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Civil Rights Violations = Broken Windows: De Minimis Curet Lex

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CIVIL RIGHTS VIOLATIONS = BROKEN WINDOWS: *DE MINIMIS CURET LEX*

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Abstract

Civil rights violations that appear relatively slight may warrant judicial redress despite their small size; some of them point up important principles. Leaving these violations unremedied may contribute to an ambient lawlessness that can foster bigger harms. A small infringement in this respect resembles the criminological construct of "broken windows," which in its prescriptive form urges governments to view *de minimis* violations as harbingers of more disorder to come.

Using broken windows to understand privately initiated civil rights claims honors a statutory mandate and helps to achieve progressive ends. This application is potentially better than the one that police impose on the street, which has raised concerns about both justice and efficacy. Rendered as a maxim, the precept that this Article commends is *De minimis curet lex*: The law ought to concern itself with some affronts that appear small.

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INTRODUCTION

Maxims of equity, formed in England at the Court of Chancery, perch quaintly today on American jurisprudence.[1] Within contemporary decisional law and legal scholarship, they are historical curiosities.[2] Adages like the hortatory "Whomever seeks equity must do equity,"[3] the descriptive "Equity regards as done that which ought to be done,"[4] the dog-Latin "Qui peccat ebrius luat sobrius,"[5] and the Norman demi-French "Non dat qui non habet"[6] sound like attempts to be funny, rather than doctrines.[7]

De minimis non curat lex—"the law does not concern itself with trifles"—is exceptional among the equity maxims. The ancient phrase still shows up frequently, not only in modern decisional law but also in state statutes and federal regulations.[8] Judges regard *de minimis non curat lex* as limiting their own prerogative: Once they conclude that an asserted interest is trivial, they withhold what the asserters seek. This predilection can relocate what parties fight for in court. Litigants lose when their stance is cast as trivial or when they fail to persuade the judge that their adversary has made a trivial claim. They win when they escape the "trivial" label that their adversary has tried to impose or when they persuade the judge that it is their adversary, not they, who is making a trivial claim.

Concerns with triviality fill many domains of American law, both public and private. The case law occupying this Article studies a portion of the issue. I review decisional law involving plaintiffs who alleged that defendants violated federal antidiscrimination provisions and judges who granted summary disposition against, or reversed a jury verdict for, these plaintiffs by concluding that the infractions were too small or unimportant to warrant redress. This Article uses "small" and "trivial" capaciously to include any reductive judicial view of the wrongful conduct that the complainant experienced: no big deal, not material, an isolated episode or instance, merely mediate or interlocutory rather than ultimate, or not greeted with sufficiently vehement contemporaneous protest.

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1. Jeff Nemerofsky, *What Is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315, 322 (2001–02) (noting the quaintness of these maxims). For the same point in a more jocular vein, see James Grimmelmann, *Koans of Equity*, 58 J. LEGAL EDUC. 472 (2008).

2. J. Stanley McQuade, *Ancient Legal Maxims and Modern Human Rights*, 18 CAMPBELL L. REV. 75, 75 (1996).

3. Linda A. Taylor & David M. Wood, *Equitable Jurisdiction of the Provincial Court of Alberta (Civil Division)*, 35 ALBERTA L. REV. 592, 619 (1997).

4. *Id*.

5. "Sin drunk, pay sober." McQuade, *supra* note 2, at 108 n.61.

6. "You can't give what you haven't got." *Id.* at 108 n.62.

7. Years ago, I spent a summer at a law firm in Delaware, the American state famed for its own chancery court. Summer associates and younger lawyers billing time in the firm's library would sometimes call out facetious chancery maxims of` their own composition. "Equity will not wear brown shoes with a blue suit" is one of the more printable coinages I recall. *See also* Grimmelmann, *supra* note 1 (recounting equity maxims as punch lines).

8. Nemerofsky, *supra* note 1, at 328–30.

"Small" and "trivial" are of course gradable adjectives whose meanings can emerge only in a context.[9] How much is much?[10] As it turns out, "isolated," as judges use the word to modify "incidents" or "episodes," also lacks an absolute definition. It does not mean solitary or unitary but instead too few, or too wan, to impress the decisionmaker-author.[11] *De minimis* has the same gradable, context-dependent function.

De minimis in practice also shows that small things grow big in the right contextual soil.[12] For centuries, judges have taken certain "trifles" seriously indeed. Slight violations of rights in property—especially real property—have gained a respectful hearing in common law courts. The tort of trespass to land retains its medieval dispensation from a general rule that a plaintiff must suffer injury to receive damages.[13] Whenever anyone enters land "against the will of the possessor," wrote one American court in the early 19th century, "the law infers some damage; if nothing more, the treading down the grass or the herbage . . . ."[14] One influential contemporary decision has led federal courts to reject *de minimis* for claims of copyright infringement: any unauthorized use, no matter how small, will entitle the copyright holder to make a claim for redress.[15] Litigants alleging violation of their constitutional rights enjoy shelter from *de minimis* as well.[16]

From the accepted starting point that many property-rights and constitutional-rights claims should not be dismissed or rejected merely because of the small size of violations, I argue in this Article that the law should extend this exclusion, and regard civil rights claims as less entitled to the *de minimis* haven that now offers considerable immunity to wrongdoers. Here "civil rights" means what a noted lexicographer has called "[t]hose rights guaranteed to an individual as a member of society," or "positive legal prerogatives—the right to equal treatment before the law, the right to vote, the right to share equally with other citizens in such benefits as jobs, housing,

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9. James J. Kilpatrick, *Quite an Interesting Question*, BUFFALO NEWS, Aug. 29, 1999, at 5H (explaining that gradable adjectives are those that "the adverbs more, less or very can modify").

10. This question languishes unresolved on WikiAnswers. *See* http://wiki.answers.com/Q/How_much_is_much (reporting no replies).

11. *See* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 499 (1997).

12. *See* Christopher Caldwell, *Some Trifles Do Concern the Law*, FIN. TIMES, July 24, 2009, *available at* www.ft.com (free registration required–search "caldwell and trifles" in principal search query box for "News") (describing the German doctrine of *Bagatelldiebstahl*, or extremely petty theft, for which an employee may be dismissed notwithstanding the strong federal laws protecting employees' rights).

13. The maxim on point here is the non-equity refusal to recognize *damnum absque injuria*. *See* Alabama Power v. Ickes, 302 U.S. 464, 479 (1937) (quoting the maxim).

14. Dougherty v. Stepp, 18 N.C. 371, 371 (1835). For a defense of this view in the context of modern land torts, see Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 ALA. L. REV. 741, 750–51 (2007).

15. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005). For a study of the importance of this decision in copyright law, see generally Andrew Inesi, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945 (2006).

16. *See generally* Nemerofsky, *supra* note 1, at 331–33 (citations omitted).

education, and public accommodations."[17] My illustrations of civil rights violations come from decisional law that construes federal antidiscrimination statutes.

Because violations of fundamental rights should stand beyond the dismissive scorn of a cliché-maxim, I contend, judges who dismiss civil rights claims should bring more than *de minimis* to the rationale that supports their rejections. Civil rights violations go unremedied all the time without the need to invoke *de minimis*. An individual victim with a valid claim might choose not to become a plaintiff. This person might not feel wronged, or might feel wronged but choose to refrain from protesting, or might lack the legal advice that brings deserving claimants to court, or might not want a legal remedy after having protested.[18] Judges, for their part, might have good reasons beyond *de minimis* for denying redress to an aggrieved plaintiff.[19] But wrongdoing protested in court that violates a person's statutorily protected civil rights should not be regarded as a trifle.

"In this area, we deal with degrees," wrote one federal appellate court when it dismissed a Title VII action that alleged a racially hostile environment. "We find no steady barrage of opprobrious racial comment."[20] Courts do indeed deal with degrees. But no civil rights statute says anything about a "steady barrage" of anything as necessary to a prima facie case. The idea that civil rights liability ought to repose, fire extinguisher-style, behind glass to be broken open only in a dire emergency—in response to only the worst offenses—has no basis in any antidiscrimination legislation. Civil rights law proscribes discrimination, full stop.[21] When courts refuse to hear claims because they regard what happened as too small, they stray from both their statutory mandate and the chance to ameliorate a social ill.

This Article expands a metaphor from criminology to describe the potential importance of civil rights violations that appear petty. "Broken windows" refers to the hypothesis that "low-level offenses like vandalism and panhandling create an environment that breeds bigger crimes."[22] The metaphor-as-policy has enjoyed extraordinary popularity since its first airing

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17. WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 127 (5th ed. 2008).

18. *See* William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 636 (1980–81) (observing that only a small minority of grievances reach the courts).

19. *See infra* Part III.B (giving examples).

20. Johnson v. Bunny Bread Co., 646 F.2d 1250, 1251 (8th Cir. 1981).

21. This generalization remains accurate even for a Title VII claim by an employee for hostile-environment harassment, where the employee-plaintiff must show that the conduct was "sufficiently severe or pervasive to alter the conditions of employment," a judicial demand not found in the statute. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986). Lower courts have misunderstood and misapplied the severe-or-pervasive criterion, to the detriment of plaintiffs. Elisabeth A. Keller & Judith B. Tracy, *Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environments by Re-Examining Supreme Court Precedent*, 15 DUKE J. GENDER L. & POL'Y 247, 256–60 (2008). *See also infra* Part III.A.2.

22. Karen Kaplan, *Wherefore, Litterbug? Bolstering 'Broken Windows' Theory, a Study Finds People Take Cues of Lawlessness for Surroundings*, L.A. TIMES, Nov. 21, 2008, at A16 (describing a study published in *Science*).

in a 1982 magazine article.[23] As effected about a decade later by then-New York Mayor Rudolph Giuliani and his police commissioner, William Bratton, broken windows law enforcement is still routinely credited for a plunge in the crime rate of a major city. In response to this acclaim, several critics have attacked broken windows law enforcement policy as both futile and pernicious.[24]

Taking both the thesis and its critics' antithesis as offering value to policymakers, I argue that broken windows enforcement holds value whether or not it enhances street policing. Civil rights liability offers an ideal proving ground for the metaphor.[25] Petty-looking civil rights violations, I argue, warrant recognition when this recognition would stop smaller pernicious behaviors from encouraging worse wrongs. Although arresting low-level offenders and applying the force of law enforcement against manifest "disorder" raises numerous worries, citizens who make claims without backing by the force of the state expand the potential of this device to achieve repair. Their status as private actors keeps the dangers of broken windows law enforcement to a minimum. A civil rights application lessens the familiar dangers of broken windows as police use the technique: authoritarianism, racism, discrimination against the poor, and threats to free expression.

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23. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29 [hereinafter *Atlantic Monthly*]. *Broken Windows* is the most frequently reproduced article in the magazine's long history. William H. Sousa & George L. Kelling, *Of "Broken Windows," Criminology, and Criminal Justice in* POLICE INNOVATION: CONTRASTING PERSPECTIVES 77, 77 (David Weisburd & Anthony A. Braga eds., 2006).

24. Among legal scholars, Bernard Harcourt has led this critique. *See* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) [hereinafter Harcourt, *Reflecting*]. In recognition of Harcourt's thoroughness on the subject, I use his writings in this Article to stand in for broken-windows disapproval. For other scholarly criticism of the hypothesis, see Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOCIOLOGY 603, 637 (1999); David Thacher, *Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning*, 94 J. CRIM. L. & CRIMINOLOGY 381 (2004).

25. Although in hindsight *Broken Windows* reads as advice to municipal governments on how to deploy their police, its real-life effect on policing was fortuitous. William Bratton, working in 1982 as chief of transit police in Boston, was slightly acquainted with George Kelling when he read Wilson and Kelling in the locally published *Atlantic Monthly*. The article strengthened Bratton's belief that "a patrolman's primary responsibility was to keep order in a community rather than just respond to growing crimes after the fact." Daniel Brook, *The Cracks in 'Broken Windows*,' BOSTON GLOBE, Feb. 19, 2006, at E1. Bratton promptly redoubled his order-maintenance efforts, intensified his friendship with Kelling, and later caught the attention of Giuliani. This show of force from an article makes it plausible for me to hope that federal judges, whose inclination to side against plaintiffs in civil rights cases has been well chronicled—*see, e.g.*, Ann F. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007); Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009)—might find this approach to a different area of law enforcement useful or congenial.

The title of this Article states my thesis: Civil rights violations that appear trivial are comparable to the broken windows that inflict little harm directly. Both may be deemed destructive, and thus, intolerable; just as a broken window might deserve the attention of law enforcement efforts, civil rights violations of comparably small size might warrant repair in the courts. Modified by conjugation, the Chancery maxim becomes *De minimis curet lex*: For the purpose of remedying and deterring this category of injustice, the law *should* concern itself with small things.[26] Plaintiffs seeking to present a civil rights claim to a jury should not be turned away with the rationale that their allegations are too petty to deserve the court's time.[27] *De minimis curet lex* becomes a constructive alternative maxim, at hand for judges who seek to do the right thing.

The Article starts with description and moves to argument. Part I uses a thesis-antithesis-synthesis study to examine the broken windows construct. This exposition continues in Part II, which considers unlawful discrimination as broken windows, and then gives reasons that privately initiated civil rights actions present a better venue for broken windows law enforcement than the more familiar street police setting. Anticipating an objection that what I propose in this Article could clutter the courts with insignificant or undeserving complaints, Part III, the most doctrinal of my three Parts, explores alternative routes to summary disposition of a bad claim. I offer these applications of doctrine not only to say how courts should answer certain recurring questions that arise in civil rights disputes but also to enlarge the jurisprudence of broken windows. The recommendations of Part III would both enhance judicial constructions of the federal civil rights statutes, all of which were codified with no *de minimis* safe harbor for wrongdoing,[28] and put the famed broken windows insight to good use.

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26. *Curet* replaces the simple present of *non curat* with the hortatory subjunctive form of *curare*.

27. By focusing on federal civil rights law, this Article argues implicitly for reversal of the current plunge in civil jury trials in the federal courts. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 55 STAN. L. REV. 1255, 1260 (2005) (observing that the number of civil trials in U.S. federal courts fell from 12,570 in 1985 to 4,206 in 2003). Writings by federal judges that lament the vanishing trial suggest that my thesis will be welcomed in at least some courts. *See, e.g.*, Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002) ("We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs . . . ."); Sam Sparks & George Butts, *Disappearing Juries and Jury Verdicts*, 39 TEX. TECH L. REV. 289, 313 (2006) (chiding fellow judges for their disregard of jury decision-making); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U.L. REV. 67, 89–90 (2006) (offering practical advice to fellow judges on how to keep trying civil cases).

28. *See* L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 591 (1995) ("Certainly, the language of [Title VII] . . . does not indicate that there is a *de minimus* [sic] threshold for actionable discrimination."). A partial exception to this generalization is present in the law governing hostile work environment claims, which frequently call for judgments about magnitude. *See supra* note 21. Here the civil rights statutes as construed by the Supreme Court do empower courts to deem an allegation too trivial for redress, provided they link this conclusion to an assessment of the environment as a whole. *See infra* Part II.B.1.

I. "BROKEN WINDOWS" AS METAPHOR AND REPARATIVE TECHNIQUE

Understanding relatively small wrongs in terms of broken windows suggests the value of redressing them. Striving for fidelity to a major source, I recount here the broken windows hypothesis as its originators, the political scientist James Q. Wilson and the social worker-criminologist George L. Kelling,[29] laid it out in a classic *Atlantic Monthly* article. Wilson and Kelling brought the broken windows metaphor to urban police work. Their innovation as described here underlies the argument I expound at the end of Part II: Privately initiated civil rights litigation is an excellent venue for broken windows enforcement of the law.

A. *The Hypothesis*

The broken windows vantage point casts familiar phenomena—both problems and solutions—in newer terms. I consider six of these phenomena below.

1. Disorder (in Contradistinction to Crime)

Wilson and Kelling contrast crime with a different social problem: "being bothered by disorderly people."[30] Observers trained to study legal doctrine, law enforcement, or any of the social sciences will more typically examine crime, which contains discrete elements—the better for replication and cross-situational comparison—rather than the vaguer category of "being bothered." Though necessarily replete with ambiguity, the text of a penal code is relatively straightforward compared to disorder. Disorder can look like a projection—the inside of someone's head—rather than an external, measurable phenomenon. Wilson and Kelling nevertheless maintain that both crime and disorder are separate sources of "very real" fear.[31]

2. Order

The contrast to disorder is public "order," another description that presents difficulties of definition and observation. Wilson and Kelling invoke order negatively, claiming that order results when disorder is curbed or controlled. In a book-length expansion of *Broken Windows*, Kelling and his co-author (and spouse) Catherine M. Coles identify "a pervasive sense among citizens that community life in their own neighborhoods was not what it ought to be."[32] This version of order includes "a modicum of civility and safety for

29. For their biographies, see http://publicpolicy.pepperdine.edu/academics/faculty/default.htm?faculty=james_wilson; http://www.newark.rutgers.edu/ourfaculty/index.php?sId=kudosDetail&expertId=43.

30. *Atlantic Monthly*, *supra* note 23, at 30.

31. *Id.* at 29. Kelling went on to define disorder as "incivility, boorish and threatening behavior that disturbs life, especially urban life." GEORGE L. KELLING & CATHERINE M. COLES, BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 14 (1996).

32. *Id.* at 108.

ordinary citizens who travel daily along streets and by public transportation to work, to school, to shop, in pursuit of all the ordinary activities of everyday life."[33]

3. Order and Disorder as Transitions

Broken windows identifies two kinds of transition, one bad and one good. Unrepaired broken windows embody the bad kind, a slide from order to disorder. Policymakers can reverse this decline and lead a transition from disorder to order. Police officers—preferably on foot and visible—are their agents. Ordinary citizens join the endeavor of installing order but cannot achieve it unaided.[34]

4. From Small to Large

The project of moving toward order rests on a premise that small units of disorder, left alone or undisturbed, will generate big negative effects. Trivial of themselves, these instances of disorder send a larger "signal that no one cares."[35] Miscreants feel at least empowered, and perhaps inspired, to make trouble when they see signs of disorder. Because breaking windows "has always been fun,"[36] communities that want to foster order need the deterrence message that intact windows deliver.

5. Bad Behavior Emboldened

Emboldening causes the transition from small harms to large. When a window breaks and stays broken, Wilson and Kelling continue, the quotidian devastation starts to escalate. "Adults stop scolding rowdy children; the children, emboldened, become more rowdy. Families move out; unattached adults move in. Teenagers gather in front of the corner store. The merchant asks them to move; they refuse. Fights occur."[37] The new behaviors are, in the aggregate, disorder.

6. Alienation

Although disorder is not crime, people who live amidst this much burgeoning decay will feel that "crime, especially violent crime, is on the rise, and they will modify their behavior accordingly."[38] Engagement with strangers becomes menacing to them. Residents of the broken windows neighborhood stay off their streets as much as they can. When they have to be

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33. *Id*.

34. Harcourt, *Reflecting*, *supra* note 24, at 308.

35. *Atlantic Monthly*, *supra* note 23, at 31.

36. *Id.*

37. *Id.* at 32. Wilson and Kelling imply that although some of these behaviors may amount to misdemeanors, none of them constitute "crime" in the sense that citizens think they mean when they refer to an increase in the crime rate. *See id.*

38. *Id.* at 32.

out, they will hurry past other people they see, taking a defensive stance.

Fear begets alienation. The slogan "don't get involved" starts to guide citizens not only when they witness untoward incidents, Wilson and Kelling argue, but also in their entire relationship with their neighborhood. Residents have homes—bounded spaces of their own behind locked doors—but for them the neighborhood no longer exists, except perhaps "for a few reliable friends whom they arrange to meet."[39]

Alienation in the neighborhood comes to include alienation from the law itself. Because residents equate disorder with crime, they conclude that police officers who fail to abate disorder in response to a call are failing to enforce the criminal law and allowing crime to flourish. These residents may stop calling the police. In turn, police officers, lacking a chance to talk to non-disorderly locals, may conclude that "the residents are animals who deserve each other."[40]

B. *The Critique*

Resistance to the broken windows hypothesis to guide law enforcement includes both conceptual and empirical challenges that are of interest beyond criminology.

1. A Problematic Metaphor about Order and Disorder

Any policy recommendation cast in metaphorical terms raises a threshold question of how to interpret the metaphor. For example, when one academic defender of the broken windows hypothesis wrote that broken windows as exemplars of disorder "need to be repaired quickly,"[41] he left opaque the details of what call for a fast fix.[42] How does anyone know that the object faced constitutes a broken window rather than an insignificant flaw?[43] Is the problem with broken windows that they languish too long unrepaired after breaking or that someone broke them in the first place? Does recognition of metaphorical broken windows in an environment justify prophylaxis—that is, measures to prevent the re-emergence of these manifestations—or only repair? Vagueness about order follows this vagueness about disorder.

Returning to the source provides only limited guidance. The *Atlantic*

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39. *Id.*

40. *Id.* at 33.

41. *See* WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF URBAN DECAY IN AMERICAN NEIGHBORHOODS 75 (1990).

42. Kelling himself has addressed this trouble with his metaphor. *See* Sousa & Kelling, *supra* note 23, at 78–79 (noting that "the broken windows metaphor is expressed not just in words, but in day-to-day action . . . ." and that applications of the metaphor may not "adhere to the spirit, philosophy, and intent of the original broken windows argument").

43. *See generally* Charis E. Kubrin, *Making Order Out of Disorder: A Call for Conceptual Clarity*, 7 CRIMINOLOGY & PUB. POL'Y 203, 204 (2008) (criticizing broken windows theorists for failing to define disorder).

Monthly manifesto began with praise for a foot-patrol technique used in New Jersey during the 1970s as part of a Safe and Clean Neighborhoods Program. Police chiefs resisted foot patrol, uniformed officers did not want to participate, and crime rates did not drop when the program was installed. Nevertheless, a "carefully controlled experiment" found that residents felt more secure, had a better impression of the police, and believed that crime had been reduced (although it had not).[44] Foot-patrol officers, in turn, reported more job satisfaction and a higher regard for neighborhood residents than did their counterparts in patrol cars.[45] The "carefully controlled experiment" therefore could proclaim that broken windows was a success.[46]

Even if these Newark-based conclusions are accurate and can be extended to other urban settings, at least two questions remain: First, what do the police do literally when they repair broken windows figuratively? Second, given mixed results in the Newark mother lode, how do reformers know that they have effected improvement? Wilson and Kelling justified the Safe and Clean Neighborhoods Program by arguing that street crime accounts for only part of what citizens fear on the street. These citizens have a "fear of being bothered by disorderly people. Not violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed."[47] A judgment of success thus becomes possible by redefining the problem.

The broken windows prescription has been imprecise from the start about which actions law enforcers ought to take and which results will indicate that a police intervention has succeeded.[48] For specifics, George Kelling had walked the streets of Newark alongside a police officer, dubbed "Kelly," to observe how a broken windows cop deals with disorderly people.[49] Even with details about Kelly's patrols filled in, the article's title stays strictly metaphor:

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44. *Atlantic Monthly*, *supra* note 23, at 29.

45. *Id.*

46. *Id.*

47. *Id.* at 30.

48. *Id.* at 30–31. For example, researchers affiliated with Harvard and Suffolk universities sought to test the broken windows hypothesis by focusing on crime in Lowell, Massachusetts. The study identified thirty-four "crime hot spots" and divided these locations into two groups. The experimental group received numerous interventions; the control group experienced no changes in its policing and services. The study concluded that "[c]leaning up the physical environment was very effective; misdemeanor arrests less so; and boosting social services had no apparent impact" on the measure studied, calls to the police. Carolyn Y. Johnson, *Breakthrough on 'Broken Windows*,' BOSTON GLOBE, Feb. 8, 2009, at Al. Though touted as a demonstration of broken windows' validity, the study also shows the futility of misdemeanor arrests, which are a staple of this approach to crime, and gives little direct guidance to other municipalities about which measures to adopt.

49. The residents were black and the police officer was white. Kelling watched Kelly permit drunks to sit on stoops but not let them lie down. Kelly would ask loiterers to state their business and ordered them away when they gave unsatisfactory answers. He arrested people for vagrancy if they bothered anyone at a bus stop; he permitted drinking only from papers bags and on side streets. *Atlantic Monthly*, *supra* note 23, at 31.

no Newark windows are described in the *Atlantic Monthly* as intact or broken.[50]

As the criminologist and legal scholar Bernard Harcourt has argued, the Newark-style policing that Wilson and Kelling praise may itself be understood as disorder. The distinction between formal crimes and harder to define instances or agents of disorder requires police to respond flexibly. If "there is such a clear line separating order from disorder," Harcourt asks, "then why do the police need so much discretion? Wouldn't disorder be immediately apparent to anyone? To a review board? To an administrative panel?"[51] Harcourt lists some activities that might amount to disorder: casual littering, hanging out, spontaneous begging, kicking an empty Coke can on the ground or, moving a bit further, public urination and riding a bus or train without paying the fare.[52] As for the absence of these sights, Harcourt speculates about what order in a neighborhood might manifest: Perhaps the neighborhood is "a commercial sex strip and the owners and operators want johns to feel safe and welcome. Or it could signal a strong Mafia presence. Or maybe a lot of wealth. Or maybe a strong police presence. Or maybe police brutality."[53]

Because "order" and "disorder" are so indeterminate and contradictory, Harcourt argues, the function of broken windows law enforcement becomes a Foucauldian creation of "the disorderly subject." It is "the whole biography of the disorderly person, rather than the criminal act . . . [that facilitates] a policy of surveillance, control, relocation, and exclusion of the disorderly."[54] Michel Foucault, upending a sociology that Emile Durkheim had laid down to describe and justify the category of order,[55] insisted that criminal sanctions do more than legitimate commonly held understandings that unite individuals into societies. Foucault inverted this conventional causality and claimed that order comes before community norms; indeed, order creates entire categories of individuals.[56]

Applying its binary of disorder-and-order to characterize a range of ambiguous behaviors, broken windows strengthens an authoritarian tendency in civic culture. Foucault in *Discipline and Punish* had described a carceral criminology that uses surveillance and punishment to imprint the body of a

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50. In a 2001 paper, George Kelling used misdemeanor arrests as a proxy for broken windows law enforcement. George L. Kelling & William H. Sousa, *Do Police Matter? An Analysis of the Impact of New York City's Police Reforms*, Manhattan Institute for Policy Research, Dec. 22, 2001, *available at* http://www.manhattan-institute.org/pdf/cr_22.pdf. *But see supra* note 48 (including police measures other than misdemeanor arrests in the broken windows classification).

51. HARCOURT, *supra* note 24, at 129.

52. *Id.* at 130.

53. *Id.* at 132.

54. Harcourt, *Reflecting*, *supra* note 24, at 365.

55. HARCOURT, *supra* note 24, at 138–42 (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1975)).

56. *Id.* at 141.

disciplined subject.[57] Critics identify a similar force in broken windows criminology: A law enforcement apparatus stares at human beings; it looks for provocations and then swoops down to punish.

2. Entrenching Discrimination

Broken windows law enforcement could, in principle, extend beyond its present reaches. For example, "order maintenance" could include tough enforcement of crimes like paying a house worker under the table, avoiding sales tax, insider trading, insurance misrepresentation, and taking office supplies home without permission.[58] An advocate of broken windows approaches to law enforcement typically will not try to apply the approach to such behaviors, even though all of them violate positive law and might encourage more lawbreaking if observed. Nor is police brutality understood as a broken window that demands repair,[59] even though conspicuous lawlessness by police might plausibly beget escalations of this wrong. Instead, broken windows law enforcement is overwhelmingly applied to poor people and people of color.

Youth curfews and police stops based on intuitions that fall short of reasonable suspicion impose detriments that are at least correlated with, if not based on, race.[60] Starting with "Kelly," the Newark police officer whom George Kelling trailed in the 1970s, through current urban implementations, police officers who effect a broken windows policy will stop and detain disorderly looking people.[61] Only by stopping a putative offender can police officers decide whether to arrest him or otherwise impede whatever jarring behavior caught their eye. Police stops have a long association with race discrimination, and "observed patterns of stop and frisk activity" align with race more than with the neutral architectural feature that gave this technique its metaphorical name.[62]

Poverty and race in combination have made urban broken windows law enforcement especially disquieting. For decades, writes social critic Barbara Ehrenreich, "whole communities have been effectively 'profiled' for the suspicious combination of being dark-skinned and poor, thanks to the 'broken windows' or 'zero tolerance' theory of policing."[63] One study of broken

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57. *Id.* at 148–50.

58. HARCOURT, *supra* note 24, at 130.

59. *Id.* at 131.

60. Eric J. Miller, *Role-Based Policing: Conduct "Outside the Legitimate Investigative Sphere*," 94 CALIF. L. REV. 617, 630 (2006).

61. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457 (2000).

62. *Id.* at 459.

63. Barbara Ehrenreich, *Is It Now a Crime to Be Poor?*, N.Y. TIMES, Aug. 8, 2009, at WK 9. *See also Fighting Tidy Whites: Broken Windows and a Capitol Hill Graffiti Cleanup*, Mar. 3, 2007, *available at* http://firewitchrising.blogspot.com/2007/03/fightin-tidy-whites-broken-windows-and.html

windows, as applied in Baltimore, concluded that it increased race-based and economic burdens that had already blighted the lives of city residents.[64] Although broken windows law enforcement need not necessarily rely only on misdemeanor arrests,[65] the Baltimore version chose this device as a first-line response to disorder rather than as a last or later resort. Arrests for loitering and failure to obey the police filled the Baltimore station houses,[66] increasing local tensions and harming the employment prospects of poor individuals who acquired a broken windows misdemeanor criminal record.[67] Another study found that perceptions of disorder in a neighborhood increased when the visible presence of African-American persons there increased, even if objective measures of increased disorder were absent.[68]

Reviewing the broken windows literature with attention to race and class suggests that some empirical claims about improvement rest on a selective reading of the record.[69] A defender of the technique might, for example, correctly point out that reported rates of a particular crime dropped following a broken windows intervention. This defender would likely overlook detriments that accompanied the improved crime rate. Community mistrust of the police, alienation from law enforcement aspirations, and feelings of powerlessness and defeat might have increased, Richard Delgado argues, shifting inversely in relation to a crime rate drop the police had pursued.[70] An increase in negative feelings might matter more than the decline of a particular reported offense.

3. Scant Improvements

Claims made about the power of broken windows law enforcement demand attention to causality. A result can follow from an antecedent without having been caused by it: *post hoc*, logicians remind us, does not necessarily demonstrate *propter hoc*. Aware that correlation is not causation, social scientists have tried to measure the utility of broken windows techniques. Their findings are equivocal.

("Broken Windows is nothing more than lipstick on the same old racial profiling pig.").

64. Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created New Crime in Baltimore*, 14 GEO. J. POVERTY L. & POL'Y 419 (2007).

65. *See supra* note 48 and accompanying text (reporting other broken-windows applications in Lowell, Massachusetts).

66. Collins, *supra* note 64, at 425.

67. *Id.* at 431.

68. Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of Broken Windows*, 67 SOC. PSYCH. Q. 319 (2004). Both African-American and white respondents evidenced this bias. *Id.* at 332.

69. Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193 (2005); *see generally* K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 299–315 (2009) (reviewing detriments to individuals and society).

70. Delgado, *supra* note 69, at 1250.

Because the connection between broken windows law enforcement and crime reduction is difficult to prove, researchers have assigned themselves the somewhat easier task of exploring the connection between disorder and serious crime. The criminologist Wesley Skogan compared disorder and crime statistics in forty urban neighborhoods spread over six large American cities.[71] Skogan found a positive association between disorder and crime that was not explained by other variables like "poverty, instability and race."[72] Bernard Harcourt, studying the same data, found that when he removed Newark from the cities studied, the association mostly disappeared.[73] Broken windows advocates, in turn, have faulted Harcourt for deeming Newark an outlier; removing different outlier neighborhoods from the data set would have strengthened the hypothesis.[74]

Even if visible disorder increases street crime, as proponents of broken windows policing contend, the more difficult next step of the crime-control thesis, its inverse, remains: How do policymakers know *ex ante* that encouraging police officers to focus on disorder will decrease crime? Numerous variables often confound the claim of causality.

The New York experience in the 1990s—broken windows law enforcement first, a drop in street crime second—has presented the most conspicuous case study. In *Freakonomics*, a bestseller exploring "the stuff and riddles of everyday life,"[75] Steven D. Levitt and Stephen J. Dubner drew up a list of popular explanations for the crime-rate plunge in the United States. "Innovative policing strategies" led the list in newspaper mentions, ahead of other possibilities (e.g., aging of the population, a stronger economy, tougher gun control).[76] "Innovative policing strategies" are exemplified by broken windows as New York police commissioner William Bratton and Rudolph Giuliani, the then-mayor, had applied the strategy, and journalists continue to credit this technique for causing a drop in crime that exceeded the crime rate drop around the country. Levitt and Dubner reject this near-consensus of the media.[77] Other social scientists have published their own skepticism about the association between this antecedent and consequences.[78] Summarizing the

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71. *See* SKOGAN, *supra* note 41, at 73–77.

72. *See* Sousa & Kelling, *supra* note 23, at 83.

73. HARCOURT, *Reflecting*, *supra* note 24, at 323–25.

74. Sousa & Kelling, *supra* note 23, at 84 (emphasis in original). Both sides agree that the rate of one crime in particular, robbery, increases when visible disorder increases. *Id.*

75. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING xi (2005).

76. *Id.* at 120–21.

77. *Id.* at 128–30; *see also* Radley Balko, *The Other Broken Windows Fallacy*, Reason.com, Mar. 8, 2010, http://reason.com/archives/2010/03/08/the-other-broken-window-fallac (noting that "many big cities that didn't adopt the policy, including San Diego, Washington, D.C., and Houston, had more significant decreases in the homicide rate over about the same period").

78. *See generally* Thacher, *supra* note 24, at 384 (observing that "social science has not been kind to the broken-windows theory" as a source of crime control).

data on Wilson and Kelling's prescription, one defender of broken windows policing agrees that the link between disorder and reported crime is weak.[79]

C. *Broken Windows Distilled to Its Uncontroversial Elements*

Though comprehensive, criticisms of the broken windows hypothesis leave portions of the construct still intact and compelling. Policymakers attuned to the value of broken windows can choose a partial or selective retention following decades of antipathy in print. We may now consider what remains.[80]

Overstatements and large promises from devotees—for instance, claims about broken windows policing as a robust source of reduced crime—probably should be trimmed. Race- and class-based oppressions have certainly accompanied applications of the policy and warrant disapproval. "Disorder" still has no agreed upon definition. After this retrenchment, however, critics and proponents of broken windows hold some ground in common.

1. Affronts and Social Meaning

One key point of accord between proponents and critics is agreement about the expressive effects of prohibitions and responses to affronts. Insofar as broken windows theorists "have pushed criminal justice to take the social meaning turn," writes critic Bernard Harcourt, "they are to be applauded."[81] Broken windows advocate Dan Kahan agrees and commends the launch of other policies, including and beyond broken windows, "aimed at regulating social meaning."[82] By way of explaining social meaning, Kahan continues: "Laws that regulate social norms determine the background against which private behavior conveys information about citizens' beliefs and intentions."[83] Kahan concludes that "a community is more likely to *be* law abiding when its members *perceive* that it is."[84] The notion of expressive meaning, central to the broken windows metaphor, is congenial to both critics and adherents.

As understood in this consensus, any message that harm-causing behavior will be expected and tolerated lowers the cost of such transgressions to individuals. Formal punishments might eventually follow, but persons present at the time of the offense observe flourishing rather than a negative response

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79. Sousa & Kelling, *supra* note 23, at 85–89. Sousa and Kelling also point out that a weak association between disorder and crime does not necessarily counsel against broken-windows policing because the strategy may have other benefits. *Id.* at 87.

80. *Cf.* Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303, 324–27 (2005) (exploring "what little remains" of law and economics following extensive scholarly criticism).

81. HARCOURT, *supra* note 24, at 217.

82. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 394 (1993).

83. *Id.*

84. *Id.* at 295 (emphasis in original).

that produces deterrence. Accordingly, these observers "are likely to infer that the risks of such behavior are small and the potential rewards high."[85]

Finding social meaning in behaviors is only the start of what Harcourt has praised as the turn to social meaning. Researchers, argues Harcourt, ought to build on their explorations of "the social meaning of practices such as juvenile gun possession or gang membership" to reach "the social meaning of the proposed policing techniques and policies themselves."[86] This recommendation encourages a more serious engagement with the premise of broken windows rather than an abandonment of the premise. Harcourt insists that "proving social meaning" requires "a rich contextual analysis of multiple meanings and countermeanings, an analysis that intersects with and deepens other compelling accounts of social meaning," to be "corroborated as much as possible by statistical analyses."[87] Antagonists would agree, continues Harcourt, "at this theoretical level."[88] Indeed, the only salient disagreement over social meaning between broken windows adherents and critics centers around which meanings to investigate. Adherents emphasize affronts; critics want to extend the inquiry beyond the infraction-and-response law enforcement dynamic. But while arguing for new sites to investigate, critics accept the summary about social meaning that Kahan offered from the side that accepts the broken windows hypothesis: "[P]rivate behavior conveys information about citizens' beliefs and intentions."[89]

Broken windows thus is uncontroversial when it declares that visible or otherwise manifested conditions convey meaning within societies and that individuals receive guidance on how to act from these manifestations. Adherents and critics agree that what people do—"private behavior," in Kahan's phrase—extends beyond the individuals who have participated directly or voluntarily in a transaction. Social context makes behaviors intelligible.[90]

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85. *Id.* at 356. Exploring this theme of tacit encouragement to do wrong, Kahan has cautioned lawyers not to presume that formal legal prohibition constitutes a social meaning of true disapproval. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996).

86. HARCOURT, *supra* note 24, at 225.

87. Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC'Y REV. 179, 181 (2000).

88. *Id.*

89. *See supra* note 87 and accompanying text.

90. Sexuality offers countless examples. *See, e.g.*, HANNE BLANK, VIRGINITY: THE UNTOUCHED HISTORY 3 (2007) ("By any material reckoning, virginity does not exist."); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 43 (1978) (arguing that only slowly over time did homosexuality evolve toward a personal identity, away from a description of acts deemed aberrant). A newer example of how context makes sexual behaviors intelligible comes from the Secret Lover Collection, a line of romantic greeting cards marketed to clandestine couples. *See* http://www.secretlovercollection.com. Customers who buy the merchandise must use e-mail addresses and credit cards, even though they presumably risk discovery thereby. The premise of this consumer product is that Hallmark-card expressions of love, omitting the

2. Coarsening Sensibilities

Both critics and advocates of broken windows focus, in different ways, on the reactions, judgments, self-conceptions, and strategies of individuals immersed in environments. For Bernard Harcourt at the end of *Illusion of Order*, these human responses affect not just the clusters of people that policy studies aggregate—the homeless, the police, gangs, juvenile delinquents, and citizens—but also human beings as subjects, with researchers not excepted.[91] Among the effects that interest critics are the consequences of order-maintenance policing, which can include effects on children's development, race relations, treatment of unemployed people, and the views that citizens who live in homes have of homeless people.[92]

This theme of coarsening sensibilities—the idea that pervasive disorder dulls responses to conditions that people feel they ought to care about and that their culture regards as important—emerges in both views on broken windows. Take, for example, an illustration used by both sides of the dispute: the broken windows tactic of increasing misdemeanor arrests of street prostitutes. Wilson and Kelling mentioned the necessity of these misdemeanor arrests back in their seminal 1982 publication,[93] and Rudolph Giuliani followed the prescription, reducing the number of street prostitutes in Manhattan by about two-thirds following a broken windows arrest initiative.[94]

The premise is that prostitutes on the street convey a sense of deterioration to law-abiding participants who share this space. "It turns out, in fact," retorts Harcourt, "that prostitution may be related to crime in a more direct way than the broken windows theory immediately suggests":[95] Assailants rape and beat street prostitutes at an extraordinarily high rate.[96] Whether Harcourt's conclusion—that it would be better to legalize prostitution than to arrest street prostitutes[97]—is correct matters not: the point about coarsening sensibilities is that what New York officials called a quality-of-life initiative left the prostitutes' quality of life in a bad state. The law enforcement policy of scrubbing the streets of this scourge may have contributed to a disregard for the welfare of these individuals, just as broken windows, in the Wilson and Kelling metaphor, coarsen the judgment of residents as they confront their own neighborhood.

For their part, advocates of broken windows law enforcement identify a more basic and unitary kind of coarsening, a finding that researchers have

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illicit context, do not adequately describe what unites the couple.

91. HARCOURT, *supra* note 24, at 218–21.

92. *Id.* at 218.

93. *Atlantic Monthly*, *supra* note 23, at 31.

94. Bernard Cohen, *Civil Order Crime*, *in* ENCYCLOPEDIA OF CRIME AND PUNISHMENT 235, 238 (David Levinson ed., 2002).

95. HARCOURT, *supra* note 24, at 221.

96. *Id*. (citations omitted).

97. *Id*. at 221–22.

been able to replicate and support. Wilson and Kelling described the consequences of broken windows as dejection and withdrawal from communal life. Citizens come to avoid public spaces and one another, refrain from speaking up when they see a disturbance, avert their eyes, and write off their neighborhood as all but obliterated.[98] Fear turns them off and shuts them down. Critics of broken windows have not disagreed, and substantial accord has been published in the decades following the *Atlantic Monthly* debut of broken windows as a source of psychological corrosion. Researchers confirm the effect of perceived decay and disorder on individual consciousness.[99]

An acclaimed return to broken windows empiricism, undertaken in the Netherlands and published in *Science* in 2008, sought expressly to study the hypothesis in the context of psychology and sociology, rather than crime control.[100] The chief researcher found that graffiti and strewn about shopping carts increased individuals' tendencies to litter, as did the sound of (illegal) fireworks nearby. Surrounding an area with garbage increased the rate of theft from a mailbox. Tracked down by a reporter to comment on these findings, the leading critic of broken windows theory scoffed—but also conceded the point about coarsened sensibilities.[101]

Social scientists have validated this point of agreement among scholars of broken windows. Environments, they report, impel individuals to engage in harmful behaviors that these persons would have eschewed if the environmental cues were absent. Working separately, the psychologists Stanley Milgram and Philip Zimbardo found devastating effects of signals that harmful behavior is acceptable or normal. A mentally healthy individual can be prompted to engage in both memorable cruelty, as Milgram reported, and banal acts of property damage, as detailed by Zimbardo.[102] One psychologist who replicated Stanley Milgram's chilling 1963 findings—that individuals will administer severe electric shocks to strangers as punishment for answering questions wrong—attributed these consistent outcomes to

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98. *Atlantic Monthly*, *supra* note 23.

99. *See* Timothy J. Haney, *Broken Windows and Self-Esteem: Subjective Understandings of Neighborhood Poverty and Disorder*, 36 SOC. SCI. RES. 968 (2007) (relating disordered environments to psychological harms); Stephen B. Blank, Catherine P. Bradshaw & Hollie Young, *An Application of "Broken-Windows" and Related Theories to the Study of Disorder, Fear, and Collective Efficacy in Schools*, 115 AM. J. EDUC. 227 (2009) (finding evidence for the thesis in a middle school).

100. Kaplan, *supra* note 22 (summarizing what the Netherlands research found).

101. "We don't care about those trivial, manipulated delinquent acts," Harcourt said. "What we are about is violence." *Id.* This interpretation of the study's findings questions their utility as a policy strategy rather than their power to explain bad behavior, which power Harcourt's comment does not challenge.

102. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 31–32 &131–32 (2004) (summarizing versions of the infamous Milgram experiments); PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007) (describing situational explanations of behavior); Philip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos*, *in* NEBRASKA SYMPOSIUM ON MOTIVATION at 237, 290–93 (William J. Arnold & David Levie eds., 1969).

situational features, which extend beyond authority to environments more generally.[103]

3. Deterioration as a Social Phenomenon

Although "social meaning" can cover a large array of affronts, the disturbances that occupy this Article are the ones that convey collapse, decay, or an end to constraints that had once reduced misbehaviors. We have already considered the portion of this hypothesis that is contested: Recall Harcourt's insistence that police officers can install disorder, and that what looks like order in a neighborhood might instead be the tidiness of well-organized crime.[104] Focusing on accord between the proponents and opponents of broken windows theory, rather than controversy, shows that both accommodate the idea of a negative change, or social deterioration.

Quoted with approval by their main antagonist, George Kelling and Catherine Coles write that "[d]isorder demoralizes communities, undermines commerce, leads to the abandonment of public spaces, and undermines public confidence in the ability of government to solve problems . . . ."[105] Broken windows critics Robert J. Sampson and Stephen W. Raudenbush agree that the concept of disorder helps to explain "migration patterns, investment by business, and overall neighborhood visibility."[106] Even social scientists frustrated with the vagueness and indeterminacy of the term seem to know it when they see it.

One critic of the broken windows hypothesis, criminologist Ralph B. Taylor, writes that the broken windows "is conceptually grounded in the incivilities thesis," which in turn maintains that "physical deterioration and disorderly social conduct each contribute independently to fear, neighborhood decline, and crime."[107] Consequently, "incivility reducing initiatives will contribute to neighborhood stability and safety, reducing fear."[108] When Taylor goes on to suggest that "this logic model is inaccurate, inadequate, or potentially misleading,"[109] he also insists that the goals of broken windows policing—public safety, stability, and responsiveness—warrant pursuit.[110] His chapter showcases a broken windows antagonist who argues that preventive

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103. Adam Cohen, *Four Decades After Milgram, We're Still Willing to Inflict Pain*, N.Y. TIMES, Dec. 28, 2008, at 24 (quoting study author).

104. HARCOURT, *supra* note 24, at 132.

105. *Id.* at 212 (quoting KELLING & COLES, *supra* note 31, at 242).

106. *Id.* (quoting Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637 (1999)).

107. Ralph B. Taylor, *Incivilities Reduction Policing, Zero Tolerance, and the Retreat from Coproduction: Weak Foundations and Strong Pressures*, *in* POLICY INNOVATION: CONTRASTING PERSPECTIVES 98, 98 (David A. Weisburd & Anthony A. Braga eds., 2006).

108. *Id.*

109. *Id.*

110. *Id.* at 106–08 (defending "coproduction," whereby civilian residents of a neighborhood produce order alongside the police, not as targets of law enforcement).

repair is the best response to early-stage social deterioration.

II. APPLYING BROKEN WINDOWS TO CIVIL RIGHTS

We may now explore three distinct ways in which the broken windows metaphor applies to civil rights violations. First, instances of unlawful discrimination, when left unchecked and unremedied, can lead to larger harms. Second, even though civil rights statutes typically contain no official requirement that claims be large, judges have construed the category of a violation too trivial to deserve their attention: this construct resembles the broken windows of which James Wilson and George Kelling wrote. At the end of this Part, I shall claim, as do proponents of broken windows street policing, that paying attention to relatively small affronts would enhance the rule of law.

A. *Discriminatory Conditions as Broken Windows*

The elements of broken windows as proffered in *Broken Windows*—which have been listed in Part I with six labels: disorder in contradistinction to crime; order; order and disorder as transitions; from small to large; bad behavior emboldened; and alienation[111]—also serve to describe discriminatory conditions that onlookers can observe. Aspects of the broken windows hypothesis that both adherents and critics accept as correct—affronts and social meaning; coarsening sensibilities; and deterioration as a social phenomenon—are also manifest in a civil rights setting. Yet, whereas the description of broken windows carries over from neighborhoods to civil rights, criticisms of broken windows policy on the street do not impede a civil rights application.[112]

The parallels to broken windows gathered in this subpart as examples are all small manifestations that can loom large and have won attention in antidiscrimination efforts. Resemblances to the broken windows of street policing vary. Some small instances of discrimination generate larger harms. Others evince a significant problem even though they are relatively slight. Some contexts invite what might be called repaired or unbroken windows—small interventions that serve progressive ends when people can observe them.

1. Race Discrimination

Writing during a postwar period of horror about the Holocaust, the psychologist Gordon Allport theorized that discrimination—defined as behaviors and actions that originate in prejudice—proceeds from small to large on a five-point scale.[113] In size-place order, the stages are antilocution,

111. *See supra* Part I.A.

112. *See infra* Part II.C.

113. GORDON ALLPORT, THE NATURE OF PREJUDICE 52 (1979) (original ed. 1954). "Allport's

or what might be called hate speech; avoidance, where the majority shuns the oppressed group; discrimination, where hostile attitudes take form in concrete actions; physical attack; and extermination.[114] Though somewhat out of the contemporary social science mainstream,[115] and not equally pertinent to all categories of social prejudice,[116] Allport's scale offers a cogent and historically grounded account of small civil rights violations as constitutive of larger harm to racial or ethnic minorities.

The social meanings of racist messages or displays underlie measures designed to lessen their broken windows effects.[117] Military culture offers an illustration. Manifested racism within the ranks of the U.S. military has spurred calls for zero-tolerance resistance, an approach that overlaps with broken windows.[118] In its report titled "A Few Bad Men," the Southern Poverty Law Center attributed an increase in the ranks of racist-extremist personnel to low standards in the "recruit-starved" armed forces.[119] To address this problem, in *A Few Bad Men* the Southern Poverty Law Center recommended to the Pentagon not only a more mindful intake strategy by recruiters and other substantive measures (such as alertness to the illicit stockpiling of weapons that several neo-Nazi servicemen have pursued), but also "zero tolerance" for extremist behaviors that seem more innocuous, such as urging fellow service personnel to join racist cohorts and possessing extremist literature.

Agreeing with this recommendation, one Defense Department study claimed that "even the non-violent activities of military personnel with extremist tendencies . . . can have deleterious consequences for the good

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definition is actually the United Nations' definition; discrimination is defined as any conduct based on distinction made on grounds of natural or social categories, which have no relation either to individual capacities or merits, or to the concrete behavior of the individual person." SAMUEL ROUNDFIELD LUCAS, THEORIZING DISCRIMINATION IN AN ERA OF CONTESTED PREJUDICE: DISCRIMINATION IN THE UNITED STATES 177 (2008).

114. ALLPORT, *supra* note 113, at 14–15.

115. LUCAS, *supra* note 113, at 175–79 (observing that Allport's model fell into decline following work by Gary Becker that described discrimination as an individual taste).

116. Avoidance and extermination are less likely, or at a minimum more complicated, when the oppressed group is women.

117. Hate speech, hate crimes, and racial profiling may be seen as other illustrations of social meanings present in racist displays. *See generally* Lu-in Wang, *"Suitable Targets"? Parallels and Connections Between "Hate" Crimes and "Driving While Black,"* 6 MICH. J. RACE & L. 209, 228 (2001) ("Both the discriminatory selection itself and the defensive behavior it encourages serve to reinforce the social context in which racial and other group-based targeting occur because they both influence expectations about how certain groups will be treated.").

118. *See Congressmen Davis, Engel Urge Rumsfeld to Apply Zero Tolerance to Racist Extremists in Our Military*, July 26, 2006, *available at* http://colorofchange.org/military/davis_engel.h
tml. On the overlap between zero tolerance and broken windows, see *supra* note 116 and accompanying text.

119. David Holthouse, *A Few Bad Men*, Southern Poverty Law Center Intelligence Project, July 7, 2006, *available at* http://www.splcenter.org/intel/news/item.jsp?pid=79.

order, discipline, readiness, and cohesion of military units."[120] Although the military tolerates the continuing recruitment of neo-Nazis and similar extremists, who probably number in the thousands,[121] at the same time it keeps alert to broken windows displays that mean little to most service personnel but generate fellowship among racist persons who unite after enlistment.[122]

2. Sex Discrimination[123]

Efforts to reduce or discourage discrimination against women encounter resistance in conspicuous expressions of prejudice. Invidious discrimination on the basis of sex comes to appear rational, normal, and ineradicable; tiny instances of sexism loom large when they reinforce a message of comprehensive inferiority. The armed forces offer an illustration here just as they illustrate broken windows effects regarding racial hatred.[124] Commentators write that tolerating misogynous displays serves to deepen and entrench sexism in military culture and generate worse harms, including sexual harassment and rape.[125]

Tolerated manifestations of discrimination can beget new harms in civilian society as well, just as tolerated blights in neighborhoods can increase larger blights.[126] Images impart prescriptive messages that replicate gender oppression. Children's literature, for example, promotes the subordination of women when it depicts agency in female characters as either malevolent (think of stepmothers and witches) or nonexistent.[127] Researchers link media-

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120. *Id*. (quoting Marc Flacks & Martin F. Wiskoff, *Gangs, Extremist Groups, and the Military: Screening for Service*, June 1998).

121. *See id*. (reporting one count of 320 extremists at a single base in Fort Lewis, Washington, housing 19,000 soldiers).

122. Examples of these displays include symbols in the Runic alphabet; the number 88, neo-Nazi code for Heil Hitler; the *Schwartze Sonne*, a graphic image; and the words White Power rendered in German. *Id*.

123. In this Article, I use the term "sex" to include gender and thereby comport with judicial interpretations of civil rights laws: sex discrimination here covers discrimination against women and also against persons perceived as homosexual, or as non-conforming to traditional gender divisions. *See infra* Part II.D.3.

124. Because of its cohesiveness and centralized control, the military is a locus of strong social meanings. *See supra* Part II.A.1.

125. CYNTHIA H. ENLOE, GLOBALIZATION AND MILITARISM: FEMINISTS MAKE THE LINK vii (2007); Madeline Morris, *In War and Peace: Incidence and Implications of Rape by Military Personnel*, *in* BEYOND ZERO TOLERANCE: DISCRIMINATION IN MILITARY CULTURE 173, 173 (Mary Fainsod Katzenstein & Judith Teppy eds., 1999).

126. *See supra* notes 34–40 and accompanying text.

127. JACK ZIPES, STICKS AND STONES: THE TROUBLESOME SUCCESS OF CHILDREN'S LITERATURE FROM SLOVENLY PETER TO HARRY POTTER 185 (2002) (arguing that this generalization applies even to the contemporary Harry Potter books, written by a woman and popular with girls); Ruth B. Bottigheimer, *Silenced Women in the Grimms' Tales: The 'Fit' Between Fairy Tales and Their Historical Context*, *in* FAIRY TALES AND SOCIETY: ILLUSION, ALLUSION, AND PARADIGM 115, 127 (Ruth B. Bottigheimer ed., 1986) (observing that in the classic fairy tales, female characters ask no questions).

promoted imagery about appearance norms with an increase in dieting and eating disorders among preteen and teenage girls.[128] Advertising in the United States inculcates "the cultural assumption that men are dominant and women are passive and subordinate," according to one sociologist.[129]

Social scientists have designed studies that serve to test broken windows-like hypotheses in the context of sex discrimination. One experiment found that participants were more likely to withhold financial support for women's organizations after exposure to sexist humor.[130] An acclaimed quantitative model of gender bias at work exemplifies a variation on the small-to-large pattern that Wilson and Kelling associated with neighborhood deterioration:[131] Because many large workplaces arrange personnel in a pyramid shape, with a large tier at the bottom that competes for relatively few promotions, even a small quantity of discrimination at the lower tiers will lead to significant effects higher up. Researchers found that a tiny quantity of gender bias, accounting for only 1% of a variance, accrues upward, so that at the higher tiers only 35% of persons promoted would be women.[132]

3. Sexual-Orientation and Gender-Identity Discrimination

The demographic here falls under the abbreviation LGBT and its variants: discrimination against individuals who are (or who are perceived to be) lesbian, gay, bisexual, or transgendered. Although federal judges have generally agreed that sexual-orientation and gender-identity discrimination are not actionable under the Civil Rights Act,[133] these categories of bias nevertheless may be understood as civil rights violations.[134] Numerous state laws recognize LGBT discrimination in civil rights terms.[135]

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128. Fiona Bawdon, *All Those Years of Feminism and Girls Still Expect to be Judged on Their Looks*, THE TIMES, Sept. 27, 2007, at Features, p. 5.

129. ANTHONY J. CORTESE, PROVOCATEUR: IMAGES OF WOMEN AND MINORITIES IN ADVERTISING 58 (3d ed. 2008).

130. Thomas E. Ford, Christie F. Boxer, Jacob Armstrong & Jessica R. Edel, *More than "Just a Joke": The Prejudice-Releasing Function of Sexist Humor*, 34 PERSONALITY & SOC. PSYCH. BULL. 159 (2007).

131. Richard F. Martell, David M. Lane, & Cynthia Emrich, *Male-Female Differences: A Computer Simulation*, 51 AM. PSYCHOLOGIST 157 (1996).

132. *Id*. at 158.

133. *See* Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Heterosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 471 (2004) (noting the unvarying resistance of federal courts to sexual orientation discrimination claims); Ulane v. Eastern Airlines, 742 F.2d 1081, 1085–86 (7th Cir. 1984) (summarizing case law and failed congressional initiatives to modify the Civil Rights Act). *But see* Schroer v. Billington, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008) (concluding that even though courts have consistently held otherwise, the refusal to hire a transgendered person violates the plain language of Title VII and is sex discrimination).

134. Jennifer C. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209, 209–20 (2008) (reporting struggles in Congress to amend Title VII to include sexual orientation and gender identity). *See also* Andrew Altman, *Civil Rights*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY 3.2 (2007), *available at* http://plato.stanford.edu/entries/civil-rights/#WhyDisUnj (surveying philosophical reasons that discrimination is wrong; most of these descriptors apply to sexual-orientation and gender-identity discrimination).

135. *See* David Crary, *Civil Rights Act for Gays, Transsexuals Gains Momentum*, NEWS J., Aug.

Advocates of improved protections for lesbian, gay, bisexual, and transgender youth have assembled evidence that condoning small affronts against these minorities has broken windows effects. Authorities often ignore sexual-orientation harassment in schools, implying to victims that they think what these students are experiencing is trivial and unworthy of official attention.[136] Some administrators and teachers go further, siding overtly with bullies.[137]

"Left unchecked," according to two advocacy groups, "this harassment and discrimination may often escalate to the level of physical violence or violent crime."[138] One broken windows escalation that many survey respondents report having experienced is a shift from verbal to physical attacks in school.[139] Conversely, the presence of gay-straight alliance student clubs has been associated with decreased levels of harassment and name calling.[140] To continue the metaphor, a gay-straight alliance in a school that had manifested anti-gay hostility would be a repaired window.

As for gender identity discrimination, this type of civil rights violation has received little recognition in the form of liability. Efforts in Congress to pass an amendment to the Civil Rights Act that would make sexual-orientation discrimination unlawful have foundered on many shoals. Notable among the shoals has been a struggle over whether to include or exclude "T," the transgendered, in amendments that extend civil rights protections to LGB persons.[141] Given this dearth of doctrine, an exploration of gender-identity discrimination as broken windows must turn to theory.

Gender-identity theorists have broached the possibility that here broken windows should refer to recognition of the category itself. In this analysis, transgendered persons remain oppressed because their crossing the gender binary threatens settled distributions and expectations. In a chapter provocatively titled "Compliance is Gendered," one academic and civil rights

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28, 2009, at N (reporting that twenty-one states recognize discrimination based on sexual orientation, and twelve include gender identity as a civil rights category).

136. *See* American Civil Liberties Union, Press Release, *High School Student Takes on Anti-Gay Harassment—And Wins*, May 18, 2009, http://www.aclu.org/lgbt/youth/39607prs20090518.html (last visited June 18, 2010).

137. Human Rights Watch, *Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual, and Transgender Students in U.S. Schools* (2001), *available at* http://www.hrw.org/legacy/reports/2001/uslgbt/toc.htm (hereinafter *Hatred in the Hallways*).

138. Gay, Lesbian, and Straight Education Network and National Center for Lesbian Rights, Frequently Asked Questions on Safe School Policies (n.d.), http://www.nclrights.org/site/DocServer/policiesfaq.pdf?docID=1664.

139. Human Rights Watch, *supra* note 137.

140. Gay-Straight Alliance Network, *Questions and Answers* (n.d), *available at* http://www.gsanetwork.org/press/GSANetworkFAQ.pdf; *see also* Benoit Denizet-Lewis, *Coming Out in Middle School*, N.Y. TIMES, Sept. 27, 2009, Mag. at 36, 54 (quoting a middle school principal: "And the most amazing thing has happened since the G.S.A. started. Bullying of all kinds is way down. The G.S.A. created this pervasive anti-bullying culture on campus that affects everyone").

141. *See* Hendricks, *supra* note 134, at 209.

lawyer writes that "almost all of the institutions and programs that exist to control and exploit poor people and people of color in the United States are sex segregated," and that gender-crossers must have enough money for medical technologies before they can expect to be granted membership in the group they regard as their own.[142] If compliance is gendered, then gender-resisters are noncompliant and jarring, just as broken windows in a neighborhood are noncompliant and jarring.

As another commentator elaborates, claims for the civil rights of transgendered persons challenge many sets of understandings, not just prejudice against those who as adults rejected the gender they were assigned in their infancy.[143] Animus against these persons may be indefensible; but siding with them when they go to court—thus necessarily making reference to formal equality—also presents difficulties. *Schroer v. Billington*,[144] the case that won attention in 2008 by holding that discrimination against a male-to-female transsexual job applicant was sex discrimination, rests on a binary: after David crossed over to become Diane, Diane became entitled to all the rights David had held.[145] Crossing genders emphasizes the oppressive boundary. And so, paradoxically, the transgendered person becomes one kind of broken window (a threat to orderly gender) to her adversaries and the opposite kind of broken window (the embodiment of a rigid, malevolent division) for her legal advocates, who report that to make a good impression in court, a transgendered person must conform to stereotypes, especially if the gender she has embraced is female.[146]

4. Disability Discrimination

The broken windows hypothesis coupled with what disability theorists describe as "invisible disability" provide understandings that may be seen as reciprocal or mutually constitutive. Broken windows theorists have claimed that disorder undermines order, and interventions to bolster order done in small, visible steps increase both perceptions and realities of safety and security. Invisible disability has a similar function, with a small inversion. Whereas fixing broken windows in the criminology context has meant installing absences—scrubbing the streets of squeegee men, loiterers, drunks,

142. Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, *in* TRANSGENDER RIGHTS 217, 220 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006).

143. Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUSTICE 83 (2008).

144. 577 F. Supp. 2d 293 (D.D.C. 2008).

145. *Id*. at 306–07.

146. Gilden, *supra* note 143, at 103–04; Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 297–98 (2005). *See generally* Symposium, *Legal Gender: The Limitations of a Male-Female Binary*, 30 WOMEN'S RTS. L. REP. 288–356 (2009) (identifying inadequacies in current antidiscrimination law with respect to transgender issues).

prostitutes, graffiti, vandalized cars and so on—fixing broken windows for disability-related purposes installs *presences*, bolstering visibility. The newly visible disability becomes a repaired window, in this sense resembling a new gay-straight alliance in a hostile high school environment.[147]

Individuals have more disabilities than are manifest; social practices, by obscuring and denying these conditions, make their consequences worse. Take mental illness for example. It is more prevalent than it appears.[148] Affected individuals can blend in with majorities who manifest no mental disability. As a result, these individuals and persons close to them may regard the condition as rare and exotic—a state of being that precludes political alliances with the non-disabled, and on which public funds should not be spent.

The analogy to repairing a broken window encourages (rather than suppresses) the display of conditions related to mobility and other functioning. Visible or not, a disability becomes easier to live with when one's environment declares it no barrier to integration. Ramps next to, or instead of, a staircase bespeak more than one way to get around. Closed-caption television programming permits audiences to consume content through eyesight as well as hearing. Defibrillators testify to the existence of cardiac conditions, as do airport signs that offer pacemaker users alternatives to the metal detector. Reminders like these claim capaciousness inside a public space. Advocates of the locution "differently abled," a phrase that never quite caught on, had a point: Social acceptance tells an individual that her characteristics and needs are all right, just different, rather than a badge of inferiority. She is welcome in public. Other people want her presence.[149]

B. *Civil Rights Trivializations: What Judges Disparage as Too Small*

A central premise of civil rights legislation is that individuals hold positive rights, which are infringed in recurring contexts. The Civil Rights Act of 1964 depicted workplaces, schools, housing, places of public accommodation, and other settings as venues of potential oppression. Decades later, this potential to oppress remains in place, and notions of *de minimis* tell injured persons to suffer in silence rather than assert their entitlements.

To get past summary judgment in a civil rights action, a plaintiff needs to gather facts and work them into a narrative. For the conclusion that favors defendants, however, all one need do is scoff: *Not enough. Not numerous enough,* or *bad enough,* or *unwelcome enough. A big claim might impress me,*

147. *See supra* note 140 and accompanying text.

148. Guido R. Zanni, *Many Americans Know Little About Mental Illness*, PHARMACY TIMES, Mar. 1, 2009, *available at* http://www.pharmacytimes.com/issue/pharmacy/2009/2009-03/2009-03-10058 (reporting survey data that show how underestimations prevail within public opinion).

149. *See* Anita Bernstein, *Lawyers With Disabilities*: L'Handicapé C'est Nous, 69 U. PITT. L. REV. 389, 394–95 (2008) (observing that messages of welcomeness to persons with disabilities can be present or absent in public settings).

but this one does not.[150] Asymmetry between the parties' burdens and entitlements makes sense in a tort context. Tort plaintiffs routinely fail to reach juries when, for example, a defendant's misbehavior was not "extreme and outrageous" enough, or their distress was not "severe," or they fell short of qualifying for a difficult adjective like wanton or reckless.[151] Wrongs identified only in the common law, which give defendants few explicit rules to guide their behavior, call for rigor in the prima facie case. When used to obstruct a claim rooted in statutory law, however, *de minimis* thwarts a legislative purpose.[152]

The function of the maxim, in the words of one court, "is to place outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case of."[153] Judges have fashioned *de minimis* barriers to recovery on their own initiative. These barriers lack bases in the statutes, and they scoff at real injuries.

1. Calling Instances or Episodes "Isolated"

Litigants who identify a hostile environment—an environment whose hostility might include detriments related to their race, sex, disability, age, national origin, or another hard-to-modify condition—typically describe unpleasant experiences in that environment as having blighted an atmosphere. Courts have described the degree of detriment that litigants must show as "pervasive."[154] When the atmosphere in question is a workplace, the detriment identified must "alter the terms and conditions" of the plaintiff's

150. *Cf.* Thomas, *supra* note 25, at 760–61 (arguing that judges, instead of inquiring whether a reasonable jury could accept the plaintiff's civil rights claim, should ask themselves whether they think the evidence is sufficient to reach a jury).

151. *See generally* Alexandra Fiore & Matthew Weinick, Note, *Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change*, 25 HOFSTRA LAB. & EMP. L.J. 525, 527 (2008) (noting the difficulty of proving tort claims brought to remedy workplace affronts).

152. *See infra* Part III.B.1 (exploring this point in the context for "isolated" instances, a judge-made device to turn away claims). Citing *Faragher v. City of Boca Raton*, 524 U.S. 777 (1998), which had noted in dicta that isolated incidents are not actionable, *see id*. at 778, courts have referred to isolated incidents as insufficient to support a claim of employment discrimination, as if they were referring to a doctrinal test rather than a tautology. *See* Walton v. Johnson & Johnson Serv., Inc., 347 F.3d 1272, 1285 n.12 (11th Cir. 2003) ("Generally speaking, isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."); Bowman v. Shawnee State Univ., 220 F.3d 456, 463 (6th Cir. 2000) (same).

153. Swick v. City of Chicago, 11 F.3d 85, 87 (7th Cir. 1993).

154. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986); *see also* U.S. Dep't of Educ., Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11448, 11449 (Mar. 10, 1994) (applying this criterion to racial harassment). For more recent expressions of the criterion, see De John v. Temple Univ., 537 F.3d 301, 316 (3d Cir. 2008) (rejecting a claim that alleged sexual harassment in education); EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 315–19 (4th Cir. 2008) (concluding that religion-based harassment of a Muslim employee met this standard).

employment.[155]

If the defendant in a hostile-environment case does not dispute the factual particulars of the plaintiff's account, yet resists the accusation of unlawful discrimination, a judge can express agreement with this resistance tersely by calling what happened to the plaintiff "isolated."[156] So used, this adjective has no precise quantitative meaning. It functions as an antonym of pervasive, but whereas judges have given complainants guidance on what the "pervasive" criterion demands of them, "isolated" is an arbitrary outcome-summarizing conclusion, devoid of substantive content.

One Title VII sexual harassment decision, *Black v. Zaring Homes*,[157] illustrates the unprincipled flexibility of "isolated" as a characterization of incidents or episodes. Before deciding to file her claim, the plaintiff in *Black* had approached the company's general counsel inside a women's restroom. The two had just left a meeting replete with coarse sexual humor and tauntings, the workplace climate to which the employee had struggled to adjust. "I can't stand [it]," the employee said. "This is crazy. . . . Has it always been like this?" "Well, that's just the way [these co-workers] are," replied the general counsel. "There's nothing you can do about it." When the plaintiff brought an action against her employer, a magistrate judge referred to one of the workplace experiences she deemed harassing as an isolated incident.[158]

Judges frequently deem instances of hostile environment sexual harassment to be too isolated to warrant relief in the courts. In *Quinn v. Green Tree Credit Corp.*,[159] the Second Circuit winnowed out several accusations from the plaintiff's original complaint, found two of them worthy of attention, and then concluded that the two acts in question, both of them done by the plaintiff's supervisor's boss—first, telling the plaintiff "that she had been voted the 'sleekest ass' in the office" and, second, deliberately touching her breasts with papers in his hand—were too "isolated" to have altered her conditions of employment.[160] Another court totaled the plaintiff's allegations of harassing behaviors by her supervisor and concluded that five acts over sixteen months were not numerous enough.[161] Eight gender-related comments,

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155. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 767 (1998) (citing Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)). In *Rogers*, the plaintiff was an employee of an optometrist whose practice was to segregate patients by race. The court agreed with her characterization of this work environment as "heavily polluted with discrimination." *Rogers*, 454 F.2d at 238.

156. Judges favor this adjective—which is not written into federal civil rights statutes to limit liability for wrongful conduct—to exonerate defendants. *See infra* notes 158–69. For a rare departure from this diction, see Rivera-Fernandez v. Autonomous Municipality of Loiza, 2009 WL 1076681, slip op. at *7 (D.P.R. 2009) (entering summary judgment for defendant because the plaintiff's allegations of race discrimination were "sparse and discrete").

157. 104 F.3d 822 (6th Cir. 1997).

158. *Id.* at 824 & n.2.

159. 159 F.3d 759 (2d Cir. 1998).

160. *Id.* at 768.

161. Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1366 (10th Cir. 1997).

some of which the Seventh Circuit characterized as "offensive," were "too isolated and sporadic" to warrant relief.[162] One defendant won summary judgment because the plaintiff "alleged only three relatively isolated incidents over a period of approximately two and a half years."[163] Also "relatively isolated," and thus inadequate, were a supervisor's touching, request for dates, and attempted kisses of his subordinate, along with calling her a dumb blond.[164]

Perhaps there exists a number of offensive incidents so large that no court could ever use the adjective "isolated" to describe them. Nevertheless, published judicial responses to hostile environment sexual harassment claims offer no certainty to would-be litigants that any particular quantity will suffice. Instead, the adjective judgment functions to express a conclusion about the environment surrounding the plaintiff: Most of this atmosphere was benign enough, and if some number of episodes marred that smooth surface, then these episodes were too scant and scarce to matter. Courts instruct would-be complainants to absorb and accommodate what a song lyric once called "a little bit of abuse,"[165] without telling them what constitutes a little bit.

Moving beyond sexual harassment into other civil rights violations, case law manifests more judicial rejection through the dismissive use of "isolated."[166] When African-American police officers protested "racially oriented graffiti in the restrooms," racial slurs used by high-level officers, and a racially offensive cartoon posted on a bulletin board, a trial court deemed these experiences "isolated events," and the Eighth Circuit, with a show of reluctance, upheld its conclusion under the indulgent "clearly erroneous" standard.[167] In another Eighth Circuit decision, an African-American man had been "exposed, at most, to six isolated instances of racially derogatory language from two managers and three coworkers over the course of a year and a half": too isolated, said the court; not enough to stop summary judgment.[168] Disability discrimination claims have also been rejected on this ground.[169]

One appellate decision shows how a court can deploy the word "isolated"

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162. Patt v. Family Health Sys., 280 F.3d 749, 754 (7th Cir. 2002).

163. Clark v. United Parcel Serv., 400 F.3d 341, 351 (6th Cir. 2005).

164. Weiss v. Coca Cola Bottling Co., 990 F.2d 333 (7th Cir. 1993).

165. *See* THOMAS M. KITTS, RAY DAVIES: NOT LIKE EVERYBODY ELSE 205 (2007) (exploring the origins of "A Little Bit of Abuse," a song by the Kinks that deplored domestic violence).

166. *But see* Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 122 (2003) (arguing that although severity and pervasiveness exist as nominal criteria for all employment-based harassment claims, in practice they function to impede only sexual harassment claims).

167. Albert v. Little Rock, 722 F.2d 1390, 1394–95 (8th Cir. 1983).

168. Jackson v. Flint Ink N. Am. Corp., 370 F.3d 791, 795 (8th Cir. 2004).

169. *See* Bethea v. Potter, 2010 WL 423105, slip op. at *4 (S.D.N.Y. Feb. 5, 2010); Porter v. Jackson, 668 F. Supp. 2d 222, 237 (D.D.C. 2009).

with the sole result, or perhaps for the sole purpose, of negating an otherwise satisfactory complaint of race discrimination. Debra A. Satchel, an African-American woman who had been terminated from her positions as a Florida schoolteacher and school board employee (for "among other things, insubordination") brought an action alleging racial harassment. The Eleventh Circuit held that "[t]he harassment Satchel complained of" could not fulfill the "pervasive" element of her prima facie case because it "consisted of specific, isolated incidents which occurred over a period of years at different schools."[170] Remove the conclusory "isolated" from this phrase and it becomes a rock-solid description of unlawful actionable conduct. By simple *ipse dixit*, "isolated" withdraws the strength from a strong allegation.

2. Saying the Violation Might Have Been Bad, But It Was Not *That* Bad

Calling incidents or episodes "isolated" deems them too trivial in number; a complementary set of dismissals deems misbehaviors too trivial in quality to matter. Most notably, starting with *Faragher v. City of Boca Raton*,[171] federal courts have used a baseline premise to constrain civil rights liability: Human relations necessarily contain some unpleasantness, and in order to be actionable, a misbehavior ought to exceed this qualitative norm. Readers of employment-discrimination case law know that adjectives like "rude" or "boorish"—along with bugbears like the dreaded "civility code,"[172] which courts seem to assume no worker, employer, or doctrine would ever want—all signal to audiences that, once again, a plaintiff has lost because, although what happened to him or her at work might have been bad, it was not *that* bad.

To the extent that this judicial predilection attempts to bring clarity to individuals' claims of being affronted, it makes good sense. The predilection avoids the dangers of an unadministrable subjective standard: Courts should not grant relief to a plaintiff based merely on her or his own testimony about perceiving hostility in an environment.[173] The predilection also recognizes the difference between unlawful discrimination and mere offense or discomfort.

But neither of these benefits—warding off the perils of a subjective criterion and clarifying what exactly a plaintiff must prove to prevail—is advanced by scoffing at a real injury. A 1998 law review article tersely titled *De Minimis Discrimination* explores how some courts defy the language and

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170. Satchel v. Sch. Bd., 251 Fed. Appx. 626, 630 (11th Cir. 2007). The four-element prima facie case in *Satchel* is derived from *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). *Satchel*, 251 Fed. Appx. at 630.

171. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787–89 (1998).

172. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998) (emphasizing the need "to prevent[] Title VII from expanding into a general civility code"); *cf.* Bouknight v. District of Columbia, 2010 WL 145091 (D.C. Cir. 2010).

173. In Part III of this Article, I link the obligation of courts to refrain from trivializing plaintiffs' accounts with the right of defendants not to be held to opaque, unpredictable interpretations of an environment that a subjective standard could impose.

purposes of Title VII by imposing a judge-made triviality criterion to bar claims of disparate treatment.[174] Judges have built this barrier out of two constructs.

The first judge-made construct is the "ultimate employment decision" requirement, which precludes relief whenever the hurtful experience inflicted by the employer on the plaintiff did not consist of "hiring, granting leave, discharging, promoting, and compensating," but instead was something that a court could deem "interlocutory or mediate."[175] The other hurdle that judges impose is a demand that the plaintiff has suffered a "materially adverse"—non-trivial, that is—action at work.[176] Neither requirement is found in the language of civil rights statutes.[177] Both requirements insist that plaintiffs meet a severity threshold before courts will consider remedying the employment wrongs they suffered.

Whole categories of workplace injury vanish when the "ultimate" wand waves them away. Consider, for example, the African-American worker who alleged that the racial composition of a promotion review panel harmed him. Postal Service rules had required the presence of at least one woman or minority group member on his review panel; the panelists who reviewed the plaintiff's candidacy were all, in violation of the policy, white men.[178] The Fourth Circuit refused to hear this grievance as a violation of Title VII, holding that as an employment action, the composition of the panel was not "ultimate" enough.[179] In other failed claims, courts held that the retaliatory behaviors that plaintiffs suffered were also not ultimate.[180] Whether employees will suffer detriment from this doctrine depends on the fortuity of where in the United States they work: several appellate courts reject the "ultimate" criterion for relief.[181]

Similarly some, but by no means all, employment discrimination complainants face a judge-made barrier that requires "material" adversity in an employment action.[182] More overtly than the "ultimate" criterion, the materiality obstacle insists that *de minimis non curat lex*. Like the isolated-incidents peril, this doctrine allows judges to respond, *Not enough, I am not impressed,* without further analysis of the plaintiff's failure. Adversity falls

174. Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

175. *Id.* at 1137 (citing Page v. Bolger, 645 F.2d 227, 223 (4th Cir. 1981) (en banc)).

176. *Id.* at 1143.

177. *Id.* at 1148–50.

178. Page v. Bolger, 645 F.2d 227, 228–29 (4th Cir. 1981) (en banc).

179. *Id.* at 233.

180. Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997) (cataloging instances); Ledergeber v. Stangler, 122 F.3d 1142 (8th Cir. 1997) (holding that the plaintiff's disciplinary transfer and the letter in her file identifying her as a racist were not "ultimate" employment actions).

181. White, *supra* note 174, at 1140–42 n.85. The Equal Employment Opportunity Commission also rejects the "ultimate" criterion. *Id.*

182. *Id.* at 1146 (noting that the Second, Tenth and Eleventh Circuits reject material adversity as an element of the prima facie case).

short of material adversity if a judge says it does. Courts have held that involuntary lateral transfers,[183] negative performance evaluations,[184] and the reduced opportunities that one notorious plaintiff attributed to her having rebuffed a crude sexual overture from then-Governor Bill Clinton[185] were all too trivial to be heard.

Hostile-environment sexual harassment case law is replete with egregious misbehaviors that courts deemed less than "severe."[186] Courts move nimbly to say that sexual harassment as plaintiffs describe it is not really that bad. In *Gabrielle M. v. Park Forest-Chicago Heights*,[187] for example, the Seventh Circuit accepted as true the five-year-old plaintiff's harrowing account of grabbing, name calling, taunting, and fondling by a peer—a course of mistreatment that caused her psychological injury—and then rejected her claim by finding that the kindergarteners described in her complaint "were unaware of the sexual nature of their behavior."[188] The Eleventh Circuit decided to reframe the *Meritor*-based severity-or-pervasiveness criterion as a four-part conjunctive test, granting summary judgment because the plaintiff had failed to show each of the four criteria: frequency, severity, physically threatening or humiliating behavior, and unreasonable interference with her job performance.[189] In *Duncan v. General Motors Corp.*,[190] the Eighth Circuit simply omitted one of the worst incidents in the plaintiff's narrative when it summarized her accusations as not bad enough.[191] All of these judicial rejections imposed hurdles on plaintiffs found nowhere in the text or history of Title VII or any other federal civil rights statute.

3. Presuming that the Violation was Welcome

Antidiscrimination doctrine on welcomeness offers another illustration of misplaced *de minimis*. Like the other dismissive devices noted above, judge-made rules about welcomeness imply that what a complainant suffered may have been no big deal. Welcomeness analysis speculates that a person might have once invited behaviors that she later deemed objectionable. A judicial

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183. Legerderber v. Stangler, 122 F.3d 1142 (8th Cir. 1997); Castro v. New York City Bd. of Educ., 1998 LEXIS 2863 (S.D.N.Y. Mar. 12, 1998).

184. Smart v. Ball State Univ., 89 F.3d 437, 442 (7th Cir. 1996).

185. Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998).

186. Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII's Transformative Potential*, 20 YALE J. L. & FEMINISM 131,152 n.103 (2008) (citing Whittaker v. N. Ill. Univ., 424 F.3d 640, 644 (8th Cir. 2005) (approving summary judgment where the plaintiff alleged repeated requests for dates from her supervisor, all refused, and repeated uses of graphic epithets from him including "stupid cunt" and "fucking lazy bitch") and Harvill v. Westward Commc'ns, 311 F. Supp. 2d 573 (E.D. Tex. 2004) (deeming less than "severe and pervasive" a succession of sexual touchings by a co-worker)).

187. 315 F.3d 817 (7th Cir. 2003).

188. *Id.* at 823.

189. Mitchell v. Pope, 189 Fed. Appx. 911, 913 (11th Cir. 2006); *see generally* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1980) (recognizing that sexual harassment constitutes sex discrimination and requiring that plaintiffs prove severity and pervasiveness when they allege a hostile environment).

190. 300 F.3d 928 (8th Cir. 2002).

191. *Id.* at 937 (Arnold, J., dissenting).

stance of rejecting complaints on the ground that the conduct in question did not, in fact, hurt the claimant does make sense at one level: Civil rights plaintiffs alleging injury have an obligation to describe the harm that they experienced.[192] Without harm, they can receive no redress.

The judicial response of, "But how do we know you didn't want the conduct you're now complaining about, back when it happened?"—what I refer to here as the unwelcomeness criterion—is, however, crucially different from the sensible insistence that anyone who claims injury must have been injured. To start, it is used for only one type of civil rights claim. For all protected categories except sex, and for all types of offending behavior except sexual harassment, disparate-treatment plaintiffs do not have to show that they found the complained of behavior unwelcome.[193] This doctrinal isolation—not written into the statute that the Supreme Court read to impose this extra showing—suggests that judges may be accepting or tolerating one type of prohibited behavior more than others.

Installing this element into the prima facie case means that a hostile environment sexual harassment plaintiff must not only point to rights-violating behavior by the defendant; she must also refute a default position that she liked (or at a minimum did not mind) a course of conduct that she went on to deem violative of her civil rights.[194] Making the claim exceptionally hard to prove for only hostile-environment sexual harassment seems like a lack of interest in redress for this injury. Both the Supreme Court, which in 1986 resolved a split in the circuits by declaring unwelcomeness part of the prima facie case,[195] and the Equal Employment Opportunity Commission, which wrote unwelcomeness into its 1980 definition of sexual harassment,[196] went out of their way to impede this set of civil rights claims.

For this category, ample impediments to recovery already exist; the unwelcomeness criterion is only one of several elements of a prima facie case for hostile-environment sexual harassment.[197] Adding unwelcomeness

192. *Cf. supra* notes 18–19 and accompanying text (noting the ways in which wrongful conduct alone does not generate, or warrant, judicial redress).

193. Ho, *supra* note 186, at 139.

194. *See, e.g.*, Derrior v. Pinkerton's, Inc., 1999 WL 311757 (N.D. Ill.) (remarking that "plaintiff is not exactly a blushing violet. She admits while on the job she repeatedly used vulgar, profane language, told dirty jokes, graphically discussed her sex life and engaged in sexual banter. It would be difficult if not impossible to believe that plaintiff would be offended" by sexual conduct).

195. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Joan S. Weiner, *Understanding Welcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621, 624 n.12 (1997) (noting that although most federal appellate courts pre-*Meritor* had required plaintiffs to show unwelcomeness, the Third and Ninth Circuits had not).

196. The EEOC placed "unwelcomeness" in a definition. *See* EEOC Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74, 676 (No. 10, 1980) (calling workplace sexual harassment "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"). This drafting contains some ambiguity, but it seems to use "unwelcome" to modify the entire list.

197. A plaintiff must also establish that the behavior complained of was based on sex, that it affected a term or condition of employment, and that the defendant-employer knew or should have known of the behavior and failed to remedy it. This version of the the prima facie case, accepted by the Supreme Court in *Meritor*, was first stated in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

presumes that a plaintiff who can show all of these other elements nevertheless presumptively welcomed the conduct in question. The criterion introduces "a troublesome line of reasoning: Since women generally welcome sexual behavior, it is most efficient to require the exceptional woman who does not welcome such behavior to make her difference known."[198]

This objection is not new; commentators have opposed the unwelcomeness criterion. Some advocate its elimination while others favor reducing its burdens on plaintiffs.[199] For the broken windows thesis of this Article, what is noteworthy about requiring evidence of unwelcomeness is not its wrongheaded policy stance but how it continues a tradition of judicial disdain in civil rights litigation. Both judges and scholars who have written about unwelcomeness in sexual harassment doctrine have commented on its unique and exceptional status.[200] Agreeing that sexual harassment does indeed differ from other civil rights claims in this respect, I would make a separate point about its similarity.

Judicial responses to civil rights claims that fault plaintiffs for not having enough episodes to recount, or not having suffered enough, are instances of the same judicial bent toward *de minimis* condemnation of unambiguous (and often undenied) wrongdoing.[201] Telling these employment discrimination plaintiffs that it is not enough for them to show that they 1) are members of a protected class; 2) suffered adversity based on their membership in that class; and 3) worked for an employer that knew or should have known about oppressive conditions yet unreasonably failed to remedy them—that this much of a showing is not enough, because a now-aggrieved employee might once have welcomed these conditions she describes as injurious—is only the most extreme judicial trivialization in use, not the only one: it resembles other ways courts tell plaintiffs that they have not endured enough abuse. Courts could not have invented the welcomeness criterion without their extensive prior experience in disparaging and minimizing violations of civil rights. "How do we know you did not like the disparate treatment about which you are complaining?" takes only a small step beyond calling accounts of injury "isolated" without defining the term or deciding that a person's injury must go unremedied because it was not severe enough.

Although the unwelcomeness criterion appears to ask a yes-no question—Did you want it, or did you not want it?—in function it takes a qualitative, gradable measure of a claim, resembling the other two judicial responses that seek to reserve recourse for only the worst harms. Like deeming

198. Ho, *supra* note 186, at 133. Ho also argues that later sexual harassment decisions by the Supreme Court bolstered the unwelcomeness criterion as a way to make plaintiffs lose and defendants win. *See id.* at 144–45 (discussing affirmative defenses as announced in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)).

199. *See id.* at 133–34 (summarizing academic proposals for reform, which include abolishing the requirement, shifting the burden of proof to defendants, and restricting it to an evidentiary doctrine with respect to damages).

200. *Meritor*, 477 U.S. at 68 (deeming unwelcomeness to be "the gravamen" of the entire cause of action); Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 781 & n.221 (2002) (reviewing scholarly commentary).

201. *See supra* Part II.B.1–2.

incidents too few and deeming them too mild, the criterion brings a *de minimis* approach to this particular civil rights violation. One commentator, Grace S. Ho, makes this point by recounting her interviews with litigators working in this field. Having talked to lawyers who represent plaintiffs, defendants, and the EEOC, Ho found that the unwelcomeness criterion has in practice post-*Meritor* moved from the prima facie case to an affirmative defense for institutional employers.[202] Although the plaintiffs' lawyers Ho surveyed believed that ideally they would know, pre-filing, about any contemporaneous protests that had indicated unwelcomeness, they recounted focusing more on whether the plaintiff had reported the conduct to her employer. They explained that they ask the did-you-report question to evaluate the strength of a prospective case.[203]

This particular inclination to sort on gradable terms—that is, to separate weak from strong, bad from good, not unwelcome from not welcome—has little to do with the statute or the substantive merits of a claim. Every one of the plaintiffs' lawyers that Ho surveyed, as well as some of the EEOC lawyers, "expressed pragmatic concerns regarding the difficulties of using the employer's complaint mechanisms."[204] In other words, these lawyer-informants believed that requiring harassed workers to have articulated a clear protest is a bad policy if one wishes to know whether harassment really happened. It is perverse for courts to suppose that disparate-impact affronts were welcome whenever an employee did not complain about them formally. Again, one finds a *de minimis* filter at work, at least in the large fraction of cases that include claims against institutional employers. The unwelcomeness criterion functions to demand an extra bad, extra severe, or extra large injury.[205]

C. *Relocating Broken Windows to Civil Rights Liability: Some Benefits*

A broken windows approach to civil rights claims would undo the judge-made doctrines that demand extra largeness from plaintiffs.[206] Judges applying broken windows to civil rights violations would recognize that even small infringements "create an environment that breeds bigger" offenses.[207] Many,

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202. Ho, *supra* note 186, at 150.

203. *Id.*

204. *Id.*

205. A racial harassment case illustrates this judicial maneuver. One district court judge, rejecting a claim, held that the racial harassment that plaintiff alleged was not "'extremely serious' as Title VII requires." Porter v. Milliken & Michaels, Inc., No. 99-0199, 2001 U.S. Dist. LEXIS 9157, at *20 (E.D. La. June 27, 2001). Title VII does not contain the phrase "extremely serious." Neither does *Faragher*, the Supreme Court decision the court cited immediately after the phrase quoted. *Id.* (citing Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)). The court, in effect, added another layer of burden onto a moderate demand as articulated by the Supreme Court. The pattern is prevalent. *See generally* Keller & Tracy, *supra* note 21 (arguing that lower courts regularly augment the Supreme Court's demands on plaintiffs who file discrimination actions).

206. *See supra* Part I.

207. *See supra* note 22 and accompanying text.

although not all, of these affronts warrant redress, for the same broken windows reasons that police officers respond to misdemeanors. Three conditions make broken windows policies more desirable in the civil rights liability context than for police work. First, assigning the role of initiator to private citizens rather than state actors mitigates abuses. Second, because civil rights claims derive from democratically enacted statutes—whereas broken windows policing rests on police discretion that permits caprice—a civil rights application is more congruent with the rule of law. Third, to the extent an instance of broken windows enforcement might be misplaced or unjust, it faces a fairer fight in civil rights litigation than it does in street policing: Civil rights defendants who are burdened by a policy of hostility to their affronts have money and power that almost every broken windows street target lacks.

1. Public Gain Through Private Initiative

The civil rights application proposed in this Article assigns enforcement to injured individuals. Government entities like the Equal Employment Opportunity Commission have the authority to initiate civil rights enforcement actions, but they will not do so for the smaller affronts that occupy us. In this particular context of *de minimis curet lex*—that is, when civil rights are at stake, the law *should* concern itself with small things—the state plays the role of adjudicator, not jackboot initiator. [208]

Relocating the broken windows hypothesis to citizen-initiated claims about civil rights removes the Foucauldian shadow that hovers atop the law enforcement application.[209] Established as a first mover, the injured person acts as as an agent and instigator. As a group of initiators, these people connect broken windows with vulnerability rather than surveillance and punishment.

They bring restraint to a metaphor long associated with authoritarian arrogance.[210] Whenever an armed front-line constabulary carries out a law enforcement policy, it uses force. Its force is checked and tempered, to be sure. Higher ups in police departments, external entities like civilian complaint boards, and courts authorized to hear complaints of brutality or other misconduct can review the conduct of officers.[211] Most law enforcement excesses, however, will escape scrutiny and sanction. Especially when it focuses on stopping poor and disempowered offenders, broken windows policing can inflict injuries that do not easily come to light through

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208. Here, I presume that agencies like the EEOC will continue to devote its enforcement energies to large-scale offenses. If this stance should change, and government entities decide that *de minimis curet lex*, then defendants will still enjoy much more power to withstand the enforcement effort than street-policing broken-windows defendants now hold.

209. *See supra* text accompanying notes 55–56.

210. *See supra* Part I.

211. SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 171–73 (2005) (summarizing twentieth-century reforms).

complaints.

This point emerges from contrasting civil adjudication, initiated by individuals, with criminal prosecution, which has been a governmental monopoly since the 19th century.[212] Stephen Yeazell has invited readers to recall the 19th-century practice of citizen-initiated criminal prosecution, where aggrieved individuals could hale offenders into the criminal courts for judicial punishment.[213] His imaginative exercise widens the arc of "access to justice" commonly (and narrowly) understood as access to the civil courts. Because many offenders lack assets to pay a civil judgment, access to courts for civil recourse means little to many potential plaintiffs.[214] "Poor people want more policing,"[215] writes Yeazell. Restoring their old prerogative to threaten offenders with jail time would give the poor real protection from such class-related harms as unlawful evictions and predatory lending.[216]

That poor people want more policing has a ready analogy in civil rights liability: People whose civil rights are covered by antidiscrimination legislation want more enforcement of these rights. The analogy is indeed stronger than Yeazell's point, because whereas the poor might have reasons to mistrust police officers, individuals whose group-based traits are protected by antidiscrimination legislation have no cause to mistrust courts empowered to apply laws written to enhance the quality of their lives. Their role as initiators reduces the danger that ostensible protection will be twisted to hurt them. Accordingly, in an extension of the idea Yeazell has broached—returning to crime victims their old prerogative to initiate a criminal prosecution of a person who violated the criminal law and hurt them thereby[217]—one may more narrowly infer that victims of civil rights violations should gain an easier passage to the courts.

Shifting broken windows enforcement power to citizens enjoys ample support in American law and policy. Fee shifting, qui tam, and the notion of a private attorney general, among other doctrines, all express overt confidence in private initiative as a source of public gain.[218] Unlawful discrimination becomes manifest in a feedback relation: Legislators who proscribe categories of injurious behavior depend on the information that emerges from civil rights claims, and individuals learn from legislation and adjudication about wrongs

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212. Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 691 (2006) (noting a 150-year-old tension between the socialization of criminal law and the privatization of civil law).

213. *Id*. at 692.

214. *Id.* at 695.

215. *Id.* at 697 (citations omitted).

216. *Id.*

217. Yeazell is careful not to recommend this reform explicitly; he confines himself to noting its virtues.

218. *See* Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2058–61 (1993); Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 1000 (2007).

that they are entitled to protest.[219] For this dialectic to flourish, every civil court must remain at least somewhat open to protests from aggrieved individuals. Complainants provide facts and experiences that alter the content of civil rights, a category of law under continual reassessment.

2. The Statutory Warrant: More Orderly Order

Judges who honor the nondiscrimination objectives that Congress wrote into civil rights law help to carry out a democratically derived mandate. Rights to equal treatment in such venues as employment, housing, and education occupy Great Society-era legislation, and have only grown since then via expansive amendments to the Civil Rights Act of 1964 and newer statutes that recognize other protected categories.[220] Civil rights protections enjoy a broad base of civic support and an even broader base of familiarity. Only a dwindling number of people alive today in the United States can remember a time when laws like these were not on the books.[221] Laws enacted at the state level underscore this consensus and enhance the democratic provenance of the protections.[222]

Recall the definition of civil rights law with which this Article began: "[T]he right to share equally with other citizens in such benefits as jobs, housing, education, and public accommodations."[223] The broken windows perspective on civil rights law regards civil rights violations as important in part because legislatures, notably Congress, have said so. Their expressions provide a statutory warrant for citizen initiative and judicial response.

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219. Michael W. McCann, *Law and Political Struggles for Social Change: Puzzles, Paradoxes, and Promises in Future Research*, *in* LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 319, 328 (David A. Schultz ed., 1998).

220. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1289–90 (2005) (noting expansions of federal statutory civil rights liability in the late 20th century).

221. One American college makes this point humorously every August by publishing a list of what students about to start their higher education take for granted. The publication serves to remind administrators, instructors, and parents how old they have grown. For example, the 2009 version includes "With little need to practice, most of them do not know how to tie a tie," "Condoms have always been advertised on television," "They may have fallen asleep playing with their Gameboys in the crib," "They missed the oat bran dieting craze," and "Lyme disease has always been a ticking concern in the woods." *See Beloit College Mindset List for the Class of 2009*, www.beloit.edu/mindset/2009.php (last visited Apr. 13, 2010). Statutory civil rights had been venerable for a long time when Gameboys and the oat-bran fad came along.

222. For a rueful comment on the dispensability of this principle when it becomes inexpedient, see Melissa McEwan, *Mourning Gay Marriage in Maine*, THE GUARDIAN, Nov. 4, 2009, http://www.guardian.co.uk/commentisfree/cifamerica/ 2009/nov/04/gay-marriage-maine-ballot-initiative ("And so came the howling about 'activist judges'. But in Maine, it was not left to a judge to decide the fate of same-sex marriage, but instead to the state legislature. And then—what a surprise—that wasn't good enough, either. It still had to be brought before Maine's voters . . . .").

223. *See supra* text accompanying note 17.

Insisting that violations of these rights will be remedied even if they are not large honors an unambiguous directive from statute-writing lawmakers. When civil rights legislation provides a private right of action, it recognizes not only a social ill but the necessity of enlisting individuals to bring claims for redress. Private rights of action in contemporary civil rights law were either written into the statutes or accepted by the legislature after judges declared this right, thereby manifesting a democratic provenance.[224]

Here, we may quickly review a few ideals of what makes democratically enacted legislation worthy of esteem. Civil rights laws were passed by elected representatives of the American people. Legislators voted openly: the public had a chance to express its approval or disapproval of provisions. Majorities prevailed. Coverage of the lawmaking process by journalists and other observers publicized the goals and content of various laws before they reached a vote. Judicial review has for centuries empowered judges to strike down enactments that are contrary to law. The passage of civil rights legislation in the United States has exemplified ideals of democracy, fairness, and progress as well as any other instance of enacted statutory law in this country. What I am calling a statutory warrant—the rightness of using majority-voted law as an instrument of progress—supports the broken windows policy that this Article advocates.

Law enforcement on the street, rooted only in a charge to watch over discrete geographic regions, lacks this overt invitation in the law. And whereas civil rights legislation deserves esteem even before it is used, simply in recognition of its democratic bona fides, police discretion deserves esteem only when individual officers use it well. The essential work of these officers can include abuses.[225] A broken windows law enforcement policy has no inherent link to such baleful inclinations, but it also contains no safeguards against them. Accordingly, the civil rights application of broken windows enforcement relocates the technique to a place with a stronger foundation in the rule of law.

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224. *Compare* 42 U.S.C. § 2000e-5(f) (2006) (codifying a private right of action for Title VII employment discrimination), *with* Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (finding a private right of action, not codified by Congress, in Title IX).

225. For example, one critic of broken windows recently wrote about a New York police practice of contriving broken windows misdemeanors by stopping persons on the street and asking them to empty their pockets. If this pocket emptying reveals marijuana, the officer can arrest the individual for publicly displaying this drug; mere possession of marijuana without displaying it is not an arrestable offense. Balko, *supra* note 78. *See also* Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479, 488 (2009) (summarizing practices that include searches in violation of the Fourth Amendment, coerced confessions that violate the Fifth and Sixth Amendments, mistreatment of suspects in confinement, race discrimination in decisions to detain individuals, police brutality, and corrupt inattention to particular violations of the law).

3. A Fairer Fight

Objections to broken windows law enforcement have come mainly from social scientists, other scholarly writers, and community activists rather than persons vulnerable to police harassment. No one on the street defends a broken window. Among those persons who have denounced broken windows as policy, few report anything about how an individual arrested, detained, questioned, or otherwise put at the receiving end of broken windows has experienced this approach to law enforcement. The policy's small scale—the petty blights, its misdemeanors rather than felonies, the police officers who irk street offenders rather than mistreat them gravely—means that protests from affected individuals stay small as well. All persons impacted by broken windows know their peripheral status. They remain marginalized.

Formal allegations of civil rights wrongs, by contrast, are aimed at people and entities that think of themselves as respectable. Cast as defendants, these entities and persons typically insist they have done nothing wrong. Their respectability makes the struggle fairer. Rather than vex petty street offenders and the hapless poor, the civil rights application advocated here applies law enforcement against persons and organizations that have money and power.

The persistence of a civil rights claim against an entity defendant suggests that something important is at stake: the defendant either has taken a stance of resistance to complaints generally or is refusing to admit wrongdoing with respect to the plaintiff's particulars. Either way, the accusation matters. Perhaps the plaintiff should lose. He may not be entitled to a day in court. But judicial labeling of the matter as unworthy because it is too small stands refuted by the power of the defendant to dispatch the accusation. If it is really so undeserving of attention, one might wonder why the defendant did not spend a pittance to make it go away.[226] Defendants in civil rights litigation not only have good access to lawyers to tell their side of the story; most of them are prosperous.

Impecunious persons certainly can violate the civil rights laws—one thinks of a low-income landlord turning away prospective tenants based on their race, unemployed louts who form packs and commit violent hate crimes, a struggling entrepreneur who exploits undocumented workers—but as a general rule, victims will file actions for financial redress only when the accused appears capable of paying a judgment.[227] Thus aided by counsel, civil rights defendants are well positioned to disparage small injuries as unworthy

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226. Lest readers infer that I have never seen a civil rights claim I didn't like, two clarifications. First, a defendant that declines to settle a claim it deems unfounded may well be hewing to principle. A principled refusal to settle is, however, inconsistent with the stance of deeming a claim too trivial to deserve attention. *See supra* Part II.B. Second, my implicit endorsement of spending a pittance to make a claim go away applies to allegations of relatively small yet real injury rather than to frivolous or bad-faith claims, which in my view should continue to receive the judicial disapproval (and sanctions) that they now encounter. I thank Diane Fahey for pressing me on this point.

227. Yeazell, *supra* note 212, at 695.

of judicial redress even if a judge takes away the *de minimis* weapon these defendants have habitually wielded. Civil rights defendants can also pay or pressure a plaintiff to withdraw an accusation. These docket-clearing devices, made out of money, permit courts to preserve scarce time on their calendars. Judges can do their jobs without the barrier of this dismissive device.

Consider the contrasts of applying broken windows to street enforcement. Broken windows misdemeanor arrests typically will not meet Sixth Amendment criteria for court-appointed counsel,[228] and most arrested persons will lack funds of their own to pay attorneys' fees. Affected individuals will receive attorney talent powerful enough to resist a broken windows policy sufficient to articulate their view of broken windows law enforcement only if a civil rights organization decides to invest in impact litigation or a similar high visibility strategy to oppose a police policy. Impact litigation of this kind was rare even back in the heyday of activist lawyering and is rarer today.[229]

Whatever else may obstruct a broken windows approach to street disorder, then, meaningful resistance by affected individuals is not among the barriers. The struggle between enforcers and the enforced-upon in this respect recalls the invasion decades ago by U.S. armed forces of an island country whose population barely exceeded 100,000. Grenada may have deserved to be invaded, but the 1983 skirmish that the bigger country started was surely an asymmetrical one. This Grenada-like absence of a fair fight—"a fair fight" meaning a dispute where the non-initiator has sufficient power to assert its interests—makes broken windows presumptively more troubling in the street enforcement context than it would be against well-heeled civil rights defendants.

Continuing the money-and-power theme, a civil rights application of the broken windows strategy makes the fight of private-law civil rights enforcement even fairer through statutory fee shifting. Fee shifting permits the awarding of attorney's fees in civil rights cases to prevailing parties, contrary to the default "American rule" that requires both sides to pay for their own lawyers in most other categories of civil litigation.[230] These statutes encourage enforcement actions that would otherwise never reach the courts. In these enforcement actions, accused persons and entities receive power through their advantaged circumstances before filing, and plaintiffs receive power through

228. Scott v. Illinois, 440 U.S. 367, 373 (1979) (holding that "actual imprisonment" as a threat must be present before a defendant has a right to counsel).

229. *See* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 947–48 (2007) (describing a retreat from impact litigation by civil rights activists).

230. The federal fee shifting statute that governs civil rights actions, 42 U.S.C. § 1988 (2006), was enacted "to make sure that competent counsel was available to civil rights plaintiffs . . . ." Blanchard v. Bergeron, 489 U.S. 87, 93–94 (1989). *See generally* Krent, *supra* note 218 (defending one-way fee shifting). For more on the default American rule, see David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule*," 15 IND. J. COMP. & INT'L L. 583, 584–89 (2005).

the prospect of shifted fees should they prevail. Both sides get to tell their own broken windows story of what happened, contrary to the street-enforcement version of broken windows that rounds up disorderly offenders and gives them no voice.

Because an application of this Article's proposed new maxim, *de minimis curet lex*, to civil rights claims would probably have the effect of reducing summary disposition and thus expanding the number of complaints that could reach a jury, the civil jury also warrants attention in this discussion of a fair fight. Civil liability defendants have for decades decried what they perceive as juries' prejudice against them, along with the uncertainty that jury adjudication adds to their business planning.[231] Their protests notwithstanding, the presence of a jury—whether actually empaneled or just a specter that influences settlement negotiations—adds to the fairness of a civil rights fight.

According to one expert on the civil jury, this group of individuals applies "commonsense justice" to civil claims.[232] The civil jury seeks balance as it evaluates the behaviors and obligations of plaintiffs and defendants.[233] Judges, defense lawyers, plaintiffs' lawyers, and jurors themselves have all expressed praise for the intelligence, good faith, and fairness of jurors.[234]

To be sure, the civil jury has provoked plenty of skepticism and distaste over the years, not only from plutocrats who fear its homespun wisdom.[235] One need not be a Tocquevillian cheerleader to accept the value of juries for this civil rights application. Jury trials offer litigants and onlookers a solemn hearing, a civic ritual, and a didactic takeaway. They also temper the power of the government: as a judicial defender of the civil jury has pointed

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231. For expressions of these discontents, see Richard M. Calkins, *Caucus Mediation—Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace and Healing*, 54 DRAKE L. REV. 259, 262–63 (2006); Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58, 67 (2007) (noting that employment defendants mistrust jury decisionmaking); *see also* Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1127 (2007) (noting concerns about unpredictability in debates about products liability).

232. Valerie P. Hans, *Juries as Conduits for Culture?*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 80, 89–92 (David M. Engel & Michael McCann eds., 2009).

233. *See id.* (citing NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 16–18 (2000)).

234. Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 479–81 (1998); *see also supra* note 27 (citing law review articles by federal judges that lament the vanishing trial).

235. *See* MARK TWAIN, ROUGHING IT 341–42 (Oxford Univ. Pres 1996) (1872) (disparaging the intelligence and probity of the American jury); Schuck, *supra* note 234, at 479–82 (noting that although all sectors of the civil justice system praise juries, they also manifest a contrary preference for settlement); Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1735–36 (1996) (reviewing WILLIAM JOHN CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING (1990)) (reporting Noah Webster's 19th-century question: "But, why this outcry about juries? If the people esteem them so highly, why do they ever neglect them, and suffer the trial by them to go into disuse?").

out—tellingly for this Article's contrast with broken windows street policing—juries "provide a vital buffer" between litigants and power-holders in the judicial, legislative, and executive branches, all of whom repose on government payrolls.[236]

To sum up: The civil rights application of broken windows gives defendants conspicuously more power than their street-side counterparts to withstand the rigors of what they will face when accused. Civil rights defendants can hire good lawyers, settle disputes with cash, and oppose the accusation with forensics. At a macro level, should this Article's recommendation be heeded and courts become more welcoming of small-scale civil rights complaints, the sectors affected would have ample opportunity to articulate their reactions to the policy.[237]

III. HOW TO FILTER CLAIMS WITHOUT TRIVIALIZING REAL CIVIL RIGHTS VIOLATIONS

We now consider how courts might apply the broken windows approach to civil rights litigation. A judge might deem the possibility plausible yet at the same time find simple good sense in the medieval *de minimis non curat lex.* Maxims or no maxims, the number of hours in a day remains twenty-four; all time spent on a small case is time unspent on something else.

Courts need analytic criteria to sort undeserving from deserving contentions. This Part offers boundary-fostering devices that permit defendants to prevail for better reasons than *de minimis* scoffing at the real, rights-violating harm that an injured person has alleged. I start by reviewing judge-made demands on claimants that the broken windows thesis of the Article would remove, and then discuss barriers against civil rights claims that ought to remain in place.

A. *To Be Discarded: Judicial Devices that Use* De Minimis *Reasoning to Reject Civil Rights Claims*

In *Harris v. Forklift Systems, Inc.*,[238] the Supreme Court unanimously reversed one of the countless lower court decisions that had rejected a plaintiff's civil rights complaint as too trivial to remedy.[239] The opinion for the Court declared the *Harris* task as "to resolve a conflict among the Circuits on whether conduct, to be actionable as 'abusive work environment'

236. Sparks & Butts, *supra* note 27, at 313.

237. These defendants might install new human resources systems to resolve low-level discrimination complaints at work. They might present a principled defense of *de minimis* in civil rights doctrine that to date has not emerged because judges have granted defendants this favor on their own. Or they might gather empirical evidence, again potentially available but never demanded, to show that small complaints are indeed not worth judicial time.

238. 510 U.S. 17 (1993).

239. *Id.* at 19–20 (noting that the lower court had found the abusive behaviors not severe enough).

harassment . . . must 'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffe[r] injury.'"[240] The answer is no, held the Court. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious."[241] *De minimis curet lex*, in effect.

Justice Scalia, writing separately, worried about relatively trivial affronts that could win redress from "virtually unguided juries," whom the Court left free to "decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."[242] Nevertheless, Scalia joined the majority opinion. The text of the Civil Rights Act of 1964, he wrote, compelled his vote:

> Be that as it may, I know of no alternative to the course the Court today has taken. One of the factors mentioned in the Court's nonexhaustive list—whether the conduct unreasonably interferes with an employee's work performance—would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute.[243]

The Scalia concurrence in *Harris* reminds judges and observers that lower courts have no prerogative to make up their own restrictions that keep statutory civil rights claims out of court. They have done so nonetheless. With only one exception, as noted below, their improvisations stray from binding Supreme Court precedent.[244]

1. Deeming Rights-Violating Incidents "Isolated"

The adjective "isolated" has no place in summary disposition of a civil rights claim. No statute establishes isolatedness as a condition warranting judicial rejection. No definition of the word is available to inform individuals or entities about the bounds of acceptable conduct. Because courts agree that even one affront, if egregious, can suffice for a civil rights claim,[245] any

240. *Id.* at 20.

241. *Id.* at 22.

242. *Id.* at 24 (Scalia, J., concurring).

243. *Id.* at 24–25.

244. For additional detail, see *supra* Part II.B (presenting these erroneous doctrines as federal courts now employ them).

245. Little v. Windermere Relocation, Inc., 301 F.3d 958, 967 (9th Cir. 2002) ("A single 'incident' of harassment—and we assume *arguendo* that three rapes in the course of one evening constitutes a 'single' incident—can support a claim of hostile work environment . . . ."); Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' . . . than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates."); Gnerre v. Mass. Comm'n Against Discrimination, 524 N.E.2d 84, 88 (Mass. 1988) (holding that one incident of sexual harassment suffices to establish sex discrimination in housing).

number of incidents greater than zero could exceed the designation of "isolated"; at the other extreme, courts have tallied no number of incidents that, as a matter of law, is always too large to be deemed isolated.[246] Juries, parties, and prospective litigants thus gain no guidance from the word.[247] It should be expunged from civil rights jurisprudence.

2. Requiring Both Severity and Pervasiveness

The *Meritor*-derived elements of "severe" and "pervasive" derive from an Eleventh Circuit decision, *Henson v. City of Dundee*, on which the Supreme Court relied when it recognized hostile-environment sexual harassment as a violation of Title VII. In *Meritor*, the Court used the severity and pervasiveness elements with considerable care.[248] First, the Court changed "severe *and* persistent," the conjunctive *Henson* locution, to the disjunctive "severe *or* pervasive."[249] By allowing either adjective to suffice, in place of requiring both, the Court moved toward making environment-related civil rights claims more welcome.

The Supreme Court has implicitly warned that using the two adjectives too strictly would bar hostile environment claims that ought to receive a hearing. The *Harris* definition of hostile or abusive environment as one "that a reasonable person would find hostile or abusive,"[250] written seven years after *Meritor*, can be read as recognition that a "severe or pervasive" criterion demands too much from civil rights plaintiffs.[251] Undoubtedly "severe or pervasive" is here to stay until the Supreme Court revisits the phrase or Congress amends the statutes. Misinterpreting the criterion as conjunctive, however, thwarts claims to a degree that civil rights law unambiguously forbids.[252] Severity (i.e., a term that might be understood as magnitude, heinousness, or reprehensibility) *or* pervasiveness (i.e., rights-violating conduct that sweeps through the geography of the environment in question) alone will suffice.

3. Requiring an "Ultimate" Employment Action

The ultimate-or-not inquiry applies to discrete instances of discrimination rather than the wide ranging swath of harms that make an environment hostile or abusive. Using "ultimate" as a barrier reminds observers of civil rights litigation that *de minimis* scorn of claims extends beyond disparaging claims

246. *See supra* Part II.B.1.

247. *See supra* note 243 and accompanying text (quoting Justice Scalia on the importance of making employment-discrimination criteria intelligible "to juries and employers").

248. Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).

249. Johnson, *supra* note 166, at 96 (emphasis added).

250. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

251. *See* Johnson, *supra* note 166, at 85–86.

252. *See supra* notes 21, 186–89 and accompanying text.

of sexual or racial harassment—categories that too often draw a judgment of "isolated" or not sufficiently severe or pervasive. Courts have rejected claims as insufficiently "ultimate" when litigants have complained under § 703(a)(1) of the Civil Rights Act, which codifies the ban on disparate treatment and requires an adverse employment action.[253] Like invoking "isolated" to bar complaints, this judicial use of "ultimate" declares a *de minimis* barrier to recovery that has no foundation in a statute.

Plaintiffs who bring disparate treatment claims under Title VII face a clear statutory statement of the elements they must prove and which injuries will suffice for redress. It is an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[254] The statute includes no provision that the employer's discriminating conduct must take some ultimate form. Courts thus have no power to reject a claim of discrimination by asserting that what the plaintiff complains of is merely "interlocutory or mediate."[255] That the plaintiff has complained establishes that the injury is ripe enough: any claim may deserve to fail, but readiness emerges from the filing itself.[256] Unlike refusals to grant interlocutory relief in litigation, this judicial rejection maneuver offers none of the administrative advantages associated with finality,[257] other than a bald (and unprincipled) reduction in litigation volume. Courts should abandon it.

4. Requiring Materiality

Like the use of "ultimate" as a barrier, the materiality element that some courts have improvised[258] has no basis in civil rights statutes that do not use the term and is refuted by the fact of a complaint. The plaintiff cared enough to bring a civil action for redress; the defendant cared enough to resist the

253. *See* White, *supra* note 174, at 1148–50.

254. 42 U.S.C. § 2000e-2(a)(1) (2006).

255. *See* Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981).

256. The "ultimate" criterion is unobjectionable when courts use it to deny relief when an employer reversed its discriminatory action. In such cases, one may say that ultimately the defendant did the right thing, and its pre-correction wrongful behaviors, having been cured, amount to no actionable civil rights violation. For discussions of the "ultimate" criterion in this context, see *Taylor v. Small*, 350 F.3d 1286, 1294 (D.C. Cir. 2003) (noting that plaintiff's supervisor had "corrected her error" before the plaintiff filed her action) and *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998) (noting that the plaintiff had "received the promotion with retroactive pay and seniority").

257. One commentator notes that refusing interlocutory challenges in the federal courts offers at least four advantages: the efficiency of a single appeal rather than "several appeals that require separate briefs, records, oral arguments and opinions," esteem for the appellate court's "broader perspective," worries about disrespecting "the authority of the trial judge," and the virtues of swiftness and predictability. David Scheffel, Note and Comment, *Interlocutory Appeals in New York—Time Has Come for a More Efficient Approach*, 16 PACE L. REV. 607, 620 (1996).

258. *See supra* notes 182–85 and accompanying text.

accusation.[259] Big enough, in short. Materiality is easy for legislators to write into a statute; the absence of "material" as a modifier tells courts not to add it to the burdens of a civil litigant.[260]

5. Presuming Welcomeness

An individual might welcome adverse disparate treatment, similar to the way sexual markets supply extraordinary humiliation and physical pain to the willing. But perversity is inherently less probable than conventional desires or responses. Scholarly commentary agrees that courts applying the preponderance standard in civil litigation should not presume that a plaintiff reacted to discriminatory conditions by welcoming them.[261] In recommending that courts excise unwelcomeness from the plaintiff's prima facie case, I differ with current Supreme Court precedent but join a virtually unanimous chorus of academic writing.[262]

In this context of writing doctrine, of course, what is more important than any consensus among scholars is what judges do. Some judges have agreed that claimants should not have to overcome a default stance that a victim of discrimination wanted to be discriminated against.[263] Judicial erosion of the *Meritor* demand should continue, and scholarship can aid this progress. More judges will choose to reject the unwelcomeness criterion when they hear echoes of the "She must have been asking for it" and "Why didn't she leave?"

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259. *See supra* text accompanying note 256.

260. A different approach applies in federal criminal law, for which the Supreme Court has issued guidance to lower courts. Reading a materiality requirement into a statute that does not codify this demand can be correct when the liberty of a criminal defendant is at stake. *See* James B. Helmer, Jr. & Julie Webster Popham, *Materiality and the False Claims Act*, 71 U. CIN. L. REV. 839, 840–43 (2003) (describing the Court's decisions on materiality as a condition for False Claims Act prosecutions). The requirement lacks this justification when improvised as a bar to civil rights complaints.

261. *See, e.g.*, Miranda Oshige, Note, *What's Sex Got to Do with It?*, 47 STAN. L. REV. 565, 579 (1995).

262. *See* Chambers, *supra* note 200, at 786; Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 825–26 (1991); Hébert, *supra* note 28, at 578; Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 499 (1994); Oshige, *supra* note 262, at 569. For my own criticisms, see Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1249 (1994) (noting the anomaly of making a litigant prove that she did not welcome unlawful discrimination); Bernstein, *supra* note 11, at 502 (arguing that by analogy to the tort affirmative defense of *volenti*—"to the willing, there is no injury"—sexual-harassment defendants ought to have the burden of proof on welcomeness).

263. In *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007, 1008–09 (7th Cir. 1994), Judge Richard Posner observed that "'[w]elcome sexual harassment' is an oxymoron" and held that the plaintiff did not have to prove unwelcomeness, *Meritor* notwithstanding. When courts certify hostile-environment sexual harassment classes, *see* Warnell v. Ford Motor Co., 189 F.R.D. 383, 387 (N.D. Ill. 1999); Jenson v. Eveleth Taconite Co., 139 F.R.D. 657 (D. Minn. 1991), they in effect remove the unwelcomeness criterion from the prima facie case; defendants are forced to litigate the merits even though the classes of plaintiffs have not presented evidence that all members found the harassment unwelcome.

rationales present in rape and domestic violence, respectively, as these legal wrongs have been depicted by feminist scholars.

That said, the unwelcomeness criterion deserves rejection from all judges who seek fidelity to the text of a statute, not just feminists. Justice Scalia's concurrence in *Harris v. Forklift Systems, Inc*. illustrates a non-feminist route to *de minimis curet lex*.[264] Now that unwelcomeness has become a sorting device for plaintiff's lawyers and an affirmative defense for employers who can show that an employee-plaintiff did not protest the conduct in question,[265] the criterion has morphed into a demand that plaintiffs must do more than other victims of civil rights violations and prove an extra severe injury. Like the other judicial devices surveyed here, this expectation adds burdens that Congress could have codified in the civil rights statutes but did not. Judges attuned to what I have called "the statutory warrant"[266] should eschew this imposition.

B. *In Place of* De Minimis*: Judicial Conclusions Available to Exclude Unworthy Cases*

A civil rights claim can fall short, either on its pleadings or after discovery, in two ways that pertain to the *de minimis curet lex* thesis of this Article. First, the circumstances or behavior that the plaintiff complains of might not be a violation of the statute. Second, regardless of whether the behavior in isolation would amount to a violation of the statute, the defendant might not be responsible for the detriment that the plaintiff experienced.

These two accounts implicitly create three conclusions that withhold judicial redress for plaintiffs. Qualitative rather than quantitative, these conclusions, described below as three "filters," recognize that *de minimis curat lex* has no principled application to civil rights claims. When any one of the conclusions is supported by the pleadings or the record, the defendant should prevail as a matter of law. When none of the conclusions is warranted, the claim is suited to go to trial. At trial, a defendant may be able to persuade the factfinder that the civil rights violation for which it is responsible is too trivial to warrant redress.[267]

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264. *See supra* notes 238–44.

265. *See supra* note 202 and accompanying text.

266. *See supra* Part II.C.2.

267. Here I express partial agreement with a thesis advanced by a distinguished trial judge and her law clerk. Shira A. Scheindlin & John Elofson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813 (1999). The authors contend that judges are generally more competent than juries to decide whether a work environment is hostile. *Id.* at 815. They apply this thesis to both sexual and racial harassment, *id.* at 822–24, while conceding that federal judges enjoy privileges that might blinker them to workplace detriments. *Id.* at 833 & n.124 (noting that these judges have "constitutionally-protected job security" and as employers "are exempt from Title VII restrictions"). The authors recommend that judges "review *de novo* a jury's conclusion that a hostile environment pervades a workplace and that trial judges should decide summary judgment motions with a critical eye on the quality and quantity of the proffered evidence." *Id.* at 815. I have no quarrel with substituting judges for juries as fact finders;

1. First Filter: Concluding That No Civil Rights-Violating Conditions Were Present

The most basic way to forestall an unsound claim of discrimination is to conclude that the behavior of which the plaintiff complains does not violate the plaintiff's civil rights. This conclusion rests on a judgment about the kind of harm that occurred, rather than its degree. It is fundamental. Once a court agrees with a plaintiff that a challenged behavior violates a statutory provision of civil rights, it has accepted a crucial part of the plaintiff's account. From there, disparaging the injury as too trivial becomes an unprincipled slur with no warrant in the statutes. The proper characterization of a claim that deserves to fail at the outset is distinct and different: the plaintiff loses because the behavior challenged does not violate his civil rights.

This filter can, and should, function powerfully in a familiar scenario: A plaintiff alleges a hostile work environment and the court, though willing to acknowledge some unpleasantness there, feels disinclined to deem this environment bad enough to violate employment discrimination law.[268] Here, neither a plaintiff's recitation of adverse episodes nor a defendant's insistence that the episodes were trivial can resolve the question of whether the environment did or did not violate the plaintiff's civil rights. Clear direction from the Supreme Court has told judges to evaluate the work environment holistically and inquire whether unlawful discrimination altered it.[269] Whenever a lower court believes a plaintiff has made a federal case, so to speak, out of nothing much, rejecting the claim compels the judge to take into account the entire workplace described in pleadings or at the trial.

Assuming that a plaintiff has worked to allege discriminatory conditions that amount to an "alter[ed] . . . environment,"[270] the judge must unite two conflicting accounts: the plaintiff's roster of unpleasant episodes and the defendant's characterization of the work environment as benign. Calling allegations "isolated" or in some other way not bad enough, without aligning the account against the work environment as a whole, denies this litigant her due. Paying attention to the entire environment uses *de minimis* considerations correctly; it can justify judicial rejection.

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this Article is striving for neutrality with respect to jury-reverence. *See supra* notes 27, 231–36 and accompanying text. Judges do some fact finding tasks better than juries. Scheindlin & Elofson, *supra* at 834–38.

Where I differ with the authors is on the one-sided application of the repair they recommend. If courts were open to granting summary judgment for plaintiffs in discrimination cases, then substituting judges for juries in the fact finder role would have an evenhanded effect. Summary judgment as now practiced, however, functions to protect only one side of the caption.

268. *See* related discussion and sources *supra* note 25.

269. For recent applications of this guidance derived from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993), see *Turner v. The Saloon, Ltd.*, 595 F.3d 679, 685 (7th Cir. 2010) (alleging disability-based harassment); *Saunders v. Emory Healthcare, Inc.*, No. 09-10283, 2010 WL 65170, at *5 (11th Cir. Jan. 11, 2010) (per curiam) (alleging race-based harassment).

270. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

For a different application of this first filter—one that undertakes the *Harris* inquiry by emphasizing another distinction, the distinction between kind and degree—consider *Baskerville v. Culligan International Co.*, a decision by the Seventh Circuit granting judgment to a defendant on a hostile-environment claim, contrary to a jury verdict that had favored the plaintiff.[271] Commentators have criticized this decision;[272] much of their criticism may be conceded here for argument's sake. Whether the Seventh Circuit reached the right outcome does not matter, for present purposes: its approach is what warrants attention.

Valerie Baskerville had worked as a secretary at the Culligan bottled water company. Her boss, a regional manager, offended her. The plaintiff prevailed at trial and then lost on appeal. "Mr. Hall," wrote Judge Richard Posner, "whatever his qualities as a sales manager, is not a man of refinement; but neither is he a sexual harasser."[273] After reviewing the plaintiff's account, Posner gave reasons for the court's conclusion that described the manager's behavior as not violative of the plaintiff's civil rights:

> He never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him, or to go out on a date with him. He made no threats. He did not expose himself, or show her dirty pictures. He never said anything to her that could not be repeated on primetime television . . . . Some of his repartée, such as, "Not until you stepped your foot in here," or, "Were we dancing, like in a nightclub?," has the sexual charge of an Abbott and Costello movie. The reference to masturbation completes the impression of a man whose sense of humor took final shape in adolescence. It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find Hall's patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.[274]

Here, the Seventh Circuit articulates the difference between a legal wrong too trivial to matter, which this Article has contended is a conclusion that civil rights statutes give judges no prerogative to conclude, and a set of behaviors that was no legal wrong at all. It is the manager's displays, not the plaintiff's accusations, that receive judicial dismissal and scorn. If the manager had violated Baskerville's civil rights, then Baskerville would have been entitled to judgment following her verdict. Instead Judge Posner casts the behavior in

271. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430–31, 433 (7th Cir. 1995).
272. Keller & Tracy, *supra* note 21, at 260.
273. *Baskerville*, 50 F.3d at 431.
274. *Id.*

question as not violative of Title VII.

The court could be wrong; but agree or disagree, its assessment of what happened to Valerie Baskerville does not trivialize her complaint. The court makes clear its low regard for the Culligan manager: few people are ever called something so devastating as "such a silly man" in the *Federal Reporter*. The plaintiff loses not because of an arbitrary *de minimis* hurdle but because the court finds that the behavior she protested was not indicative of a hostile environment. Judges are competent to so conclude, even after a jury has held otherwise.[275]

2. Second Filter: Concluding That Although Civil Rights-Violating Conditions Likely Were Present, Individuals Other than an Entity Defendant Were Responsible

Once the plaintiff has presented behavior that violates his civil rights, the defendant may have an affirmative defense related to responsibility for this wrong. This second filter, which declares a responsibility boundary, directs judges to ask who in effect owns the wrongful conduct. When the defendant is an entity, it can escape ownership of the wrong if it acted responsibly at the time.

The leading decision on employer liability for hostile-environment sexual harassment, *Faragher v. City of Boca Raton*, establishes the centrality of responsibility in civil rights litigation. *Faragher* rejects liability when defendants are not responsible for conduct that would otherwise suffice to establish violations. It establishes an affirmative defense for employers whereby defendants are not liable for their employees' rights-violating harassment if they can establish the two elements of the defense: they acted reasonably to "prevent and correct promptly" any harassing behavior and the plaintiff-employee "unreasonably failed to take advantage of any preventative or corrective opportunities" that the defendant-employer put in place.[276]

This two-part test removes responsibility from an employer when the record shows that others are responsible for the rights-violating conduct and the employer is not. Courts are empowered to ascribe blame for the harm to employees who violated the employer's policy, along with blaming plaintiffs who unreasonably failed to take shelter in their employers' preventatives. The affirmative defense classification, supported further by *Faragher* and the companion *Burlington Industries, Inc. v. Ellerth*,[277] obliges defendants to do

275. *See* Scheindlin & Elofson, *supra* note 267, at 815.

276. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). A similar approach applies to claims of harassment in education, although with more demanding criteria: entity defendants are not liable unless plaintiffs can prove actual knowledge of the harassment, deliberate indifference, and both severity and pervasiveness. Brianna J. Schroeder, Note, *Power Imbalances in College Athletics and an Exploited Standard: Is Title IX Dead?*, 43 VAL. U. L. REV. 1483, 1489–98 (2009) (summarizing holdings of the Supreme Court).

277. 524 U.S. 742, 764–65 (1998).

the work whenever plaintiffs are to be blamed. Accordingly, should defendants, for example, proffer a harassment policy to show that a plaintiff could have fended off adverse disparate treatment before it injured her, they must show the reasonableness of this policy. Boilerplate disapproval of harassment with an office to hear complaints probably does not suffice: it is reasonable for an employee to eschew human-resources protocols at early stages in an effort to diffuse tensions on a job, and so the policy must not require workers who feel harassed to make a prompt official complaint at pain of forfeiting their claim.[278]

3. Third Filter: Concluding that the Plaintiff Bears Responsibility for the Conditions Complained Of

A final route to exoneration is for the court to blame the plaintiff. At present, courts do so all the time, but conventions obscure their judgments on this point. Claimant-blaming should be transparent and overt. Compelled to say, almost in so many words, "You lose because it is you and not the defendant who is responsible for whatever civil rights violation may be present in the behavior of which you complain," a court becomes more mindful in its assignment of blame.

Civil rights plaintiffs can be understood as responsible for their own injury in two ways. The first way, noted above, is to react unreasonably to rights-violating affronts.[279] The second way is to manifest approval and acceptance of the rights-violating behavior when it occurred. Both conclusions raise the danger of unjust victim-blaming, but each can be accurate.

Welcoming the behavior in question, a possibility discussed above,[280] is only one of the ways that the plaintiff may be deemed responsible for the experiences about which he or she complains. The plaintiff might have responded unreasonably, making it too difficult for the defendant to effect a repair. Familiar affirmative defenses pertaining to delay—statutes of limitation and laches—can also ascribe responsibility to a plaintiff. Even the controversial criminal law doctrine of "provocation" can defeat accusations.[281]

Judges applying these doctrines already know that the doctrines all hold a key trait in common: they rarely arise. Most victims of rights-violating conduct do not respond unreasonably.[282] Stale claims and laches are atypical

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278. Evan D. H. White, Note, *A Hostile Environment: How the "Severe or Pervasive" Requirement and the Employer's Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C. L. REV. 853, 855 (2006).

279. *See supra* Part III.B.2.

280. *See supra* Part III.A.5.

281. *See* Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence* 412, 48 VAND. L. REV. 1155, 1166–67 (1995) (arguing that the *Henson* and *Meritor* decisions "establish that the plaintiff's invitation to or provocation of the alleged harassment is of central, if not determinative, importance to the disposition of her claim").

282. *See supra* text accompanying note 278 (discussing the insight of commentator Evan D. H.

in civil rights litigation too, as is provocation. But all can happen, and they should be available to filter unworthy claims from juries as a matter of law.

CONCLUSION

Judgments about size, scope, or magnitude—such as "adequate," "too big," "not enough"—can occur only within contexts that set expectations and baselines. If civil rights matter, then a civil rights violation of any size is not trivial, just as violations of property rights and constitutional rights of any size are not trivial.[283] Courts stray from this precept when they refuse to remedy infringements of statutory antidiscrimination law on the ground that the wrongs are too small to warrant their attention.

Whenever a federal court declines to repair rights-violative experiences on the ground that they are not important enough—using mystifying labels of dismissal like "isolated,"[284] not sufficiently "hellish,"[285] not a steady barrage of opprobrium,[286] and so on, to describe its conclusions—it obstructs a scheme for prevention and redress that Congress installed. This Article has described manifest unlawful discrimination as a wrong that, if left unaddressed, risks generating more wrongdoing.[287] In this sense, civil rights violations resemble the disorder that James Q. Wilson and George L. Kelling sought to undo in their famed 1982 publication, *Broken Windows*.

Support for this contention emerges through extensions of a metaphor that normally resides in the criminal justice neighborhood. American psychologist Gordon Allport's scale of animus, with hateful words at one end and extermination of human beings at the other, resembles in heightened form the path of deterioration that Wilson and Kelling described.[288] The American military uses broken windows reasoning to crack down on relatively small demonstrations of extreme racial bigotry, and some scholars have argued that it ought to treat relatively small demonstrations of sexism with similar intolerance.[289] Illustrations related to sex discrimination have included the social-meaning category, where a small disorder manifests or begets a larger one, and an arithmetical variation on broken windows, where sex discrimination at a low level leads to enlarged effects at upper levels of a workplace pyramid.[290] Reversing the broken windows trajectory, a relatively small public display of progress (e.g., a new gay-straight alliance in a school or an intervention that makes life in public spaces easier for a person with a

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White).

283. *See supra* text accompanying notes 13–16.
284. *See supra* Part II.B.1.
285. Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997).
286. *See supra* note 20 and accompanying text.
287. *See supra* Part II.A.
288. *See supra* notes 113–16 and accompanying text.
289. *See supra* notes 117–25 and accompanying text.
290. *See supra* Part II.A.2.

particular disability) generates relatively large improvements.[291]

When courts permit discriminatory behaviors to flourish openly, victims and observers will infer that the communities in which they live do not care about this suffering,[292] and that the legislation proscribing harmful attention to group-based characteristics has little force. They can expect the unremedied disorder that has injured them to get worse. Victims of civil rights violations, along with decent-minded onlookers, desire what Wilson and Kelling's urban residents wanted: "a modicum of civility and safety for ordinary citizens who travel daily along streets and by public transportation to work, to school, to shop in pursuit of all the ordinary activities of everyday life."[293] Just as having to live amidst broken windows blighted the daily lives of Wilson and Kelling's city residents even when they were not direct victims of crime, having to live in an environment that condones discrimination blights the daily lives of even those persons not directly suffering discrimination themselves.

The stance that I have called *De minimis curet lex*—the law *should* concern itself with small things when these small things attack important values or threaten escalations of the harms that are addressed in civil rights statutes—presents a jurisprudential approach that judges and scholars will find familiar.[294] Broken windows criminology is almost equally venerable.[295] Both approaches are rooted in deep traditions, a condition that makes progressive change more likely to result from their concerted application.[296]

Uniting broken windows with civil rights liability brings contemporary relevance to both sets of traditions. Statutory civil rights might seem different from the pre-political idyll of law and order on the street that broken windows law enforcement has been trying to advance. Decades following the enactment of civil rights legislation, however, have made these positive rights historically prior to the infractions that now harm victims and civil society. Most Americans who are alive today came of age after a civil rights era was long established. Their entitlement to be safe from unlawful discrimination now stands as solid as an intact window. Manifest and unrepaired civil rights

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291. *See supra* Part II.A.3.

292. *See supra* notes 82–85 and accompanying text (reviewing the work of Dan Kahan).

293. *See supra* text accompanying note 33.

294. *See supra* notes 12–16 and accompanying text (noting that courts do indeed concern themselves with small things when they regard the stakes as high).

295. Criticisms notwithstanding, *see supra* Part I.B., it will likely remain venerable; American police forces and elected officials in municipalities have long deemed broken windows vital to law enforcement. William Bratton & George Kelling, *There Are No Cracks in the Broken Windows*, NAT'L REV. ONLINE, Feb. 28, 2006, http://www.nationalreview.com/comment/bratton_kelling200602281015.asp (maintaining that enthusiasm for broken windows among police officers and local governments serves as an unassailable refutation of criticism) (last visited June 17, 2010).

296. *Cf.* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1544–47 (1997) (arguing that a new tort gains acceptance more readily when its proponents can associate it with a longstanding doctrinal tradition).

violations bespeak—and also cause—a disorder and disarray that American courts can repair.