistent behaviour; intimidation through word, act or gesture; a previous violent relationship or any relationship with negative overtones and repeated and continuous action with no apparent or logical purpose.9

In both of the above cases, the courts ruled that the victims’ fear had not been reasonable. This was so despite the fact that the behaviour that the women were subjected to would undoubtedly scare most females. The actual fear these women felt was evidenced by the fact that they had filed complaints with the police and gone to trial to take the stand against their stalkers. Thus, both common sense and the victims’ actions in these cases speak of a real and valid fear that was not addressed by the “reasonableness standard”.

Feminists must remain critical of whose lives are actually being reflected in the reasonable person standard. It is likely that, even as our legal system becomes more inclusive of women, the law will incorporate only the experiences of women who have ready access to the justice system into the reasonable person paradigm. These are the women who already have a fair degree of power in our society. Unless we pay careful attention to the development of the reasonable person standard, women who live on the margins of our society and our legal system will remain invisible to us. We must remember that street harassment is interpreted in different ways depending on our sex, race, sexuality, age, class and other facets of our unique situations. Catherine MacKinnon has noted:

Sex is peculiarly an area where a presumption of gender sameness, or judgments by men of women, are not illuminating as standards for equal treatment, since to remind a man of his sexuality is to build his sense of potency, while for a man to remind a woman of hers is often experienced as intrusive, denigrating, and depotentiating. Making an issue of skin color does not have the same social meaning for blacks as for whites.\(^{10}\)

**Criminal Law**

Section 264.1 of the *Criminal Code* punishes those who knowingly utter a threat to cause bodily harm to another person.\(^{11}\) In order to be found guilty of uttering a threat, the perpetrator must intend to instill fear in his victim or the words spoken must constitute a threat to a reasonable person.\(^{12}\) Section 264.1 fails to address the reality of street harassment, which rarely involves violent threats. Moreover, the *Criminal Code* provision would not apply to street harassment because it would be difficult to demonstrate that a harasser intended to scare his target; indeed, according to Gardner’s interviews, many men who harass women believe that they are complimenting them.\(^{13}\)

Finally, the section would be unlikely to apply to street harassment because it has a “reasonable person” standard built into it. Courts have held that in instances of verbal threats, an individual will only be legally responsible for the words spoken if, viewed objectively in the context of all the words spoken, and having regard to the person to whom they were addressed, the questioned words would convey a threat of serious bodily harm to a “reasonable person”. Courts have sometimes considered the perspective of

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\(^{11}\) *Criminal Code*, s. 264.1.


women when interpreting this “reasonableness” standard in the context of serious threats.\(^\text{14}\)

However, the reasonable person standard will only hinder women who are the victims of street harassment. A court of law is unlikely to find that street harassment constitutes threatening behaviour to a reasonable person. Street harassment is normally characterized as a trivial nuisance. Words that a man may consider, at best, complimentary and, at worst, an intrusion, are experienced differently by a woman walking in a public place by herself.\(^\text{15}\) In such an instance, even an innocent comment can serve as a reminder to a woman that she is subject to the whims of every male passerby. We live in a culture in which violence against women is prevalent and a woman cannot know if or when a street remark will turn into a physical attack. Men and women experience harassment in different ways. Women of different social locations also experience harassment in different ways. Unfortunately, because the reasonable person standard is more likely to reflect the experiences of men, and, more recently, advantaged women, it is unlikely that many judges would view street harassment as threatening.\(^\text{16}\)

\(^{14}\) *R. v. McCraw*, [1991] 3 S.C.R. 72. In *McCraw*, a man sent letters to cheerleaders, in which he threatened to rape them. The Court determined that the threat of rape constituted a threat of serious bodily harm, concluding, at para. 29, “It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women.”

\(^{15}\) Indeed, a number of studies have indicated that women are more likely to label a situation as harassing than are men: S. Valentine-French & H.L. Radtke, “Attributions of Responsibility for an Incident of Sexual Harassment in a University Setting” (1989) 21 *Sex Roles* 545; D. Lester et al., “Judgments About Sexual Harassment: Effects of the Power of the Harasser” (1986) 63 *Perceptual and Motor Skills* 990.

\(^{16}\) See discussion on “reasonableness”, above; Bowman, *supra* note 5 at 553.
Other sections of the *Criminal Code* also fail to adequately address the problem of street harassment. Section 264 of the *Code* was enacted in 1993 to deal with criminal harassment. It reads:

264(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in the conduct outlined below that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of:

(a) repeatedly following from place to place the other person or anyone known to them,

(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them,

(c) besetting or watching the dwelling-house or place where the other person or anyone known to them resides, works, carries on business or happens to be or

(d) engaging in threatening conduct directed at the other person or any member of their family.  

Common sense indicates that the first three provisions of section 264(1) were not drafted to assist women targeted by street harassers. First, street harassers do not repeatedly harass the same woman. Instead, they engage in an isolated interaction with one woman and then move on to a new target. Second, street harassment occurs between strangers. Thus, a street harasser is rarely interested in or capable of stalking his victims.

While it is possible that a man could be found guilty of criminal harassment if he engaged in threatening conduct directed at a female passerby, section 264(2)(d) is unlikely to apply to a street harassment scenario. In order to be found guilty of criminal harassment, the conduct of the accused must cause the other person to reasonably fear for

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17 *Criminal Code*, s. 264.
her safety. As mentioned above, the requirement that a woman reasonably fear for her safety can be disadvantageous. The *Martynkiw* and *Ducey* cases discussed above indicate that, even in instances of stalking, the reasonable person standard fails to address women's real and valid fears. Given the courts' response in cases like *Martynkiw* and *Ducey*, where common sense and the victims' responses attest to the fear these women felt, one can only imagine a court’s reaction to a casual comment or compliment made by a passerby on a busy street in the middle of the day.

Finally, the criminal harassment provision of the *Criminal Code* will not aid a woman who is harassed on the street because the offence requires a subjective *mens rea*. In other words, the Crown must prove that the harasser either knows that the woman is harassed or is reckless as to whether the woman is harassed in order to prove guilt. Generally, in order to be found reckless, the accused needs some awareness that his actions would bring about a prohibited risk. Because it is impossible to know with certainty what was in the accused's mind when he committed an offense, courts use extrinsic evidence to infer actual knowledge or recklessness. In the case of street harassment, a court may look to a man's gestures or words to determine if he actually knew or was reckless to the fact that his victim was harassed. A court is more likely to infer that a harasser had this knowledge if a reasonable person in the position of the harasser would perceive his approaches as distressing.

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19 See footnote 7, above.

20 *Ryback*, supra note 18.

This subjective *mens rea* requirement means that it is unlikely that a judge would find a street harasser guilty of violating section 264(2)(d) of the *Criminal Code*. Few street harassers have actual knowledge that the women they approach feel harassed; indeed, they believe that women feel flattered as a result of male attention.22 Because street harassment is seen as trivial by many in our society, courts are unlikely to infer a harasser meant to “torment, trouble, worry continually and chronically, plague, bedevil, [or] badger” a woman by complimenting her on the street.23

Indeed, the subjective *mens rea* requirement has worked to the disadvantage of women even in cases of serious stalking. For instance, in *R. v. Carey*, the court acquitted the accused, who had sent cards and notes to a woman while subject to a court order prohibiting contact, of harassment. The court determined that, given the history of relationship between accused and complainant, the relatively innocuous nature of the conduct and the absence of notification to the accused that the conduct was harassing, the evidence did not support finding that a reasonable person in the position of the harasser would perceive his conduct as harassing. Therefore, the court refused to infer that the accused knew or was reckless to the fact that the complainant was harassed.

The conduct of the accused during the period of time covered by the criminal harassment charge was only improper because of the court orders. The actions themselves were innocuous and infrequent, merely a few occasions of sending notes, cards, and gifts to the complainant and the children, plus the removal of the decal from the car when nobody was home and one attendance at the complainant's home which did not result in any actual contact between the parties. His actions in the past were certainly more extreme....[and] nothing was communicated to the accused, directly or indirectly, to advise him that this form of contact was not welcome and was seen to be harassing.... [The] more minor the

conduct, the more likely it will be that a reasonable person in the position of the party complained against might not be aware of the effect of his or her conduct. Where the conduct itself is not extreme, the absence of any notification to the accused that the conduct is harassing the complainant is a relevant consideration in determining whether a reasonable person would consider it to be so. In the case before the court, the conduct itself was not extreme, albeit contrary to existing court orders. In the absence of any reaction from the complainant to the cards, notes and gifts, and given their comparative infrequency and content, in my view a reasonable person might easily be unaware that this conduct was harassing to the complainant.24

In Carey, the Court determined that the accused was not guilty. The Court's decision was based mainly on its finding that it could not infer Carey had knowledge that his actions were harassing because a reasonable person would not consider the prohibited communications to be harassing. If a serious case of stalking could be excused on this basis, one can only imagine how quickly a court would dismiss an action based on street harassment. This is especially so when one takes into account that street harassment is often considered trivial. Moreover, street harassment lacks the prior notification and ongoing relationship criteria that the court considered so important in Carey. It is unlikely that a court would determine that a street harasser knew or was reckless as to whether or not a woman he approached was harassed. As a result, street harassment would only fall under the rubric of criminal harassment in the most extreme cases.

There is nothing in the text of section 264(2)(d) that would prohibit its use to combat street harassment. For the most part, the criminal harassment provision would fail to redress instances of street harassment because of the way courts have interpreted section 264. Despite the fact that the text of the provision could be used to address street

harassment, I have decided to pursue the creation of a new *Criminal Code* provision instead of attempting to expand the scope of the judicial interpretation of section 264.

I would prefer the enactment of a new law aimed specifically at street harassment for a number of reasons. First, case law is slow to change because it is based on precedent. I consider street harassment to be an urgent problem that should be addressed immediately. While I value women's attempts to reform existing laws so they better fit with their own experiences, I think that street harassment is a problem in its own right that deserves an independent remedy.

Second, Parliamentary debates indicate that section 264 of the *Criminal Code* was enacted to deal only with stalking. It may be possible to use a portion of that law to deal with street harassment, forcing section 264 to come to the aid of women who are not in a stalking situation. However, using the law in this fashion was not the intent of the legislature. Therefore, reading street harassment into the law does a disservice to the democratic process. It also causes women to suffer an injustice. By using the judiciary instead of elected officials to solve the problem, a great deal of debate about street harassment will be lost. Debate and discussion are vital if we are to encourage women of different social locations to talk about their varied experiences and define the problems they face in their own words.

The criminal offence of causing a disturbance also fails to address the problem of street harassment. Section 175 of the *Code* prohibits individuals from causing a disturbance by fighting, screaming, shouting, swearing, singing or using insulting, obscene language in a public place. The same section outlaws impeding or molesting
other persons and loitering in such a way as to obstruct other persons. On its face, this section would appear to address the problem of street harassment.

However, courts have held that, in order to be found guilty of causing a disturbance, an accused must cause an externally manifested disturbance of the public peace in the sense of interference with the ordinary and customary use of premises by the public. In other words, the disturbance must be something more than mere emotional upset. The nervous reactions of one oversensitive person will not amount to a disturbance of the kind contemplated by the section. Using this reasoning, courts have determined that referring to a person as a "fucking Chinaman" or to a policeman as a "fucking pig" did not cause a disturbance. Courts have also held that determining whether or not a disturbance occurred is a question of fact and depends on the degree and intensity of activity complained of and degree and nature of "peace" which should be expected to prevail. Arguably, the degree of peace to be expected in a public thoroughfare is minimal.

An externally manifested disturbance is a requirement of all disturbance offences, including obstruction. In R. v. Michel, a panhandler was acquitted of causing a disturbance despite the fact that he repeatedly placed himself directly in the path of passerbys on the sidewalk, forcing them to go around him. The court determined that, while the accused had "impeded" others by hindering them or standing in their way, the

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25 Criminal Code, s. 175.
26 R. v. Reed (1992), 76 C.C.C. (3d) 204 (B.C.C.A.)
annoyance he caused to pedestrians was not sufficient to interrupt the public’s peace and tranquillity.\textsuperscript{31}

The “externally manifested disturbance” is also needed to prove someone guilty of causing a disturbance in instances involving obscene language. In \textit{R. v. Gallant}, an individual shouted derogatory comments of a racial nature and obscenities at a hockey game. Because there was no evidence of an externally manifested disturbance of the public peace which brought about any interference with the ordinary and customary use of the premises, the accused was acquitted.\textsuperscript{32} Given the above, it is doubtful that street harassment, which is directed at a sole passerby in a place in which people have a lowered expectation of impregnability, would amount to street harassment.

The \textit{Criminal Code} provisions dealing with intimidation would also fail to address the most commonplace forms of street harassment. Section 57 provides, inter alia, that every one who uses violence or threats of violence in order to compel another person to abstain from doing anything that he or she has a lawful right to do is guilty of an offence.\textsuperscript{33} This offence is unlikely to redress street harassment for a number of reasons. Firstly, courts have interpreted the word violence to mean "forcibly interfering with personal freedom" or "force or strength of physical action".\textsuperscript{34} It is unlikely that a court would consider words uttered to a passerby to constitute violence despite the effect that the words have on the passerby.

\textsuperscript{31} \textit{R. v. Michel} (February 8, 1991), Doc. Vancouver CC891739 (B.C. S.C.).
\textsuperscript{33} \textit{Criminal Code}, s. 57.
\textsuperscript{34} \textit{R. v. Lenton} (1947), 88 C.C.C. 1 (Ont. C.A.).
Section 57 also provides that anyone who blocks or obstructs a highway in order to compel another person to abstain from doing anything that he or she has a lawful right to do is guilty of an offence.\(^{35}\) On its face, it seems as though this section could address instances of street harassment if the harasser obstructs a woman's right of way. However, it is unlikely that a court would apply this provision to an incident of street harassment. For the most part, section 57 has been used in cases of labour unrest. Courts have failed to apply the provision to even the most obvious instances of obstruction if they involve more personal relationships. For instance, in \textit{R. v. Lendvay} the court acquitted the accused of the intimidation charges against her after she had parked her car at the end of her ex-boyfriend's driveway for hours on end. The court determined that, because the "differences between the complainant and the appellant could readily be characterized as a social problem" and because the accused was attempting to revive their past relationship as opposed to forcing the complainant to do something he did not want to do, the charges had to be dismissed.\(^{36}\)

Finally, section 173 of the \textit{Criminal Code}, which prohibits indecent acts, will not apply to street harassment. Section 173 makes it an offence to wilfully commit an indecent act in a public place or in any place with the intent to insult or offend any person.\(^{37}\) On its face, this section seems capable of applying to instances of street harassment. However, courts have applied the "community standard" test of tolerance in order to determine whether or not an act is indecent. The community standard test is a contemporary, national test that measures to what behaviour Canadian citizens will

\(^{35}\) \textit{Criminal Code}, s. 57.
\(^{37}\) \textit{Criminal Code}, s. 173.
tolerate other Canadian citizens being exposed. The possible harm that may result from the behaviour will help determine whether or not the community would allow it. The greater the possible harm that would flow from the behaviour, the less the chance that the community would tolerate it.\textsuperscript{38} As long as street harassment is trivialized and is generally considered to be acceptable behaviour, section 173 will remain incapable of addressing the problem of street harassment.

\textbf{Public Order By-laws}

In some instances, municipal bylaws may address street harassment. For instance, in Vancouver, section 10 of the \textit{Parks Control By-law} in Vancouver states "No person shall conduct himself in a disorderly or offensive manner or molest or injure any other person...or obstruct the free use and enjoyment of any park or place by any other person...".\textsuperscript{39} Section 25 of the \textit{By-law} allows for a fine of $50-$2000 or imprisonment for up to 2 months for any infraction.\textsuperscript{40} While it is difficult to say with certainty how this provision would be interpreted, the fact that the \textit{Parks Control By-law} has never been used to prosecute an instance of street harassment speaks volumes.

\textbf{Tort Law}

Like the criminal law in the area, tort law as it currently stands is unable to address street harassment. On the surface it appears as though torts such as assault, harassment, the invasion of privacy or the intentional infliction of nervous shock may


\textsuperscript{39} City of Vancouver, \textit{Parks Control By-law} (10 July 1978).

\textsuperscript{40} \textit{Ibid}. 
apply to instances of street harassment. However, a quick perusal of the cases dealing with these torts tells a different story.

In civil law, the tort of assault allows individuals to sue anyone who, by way of a direct and intentional act, causes them to reasonably apprehend the infliction of immediate, unlawful force.\(^{41}\) Unfortunately, as with uttering threats, the tort of assault requires both intent and reasonable apprehension of fear. An earlier discussion indicated that both of these criteria will prove difficult for women who have been harassed.

The law surrounding the tort of harassment and invasion of privacy is conflicting. Some courts have refused to acknowledge that such torts exist.\(^{42}\) Others have dealt with these torts under the rubric of nuisance. In these nuisance cases, courts have determined that, in order to find a remedy in tort law, a defendant must unduly interfere with an individual's proprietary interest in order for a plaintiff to have a claim against him or her.\(^{43}\) Obviously, neither of these judicial interpretations could aid a woman who is harassed on a public street by a strange man.

Some judges, however, have recognized the need to create independent torts of harassment, sexual harassment,\(^ {44}\) and the invasion of privacy.\(^ {45}\) Because these torts would not fall under the rubric of nuisance law, one can assume that a plaintiff need not prove interference with a proprietary interest in order to succeed in her claim. Still, these newly developing torts are used sparingly. In order for a court to find a defendant liable

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for harassment, the plaintiff must prove that she was harassed in the exercise of a right.\textsuperscript{46} Sexual harassment is available only in cases of workplace misconduct.\textsuperscript{47} Finally, it appears that a plaintiff would need to prove substantial intrusion of a kind that a reasonable person of normal sensitivity would regard as offensive and intolerable to support a claim of invasion of privacy.\textsuperscript{48} It is unlikely, then, that the torts of harassment, sexual harassment, or the invasion of privacy will help women who are harassed on the street.

Of course, British Columbia and a number of other provinces have passed legislation dealing with the invasion of privacy. Section 1 of the \textit{Privacy Act} states that it is a tort for a person to violate the privacy of another individual. The \textit{Act} goes on to specify that a person’s right to privacy depends on what is reasonable in the circumstances and that a court must consider the relationship between the parties as well as the nature, incidence and occasion of the defendant’s act when applying the \textit{Act}.\textsuperscript{49} Needless to say, the \textit{Privacy Act} of British Columbia has never been applied to an instance of street harassment. Indeed, it is unlikely to redress instances of street harassment which occur in a public place where a person has a low expectation of privacy.

The tort of intentional infliction of emotional distress is equally ill-equipped to deal with street harassment. In order to succeed in making a claim, a plaintiff needs to prove outrageous, extreme conduct on the part of the defendant, coupled with intent to cause severe impact on a plaintiff’s psychological well being. A plaintiff must also show

\textsuperscript{46} Roth, \textit{ibid.}  
\textsuperscript{47} Chaychuk, supra note 44.  
\textsuperscript{48} Roth, supra note 45.  
\textsuperscript{49} Roth, supra note 45.
that she suffered psychological illness or physical harm as a result of this conduct.\textsuperscript{50} Given societal acceptance of street harassment, it is difficult to imagine a court characterizing a harasser’s conduct as outrageous or extreme. Despite the psychological impact on the woman being harassed,\textsuperscript{49} it would be equally burdensome to prove that the harasser intended to negatively impact her well being; indeed, men often believe their comments are flattering to women.\textsuperscript{51}

\textbf{The Problem with Inadequate Laws}

In short, neither tort law or criminal law is currently able to address the problem of street harassment. This inadequacy suggests that street harassment has never been considered a serious issue worthy of judicial or parliamentary concern. The existing law is also incapable of tackling the problem because of the male bias in our legal system. For instance, the “reasonable person” standard sometimes means that the law fails to address women’s experiences. Although male bias has decreased somewhat more recently, the common law system is slow to change and may not fully represent the unique experiences of all women for quite some time.\textsuperscript{52}

Whatever the cause of the inadequacy of the law, the effect of this shortcoming is extremely unfavorable to women. The most obvious consequence is that women are unable to obtain a remedy when they are harassed on the street. The other effects are far more insidious.

\textsuperscript{49} Privacy Act, R.S.B.C. 1996, c. 373, s. 1.
\textsuperscript{50} Linden, \textit{supra} note 41 at 51-52. Linden notes that asking a woman to engage in sexual acts was only actionable if the woman was married or pregnant.
\textsuperscript{51} Gardner, \textit{Public Harassment, supra} note 13.
\textsuperscript{52} See discussion on “reasonableness”, above.
Law is an important discourse that shapes societal views of right and wrong. In this way, law helps to delineate appropriate social behaviour and tell people what is expected of them. When the law fails to recognize street harassment as a problem, it indicates that the harassment of women will be tolerated by our society.53

Law also acts to construct the way people understand the world.54 It is generally accepted that the law provides a remedy for injuries that are sustained. In this way, the legal system validates human suffering. Because the law fails to address the problem of street harassment, both women and men come to view harassment as trivial and harmless: "The failure of the legal system to respond to women's gender-specific injuries constructs these harms as not only different from but also less important than other types of injuries."55

The idea that harassment is a legitimate and harmless form of social interaction shapes the views of both men and women in a myriad of ways. First, it affects the way women come to understand and deal with the pain they may suffer as a result of harassment. Women may trivialize the harm they suffer from street harassment because society tells them that it is insubstantial.56

Second, because women have no legal recourse against a harasser, they may also transform an encounter with a harasser into something that is less painful and easier to deal with. Thus, women may characterize harassment as flattery or chivalry. Women of

colour may be encouraged to view their encounters with men of colour as harmless "rap" sessions. Redefining harassment as a personal problem affects the way women resist harassment as a source of pain.\textsuperscript{57} Many women seek out unsatisfactory personal solutions. For instance, a woman may submit to being escorted home by a man because, "when men accompany women, as all women know, harassment stops".\textsuperscript{58}

Finally, law, or the lack thereof, influences the way people frame their legal rights. In other words, a void in the law impacts people's views of the remedies that are or should be available to them.\textsuperscript{59} The fact that the legal system has never been used to redress street harassment limits the collective imagination. For instance, many women oppose legal interference in instances of street harassment, thinking that relying on the law undermines women's self-sufficiency and equality. It is interesting to note that, until recently, a similar attitude existed towards workplace harassment.\textsuperscript{60} Many scholars argue that as long as women's injuries are deemed unworthy of redress by law, women will not truly be full citizens of our society.\textsuperscript{61} Until the law is used to outlaw the whole spectrum of sexual terrorism, women will not feel entirely safe in the public realm. In the next chapter, I will explore the possible form such a law might take.

\textsuperscript{58} Ibid. at 94.
\textsuperscript{59} Nielsen, supra note 54 at 1080; R. West, "Pornography as Legal Text: Comments from a Legal Perspective" in S. Gubar & J. Hoff, eds., For Adult Users Only: The Dilemma of Violent Pornography (Indianapolis, Indiana University Press, 1989) 108 at 111.
\textsuperscript{60} Nielsen, supra note 54 at 1080.
\textsuperscript{61} Bowman, supra note 5 at 520; Tuerkheimer, supra note 55 at 200.
Chapter 4

Possibilities for Legal Regulation

As the last chapter demonstrated, the absence of law in the area of street harassment can be harmful to women. At the same time, an anti-harassment law could be quite beneficial to women. Access to such a law would reduce many women’s feelings of helplessness; those who feel violated by street harassment would have some form of redress.\(^1\) Perhaps more important, the debate and discussion that would precede the passage of the law would direct attention to the problem of harassment and make its harm more visible to the community.\(^2\) Feminists could use the discussion to highlight the continuum of violence that women face on a daily basis and to identify the role sexual harassment plays in terrorizing women.\(^3\) Planning the enactment of a law would also provide a forum for women of all groups to come together to discuss the problem from their own vantage point.\(^4\)

Of course, discussing the theory of an anti-harassment law is easier than canvassing possible models of such a law. In this chapter, I explore the form that a law against street harassment might take. In the course of my discussions, I examine the benefits and detriments of the model that I have chosen. This chapter is not intended to canvas the pros and cons of using our legal system to address street harassment in the first place, as my last substantive chapter is dedicated to that weighty issue.

\(^3\) Heben, supra note 1 at 205.
\(^4\) Tuerkheimer, supra note 2 at 200.
In our current legal system, an anti-harassment law could take two forms; the law could be criminal or civil in nature. In the first instance, street harassment would be a public offence prosecuted by the government and punishable by fines, imprisonment, or some brand of restorative justice. In the latter case, individual women would be entitled to recover damages from their harassers in a private law suit. Both the public and private modes of justice have benefits and detriments.

Public Law

A public law against harassment could be created by adding a section to the criminal code, passing a provincial statute, or generating a local by-law.\(^5\) In each of these instances, the government would control the prosecution of a harasser. By indicating that the government will not tolerate sexual terrorism of any kind, a public law would send a strong message about the harms of street harassment and violence against women.\(^6\) A public law would also be beneficial because it would be accessible to women. A harassed woman could file a complaint with law enforcers at no economic cost to herself.\(^7\) Finally, public law is often more flexible than private justice. Whereas courts in civil suits are only able to award monetary damages to remedy an injustice, judges are able to be more imaginative in criminal cases. Relatively recent developments in restorative justice mean that judges are often able to compel offenders to attend educational workshops or to walk a mile in their victims' shoes.\(^8\) Mandatory sensitivity

\(^5\) Of course, passing legislation in a new field always raises a question about division of powers. The issue is discussed later in this chapter.
\(^6\) Tuerkheimer, supra note 2 at 199.
\(^7\) M. J. Langelan, Back Off! How to Confront and Stop Sexual Harassment and Harassers (Fireside, New York: Simon & Schuster, 1993) at 340.
\(^8\) See, for example "Picture of the Week" US Weekly (12 November 2001) 64, where it was reported that:
training for first-time offenders would be far more likely to persuade a harasser that his actions were harmful than forcing him to write a cheque.\(^9\)

Of course, there are also drawbacks to using criminal laws to redress street harassment.\(^10\) One major flaw of the scheme is the lack of control women would have over their claims.\(^11\) In public law, the state decides when and how to investigate and punish an offence. This type of state control is intrusive even if a woman finds harassment repugnant. For women who enjoy male attention in public or find state intervention offensive for personal or political reasons, this amount of interference would be simply unacceptable. Although these women could refuse to file complaints or be hostile witnesses, it is conceivable that overzealous law enforcers would attempt to proceed with the cases in any event. Such state control is counter-intuitive to many feminist theorists who are concerned about bestowing even more power on a patriarchal state.\(^12\)

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On October 25, Jason Householder, 23, ...and John Stockum, 21, served their sentence for making derogatory comments to and throwing beer bottles at a woman in a car: an hour-long stroll down Main Street in Coshocton, Ohio, wearing dresses, wigs and makeup. Municipal Court Judge David Hostetler gave the pair a choice between walking the walk or spending 60 days in the overcrowded Coshocton County Jail. 'It's not illegal to be obnoxious; it's just rude,' Hostetler said.

Of course, the judge trivializes the incident, which clearly involved an assault, at the same time as he punishes the harassers.


\(^10\) The many and varied problems with using the law as a tool to help women who are harassed in the street is canvassed in my next chapter. In this chapter, I simply discuss the possible implications of using criminal or civil law.


A second drawback to a criminal scheme is the fault requirement. Because criminal punishments seriously impede personal freedom and damage individual reputations, offenders cannot be found guilty of criminal offences unless they have the requisite degree of fault. Oftentimes, the Crown needs to prove that an offender had actual, subjective intent to commit a crime. This requirement can make laws difficult to prosecute. For instance, many criminal harassment cases have fallen by the wayside because the state has been unable to prove that the harassers intended to harass their victims. Similarly, men who harass women on the street seldom intend to make their targets feel scared or angry; usually their intention is to compliment their victims.

**Private Law**

Because of the many drawbacks apparent with a public law, we should also consider using civil or private law to address the problem of street harassment. The benefits to a private law stand in stark contrast to the detriments of criminal regulation. Individual women have complete control over if, when and who they decide to bring an action against. This type of control is pivotal to providing women with the autonomy and personal freedom they deserve. A private law means that women who have no issue with street harassment or who find legal intervention patronizing can choose not to pursue street harassment using legal venues. This choice is important if we recognize that women are a diverse group comprised of people with differing needs.

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14 See discussion on R. v. Carey in chapter 3, above, for further discussion of this point.
Unfortunately, civil remedies also have shortcomings. Most importantly, private laws are expensive to enforce. Relegating an anti-harassment ordinance to civil law hinders women with lesser means from obtaining a remedy. Street harassment would, in effect, only be punished if women from a higher socio-economic class were hurt by it.¹⁶

Another serious disadvantage of private law is the limited type of remedy available in civil suits. While monetary awards may assist some women to overcome the injury suffered as a result of street harassment, it may not help to change the attitude of harassers. It is true that non-monetary awards in civil suits may become more common as mediation gains in popularity. In the meantime, however, the awards are likely to be monetary in nature. Moreover, they will be nominal because the damage suffered by women in street harassment is difficult to quantify.¹⁷

Finally, civil law tends to individualize the systemic problem of sexual harassment: “The essential purpose of tort law, although it has policy assumptions and implications, is to compensate individuals one at a time for mischief which befalls them as a consequence of the one-time ineptitude or nastiness of other individuals.”¹⁸ As a result, our society loses sight of the fact that harassment is both an individual injury and a social problem.

As we have seen, then, both public and private laws have their own unique benefits and shortcomings. A public law and a private law would also be enacted in

¹⁶ Heben, supra note 1 at 212.
¹⁷ Langelan, supra note 7 at 358. While Human Rights Tribunals have awarded up to $5000 for hurt feelings and personal indignities in workplace sexual harassment cases [see, for example, Robichaud v. Brennan (1989), 90 C.L.L.C. 17,0007 (Canadian Human Rights Review Tribunal)], it is doubtful that a court of law would be so generous in the case of street harassment. Street harassers do not have an ongoing relationship with their victims, nor do their actions usually affect their victim’s livelihood.
fairly distinct ways. If we choose to proceed with a private law, the task would fall to provincial legislators. If we choose to use public law to redress the problem of street harassment, it is not so clear whether the federal or the provincial government would be responsible for the enactment. This confusion is canvassed briefly in the following section.

**Division of Powers and Public Law**

Before setting out my proposed law and discussing the implications it may have for women’s lives, it is necessary to briefly canvas the division of powers debate. Section 91(27) of the *Constitution* gives the federal government power over areas pertaining to criminal law. As a result, the Supreme Court of Canada has determined that provinces may not make laws dealing with true crimes or public order. What constitutes criminal legislation has been the subject of much debate. Early decisions identified a criminal statute as one that has penal consequences and prohibits a typically criminal act that effects a public purpose such as “public peace, order, security, health, morality”. In *RJR-MacDonald*, Justice La Forest approved of this test, holding that a criminal statute must be prohibitive, have penal consequences and be aimed at a “criminal purpose”. In other words, the law must be directed at an activity that has an evil or injurious effect upon the public.

The issue becomes complicated when one considers that section 92(15) of the *Constitution Act, 1982* authorizes the provinces to punish individuals who contravene

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provincial laws. Despite the fact that provinces are not allowed to legislate on matters that are truly criminal in nature, they are able to pass penal laws as long as the pith and substance of those laws deals with provincial matters, such as property, streets, parks, or business activity. In the past, courts have used section 92(15) to uphold provincial penal legislation that could arguably be considered criminal. For instance, provincial laws prohibiting nude performances in drinking establishments, banning houses of ill repute or creating regimes of film censorship were upheld on the grounds that they were directed primarily at private property and civil rights.

Due to the confusion surrounding criminal laws and the division of powers, it is difficult to determine how a court of law would characterize an anti-harassment ordinance. If a court equates street harassment with criminal harassment, any law prohibiting street harassment would be considered criminal in nature and would have to be passed by the federal government. However, it is possible that a court would view street harassment as a type of public nuisance, like panhandling or street vending, in which case it would determine that any anti-harassment legislation was within the purview of the province.

The Supreme Court's decision in Westendorp can help to resolve this division of powers conundrum. In Westendorp, the Court struck down a municipal by-law that

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24 Recently, in Federated Anti-Poverty Groups of British Columbia v. Vancouver (City), [2002] B.C.J. No. 493, the British Columbia Supreme Court held that the purpose behind an anti-panhandling by-law was to regulate the manner and conduct of people using the street. Because its pith and substance was the safe and efficient passage of pedestrians on city streets and because it was part of a broader regulatory scheme, the court found that the matter was provincial in scope (paras 136, 140). Vancouver was thus able to regulate panhandling because the province had delegated this power to it.
prohibited solicitation for the purposes of prostitution on the grounds that the purpose of
the by-law was not to regulate the streets, but to "control or punish prostitution".\textsuperscript{25} While
this decision may seem contradictory to previous rulings,\textsuperscript{26} in actuality it helps to explain
the Supreme Court's decision-making process in division of powers cases. The Supreme
Court has allowed the provinces to pass seemingly criminal statutes only when the
legislation in question is firmly anchored in a head of authority outlined in section 92. As
the Court expressed in \textit{Westendorp}, morality cannot be the only issue at stake. Moreover,
the Court is more likely to allow provincial legislation if it is part of a regulatory scheme.
For instance, in \textit{Rio Hotel}, the Court allowed the province to pass a law about nudity in
taverns as a part of a licensing scheme. Finally, the Court is less likely to allow a
province to pass a law that is in the form of a prohibition coupled with a penalty or that
closely resembles a \textit{Criminal Code} provision. The law in \textit{Westendorp} was treated
suspiciously by the Court because it took that form.

In my opinion, a public law prohibiting street harassment would most likely fall
under federal jurisdiction. First, the law is in the form of a prohibition coupled with a
penalty. Second, while it could be argued that the law seeks to govern conduct on city
streets, the law is much more ambitious than that. The purpose of the anti-harassment
law would be to protect women and discourage certain social behaviour. As such, it is a
moral code that is aimed at eradicating an injurious activity. In this way, the anti-
harassment law would closely resemble the law at issue in \textit{Westendorp}. Like solicitation,
street harassment obviously affects provincial concerns like the regulation of streets and
parks. However, the law's primary purpose is to criminalize behaviours that our society

\textsuperscript{25} \textit{Westendorp}, supra note 22 at 52.
considers to be unwelcome or immoral. Additionally, as we shall see, my model law closely parallels the *Criminal Code* provision that prohibits solicitation for the purpose of prostitution. For all of these reasons, it is most likely that the task of passing a public law prohibiting street harassment would fall to the federal government.

**Proposal**

As discussed above, both public and private law solutions have benefits and drawbacks. When drafting a law, one must keep these factors in mind. It is also helpful to consider the suggestions of other feminist legal theorists who have worked in the area of street harassment.

Some theorists have suggested using both types of law to deal with street harassment. For instance, Tiffanie Heben recommends using criminal law to prohibit violent, racist and homophobic assaults and using civil law to address less severe forms of harassment. Unfortunately, this vision compels women of lesser means to suffer some forms of street harassment without redress. Because I believe that all women should have equal access to justice, my solution relies exclusively on public law.

Other theorists favour municipal ordinances that outlaw gender-based street harassment. Cynthia Bowman recommends the following:

> 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 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

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26 See, for example, the cases mentioned in footnote 23, above.
27 Heben, *supra* note 1 at 219.
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.28

I agree with much of Bowman’s proposed law. For instance, I like the requirement that the attention must be “unwelcome” to the victim. This prerequisite means that women who enjoy harassment do not need to have a legal solution forced upon them. I also like Bowman’s restriction on the harasser’s intent. This limitation would allow women to use the law even if their harassers meant only to flatter them. When combined, these conditions ensure that the women victimized by harassers will control their own fate; the interpretations of law enforcement and harassers are not as important as those of the women affected by street harassment.

While I also approve of much of Bowman’s definition of street harassment, I chose not to adopt it verbatim. Parts of her definition seem somewhat vague, which could prove problematic when subjected to a Charter challenge. For instance, the concept of sexual objectification could be a contentious one. I also do not see the point of criminalizing words that provoke “violent resentment”. In my opinion, the term “unwelcome” is broad enough to include this type of harassment.

Finally, while Bowman prefers the more localized solution of a municipal by-law, I would prefer a country-wide prohibition on street harassment. I view street harassment

28 Bowman, supra note 9 at 575.
as a societal problem that exists across the country. In my mind, the most effective way to combat such a wide-reaching problem would be a federal law.

Other American feminists favour a more limited approach to control harassment. Deborah Thompson, concerned with violating a harasser’s right to free speech, suggests regulating harassment only in particular public spaces. Thompson identifies outdoor workplaces, transportation systems and public parks as the places where most women are harassed. She then suggests that feminists work to transform these areas into “hassle-free zones” using workplace anti-harassment laws, transit regulations and park ordinances.28

Again, Thompson’s solution does not stretch far enough. While prohibiting harassment in specific public spaces may send a message that harassment is problematic, her recommendation would not curb harassment on a societal level. A woman walking down the sidewalk would still be vulnerable to attack. Women would feel safe and free from sexual comments only in limited areas. Clearly, this solution does not have the far-reaching effect that I desire.

Because I want a solution that is societal in nature and that is available to all women who would choose to use it, I propose that the following law be adopted as part of the Criminal Code:

(1) Every person who, in a public place, communicates or attempts to communicate with any stranger in a manner that he knows or ought to know is unwelcome to the stranger while using language or action that is explicitly or implicitly sexual is guilty of an offence punishable on summary conviction.

(2) For the purposes of this section,
(a) “public place” includes any place to which the public have access as of right, or by invitation, express or implied;

(b) “sexual” language or action includes but is not limited to references to genitalia, body parts or sexual activities, solicitation of sex or the treatment of the other person as the object of sexual desire.29

(c) “stranger” means any female who is unknown to the person accused of the offence.

This law loosely resembles section 195.1 of the Criminal Code, which outlaws solicitation for the purposes of prostitution. Because the law requires the woman involved to actually feel harassed before an intrusion can be defined as street harassment, the issue of control is somewhat resolved. A woman who enjoys male attention or women who oppose state intervention need not use the Criminal Code to resolve the situation.

Note that I have not included a “reasonableness” standard for the victim in the offence. A woman who is accosted on the street need not prove that an objective individual would feel harassed by the incident; it is enough that the woman, herself, felt the intrusion was unwelcome. Undoubtedly this exclusion will prove controversial. Many may feel that harassers should not be responsible for what they might perceive as the delicate composition of some victims. The alternative, however, is to measure a woman’s reaction against a biased standard of objectivity. Given these choices, I do not

28 D. Thompson, “‘The Woman in the Street:’ Reclaiming the Public Space from Sexual Harassment” (1994) 6 Yale Journal of Law and Feminism 313 at 331.

29 Bowman, supra note 9 at 575. Of course, this definition is not exhaustive. Courts would be allowed to define the term as they saw fit, much like the Supreme Court defined the term “sexual assault” in R. v. Chase, [1987] 2 S.C.R. 293.
believe that the burden placed on a stranger sexually accosting someone else is overly onerous.

Note also that my law is limited to the street harassment of strangers. The reasons for this are twofold. First, the aim of my law is to address a form of harassment that has been completely unacknowledged by the law. I believe that the current law provides adequate forms of redress for harassment between people who know each other. The criminal harassment section of the *Criminal Code* and the *Human Rights Code* are examples of resources available for women who are harassed by men they know. Second, I have chosen to limit my law to keep it from being overly broad. It is conceivable that if the "stranger" requirement was not part of the law, a woman could charge her boyfriend with street harassment if he commented on her appearance at an inappropriate time. While this type of situation may be a social problem in and of itself, it clearly does not give rise to the types of fear and resentment that accompany street harassment as I have defined it.

Additionally, when using my proposed law, the Crown need not prove that the harasser intended to bother his victim. Instead, it is enough that the offender intended to communicate with a stranger in a sexual fashion in a public place in a manner that he knew or should have known was unwelcome.\(^\text{30}\) In other words, the offence requires an objective *mens rea*. The objective *mens rea* component is, of course, more easily proved by the Crown. However, this relaxed fault requirement should not deter legislators from adopting my proposed law. Other sections of the *Criminal Code* require only the intent

\(^{30}\) Because my proposed law contains an objective *mens rea* requirement, an accused will not be able to argue that he made an honest mistake about how welcome his advances were: *R. v. Pappajohn*, [1980] 2 S.C.R. 120.
to commit an initial act, but then hold the offender liable for resulting consequences that he or she may not have subjectively intended. For example, section 222 of the *Criminal Code* punishes offenders for unlawful act homicide. In *R. v. DeSousa*, the Supreme Court of Canada upheld the provision of the *Criminal Code*. Sopinka J., for the Court, determined that, to be found guilty, the accused needed only to commit an unlawful act with the *mens rea* to commit that initial, unlawful act. The accused did not need subjective foresight of bodily harm to be responsible for the consequences of his actions.31

Also note that under my proposed law, I have not included any aggravating factors to be considered upon sentencing. Tiffanie Heben suggests that harassment motivated by racism or homophobia should be dealt with more harshly than sexual harassment that is purely sexual in nature.32 I agree with her approach. However, I believe that section 718.2 of the *Criminal Code*, which encourages courts to consider evidence that an offence was motivated by bias when sentencing an offender, is sufficient in this respect. It is my hope that this provision, combined with the subjective nature of my proposed law, reflects the complex ways that women of different social locations experience street harassment.

Finally, I deliberately chose to make my law gender-specific. Because the stranger/victim must be female, it is not possible for a man to be harassed using this section.33 This decision may give rise to a *Charter* challenge on the grounds that my law

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32 Heben, *supra* note 1 at 213.
33 I realize that some individuals may take issue with the fact that I have not defined the word “female” in my proposed law. For example, transgendered individuals who would not traditionally be identified as female may be subject to intense street harassment because of their appearance. In such an instance, I would expect a court of law to be sensitive to the way the victim identifies him or herself. In other words,
does not treat men and women equally.³⁴ Men may also take issue with the fact that they are not protected from harassment by women or other men. They may assert that the exclusion invalidates any feelings of fear or anger that they experience when accosted on the street. I do not wish to make light of the experiences of men who are harassed. However, it is important to recognize that men and women have different experiences with harassment. There is a propensity for violence against women in our society. Women are more likely to be smaller and weaker than their harassers. These sociological and biological realities make harassment different for women and men.

Men may legitimately dislike harassment and, one day, a law that promotes public respect for all may be enacted. However, my thesis does not deal with social interaction in general. My sole concern is how street harassment affects women. Given that I see street harassment and its ensuing injuries as gender-specific, it would be dishonest of me to use gender neutral language. If my true objective in implementing a law is to protect women from being sexually accosted in public places, my law must be specifically

³⁴ This issue is canvassed further in the next chapter.
tailored to address that particular mischief. Otherwise, the proposed law might not pass constitutional scrutiny.35

In conclusion, I believe that my proposed law would greatly alleviate street harassment. In the next chapter, I discuss the likely arguments of opponents of my proposal.

35 As we shall see in the next chapter, in order to infringe an individual’s Charter right, the government must have a law tailored to the purpose it is trying to achieve.
Chapter 5

The Problems Facing Legal Regulation

In earlier chapters I discussed the necessity of a law prohibiting street harassment and then presented a possible model of that law. In this chapter, I set out potential problems with my model and the difficulties of legislating against street harassment in general. The government would face three major dilemmas if it decided to implement an anti-harassment law. First, it would incur practical difficulties when enforcing such a law. Second, many civil libertarians would take issue with the law on the grounds that it infringes individual freedom and equality rights. Finally, feminists may oppose the law on the grounds that it might have little effect and that it might further victimize women.

Practical Difficulties

The first major hurdle the government would have to surmount would be the practicality of enforcing a law against street harassment. Needless to say, crimes committed by strangers are difficult to prosecute. Women who are harassed in the street may not be able to identify their harassers. They certainly will not know the name of the harasser. Typically, street harassment consists of a relatively short interaction. As a result, a woman may not even be able to give a description of the suspect to the police.
Police and prosecutorial bias presents another difficulty in enforcing an anti-harassment law. Because street harassment is considered trivial, there is no guarantee that those involved in an already overburdened legal system would pursue the charges.¹

Finally, some theorists fear that the racist and classist bias that many police officers, prosecutors and women hold may result in discriminatory enforcement. Gardner notes that women are more likely to interpret street remarks as complimentary when they come from good-looking or well dressed men, especially when it is evident that the man is from a higher socio-economic class.² When asked, white women believed that men who were of a lower class and a different race harassed them more, despite the fact that sociological evidence did not support this belief.³ It makes sense that this biased attitude would result in more complaints being leveled against men of colour or men of a lower socio-economic class.

³ Ibid. at 109.
The well-documented bias of police officers and others active in the legal system would only serve to exacerbate the discriminatory enforcement.\(^4\) Social scientists have noted that poor and minority neighbourhoods are more closely monitored by the police than are affluent neighbourhoods.\(^5\) Discretion allows police officers and other enforcement personnel to investigate, arrest and prosecute minorities more often than they prosecute people in positions of power.\(^6\) As a result, Indigenous people comprise 10\% of the federal penitentiary population despite the fact that they make up only 2\% of the general population.\(^7\) In 1998, 74\% of adults sentenced to jail in Saskatchewan were of Aboriginal ancestry.\(^8\)

These practical difficulties should not dissuade legislators from creating an anti-harassment statute. First, the problems inherent in pursuing crimes committed by strangers is not unique to street harassment. Muggings, hit-and-runs, and many instances of assault are crimes that are perpetrated by strangers. In these instances of transient crimes, difficulties with identifying the perpetrator are not enough to halt police investigations. It is true that there is no physical evidence left behind as a result of street harassment. However, any issues of credibility that may arise at trial could be resolved with the “he said/she said” debate which arises in many sexual assault trials. In short, the

\(^4\) Bowman, *supra* note 1 at 548 and 551; Thompson, *supra* note 1 at 330.
\(^7\) *The Royal Commission on Aboriginal People, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996) at 37.
\(^8\) T. Quigley, “Are We Doing Anything About the Disproportionate Jailing of Aboriginal People?” (1999) 42 *The Criminal Law Quarterly* 129 at 159.
problems of enforcing an anti-harassment law are not terribly different from the obstacles of prosecuting other crimes committed by strangers.

Second, while police and prosecutors may consider street harassment to be too trivial to pursue, an anti-harassment law would go a long way to changing these attitudes. Only twenty years ago harassment in the workplace was trivialized and ignored. Since the onslaught of legislation against sexual harassment in the workplace, however, most employers and courts view it as a serious problem. Because my model anti-harassment law would name street harassment as injurious conduct that harms women, the statute would convey to society in general and police in particular that such behaviour is not trivial.

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Finally, the possible racist and classist bias of women and those in the legal system should not discourage legislators from creating an anti-harassment law. Racism and classism have always adversely affected minorities in the criminal justice system. It is no accident that they are over-represented in our prison populations; the actions of men of colour and men of lower socio-economic groups are more closely scrutinized by the people around them, including police officers. However, this unfortunate bias has not dissuaded legislators from creating other laws that could affect minorities in a discriminatory fashion. One need only walk down a street in a large city to see how differently panhandlers and well-dressed college students experience disorderly conduct laws. Similarly, natives are far more likely to be arrested for public drunkenness than are non-native people. The systemic racism that permeates our criminal justice system does not mean that our disorderly conduct or public drunkenness laws should be repealed. Instead, they indicate that we need to educate police officers, prosecutors and society that white, rich people are equally culpable for their actions.

Constitutionality

A. Section 2(b) – Freedom of Expression

10 Davis, supra note 5.
12 The Report of the Commission on Systemic Racism in the Ontario Justice System, supra note 6 documents the systemic racism in the criminal justice system.
Harassers will argue that any proposed legislation prohibiting street harassment would violate section 2(b) of the Charter of Rights and Freedoms. Section 2(b) of the Charter states that “everyone has the...freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”\(^\text{13}\) Born from a liberal tradition, the right to free speech prohibits the state from interfering with the speech of its citizens for fear that government intervention may skew public debate and hinder democracy. Using this rationale, even unpopular expression is protected on the grounds that “it serves to preclude the majority’s perception of ‘truth’ or ‘public interest’ from smothering the minority’s perception.”\(^\text{14}\)

In order to prove that the right to free speech has been violated, a complainant must prove that the activity restricted by governmental action does, in fact, constitute protected expression. The Supreme Court of Canada has repeatedly held that the term “expression” must be given a large and liberal interpretation. As a result, any non-violent activity that conveys meaning will be considered expression and will be protected by the Charter.\(^\text{15}\)

\(^{13}\) Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 2(b) [hereinafter the Charter].


In the context of free speech, violent activity has been construed quite narrowly. For instance, in *R. v. Keegstra*, the Supreme Court determined that even threats of violence were free expression and, as such, deserved constitutional protection. Given this line of reasoning, it is quite obvious that typical incidences of street harassment (that is, those that do not involve unwanted physical contact) would be considered to be non-violent expression that conveys meaning.

Once it has been determined that protected expression has been infringed, the court must assess whether the limitation was the purpose or simply the effect of the governmental act. If the government intended to restrict the content of expression, it must justify the limitation. If, however, the government aim was to control only the physical consequences of the activity involved, regardless of the meaning being conveyed, the claimant must prove that the effects of the legislation violated his or her right to free expression. In order to demonstrate this, the complainant must show that the restricted expression advanced the values underlying the section 2(b) right. The Supreme Court of Canada has determined that three ideals provide the foundation for free expression: seeking and attaining truth; participation in social and political decision-making; and individual self-fulfillment and human flourishing.

In the current instance, my proposed legislation represents an obvious attempt to restrict expression. My law focuses on the content of a street harasser’s speech: sexually explicit dialogue. Thus, the onus must shift to the government to justify the anti-

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17 *Irwin Toy*, supra note 15 at 976.
harassment law. This will be explored in the section 1 analysis, which follows my section 7 and section 15 inquiry.

B. Section 7 – Fundamental Justice

Section 7 of the Charter reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.¹⁸

My proposed law states that a convicted street harasser is guilty of an offence punishable on summary conviction. Section 787 (1) of the Criminal Code provides that anyone convicted of a summary offence may face a fine of up to $2000 and/or imprisonment for a term not exceeding 6 months. Because my proposed law carries with it the possibility of imprisonment, it clearly infringes on the liberty of an offender. Thus, it is necessary to examine whether the infringement occurs within the parameters of fundamental justice.¹⁹ In the current instance, a court could find the anti-harassment law contrary to the principles of fundamental justice on the basis that it is too vague, that it is overbroad, or on the grounds that the mens rea requirement is too lax. Because I deal with the overbreadth argument in my section 1 minimal impairment analysis, below, I shall deal only with the issue of vagueness and the mens rea requirement here.

(1) Vagueness

¹⁸ Charter, supra note 13, s. 7.
A law that infringes the life, liberty or security of the person will not satisfy the principles of fundamental justice if it is too vague. In short, a law must be reasonably delineated so that a legal debate could occur as to the application of a provision to a specific fact situation.\textsuperscript{20} It goes without saying that a law cannot guarantee absolute certainty; there is a need for flexibility in law. In \textit{Nova Scotia Pharmaceutical Society}, the Court held that courts should consider the following when determining if vagueness is at issue:

"(a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate, and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist.\textsuperscript{21}

In the current instance, my proposed law does leave some terms undefined. For example, the law does not elucidate the meaning of the word "unwelcome". However, many sections of the \textit{Criminal Code} leave terms to be defined by the judiciary. For instance, section 264 of the \textit{Criminal Code} does not define the term harassment. Instead, this term was defined by the courts. This omission did not render the prohibition on criminal harassment unconstitutional:

In my opinion, s. 264 does not suffer from vagueness. Certainly there are many facets of it that will have to be interpreted by the court. I have no doubt that as time progressed it will be given a constant and settled meaning.\textsuperscript{22}

In the pivotal case about pornographic materials, \textit{R. v. Butler}, the Supreme Court determined that "Standards which escape precise technical definition...are an inevitable

part of the law..." and that "It is within the role of the judiciary to interpret these terms. If such interpretation yields an intelligible standard, the threshold test for the application of section 1 is met." In that instance, the Court went on to define the terms "obscene" and "undue exploitation".

More to the point, the section outlawing solicitation did not define the meaning of the term "communication" although it was central to the charge of communicating for the purpose of engaging in prostitution. In the Prostitution Reference, the Supreme Court determined that a law would not be vague if it could be sensibly interpreted by the courts and that it was permissible for a court of law to restrict the meaning of "communication" by referring to the purpose of the legislation. If terms like "communicate" and "harass" can give rise to meaningful legal debates, so can the term "unwelcome". In short, a court would not find that my law is unconstitutional due to vagueness.

(2) Mens Rea

The notion that the punishment received by an offender must be proportionate to the moral blameworthiness of an offence committed by that offender existed even before the Charter came into existence. The government's commitment to fundamental justice as delineated in section 7 of the Charter enhanced its pledge to punish only those who had some degree of mental fault. In R. v. Creighton, the Supreme Court determined that a number of factors must be met for a criminal law to satisfy section 7 of the Charter. First, the mens rea and the penalty of an offence must reflect the crime and the stigma associated with being convicted of that crime. Second, the punishment must be

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proportionate to the moral blameworthiness of the offender. Finally, individuals who cause harm intentionally must be punished more severely than those who cause harm unintentionally.\textsuperscript{26}

Some may debate the constitutionality of my law on the grounds that it does not require a strong mental element. To be found guilty under my proposed law, an offender must attempt to communicate with a stranger in a sexual fashion in a manner in which he knows or ought to know is unwelcome to the stranger. Unlike the criminal harassment provisions of the \textit{Criminal Code}, a street harasser does not need to intend to offend that stranger. It is enough that a reasonable person in his position would know his advances were unwelcome.

It is necessary to examine whether this objective \textit{mens rea} requirement is appropriate given the fact that imprisonment is a possible form of punishment. It is my contention that this \textit{mens rea} requirement will not render the law unconstitutional. The Supreme Court has determined that a subjective fault requirement does not need to exist for each element of the act of the crime. In \textit{R. v. Creighton}, the majority of the Court held:

\begin{quote}
I know of no authority for the proposition that the \textit{mens rea} of an offence must always attach to the precise consequence which is prohibited as a matter of constitutional necessity...Provided an element of mental fault or moral culpability is present, and provided that it is proportionate to the seriousness and consequences of the offence charged, the principles of fundamental justice are satisfied.\textsuperscript{27}
\end{quote}

On a similar note, the Court in \textit{R. v. DeSousa} held:

\textsuperscript{25} \textit{Prostitution Reference}, supra note 19.
\textsuperscript{27} \textit{Ibid.} at 54.
Provided that there is a sufficiently blameworthy element of the actus reus to which a culpable mental state is attached, there is no additional requirement that any other element of actus reus be linked to this mental state or a further culpable mental state. As inferred by Blackstone (supra), provided that the actor is already engaged in a culpable activity, foresight of consequences is not required in order to hold that actor responsible for the results of his or her unlawful activity.  

In other words, it is permissible to find someone guilty of a crime even if they do not intend to cause the consequences that may arise from their initial, willful, act. In R. v. Sillip, the Alberta courts dealt with the mens rea required to be found guilty of criminal harassment. In that case, the accused argued that a strict construction of section 264 of the Criminal Code meant that an individual could be guilty of an offence even if he did not know that his behaviour caused another to feel fear. In that instance, the Alberta Court of Queen's Bench determined “It is not necessary that the Crown prove that he knew that the 'other person' feared for his or her safety which would be very difficult to do.” 

The Alberta Court of Appeal upheld Murray J.’s reasons, concluding “given that there is in s. 264 a sufficiently blameworthy element in the actus reus to which the culpable mental state attaches, foresight of the prohibited consequence of causing actual fear is not required in order to hold the accused responsible for the results of his or her unlawful activity.”

In the instance of street harassment, it is enough that a man intends to attempt to communicate with a stranger in a sexual manner that he ought to know is unwelcome. It does not matter that he, himself, did not intend to scare, intimidate or harass her. He is

29 R. v. Sillip, supra note 22 at 561.
culpable for the consequences that arise from his communications. Thus, despite the fact that imprisonment is a possible form of punishment, I do not believe that a court of law would view my proposed law as a violation of the principles of fundamental justice. This is especially so given that the street harassment is not an offence to which a stigma is attached, like murder or sexual assault.

C Section 15 – Gender Equality

Section 15 of the Charter reads:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.31

My law treats men and women differently. It prohibits street harassment only when women are the victims of an incident. The fact that men and women are not given equal protection under the law is an apparent infringement of the section 15 right to equality.

In Law v. Canada, the Supreme Court set out a purposive and contextual approach to discrimination analysis. In that case, the Court determined that the purpose of s. 15(1) was to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice. It also

31 Note that section 15(2) is rarely given any independent force. It is most often used to interpret section 15(1). This will become more obvious in my discussion of Law v. Canada, below.
existed to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.\textsuperscript{32}

In interpreting section 15(1), the Court focused on three issues. First, the Court determined whether the law in question imposed differential treatment between the claimant and others, in purpose or effect. Once the complainant had established differential treatment, the Court looked to whether one or more enumerated or analogous grounds of discrimination had been the basis for the differential treatment. Finally, the Court considered if the law had a purpose or effect that was discriminatory within the meaning of the equality guarantee.\textsuperscript{33} In the current instance, the law in question draws a formal distinction between men and women based on an enumerated ground. The only question at issue is whether the differential treatment is discriminatory in nature.

The Court in \textit{Law} concluded that a piece of legislation would be considered discriminatory if the differential treatment imposed a burden upon or withheld a benefit from a claimant in a manner that reflected the stereotypical application of presumed group or personal characteristics. A law would also be considered discriminatory if it otherwise had the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.\textsuperscript{34}

Iacobucci J. for the Court established a list of contextual factors that determine whether legislation had the effect of demeaning a claimant's dignity. These included pre-

\textsuperscript{33} \textit{Ibid.} at para. 88.
existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society: and, the nature and scope of the interest affected by the impugned law.\textsuperscript{35}

In the current instance, the anti-harassment law withholds a benefit from men; they are unable to utilize the law to address instances of harassment. However, this differential treatment does not impair the dignity of men. First, men, as a group, are not a historically disadvantaged group. Of course, some men do face significant barriers. For example, men of colour or homosexuals do comprise discrete and insular minorities. However, taken as a whole, men do not face pre-existing disadvantage, especially with respect to being sexually harassed on the street.

Second, the difference in treatment between the men and women is appropriate given the actual needs and circumstances of the sexes. Men do not need the benefit of the law as much as women do. Social science evidence indicates that street harassment is aimed overwhelmingly at women. As we shall see below, the Supreme Court has allowed differential treatment for men and women if it is based on historical, biological and sociological differences.\textsuperscript{36}

Third, the law could be characterized as ameliorative because it is aimed at making public space comfortable for women. Finally, the nature of the interest affected is not

\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid.
terribly significant or severe for men as a group. The law is aimed at unwelcome sexual advances. Again, evidence indicates that women, not men, are the victims of such harassment.

Any section 15 challenge to my proposed law would be similar to the challenge heard by the Supreme Court of Canada in *Weatherall v. Canada*. In *Weatherall*, male prisoners challenged the constitutionality of frisk searching and surveillance conducted by female guards. Female inmates were not subjected to cross-gender frisk searches or surveillance. In holding that it was doubtful that section 15(1) was violated by this discrepancy, La Forest J. concluded:

> The jurisprudence of this court is clear: equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality. Given the historical, biological and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors.... Moreover, women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men.\(^{37}\)

Just as cross-gender searching has different implications for men and women, so does street harassment. The gender-specific language used in my proposed law is simply a reflection of the unique injuries women incur when they are harassed. In a way, my proposed law could be seen as a law whose object is to ameliorate a condition of

\(^{36}\) See the *Weatherall* discussion, below.

\(^{37}\) La Forest J. held that, even if section 15 had been violated by the searches, the practices were saved by section 1 of the Charter: *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 at 877-878.
disadvantage that women face. Therefore, my proposed law would not violate section 15 of the Charter.

Section 138

A. Deference

Section 1 of the Charter reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.39

In order to justify an infringement, the government must first prove that the limit is prescribed by law and that this law serves a pressing and substantial interest. The government must then demonstrate that the law is proportional to this objective. The Supreme Court of Canada has determined that in order to prove proportionality, the Crown must show that the law is rationally connected to the objective, that the law minimally impairs the right in question, and that the salutary effects of the legislation outweigh its deleterious effects.40

Normally, the government must present clear and persuasive evidence in order to justify the violation of a right. However, the Supreme Court has recognized that there may be instances in which a less stringent burden of justification and greater deference to legislative choice should be shown. Many courts address the degree of deference to be

38 Because I concluded, above, that my proposed law would violate section 2(b), but not sections 7 or 15 of the Charter, the majority of my section 1 analysis is directed towards justifying the limits my law places on free expression. Of course, I believe that if my earlier examinations of section 7 or section 15 were incorrect and my proposed law would violate these sections, the anti-harassment law would be saved by section 1 for the same reasons that section 1 will justify the limit placed on free expression.
39 Charter, supra note 13, s. 1.
afforded to legislation only when discussing minimal impairment. I chose to address the issue at the outset of my section 1 analysis. I believe that the same factors that cause courts to show deference to legislators in the minimal impairment inquiry also impact how courts view the importance of the legislation’s objective and the degree of correlation needed to prove rational connection. In *Thomson Newspapers*, Bastarache J. put it thusly:

Context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

Many factors are to be considered when determining the appropriate degree of deference in a *Charter* case. In *Thomson Newspapers*, the majority of the Supreme Court provided a checklist of these factors. At p. 942-43 of the judgment, Bastarache J. ruled

[the] vulnerability of the group which the legislator seeks to protect..., that group’s own subjective fears and apprehension of harm..., and the inability to measure scientifically a particular harm in question, or the efficaciousness of a remedy..., are all factors of which the court must take account in assessing whether a limit has been demonstrably justified according to the civil standard or proof. ...Another contextual factor to be considered is the nature of the activity which is infringed.

More recently, the Supreme Court reasserted the contextual test:

However, as outlined in *Thomson Newspapers*, political complexity is not the deciding factor in establishing a margin of deference under s. 1. Rather, the margin will vary according to whether legislature has (1) sought a balance between the interests of competing groups, (2) defended a vulnerable group with a subjective apprehension of harm, (3) chosen a remedy whose effectiveness cannot be measured scientifically, and (4) suppressed an activity whose social or moral value is relatively low.

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Irwin Toy demonstrates the court's willingness to defer to the legislative objective when the law is attempting to balance the rights of different groups while seeking to protect a vulnerable group. In that case, the law in question sought to ban advertisements that were aimed at children. The Supreme Court upheld the ban. In its reasons, the Supreme Court distinguished cases where the state was acting to mediate the interests of competing groups from cases where the government was the singular antagonist of the individual whose right has been infringed. The Supreme Court concluded that, when the law at issue is seeking to strike a balance between the claims of competing groups and, in so doing, is acting "with respect to the protection of vulnerable groups", courts are to take a more deferential approach to a section 1 analysis.\(^\text{43}\)

\(^{43}\) *Irwin Toy*, supra note 15 at 993-94.
In the instance of a law prohibiting street harassment, the state is acting as an antagonist to harassers by limiting their freedom. On another level, however, the state is acting to balance the competing rights of women, a vulnerable group, with the rights of their harassers. The Supreme Court has been faced with this dilemma in other free speech challenges to criminal legislation. For instance, in *R. v. Butler* the Supreme Court considered the constitutionality of a ban on obscene material. The ban limited access to specific types of pornographic material. In this way, the state was acting as an antagonist to pornographers. At the same time, the governmental action was a clear attempt to protect women. Thus, the legislation also served to balance the rights of women against the freedoms of the pornographers. In that instance, the Supreme Court accorded a high degree of deference to the objectives of the legislators. This decision was based, in part, on the fact that women are a vulnerable group in need of protection.44 Like the ban on pornography, any anti-harassment law would be balancing the rights of a vulnerable group against the rights of more powerful individuals. As a result, a court would be likely to show a higher degree of deference to the legislative aim.

The issue of balancing competing interests vis-à-vis criminal legislation was also at issue in *RJR MacDonald Inc. v. Canada*. In that case, La Forest J., for the minority, determined that prohibitions on cigarette advertisements were a justifiable infringement of a tobacco company’s section 2(b) right. He held that:

> Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the

44 *Butler*, supra note 23.
necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary.\textsuperscript{45}

La Forest J. concluded that the prohibition was a reasonable compromise between the competing interests of smokers, non-smokers and manufacturers and that the law acted to protect vulnerable groups in society:

Seen in this way, it is clear that the Act is the very type of legislation to which this Court has generally accorded a high degree of deference. In drafting this legislation, which is directed toward a laudable social goal and is designed to protect vulnerable groups, Parliament was required to compile and assess complex social science evidence and to mediate between competing social interests. Decisions such as these are properly assigned to our elected representatives, who have at their disposal the necessary resources to undertake them, and who are ultimately accountable to the electorate.\textsuperscript{46}

McLachlin J. (as she then was) and Iacobucci J. formed the majority of the court. Both judges ruled that the government had not demonstrated that the legislation minimally impaired the rights of the cigarette companies and, as a result, held that the law failed the section 1 analysis and was unconstitutional. However, McLachlin J. agreed with La Forest J. that “the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament’s choice”. She concluded that context, deference and a flexible approach should be used in a section 1 analysis. Nevertheless, she stressed that “They must not be attenuated to the point that they relieve the state of the burden the Charter imposes of demonstrating that the limits imposed...are

\textsuperscript{45} RJR MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at 277.
\textsuperscript{46} Ibid. at 279.
reasonable and justifiable in a free and democratic society.” Iacobucci J. generally agreed with McLachlin J.’s reasons.

The subjective fears of the group being protected and the inability to measure harm will also affect the degree of deference to be accorded to the law. In the current instance, there is sociological literature that points to women’s actual fears surrounding street harassment. This literature indicates that street harassment has a negative impact on women’s psychological well-being. As was the case in Butler, it is difficult to conduct an empirical study of this fear or the effect that an anti-harassment law might have. Due to this difficulty, one would expect the court to require less than scientific certainty when determining if there is a rational connection between the proposed law and its underlying objective.

Finally, the court must consider the nature of the expression that is infringed upon when determining the degree of deference to be shown to the government. More deference to government may be warranted under section 1 when the nature of the expression lies far from the core of Charter values, particularly when the legislative objective protects compelling social interests. For example, when commercial expression has been infringed, the court is more willing to be deferential to the infringing law than when political expression has been violated.47

The speech at issue in street harassment lies far from the values underpinning the Charter, namely seeking and attaining truth; participation in social and political decision-making; and individual self-fulfillment and human flourishing. While some civil rights

advocates claim that free speech in a public arena is integral to truth and democracy, it would be difficult for any liberal to link street harassment to these two values.

Street harassment is similar to hate speech. Like hate speech, it is aimed at socially disadvantaged individuals. Additionally, social science evidence indicates that, like hate speech, street harassment has a negative impact on the disadvantaged group at which it is aimed. In Keegstra, the Supreme Court of Canada considered whether section 319(2) of the Criminal Code, which criminalized the wilful promotion of hatred, violated the right to free expression. The majority of the Court determined that hate speech actually harmed the promotion of truth and democracy because it had an ill-effect on vulnerable groups in society:

Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world.

Expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values.49

48 Some liberals contend that speech that occurs in a public place should be highly valued in a democratic society. This is because discourse in the public sphere aids democracy:
For politics to occur it is not enough to have a collection of private individuals voting separately and anonymously according to their private opinions. Rather these individuals must be able to see and talk to one another in public, to meet in a public space so that their differences as well as their commonalities can emerge and become the subject of democratic debate.
49 Keegstra, supra note 16 at 763.
The majority of the Supreme Court came to this conclusion even though it was dealing with speech that was clearly political in nature, "thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process."\(^{50}\)

Unlike hate speech, street harassment is not political speech. Although the cumulative effect of harassment negatively affects women as a group, street harassment takes the form of personal and individual attacks. If the Supreme Court characterizes hate speech aimed at social groups as a whole as "inimical to the democratic aspirations of the free speech guarantee",\(^{51}\) there is no doubt that individual attacks that serve to intimidate, silence and control women likewise stifle truth and participation in democratic society.\(^{52}\)

The only value that street harassment could be said to promote is the individual self-fulfillment of the harasser. Again, street harassment could be likened to hate speech. In *Keegstra*, the majority of the Supreme Court held that, although hate speech did engage this third purpose of the right to free speech, it did so only minimally and at the expense of the self-fulfillment of members of a vulnerable group:

> The message put forth by individuals who fall within the ambit of s.319(2) represents a most extreme opposition to the idea that members of identifiable groups should enjoy this aspect of the s. 2(b) benefit. The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it advocates with inordinate vitriol an intolerance and prejudice which views as execrable the process of individual self-development and human flourishing among all members of society.\(^{53}\)

Street harassment could also be likened to pornography. In both pornography and street harassment, the expression at issue portrays women as sexual objects that exist to

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\(^{50}\) Ibid. at 764.

\(^{51}\) Ibid.

\(^{52}\) Bowman, *supra* note 1 at 548.
serve male needs. In Butler, the Supreme Court of Canada determined that expression that degrades and dehumanizes women did not engage the "core of the freedom of expression values." 54

Finally, street harassment is similar to criminal harassment or stalking. Both actions are part of a continuum of violence against women. Both cause women to fear for their safety and circumscribe their freedoms. In R. v. Sillip, a man charged with stalking his ex-wife challenged the constitutionality of the anti-stalking provision on the grounds that it violated his right to free expression. When considering the importance of the expression at hand, Murray J. determined:

I have trouble seeing how the meaning conveyed by means of the forms of expression enumerated in s. 264 can validly be said to fall within the ambit of the three enunciated values and principles set out in Irwin Toy. Indeed, a form of expression which leads to such a result is, to my mind, inconsistent with all three and the antithesis of the third. 55

Murray J. concluded that the expression at issue was not closely linked to the rationales underlying section 2(b). These findings were upheld at the Alberta Court of Appeal and leave to appeal to the Supreme Court was refused. 56

53 Keegstra, supra note 16 at 763.
54 Butler, supra note 23 at 500.
55 Sillip, supra note 22 at 573.
56 Sillip, supra note 30.
Like hate speech, pornography, and stalking, street harassment hinders the self-development of women. It causes women to fear public excursions and makes them feel like sexual objects. While street harassment may promote the fulfillment of individual men, it does so at the expense of women. In the instance of street harassment, it is likely that a court would follow the decisions of the courts in Keegstra, Butler and Sillip and determine that street harassment lies far from the core of all three of the values underlying the right to free expression. As a result, a court of law may show a higher degree of deference to the legislation in question.

B. Prescribed By Law

In order to prove that the limit placed on free expression is justified, the government needs first to show that the anti-harassment ordinance is prescribed by law. This means that any limitation must have been properly authorized by the legislature. More importantly, it means that the legislature must provide an intelligible standard according to which the judiciary can do its work. This standard protects individuals from laws that are too vague by insisting that laws must give fair notice of prohibited behaviour to both citizens and law enforcers. As discussed in the section 7 analysis, above, my proposed law is not too vague. As a result, the anti-harassment law will pass the "prescribed by law" portion of the section 1 test.

57 Bowman, supra note 1 at 548.
58 Irwin Toy, supra note 15 at 982-83.
C. Pressing Objective

In order to justify an infringement, the government must next prove that the law in question serves a pressing and substantial interest. In the instance of an anti-harassment law, the state could demonstrate that the governmental objective was to reduce harassment, thereby making women feel more secure in public. It would then have to prove that this objective was significant enough to allow an important right to be infringed.

In *Butler*, the Supreme Court determined that the purpose behind an anti-obscenity law was the "avoidance of harm to society resulting from antisocial attitudinal changes that exposure to obscene material causes." The Court noted that obscenity reinforced male-female stereotypes to the detriment of both sexes and that pornography tended to normalize violence and the degradation of women. The Court determined that the objective behind the anti-obscenity provision was pressing given our society’s commitment to equality:

...if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on ‘the individual’s sense of self-worth and acceptance’.

A similar conclusion was reached in *R. v. Sillip*. In that case, a man accused of criminally harassing a woman argued that his right to free speech was violated by section 264 of the *Criminal Code*. While the Court had difficulty accepting that the right to free speech was engaged by the act of stalking, Murray J. conducted a section 1 test in case his section 2(b) analysis was incorrect. In his section 1 analysis, Murray J. determined that
the purpose of criminal harassment provision was to "...control attempts by persons to convey meanings of latent physical violence and direct psychological violence to other persons...". He concluded that this objective was of great importance:

In Canada it is apparent from what was said by our elected representatives, that values fundamental to the Canadian concept of a free and democratic society dictate an approach which denies a person the right to behave in a manner prohibited by s. 264. Cory J. in McCraw said that the freedom Parliament was attempting to protect by enacting s. 264.1, freedom of personal choice and action, was a matter of fundamental importance to members of a democratic society. So it is with s. 264.60

In Butler and Sillip, then, social science indicated that certain materials and behaviours had a negative impact on women’s physical and psychological well-being. The courts in these cases determined that creating laws to combat these materials and behaviours was crucial to securing freedom and equality for women. In the current instance, evidence suggests that street harassment terrorizes many women, controls their movements and teaches men and boys to believe that women exist to fulfill their fantasies. The conclusions that the courts reached in Butler and Sillip suggest that the sociological evidence that exists with regard to street harassment would be enough to support the objective behind an anti-harassment law.61

The importance of this objective is supported by the fact that section 15 of the Charter emphasizes the importance of the equality of women in Canadian society. In Keegstra, the majority of the Supreme Court looked at Canada’s overall commitment to equality when assessing the importance of Parliament’s ban on hate speech: “Most importantly for the purposes of this appeal, ss. 15 and 27 represent a strong commitment

59 Butler, supra note 23 at 491, 493.
60 Sillip, supra note 22 at 573.
to the values of equality and multiculturalism, and hence underline the great importance of Parliament’s objective in prohibiting hate propaganda”.

The Court’s reasoning in Keegstra was upheld in Butler, where the Supreme Court reaffirmed Canada’s commitment to equality. The Court in Butler determined that the equality guarantee emphasized the significance of the objective in banning obscenity. The commitment to equality that has been stressed in these cases indicates that any governmental aim to increase feelings of security among women would be seen as pressing and substantial.

D. Proportionality Test

The government would then have to face the proportionality test by proving that the means chosen were proportional to that objective. In order to pass this test, the state must show that the law is rationally connected to the objective, that the law minimally impairs the right to free speech, and that the salutary effects of the legislation outweigh its deleterious effects.

(1) Rational Connection

Rational connection shows a causal relationship between the purpose of the law and the measures enacted by the law. The court must ensure that the law has been tailored to suit its purpose. Recently, the Supreme Court has relaxed the government’s burden when determining if a rational connection exists, especially if the issue is a complex social problem from which it is difficult to draw conclusions with certainty. Thus, the

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61 See the discussion in chapter 2, above, for detailed information on the harms of street harassment.
62 Keegstra, supra note 16 at 755.
connection need not be established with exact certainty, but can be based on common sense, reason, or logic.\textsuperscript{64} In the case of anti-harassment legislation, the state would have to demonstrate that a statute prohibiting street harassment would, in fact, curb the behaviour of harassers. Despite some valid concerns about the effectiveness of an anti-harassment legislation, common sense indicates that such a law would have some impact on reducing street harassment.

In \textit{Keegstra}, the majority of the Supreme Court determined that a ban on hate speech was rationally connected to the reduction of racism. In its decision, the Court pointed to the fact that a criminal prohibition of hate speech demonstrated society’s severe disdain of such expression. The Court also concluded that a criminal law would make hate speech a less attractive and acceptable form of expression. As a result, the equality and dignity of each individual would be celebrated. Similarly, a criminal prohibition of street harassment would indicate that such forms of expression are intolerable and would, therefore, promote the equal treatment of women in society.\textsuperscript{65}

(2) Minimal Impairment

\textsuperscript{63} \textit{Oakes}, supra note 40; \textit{Dagenais}, supra note 40.
\textsuperscript{64} \textit{RJR MacDonald}, supra note 45.
\textsuperscript{65} \textit{Keegstra}, supra note 16 at 769.
The state would also have to demonstrate that the anti-harassment law minimally impairs the right to free speech. In deciding if a law minimally impairs a right, the court considers if the law is appropriately tailored to the objective in question. A court will examine whether or not a piece of legislation impairs a right as little as reasonably possible to aid its decision. A law will not pass the “minimal impairment” test if alternative means would have aided the legislators in meeting their objective. Of course, the government need not rely only on the least intrusive mode of intervention. The Supreme Court of Canada has indicated that as long as the legislation exists within a reasonable range of alternatives, the court will not supplant the legislator’s choice with its judicial opinion. This is especially so in cases that involve social science problems whose solutions affect vulnerable groups and are difficult to measure with exact certainty:

This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.

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66 Butler, supra note 23 at 505.
67 Although Dickson originally asserted that a law would pass muster only if it impaired the right in question “as little as possible” (Oakes, supra note 40 at 139), the Supreme Court later relaxed this standard in R. v. Edward Books and Art Ltd., [1986] 2 S.C.R. 713.
68 Edward Books, ibid.
69 Irwin Toy, supra note 15 at 999.
In the current instance, it is unlikely that a court would consider asking men to refrain from accosting women in a sexual fashion to be overly intrusive. Social science indicates that women are vulnerable to varying degrees of violent male activity. In *Keegstra*, the Court supported a criminal ban on hate speech on the grounds that it was necessary to send a strong message of moral condemnation with regards to such expression. The majority of the court determined that, although other responses would aid in the reduction of racism, a criminal law was an essential step in shaping social norms.\textsuperscript{70} Similarly, in the current instance, the law in question must be strong enough to send a message that street harassment will not be tolerated in our society.

A law will also fail the minimal impairment test if it is overly broad. The Supreme Court has held that a law would be too encompassing if it restricted liberty more than was necessary to accomplish the purpose underlying the law. In other words, if the law captures expressive activity that does not qualify as street harassment, it will be held void for overbreadth.\textsuperscript{71}

\textsuperscript{70} *Keegstra*, supra note 16 at 769, 785.
\textsuperscript{71} *Ontario v. Canadian Pacific*, supra note 20 at para 70.
In the current instance, the law prohibits individuals from communicating with strangers in a sexual way that is unwelcome. At first glance, such a provision may appear to have a “chilling effect” on public speech. One must keep in mind, however, that the Supreme Court has a tendency to “read down” legislation so that it applies only to those instances to which the legislators intended. For instance, in R. v. Butler, the Court defined obscenity so that it included works that degraded women.\(^{72}\) It is not my intention to rely on judicial interpretation to make my proposed law constitutional. However, I have faith that a court of law could provide common-sense definitions of the terms “communicate” and “unwelcome” that would ensure innocent expressive activity was not caught by the anti-harassment provision.

(3) Weighing Benefits and Detriments

Finally, in order to prove proportionality, the Crown must demonstrate that the benefits of the proposed law outweigh its detriments. In this case, the law will have a positive impact on women who will feel more secure in public. The law will also convey the serious nature of street harassment and its ill-effects on women. These benefits obviously outweigh the law’s detriments, which consists of asking men to abstain from sexually accosting women in a public place. In conclusion, then, my proposed law would violate section 2(b) of the Charter, but, because street harassment is a practice of inequality that is only tenuously connected with the values underlying the Charter, the limitation on free expression would prove to be justifiable.

\(^{72}\) Butler, supra note 23.
Feminist Concerns

Feminists also have valid concerns relating to an anti-harassment law. While the lack of a law in the area indicates that women’s injuries from street harassment are insignificant, legal interference may actually harm women. First, law has a tendency to disempower women. In order to use the law to prosecute harassers, women must first identify as victims of a crime. Identifying as a victim can have negative consequences. Davis points out that feminist attempts to make victimization central to female identity results in an inability to celebrate other aspects of women’s personality. When women come to see themselves as victims, they identify with weakness and vulnerability, which disempowers them.

75 Bumiller, supra note 73 at 62; Bowman, supra note 1 at 550; Tuerkheimer, supra note 9 at 203.
Some theorists worry that, after a woman has identified herself as a victim of street harassment and has entered the legal system, she will be expected to conform to the image of the ideal victim in order to win her case. Tuerkheimer, for instance, suggests that if a woman deviates from societal expectations of what a woman is and how she should behave, she is less likely to succeed in a court of law.\textsuperscript{76} It is not difficult to imagine that how a woman dresses, where she walks and how she reacts to street harassment will all have a role in how a court perceives the situation; indeed, these factors have been highly influential in sexual assault decisions. Expectations of an “ideal victim” also negatively impact women who live in less privileged social locations. It is easy to imagine how differently a prostitute’s allegations of street harassment would be treated from the complaint of a well-to-do woman.

Some theorists worry that, at a trial for street harassment, women will not only have to fit specific expectations, but will have to tell their story so that it conforms with a constrained script. Law’s tendency to fit players into narrow categories hurts the actors involved by obscuring the nature of the pain suffered. It also negatively impacts women in general by suggesting that only women who fit with the feminine ideal are valuable enough to be afforded protection.\textsuperscript{77} In a similar vein, many feminists worry that the legal system tends to individualize and depoliticize social problems.\textsuperscript{78}

\textsuperscript{76} Tuerkheimer, \textit{supra} note 9 at 202-203.
\textsuperscript{77} \textit{Ibid.}
Many feminists fear that a law prohibiting street harassment would be meaningless because of the male bias inherent in the legal system. For starters, women may fail to report incidents of street harassment because they may fear that police will minimize the assaults or blame the victims.\(^79\) This fear is not only valid, it is a concern that affects women of different classes, sexual orientations and races differently.\(^80\) Assuming this hurdle is overcome and the woman in question proceeds with a criminal charge, these theorists fear that the male biased legal reasoning that exists in our current system may result in the charges being dismissed.\(^81\)

On a similar note, many feminists may worry that my proposed law would be meaningless because of the objective *mens rea* requirement. In order to be convicted of street harassment with my law, an offender must communicate with a stranger in a sexual fashion in a way that he knows or "ought to know" is unwelcome. I adopted this *mens rea* requirement so that my law could more easily pass *Charter* scrutiny. However, I am aware that it also invokes the reasonable person standard. As I demonstrated in chapter 3, the reasonable person standard has not always considered the unique vantage point of different women. The objective *mens rea* requirement in my proposed law might make it easier for law enforcement officials and judges to continue to ignore street harassment: it could be argued that no reasonable person would know that a casual remark said in passing would be unwelcome.

\(^79\) T. Heben, "A Radical Reshaping of the Law Interpreting and Remediying Street Harassment" (1994) 4 Review of Law and Women’s Studies 183 at 216.
\(^80\) Heben explains that law enforcers are less likely to believe women of colour who report sexual assaults: Heben, *ibid*.
\(^81\) Because I elucidated on this male bias in previous chapters (see, for example, the discussion on objective reasonable person in chapter 3), I will not go into detail here.
Other feminists worry that using the legal system to solve women's problems empowers a structure that has historically disadvantaged women. These theorists are concerned that the law has been used to reinforce dominant gender, race and class patterns and to legitimize social control over these groups. Thus, granting the system more power could be detrimental to women and other minorities.\(^82\) This worry becomes even greater once one considers that, while feminists may have enough lobbying power to create new laws, they cannot be certain that the laws will be interpreted in their favour. Laureen Snider is quick to point out that "laws have the potential to be interpreted in ways which hurt women because women lack the power to resist such interpretations."\(^83\) Hence, once the law has been created and feminists have relaxed their vigilant efforts, the law may come to be a tool that supports "the status quo of economic, social, and familial relations."\(^84\)


\(^{83}\) Snider, "Feminism", *supra* note 82 at 97.

\(^{84}\) Snider, "Potential", *supra* note 82 at 162.
Finally and most significantly, legal regulation of street harassment may be opposed by feminists because a large number of women are opposed to the creation of such a law. Nielsen's study suggests that, although women consider harassment to be a major problem, most women oppose legal regulation. Although some women believe that such a law will impede free speech, is impractical or makes no difference in women's everyday lives, many women oppose legal regulation on the grounds that it will undermine the self-sufficiency of women and promote dependence on the legal system.85

Thus, feminists have a number of valid reasons to oppose legal regulation of street harassment. While any law would have to address these concerns, the misgivings should not act as an impediment to legislating against harassment. It is true that legal solutions sometimes disempower women by forcing them to play into the traditional role of the "weaker sex". However, women who are harassed on the street often have to conform to stereotypes in order to survive attacks. For instance, a woman may act flattered or demure to avoid provoking her harasser.86 Women may also alter their appearance to appear more ladylike or may accompany a man, all in the name of preventing harassment.87 In other words, non-legal solutions can also disempower women.

Feminists are also correct to point out that legal reasoning is often male-biased and can require a woman to tailor her story so she is able to fit the narrow constructs created by precedent. However, this flaw in our common law system will never be corrected if minority groups do not actively participate in the system to activate change. Since it is not

86 Gardner, supra note 2 at 222.
always possible for women to “opt out” of the legal system, it is essential that women of
different social locations attempt to shape law to their advantage. Tuerkheimer stresses:

By using legal tools to effect social change, we redefine the meaning of
justice, community, and law itself. As the conditions of women’s lives are
improved by changes in legal doctrine and legal structures, so are the ways
in which law is conceptualized and its contours delineated.88

The fact that street harassment is often trivialized in our culture may mean that the
legal regulation of street harassment would not curb the problem in the short term. Police
and prosecutors may not take the law seriously in the beginning. Judges may use the
objective mens rea requirement contained in my law as an opportunity to excuse
harassers’ behaviour. However, the very conception of an anti-harassment law would
signal the gravity of street harassment. As a result, law enforcement would increase its
efforts to stop the offence and judges would begin to take street harassment more
seriously.89

Feminists who are concerned about empowering the legal system also have a valid
concern. In the past, the criminal justice system has been used to legitimize the control of
minorities. While it is doubtful that my model law could be used to harm women because
it is gender-specific, it is possible that it would be used to target and control minority men.
I find it repugnant that minority men may be affected disproportionately by my law. The
solution to this problem, however, is to fight against the discrimination that plagues our
criminal justice system. I believe that we must use the tools we have at our disposal to

88 Tuerkheimer, supra note 9 at 197; this sentiment also holds true for redefining the concept of the
“reasonable person”.
89 Ibid.
make the streets safer for women. As Laureen Snider, a feminist opposed to using the
criminal justice system, admitted, criminal law has some benefits:

And criminal law has a place here as well. The struggles to secure legal reforms that redefined rape as sexual assault and rediscovered wife battering as a moral evil have ideological and symbolic significance – if only because of the unfortunate centrality criminalization and control discourses enjoy in public arenas. Obviously, short-term intervention strategies that allow the state to intervene and stop men from beating and raping women are essential and, whether due to a failure of imagination or not, the only ones we now have rely on criminal law.90

Feminists are also right to worry that criminalizing activity tends to take it out of a political context. Currently, however, street harassment is a phenomenon which is largely ignored and trivialized. I believe that the debate that my proposed law would spark would bring the issue of street harassment and the role that it plays in terrorizing women to the forefront of political discussion. Because criminalizing street harassment would encourage politically charged debate, my proposed law would call attention to the social problem of all forms of sexual terrorism.

Finally, some women enjoy attention from male strangers and, as Nielsen’s study indicates, most women oppose legal regulation of street harassment. These women’s opinions should not be ignored or explained away as a product of false consciousness.91 If one of the purposes of feminism is to improve women’s day-to-day lives, feminists cannot disregard women’s actual lived experiences and desires.92

Therefore, any legal solution would need to be flexible enough to allow women to either utilize or disregard the law as they saw fit. My solution meets this criterion because

90 Snider, “Feminism”, supra note 82 at 103.
91 Note that Nielsen herself attempts to downplay women’s opposition to legal regulation, reasoning that the law shapes women’s ideas about what is possible and appropriate: Nielsen, supra note 85 at 1080.
it requires a woman to actually feel harassed before a crime has been committed. As a result, women who oppose legal regulation could be free to adopt non-legal solutions to harassment. These may include confronting the harassers by complaining to companies whose employees harass passerbys and boycotting companies that do not attempt to discipline these employees. Women may also organize educational workshops or demonstrations to draw attention to the problem of street harassment.\footnote{Langelan suggests that women confront their harassers in a non-violent way in order to disrupt the personal abuse and challenge the social pattern of male dominance.\footnote{Most important, women should continue to write and speak about street harassment so they can transform social consciousness about the issue.\footnote{However, I also believe that we need to have a law in place that criminalizes street harassment. Criminal laws work on both a practical and a symbolic level. At the practical level, a law prohibiting street harassment would hopefully provide immediate protection for women in public. Even if there were difficulties with the enforcement of my law, the law would send a signal about the moral status of the act. Our criminal laws represent collective disapproval and, as such, tell us when activities are morally repugnant.\footnote{In the case of street harassment, which is trivialized and ignored, the symbolic role that a criminal law has to play is invaluable.}}}}

\footnote{West, supra note 87 at 90.}
\footnote{Bowman, supra note 1 at 570-71.}
\footnote{M. Langelan, \textit{Back Off! How to Confront and Stop Sexual Harassment and Harassers} (New York: Simon & Schuster, 1993) at 82.}
\footnote{Bowman, supra note 1 at 571.}
Conclusion

In my thesis, I asked if we should create a criminal law that would prohibit street harassment. I answered this question in the affirmative. At the outset of this thesis, my purposes were threefold. I wanted to add my voice to the dialogue centering around street harassment in order to draw attention to the issue. I wanted to ensure that my paper was inclusive by presenting the perspectives of different women. Finally, I wanted to present a solution to the problem of street harassment that would work in a Canadian legal system. It is my hope that my thesis has accomplished all of these goals.

Throughout my thesis, I acknowledged that every woman experiences street harassment in a different way. Her encounters will be coloured by her unique position in society. I have attempted to remain sensitive to this phenomenon in my paper. However, it is important to admit that my personal bias has come into play throughout my thesis.

If I were not a woman who had felt the pain and degradation of street harassment, I would not have considered studying this topic. If I were not a feminist, I would not have noticed a connection between my personal experience of street harassment and the larger pattern of oppression and sexual terrorism that I am sure exists. If I were not white, I would have been more sensitive to the experiences of women who are sometimes ignored or forgotten. If I were not a law student, I would not have such faith that the law could redress our social problems.

I am, however, all of these things. In the end, I cannot pretend that my thesis represents anything more than just one story about street harassment. Nonetheless, it is my story and it is the only story that I can tell truly and accurately. I believe that street harassment demeans me. When I am harassed, I feel angry that I must be constantly
reminded that I am, first and foremost, a sexual object to be judged and commented upon. I am often scared by incidents of street harassment and I am always livid that a stranger feels it is his right to burden me with his assessment of my physicality. I have been forced to ask men that I do not know well to escort me home in order to ensure my safety, all the while wondering if I am exchanging stranger rape for date rape.

As unpleasant as these feelings may be, they are not the most severe repercussion of street harassment. The worst of it all is that every time I step out of my house, I am waiting for and expecting to be mistreated. Walking down the sidewalk, I must brace myself every time I pass a man, constantly wondering if this is someone who will wrest my sexuality from me or if he will treat me with dignity and respect.

Again, however, other women have different experiences with street harassment. We have yet to hear from female police officers, indigenous women, women with disabilities, or prostitutes. We still have much to learn from women who enjoy street harassment or feel sexually empowered from these experiences. I hope that relaying my story will inspire these women, and others, to come forward with their accounts. Discussion and debate are necessary to draw attention to the problem of street harassment.

The last half of my thesis focussed on resolving the problem of street harassment. I proposed a legal solution, no doubt because, as a law student, I have faith that the law can positively impact our society. I realize that my solution is not without its problems. Practicalities will make it difficult to enforce the law. Civil libertarians may oppose the law on the grounds that it impedes the freedom of men. Feminists may take issue with
using law to redress problems facing women, worrying that legal solutions disempower
women.

I recognize that my proposed criminal law does have these flaws. I would not
suggest that this model law is the only or the best solution to curbing street harassment.
However, I do believe that the legislation is a necessary first step. Until the law
acknowledges that street harassment is problematic, our culture will continue to ignore it.
Unless we develop a legal response to sexual terrorism, we will be sending a signal to
women that their injuries are not important. If street harassment is not outlawed, we will
be sending a powerful statement about appropriate social behaviour.

While we do not have to treat our legal system as if it is the only institution that
shapes our consciousness and behaviours, we cannot ignore its importance in our culture.
Above all, we must believe that, even if the law has failed to help women in the past,
there is hope that it will be able to aid women in the future. Catherine MacKinnon noted:

Women who want to resist their victimization with legal terms that
imagine it is not inevitable can be given some chance, which is more than
they had before. Law is not everything in this respect, but it is not nothing
either. Perhaps the most important lesson is that the mountain can be
moved... Sometimes even the law does something for the first time.1

1 C. MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University


Bibliography

Legislation

Constitutional Statutes


Canada


British Columbia

Privacy Act, R.S.B.C. 1996, c. 373.

City of Vancouver, Parks Control By-law (10 July 1978).

Cases


Reed v. Maley, 74 S.W. 1079 at 1081 (Ky, 1903).


Secondary Materials
Books


A.M. Linden, Canadian Tort Law, 5th ed. (Toronto: Butterworths, 1993).


**Articles (Academic)**


D. Thompson, “‘The Woman in the Street’: Reclaiming the Public Space from Sexual Harassment” (1994) 6 Yale Journal of Law and Feminism 313.


Articles (Newsprint or Magazine)


E. Kuster, "Don't 'Hey Baby' Me" (1992) September Glamour 308 at 309.


"Picture of the Week" US Weekly (12 November 2001) 64.
