

TRAPPED IN PUBLIC: THE REGULATION OF STREET HARASSMENT AND CYBER- HARASSMENT UNDER THE CAPTIVE AUDIENCE DOCTRINE

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INTRODUCTION

In the wake of the 2016 presidential election, public intimidation of women, particularly women of color, seems to be on the rise.¹ Even before the election, however, a woman's presence on a public street or public website has routinely made her a target for unwanted and often threatening male attention, also known as street harassment or cyber-harassment. Scholars and journalists have called for laws that would penalize street and cyber-harassment.² However, this type of legislative effort will be met with several difficulties, including logistical problems due to the high prevalence and anonymity of street and cyber-harassment, as well as cultural opposition to what is perceived by many to be a nonexistent or minor issue with little actual consequences.³ Another major argument against regulation of street and cyber-harassment is that any laws prohibiting such speech would violate the First Amendment. In response to the latter argument, this Article argues that laws regulating street or cyber-harassment should be protected from First Amendment scrutiny under the captive audience doctrine. As this Article demonstrates, by using the captive audience doctrine,

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¹ Alexis Okeowo, *Hate on the Rise After Trump's Election*, NEW YORKER (Nov. 17, 2016), <http://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election> [https://perma.cc/RG7Z-D9DE].

² See, e.g., Tiffanie Heben, *A Radical Reshaping of the Law: Interpreting and Remediating Street Harassment*, 4 S. CAL. REV. L. & WOMEN'S STUD. 183 (1994); Sarah Jameson, *Cyber-harassment: Striking a Balance Between Free Speech and Privacy*, 17 COMMLAW CONSPECTUS 231, 234 (2008).

³ Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 519 (1993); Amanda Hess, *Why Women Aren't Welcome on the Internet*, PAC. STANDARD (Jan. 6, 2014), <https://psmag.com/why-women-aren-t-welcome-on-the-inter-net-aa21fdb8d6#.2oh6joc1f> [https://perma.cc/P6BH-CZW7].

legislators can attack the problem of street and cyber-harassment without running afoul of the First Amendment.

I. EXPLAINING STREET AND CYBER-HARASSMENT

According to noted feminist scholar Cynthia Grant Bowman, the best working definition of street harassment (sometimes referred to as “catcalling”) is

when one or more strange men accost one or more women . . . in a public place which is not the woman’s/women’s worksite. Through looks, words, or gestures the man asserts his right to intrude on the woman’s attention, defining her as a sexual object, and forcing her to interact with him.⁴

Street harassment can range from seemingly benign (a quick “hello”) to patently offensive (lasciviously commenting on a woman’s body or calling her insulting names). Sexual comments can also be combined with racial or ethnic slurs, or references to a woman’s perceived homosexuality.⁵

Street harassment is a prevalent phenomenon that generally affects women of every race, religion, and sexual orientation. Some studies have revealed that over 80 percent of women have been subjected to street harassment.⁶ Although men, particularly gay men, are also subjected to street harassment,⁷ due to the prevalence of male harassment of women, this article will be using the corresponding pronouns for ease of writing. The arguments that are made in this Article should apply just as forcefully to male victims who receive similar treatment on account of their gender or sexual orientation.

A majority of women who experience street harassment have reported that they find it intimidating and it negatively affects their daily lives.⁸ In addition to feeling that their privacy is invaded, women have also stated that it makes them fearful of rape.⁹ Research has shown that street harassment causes lower

⁴ Bowman, *supra* note 3, at 524 (internal quotation marks and citation omitted).

⁵ Heben, *supra* note 2, at 187–88.

⁶ Amanda Roenius, Comment, *My Name Is Not “Beautiful,” and, No, I Do Not Want to Smile: Paving the Path for Street Harassment Legislation in Illinois*, 65 DEPAUL L. REV. 831, 842 (2016).

⁷ Deirdre Davis, *The Harm That Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN’S L.J. 133, 152 n.96 (1994).

⁸ See Natalie DiBlasio, *Voices: Catcalls Aren’t Flattering, They’re Frightening*, USA TODAY (updated Aug. 20, 2014, 9:50 AM), <http://www.usatoday.com/story/news/nation/2014/08/19/catcalling-ny-post/14300189/> [<https://perma.cc/9EZP-SLFS>]; Katarina Hybenova, *Catcalling Is NOT Flattering: Why I Stopped Running in Bushwick*, BUSHWICK DAILY (Aug. 20, 2014), <http://bushwickdaily.com/bushwick/categories/opinion/2524-cat-calling-is-not-flattering-why-i-stopped-running-in-bushwick> [<https://perma.cc/85XU-XZQP>]. But see Doree Lewak, *Hey, Ladies—Catcalls Are Flattering! Deal with It*, N.Y. POST (Aug. 18, 2014, 10:38 PM), <http://nypost.com/2014/08/18/enough-sanctimony-ladies-catcalls-are-flattering/> [<https://perma.cc/Q4QD-AGXG>].

⁹ Deborah M. Thompson, “*The Woman in the Street: Reclaiming the Public Space from Sexual Harassment*,” 6 YALE J. L. & FEMINISM 313, 320 (1994); Bowman, *supra* note 3, at 535. Their fears are well founded; evidence has shown that rapists often use street harass-

self-esteem, psychological damage, and even physical distress.¹⁰ It also impedes women's geographic mobility because women will change their routes, modes of transportation, or go out less often to avoid street harassment.¹¹ For example, 72 percent of American women in one survey stated they took different transportation to avoid street harassment.¹² In addition, the harms are exacerbated for women of color, who have historically been objectified to an even greater extent than white women.¹³

The reasons men engage in street harassment appear to be wide-ranging. In one study, interviews with men have shown that men often engage in "girl watching" to build camaraderie with other men and they have no real interest in engaging with the woman at all.¹⁴ In another study, men have reportedly given three broad reasons for engaging in street harassment: to "cheer up" women with a compliment, for "fun," and to humiliate women.¹⁵

The humiliation rationale resonates with feminist scholarship. Many feminists have argued that street harassment is a tool for men to exercise their power over women and remind women of "their place" when they are in public.¹⁶ When engaging in street harassment, men want the other men they are with, as well as the target woman, to know they are looking at her in order to display their power over her and turn her into a sexual object.¹⁷ Some believe it is a

ment to seek out victims who will be submissive to them, a practice known as "rape testing." *Id.* at 536.

¹⁰ Bowman, *supra* note 3, at 537–38; Heben, *supra* note 2, at 201–02; Marc Tran, Note, *Combating Gender Privilege and Recognizing a Woman's Right to Privacy in Public Spaces: Arguments to Criminalize Catcalling and Creepshots*, 26 HASTINGS WOMEN'S L.J. 185, 187 (2015). Some have called it "spirit murder," a series of micro-aggressions, "the cumulative effect of which is the slow death of the psyche, the soul and the persona." Davis, *supra* note 7, at 176 (internal quotation marks and citation omitted).

¹¹ Bowman, *supra* note 3, at 539; Davis, *supra* note 7, at 144–45; Thompson, *supra* note 9, at 322. Similarly, women may also bring a male escort to lessen their fears of crime. Carol Brooks Gardner, *Safe Conduct: Women, Crime, and Self in Public Places*, 37 SOC. PROBS. 311, 319 (1990).

¹² *Cornell International Survey on Street Harassment*, HOLLABACK (2016), <http://www.ihollaback.org/cornell-international-survey-on-street-harassment/> [https://perma.cc/SWT7-A6XN] (last visited Apr. 23, 2017).

¹³ Davis, *supra* note 7, at 164–68.

¹⁴ Bowman, *supra* note 3, at 542–43; Beth A. Quinn, *Sexual Harassment and Masculinity: The Power and Meaning of "Girl Watching"*, 16 GENDER & SEXUALITY 386, 392 (2002).

¹⁵ Olatokunbo Olukemi Laniya, *Street Smut: Gender, Media, and the Legal Power Dynamics of Street Harassment, or "Hey Sexy" and Other Verbal Ejaculations*, 14 COLUM. J. GENDER & L. 91, 108–09 (2005).

¹⁶ Bowman, *supra* note 3, at 541; *see also* Davis, *supra* note 7, at 140 (describing street harassment as "sexual terrorism" that maintains social orders).

¹⁷ Quinn, *supra* note 14, at 392.

way for men to inform women that they are being sexualized,¹⁸ in an effort to dominate, intimidate, or exclude women from the public sphere.¹⁹

In contrast to street harassment, cyber-harassment is usually more explicitly insulting and threatening. Cyber-harassment is the term used when someone is sent tweets, messages, or comments that are demeaning or offensive in an effort to cause the recipient emotional distress.²⁰ As with street harassment, although there is nothing inherently gender-restrictive about cyber-harassment, the victims are typically women, gay men, or transgender women, and the perpetrators are usually men.²¹ Due to these trends, this article will focus on women as victims and men as perpetrators, though the arguments advanced herein apply with equal force to all genders.

The most common areas for women to be subjected to cyber-harassment are on dating websites or apps after they ignore or politely reject a man's advances, or in response to something a woman posted online, either through twitter, a blog, or a website. Several websites have been created to allow women who have been harassed on dating sites or social media to post screenshots of the abuse, often with the identifying information of the harasser left intact.²² These websites show that, in response to perceived rejection, men often insult and sometimes threaten the woman they had previously made romantic overtures to.²³ Women are not only called names and insulted (usually called overweight or unattractive) but they can also be intimidated and threatened with bodily harm.²⁴ Women of color, unexpectedly, are more likely to be harassed.²⁵

¹⁸ Shannon Deep, 'Hello' Isn't Always 'Hello' in NYC, HUFFINGTON POST (updated Jan. 6, 2015) http://www.huffingtonpost.com/shannon-deep/-new_3_b_6103200.html [<https://perma.cc/U7DX-3GDA>].

¹⁹ See About: What is Street Harassment?, HOLLABACK, <https://peterborough.ihollaback.org/about/> [<https://perma.cc/HL6E-C9VG>] (last visited Apr. 18, 2017) ("The real motive of street harassment is intimidation. To make its target scared or uncomfortable, and to make the harasser feel powerful.").

²⁰ Jameson, *supra* note 2, at 235.

²¹ Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 378 (2009); Ari Ezra Waldman, Amplifying Abuse: The Fusion of Cyberharassment and Discrimination, B.U. L. Rev. Annex (Oct. 22, 2015), <https://www.bu.edu/bulawreview/waldman-amplifying-abuse/> [<https://perma.cc/Z2WF-2N8M>].

²² See, e.g., Bye Felipe (@byefelipe), INSTAGRAM, <https://www.instagram.com/byefelipe/?hl=en> [<https://perma.cc/658C-T7XZ>] (last visited Apr. 18, 2017); STRAIGHT WHITE BOYS TEXTING, <http://straightwhiteboystexting.org/important> [<https://perma.cc/KL79-FN83>] (last visited Apr. 18, 2017). Fortunately, these sites also cover up the offending images that are often posted as examples of harassment.

²³ Bye Felipe, *supra* note 22; STRAIGHT WHITE BOYS TEXTING, *supra* note 22.

²⁴ Tracy L.M. Kennedy, *An Exploratory Study of Feminist Experiences in Cyberspace*, 3 CYBERPSYCHOLOGY & BEHAVIOR 707, 715–16 (2000); Hess, *supra* note 3.

²⁵ See Zeba Blay, *I Wasn't Prepared for the Horror Story That Is Online Dating While Black*, XOJANE (Jan. 13, 2015), <http://www.xojane.com/sex/online-dating-as-a-black-woman> [<https://perma.cc/C76L-WNQY>]; Charlie Brinkhurst-Cuff, *Women of Color Get No Love on Tinder*, VICE (May 14, 2015), http://www.vice.com/en_us/article/this-is-what-its-like-to-be-a-woman-of-color-on-tinder-514 [<https://perma.cc/Z2TN-44PR>].

In addition, women who write online, either as tweeters, bloggers, or journalists—particularly those who write on traditionally masculine subjects such as science, video games, or comic books—are often targeted by cyber-harassers.²⁶ So too are women who write with a feminist lens or criticize others for misogyny.²⁷ As one reporter described it, women (and gay men) who write on the internet are subjected to an entirely different level of “intensely personal missives of hyper-sexualized hate.”²⁸ The abuse can also be taken on as a cause by a larger group of men who, in a concerted effort, do whatever they can to make the victim’s life miserable.²⁹

As a result of cyber-harassment, victims feel fear and intimidation; many withdraw from the internet altogether.³⁰ Cyber-harassment also affects their careers—female journalists may stop blogging or refuse to take on certain topics that are certain to open them up to misogynist invective.³¹ Even the effort it takes to filter, document, and seek out law enforcement involves mental, emotional, and financial costs for women that men simply do not experience.³² Moreover, the threats can be so personal and specific that women are forced to leave their homes and be constantly vigilant when in public.³³ Most troublingly, in these situations, the victim’s personal information can be made public so the harassment can continue offline.³⁴

Clearly, street and cyber-harassment constitute a serious problem for their victims, one that is so harmful and commonplace that it seems appropriate for the law to step in. However, invoking the law is likely to be met with substantial resistance, particularly under the First Amendment. Indeed, past efforts to

²⁶ Jenn Frank, *How to Attack a Woman Who Works in Video Gaming*, GUARDIAN (Sept. 1, 2014, 9:44 AM), <https://www.theguardian.com/technology/2014/sep/01/how-to-attack-a-woman-who-works-in-video-games> [https://perma.cc/TJE7-NSMB]; Rachael Krishna, *This Woman Writer Was Trolled so Badly, She Left Twitter*, BUZZFEEDNEWS (Oct. 27, 2016, 8:57 AM), https://www.buzzfeed.com/krishrach/a-women-writer-was-harassed-off-twitter-for-a-feminist-comic?utm_term=.urzANVR2e#.kenDv7Ppm [https://perma.cc/AL7T-QG3R].

²⁷ Lindy West, *What Happened When I Confronted My Cruellest Troll*, GUARDIAN (Feb. 2, 2015, 1:00 PM), <https://www.theguardian.com/society/2015/feb/02/what-happened-confronted-cruellest-troll-lindy-west> [https://perma.cc/WJ3G-XYKH]; see also Richard Spillett, *You’re Pretty but You Have Crazy Written All in Your Eyes’: Student, 19, Who Changed Her Tinder Profile to Include the Word ‘Feminist’ is Immediately Trolled by Other Users*, DAILY MAIL (July 8, 2016, 2:47 PM), <http://www.dailymail.co.uk/news/article-3681096/Student-trolled-desecriving-feminist-Tinder.html> [https://perma.cc/C7J7-YQAJ].

²⁸ Conor Friedersdorf, *When Misogynist Trolls Make Journalism Miserable for Women*, ATLANTIC (Jan. 7, 2014), <http://www.theatlantic.com/politics/archive/2014/01/when-misogynist-trolls-make-journalism-miserable-for-women/282862/> [https://perma.cc/5DY2-LXC9].

²⁹ Tara Dublin, *I Got Doxxed After Giving a Donald Trump Supporter the Finger*, XOJANE (Sept. 29, 2016), <http://www.xojane.com/issues/trump-supporters-doxxing-me-for-giving-finger> [https://perma.cc/A4GC-UD3X].

³⁰ Citron, *supra* note 21, at 386; Hess, *supra* note 3.

³¹ Friedersdorf, *supra* note 28.

³² *Id.*

³³ Hess, *supra* note 3.

³⁴ Dublin, *supra* note 29.

restrict hate speech against other groups have been largely struck down on First Amendment freedom of expression grounds.³⁵ Accordingly, in order to effectively regulate street and cyber-harassment, legislators will need to find a way to ensure that the law satisfies the requirements of the First Amendment.

II. THE FIRST AMENDMENT AND SILENCING PUBLIC SPEECH

One reason street and cyber-harassment will be difficult to regulate under the First Amendment is that those acts take place in public. The Supreme Court has recently reaffirmed that “[c]onsistent with the traditionally open character of public streets and sidewalks, we have held that the government’s ability to restrict speech in such locations is ‘very limited.’”³⁶ More specifically, the Supreme Court has previously noted that public sidewalks are assumed to be public free speech forums with heightened First Amendment protection.³⁷ According to the Supreme Court, “the guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum.”³⁸

The offensive nature of speech is also of no import under the First Amendment. According to the Supreme Court, “when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.”³⁹ Further,

[i]n most circumstances, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.⁴⁰

Consequently, when “pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors” the courts must engage in “delicate balancing” of those interests.⁴¹

³⁵ See, e.g., *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1165–69, 1181 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856–57, 867–69 (E.D. Mich. 1989).

³⁶ *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (internal citation omitted).

³⁷ *United States v. Grace*, 461 U.S. 171, 177 (1983).

³⁸ *Coakley*, 134 S. Ct. at 2529 (internal quotation marks and citation omitted).

³⁹ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975).

⁴⁰ *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (internal quotation marks and citation omitted).

⁴¹ *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (quoting *Erznoznik*, 422 U.S. at 209); see also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–03 (1974) (“Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.”).

With regard to sex-based harassment or intimidation, any law that limits such speech is arguably creating a content-based prohibition on speech, to which courts give the highest level of scrutiny.⁴² Content-based prohibitions on speech restrict speech based on what the person is saying, limiting some subjects and not others.⁴³ An argument could be made that laws against street and cyber-harassment really restrict behavior or secondary effects of speech. This is because the restrictions on street and cyber-harassment would likely focus on the effects of the speech by prohibiting speech that harms or harasses the listener, instead of focusing on what the speaker is saying. The Supreme Court is generally willing to allow restrictions on speech if the government is trying to prevent secondary effects and not the speech itself.⁴⁴ For example, in *City of Renton v. Playtime Theaters, Inc.*, the Supreme Court upheld a zoning ordinance restricting the location of adult theaters because the city was trying to combat the increased crime and other “urban blight” effects that were associated with those theaters.⁴⁵

However, the Supreme Court has held that restricting speech based on its emotional impact still counts as a content-based restriction on speech.⁴⁶ Being offended by speech, in other words, is too closely tied to the speech itself to be considered a secondary effect. Consequently, laws targeting street and cyber-harassment are likely to be seen as content-based restrictions on speech.

Furthermore, unless the speech has a physical act component (such as cross burning),⁴⁷ the Supreme Court has generally been opposed to laws that restrict hateful or offensive speech, particularly when the speaker is using that speech to also talk about issues of public interest.⁴⁸ Lower courts have likewise struck down speech codes meant to curb offensive speech, even those limited to university campuses, on the grounds that those codes are vague and overbroad.⁴⁹ Moreover, because these laws are content-based, they cannot be considered

⁴² R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 292 (2016). Public speech regulations that are content neutral, in contrast, are given intermediate scrutiny, which requires that the regulations be “narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of information.” *Id.* at 293 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

⁴³ *Snyder*, 562 U.S. at 457 (noting that an ordinance was not content-neutral because liability attached because of what the protesters said, not the fact that they were protesting); *Ward*, 491 U.S. at 791 (1989) (“[T]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”).

⁴⁴ *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50–51 (1986).

⁴⁵ *Id.* at 51.

⁴⁶ *Boos v. Barry*, 485 U.S. 312, 321 (1988).

⁴⁷ *Virginia v. Black*, 538 U.S. 343, 347–48 (2003).

⁴⁸ *Snyder*, 562 U.S. at 444–45.

⁴⁹ *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1165–67, 1181 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856–57, 867–69 (E.D. Mich. 1989).

“time, place, or manner” restrictions, that are typically given intermediate scrutiny.⁵⁰ Accordingly, any restrictions on such speech will receive strict scrutiny.⁵¹

Scholars have begun to grapple with this problem and have suggested a variety of ways to regulate street or cyber-harassment without running afoul of the First Amendment. For example, some have argued that sexual harassment or street harassment should not be given First Amendment protection because it constitutes “fighting words,” that has traditionally not been protected.⁵² Fighting words is a narrow concept and applies to words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁵³ These words must also be “personally abusive epithets” that are “addressed to the ordinary citizen.”⁵⁴

However, although there is an argument to be made that street and cyber-harassment can constitute fighting words, much of the doctrine would need to be adapted to apply to these modern problems. First, not all street harassment comes in the form of personally abusive epithets. Instead, much of street harassment is cloaked in benign “compliments”; it is the intrusion, and not the words themselves, that is offensive. Similarly, although cyber-harassment does take the form of personal insults more often, the concept of “fighting words” does not appear to apply to cyber-harassment because the encounters do not happen face-to-face where a violent reaction is possible. Finally, this doctrine may not be applicable to street or cyber-harassment because women are socialized to not fight back when provoked.⁵⁵ Because women respond with fear and are unlikely to be violent in response, which is what the “fighting words” doc-

⁵⁰ Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 485 (2007) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1826 (1992).

⁵¹ *United States v. Grace*, 461 U.S. 171, 177 (1983).

⁵² Bowman, *supra* note 3, at 558; Bunkosal Chhun, Note, *Catcalls: Protected Speech or Fighting Words?*, 33 T. JEFFERSON L. REV. 273, 273–74 (2011); Maeve Olney, Note, *Toward a Socially Responsible Application of the Criminal Law to the Problem of Street Harassment*, 22 WM. & MARY J. WOMEN & L. 129, 148–50 (2015).

⁵³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see also* *Cohen v. California*, 403 U.S. 15, 20 (1971) (stating fighting words are those words that, “as a matter of common knowledge,” are “inherently likely to provoke violent reaction”).

⁵⁴ *Cohen*, 403 U.S. at 20.

⁵⁵ Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 17–19 (1990); *see also* Sopen B. Shah, *Open Season: Street Harassment as True Threats*, 18 U. PA. J. L. & SOC. CHANGE 377, 391 (2016); Chhun, *supra* note 52, at 290–91; Gabrielle Moss, *Do You Respond to Catcalling? 23 Women Reveal How They Reply to Street Harassment*, BUSTLE (July 14, 2015), <http://www.bustle.com/articles/97065-do-you-respond-to-catcalling-23-women-reveal-how-they-reply-to-street-harassment> [https://perma.cc/HR3W-7DAX] (stating that many of the women surveyed said they did not respond to street harassment or responded less assertively than they wished they had).

trine seeks to avoid, it is unlikely that a court would find this doctrine to be applicable to either street or cyber-harassment.

Similarly, obscenity is an unlikely avenue for evading First Amendment protection because most of the comments levelled at women either in public or online do not meet the strict standards of the *Miller* test.⁵⁶ The *Miller* test requires that, in order to be legally “obscene,” material must “appeal to the prurient interest in sex in a patently offensive manner and lack serious redeeming ‘literary, artistic, political, or scientific value.’”⁵⁷ Most street and cyber-harassment, though based on gender, is more about intimidation than appealing to a prurient interest in sex.⁵⁸ Even threats of rape are not meant to provoke feelings of lust in their targets; they are meant to frighten or upset them.

Further, some have argued that street harassment should be considered “low value” speech because it is not relevant to public affairs, it is noncognitive, the speaker is not trying to send a message or impart some knowledge, and the government has a legitimate reason to regulate the speech.⁵⁹ The two categories of low value speech identified by the Supreme Court are commercial speech⁶⁰ and sexually explicit speech.⁶¹ Sexually explicit speech appears to closely resemble some aspects of street or cyber-harassment, but not all of it. Like obscenity, “sexually explicit speech” requires much more sexual content than the full spectrum of street and cyber-harassment; the speech must be of a sexual nature⁶² and street and cyber-harassment can run the gamut from seemingly innocuous greetings to death threats, neither of which has overt sexual content. Moreover, courts have rarely used this doctrine for sexually explicit speech, usually invoking it for nude dancing and combining it with the speech’s secondary effects as well as the time, place, or manner restrictions discussed above.⁶³

Another argument, and one that has not been fully addressed in the literature,⁶⁴ is that street and cyber-harassment should be limited under the First Amendment using the “captive audience doctrine.”

⁵⁶ See Strauss, *supra* note 55, at 19–20 (arguing that sexual harassment is unlikely to be legally obscene, particularly because the speech is about power, not sex).

⁵⁷ Jessica R. Vartanian, *Speaking of Workplace Harassment: A First Amendment Push Toward a Status-Blind Statute Regulating “Workplace Bullying”*, 65 ME. L. REV. 175, 193 (2012) (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

⁵⁸ Bowman, *supra* note 3, at 541.

⁵⁹ Olney, *supra* note 52, at 148.

⁶⁰ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

⁶¹ *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

⁶² “Sexually explicit speech” has not been fully defined by the courts but appears to refer to speech with an overt erotic or sexual content, such as pornography. See *id.* at 69–70.

⁶³ Vartanian, *supra* note 57, at 195; Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 199 n.27 (2001).

⁶⁴ This concept has been thoroughly explored with regard to workplace sexual harassment. See, e.g., Strauss, *supra* note 55, at 36–37; Volokh, *supra* note 50, at 1840–42.

III. THE CAPTIVE AUDIENCE DOCTRINE

The Supreme Court has recognized that speech may be limited, even in public, where “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.”⁶⁵ Accordingly, “the ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”⁶⁶

Whether speech invades privacy interests often rests on the difficulty of avoiding it. To that end, the Supreme Court has repeatedly made a distinction between speech encountered inside and outside the home:

Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. That we are often “captives” outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere. Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.⁶⁷

Accordingly, the State can restrict even the mailing of unwanted material to a person’s home.⁶⁸

In contrast, according to Justice Scalia, “Outside the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other ‘offensive’ intrusions which increasingly attend urban life.”⁶⁹ Indeed, according to the Ninth Circuit, “captive” must mean more than simply being “less interested in staying where they are rather than moving to a different location.”⁷⁰ Therefore, pursuing activities in public such as “waiting in line, attend-

⁶⁵ *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

⁶⁶ *Snyder v. Phelps*, 562 U.S. 443, 459–60 (2011) (internal quotation marks and citation omitted). For example, members of the Westboro Baptist Church who were protesting outside of a funeral were given First Amendment protection because the members “stayed well away from the memorial service,” the family “could see no more than the tops of the signs when driving to the funeral” and there was “no indication that the picketing in any way interfered with the funeral service itself.” *Id.* at 460.

⁶⁷ *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) (citations omitted); *see also Erznoznik*, 422 U.S. at 209 (noting that content restrictions have been upheld “when the speaker intrudes on the privacy of the home”).

⁶⁸ *Rowan v. U.S. Post Office Dep’t.*, 397 U.S. 728, 738 (1970) (“The asserted right of a mailer, we repeat, stops at the outer boundary of every person’s domain.”).

⁶⁹ *Hill*, 530 U.S. at 752–53 (Scalia, J., dissenting) (internal quotation marks and citation omitted); *see also Eugene Volokh, Gruesome Speech*, 100 CORNELL L. REV. 901, 936 (2015) (extolling the virtues of having an open marketplace of ideas on the public streets, even if offensive speech is unavoidable there).

⁷⁰ *Berger v. City of Seattle*, 569 F.3d 1029, 1055 (9th Cir. 2009).

ing an event, or eating without communication by others” does not implicate a substantial privacy interest.⁷¹

However, the captive audience doctrine does not require that the listener or viewer be actually trapped or captive. Instead, the question is whether the person should have to flee to avoid the speech.⁷² Some speech, scholars have argued, creates a coercive environment that the victim should not be forced to flee because doing so requires the victim to make an unfair choice.⁷³ For example, a worker should not have to choose between being repeatedly subjected to sexually harassing speech and keeping her job; that is precisely why Title VII forbids the creation of a hostile work environment.⁷⁴ In other words, it is the situation, not the physical place, that should determine whether the audience is captive.⁷⁵ Some Supreme Court jurisprudence can be read to follow this line of thought.

In some public places, when the speech is difficult to avoid and the audience is there “as a matter of necessity, not of choice,” the Supreme Court is more likely to apply the captive audience doctrine.⁷⁶ Consequently, speech on public transportation has been limited under the captive audience doctrine.⁷⁷ Similarly, speech at a graduation ceremony⁷⁸ or in a college classroom⁷⁹ has been held to impact a captive audience. In contrast, public spaces such as parks or street corners are inherently open and unlikely to hold a captive audience.⁸⁰

The medium of the message is also important. The Supreme Court has shown much less tolerance for restrictions on printed messages than verbal ones.⁸¹ According to Justice Stevens, even if someone can publicly protest by “placing a vulgar message on his jacket and, in so doing, expose unwilling viewers, . . . that does not mean that he has an unqualified constitutional right to follow and harass an unwilling listener.”⁸² For that reason, broadcast media

⁷¹ *Id.*

⁷² J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2310–11 (1999).

⁷³ *Id.* at 2312.

⁷⁴ *Id.*

⁷⁵ *Id.* at 2312–13.

⁷⁶ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

⁷⁷ *Id.* In public transportation situations, the Court also noted that the State uses it as a source of commerce, which gives the State an interest in ensuring that its passengers are not offended. *Id.* at 303.

⁷⁸ *Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009).

⁷⁹ *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1986).

⁸⁰ *Lehman*, 418 U.S. at 302; *see also* *Berger v. City of Seattle*, 569 F.3d 1029, 1054–55 (9th Cir. 2009) (stating public park visitors were not a captive audience).

⁸¹ *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978); *see also* *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 772–73 (1994) (“The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.”).

⁸² *Madsen*, 512 U.S. at 781 (Stevens, J., concurring in part and dissenting in part) (citing *Cohen v. California*, 403 U.S. 15, 21–22 (1971)).

has been given a lower level of scrutiny than print media.⁸³ In contrast, lower federal courts have recently refused to apply the captive audience doctrine to an offensive beer label displayed in grocery stores⁸⁴ or to offensive personalized license plates⁸⁵ because the viewer could easily avert their eyes.

Where the street and cyber-harassment fit on this spectrum is difficult to predict. Street harassment typically takes place on a public street, making it less likely than some venues to create a captive audience. However, the messages are usually verbal, which are more difficult to avoid. In contrast, the Supreme Court has previously distinguished the internet from broadcast media, emphasizing that, unlike with television, it is difficult for users to stumble upon offensive content.⁸⁶ This holding, as well as the Court's assumption that it is difficult for children to maneuver to inappropriate sites online, has been criticized by scholars.⁸⁷ Moreover, the Supreme Court has more recently acknowledged that it is easier for minors to acquire pornography on the internet than was first imagined.⁸⁸ In addition, because of technology, users can access the internet anywhere, including in public and their homes, effectively bridging the public/home divide and making that traditional distinction unworkable.⁸⁹

Another way to look at captive audience precedent is how direct or targeted the message is. Messages that are intended only for specific individuals are more likely to invade privacy than messages that are intended for the general public.⁹⁰ Instead of spreading ideas to the public, targeted messages are directed at a particular person and are intent on reaching that person whether she wants to hear the message or not.⁹¹ These targeted messages are therefore more likely to continue to intrude until the target has heard the message, making avoidance extremely difficult.⁹² As noted by the Supreme Court, listeners have "a right to

⁸³ Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183, 192–93 (2004).

⁸⁴ *Flying Dog Brewery, LLP v. Michigan Liquor Control Comm'n*, 597 F. App'x 342, 374–75 (6th Cir. 2015) (unpublished) ("[T]he captive audience doctrine does not aid the Commissioners because seeing a beer bottle label in a grocery store or a restaurant does not invade substantial privacy interests . . . in an essentially intolerable manner.") (internal quotation marks and citations omitted).

⁸⁵ *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 829–30 (W.D. Mich. 2014).

⁸⁶ *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997).

⁸⁷ Garry, *supra* note 83, at 202.

⁸⁸ *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 200 (2003) ("The accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography.").

⁸⁹ Patrick M. Garry, *The Flip Side of the First Amendment: A Right to Filter*, 2004 MICH. ST. L. REV. 57, 73 (2004).

⁹⁰ John B. Major, Note, *Cyberstalking, Twitter, and the Captive Audience: A First Amendment Analysis of 18 U.S.C. § 2261A(2)*, 86 S. CAL. L. REV. 117, 149 (2012).

⁹¹ See Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 NW. U. L. REV. 731, 740–43 (2013).

⁹² Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 945–46 (2009).

be free from persistent importunity, following and dogging after an offer to communicate has been declined.”⁹³

Moreover, the nature of the message itself may be considered when determining whether someone’s privacy interests have been invaded in an intolerable manner. Substantial privacy interests may be burdened by speech if the nature of the speech is “offensive and disturbing,”⁹⁴ or affects the psychological or physical well-being of the targeted listeners, particularly if they are seeking medical attention.⁹⁵ For that reason, the Supreme Court upheld an injunction provision that required abortion protestors to move away from abortion clinic patients who asked to be left alone.⁹⁶ Other relevant state interests include “ensuring the public safety and order . . . [and] promoting the free flow of traffic on public streets and sidewalks.”⁹⁷

According to constitutional law scholar Marcy Strauss, although the captive audience doctrine has been applied inconsistently by the courts, it generally protects the privacy rights of listeners in three different ways: (1) the right to make our own choices without interference; (2) “the right to repose” or find peace without intrusion; and (3) “the right to be free from offensive speech” as long as there is a definite harm associated with that speech.⁹⁸

Strauss has also suggested a three-part test for when to apply the captive audience doctrine: (1) the justification for applying the doctrine (using the three justifications listed above); (2) the potential “burden on the listener in avoiding the speech”; and (3) the impact on expression, particularly on willing listeners.⁹⁹ Under this test, if the speech is highly intrusive, poses a large burden to avoid it, and has a minimal effect on expression, the captive audience doctrine should be used.¹⁰⁰ These criteria may be used to show that even the public street or internet can create a captive audience when harassment is so commonplace.

⁹³ Hill v. Colorado, 530 U.S. 703, 718 (2000) (internal quotation marks omitted).

⁹⁴ Frisby v. Schultz, 487 U.S. 474, 487 (1988) (explaining that anti-abortionists were picketing outside a doctor’s house).

⁹⁵ Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 768 (1994) (explaining that anti-abortionists were picketing and counselling outside an abortion clinic).

⁹⁶ Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 383–84 (1997).

⁹⁷ Madsen, 512 U.S. at 768.

⁹⁸ Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 108–16 (1991).

⁹⁹ *Id.* at 116–20.

¹⁰⁰ *Id.* at 120. Strauss has also argued that workplace harassment should be subject to a captive audience analysis and a few federal courts have adopted this approach when applying Title VII. See Strauss, *supra* note 55, at 36; see also Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?* 12 TEX. J. WOMEN & L. 67, 89 n.138 (2002) (citing cases).

A. *Justification for Regulating Street and Cyber-Harassment*

Using Strauss's test, the State has ample reasons for regulating street and cyber-harassment:

lessening the danger of violence, . . . preventing the psychological injury that is inflicted on the target of such language, . . . addressing the general social offense or outrage that such language is used, and . . . the destructive attitude of male superiority and social acceptance of violence against women.¹⁰¹

Suppressing sexist speech may also lessen discriminatory behavior by changing attitudes.¹⁰² By passing a law that restricts or criminalizes street and cyber-harassment, society will send a message such behavior is harmful and not to be tolerated. Similarly, by suppressing sexist, harassing speech, women will feel safer to engage in public activities and use their own voices online, ultimately increasing the speech available to others. In addition, street harassment is sometimes a precursor to physical violence.¹⁰³ By criminalizing street harassment, women will have a way to prevent physical abuse.

Moreover, all three of Strauss's offered justifications for regulating speech are present here. Street and cyber-harassment affect women's choices of where to go and when, and what they can say or do online. It disturbs their peace when in public and subjects them to offensive speech that causes psychological and physical harm. Accordingly, much would be accomplished by regulating street and cyber-harassment.

B. *The Burden on the Listeners*

Street and cyber-harassment also place a heavy burden on the listeners. Women cannot simply avoid street harassment when it is everywhere, when harassers may follow them, and when the costs of ignoring harassment may cause it to escalate into violence. As noted above, women already change their travel routes, modes of transportation and even frequency of travel to avoid street harassment. It is not a stretch to argue that women suffer a substantial burden to avoid this unwanted speech.

Similarly, the internet may create a captive audience because there is no alternative for those who use the internet for their social lives or livelihood.¹⁰⁴ There is no other place like the internet for the rapid exchange of ideas and pure reach to other people around the world. Although one scholar has argued

¹⁰¹ Olney, *supra* note 52, at 146.

¹⁰² Strauss, *supra* note 55, at 14–15.

¹⁰³ Indeed, there is a Tumblr page that collects news stories and first-person testimonials of when men have reacted with violence to a woman's rejection. See WHEN WOMEN REFUSE, <http://whenwomenrefuse.tumblr.com/> [<https://perma.cc/62FQ-99ZH>] (last visited Apr. 18, 2017).

¹⁰⁴ See Patrick M. Garry, *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography: Revising the Strict Scrutiny Model to Better Reflect the Realities of the Modern Media Age*, 2007 BYU L. REV. 1595, 1613–14 (2007).

that “an individual confronted with an uncomfortable message can always . . . leave the Web site,”¹⁰⁵ the importance of the internet socially and professionally for many people makes that much less of an option than it used to be.¹⁰⁶

Moreover, some web services such as Twitter make it almost impossible for the victim to tune out the harassing messages. Twitter allows users to “tag” their intended recipient, which places the harassing message alongside other messages that the victim wants to read so that the victim will invariably read the harassing message before she realizes it is harassment.¹⁰⁷ Even blocking the offending user will do little because the user can simply make another account or combine his efforts with others to send a deluge of harassment.¹⁰⁸ That is exactly what happened with actress Leslie Jones; the initial instigator did not send any harassing messages himself.¹⁰⁹ Instead, he sounded a call to action among his followers who were happy to send hundreds of offensive, racist messages to her. Twitter has since begun deleting accounts of users who have been reported for hate speech¹¹⁰ but those efforts are piecemeal and usually after the fact.

Similarly, online dating apps or websites have messaging functions where other users can send each other messages without invitation or any other kind of screening.¹¹¹ Such a process is meant to help people connect more easily but it also makes it easier for men to harass multiple women at once. To avoid all harassing messages, women would have to leave the site or app entirely, defeating the purpose of online dating. Accordingly, due to the way internet messaging works, it is extremely difficult to avoid harassing speech without also avoiding all speech.¹¹²

¹⁰⁵ Volokh, *supra* note 69, at 936.

¹⁰⁶ Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1113 (2011).

¹⁰⁷ Major, *supra* note 90, at 125.

¹⁰⁸ *Id.* at 150.

¹⁰⁹ Kristen V. Brown, *How a Racist, Sexist Hate Mob Forced Leslie Jones off Twitter*, FUSION (July 19, 2016, 12:52 PM), <http://fusion.net/story/327103/leslie-jones-twitter-racism/> [<https://perma.cc/86U7-CTSM>].

¹¹⁰ Laura Bult, *Twitter Bans Multiple Accounts of Prominent Alt-Right Leaders Citing Violation of Hate Speech Rules*, N.Y. DAILY NEWS (Nov. 16, 2016, 4:03 PM), <http://www.nydailynews.com/news/national/twitter-bans-multiple-alt-right-leaders-accounts-hate-speech-article-1.2876266>; Ivana Kottasova, *Facebook and Twitter Pledge to Remove Hate Speech Within 24 Hours*, CNN (May 31, 2016, 8:35 AM), <http://money.cnn.com/2016/05/31/technology/hate-speech-facebook-twitter-eu/> [<https://perma.cc/KB78-4LP5>].

¹¹¹ Olga Khazan, *Rise of the Feminist Tinder-Creep-Busting Web Vigilante*, ATLANTIC (Oct. 27, 2014), <http://www.theatlantic.com/health/archive/2014/10/rise-of-the-feminist-creep-bust-ing-web-vigilante/381809/> [<https://perma.cc/P983-PJTG>].

¹¹² One scholar has argued for filtering as a “self-help” technique that would remove the availability of the captive audience doctrine. Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 763–65 (2003). However, as argued above, filtering presents an after-the-fact, partial solution, at best.

Consequently, for both street and cyber-harassment, it is difficult for women to avoid this unwanted speech without fundamentally altering the way they interact with the world. A high burden, to be sure.

C. *Impact on Willing Listeners*

Finally, prohibiting street and cyber-harassment would have a low impact on expression. Although a few women have asserted that they like street harassment,¹¹³ the vast majority of women find it intimidating and upsetting.¹¹⁴ In other words, there are few willing listeners to street harassment and it is hard to imagine that anyone would miss it. Cyber-harassment has even fewer willing recipients because the speech is overwhelmingly violent and insulting. Although some bystanders may enjoy watching others being humiliated and attacked online, this is hardly the kind of expression the First Amendment was meant to protect. Therefore, despite what one scholar has argued,¹¹⁵ harassment is not productive speech. It does not seek to inform others or create a dialogue; it only seeks to intimidate and upset. Restrictions on street and cyber-harassment would not deprive anyone of meaningful ideas or discussion.

Accordingly, based on Strauss's three-part test, street and cyber-harassment are good candidates for the captive audience doctrine. These forms of harassment have multiple harmful effects, create a burden on the unwilling recipients, and provide little to no value for any willing listeners.

CONCLUSION

Both street and cyber-harassment carry significant harms for their victims, resulting in women often leaving or reducing their exposure to the public sphere out of fear. Although there are many obstacles to regulating street and cyber-harassment, the First Amendment should not be one of them. The street and the internet are large, public places, but harassment in these venues is so commonplace and pronounced that women feel trapped there. The right to speak, to say harassing, hateful things, should not outweigh a woman's right to some privacy and peace when she enters the public sphere. By using the captive audience doctrine, courts can uphold regulations against speech that are meant to harass and intimidate women as they go about their daily lives, meet new people, and do their jobs. Accordingly, the captive audience doctrine represents a good way forward when balancing the rights of men to speak their minds and the rights of women to be left alone.

¹¹³ See, e.g., Lewak, *supra* note 8.

¹¹⁴ Bowman, *supra* note 3, at 537–38.

¹¹⁵ See Volokh, *supra* note 50, at 1841–42 (arguing that workplace harassment constitutes “political speech”).