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Walking the Streets Without Fear: Investigating a Specific Offence of Public Sexual Harassment

Holly Robson

Abstract

The events of 2021 sparked a socio-political awakening among our population. Public protests and social media campaigns intensified against the backdrop of recurring high-profile cases of violence against women such as the murders of Sarah Everard, Ashling Murphy and Sabina Nessa. As awareness, and fear, of sexual harassment in public places rises among women and girls in the United Kingdom, it must be investigated whether the law is being fully utilised to protect the female population. This article seeks to understand how we can employ the criminal law to respond to this problem. Through investigating what public sexual harassment is, why it possesses characteristics of criminality and how it engages with existing legal framework. This article argues that the English and Welsh criminal law systems should introduce a specific offence that outlaws public sexual harassment (PSH). At the time of writing, women can, legally, be subjected to public displays of unwanted sexual attention. Where behaviours can be shoehorned under an existing offence, complexities in the framework mean the law struggles to ever be enforced effectively. As such, this discourse will explore the opportunities that a specific office of public sexual harassment would create to address the shortcomings of current law and how such an offence could operate to provide the legal protection desired by so many in our society. It argues that by doing so, favourable social responses can be generated which will deter engagement with the conduct and decrease its prevalence by changing social perceptions of the act itself.

1 Introduction

Olivia is a 24-year-old female living and working in central London. While on her commute to work, Olivia alighted onto the familiar surroundings of the district line tube and held on to an elevated strap. A man stood directly behind her. As the tube departed, he began swaying against Olivia's body. Olivia presumed this was just the rhythm of the carriage until he leaned in closer, breathing directly, loudly and heavily into her ear. At this point, she realised that he was not swaying — he was rubbing up against her.¹ Traumatized by her encounter, Olivia disembarked the tube three stops early, opting to walk the remainder of her journey.

Olivia does not exist, but her story does.² However, it is by no means extraordinary. Olivia's experience is understood all too well by women.³ Her story highlights how the ingrained normalisation of unwanted sexual attention has created an epidemic of willing perpetrators who, collectively, inhibit the progression of women's rights by maintaining a culture in which women are unable to enjoy the same freedoms in public spaces as men. Blinded by the orthodox conceptions of flirtatious and complimentary behaviour, most conduct is presently unaddressed by law, leaving victims, like Olivia, stuck with the reality of repeat victimisation. However, the likelihood of this reality persevering into the next decade is unlikely.

¹ Imogen Groome, 'Sexual Assault on Public Transport Is an Increasing Problem: Here's Why We Need to Speak Out' (*Metro*, 30 April 2017) <<https://metro.co.uk/2017/04/30/sexual-assault-on-public-transport-is-an-increasing-problem-heres-why-we-need-to-speak-out-6593306/>> accessed 22 May 2023.

² Olivia's story is based on the real-life experiences cited in the above reference.

³ All-Party Parliamentary Group (APPG) for UN Women, 'Prevalence and reporting of sexual harassment in UK public spaces' (UN Women UK, 2021) 6.

The tragic murder of Sarah Everard⁴ sparked social upheaval in 2021. Sarah's death triggered the #shewaswalkinghome movement which saw women sharing stories of how they respond to unwanted displays of sexual attention. Women discussed behaviours like thrusting keys between their knuckles, adjusting outfits to cover up skin and calculating the best tone of voice to use when responding to a stranger's sexual greeting.⁵ Accordingly, the conversation turned to how we prevent a need for this mitigation. Top of the agenda was to take the suggestion of criminalising the conduct instigating violent encounters more seriously. That conduct was public sexual harassment (PSH).

The debate of whether to criminalise PSH is not unfamiliar in the legal sphere. For over forty years, academics globally have argued for the right to walk the streets without fear. They propose that criminalising PSH is the best mechanism by which to achieve such an outcome. Indeed, some have succeeded, with PSH being made a specific offence in countries like France and Belgium but, England and Wales are yet to take a stance. This article will argue that the current social climate in this country is the opportune moment to capitalise on such a development.

To articulate this argument, the foundational groundwork that is required to justify this article's proposition will be investigated. An exhaustive analysis of law reform is a task far too great for this scope of this article but, what can be established is why such a suggestion is reasonable. Subsequently, across four sections, this article will demonstrate why we need a specific offence for PSH. The first section will identify the problem of PSH and contextualise the interpretational

⁴ Lucy Gilder and Jennifer Clarke, 'Sarah Everard Murder' (*BBC News London*, 10 March 2021) <<https://www.bbc.co.uk/news/topics/c8657zxk82wt>> accessed 22 May 2023.

⁵ Melissa Jeltsen, 'She Was Walking Home: How Sarah Everard's Murder Revealed Feminism's Fault Lines' (*Vanity Fair London*, 28 September 2021) <<https://www.vanityfair.com/news/2021/09/how-sarah-everards-murder-revealed-feminisms-fault-lines>> accessed 22 May 2023.

issues embedded in the dilemma itself. Section two utilises the principles of criminalisation to present a theoretical justification for criminalising PSH, based on the conclusion that it possesses key characteristics of a crime. The third section investigates why PSH is not adequately dealt with under existing law. The final section explores more specifically, why the best legal response is through a specific offence, rather than by amendments to existing law, finishing with the presentation of two recommendations that would allow this offence to punish offenders, remedy victims, and change societal norms.

2 The ‘Harm That Has No Name’⁶

2.1 The Importance of Labelling

The term ‘street harassment’ first arrived in academic literature after the second-wave feminist movement of the 1970s. Sparked by social movements such as ‘Take Back the Night’⁷ and the ‘Wall Street Ogle-in’,⁸ ‘street harassment’ became synonymous with behaviours like catcalling, groping and leering, while embedding itself comfortably in the wider discussion of violence against women and girls (VAWG). However, despite the public lexicon of ‘street harassment’ being coined in early deliberation of the phenomena, there is no consistent term or definition used across the literature.⁹ Academics have pondered over

⁶ Deirdre Davis, ‘The Harm That Has No Name: Street Harassment, Embodiment, and African American Women’ (1994) 4 *UCLA Women’s LJ* 133, 135.

⁷ Take Back the Night Foundation, ‘What Is Take Back the Night?’ (*Take Back the Night*, 2016) <<https://takebackthenight.org/about-us/>> accessed 22 May 2023.

⁸ Nina Renata Aron, ‘Sexually Charged “Ogle-Ins” Allowed 1970s Feminists to Humiliate Catcalling Men’ (*Medium*, 6 April 2018) <<https://timeline.com/ogle-ins-allowed-women-to-teach-catcallers-a-lesson-691a5eaa3a37>> accessed 22 May 2023.

⁹ Fiona Vera-Gray, ‘Men’s Stranger Intrusions: Rethinking Street Harassment’ (2016) 58 *Women’s Stud Int Forum* 9, 10.

what to call these public displays of unwanted sexual attention and many have endeavoured to capture the behaviours in a single definition. However, few have proposed a solution that reflects the complex and dynamic nature of this behaviour. This article argues that ‘public sexual harassment’ holds the most promise as functioning legal and academic terminology and proposes a unique definition of PSH to avoid definitional complexities infiltrating the argument presented.

The absence of an accepted term to describe public displays of unwanted sexual attention is problematic. The lack of consistent labelling forces the behaviour to become invisible, by increasing the difficulty associated with identifying and controlling it.¹⁰ Spender states that this silence can be directly correlated to naming issues as when women’s experiences remain unnamed, they become a dubious reality to others.¹¹ Consequently, the inability for victims to affiliate their experience to a well-known label will likely strengthen the normalisation of PSH. This will limit its transition into the legal sphere as the true extent of prevalence is lost in a sea of ambiguous legitimacy. Spender’s ‘dubious reality’¹² is reiterated by Tuerkheimer¹³ and Davis¹⁴ in what they refer to as the ‘trivialisation’ of PSH. Tuerkheimer argues the challenge for women to identify what they have experienced results in the denial of their suffering.¹⁵ Therefore, naming the conduct allows it to be vocalised, changing the way women experience it.¹⁶ Davis’s

¹⁰ Pamela Davies, Peter Francis and Tanya Wyatt, ‘Taking Invisible Crimes and Social Harms Seriously’ in Pamela Davies, Peter Francis and Tanya Wyatt (eds), *Invisible Crimes and Social Harms* (Palgrave Macmillian 2014) 5.

¹¹ Dale Spender, *Man Made Language* (2nd edn, Routledge and Kegan Paul 1998) 184.

¹² *ibid.*

¹³ Deborah Tuerkheimer, ‘Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm’ (1997) 12 *Wis Women’s LJ* 167, 174.

¹⁴ Davis (n 6).

¹⁵ Tuerkheimer (n 13) 174.

¹⁶ *ibid.*

perspective relates more strongly to patriarchy and gender-blind legal theory. Davis argues that because PSH is not experienced by most men, it is perceived to be invisible and subsequently, not something society, or the law, recognises.¹⁷ Although an argument presented in 1994, Davis's point has clear applicability in our modern society as even a male Prime Minister has overlooked the essence of PSH believing its substance terminates with mere catcalling.¹⁸ Therefore, finding an appropriate name and definition is vital to empowering the validity of PSH encounters in the eyes of society, and those controlling the law.

2.2 Selecting a Term

According to Kissling,¹⁹ one of the first academic examinations of PSH came from sociologist Carol Gardner who defined the phenomenon as 'street remarks'²⁰ which has since been discarded for inferring interactions are only verbal 'remarks'.²¹ Since Gardner's discussion, several academics have attempted to find and refine a term that captures the wide range of sexual behaviours experienced uniquely by women in public places. The table below presents three examples of labels currently being used across the literature. Each label has been accompanied by a supporting summary of its most significant strengths and drawbacks.

¹⁷ Davis (n 6) 152.

¹⁸ Mark Townsend, 'Priti Patel's fury as Johnson blocks public sexual harassment law' *The Guardian* (London, 9 October 2021) <<https://www.theguardian.com/world/2021/oct/09/priti-patel-johnson-blocks-public-sexual-harassment-law-home-office-pm-offence?msclkid=818ea056b05111ec9d523ad1f8e5892a>> accessed 23 May 2023.

¹⁹ Elizabeth Kissling, 'Street Harassment: The Language of Sexual Terrorism' (1991) 2 *Discourse Soc* 451.

²⁰ Carol Brooks Gardner, 'Passing By: Street Remarks, Address Rights, and the Urban Female' (1980) 50 *Sociol Inq* 328.

²¹ Kissling (n 19) 457.

Term	Strengths	Drawbacks
Street Harassment	<ul style="list-style-type: none"> • Powerful ‘social currency’²² as clearly understood by society — clarity may have rule of law advantages based on the principle of legality. • Dominant term used across academic work, for example, by feminists like Fileborn,²³ Bowman²⁴ and Kissling.²⁵ • Leaves the nature of the harassment open to interpretation by the victim — it is not confined by the explicit label of ‘sexual’. • Wide understanding of what conduct would amount to ‘harassing’. 	<ul style="list-style-type: none"> • However, ‘harassment’ ‘predefines the experience and narrows the range of possible responses’²⁶ due to its association with the existing harassment framework. • The term ‘street’ connotes a spatial boundary as to where this type of conduct is perpetrated. This risks excluding semi-public places, like bars and clubs. • ‘Street’ also ‘marks a separation between physical and non-physical space’.²⁷ PSH can be perpetrated in an online environment and is not limited to physical locations.

²² Bianca Fileborn, ‘Mapping Activist Responses and Policy Advocacy for Street Harassment: Current Practice and Future Directions’ (2021) 28 *Eur J Crim Policy Res* 99.

²³ *ibid.*

²⁴ Cynthia Grant Bowman, ‘Street Harassment and the Informal Ghettoization of Women’ (1993) 106 *Harv L Rev* 517.

²⁵ Kissling (n 19).

²⁶ Vera-Gray (n 9) 11.

²⁷ *ibid.*

Men's Stranger Intrusions	<ul style="list-style-type: none"> • Using the term 'intrusion' shifts attention from the substance of the act to the deliberateness of the practice²⁸ — this is advantageous as less value is ascribed to the subjective experience of the victim. 	<ul style="list-style-type: none"> • 'Intrusion' infers a lesser degree of seriousness than 'harassment'.²⁹ • An inferred lower degree of seriousness may mean victims are less likely to report encounters. • Connotes the idea that it can only be perpetrated by a male — not always the case.
Public Sexual Harassment	<ul style="list-style-type: none"> • Depicts both the nature (public and sexual) and impact (harassment) of the conduct. • The term supporting the current social movement campaigning for criminalisation in England and Wales.³⁰ • Similar advantages with 'harassment' as the public are likely to know what behaviours amount to this standard. 	<ul style="list-style-type: none"> • Similar difficulties with associating the harassment framework. • Inclusion of 'sexual' may present interpretational issues if behaviours are not explicitly sexual.

²⁸ *ibid* 15.

²⁹ *ibid* 11.

³⁰ 'Our Problem' (*Our Streets Now*, 2023) <<https://www.ourstreetsnow.org/our-problem>> accessed 23 May 2023.

There is strong evidence to support the argument that ‘street harassment’ should be the obvious choice of vocabulary. However, the existing wide use and understanding of ‘street harassment’ presents significant disadvantages. It may be difficult to refine the clarity of a widely used old term, rather than increasing the popularity of an existing term that functions effectively. As there is already a strong academic agreement³¹ on drawbacks of ‘street harassment’, it seems challenges would lie with removing it from colloquial language. On the other hand, Vera-Gray’s proposal of ‘men’s stranger intrusions’³² is similarly problematic. Although ‘intrusion’ can lower the conduct threshold (‘one does not necessarily have to experience the act as intrusive for it to be an intrusion’³³) it fails to recognise the importance of experiencing the encounter as ‘an intrusion’ for the purposes of reporting. Consequently, this article argues that ‘public sexual harassment’ holds the most hope as legal terminology. By favouring ‘public’ as a spatial indicator, the term encompasses all shared spaces that can be accessed by the public. Additionally, it is significantly important to state the sexual nature of attacks in the label. If other motivating factors such as race, were captured under PSH it would take away from its core sexual principle.³⁴ It could also intersect with existing laws attempting to punish similar conduct of a separate nature, like hate crimes — although this would be something that could operate alongside a PSH law to combat attacks that occur at the intersection. Therefore, ‘public sexual harassment’ will be the only term used for the purposes of this article and the label recommended for a specific offence.

2.3 Formulating a Definition

PSH can be perpetrated verbally, non-verbally in the form of gestures,

³¹ Vera-Gray (n 9) 10.

³² *ibid.*

³³ *ibid* 12.

³⁴ Sonja Arndt, ‘Street Harassment: The Need for Criminal Remedies’ (2018) 29 *Hastings Women’s LJ* 81.

or virtually, using online platforms as a forum of perpetration. The conduct can range from low-level degrading comments about, for example, a person's appearance, to sexual propositioning that, can amount to threats of sexual violence. However, such conduct also has different degrees of impact based on who is targeted and how they feel about the encounter. Consequently, PSH itself is very difficult to define and incorporate all women's experiences.³⁵

As early as 1980, characteristics of PSH have circled the literature in search of finding commonality in an overarching definition. Bowman was one of the first to embark on this process. She identified six defining characteristics of PSH: the targets of street harassment are female, the harassers are male, the harassers are unacquainted with their targets, the encounter is face to face, the forum is a public one and the content of the speech is not intended as public discourse.³⁶ Bowman's characteristics have heavily influenced subsequent academic definitions; however, this article proposes that her defining characteristics are outdated and do not reflect the modern operation of PSH. Instead, favour is directed toward Arndt's characteristics of PSH. She proposes that: all forms of PSH must occur in a public place, must not be limited by gender, be explicitly, or implicitly sexual and, be unwelcome.³⁷ Arndt's characteristics of PSH operate better than Bowmans as first, they appropriately capture the importance of a *sexually* motivated attack (as previously discussed). They also reflect the importance of a non-gendered definition to avoid exclusionary applications as while this article focuses on women as the key vulnerable group, experiences that satisfy PSH's definition should not be undermined as a result of gender identity. The intersection of PSH and gender is a discussion beyond the scope of this article but is a point interesting to raise nonetheless. Additionally, Arndt's characteristics

³⁵Tiffanie Heben, 'A Radical Reshaping of the Law: Interpreting and Remediating Street Harassment' (1994) 4 S Cal Rev L & Women's Stud 183, 188.

³⁶ Bowman (n 24) 323.

³⁷Arndt (n 34) 92.

capture the unwanted nature of PSH which explicitly characterises it as sexual violence. According to Kelly, sexual violence exists as a continuum.³⁸ Consequently, Desborough emphasises how placing PSH on this continuum is important to embed its consciousness directly within the scope of other sexual crimes taken more seriously.³⁹ By utilising the characteristics proposed by Ardnt, this article suggests the following definition best captures the nature of PSH.

The definition of PSH is as follows:

Unwanted and unconsented words or actions, that are explicitly or implicitly sexual⁴⁰ and directed at a specific person in a place accessible to the public. The words or actions displayed must create an “intimidating, hostile, degrading, or offensive environment⁴¹ for the targeted person.”

This definition addresses the issues of spatial boundaries and the subjectivity of impacts to propose a comprehensive explanation of what behaviours are intended to be covered by the label of PSH. By stating that the forum of perpetration must be one accessible to the public rather than public in nature, this definition captures behaviour committed in public, semi-public and online environments. Additionally, the inclusion of a necessary effect ensures that encounters are *not* captured by this definition if the victim does not perceive the behaviour to create the required environment. To conclude, although this section has identified what PSH is, it also emphasises the complex and dynamic nature of perpetration, reinforcing how this contributes to the problem itself.

³⁸ Liz Kelly, *Surviving Sexual Violence* (Minneapolis University of Minnesota Press 1993).

³⁹ Karen Desborough, ‘The Global Anti-Street Harassment Movement’ (DPhil thesis, University of Bristol 2020) 51.

⁴⁰ Ardnt (n 34) 92.

⁴¹ Equality Act 2010 (EA 2010), s 26(2)(a).

3 Crime, not Compliment: Justifying the use of Criminal Law

3.1 Theories of Crime

The rationale for the existence of criminal law is embedded in our moral conceptions of wrongdoings and the desire to regulate behaviour. By identifying the behaviours that society judges to seriously violate our social interests,⁴² we deter engagement for fear of punishment and public condemnation. Subsequently, it can be argued that by attaching a criminal label to PSH, effective responses to the social epidemic will be generated. However, to uphold the integrity of criminal law, justification for such a label must be established. There is no ‘test’ to discover whether a behaviour should be criminalised. Consequently, we rely on numerous complex philosophical, criminological and sociological theories to identify what *should* amount to a crime.

To present a clear argument for such a complex and contested issue, this article focuses on the leading principles of harm and wrongfulness. This reflects the consensus among modern theorists of the importance of these two principles as the origin for making an activity criminal. Although accompanying principles have been debated, such as Joel Feinberg’s offence principle,⁴³ a stronger argument is embedded in harm and wrongfulness due to a wider acceptance of their substance and less controversial critiques of their completeness.

3.2 Harm

For the law to be able to deter conduct and fulfil its regulatory function, strong social disapproval must be associated deeply with a behaviour.

⁴² Nicola Lacey and Lucia Zedner, ‘Criminalization: Historical, Legal, and Criminological Perspectives’ in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (6th edn, OUP 2017) 64.

⁴³ Joel Feinberg, *The Moral Limits of the Criminal Law: Volume 2: Offense to Others* (OUP 1985).

Commonly, disapproval is intensified when an act has a clear victim, because society is sensitive to harm as a measure of seriousness. Using harm as an indicator for criminal behaviour was famously articulated by John Stuart Mill and deemed ‘the harm principle’.⁴⁴ His principle argues that harm is a necessary characteristic of crime and that justification for limiting liberty, through criminal punishment, is embedded solely in preventing this harm.⁴⁵ This principle tells us that harm is a necessary characteristic of criminality. Therefore, by proving that PSH generates harm, and that the level of harm generated by PSH is to an extent that should engage criminal law, the proposal of PSH as a crime can be justified.

Mill’s work paints an ambiguous picture of what constitutes harm under his principle, as such, this article looks further afield to define harm. In academia, Fienberg has argued that harm is a ‘thwarting, setting back or defeating of an interest’,⁴⁶ that has grave implications for our well-being and prospects. In the courts, Lynsky J defined the harm requirement for actual bodily harm⁴⁷ to incorporate ‘hurt or injury calculated to interfere with the health or comfort of the victim’.⁴⁸ When reflecting on these perspectives, two key characteristics of harmful conduct can be identified. First, an interference with personal interests and second, an interference of such nature that has an adverse effect.

It is rational to assume that health, both physical and mental, are of significant interest to the average person. Therefore, this article submits that PSH satisfies the harm requirement of this principle because it interferes adversely with physical *and* mental health. From existing data on the effects of PSH, it is clear most harm manifests itself psychologically. For many women, experiences of PSH can be directly

⁴⁴ John Stuart Mill, *On Liberty* (Longmans, Green and Co 1859).

⁴⁵ *ibid.*

⁴⁶ Feinberg (n 43) 33.

⁴⁷ Offences Against the Person Act 1861, s 47.

⁴⁸ *R v Miller* [1954] 2 QB 282, 285.

related to PTSD symptoms along with depression and anxiety.⁴⁹ Carretta has identified a clear positive correlation between ongoing exposure to PSH and PTSD symptoms, brought on through a series of traumatic encounters throughout a woman's lifetime.⁵⁰ It can be deduced that psychological injury of this nature will be considered appropriate to constitute a legal response as it already exists as a standard of harm under existing offences, like assault. In *R v Ireland*,⁵¹ the harm generated from repeated, silent phone calls amounted to assault because of psychological damage. Significantly, Lord Goff stated that the defendant's repetitive use of silence was used as 'a means of conveying a message to his victims'⁵² and that it was the fear of immediate violence⁵³ which amplified the level of harm. If we apply this standard to instances of PSH, there are similarities in perpetration traits. Taking prolonged staring as an example; it is clear that the perpetrator is conveying a message to the victim, but it is unknown whether this message will amount to anything more serious. Thompson says that because women can't determine the motive behind each encounter, they often view *all* confrontations from men on the street as potential threats that could end dangerously.⁵⁴ Consequently, this ongoing fear of violence demonstrates one way in which harm manifests itself, psychologically, through PSH.

⁴⁹ Jenny Lincoln, 'What Works for Ending Public Sexual Harassment' (*Plan International*, 2021) 17 <<https://plan-uk.org/file/what-works-for-ending-public-sexual-harassment-full-report/download?token=wtUTx1DM>> accessed 22 May 2023.

⁵⁰ Rachel Carretta and Dawn Szymanski, 'Stranger Harassment and PTSD Symptoms: Roles of Self-Blame, Shame, Fear, Feminine Norms, and Feminism' (2019) 82 SR 525, 526.

⁵¹ [1998] AC 147; *R v Burstow* [1997] UKHL 34.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ Deborah M Thompson, 'The Woman in the Street: Reclaiming the Public Space from Sexual Harassment' (1994) 6 Yale JL & Feminism 313, 321.

Fear of violence can diminish a person's ability to make free and unintimidated choices about their lifestyle. This undoubtedly encroaches into human rights territory and leads to the proposition that PSH also generates harm by interfering with personal interests that are protected by legally enforceable rights. This perspective was also taken by Hörnle who proposes a rights-centred extension of the harm principle.⁵⁵ This article's agreement with Hörnle's perspective is cut short when discussing *which* rights violations should justify criminalisation. Hörnle states that his notion of rights is intended to include rights justified in political philosophy, like freedom from humiliation, and not those granted in positive law.⁵⁶ However, this article agrees with Case's point that basing criminalisation on violations of philosophical rights may result in minor instances being criminalised.⁵⁷ Consequently, the following discussion will be curtailed to potential violations of legal rights.

The specific rights engaged by PSH are dependent on the context and extent of the intrusion. For the purposes of this chapter, focus will centre on potential rights interferences with Article 8 of the Human Rights Act 1998. Although this article acknowledges that potential rights violations do not end here, it proposes that the strongest case for interference can be made through exploring the operation of Article 8⁵⁸ in particular. Article 8's⁵⁹ engagement with PSH is grounded by the extension of 'private life'⁶⁰ protections into the 'psychological integrity of a person'.⁶¹ As being in a *public* place does not diminish the

⁵⁵ Tatjana Hörnle, 'Theories of Criminalization' (2014) 10 *Crim Law Philos* 301.

⁵⁶ *ibid.*

⁵⁷ Steve Case and others, 'What is Crime?' in Steve Case and others (eds), *The Oxford Textbook on Criminology* (2nd edn, OUP 2021) 28.

⁵⁸ Human Rights Act (HRA) 1998, art 8.

⁵⁹ *ibid.*

⁶⁰ *ibid.*, s 1.

⁶¹ *Pretty v United Kingdom* (2002) 35 EHRR [61], [62].

operation of *private* life protections,⁶² it follows that the ‘psychological beating’⁶³ experienced through PSH should amount to an interference with personal integrity and subsequently, employ Article 8.⁶⁴ Although the essential purpose of this article⁶⁵ is negative and aims to prevent public authorities from interfering with private life, it may also ‘require states to take positive steps’⁶⁶ in order to ensure that private life is respected, steps which extend to intrusions that come from individuals themselves.⁶⁷ Consequently, when instances of PSH impede Article 8,⁶⁸ the state should step in to provide legal remedies. If the law functions properly, these legal remedies could reduce PSH’s associated harms by providing a greater range of protection for victims of these unjustified and malicious attacks.

3.3 Wrongfulness

Herring proposes that ‘it is not the causing of the harm alone that justifies criminalisation, but the wrongfulness of causing the harm’.⁶⁹ Establishing wrongfulness is an important element to incorporate into the justifications for criminal labelling as it reflects the function of the criminal law as a moral regulator. In Simester and Von Hirsch’s analysis of wrongfulness, they propose that the ‘necessity thesis’⁷⁰ best captures the essence of wrongfulness. This states that ‘prohibition can

⁶² Howard Davis, ‘Article 8: Right to Respect for Private and Family Life’ in Howard Davis (eds), *Human Rights Law Directions* (5th edn, OUP 2021) 319.

⁶³ Bowman (n 24) 537.

⁶⁴ HRA 1998, art 8.

⁶⁵ HRA 1998, art 8.

⁶⁶ Davis (n 62) 313.

⁶⁷ *X and Y v The Netherlands* (1986) 8 EHRR 235 [23].

⁶⁸ HRA 1998, art 8.

⁶⁹ Jonathan Herring, ‘Basic Concepts in Criminal Law’ in Jonathan Herring (eds), *Criminal Law: The Basics* (Taylor & Francis 2009).

⁷⁰ AP Simester and Andreas Von Hirsch, ‘Wrongfulness and Reasons’ in AP Simester and Andreas Von Hirsch (eds), *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing Ltd 2011) 22.

be justified only when the action is morally wrongful'.⁷¹ Following this proposition, this article argues that PSH is morally wrong and therefore, by virtue of the Necessity Thesis,⁷² should be prohibited.

To investigate what amounts to morally wrong behaviour, this article will utilise the theory of legal moralism. This theory justifies the prohibition of certain behaviours based on the collective societal judgement that it is immoral.⁷³ Therefore, if it can be proved that the collective judgement of society is that PSH amounts to immoral behaviour, then we can deem it wrongful and more deserving of criminalisation. Devlin has proposed that the standard of the 'reasonable man' can be utilised to assess immorality.⁷⁴ When applying Devlin's proposition to the context of PSH, it becomes more suitable to follow Bowman's suggestion of the standard of the 'reasonable women'⁷⁵ to properly reflect how the act itself is experienced, but the premise of what both academics are saying remains the same.

PSH is immoral because the reasonable woman would perceive it to be more than deviance. Deviance can be defined as a behaviour which violates social norms but is not legally controlled. The key difference between crime and deviance is that while crime is defined and limited by law, deviance is in the eye of the beholder — what one person may see as deviance, another may not.⁷⁶ The #MeToo Movement was utilised by Case to highlight differences in what some of society deem acceptable sexual contact.⁷⁷ The 'reasonable women'⁷⁸ would not deem most of the conduct associated with #metoo as acceptable, reflecting the growing consensus that this behaviour is no longer

⁷¹ *ibid* 23.

⁷² *ibid*.

⁷³ Case and others (n 57) 38.

⁷⁴ Patrick Devlin, *Morals and the Criminal Law* (Jerusalem 1965) 185.

⁷⁵ Bowman (n 24) 554.

⁷⁶ Case and others (n 57) 35.

⁷⁷ *ibid* 33.

⁷⁸ Bowman (n 24) 554.

‘complimentary’. Legal shifts to reflect social standards of wrongfulness can be observed in the past, for example when marital rape was criminalised. Therefore, if it now follows that society collectively judges PSH to extend beyond deviance it can be deemed morally wrongful and deserving of criminalisation.

3.4 Challenging Complimentary Connotations

The argument that PSH is no longer deviant and instead should be a crime, is an adjustment still likely to be met with hostility. PSH is interpreted differently by different women. Behaviours, such as catcalling, are not always perceived as negative, and as such, not considered harmful nor wrong. Oshynko highlights how some women have described PSH as ‘flattering and empowering’.⁷⁹ Such an observation is supported by Heben who emphasises that women, who are often heterosexual, perceive PSH to be a response to their level of attractiveness.⁸⁰ Therefore, some believe that PSH is a ‘linguistic inflation’⁸¹ of flirtatious and playful behaviour. However, this article strongly sides with the belief of Bowman who emphasises that the harm experienced by some women, should outweigh the pleasure felt by others.⁸² By doing so, the opinions of this contrasting category of women are not undervalued, but instead, considers the general utilitarianism perspective of harm and wrongfulness in this context. Criminalising PSH would benefit the greatest number of people positively.

⁷⁹ Norma Anne Oshynko, ‘No Safe Place: The Legal Regulation of Street Harassment’ (LLM thesis, University of Saskatchewan 2002) 42.

⁸⁰ Heben (n 35) 189.

⁸¹ Celia Walden, ‘In the Context of Violence against Women, Can Wolf-Whistling Be Called Evil?’ *The Telegraph* (London, 23 May 2022) <<https://www.telegraph.co.uk/columnists/2022/05/23/context-violence-against-women-can-wolf-whistling-called-evil/>> accessed 23 May 2023.

⁸² Bowman (n 24) 543.

4 Analysing the Effectiveness of the Current Legal Framework

4.1 Existing Laws and their Limits

Many have argued that current law is not fit to respond to all instances of PSH.⁸³ They identify that as a result, PSH often falls through the legislative cracks, essentially labelling these behaviours ‘legal’ and reinforcing their acceptability. The Government has repeatedly argued that there are several offences already in place which capture notions of PSH when circumstances allow — but should this be the case? How can we expect the criminal justice system to be functioning effectively when the only victims able to properly remedy their harms are those whose case fits the ‘ideal’ circumstances for a successful prosecution? Consequently, this section will focus on how we can or (as it will be concluded) cannot use existing laws to prosecute most instances of PSH. The value of this investigation is that by establishing that present laws are unfit to respond to certain instances of PSH, this discourse can confirm that reform is needed.

In June 2021, Victoria Atkins⁸⁴ made the following statement while addressing the House of Commons on the matter of introducing a specific offence of ‘street sexual harassment’.⁸⁵

I wish to correct some impressions that might exist.
While there is not an offence of street harassment
— or, indeed, of sexual harassment — a number of

⁸³ Rubie Harrington, Interview with Dexter Dias QC and Dr Charlotte Proudman, (Plan International UK, 13 July 2021).

⁸⁴HM Government, ‘Victoria Atkins MP’ (*GOV.UK*) <<https://www.gov.uk/government/people/victoria-atkins>> accessed 23 May 2023.

⁸⁵ PBC Deb (Bill 5) 22 June 2021, cols 648–54.

existing laws make harassment illegal, including where such behaviour occurs in a public place.⁸⁶

The laws referred to in this statement are the Protection from Harassment Act 1997 (PHA), the Public Order Act 1986 (POA) and the Sexual Offences Act 2003 (SOA). Following Atkins' declaration, the College of Policing produced a guidance document⁸⁷ outlining all the relevant offences for police officers to utilise when faced with instances of PSH. These ranged from the offences found in the legislation outlined above, to assault, outraging public decency and public nuisance.⁸⁸ If government is using these offences to justify that a specific offence is unnecessary, it should follow that these offences, in particular, would have the most potential for successful application. Therefore, attention will be directed to our ability to prosecute PSH under harassment and sexual offences frameworks.

4.2.1 PSH as Harassment

Harassment framework can be found under both the PHA⁸⁹ and the POA.⁹⁰ Both statutes contain several offences which make harassment in a public place, illegal.⁹¹ Additionally, a proportion of these offences also prohibit higher level harassment conduct which causes, or is likely to cause, fear of violence.⁹²

Offences contrary to the POA relate to 'threatening, abusive'⁹³ or

⁸⁶ *ibid* col 652.

⁸⁷ 'Street Harassment' (*College of Policing*, 15 December 2021) <<https://www.college.police.uk/guidance/violence-against-women-and-girls-toolkit/street-harassment>> accessed 23 May 2023.

⁸⁸ *ibid*.

⁸⁹ Protection from Harassment Act 1997 (PHA 1997).

⁹⁰ Public Order Act 1986 (POA 1986).

⁹¹ PHA 1997, s 2; POA 1986, s 4A, s 5.

⁹² PHA 1997, s 4; POA 1986, s 4.

⁹³ POA 1986, s 5(1)(a); s 4A(1)(a).

‘insulting’⁹⁴ words or behaviour that intentionally causes harassment, alarm, or distress (section 4A⁹⁵) or is likely to (section 5⁹⁶) or, causes another to fear immediate violence (section 4⁹⁷). These offences are rarely utilised in the context of one-on-one encounters as the act itself was designed to capture previous common law offences relating to protests and riots,⁹⁸ but nonetheless, what it prohibits is still applicable in this context.

Comparable conduct is caught by the PHA. The relevant offences found under this statute criminalise perpetrators who pursue a course of conduct amounting to harassment⁹⁹ or, pursue a course of conduct which puts the victim in fear of violence.¹⁰⁰ Consequently, when considering the basic substance of behaviours associated with PSH, it seems these offences *should* present a compelling argument for the utilisation of established laws. However, the extent to which they *can* be utilised, requires further evaluation.

There are two characteristics of harassment offences, shared with some instances of PSH, that make prosecutions possible. The first characteristic is the ability for conduct to be applicable when exhibited in public places. This contrasts with the sexual harassment framework found under the Equality Act 2010¹⁰¹ which limits its scope to workplace environments. The second, is the comparable degrees of required harm for the satisfaction of certain *actus reus* elements across both legislations. The required impact of conduct ranges from causing

⁹⁴ *ibid* s 4(1)(a).

⁹⁵ *ibid* s 4a.

⁹⁶ *ibid* s 5.

⁹⁷ *ibid* s 4.

⁹⁸ David Ormerod and Karl Laird, ‘Offences Against Public Order’ (additional chapter) in David Ormerod and Karl Laird (eds), *Smith, Hogan and Ormerod’s Criminal Law* (16th edn, Oxford University Press 2021) 2.

⁹⁹ PHA 1997, s 2(1).

¹⁰⁰ *ibid* s 4(1).

¹⁰¹ Equality Act (EA) 2010, s 26(2)(a).

of ‘alarm and distress’¹⁰² to the fear, and belief of immediate violence¹⁰³ which reflects the spectrum of severity on which PSH operates. Therefore, the combined presence of these shared attributes places PSH well within the reach of these laws. However, difficulties begin to arise when attempting to harmonise PSH in line with the required modes of perpetration and their accompanying intent elements.

There are three general, substantive limitations that render existing harassment framework unable to fully address PSH. The first reason is that due to ingrained normalisation of the phenomena, it is more likely that police and prosecutors will not believe PSH achieves the level of severity needed to fulfil the conduct threshold required. This will be demonstrated by analysing the *actus reus* of section 4¹⁰⁴ and section 5¹⁰⁵ of the POA. For successful prosecution of these offences, conduct must be established as being ‘threatening, abusive’,¹⁰⁶ ‘insulting’,¹⁰⁷ or ‘disorderly’.¹⁰⁸ While reaching this threshold should seem simple, the trivialisation of PSH will mean it is significantly difficult. Feminists often used critical legal studies (CLS) to explain this problem.¹⁰⁹ CLS theorises that legal thought originates with the dominant class (the heterosexual male) because it is in their interests to bring their opinions into being.¹¹⁰ This results in the law possessing an inherent social bias

¹⁰² Crown Prosecution Service, ‘Stalking and Harassment’ (CPS, 23 May 2018) <<https://www.cps.gov.uk/legal-guidance/stalking-or-harassment>> accessed 23 May 2023.

¹⁰³ POA 1986, s 4(1).

¹⁰⁴ *ibid* s 4

¹⁰⁵ *ibis* s 5.

¹⁰⁶ *ibid* s 4a(1)(a); s 5(1)(a).

¹⁰⁷ *ibid* s 4(1)(a).

¹⁰⁸ *ibid* s 4A(1)(a); s 5(1)(a).

¹⁰⁹ Denise Brunson, ‘Legal Solutions to Street Sexual Harassment in the #MeToo Era’ (2018) 39 *Atlantis* 40, 44 <<https://www.erudit.org/en/journals/atlantis/2018-v39-n2-atlantis04853/1064071ar/>> accessed 22 May 2023.

¹¹⁰ Peter Gabel, ‘Reification in Legal Reasoning’ in James Boyle (eds), *Critical Legal Studies* (Dartmouth Publishing 1992).

as connectedness would otherwise afford less powerful communities, like women, influence over legal reasoning.¹¹¹ Through the lens of this theory, PSH will struggle to surpass this conduct threshold as a consequence of legal reasoning being dictated by the consciousness of the heterosexual male.¹¹² Lord Reid has stated that no further explanation of the terms ‘threatening, abusive, disorderly’¹¹³ or ‘insulting’¹¹⁴ is required as ‘an ordinary, sensible *man* knows (threatening, abusive, insulting, or disorderly conduct) when he sees or hears it’.¹¹⁵ Therefore, we are once again relying on the male perception of harm to judge an encounter that could rarely ever be experienced in a similar manner. This limitation is well reflected in the Canadian case of *R v Burns*¹¹⁶ which captures the reality of most PSH prosecutions in western, common-law systems. In this case, a criminal harassment charge, relating to an incident of catcalling and sexual remarks, was successfully appealed. The court’s reasoning for this decision was that ‘although the complainant justifiably felt upset and scared by the appellant’s conduct’,¹¹⁷ they did not see it as rising to a level of intimidation that should instil a sense of fear.¹¹⁸ If we apply the premise of this reasoning to public order offences, it is likely that the male perception of frivolousness regarding PSH’s associated conduct, will mean these behaviours will struggle to ever reach the threshold of severity required for a successful prosecution.

The second reason is that intent, beyond reasonable doubt, is extremely difficult to prove due to wider societal impressions of acceptability. This limitation is reflected across all the offences discussed because there is no offence with strict liability, however, this article suggests

¹¹¹ Brunsdon (n 109) 44.

¹¹² *ibid.*

¹¹³ POA 1986, s 4A(1)(A); s 5(1)(a).

¹¹⁴ *ibid* s 4(1)(a).

¹¹⁵ *Brutus v Cozens* [1972] 2 All ER 1297, 1300.

¹¹⁶ [2007] OJ 5117, 2007.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

that the biggest challenge exists under section 5 POA.¹¹⁹ The *mens rea* of section 5 is an intention for the conduct to be threatening or abusive¹²⁰ or an awareness that it may be.¹²¹ Nonetheless, if the defendant can prove his conduct was reasonable,¹²² he may have a defence against the victim's claims of harassment. This standard of reasonableness will be problematic for those attempting to bring legal action under section 5,¹²³ as PSH is often intended to be complimentary, which by current societal standards, will more than likely be deemed reasonable. In her investigation into why men engage with PSH, Kearl highlights that men often believe their actions are an appropriate way to greet a woman and cannot comprehend the bigotry of their claims that all women enjoy the attention.¹²⁴ She recalls the story of interviewing a man who only when pressed for deeper consideration of his actions, realised the realistic outcome of his past behaviours.¹²⁵ Therefore, it becomes very difficult to establish that conduct was intended to be 'threatening and abusive'¹²⁶ when the reality is that the normalisation of PSH is so ingrained in society that even an awareness of such an outcome is scarce among perpetrators.

The third reason is that the legislation is being 'shoehorned' into the rubric of PSH when they are designed for different purposes. Activist group, Plan Intentional, have openly condemned the forced injection of PSH into these frameworks stating it misses the crucial sexual element of PSH's definition, which distinguishes it significantly from existing

¹¹⁹ POA 1986, s 5.

¹²⁰ *ibid* s 6(4)

¹²¹ *ibid*.

¹²² *ibid* s 5(3)

¹²³ *ibid* s 5

¹²⁴ Holly Kearl, 'Educating Men and Engaging Men Allies' in Holly Kearl (ed), *Stop Street Harassment Making Public Places Safe and Welcoming for Women*. (Createspace Independent Publisher 2012) 132.

¹²⁵ *ibid* 133.

¹²⁶ POA 1986, s 6(4).

offences covered by these acts.¹²⁷ Due to these differing purposes, PSH often does not fulfil the nature of required conduct. The main example of this can be seen in all relevant crimes found under the PHA. The ‘course of conduct’¹²⁸ element of PHA offences requires the behaviours to be exhibited on at least two occasions.¹²⁹ Therefore, despite PSH being a repetitive phenomenon throughout a woman’s life, this means most cases of PSH will not be covered by these offences as the act is perpetrated by different people in one-off encounters.

4.2.2 PSH as a Sexual Offence

The most relevant sexual offence when attempting to prosecute PSH is section 3 of the SOA — sexual assault.¹³⁰ Section 3¹³¹ states that a person commits an offence if, they intentionally touch another person,¹³² the touching is of an unconsented¹³³ sexual nature,¹³⁴ and they do not reasonably believe that the other person consents.¹³⁵ This offence can successfully capture, and respond to, behaviours like groping as it covers sexual and unconsented physical contact. Groping normally includes the touching of another’s private bodily areas, such as the breasts or buttocks, without prior consent to doing so. Therefore, when instances of PSH are explicitly sexual and physical in nature, this law, generally, operates to an extent which is effective to deal with the problem.

¹²⁷ ‘Ending Public Sexual Harassment: The Case for Legislation’ (*Plan International*, 2020) 13 <<https://plan-uk.org/file/ending-public-sexual-harassment-the-case-for-legislationpdf/download?token=YINyy0fW>> accessed 23 May 2023.

¹²⁸ PHA 1977, s 2(1); s 4(1).

¹²⁹ *ibid* s 7(3).

¹³⁰ Sexual Offences Act 2003 (SOA 2003), s 3.

¹³¹ *ibid*.

¹³² *ibid* s 3(1)(a).

¹³³ *ibid* s 3(1)(b).

¹³⁴ *ibid* s 3(1)(c).

¹³⁵ *ibid* s 3(1)(d).

Difficulties begin to arise when dealing with behaviours of an implicit sexual nature. If we define groping as a spectrum of unwanted physical contact,¹³⁶ ranging from a hand on a shoulder to the grabbing of breasts, there seems to be a discrepancy as to when groping crosses over into the sexual territory intended to be covered by section 3.¹³⁷ This boundary of ‘sexual nature’ is defined by a jury¹³⁸ and so dependent on public conceptions of sexuality. This article suggests that sexuality collides with publicly harassing behaviours, such as rubbing against someone, through its wider use as a form of sexual terrorism. Kissling argues that, explicitly sexual or not, PSH produces a ‘sexually terroristic culture’¹³⁹ in which women are reminded of their subordinate sexual status. The act itself may not be explicitly sexual, but its mere existence constitutes sexual terrorism as the victim is subjected to decisions by a man, for their personal satisfaction, which dominates over a woman’s decision to not be touched. If this relationship is not understood by a jury, some instances of PSH will fall through the cracks of section 3.¹⁴⁰

Of the limited instances of PSH that are reported, nearly 70% result in inaction.¹⁴¹ Without a significant number of successful prosecutions, the preventative, protective, and punishing functions of the criminal law will struggle to be upheld. Assuming a victim is able to report their experience, and identify their attackers, it is likely most experiences of PSH will not be investigated. Despite the damaging impact on mental health and dignity, the law is unable to confidently redress harm as gaps stretch across both the *actus reus* and *mens rea* requirements of all the

¹³⁶ Tom De Castella, ‘The Difficulty of Dealing with Groping’ (*BBC News*, 28 February 2013) <<https://www.bbc.co.uk/news/magazine-21573043>> accessed 23 May 2023.

¹³⁷ SOA 2003, s 3.

¹³⁸ Nicola Monaghan, ‘Sexual Offences’ in Nicola Monaghan (ed), *Criminal Law Directions* (6th edn, Oxford University Press 2020) 214.

¹³⁹ Kissling (n 19) 456.

¹⁴⁰ SOA 2003, s 3.

¹⁴¹ Lincoln (n 49) 28.

discussed offences. As such, women cannot rely on the law to redress their harms as more often than not, their experiences cannot be legally translated into an applicable offence.

5 A Progressive Reshaping of the Law

5.1 A Significantly Different Offence

Based on the judgment that current law is failing victims of PSH, attention must now turn to what can be done to respond to this problem. As argued throughout this article, the most effective route of response is through the creation of a specific offence of PSH. However, this opinion is not unique. It is shared by 94% of women in the UK¹⁴² along with politicians,¹⁴³ judges¹⁴⁴ and over 470,000 people who signed a petition to make PSH a criminal offence.¹⁴⁵ Consequently, as it is clear the public supports a progressive reshaping of the law, it must be investigated how such an offence may operate. This task is immense and not one able to be fully addressed in this discussion. However, what can be conveyed is why reform should be a specific offence and, based on the evaluation of existing PSH laws in other countries, what could be key to include *if* such an offence was implemented.

Although it has been demonstrated that existing law itself cannot address PSH, the question still pertains as to what makes PSH so

¹⁴² ‘Making Public Sexual Harassment Illegal’ (*Our Streets Now*, 2023) <<https://www.ourstreetsnow.org/crimenotcompliment>> accessed 23 May 2023.

¹⁴³ Alexandra Topping, ‘Public Street Harassment Could Be Made Illegal in England and Wales’ *The Guardian* (London, 20 July 2021) <<https://www.theguardian.com/world/2021/jul/20/public-street-harassment-to-be-made-in-england-and-wales>> accessed 23 May 2023.

¹⁴⁴ Harrington (n 83).

¹⁴⁵ Gemma Tutton and Maya Tutton, ‘Sign the Petition’ (*Change.org*, 2021) <<https://www.change.org/p/make-public-sexual-harassment-a-criminal-offence-in-the-uk>> accessed 23 May 2023.

significantly different that it requires its own offence rather than being addressed through amendments to existing ones. Despite not dismissing the notion that existing offences *could* be amended to capture PSH in their framework, such a decision would fail to reflect the fact that PSH would be a significantly different type of crime. It is perpetrated, uniquely, through isolated attacks that occur for a variety of different reasons and produce a range of impacts on victims. Therefore, simply amending existing offences to ensure they capture *more* instances of PSH would be ineffective. Without being able to address *all* instances of PSH, which would require a radical reshaping of their offence structure, the problem will still prevail. Additionally, to capture PSH under the label of existing offences may be unfair to the defendant and victim by over, or, understating the seriousness of the act. Leverick argues that it can be unfair to label an offender in a particular way because the offence name symbolises the associated degree of condemnation, signalling to society how the offender should be regarded.¹⁴⁶ Therefore, amending existing offences may unfairly label perpetrators as a ‘sexual assaulter’, connoting an unreasonably larger degree of social disapproval compared to a ‘public sexual harasser’. On the other hand, labelling a ‘public sexual harasser’ a ‘public offender’, may, as Horder puts it, give an anaemic conception of what the behaviour might have been.¹⁴⁷ To label a specific offence ‘PSH’ would ensure maximum certainty regarding proportional perceptions of the crime and its accompanying social condemnation. Society would be able to clearly identify what the behaviour is rather than inferring its substances under the ruse of a differently named offence. Heben argues that such awareness may alter public consciousness of the problem, altering what is expected of them as law-abiding citizens and allowing people to ‘unlearn’ their sexist behaviour¹⁴⁸ — an understanding vital

¹⁴⁶ James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 MLR 217, 226.

¹⁴⁷ Jeremy Horder, ‘Rethinking Non-Fatal Offences against the Person’ (1994) 14 OJLS 335, 351.

¹⁴⁸ Heben (n 35) 206.

to reach the goal of changing the behaviour of the harasser.¹⁴⁹ Therefore, a specific offence should more suitably control the social epidemic because PSH is a significantly different type of behaviour compared with existing offences.

5.2 Learning from the French

In post #metoo France, the ‘*Outrage Sexiste*’¹⁵⁰ law was passed, criminalising conduct with a ‘sexual or sexist connotation that either violates dignity because of its degrading or humiliating nature, or creates an intimidating, hostile or offensive situation’.¹⁵¹ The law operates through a system of on-the-spot fines of up to €1500 and has been used over 700 times in its first year of operation.¹⁵² Reflecting on this law’s success, this article identifies several key reasons why the structure of *Outrage Sexiste*¹⁵³ is a prosperous way of addressing PSH. First, on-the-spot fines have the significant advantage of avoiding PSH’s reporting problem.¹⁵⁴ By placing the burden of identification on police, the internal trivialisation of encounters, or fear of reporting, is prevented. Second, fines of such a significant financial value will likely decrease the frequency of perpetration as the potential cost will outweigh the benefits of engaging with PSH. Additionally, the use of fines, rather than any other means of punishment, is balanced proportionately to the level of harm experienced by the victim. Heben argues how legal action of this nature helps to relieve feelings of frustration for the victim by virtue of knowing some action is taking place,¹⁵⁵ rather than having to wait for lengthy prosecution processes.

¹⁴⁹ Bowman (n 24) 574.

¹⁵⁰ Loi Schippa 2018, art 14.

¹⁵¹ *ibid* art 15.

¹⁵² Lauren Chadwick, ‘France Issues More than 700 Fines under New Street Harassment Law’ (*euronews*7, August 2019) <<https://www.euronews.com/2019/08/07/france-issues-more-than-700-fines-under-new-street-harassment-law>> accessed 23 May 2023.

¹⁵³ Loi Schippa 2018, art 15.

¹⁵⁴ Lincoln (n 49) 26.

¹⁵⁵ Heben (n 35) 206.

However, Zadeyeh has identified the relative futility of this law when looking at wider VAWG policy in France. She argues that the wider social climate in France fosters a culture of forgiveness that reinforces notions of acceptability and repeat perpetration.¹⁵⁶ Therefore, what we can learn from ‘*Outrage Sexiste*’¹⁵⁷ is that fines as a mechanism of legal action work effectively if the implementation is supported by a wider network of educational policies to promote an understanding of intolerance.

5.3 Recommendations for a Specific Offence

In June 2021, Labour MP Alex Cunningham proposed the introduction of a ‘street sexual harassment’ offence under the new clause 23 of the Police, Crime Sentencing and Courts Bill.¹⁵⁸ Modelled on ‘*Outrage Sexiste*’,¹⁵⁹ clause 23 possessed several features that would have made it successful. This includes, but is not limited to, affording police the power to give fixed penalty notice (FPN) of up to £1000 for detected instances,¹⁶⁰ the exclusion of behaviours that are physical in nature¹⁶¹ (avoiding cross over with existing laws able to address these behaviours¹⁶²) and the recognition of not forcing legal action on situations where the victim does not experience the conduct as harassing.¹⁶³ However, despite the prospects for functionality, clause 23 was rejected on the grounds that the Government required more time to review research findings to fully understand how the phenomena operates.¹⁶⁴ Although a disappointing outcome for campaign groups and victims alike, such a delay allows for a deeper investigation into the

¹⁵⁶ Sandra Zadeyeh, ‘After #MeToo: France Ignites Its Combat against Sexual and Domestic Violence’ (2021) 29 Tul J Int’l & Comp L 197, 210.

¹⁵⁷ Loi Schippa 2018, art 15.

¹⁵⁸ PBC Deb (Bill 5) 22 June 2021, cols 648–54.

¹⁵⁹ Loi Schippa 2018, art 15.

¹⁶⁰ PBC Deb (Bill 5) 22 June 2021, col 649.

¹⁶¹ *ibid* col 649.

¹⁶² SOA 2003, s 3.

¹⁶³ PBC Deb (Bill 5) 22 June 2021, col 649.

¹⁶⁴ *ibid* col 653.

best offence structure. Aside from a name change to ‘public sexual harassment’, there are two other recommendations this article proposes could add value to the offence outlined in clause 23. Both recommendations have the effect of generating further opportunities for the law to influence a shift in societal norms both through the deterrence imposed by strict liability and the educational element of restorative justice (RJ).

5.3.1 Recommendation 1: Liability Should be Strict

This article recommends that the offence of PSH should be one of strict liability — it should not require proof of *mens rea* in respect of at least one element of the offence.¹⁶⁵ An offence of PSH should have no intent requirement apart from intending to engage with the conduct itself. PSH operates in a very similar way to existing regulatory offences with a strict liability requirement, like road traffic offences. Isolated instances of varying levels of severity place it in a category of offences requiring regulation to diminish prevalence rather than serious criminal punishment. Although this may be deemed a controversial comparison, such a belief is in line with academic consensus regarding the potential structure of a PSH law. Those such as Bowman and Heben have argued that focus should be ‘on the harasser’s objective conduct rather than his intent or the reaction of the target, except to the extent that she must allege the conduct was not welcome’.¹⁶⁶ In Heben’s supportive reasoning for such a decision, she identifies that the legal system often ‘denies injury if the perpetrator did not *think* he was causing injury’.¹⁶⁷ Consequently, she concludes that we should not be diminishing liability based on the premise that the perpetrator did not intend to harm the victim as just because an action may have been intended to be

¹⁶⁵ David Ormerod and Karl Laird ‘Strict Liability’ in David Ormerod and Karl Laird (eds), *Smiths, Hogan and Ormerod’s Text, Cases and Materials on Criminal Law* (13th edn, OUP 2020) 137.

¹⁶⁶ Bowman (n 24) 576.

¹⁶⁷ Heben (n 35) 215.

complementary does not *make* the behaviour a compliment.¹⁶⁸ Additionally, this recommendation is also likely to be accepted by the executive, legislative and judiciary as it follows current precedent. In *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong*,¹⁶⁹ it was emphasised that a presumption of *mens rea* can be dismissed if the law deals with an issue of social concern.¹⁷⁰ Gender equality and the safe protection of women and girls in public is clearly an issue of social concern, as emphasised by the commitment to sustainable development Goal 5 (gender equality).¹⁷¹ Therefore, although a recommendation of strict liability can often be faced with hostility, utilising it for the offence of PSH is proportional to the nature of the behaviour itself and in line with academic and legal standards of justification.

Clause 23 recommends that the *mens rea* state of this offence should be one of knowledge — ‘they know or ought to know it amounts to street sexual harassment’.¹⁷² However, this does not address the problem that men, and often the reasonable person, do not consider the outcomes of their behaviour and therefore, would be unable to judge when it amounts to PSH. Consequently, we are drawn back to the intent issues previously discussed even when the offence is specifically tailored to PSH. Strict liability would address this problem as it would no longer be relevant what intention, or awareness, the perpetrator held with regard to his conduct and instead, focus is instead on the objective substance of the behaviour. By virtue of this standard, it would follow that, men who publicly, sexually, harass women would do so at their own risk.¹⁷³

¹⁶⁸ *ibid.*

¹⁶⁹ [1984] UKPC 17.

¹⁷⁰ *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1, 8.

¹⁷¹ United Nations, ‘The 17 Sustainable Development Goals’ (2015) <<https://sdgs.un.org/goals>> accessed 23 May 2023.

¹⁷² PBC Deb (Bill 5) 22 June 2021, col 649.

¹⁷³ Heben (n 35) 215.

There are two key advantages associated with this outcome for the purposes of regulating PSH.

1. Creating easily proven offence elements promotes more successful prosecutions which generate an effective deterrence mechanism.

Strict liability for PSH would ease the burden of proving intent, or awareness. Such a burden limits prosecution of PSH under existing offences and so by removing such a standard from a specific offence, we increase the likelihood of successful convictions. Consequently, if proving offence elements is easier through the existence of strict liability, perpetrators are more likely to be deterred from engaging with PSH on the grounds they are more likely to be convicted.

2. Encouraging greater vigilance makes women feel safer in public spaces.

Making PSH an offence of strict liability is advantageous because it affords maximum protection to victims by forcing potential perpetrators to have increased caution when attempting to engage with strangers in public. Levenson argues such a standard sends ‘a powerful public statement of legislative intolerance’¹⁷⁴ and affirms ‘society’s interest in being protected from certain conduct’.¹⁷⁵ Consequently, such a standard will make women feel safer in public spaces as they know the law will have no leniency for the intent behind their attacker’s conduct and will therefore, give them more power to hold their attackers accountable.

As a concluding remark, this article does not dismiss the opportunity for this strictness to be altered to that of negligence, or knowledge (as with clause 23¹⁷⁶), in the future. Both standards of liability could be a

¹⁷⁴ Laurie Levenson, ‘Good Faith Defenses: Reshaping Strict Liability Crimes’ (1992–1993) 78 *Cornell L Rev* 401, 422.

¹⁷⁵ *ibid.*

¹⁷⁶ PBC Deb (Bill 5) 22 June 2021, cols 649–48.

good way to approach a specific offence of PSH but only if the reasonable person understands the operation and impacts of PSH. Therefore, if the implementation of strict liability is successful and a general understanding of PSH is improved, this could be something for the Law Commission to investigate, accordingly.

5.3.2 Recommendation 2: Including Restorative Justice Techniques

The cause and consequence relationship between the structure of society and PSH proposes the issue of whether conventional methods of punishment may work for such complex and dynamic behaviours. Fine systems, alone, may have regressive impacts, simply acting as ‘the cost of catcalling’ rather than as a system of social change. Therefore, the question is: can justice be served through a framework that deters conduct, but actually changes societal impressions of PSH? This article argues that restorative justice (RJ) is the answer. Marshall defines restorative justice as ‘a process whereby all parties with a stake in a particular offence collectively, resolve how to deal with the aftermath of that offence and its implications for the future’.¹⁷⁷ Although more favoured¹⁷⁸ is to define such a process by its goal of ‘cementing a common core of ethics and values’.¹⁷⁹ Therefore, this article’s second recommendation is that a specific offence of PSH should be able to accommodate mechanisms of restorative justice, alongside the established system of fines. This could operate by preserving the FPN framework proposed in clause 23¹⁸⁰ but adding an additional requirement for an offender to engage with RJ processes.

¹⁷⁷ Tony Marshall, *Restorative Justice: An Overview* (Home Office Research Development and Statistics Directorate, 1999).

¹⁷⁸ Meredith Rossner, ‘Restorative Justice in the Twenty-First Century: Making Emotions Mainstream’ in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (OUP 2017) 969.

¹⁷⁹ Joanna Shapland, ‘Implications of Growth’ (2013) 20 IRV 111, 124.

¹⁸⁰ PBC Deb (Bill 5) 22 June 2021, cols 649–48.

The main problem with using fines alone is that it deters conduct for fear of punishment, rather than because the act itself is wrong. Consequently, the social circumstances that allow PSH to happen are not addressed and will continue to simmer in the background. As demonstrated in France, to avoid this outcome, supportive educational policy is required to ground laws in legal consciousness. A system of RJ could capture such a requirement from the outset. Fileborn and Vera-Gray have argued that using a traditional criminal justice approach to respond to PSH, is often incompatible with the desired outcome of justice for victims.¹⁸¹ Within their research, they identify that many women feel that education, in particular the need for empathy,¹⁸² is a key site for justice. By the standard of Braithwaite's 'reintegrative shame theory', RJ can contribute to a system in which emotions, such as guilt, remorse and empathy,¹⁸³ can strengthen social bonds and build an internal consciousness that prevents future wrongdoing.¹⁸⁴ Retzinger and Scheff identify that given the opportunity to discuss the conduct in question, acknowledgement of the emotions of both victim and offender can lead to symbolic repatriation and reintegration through an understanding of remorse and forgiveness.¹⁸⁵ Applying Fileborn and Vera-Gray's findings that women want men to understand how PSH makes them feel,¹⁸⁶ it is likely such a process will be of value when attempting to change public attitudes and appropriately remedy victims while remaining proportional to the harm they experience. This combined mechanism of legal response will ensure that offenders

¹⁸¹ Bianca Fileborn and F Vera-Gray, "I Want to Be Able to Walk the Street without Fear": Transforming Justice for Street Harassment' (2017) 25 *Fem Leg Stud* 203, 214.

¹⁸² *ibid* 218.

¹⁸³ John Braithwaite, *Crime, Shame and Reintegration* (CUP 1989).

¹⁸⁴ Rossner (n 178) 976.

¹⁸⁵ Suzanne Retzinger and Thomas Scheff, 'Strategy for Community Conferences: Emotions and Social Bonds' in Burt Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press 1996).

¹⁸⁶ Fileborn and Vera-Gray (n 181) 218.

actually empathise with their victims to catalyse social change and decrease prevalence.

6 Conclusion

The aim of this article was to establish the extent to which criminal law could be utilised to respond to PSH. Based on what has been presented, this article concludes that the criminal law can, and should, be utilised to respond to PSH in the form of introducing a specific offence. Such a response would allow the mechanism of our criminal justice system to flourish, generating favourable changes in attitude towards the behaviours ingrained into our perception of normal life and solving the problems created by this social epidemic.

The combined conclusions of the first two sections of this article demonstrated why criminal law is an appropriate mechanism of response. By examining the definitional complexities associated with PSH, this article highlighted why such difficulties in defining PSH can exacerbate the problem and identified the value of using cohesive language and definitions when responding to PSH. The utilisation of the principles of criminalisation uncovered that PSH possesses key characteristics of criminality and therefore, requires a response from criminal law. By emphasising how women cannot distinguish between encounters that could end up like Sarah Everard's and those which are purely derogatory, it was concluded that the behaviour causes psychological harm on a level that should be considered severe enough to justify criminal action.

The final two sections conclude that a specific offence of PSH presents the best option for reform on the basis that existing law allows PSH to fall through its legislative gaps. Existing law claimed to cover instances of sexual harassment in a public space possesses significant limitations that mean most instances of PSH cannot be captured within their scope. Through applying the discussed limitations to Olivia's story, this article verified that women cannot rely on existing frameworks to remedy their harm because PSH is a significantly different type of offence,

perpetrated in various ways and for different reasons. The final section explains why the best mechanism of response is through introducing a specific offence, rather than amending existing law, and what such an offence could look like. Reflecting on the operation of ‘*Outrage Sexiste*’,¹⁸⁷ this article recommends that an offence of PSH should be one of strict liability and leave space for restorative justice techniques to work alongside a system of fines to encourage a *real* shift in societal norms rather than deterring PSH for fear of punishment.

Further research into the value of a specific offence of PSH should address how it will interact with existing VAWG policy and, understand its operation alongside hate crimes — particularly when the debate of misogyny becoming a hate crime that floats continuously in and out of legal discussion. If such an operation would be compatible, there is no doubt that the implementation of a specific offence of PSH would be a success.

¹⁸⁷ Loi Schippa 2018, art 15.