

Summer 2018

A Broken Windows Theory of Sexual Assault Enforcement

Erin Sheley

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#)

Recommended Citation

Erin Sheley, *A Broken Windows Theory of Sexual Assault Enforcement*, 108 J. CRIM. L. & CRIMINOLOGY 455 (2018).
<https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss3/2>

This Criminal Law is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

A BROKEN WINDOWS THEORY OF SEXUAL ASSAULT ENFORCEMENT

ERIN SHELEY*

The law of sexual assault is in conflict. Jurisdictions struggle with the conceptual shift from thinking of rape as forcible sex to a broader understanding that turns on the meaning of consent. Due to resource, evidentiary, and reporting problems there is a mismatch between the new substantive understanding of sexual assault and its actual enforcement. This has led to something of a cultural war by survivors and many women generally against the idea of “rape culture,” which runs the risk of categorizing all sexualized or gendered speech and much of male behavior as implicitly rape-supportive. This article proposes that lessons from broken windows policing can assist prosecutors in addressing the expressive gap between the law’s definition of sexual assault and the current realities of under-enforcement and victim disempowerment. I suggest that enforcement of existing laws against the lower level street harassment of women, on the occasions it already meets the elements of assault or sexual assault, will likely have two positive effects. First, while the efficacy of broken windows theory is hotly debated, to the extent that aggressive enforcement of lower level crimes of disorder does translate into a reduction in more serious offenses, more convictions for street harassment may result in a longer-term reduction in more serious sexual assaults that are much harder to detect and prove. Second, and perhaps more importantly, aggressive prosecution of even “harmless” non-consensual street harassment would help to resolve the expressive problems surrounding the law’s definition of non-consensual sex more broadly. This would combat—more concretely and less divisively—the norm of default access to female bodies than the amorphous, extra-legal critique of “rape culture” has thus far.

* Assistant Professor, University of Oklahoma College of Law. Many thanks to the participants in the 2017 Federalist Society Junior Scholars Workshop (and particularly to John Pfaff) for their useful feedback on this paper.

TABLE OF CONTENTS

INTRODUCTION.....	456
I. THE RAPE CYCLE.....	458
A. Under-Enforcement.....	459
B. Definitional and Evidentiary Problems.....	462
C. Rape Culture: Social Norms Shaping Legal Norms.....	465
D. Expressive Punishment: Legal Norms Shaping Social Norms.....	474
E. Concluding Observations.....	478
II. BROKEN WINDOWS THEORY.....	478
A. The Theory and Its Critics.....	479
B. The Various Functions of Regulating for Appearance.....	484
C. Considerations for a Broken Windows Approach to Sexual Assault.....	487
III. STREET HARASSMENT.....	489
A. What is Street Harassment?.....	489
B. Defining the Harm.....	491
C. Prosecuting Harassment.....	494
1. Blanket Statutory Bans on Street Harassment.....	496
2. Existing Harassment Statutes.....	498
IV. COMBATting SEXUAL ASSAULT THROUGH STREET HARASSMENT ENFORCEMENT.....	500
A. Street Harassment as Assault.....	500
B. The Strong Broken Windows Effect.....	505
C. The Weak Broken Windows Effect.....	506
D. Potential Concerns for Application.....	508
CONCLUSION.....	509

INTRODUCTION

The law of sexual assault is in an expressive crisis. Social media has raised awareness of how easily even acquaintances may sexually violate a woman,¹ and the newly-elected U.S. President is on tape endorsing it.² At the same time, many jurisdictions have adopted broader definitions of sexual assault to match reality, shifting away from the traditional conception of rape

¹ See, e.g., Richard A. Oppel, Jr., *Ohio Teenagers Guilty in Rape that Social Media Brought to Light*, N.Y. TIMES (Mar. 17, 2013), <http://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html>.

² Penn Bullock, *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html>.

as forcible sex, to one based on lack of consent.³ Yet police departments and prosecutors struggle with the new doctrinal shift.⁴ Due to resource, evidentiary, and reporting problems, there is a mismatch between the new substantive understanding of sexual assault and its actual enforcement. This has contributed to something of a cultural war waged by survivors (and many women generally) against “rape culture.”⁵ While it sheds valuable light on the relationship between misogynistic cultural attitudes and sexual violence, the war on rape culture also runs the risk of indiscriminately categorizing all sexualized or gendered speech and much of male behavior as implicitly rape-supportive.

This article proposes that lessons from the so-called “Broken Windows” theory of policing can assist prosecutors and lawmakers in addressing the gap between the law’s definition of sexual assault and the current realities of under-enforcement and victim disempowerment. The key hypothesis of Broken Windows theory is that the appearance of order gained by cracking down on misdemeanors will create the reality of order and reduce more serious violent crimes. This claim remains controversial, even thirty years after Rudolph Giuliani famously relied on it to clean up the streets of New York City.⁶ Empirical scholars disagree on the theory’s efficacy and police have used racially suspect means to apply it.⁷

Nonetheless, the interaction between appearance and reality posited by Broken Windows has unique explanatory power in the area of rape law. Inadequate sexual assault enforcement is, as I will demonstrate, a cyclical problem with four phases: weak cultural norms, under-enforcement, victim disempowerment, and underreporting. I suggest that prosecutors, police, and lawmakers must aggressively target lower level *street* harassment of women, on the occasions it already meets the elements of assault. While the instances where a harasser can be shown to have the intent of putting his victim in immediate apprehension of unwanted touching may be a minority of all

³ See John F. Decker & Peter G. Baroni, *Criminal Law: “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1084 (2011).

⁴ See, e.g., THOMAS E. PEREZ & MICHAEL W. COTTER, U.S. DEP’T OF JUSTICE, RE: THE UNITED STATES’ INVESTIGATION OF THE MISSOULA POLICE DEPARTMENT 6 (May 15, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/missoulapdfind_5-15-13.pdf.

⁵ See Emilie Buchwald et al., *Are We Really Living in a Rape Culture?*, in TRANSFORMING RAPE CULTURE vii (Emilie Buchwald et al. eds., 1993).

⁶ See George L. Kelling, *How New York Became Safe: The Full Story*, CITY J. (SPECIAL ISSUE) (2009), <http://www.city-journal.org/html/how-new-york-became-safe-full-story-13197.html>.

⁷ See *infra* Section II.A and accompanying footnotes.

harassment cases generally, they are frequent enough that the state can send an important expressive message by prosecuting them as simple assault or other related offenses.

This should have two positive effects. First, if the proponents of the strong view of Broken Windows are correct that enforcing lower level laws does reduce more serious offenses, then punishing street harassment may, over the long term, reduce the more serious sexual assaults that are much harder to detect and prove. Second, if the critics of Broken Windows are right—if all we get from Broken Windows policing are fewer “broken windows”—that would still be uniquely beneficial in the context of sexual assault due to the high symbolic value of street harassment. Aggressive prosecution of even “harmless” non-consensual street harassment would help resolve the law’s broader expressive problem with categorizing non-consensual sex. Even if it did not directly deter serious sexual assault, it would help combat the norm of default access to female bodies more concretely and less divisively than the amorphous, extra-legal critique of “rape culture” has thus far. It would also encourage victims to report more serious offenses by showing that the state cares about prosecuting them. All of these effects would serve, indirectly, to reduce the incidence of sexual assault.

This article will proceed in five parts. In Part I, I identify and explain the cyclical relationship between the appearance and reality of states under-enforcing the sexual assault laws. In Part II, I introduce Broken Windows theory and its critics and propose a framework for evaluating its efficacy in the context of sexual assault. In Part III, I describe the problem of street harassment and the harms it causes and suggest its sociological and legal relationship to sexual assault. In Part IV, I argue that Broken Windows theory holds promise for sexual assault enforcement and propose that prosecutors prioritize charges against street harassers in order to improve their inadequate enforcement of sexual assault laws. I also consider counterarguments. In Part V, I conclude.

I. THE RAPE CYCLE

It has become something of a truism that rape is under-reported and under-prosecuted. This section reviews the various data on these claims and explores the problems contributed by doctrinal confusion over the definition of rape and cultural mythologies about sex and gender. It concludes that the appearance of under-enforcement has contributed to under-reporting, and that the resulting expressive crisis has had a negative impact on relevant cultural norms—which have in turn contributed to under-enforcement in a kind of vicious cycle.

A. UNDER-ENFORCEMENT

In 2013, the U.S. Department of Justice (DOJ) issued findings following its investigation of the Missoula, Montana Police Department (MPD) for under-enforcement of the law in cases of sexual violence.⁸ Operating under the authority granted by 42 U.S.C. § 14141—allowing the federal government to bring suit against unconstitutional patterns of policing—the DOJ targeted the MPD after a series of local news reports detailed its systemic law enforcement failure when it came to sex crimes.⁹ The DOJ identified MPD policies such as “discouraging female victims of sexual assault from cooperating with law enforcement” due, in part, to “stereotypes and misinformation about women and victims of sexual assault.”¹⁰ The report concluded that the MPD’s systematic under-enforcement of the sexual assault laws, particularly in cases of non-stranger rape, constituted a violation of the Equal Protection Clause.¹¹

The DOJ noted that victims may have been routinely deterred from seeking prosecution by being asked at the outset whether they wished to proceed criminally. “Such a question,” the report noted,

may send the message that if she proceeds with her case she will be expected to be the driving force behind the prosecution; that she should already feel sufficiently well-informed and empowered to make the decision as to whether to seek prosecution; or that she should feel personally responsible for imposing serious criminal consequences on the assailant.¹²

Furthermore, the report noted that the MPD failed to employ certain techniques relevant to proving the crucial element of lack of consent in alcohol-facilitated assaults.¹³ Such omissions included collecting evidence, interviewing witnesses, and questioning suspects.¹⁴ Eventually, the MPD

⁸ See generally PEREZ & COTTER, *supra* note 4.

⁹ See, e.g., Gwen Florio, *Student Says She was Sexually Assaulted by UM Football Players; County Filed No Charges*, MISSOULIAN (Dec. 21, 2011), http://missoulian.com/news/local/student-says-she-was-sexually-assaulted-by-um-football-players/article_5fd79f90-2b8f-11e1-a73a-0019bb2963f4.html; Gwen Florio, *Missoula Police: 2nd Attack May Be Linked to Alleged Sex Assault Involving UM Football Players*, MISSOULIAN (Dec. 20, 2011), http://missoulian.com/news/local/missoula-police-nd-attack-may-be-linked-to-alleged-sex/article_d261cb6e-2aca-11e1-9033-0019bb2963f4.html; Gwen Florio, *3 UM Football Players Allegedly Involved in Sexual Assault on Campus*, MISSOULIAN (Dec. 16, 2011), http://missoulian.com/news/local/um-football-players-allegedly-involved-in-sexual-assault-on-campus/article_265fbee2-27a6-11e1-8834-0019bb2963f4.html.

¹⁰ PEREZ & COTTER, *supra* note 4, at 6.

¹¹ *Id.*

¹² *Id.* at 8–9.

¹³ *Id.* at 7.

¹⁴ *Id.* at 8.

settled with the government and agreed to modify its policies to implement best practices to combat gender bias consistent with the International Association of Chiefs of Police (IACP) Model Policy on Investigating Sexual Assaults.¹⁵

As a vindication of the Equal Protection Clause's promise of gender-neutral state law enforcement protection, the Missoula settlement has been heralded as coming "as close as any intervention since Reconstruction to addressing the framers' core concern with underenforcement."¹⁶ It is, however, only a very early inroad into a problem that has become a truism in criminal justice circles: most victims fail to report sexual assaults.¹⁷ The DOJ estimates that, among eighteen to twenty-four-year-old women, only 20% of college students and 32% of non-college students report these crimes.¹⁸ Of those numbers, one in five of the non-college students surveyed stated that they did not report because they believed that "police would or could not do anything to help."¹⁹

While these bleak numbers have been controversial, they are consistent with other literature on sexual assault investigations around the country, which reveal a pervasive failure of law enforcement and prosecutors' offices to pursue reported sexual assaults.²⁰ Empirical literature suggests that

¹⁵ Memorandum of Understanding Between the United States Department of Justice and the City of Missoula Regarding the Missoula Police Department's Response to Sexual Assault 1-4 (May 13, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/05/15/missoulapdsettle_5-15-13.pdf.

¹⁶ Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1287 (2016).

¹⁷ See, e.g., Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*, NAT'L INST. JUST. 34 (Oct. 24, 2013) (finding that 80.9% of rape survivors do not report their assault to the police).

¹⁸ See SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T OF JUST., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013 1, 5 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

¹⁹ *Id.* at 9.

²⁰ See, e.g., CASSIA SPOHN & KATHARINE TELLIS, NAT'L CRIM. JUST. REFERENCE SERV., POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE (2012); Justin Fenton, *City Rape Statistics, Investigations Draw Concern*, BALT. SUN (June 27, 2010), <http://www.baltimoresun.com/news/bs-md-ci-rapes-20100519-story.html> (reporting that the police investigated only four out of ten emergency rape calls between the years 2003-2010); Jeremy Kohler, *What Rape?: Abused by the System*, ST. LOUIS POST-DISPATCH (Aug. 28, 2005), <http://dartcenter.org/content/what-rape>; Todd Lighty et al., *Few Arrests, Convictions in Campus Sexual Assault Cases*, CHI. TRIB. (June 16, 2011), <http://articles.chicagotribune.com/2011-06-16/news/ct-met-campus-sexual-assaults-0617->

prosecutors are more likely to see rape cases as “winnable” when they fit the model of so-called “real rape” (for example, when the assailant used a weapon or there was at least evidence of use of force).²¹ Furthermore, juries are four times more likely to convict when a sexual assault involves factors such as stranger assailants, multiple assailants, or violence.²² While some of that disparity may be explained on purely evidentiary grounds—cases of violent rape generally leave more physical evidence and make intentionality easier to prove—the evidence suggests that judges and juries reach disproportionately divergent conclusions in non-aggravated sexual assault cases.²³ According to Kalven and Zeisel’s landmark study of the American jury, in 88% of aggravated sexual assault cases, judges and juries reach the same verdict of guilty; yet, they agree only 40% of the time in other sexual assault cases.²⁴ In other words, in cases where women could be perceived as in some way contributing to their victimization, judges found guilt but juries did not.²⁵

It should be noted that there are many reasons other than gender stereotypes that could explain why law enforcement may fail to pursue these cases. One is the now-famous “rape kit backlog,” which currently thwarts the potential discovery of DNA evidence in approximately 400,000 cases across the country.²⁶ According to a recent National Institute of Justice (NIJ) study, 18% of the unsolved alleged sexual assaults occurring from 2002–2007 involved forensic evidence collected but never submitted for DNA analysis.²⁷ Clearly, given the centrality of DNA evidence to proof of sexual assault, more funding for police departments and crime labs would improve the clearance rates for sex offenses.

That said, Congress has addressed the public indignation over the rape kit backlog with funds. In 2004, it enacted the Debbie Smith Act (which was

20110616_1_convictions-arrests-assault-cases; *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (analyzing FBI data to conclude that of every 310 reported rapes only fifty-seven lead to an arrest). For a more detailed review of this literature, see Tuerkheimer, *supra* note 16, at 1294–96.

²¹ See SUSAN ESTRICH, *REAL RAPE* 18–19 (1987); Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 J. CRIM. L. & CRIMINOLOGY 267, 301, 305 (1990).

²² HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 252–53 (1971).

²³ *Id.* at 253.

²⁴ *Id.*

²⁵ *Id.* at 252 n.14.

²⁶ Caitlin Dickson, *How the U.S. Ended up With 400,000 Untested Rape Kits*, DAILY BEAST (Sept. 23, 2014), <http://www.thedailybeast.com/articles/2014/09/23/how-the-u-s-ended-up-with-400-000-untested-rape-kits.html>.

²⁷ NANCY RITTER, *THE ROAD AHEAD: UNANALYZED EVIDENCE IN SEXUAL ABUSE CASES*, NAT’L INST. OF JUST. 1 (May 2011), <https://www.ncjrs.gov/pdffiles1/nij/233279.pdf>.

reauthorized in 2008 and 2014), allocating funds for states to test DNA samples and crime scene analysis, as well as to incorporate DNA analysis into state databases linked to the National DNA Index System.²⁸ Furthermore, the Violence Against Women Reauthorization Act of 2013 incorporated the Sexual Assault Forensic Evidence Registry (SAFER) Act, which created incentives for local jurisdictions to audit their rape kit backlog and hire new staff to process it.²⁹ Despite these federal efforts, only seventeen states have introduced measures to address their backlogs.³⁰ As Deborah Tuerkheimer has noted of a recent Detroit study:

Contrary to conventional wisdom, police officers repeatedly indicated that the failure to submit a rape kit for testing was indicative of a decision *not* to pursue the case, rather than a decision to pursue it without additional corroboration. Put differently, the kits were shelved because the allegations had already been disregarded.³¹

At the very least there seems to be some evidence of state entities de-prioritizing the pursuit of sexual assault allegations, particularly those lacking evidence of obvious violence.

B. DEFINITIONAL AND EVIDENTIARY PROBLEMS

The most fundamental evidentiary problems at the heart of sexual assault enforcement may relate less to flawed police practices than to the substantive definition of sexual assault. The ambiguity of what constitutes a sexual assault—coupled with the classic he said/she said credibility choice at the heart of many non-stranger rape fact patterns—has been challenging for prosecutors.

At common law, “force” was an element of rape, meaning that the state needed to show that the accused had had “carnal knowledge of a woman forcibly and against her will.”³² That requirement remains the touchstone of the law in sixteen of the U.S. states requiring a showing of “forcible compulsion” or at least “incapacity to consent.”³³ However over time, more

²⁸ 42 U.S.C. § 13701 (2012).

²⁹ Pub. L. No. 113–4, 127 Stat. 54 (Mar. 7, 2013).

³⁰ See Graceann Carimico et al., *Rape and Sexual Assault*, 17 GEO. J. GENDER & L. 359, 368 (2016) (citing Soraya Chemaly, *How Many of the Hundreds of Thousands of Untested Rape Kits in the US Are in Your City?*, HUFFINGTON POST (Nov. 19, 2014), https://www.huffingtonpost.com/soraya-chemaly/how-many-of-the-uss-40000_b_5845052.html).

³¹ Tuerkheimer, *supra* note 16, at 1296–97 (citing REBECCA CAMPBELL ET AL., NAT’L CRIMINAL JUSTICE REFERENCE SERV., THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP) FINAL REPORT 121 (2015)).

³² 4 WILLIAM BLACKSTONE, COMMENTARIES 210 (1765).

³³ Decker & Baroni, *supra* note 3, at 1085–86. Massachusetts is the sole state of that number specifically requiring compulsion. *Id.* at 1086.

and more states began to adopt a definition of sexual assault based on the victim's lack of consent, as opposed to the defendant's show of force. John Decker and Peter Baroni provide a useful taxonomy of these developing new standards.³⁴ The twenty-eight "true non-consent states" have at least one sex offense on the books that can be proven by showing that the victim did not consent to the sexual act.³⁵ Of these, seventeen have non-consent provisions for sexual penetration offenses, while the other eleven have non-consent provisions for offenses involving sexual contact with the victim's intimate parts.³⁶ Nine "contradictory non-consent states" have laws drafted to suggest that the elements of a sex offense statute are met when a victim does not affirmatively consent to the act.³⁷ As Decker and Baroni point out, though, these states define "consent" in such a way that negates the purpose of requiring affirmative consent: "To establish a 'lack of consent' in contradictory states, the prosecution must show either the use of forcible compulsion or a victim's incapacity to consent. Requiring force or a lack of capacity to consent completely negates the purpose of including a non-consent provision."³⁸

Commentators have criticized the status quo for failing to criminalize pure non-consensual sex across the board.³⁹ As Decker and Baroni put it, "[a] victim, frozen with fear, who fails to express approval by words or actions should have that decision protected by the criminal justice system."⁴⁰ They also criticize the lack of criminal sanction for those who obtain sex through deception, at least where there is a specific intent to achieve the sex.⁴¹

In contrast, Donald Dripps fears that shifting the standard away from the force requirement and towards consent will fail as a pragmatic matter.⁴² He argues that juries will never appropriately apply the consent standard in fact due to tension between "elite opinion," which values sexual autonomy and condemns sexual aggression, and "popular opinion," which supposes that

³⁴ *Id.*

³⁵ *Id.* at 1084.

³⁶ *Id.*

³⁷ *Id.* at 1085.

³⁸ *Id.*

³⁹ The Criminal Code of Canada, for example, does not allow the defense of honest but mistaken belief in consent unless the accused has taken "reasonable steps" to ascertain that the complainant was consenting. C.C.C. Sec. 273.2

⁴⁰ Decker & Baroni, *supra* note 3, at 1167.

⁴¹ *Id.* As Robin West points out, this would constitute fraud in most other contexts. Robin West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1443 (1993).

⁴² Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957 (2008).

sexual autonomy “may be forfeited by female promiscuity or flirtation, and views male sexual aggression as natural, if not indeed admirable.”⁴³ As he puts it:

A number of factors are at work. One, probably more prominent than academic observers may realize, is the tremendous caseload pressure throughout the system. Sex crimes units struggle just to process the aggravated cases; until they have more resources than aggravated cases, only the aggravated cases will be charged. Another is very likely prosecutorial perception of juror prejudice. If prosecutors have a tough time winning convictions in the aggravated cases, why should they reach for cases in which guilty verdicts are even more unlikely?⁴⁴

Evidence suggests that prosecutorial discretion based on anticipated juror bias has indeed served to undermine legislative messaging in the somewhat analogous context of hate crime laws.⁴⁵ According to one recent study, prosecutors expressed concern about including hate crime charges because “it might complicate the issues of the case before a jury” as well as the fact of “the political landscape of their jurisdiction as a reason not to include hate crime charges.”⁴⁶

Of course, even assuming infinite prosecutorial resources, substantive standards of affirmative consent, and non-biased juries, many, if not most, of sexual assault cases pose evidentiary problems at the level of the individual facts.⁴⁷ Cases of forcible rape, where the primary issue at trial is generally identity,⁴⁸ are among the most frequently overturned as a result of DNA retesting.⁴⁸ In cases of acquaintance rape, however, the issue is often consent, which invariably (and necessarily) boils down to a credibility contest between the defendant and the victim.⁴⁹

Legislative initiatives such as “rape shield” laws,⁵⁰ which prohibit use of a victim’s prior sexual history to prove her likelihood of consent, and exceptions to the general ban on “propensity” evidence in order to admit a defendant’s prior sexual misconduct,⁵¹ look to improve the prosecution’s

⁴³ *Id.* at 958. Dripps concludes that the disconnect between popular opinion and law urges that prosecutors try close cases before judges, even if that constitutionally limits them to seeking only six-month prison terms.

⁴⁴ *Id.* at 975.

⁴⁵ Avlana Eisenberg, *Expressive Enforcement*, 61 *UCLA L. REV.* 858, 893–95 (2014).

⁴⁶ *Id.* at 893–94.

⁴⁷ *See generally* Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 *FORDHAM L. REV.* 1585 (2007).

⁴⁸ *Id.* at 1591.

⁴⁹ *See* Deborah Tuerkheimer, *He Said, She Said*, *MS. BLOG* (Apr. 27, 2017), <http://msmagazine.com/blog/2017/04/27/he-said-she-said/>.

⁵⁰ *See, e.g.*, *FED. R. EVID.* 412.

⁵¹ *See, e.g.*, *FED. R. EVID.* 413.

chances of proving consent in these cases. Yet, in cases that boil down to a straightforward he-said/she-said conflict where both parties appear credible, the defendant must get the benefit of the reasonable doubt standard unless we agree to ignore the Constitution altogether.⁵²

In short: at the adjudicatory level—much like the investigatory level—sexual assault prosecutions face both substantive and procedural obstacles. In the next two Sections, I will consider how these legal obstacles reciprocally impact cultural discourses about sexual assault and consent. The dialogue creates unfortunate expressive consequences for the criminal justice system’s messaging about women’s sexual dignity.

C. RAPE CULTURE: SOCIAL NORMS SHAPING LEGAL NORMS

Legal change, of course, does not happen in isolation, but through a dialectical exchange with culture.⁵³ Changing cultural norms about right and wrong affect lawmakers and enforcers, and new legal norms can shape cultural norms in return, though rarely in a perfect, one-for-one exchange.⁵⁴ Since the 1970’s, feminist scholars have identified the social phenomenon of “rape culture” as a negative influence on the reporting, prosecution, and conviction of sexual assailants.⁵⁵ “Rape culture” is the belief system

⁵² As I will discuss in Section I.C, *infra*, the trend in college administrative proceedings has been to implement a preponderance of the evidence standard on the issue of consent, which has drawn criticism and litigation. See Conor Friedersdorf, *What Should the Standard of Proof Be in College Rape Cases?*, ATLANTIC (June 17, 2016), <https://www.theatlantic.com/politics/archive/2016/06/campuses-sexual-misconduct/487505/>. Some observers urge a lower standard of proof even in criminal proceedings. Rei, *Beyond A Reasonable Doubt: Applying The Wrong Legal Standard To Establishing Consent in Rape Cases*, DAILY KOS (June 19, 2013), <http://www.dailykos.com/story/2013/6/19/1217232/-Beyond-The-Shadow-of-a-Doubt-Applying-The-Wrong-Legal-Standard-To-Establishing-Consent-in-Rape-Case>. The Constitutional question is beyond the scope of this article, which takes as a starting point that the rule of law requires the same standard of proof apply to all defendants, regardless of offense.

⁵³ An example is the use of municipal “pooper scooper” ordinances to change social norms about cleaning up after dogs. See, e.g., Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1675 (1996).

⁵⁴ See Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 REV. OF L. & ECON. 715, 716–18 (2008) (reviewing the literature on the relationship between law and norms).

⁵⁵ See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 389 (1975); Buchwald et al., *supra* note 5, at vii; Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 229 (1980); Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths: In Review*, 18 PSYCHOL. WOMEN. Q. 133, 136–37 (1994); Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?*, 1 SEATTLE J. SOC. JUST. 743, 745 n.15 (2003); Vicki McNickle Rose, *Rape as a Social Problem: A Byproduct of the Feminist Movement*, 25 SOC. PROBS. 75, 78 (1977) (“From the feminist

encouraging and legitimizing male sexual aggression against women.⁵⁶ The key features of rape culture include dominant-submissive stereotypes of male-female sex roles, the perpetuation of so-called “rape myths,” and a “framework that blames sexual assault on the actions of the victim rather than questioning the behavior of the rapist.”⁵⁷

Psychologist Diana Payne has identified seven key myths supporting rape culture: 1) “She asked for it” (in particular by being drunk); 2) “It wasn’t really rape” (in the absence of physical injury); 3) “He didn’t mean to” (because he was too aroused to notice she wasn’t consenting); 4) “She wanted it” (because women have rape fantasies); 5) “She lied” (because she consented but then changed her mind afterward); 6) “Rape is a trivial event” (and women exaggerate its emotional effects); and 7) “Rape is a deviant event” (because rarely are women raped by their own partners).⁵⁸ These myths were embodied in the long-lived common law evidentiary rules about rape that required proof of force, admitted the complainant’s sexual history as relevant to both consent and credibility, and failed to recognize marital rape at all.⁵⁹

While these formal rules have changed over time, through both statute and case law,⁶⁰ such myths continue to animate our society and our legal

perspective, rape is a direct result of our culture’s differential sex role socialization and sexual stratification.”); *see generally* Meagan Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALBANY L. REV. 1059 (2015).

⁵⁶ Hildebrand & Najdowski, *supra* note 55, at 1060.

⁵⁷ *Id.* at 1062.

⁵⁸ Diana L. Payne et al., *Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale*, 33 J. RES. PERSONALITY 27, 59 (1999).

⁵⁹ The proof of force was a long-standing requirement under the common law for reasons typified by Victorian gynecologist Lawson Tait, who observed, “I am perfectly satisfied that no man can effect a felonious purpose on a woman in possession of her senses without her consent” because, after all, “you cannot thread a moving needle.” SUSAN S.M. EDWARDS, *FEMALE SEXUALITY AND THE LAW* 122–26 (1981). As to the relevance of prior sexual history to consent, a nineteenth century American court once asked, “will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?” *People v. Abbott*, 19 Wend. 192 (N.Y. 1838). On the relevance to credibility, it was “a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman.” *State v. Sibley*, 131 Mo. 519 (Mo. 1895).

⁶⁰ While, as described in Section I.B, *supra*, the shift from force to consent is still in progress in the U.S., two English cases, *Regina v. Camplin*, 1 Cox C.C. 220 (1845), and *Regina v. Fletcher*, 8 Cox C.C. 131 (1859), began to shift the law toward the consent model far earlier. In *Camplin*, the court upheld the defendant’s conviction for having sex with an insensible thirteen-year-old after he had given her alcohol “in order to excite her.” 1 Cox. CC at 220. In *Fletcher*, the victim was a developmentally disabled girl who had not resisted the defendant’s

system. Studies have shown support for the beliefs that women who do not wear bras or do wear short skirts are “asking for trouble,” as well as for the belief that going to a man’s home with him suggests the desire to consent to sex.⁶¹ Furthermore, laypeople, police officers, rape crisis counselors, and rapists have been found to support fourteen out of thirty-two rape myths, such as the idea that a woman should feel guilty after being raped and that the victim should be responsible for physical resistance.⁶² Indeed, laypeople, police officers, and counselors were even *more* likely than rapists themselves to believe that women help bring about rape through appearance or behavior, and that they should physically resist their attackers.⁶³ This last data point is consistent with the DOJ’s findings about the Missoula Police Department discussed above in Section I.A.

Hildebrand and Najdowski have posited a psychological model through which the prevalence of such rape myths may affect jury decision-making in rape trials.⁶⁴ They point to the evidence that knowledge is structured according to cognitive schemas and scripts, and hypothesize that “jurors’ scripts for sexual assault are based on the cultural ‘real rape’ narrative” such that:

when a woman alleging sexual assault behaved in ways that are inconsistent with the ‘real rape’ script (e.g., she was drinking prior to the assault, she did not physically fight her attacker, she did not report the assault immediately) or men’s behavior is legitimized by cultural norms (e.g., expectations about what happens when a woman goes home with a man), jurors may be less likely to believe that a sexual assault occurred.⁶⁵

The authors also suggest that this tendency will be exacerbated by confirmation bias—the process of seeking out information consistent with

advances. In upholding his conviction, the court said:

The question is, what is the proper definition of the crime of rape? Is it carnal knowledge of a prosecutrix? If it must be against her will, then the crime was not proved in this case; but if the offence is complete where it was by force and without her consent, then the offence proved that was charged in the indictment, and the prisoner was properly convicted It would be monstrous to say that these poor females are to be subjected to such violence, without the parties inflicting it being liable to be indicted. If so, every drunken woman returning from market, and happening to fall down on the road side, may be ravished at the will of the passers by.

Fletcher, 8 Cox C.C. at 134.

Rape shield laws have, as also discussed in Section I.B, *supra*, served as a statutory fix for the rape myths of the “unchaste” woman.

⁶¹ Burt, *supra* note 55, at 223.

⁶² Hubert S. Field, *Attitudes Toward Rape: A Comparative Analysis of Police, Rapists, Crisis Counselors, and Citizens*, 36 J. PERSONALITY & SOC. PSYCHOL. 156, 160, 168 (1978).

⁶³ *Id.* at 170.

⁶⁴ Hildebrand & Najdowski, *supra* note 55, at 1073.

⁶⁵ *Id.*

pre-conceived scripts and disregarding other inconsistent information.⁶⁶ They conclude that rape culture, through its effects on the types of schemas and scripts that jurors rely on in sexual assault trials, and the resulting confirmation bias and selective evidence processing, affects the ways jurors assign responsibility to victims and defendants.⁶⁷

But where does rape culture come from in the first place? Many scholars agree that it is socially contingent, rather than purely organic.⁶⁸ Catharine MacKinnon and Andrea Dworkin famously critiqued pornography for contributing to the problem by presenting women as “sexual objects experiencing sexual pleasure in rape, incest[,] or other sexual assault” and “dehumanized as sexual objects, things, or commodities.”⁶⁹ Beyond actual pornography, theorists often point the finger at media and pop culture—at music lyrics, television, advertisements, and social media—which communicate rape myths and objectified portrayals of women.⁷⁰ For example, many critics flag the lyrics of the Robin Thicke song “Blurred Lines” as a particularly clear example of this phenomenon: “I hate these blurred lines, I know you want it . . . but you’re a good girl, the way you grab me, must wanna get nasty.”⁷¹ Thicke describes as “blurry” the perceived contrast between a woman’s stated lack of consent and the “secret” desire for sex despite herself.⁷² Notably, the song captured the top spot on Billboard’s 2013 Songs of the Summer chart.⁷³

In another recent example, the HBO television show *Game of Thrones*, based on the George R.R. Martin epic fantasy series, *A Song of Ice and Fire*, has drawn heavy criticism for its portrayal of sexual violence against women.⁷⁴ While we, as viewers, are intended to view most of the show’s

⁶⁶ *Id.* at 1074.

⁶⁷ *Id.* at 1077–78.

⁶⁸ See Buchwald et al., *supra* note 5, at vii.

⁶⁹ CATHARINE MACKINNON & ANDREA DWORKIN, IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 428 (1997).

⁷⁰ Hildebrand & Najdowski, *supra* note 55, at 1066–67 (citing Monique Ward et al., *Breasts are for Men: Media, Masculinity Ideologies, and Men’s Beliefs About Women’s Bodies*, 55 *SEX ROLES* 703, 705 (2006); Nicola Henry & Anastasia Powell, *The Dark Side of the Visual World: Towards a Digital Sexual Ethics*, in PREVENTING SEXUAL VIOLENCE: INTERDISCIPLINARY APPROACHES TO OVERCOMING A RAPE CULTURE 84, 90–91 (Nicola Henry & Anastasia Powell eds., 2014).

⁷¹ Hildebrand & Najdowski, *supra* note 55, at 1067.

⁷² *Id.*

⁷³ Gary Trust, *Robin Thicke’s “Blurred Lines” is the Song of the Summer*, BILLBOARD (Sept. 5, 2013), <http://www.billboard.com/articles/news/5687036/robin-thickes-blurred-lines-is-billboards-song-of-the-summer>.

⁷⁴ See Oliver Noble, *All the Sex and Nudity in ‘Game of Thrones’ Season 6*, HUFFINGTON POST (last visited Oct. 5 2015), <http://www.huffingtonpost.com/entry/all-the-sex-and-nudity->

sexual perpetrators as evil, and the violence is realistic to the brutal medieval world the series portrays, one particular scene from the series' fourth season attracted critical ire. In it, Jaime Lannister—a corrupt but often sympathetic character—comforts his sister over the coffin of the child of their incest. Out of nowhere (and inaccurately to the parallel scene in the book) Jaime suddenly growls “you’re a hateful woman; why have the Gods made me love a hateful woman?” and proceeds to rape her over her protests.⁷⁵

In a press conference on the matter, Dawn Hawkins, executive director of the National Center on Sexual Exploitation, accused HBO of bringing “the ambiance of torture pornography into American living rooms through *Game of Thrones*’ explicit depictions of rape, incest, prostitution, and sexual violence” and urged that “[t]his cocktail of pornography and twisted plot lines must be denounced as socially irresponsible, especially in an age when American society is struggling to combat the crises of sexual assault and rape culture.”⁷⁶ Yet other commentators have noted that *Game of Thrones* can actually be read as a feminist text, due to its depictions of precisely the female perspectives that are often silenced.⁷⁷ In this view, while the show may replicate discourses of masculinity that contribute to “rape culture,” it also—particularly as supplemented by feminist discourse in online fan communities—provides “a potential space for change through speaking out about silenced experiences of trauma.”⁷⁸

Game of Thrones is just one example of how social media has shaped feminist discourse about rape culture, providing a space for women to publicly identify examples and discuss them. This function is particularly important when, as discussed in Part I, one of the obstacles to proper enforcement is the culturally contested and legally unstable definition of rape itself. Two recent, high-profile examples are former Stanford swimmer Brock Turner’s victim’s widely-circulated account of experiencing the aftermath of sexual assault while unconscious,⁷⁹ and the commentary on the

in-season-6-of-game-of-thrones_us_5772c998e4b0eb90355c8a05; see generally VALERIE ESTELLE FRANKEL, *WOMEN IN GAME OF THRONES: POWER, CONFORMITY AND RESISTANCE* (2014).

⁷⁵ *Game of Thrones: Breaker of Chains* (HBO television broadcast Apr. 20, 2014).

⁷⁶ Joe Otterson, ‘*Game of Thrones*’ Accused of Promoting Rape Culture, ‘Torture Pornography,’ WRAP (Apr. 25, 2016), <http://www.thewrap.com/game-of-thrones-accused-of-promoting-rape-culture-torture-pornography/>.

⁷⁷ See FRANKEL, *supra* note 74, at 2.

⁷⁸ Debra Ferreday, *Game of Thrones, Rape Culture and Feminist Fandom*, 30 AUSTRALIAN FEMINIST STUDIES 21, 21 (2015).

⁷⁹ See Erin Sheley, *Victim Impact Statements and Expressive Punishment in the Age of Social Media*, 52 WAKE FOREST L. REV. 157 (2017), for an account of the significance of the Stanford victim impact statement in the context of expressive punishment.

light sentences of Steubenville, Ohio high-school football players Ma'lik Richmond and Tyler Mays for the video-recorded rape of a sixteen-year-old girl, during which one of the assailants observed that "some people deserve to be peed on."⁸⁰ As to the latter, it has been said that "social media won the Steubenville case,"⁸¹ after crime blogger Alexandria Goddard compiled screen shots of Facebook, Instagram, and Twitter posts as evidence of the assault.⁸²

Cultural theorists praise social media as a forum for witnessing testimony and critique about rape culture and its effects. As Carrie Rentschler puts it, "[f]eminist responses to rape culture transform notions of witnessing, moving from conceptions of witnessing as a sensory-based act of seeing or hearing to the ability to record and distribute audio-visual evidence of rape culture."⁸³ Both the Stanford and Steubenville cases make explicit not only the relationship between culture and violence, but also between cultural commentary and the construction of legal truth: culture may indeed help normalize sexual violence against women, but it can also cast light on reality in a way that may ultimately affect legal decision-making. In particular, it has been useful in publicly redefining as rape non-consensual sexual behavior that had previously been tolerated, or at least not spoken about.

That said, despite the importance of recognizing rape culture's effect of diminishing rapists' accountability, it is dangerous to use the term as a blanket critique of much of male behavior generally. Rape is a legal term. To use it effectively to assign the stigma of criminal accountability where it belongs, "rape" must be susceptible to a precise definition. While the myth that limits the definition of rape to circumstances of violent, stranger rape has demonstrably contributed to the under-reporting and under-enforcement

⁸⁰ Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES (Dec. 16, 2012), <http://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html>.

⁸¹ Adam Cohen, *Steubenville Rape Guilty Verdict: The Case That Social Media Won*, TIME (Mar. 17, 2013), <http://ideas.time.com/2013/03/17/steubenville-rape-guilty-verdict-the-case-that-social-media-won/>.

⁸² Carrie A. Rentschler, *Rape Culture and the Feminist Politics of Social Media*, 7 GIRLHOOD STUD. 65, 65–66 (2014).

⁸³ *Id.* at 69. The same power exists in traditional literature. See, e.g., Leone Sandra Hankey, *Women Write Patriarchal Wrongs: Narrative Resistance to the Rape Culture*, in BEYOND PORTIA: WOMEN, LAW AND LITERATURE IN THE UNITED STATES 205 (Jacqueline St. Joan & Annette Bennington McElhiney eds., 1997) (giving, as an example, Joanna Russ's science fiction novel *The Female Man*, which "shows the effectiveness of going outside legal discourse and using the tools of plainspeak, parody, and ridicule to reveal the irrationality and viciousness of the way raped women are treated").

crises,⁸⁴ there are also grave risks should the only alternative narrative be overly broad.

The discourse of rape culture raises particular problems through its construction of women as victims. Aya Gruber criticizes the theory of rape culture for perpetuating, to an unhealthy degree, what she terms the “trauma narrative” of rape in the context of campus sex.⁸⁵ The trauma narrative is “rife with other risks, including bureaucratic management of students stripped of their subjectivity and speech restrictions” and “construes sexual assault complainants as devastated (or self-deluding) and female students as incapable of self-management.”⁸⁶ In short, she fears, “anti-rape culture repackages feminist energy and female empowerment as sexual victimhood.”⁸⁷ She also notes the dangers of widespread silence around the topic of rape, epitomized by the increasing calls for “trigger warnings” to avoid potentially traumatizing rape victims.⁸⁸

Commentators who overuse the notion of “rape culture” run the risk of constructing the victim as perpetually fragile and unable to escape a subordinating cultural context. This notion shares disturbing commonalities with precisely the patriarchal culture it opposes. Indeed, through a comparative analysis of contemporary American culture with patriarchal Puritan culture, Bryden and Madore conclude that patriarchal culture—traditionally cited as a pre-condition *to* rape culture—was in fact *less* rape supportive than contemporary egalitarian culture.⁸⁹ The authors do not endorse a return to Puritan culture, nor a shift in enforcement focus away from attempting to change rapists’ behavior in favor of changing women’s behavior—they simply note that speculating about patriarchal origins is not always constructive in shaping rape policy, as it does not appear to be independently criminogenic.⁹⁰

No less an authority than the Rape, Abuse & Incest National Network (RAINN) has warned of the consequences of allowing a monolithic critique of culture to distract from the uniquely condemnable individual culpability of the comparatively small percentage of men who are actually rapists:

In the last few years, there has been an unfortunate trend towards blaming ‘rape culture’ for the extensive problem of sexual violence on campuses. While it is helpful to point

⁸⁴ See *supra* Part I and supporting footnotes.

⁸⁵ Aya Gruber, *Anti-Rape Culture*, 64 KAN. L. REV. 1027, 1048–49 (2016).

⁸⁶ *Id.* at 1048.

⁸⁷ *Id.* at 1049.

⁸⁸ *Id.* at 1049–50.

⁸⁹ David P. Bryden & Erica Madore, *Patriarchy, Sexual Freedom, and Gender Equality as Causes of Rape*, 13 OHIO ST. J. CRIM. L. 299, 345 (2016).

⁹⁰ *Id.*

out the systemic barriers to addressing the problem, it is important to not lose sight of a simple fact: rape is caused not by cultural factors but by the conscious decisions, of a small percentage of the community, to commit a violent crime.⁹¹

Even in pursuit of the very laudable goal of getting the justice system to accurately label and punish acquaintance rapists such as Brock Turner and the Steubenville defendants, it does a disservice to their victims to blur their criminal conduct into that of every boorish or mildly inappropriate display of masculinity (such as, for example, the campaign video of Ted Cruz trying to kiss his very reluctant daughter, which *Huffington Post* blogger Charles Clymer described as a “prime example” of “‘benign’ rape culture.”⁹²)

Another potentially problematic feature of the “rape culture” critique is the extent to which it has focused heavily on college campuses. The horrifying statistic that one in five female college students has been sexually assaulted has been widely-circulated in the press, even by President Obama, who made campus rape a “marquee issue” for his administration.⁹³ That statistic comes from the 2007 Campus Sexual Assault Study, funded by the National Institute of Justice, which had a sample size of 5,466 female college students at two public universities.⁹⁴ Yet those numbers diverge wildly from other studies, such as the National Crime Victimization Survey, conducted in 2011 by the federal government with a national sample of females age eighteen to twenty-four.⁹⁵ In that study, an estimated 0.8% of non-college respondents reported that they were victims of threatened, attempted, or completed sexual assault, in contrast to approximately 0.6% of college females.⁹⁶ It is difficult to evaluate these numbers, particularly in light of the data, discussed in Section I.A suggesting that college students are less likely to report sexual assault than are their non-college counterparts.

Regardless, Deborah Tuerkheimer argues that the potentially misguided focus on primarily campus rape has created a “discrepancy between competing rape definitions,” one of which involves non-forcible sexual

⁹¹ Letter from Rape, Abuse & Incest National Network (RAINN) to White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014), <https://www.rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf>.

⁹² Blake Neff, *HuffPo Contributor: Cruz’s Awkward Daughter Hug Example of ‘Rape Culture,’* DAILY CALLER (Feb. 1, 2016), <http://dailycaller.com/2016/02/01/huffpo-contributor-cruzs-awkward-daughter-hug-example-of-rape-culture/>.

⁹³ Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html.

⁹⁴ CHRISTOPHER KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT STUDY* vii (Oct. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

⁹⁵ See generally SINOZICH & LANGTON, *supra* note 18.

⁹⁶ *Id.* at 1.

violations by acquaintances in a college setting, and the other of which perpetuates the myth of the force requirement in most other settings.⁹⁷ She argues that this false dichotomy overlooks non-forcible violations against non-student victims, who are, contrary to current popular assumptions, actually even more vulnerable to acquaintance or intimate partner rape than are undergraduates.⁹⁸

And, of course, there is the risk of actual false reporting. While this is a risk in all criminal contexts, the old myth that it was much *more* likely in sexual assault cases has resulted in an overcorrection whereby commentators sometimes suggest that even raising the concern is, in and of itself, a part of rape culture.⁹⁹ Because the university setting is unique in that it has its own, sub-legal disciplinary system, students accused of rape can be expelled from school (and stigmatized forever) with procedural safeguards far below the standard required by the Due Process Clause in a criminal context.¹⁰⁰ This trend has been motivated in part by pressure from the Department of Education's Office for Civil Rights (OCR), which can strip schools of federal funding for failure to comply with Title IX of the Education Amendments of 1972.¹⁰¹ In an open letter in the *Boston Globe*, twenty-eight Harvard Law School professors, citing the lack of rights to confrontation and counsel in Harvard's new policies, protested that the OCR's directives "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation."¹⁰²

The question of whether or not OCR's policies for adjudicating campus rape cases are sound or even constitutional is far beyond the scope of this article. That said, the significant public turmoil generated by the debate is, in and of itself, a problem. The cyclical relationship between law, culture, and under-reporting is likely only going to be exacerbated by a polarized public discourse in which the only two perceived options are dismissing the

⁹⁷ Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 5 (2015).

⁹⁸ *Id.*

⁹⁹ See, e.g., Jenny Kutner, *False Reports of Rape are Vanishingly Rare, So Why Treat Women Like Liars By Default?*, SALON (June 1, 2015), http://www.salon.com/2015/06/01/false_reports_of_rape_are_vanishingly_rare_so_why_treat_women_as_liars_by_default/.

¹⁰⁰ See Yoffe, *supra* note 93.

¹⁰¹ Title IX, 20 U.S.C. §§ 1681–88 (2017).

¹⁰² Eugene Volokh, *28 Harvard Law Professors Condemn Harvard's New Sexual Harassment Policy and Procedures*, WASH. POST (Oct. 15, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/15/28-harvard-law-professors-condemn-harvards-new-sexual-harassment-policy-and-procedures/?utm_term=.e7a267fd579f.

widespread victimization of women and fully excusing the culture that supports it or embarking on a non-differentiated war against “rape culture” that relies on new stereotypes about all of its participants. Not only do such choices lead to a break-down in positive communication and education, they contribute further to the substantive confusion over the precise meaning of sexual assault.

D. EXPRESSIVE PUNISHMENT: LEGAL NORMS SHAPING SOCIAL NORMS

If cultural norms affect the law, the law likewise affects cultural norms. The “expressive” function of punishment is the law’s capacity to send a message of condemnation about a particular criminal act.¹⁰³ In Jeffrie Murphy’s formulation, a wrongdoer’s crime sends a message to the world about the value of his victim: “[t]here are ways a wrongdoer has of saying to us, ‘I count but you do not,’ ‘I can use you for my purposes,’ or ‘I am here up high and you are there down below.’”¹⁰⁴ Conversely, punishment sends a reciprocal message, in a kind of dialogue with the crime.¹⁰⁵ Punishment allows the criminal justice system to condemn the criminal’s devaluation of the victim by devaluing him or her as a result of it.

Anthony Duff explains that this communicative process is both forward and backward-looking, and that there are multiple audiences for the message communicated by punishment.¹⁰⁶ In his framework, the expressive theory:

Takes the primary communicative purpose of punishment to be the communication to offenders of the condemnation they deserve for the wrongs they have committed, and explains that purpose in back-ward looking terms of what we, as a polity, owe to victims, to offenders, and to ourselves as a political community . . . as a response to such wrongs¹⁰⁷

Yet punishment is also forward-looking because it helps the convicted to “understand, and so to repent [the] wrong as a wrong both against the individual victim (where there was one) and against the wider political community to which they both belong.”¹⁰⁸ Expressive punishment therefore

¹⁰³ See generally Joel Feinberg, *The Expressive Function of Punishment*, in DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95 (1970); Jean Hampton, *An Expressive Theory of Retribution*, in RETRIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992); Jeffrie Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY 25 (Murphy & Hampton eds., 1988).

¹⁰⁴ Murphy, *supra* note 103, at 25.

¹⁰⁵ Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 463 (1999).

¹⁰⁶ R. A. Duff, *Guidance and Guidelines*, 105 COLUM. L. REV. 1162, 1182 (2005).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

recognizes the relationships between victim, offender, and society as a whole that are all implicated by the offense.¹⁰⁹ Punishment sends messages to the offender about his conduct, to the victim about his or her worth in the view of society at large, and to society about what we, collectively, demand from one another and refuse to tolerate.¹¹⁰

Furthermore, the expressive function of punishment is both retributive and utilitarian. As to the former, Jean Hampton argues that what the criminal justice system must express through punishment is the message of equivalence between victim and offender that lies at the heart of retributivism or “just desserts” theory:

The retributive punisher uses the infliction of suffering to symbolize the subjugation of the subjugator, the domination of the one who dominated the victim. And the message carried in this subjugation is ‘What you did to her, she can do to you. So you’re equal.’ The one who acted as if he were the lord of the victim is humbled to show that he isn’t lord after all. In this way, the demeaning message implicit in his action is denied. Therefore, just as the crime has symbolic meaning, so too does the punishment.¹¹¹

While retributivism does not fundamentally require an expressive component—an offender can be punished according to just desserts for the sake of the punishment itself—as I have argued previously, Hampton’s theory gets to the heart of the symbolic effects of a crime.¹¹² “Implicit in expressive retributivism is the concept that, even if a punishment can be proportional to the physical harm done to a victim, the symbolic harm can only be remedied if this proportionality is communicated to all parties involved, including the public.”¹¹³

More importantly for our current purposes, expressive punishment likewise serves a utilitarian function. The law has the power to change social norms and behavior via the messages it expresses, through what has been called a “persuasive” and “acculturating” effect.¹¹⁴ Thus, even if we set aside concerns about proportionality of punishment as an end in and of itself, simply communicating condemnation of certain behavior—particularly if it does so in a way that is seen as procedurally fair—may lead to a practical

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1182–86.

¹¹¹ Hampton, *supra* note 103, at 5.

¹¹² Sheley, *supra* note 79, at 167.

¹¹³ *Id.*

¹¹⁴ See generally Robert C. Ellickson, *The Evolution of Social Norms: A Perspective From the Legal Academy*, in SOCIAL NORMS 35 (Michael Hechter & Karl-Dieter Opp eds., 2001). It should also be noted that the retributive function of law, as a general matter, has been shown to have utilitarian value, as people become more law-abiding if they believe the law itself is accurately capturing their beliefs about desert. See generally PAUL ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT (Oxford Univ. Press 2013).

reduction in crime.¹¹⁵ Furthermore, punishing an offender appears to have the additional utilitarian benefit of increasing a victim's social standing in his or her community.¹¹⁶

The communicative function of punishment flows not only from the actual sentence imposed in a particular case, but also from the full gamut of institutional expressions at each stage of the criminal process. The existence and content of a criminal law in the first place expresses that conduct beyond certain parameters is unacceptable and warrants official sanction; this message-sending function is frequently noted in the legislative debates over proposed statutes.¹¹⁷ As Avlana Eisenberg notes in her study on the expressive effects of hate crime prosecutions, enforcement decisions can also be expressive.¹¹⁸ With only so much bandwidth, prosecutors necessarily wield a broad degree of discretion in deciding what cases to bring.¹¹⁹ As Eisenberg puts it, "much of a law's communicative impact is not felt until later and is bound up with whether and how the legislation is enforced."¹²⁰

With these goals in mind, it is clear to see how the underreporting and under-enforcement of sexual assault laws—certainly when attributable to the endurance of rape myths within the system, but even when caused by inescapable evidentiary and resource issues—has led to an expressive crisis surrounding the criminalization of sexual assault. The law's failure to penalize many forms of sexist violence has created a kind of cultural permission for these acts.¹²¹ As a result, the systemic difficulties we have encountered in defining a sexual assault and the requirements for proving lack of consent have resulted in a significant public discourse among sexual assault survivors who feel as though the system cannot or will not recognize the wrongs they have suffered.

The Twitter hashtag #WhyWomenDontReport has collected thousands of tweets by women identifying as sexual assault survivors providing explanations for why they did not seek recourse through the criminal justice system.¹²² While the spectrum of reasons given by these women runs the

¹¹⁵ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 170–78 (1990).

¹¹⁶ See generally Kenworthy Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL L. STUD. 358 (2016).

¹¹⁷ See, e.g., CONG. REC.—HOUSE 23252 (2010) (statement of Rep. George Miller) (arguing that Congress owes it to children to "send a strong message that people who abuse children or do not do their jobs to keep children safe will face serious consequences").

¹¹⁸ Eisenberg, *supra* note 45, at 858.

¹¹⁹ See Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMPLE POL. & C. R. L. REV. 369, 369 (2010).

¹²⁰ *Id.*

¹²¹ See Hankey, *supra* note 83, at 213 n. 2.

¹²² #WhyWomenDontReport, TWITTER, <https://twitter.com/hashtag/WhyWomenDontReport?src=hash>.

gamut from fear of professional fallout to cultural resistance to generalized fear of not being believed by communities, friends, and family, many women point to the criminal justice system itself as being unwelcoming or unwilling to provide redress or even threatening to the victims in and of itself.¹²³

A survey of tweets falling into the latter category provides a number of examples:

“Because no matter when you tell your story, they’ll try to discredit you with “Why now?””¹²⁴

“From the moment a woman walks into a police station/hospital the system is working against her.”¹²⁵

“I watched enough SVU to know no one would believe me. I was 15 & scared. I knew the cops were ppl who would hurt Muslims like me.”¹²⁶

A quick scan of the contributions to the hashtag in December 2016 provides some others:

“Also why on earth would women ever report at this point? Because the justice system has been so kind to survivors?”¹²⁷

“Because they’ll [sic] be mountains of evidence of rape and this chump will put it down to ‘young girls lying for attention.’”¹²⁸

“Despite marital rape being illegal, no one believes it’s possible since your relationship must be a sign of consent.”¹²⁹

“So our new AG appears to not know what constitutes sexual assault.”¹³⁰

The expressive breakdown around the criminalization of sexual assault roared into the public sphere in the Brock Turner case, after he was convicted of manually sexually assaulting an unconscious woman and subsequently

¹²³ *Id.*

¹²⁴ Amy Siskind (@amy_siskind), TWITTER (Oct. 13, 2016, 7:31 PM), https://twitter.com/Amy_Siskind/status/786726112613298176.

¹²⁵ Rebekah Gordon (@RebekahGordon1), TWITTER (Oct. 13, 2016, 3:21 PM), <https://twitter.com/RebekahGordon1/status/786663159968956416>

¹²⁶ Mahroh Jahangiri (@mahrohj), TWITTER (Oct. 13, 2016, 3:29 PM), <https://twitter.com/mahrohj/status/786665212153884672>.

¹²⁷ Sophie Hansen LCSW (@SophieNavaR), TWITTER (Dec. 15, 2016, 7:23 AM), <https://twitter.com/SophieNavaR/status/809418650323193856>.

¹²⁸ Cerys Vaughan (@cerysjvaughan), TWITTER (Dec. 4, 2016, 10:12 AM), <https://twitter.com/cerysjvaughan/status/805474832636870656>) (referring to Nodaway County, Missouri Sheriff Darren White’s comments about the alleged rape of Daisy Coleman).

¹²⁹ Arielle (@xdreamfaex), TWITTER (Nov. 23, 2016, 8:32 AM), <https://twitter.com/xdreamfaex/status/801433215982510080>.

¹³⁰ Fiddler (@cfidd), TWITTER (Nov. 18, 2016, 8:05 AM), <https://twitter.com/cFidd/status/799614400122519554> (referring to Jeff Sessions’ opinion that it would be “a stretch” to classify Donald Trump’s “pussy grabbing” comments as describing criminal sexual assault.”).

sentenced to only six months in county jail.¹³¹ California Superior Court Judge Aaron Persky prompted outrage with his observation, during sentencing, that “a prison sentence would have a severe impact on him. I think he will not be a danger to others.”¹³² The impact statement given by the Stanford victim created a social media firestorm after it was released by the court and appeared on the website BuzzFeed.¹³³ The statement had immediate public resonance in part due to the victim’s eloquent account of the harm she had suffered after the non-consensual encounter, as well as her re-victimization by the justice system itself.¹³⁴

E. CONCLUDING OBSERVATIONS

It is impossible to make confident assertions of causation in a context as complex as the tangle of social and legal circumstances affecting sexual assault enforcement. That said, the preceding analysis reveals a significant, mutually reinforcing relationship between appearance and reality complicating the legal system’s ability to address rape. Longstanding assumptions about the nature of rape have thwarted enforcement of new legal definitions, perhaps due in part to prosecutorial knowledge of likely juror behavior (in addition, of course, to legitimate evidentiary problems). In turn, under-enforcement appears to have contributed to both underreporting, and a widely shared belief among victims and some women that the criminal system does not provide justice. To the extent that the system expresses this message through under-enforcement, it contributes to the original cultural assumptions that only certain forms of non-consensual sex qualify as “real rape.” Which brings us back to the beginning, in a perfectly vicious cycle. Courts, prosecutors, and lawmakers must find a way to interrupt this cycle by changing the expressive messages about rape the criminal justice system currently produces.

II. BROKEN WINDOWS THEORY

This Part will explore what we know about using the criminal law to

¹³¹ Victor Xu, *Brock Turner Sentenced to Six Months in County Jail, Three Years Probation*, STAN. DAILY (June 2, 2016), <http://www.stanforddaily.com/2016/06/02/brock-turner-sentenced-to-six-months-in-county-jail-three-years-probation/>.

¹³² Katie J.M. Baker, *Here is the Powerful Letter the Stanford Victim Read Aloud to Her Attacker*, BUZZFEED (June 3, 2016), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.gp44bWgMB#.b1MBP54L9.

¹³³ Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 2, 2016), <http://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html>.

¹³⁴ See generally Sheley, *supra* note 79 (analyzing the expressive effects of the Stanford victim impact statement).

manage appearances in the hopes of changing reality. I take up the most famous example of this effort, the Broken Windows theory of policing, to consider its strengths, weaknesses, and potential application to the prosecution of sexual assault.

A. THE THEORY AND ITS CRITICS

In a famous 1982 article for the *Atlantic Monthly*, criminologists James Q. Wilson and George L. Kelling proposed that policing minor offenses, such as loitering, panhandling, prostitution, and graffiti, might reduce more serious crime.¹³⁵ Their idea turned on the relationship between the appearance of disorder and the actual amount of disorderly behavior in society: “If a window in a building is broken and left unrepaired, all of the windows will soon be broken.”¹³⁶ As its name suggests, “Broken Windows” theory has a strong aesthetic component, and has been associated with the elimination of offenses—such as the particular form of pan-handling engaged in by New York City’s “squeegee men”—most likely to be visually irritating to a city-dweller going about his or her daily life.¹³⁷

This theory eventually became the basis for new policing strategies in several major U.S. cities in the 1990s, most notably Rudolph Giuliani’s New York.¹³⁸ The New York Police Department (NYPD) increased arrests for minor yet visible misdemeanor and ordinance violations; the years 1994 and 1998 saw an increase in misdemeanor arrests by about 40,000 per year.¹³⁹ Other cities, such as Chicago and Los Angeles, followed suit and adopted a Broken Windows approach to policing, otherwise known as “order maintenance” policing.¹⁴⁰ The years 1991 to 2001 also saw a dramatic, nation-wide drop in crime—homicide by 43%, violent crime by 34%, and property crime by 29% according to some measures.¹⁴¹ While more measurable factors such as the overall increase in the number of police, the rise of the prison population, the decline of the crack epidemic, and the

¹³⁵ James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 38.

¹³⁶ *Id.* at 31.

¹³⁷ Corey Kilgannon, *With a Squeegee and a Smile, a Relic of an Unruly Past Wipes On*, N. Y. TIMES (Oct. 3, 2010), <http://www.nytimes.com/2010/10/04/nyregion/04squeegee.html>.

¹³⁸ See BERNARD E. HARCOURT, *ILLUSION OF ORDER* 1, 46–51 (Harv. Univ. Press 2001).

¹³⁹ *Id.* at 2.

¹⁴⁰ Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272 (2006) (citing *City of Chicago v. Morales*, 527 U.S. 41, 49 (1999)); Charlie LeDuff, *Los Angeles Police Chief Faces a Huge Challenge*, N.Y. TIMES (Oct. 24, 2002), <http://www.nytimes.com/2002/10/24/us/los-angeles-police-chief-faces-a-huge-challenge.html>.

¹⁴¹ Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON PERSP. 163, 163 (2004).

legalization of abortion can help explain this drop,¹⁴² supporters of order maintenance theory declared victory.¹⁴³

The exact mechanism by which Broken Windows theory operates has always been somewhat hazy. As Adam Samaha notes, the theory is not a monolithic idea of causation but, rather, a collection of various potential relationships between appearance and disorder.¹⁴⁴ He notes, for example, that “one might hypothesize that the appearance of a broken window will soon lead to an outbreak of window breaking and nothing else, or that much more serious misconduct will soon follow,” but that, regardless, “a theme in broken windows theory of misconduct is that the appearance of disorder suggests to observers that disorder is uncontrolled and that this perception prompts some people toward even greater disorder that is, in fact, not controlled.”¹⁴⁵

Despite the staggering drop in crime—which was even greater in New York City, where Broken Windows policing was most widely adopted—criminologists hotly contest its efficacy. No scholarly consensus currently exists on the theory, and there is, at best, weak empirical evidence to support its broadest form.¹⁴⁶ In a 2015 meta-analysis of thirty randomized tests of disorder policing, Anthony Braga and his co-authors discovered a statistically significant, modest crime reduction effect, across a range of violent, property, and drug-based offenses.¹⁴⁷ Specifically, they found that the strongest effects are generated by community and problem-solving interventions designed to change social and physical disorder conditions at particular places.¹⁴⁸ Conversely, aggressive order maintenance strategies that target individual disorderly behaviors do not generate significant crime reductions.¹⁴⁹ The various studies undergirding these conclusions merit summary.

In a 1990 study of thirty neighborhoods, Wesley Skogan found a statistically significant relationship between citizens’ perceptions of disorder and the rate of robbery, even after controlling for race, poverty, and proxies

¹⁴² *Id.* at 164.

¹⁴³ See Kelling, *supra* note 6 (explaining how “a diverse set of organizations in the city—pursuing their own interests and using various tactics and programs—all began trying to restore order to their domains”).

¹⁴⁴ Adam Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1621 (2012).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See generally Anthony A. Braga, Brandon C. Welsh & Cory Schnell, *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-Analysis*, 52 J. RES. IN CRIME & DELINQ. 567 (2015).

¹⁴⁸ See generally *id.*

¹⁴⁹ See generally *Id.*

for neighborhood stability.¹⁵⁰ However, Bernard Harcourt, examining the same data, concluded that Skogan's study should be qualified due to the facts that it omitted certain data on robbery and disorder, and that the victims surveyed had not been asked about the location of the relevant crimes.¹⁵¹ Further, he concluded there was no statistically significant relationship between perceptions of disorder and other crimes beyond robbery, such as rape, burglary, assault, or purse snatching.¹⁵²

In a 2001 Manhattan Institute study of New York City neighborhoods in the 1990s, George Kelling and William Sousa found a large, statistically significant inverse relationship between misdemeanor arrests and violent crime (defined as homicide, rape, robbery, and felony assault).¹⁵³ By contrast, they could not find a significant positive relationship between the violent crime rate and other proxy variables, such as cocaine use, young male population, and low socioeconomic conditions.¹⁵⁴ Kelling and Sousa concluded that a neighborhood could expect to suffer one less violent crime for approximately every twenty-eight misdemeanor arrests and that Broken Windows policing had thus prevented over 60,000 violent crimes in the 1990s.¹⁵⁵

By contrast, Bernard Harcourt and Jens Ludwig used data similar to Kelling and Sousa, but controlled for the violent crime rate in each neighborhood leading up to 1989 and shifted from the average arrest rate for the decade to the yearly arrest rate from the years 1989 to 1998.¹⁵⁶ Harcourt and Ludwig concluded that the pattern of crime reduction Kelling and Sousa attributed to "Broken Windows" policing was equally consistent with "mean reversion"—that those precincts receiving the most Broken Windows policing were the ones that experienced the largest increases and levels of crime during New York's crack epidemic.¹⁵⁷ In other words, precincts that had the most severe increases in crime also had the sharpest decreases, as they readjusted to the state of affairs prior to the epidemic.¹⁵⁸ The authors further found, based on data from a five-city social experiment called "Moving to Opportunity," that participants' movements to less disorderly,

¹⁵⁰ WESLEY G. SKOGAN, *DISORDER AND DECLINE* 73–74 (The Free Press 1990).

¹⁵¹ HARCOURT, *supra* note 138, at 90–91.

¹⁵² *Id.* at 60–61.

¹⁵³ GEORGE L. KELLING & WILLIAM H. SOUSA, JR., *DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS*, MANHATTAN INST. 5, 8–10 (2001), <https://www.manhattan-institute.org/html/do-police-matter-analysis-impact-new-york-citys-police-reforms-5800.html>.

¹⁵⁴ *Id.* at 4–5, 8.

¹⁵⁵ *Id.* at i.

¹⁵⁶ *See generally* Harcourt & Ludwig, *supra* note 140.

¹⁵⁷ *Id.* at 315.

¹⁵⁸ *Id.*

less disadvantaged communities did not appear to reduce criminal behavior, and that therefore if disorder does affect crime, such effects are: “Small enough to be dominated by whatever pernicious effects on people’s criminal behavior may arise from increases in neighborhood socioeconomic status, as would be expected to occur to some degree in normal circumstances as neighborhoods with declines in disorder begin to gentrify.”¹⁵⁹

Despite the fact that the sweeping claims about the success of Broken Windows—particularly in the political rhetoric of the Giuliani administration¹⁶⁰—do not appear to be borne out by the data, other research does reveal an impact around the margins, particularly in certain contexts. Richard Rosenfeld et al., controlling for mean reversion, examined precinct-level data on robbery and homicide rates in the years 1984 and 1988.¹⁶¹ They found that these offenses were statistically significantly associated with misdemeanor and ordinance-violation arrests from 1988 to 2001, though they also concluded that these arrests explained only 7–12% of the decline in homicides and 1–5% of the decline in robberies.¹⁶² Other work suggests that Broken Windows policing has an impact only on certain crimes, such as homicide with guns, and little effect on others, such as homicide without guns (presumably because misdemeanor arrests allow the police the opportunity to get guns off of the street incident to arrest, which does not itself relate to the hypothesis that perceptions of disorder affect violent crime).¹⁶³ While these impacts are small, as Samaha points out, “it depends on what counts as small when lives are at stake and when people have only so many policy levers to pull.”¹⁶⁴

A couple of other studies have found some smaller, context-specific Broken Windows impacts. In 2010, Magdalena Certa and her colleagues broke down New York City gun homicides into three groups by victim age, and concluded that higher misdemeanor arrest rates did have a statistically significant negative association with the rate of gun homicide on adult

¹⁵⁹ *Id.*

¹⁶⁰ *What Reduced Crime in New York City*, NAT’L BUREAU OF ECON. RES., <http://www.nber.org/digest/jan03/w9061.html> (quoting Giuliani’s statement to the press that “[o]bviously murder and graffiti are two vastly different crimes. But they are part of the same continuum, and a climate that tolerates one is more likely to tolerate the other”).

¹⁶¹ Richard Rosenfeld et al., *The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988–2001*, 45 *CRIMINOLOGY* 355, 374 (2007).

¹⁶² *Id.* at 377–78.

¹⁶³ See Seven F. Messner et al., *Policing, Drugs, and the Homicide Decline in New York City in the 1990s*, 45 *CRIMINOLOGY* 385, 405 (2007).

¹⁶⁴ Samaha, *supra* note 144, at 1626.

victims thirty-five-years and older between 1990 and 1999.¹⁶⁵ Broken Windows theory looks more promising when examined not as a blunt tool positing overall violent crime reduction from a zero-tolerance misdemeanor arrest policy, but with attention to specific policing strategies. In 2008, Anthony Braga and Brenda Bond studied thirty-four high-crime areas in Lowell, Massachusetts, and divided them into pairs, where one of each pair received a number of law-enforcement interventions.¹⁶⁶ Such interventions included: “order maintenance” strategies, such as increases in misdemeanor arrests and stops-and-frisks; “situational strategies” to target disorder, such as more street lighting, video surveillance, and destruction of vacant buildings; and “social service” strategies that connected law enforcement with mental health providers, homeless shelters, and youth recreation services.¹⁶⁷ After one year, the experimental neighborhoods had around 20% fewer emergency calls than the control neighborhoods.¹⁶⁸ Among the three methods of intervention, situational strategies were most strongly associated with fewer calls; misdemeanor arrests were less effective but still statistically significant, and social service strategies failed to produce a significant effect.¹⁶⁹

In their meta-analysis of all of this literature, Braga and Bond concluded that order maintenance policing is an effective use of law enforcement resources, but that it is most effective when it involves a cooperative effort between law enforcement and other stakeholders: “[I]ncivility reduction is rooted in a tradition of stable relationships with the community and responsiveness to local concerns . . . a sole commitment to increasing misdemeanor arrests . . . may undermine relationships in low-income, urban minority communities where coproduction is most needed and distrust between the police and citizens is most profound.”¹⁷⁰

The work of Braga and Bond constitutes the first large-scale meta-analysis of the data on Broken Windows policing, and suggests that there is indeed at least some value to focusing on reducing low-level disorder, and the appearance thereof, as a means of targeting higher level violent crime.¹⁷¹ Yet, their attention to the potential risk of undermining the relationship

¹⁶⁵ Magdalena Cerda et al., *Investigating the Effect of Social Changes on Age-Specific Gun-Related Homicide Rates in New York City During the 1990s*, 100 AM. J. PUB. HEALTH 1107, 1113 (2010).

¹⁶⁶ Anthony A. Braga & Brenda J. Bond, *Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial*, 46 CRIMINOLOGY 577, 582–85 (2008).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 587–88, 592–93.

¹⁶⁹ *Id.* at 594–95.

¹⁷⁰ *Id.* at 600.

¹⁷¹ *Id.* at 587–88, 592–93.

between law enforcement and citizens in low income and minority communities highlights another common criticism of Broken Windows.

Scholars criticize Broken Windows for its alienation of minority communities from the police that should be protecting them: “NYPD arrest policies . . . have helped shape a managerial, non-adjudicative, order-maintenance system of criminal justice that reflects the growing racial and socioeconomic divide between New York City’s haves and have-nots.”¹⁷² While Broken Windows as a theory is race-neutral, there is significant evidence that it has been deployed by law enforcement in a racialized manner, resulting in exactly the mutual hostility between law enforcement and citizens warned of by the Braga study.¹⁷³ The widespread use of “stop-and-frisk” given Fourth Amendment sanction by the Supreme Court in *Terry v. Ohio* has become emblematic of this ongoing problem, particularly on the occasions it spirals into police violence against unarmed citizens.¹⁷⁴ Thus, any argument based in part upon the idea of order maintenance must take into account the terrible costs of its racialized misapplication.

B. THE VARIOUS FUNCTIONS OF REGULATING FOR APPEARANCE

I mentioned previously that the Broken Windows theory may suggest more than one understanding of the relationship between perceived disorder and criminal harm, depending on the nature of the particular harm sought to be prevented.¹⁷⁵ To consider the theory’s potential application to the specific context of sexual assault, we must be precise about the relationship with which we presume to work. Adam Samaha has proposed a framework for understanding the major categories of potential connection between appearance and reality in the context of government policy-making, which provides a useful analytical aid for this process.¹⁷⁶

Samaha identifies three relevant relationships: 1) reality insulated from

¹⁷² Jonathan Oberman & Kendea Johnson, *Symposium: The Underbelly of the Beast: Misdemeanor Practice in the Era of Broken Windows and Saturation Policing: Introduction: Broken Windows: Restoring Social Order or Damaging and Depleting New York’s Poor Communities of Color?*, 37 CARDOZO L. REV. 931, 950 (2016).

¹⁷³ See generally Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 FORDHAM URBAN L.J. 457 (2000); Joseph Goldstein, *Safer Era Tests Wisdom of “Broken Window” Focus on Minor Crime*, N.Y. TIMES (July 25, 2014), https://www.nytimes.com/2014/07/25/nyregion/safer-era-tests-wisdom-of-broken-windows-focus-on-minor-crime-in-new-york-city.html?_r=0.

¹⁷⁴ 392 U.S. 1 (1968). For a discussion of the interaction between the *Terry* holding and increased levels of police violence, see Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk,”* 50 OKLA. L. REV. 451, 464–71 (1997).

¹⁷⁵ See *supra* Section II.A.

¹⁷⁶ Samaha, *supra* note 144, at 1574–84.

appearance, 2) appearance driving reality, and 3) reality collapsing into appearance from the outset.¹⁷⁷ As an example of reality insulated from appearance, he points to a bridge, the actual safety of which may diverge, even radically, from its appearance.¹⁷⁸ While it would be undesirable to have a structurally safe bridge that looked run-down, thus deterring people from using it, it would be even worse if it looked safe and was not deterring people from using it. In contrast, to illustrate the case of appearance driving reality Samaha gives the example of a bank.¹⁷⁹ Samaha notes that banks go out of their way to project an appearance of respectability and solidity through such means as steel and granite architectural choices.¹⁸⁰ The trick “is to generate the belief among a sufficient number of potential and actual depositors that the banks will not be destabilized by depositors making a run.”¹⁸¹ In that manner, appearance becomes reality because confident depositors leave their money in the institution: “Widespread depositor confidence in a bank can make the institution justifiably stable, whether or not the expectation against a future bank run can be counted as a false belief.”¹⁸²

In applying these first two categories to the current state of knowledge on Broken Windows theory, Samaha cautions that its proponents may put too much weight on the assumption that it functions according to a bank model, where enforcing the appearance of order secures actual order. If this is not true—if crime control functions, instead, according to a bridge model—then Broken Windows policing may pose “transparency problems.”¹⁸³ Transparency problems arise in bridge models where the general public is misled about the reality of a policy situation by focusing instead on appearances.¹⁸⁴ In the case of Broken Windows this would mean that the public was overly persuaded that the new policing strategy drove down violent crime.¹⁸⁵

Samaha notes that the gap between appearance and reality in this context may be narrower and therefore less harmful than in other contexts, such as political corruption: “The broken windows transparency issue involves overclaiming about the causal effect of a policing strategy, rather than misleading the public about violent crime or misdemeanor arrest rates.”¹⁸⁶ By contrast,

¹⁷⁷ *Id.* at 1583.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1577.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1579.

¹⁸³ *Id.* at 1629.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1630.

¹⁸⁶ *Id.* at 1631.

he points out, judicial enforcement of campaign finance regulation has become so focused on the “appearance of corruption” that courts have stopped asking whether fixing appearances will do anything to prevent actual corruption.¹⁸⁷ In any case, the current data suggests that Broken Windows policing may engage both the bridge and bank model: the efficacy of focusing on appearance to fix reality has likely been overstated by political actors in this context, but there remains evidence that, at least in certain circumstances, a bank model applies.¹⁸⁸

That said, Samaha’s third category—cases where reality collapses into appearance from the outset—provides another useful framework for understanding Broken Windows.¹⁸⁹ To illustrate this model, he uses the example of the clock constructed in a town square to serve as the official time for a municipality.¹⁹⁰ As he puts it, “[i]n the case of standard time used for coordination purposes, the reality in question is constructed from beliefs that follow salient representations of time.”¹⁹¹ In other words, there is no “deeper truth” to the fact that it is 12:00 PM—it just matters that everyone agrees 12:00 PM is the same thing.¹⁹² The clock is an aesthetic mechanism for coordinating the minds of all of the citizens to create the relevant reality: that it’s 12:00 PM whenever the clock says it is.¹⁹³

Samaha contends that arguments surrounding policy decisions in which appearance and reality collapse rely on “logic and values special to aesthetics and expressivism.”¹⁹⁴ This is because even where appearance and reality collapse, there is debate as to the content of what should result; the examples he gives on that point are the fact that constitutional challenges to government-sponsored Confederate flags are rarely judicially entertained despite the fact that challenges to government-sponsored religious symbols are.¹⁹⁵ These debates center on taste-like evaluations, similar to arguments over textual interpretation.¹⁹⁶ While Samaha characterizes these sorts of decisions as largely aesthetic,¹⁹⁷ he may overly minimize them. Defining a criminal offense is, on the one hand, a purely expressive problem: we must agree collectively on what legally constitutes rape, in much the same way

¹⁸⁷ *Id.* at 1602.

¹⁸⁸ *See supra* notes 165–174 and accompanying text.

¹⁸⁹ *See Samaha, supra* note 144, at 1579.

¹⁹⁰ *Id.* at 1584.

¹⁹¹ *Id.* at 1581.

¹⁹² *Id.*

¹⁹³ *Id.* at 1584.

¹⁹⁴ *Id.* at 1585.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1581.

¹⁹⁷ *Id.* at 1584.

that we agree upon what constitutes 12:00 PM. Both are somewhat artificial constructions, but the former clearly has both moral and utilitarian significance.

As to the justifications for Broken Windows theory, Samaha proposes that the bridge/bank problem he identified could be mitigated if policy-makers focused more on the “clock” model.¹⁹⁸ The transparency problems would disappear if there were no gap between appearance and reality: in other words, if the orderly appearance attained through misdemeanor enforcement were the end in and of itself.¹⁹⁹ As he puts it: “Most people seem to find graffiti ugly, loitering discomfoting, and public urination obnoxious. If it effectively targets these problems, [B]roken [W]indows policing could be worth the cost without any benefit other than aesthetic comfort for mainstream residents.”²⁰⁰

This argument is, of course, open to the criticism that, if all we’re really getting from Broken Windows is better aesthetics, it is not worth the well-documented costs in terms of racialized enforcement—at least unless enforcement practices change dramatically. Nonetheless, Samaha’s categories give us a much broader canvas to paint on as we consider the function of broken windows theory in any particular context.

C. CONSIDERATIONS FOR A BROKEN WINDOWS APPROACH TO SEXUAL ASSAULT

The prior sections have explained how the under-enforcement of sexual assault laws create expressive problems that tend to devalue the experiences of rape victims; the centrality of defining consent to these problems; and the mechanisms by which Broken Windows policing may affect the relationship between appearance and reality.²⁰¹ I now suggest a framework for thinking about sexual assault enforcement and Broken Windows. Existing research suggests that Broken Windows policing may productively manage the relationship between appearance and reality in the area of crime control in one of two ways: 1) through a bank model, which is controversial but is supported by at least some evidence, or 2) through a clock model, insofar as it attacks detrimental appearances for their own sake.²⁰² Further, with regard to the clock model, we can also say that appearances can be changed for their own sake to create *new* expressive legal values, which may themselves be contested (the Confederate flag and the religious icons, for example—or the

¹⁹⁸ *Id.* at 1632.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *supra* Parts I–II.B and supporting footnotes.

²⁰² See Samaha, *supra* note 144.

meaning of a legal term such as sexual assault).²⁰³

With respect to sexual assault, the question we should ask of a bank model is whether we can use the law to alter the appearances of the world as a sexually dangerous place for women—widely described as rape culture—in such a way that it would have a positive effect on reality. We should ask of a clock model whether there are contestable appearances of sexual danger that create their own reality. In other words, are there choices in policy or enforcement we could make that would directly alter the aesthetic fact of rape culture itself, with positive results, even if they did not lead to a reduction in the reality of actual sexual assault? I will refer to this as the narrow clock model. But I propose that we can ask a third question here as well. Are there openly debated expressive values—particularly related to the currently volatile legal understanding of consent—that we can alter through attention to appearances? I will refer to this as the broad clock model.

The data on Broken Windows theory generally does not give us concrete answers to the bridge model question, though Braga and Bond's 2015 study suggests that the best place to start would be through a model of community engagement, focused on specific geographic places.²⁰⁴ Thus, we would want to think more about the role of space and community as a context for sexual assault. As to both the narrow and broad forms of the clock model, we should look to the sexualized aspects of disorder *qua* disorder. Wesley Skogan, who has studied disorder itself as part of the “downward spiral of urban decay” describes its social dimensions with attention to this component:

Disorder is evident in the widespread appearance of junk and trash in vacant lots; it is evident, too, in decaying homes, boarded-up buildings, the vandalism of public and private property, graffiti, and stripped and abandoned cars in streets and alleys. It is signaled by bands of teenagers congregating on street corners, by the presence of prostitutes and panhandlers,²⁰⁵ by public drinking, *the verbal harassment of women*, and open gambling and drug use.

Skogan's account recognizes sexual violence—in the form of gender-based street harassment—as a component of general disorder, the component that drives the appearance of sexual danger for women. This recognition suggests that we should look to street harassment if we are going to apply Broken Windows theory to the appearance of sexual violence.²⁰⁶ Yet

²⁰³ *Id.* at 1581.

²⁰⁴ See Braga & Bond, *supra* note 166, at 1628–29 and supporting notes.

²⁰⁵ SKOGAN, *supra* note 150, at 2 (emphasis added).

²⁰⁶ See David P. Bryden & Erica Madore, *Patriarchy, Sexual Freedom, and Gender Equality as Causes of Rape*, 13 OHIO ST. J. CRIM. L. 299, 306 (2016) (suggesting, “by a rough analogy to the ‘broken windows’ theory of crime prevention, disrespectful treatment of women, ranging from sexist jokes to street harassment, may help to create an environment that encourages more serious offenses such as rape”).

Skogan's account likewise groups street harassment with a list of aesthetic, property, and vice crimes and ailments, most of which lack specific human victims. This failure in and of itself belies the fact that harassment has been insufficiently recognized as an offense of violence against the person, rather than merely an unattractive symptom of urban disorder. To better understand how Broken Windows can help us with the precise expressive harms of sexual "disorder," we need to consider street harassment as a unique problem.

III. STREET HARASSMENT

As mentioned, Broken Windows enforcement has focused heavily on the visual. The theory relies upon the public perceiving a world that was cleaner, safer, and more orderly. While street harassment differs from vandalism in that it has an immediate, human victim, it is highly visible. It thus differs dramatically from sexual assault, which most often takes place behind closed doors with few witnesses other than the assailant and the victim. Yet street harassment carries with it the threat of sexual violence of which rape is the ultimate manifestation. In that way, the two offenses are linked far more closely than vandalism or pan-handling and assault or murder. For that reason we can profitably explore how regulating the appearance of sexual assault may impact its reality.

A. WHAT IS STREET HARASSMENT?

Street harassment has been notoriously hard to define, and it encompasses a wide range of behavior. According to one account, we can observe a three-level hierarchy of street harassment, with the most severe incarnations including 1) "sexually explicit references to a woman's body or [] sexual [acts]"; 2) gender-based profanity; 3) qualifying comments accompanied by slurs about race or sexual orientation; and 4) physical acts such as groping.²⁰⁷ Moderately severe harassment includes sexual innuendos or "references to a woman's gender or body that are not sexually explicit."²⁰⁸ The least severe category includes staring, whistling, or comments made to a woman that are "unnecessary or not political in nature."²⁰⁹

Street harassment is very pervasive. According to a 2014 study, 65% of women and 25% of men experienced street harassment over the course of their lifetime.²¹⁰ For 41% of women and 16% of men, that harassment

²⁰⁷ Tiffanie Heben, *A Radical Reshaping of the Law: Interpreting and Remediating Street Harassment*, 4 S. CAL. REV. L. & WOMEN'S STUD. 183, 187-88 (1994).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 188.

²¹⁰ HOLLY KEARL, STOP STREET HARASSMENT, UNSAFE AND HARASSED IN PUBLIC SPACES: A NATIONAL STREET HARASSMENT REPORT 14 (2014).

became physically aggressive.²¹¹ In addition, minority respondents were disproportionately likely to experience such harassment.²¹²

In response to a non-scientific query posted to the author's Facebook page, women revealed a consciousness of how their changing appearances and life choices affected the incidence of harassment. One woman reported that she used to be catcalled about twenty to thirty times a year before she started dying her hair vivid, unusual colors. She speculated that there might be

a silencing of certain types of men, to whom I used to read as a meek and well-mannered middle-class white lady, and therefore a low-risk target. I now seem slightly more likely to freak the fuck out on them/be a crazy bitch of one sort or another, so they opt not to catcall.²¹³

Another woman, who estimated she was harassed about seventy-five to eighty times in 2016, reports:

At least two times they involved actual touching of my body, usually in the form of touching my arm. In one instance a man on a train tried to move my hand toward his crotch, while saying 'you are pretty' and 'I know what you are,' [referring, ostensibly, to her identity as a trans woman]²¹⁴ as the other hand remained in his pocket fingering either his penis or a weapon.

A third observed that moving from a "walking" city to a "driving" city had resulted in a noticeable release from old anxieties about harassment:

I love being wrapped in the protective encasement of my car, safe(r) from street harassment than I was in the public transport oriented cities I've lived in previously. Sure, I love the idea of walking more, but in practice that means more exposure to harassment and more active fear of things much worse than 'mere' harassment. Now I get in the car, I lock the doors, I breathe easier.²¹⁵

A fourth said that "harassment dropped dramatically for me after I chopped off my hair—people don't seem to see short hair and think 'woman,' even when I'm wearing distinctly 'female' clothes (I don't see that as a drawback)."²¹⁶ And a fifth said "[A]s a fat woman, the harassment I have experienced . . . hasn't been catcalling but more of the sort like "watch out, fatty" (even if I wasn't near bumping into them or they were invading MY space) version. I'm only now beginning to realize that is harassment just like catcalling."²¹⁷

²¹¹ *Id.*

²¹² *Id.*

²¹³ Confidential email to author (Jan. 3, 2017) (on file with author).

²¹⁴ Confidential email to author (Jan. 10, 2017) (on file with author).

²¹⁵ Confidential email to author (Jan. 2, 2017) (on file with author).

²¹⁶ Confidential Facebook post (Jan. 2, 2017) (on file with author).

²¹⁷ Confidential Facebook post (Jan. 2, 2017) (on file with author).

These accounts vividly demonstrate how street harassment shapes, overtly and implicitly, a woman's awareness of her own physical embodiment. While none of the respondents changed their appearances or residence to avoid street harassment, their accounts share a latent awareness of how anonymous harassers' definition of what constitutes desirable—and thus available—femininity can impact a woman's interaction with the world on a day-to-day basis.

B. DEFINING THE HARM

Over the last twenty or so years, feminist scholars have worked to define the precise nature of the harm imposed by street harassment as part of the argument that it ought to be legally cognizable. A common theme in this literature is the extent to which street harassment entrenches a lowered standard of basic privacy for women in public spaces, in violation of otherwise established cultural norms about “civil inattention” (essentially, the idea that staring at strangers is rude).²¹⁸ As Cynthia Grant Bowman observes, “[u]nlike men, women passing through public areas are subject to ‘markers of passage’ that imply either that women are acting out of role simply by their presence in public or that a part of their role is in fact to be open to the public.”²¹⁹ Bowman argues that because breaches of the norm of civil inattention tend to occur when there is something unusual or out-of-place about the person observed, the practice of singling out women in public spaces for commentary shows that “women, unlike men, belong in the private sphere, the sphere of domestic rather than public responsibility.”²²⁰ She notes that, ironically, “men convey this message by intruding upon a woman's privacy as she enters the public sphere.”²²¹

Conceived of in these terms, street harassment imposes a significant harm separate from whatever specific embarrassment or discomfort a woman might experience on a given occasion. To the extent it is tolerated, such behavior contributes to a shared cultural norm against women accessing public spaces—a norm with obvious disadvantages for the professional, recreational, and commercial lives of half the population. Every time a woman decides against a career with a substantial public, outdoor component (landscaping, for example), or decides not to walk to the store to spend money

²¹⁸ See ERVING GOFFMAN, *BEHAVIOR IN PUBLIC PLACES* 86 (1963) (“The act of staring is a thing which one does not ordinarily do to another human being; it seems to put the object stared at in a class apart. One does not talk to a monkey in a zoo, or to a freak in a sideshow—one only stares.”).

²¹⁹ Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 526 (1993).

²²⁰ *Id.*

²²¹ *Id.*

at a certain time of night, this norm affects more than simply the woman's dignity on the particular occasion.

The literature also identifies the psychological harms arising from street harassment. First, it contributes to hostility between the sexes, making it more difficult for even well-intentioned men to communicate with women innocuously.²²² Second, and perhaps most obviously, it has an enormously disruptive effect on women's identities and self-image: as Bowman puts it, "[w]omen learn to associate their bodies with fear, shame[,] and humiliation. Women also learn their place in society from language, and they learn that this place is not a public one."²²³ Beth Livingston identifies emotions ranging from fear, anxiety, anger, shame, and helplessness among the victims of street harassment and notes that "[t]hese sorts of emotions—particularly when experienced day after day—can become paralyzing It is incredibly likely that, as with many other negative emotional experiences, the impact can accumulate over time, leading to behavioral and health outcomes that we should be concerned about."²²⁴ Harassment has also been associated with the phenomenon of "self-objectification," a psychological process by which a subject begins to think of her body as an object for the pleasure of others.²²⁵ Self-objectification "can [] teach individuals to 'associate their bodies with fear and humiliation . . . [which] may also interfere with [their] ability to be comfortable with [their] sexuality.'"²²⁶ Beyond that, it is correlated with other negative emotional states such as depression, anxiety, and eating disorders.²²⁷

Feminist scholars have used the term "spirit murder," originally devised by Patricia Williams in the context of race, to describe the deep harm street harassers inflict on their victims.²²⁸ The idea is that private behavior that overtly imposes racist or sexist thought on a victim creates and perpetuates

²²² *Id.* at 540–41 (citing GOFFMAN, *supra* note 218, at 142).

²²³ Bowman, *supra* note 219, at 540–41.

²²⁴ KEARL, *supra* note 210, at 10 (quoting an interview with Beth Livingston, Assistant Professor, Cornell University (Apr. 2014)).

²²⁵ See Amanda Roenius, Comment, *My Name is Not "Beautiful," and, No, I Do Not Want to Smile: Paving the Path for Street Harassment Legislation in Illinois*, 65 DEPAUL L. REV. 831, 849 (2016) (citing Kathryn Stamoulis, "Hey Baby" Hurts, PSYCHOL. TODAY (Aug. 19, 2011), <https://www.psychologytoday.com/blog/the-new-teen-age/201108/hey-baby-hurts>).

²²⁶ *Id.* (quoting Bowman, *supra* note 219, at 538).

²²⁷ *Id.*

²²⁸ See Deirdre Davis, *The Harm that Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN'S L.J. 133, 177 (1994) (asserting that "by disregarding my right to use my energy as I deem appropriate, the harasser has caused me to suffer a spirit murder"); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151–52 (1987).

subordinating social structures, and gives hatred and fear an outlet.²²⁹ Deirdre Davis proposes that this complex tangle of adverse social and psychological effects flowing from street harassment can be classified into four categories: exclusion, domination, invasion, and oppression, which all contribute to “genderizing” the street.²³⁰ It excludes by “mark[ing] the street as male.”²³¹ It dominates by “establishing the rules of women’s participation” in a street environment.²³² It invades by removing women’s sense of privacy.²³³ And it oppresses by forcing women to alter their behavior to avoid it.²³⁴

While the forgoing summarized the most direct harms street harassment imposes on a victim, scholars have theorized that it must also be understood within a broader context of gender subordination and potential sexual violence. As Deborah Tuerkheimer puts it:

Because we can never transcend social context, an interaction between one man and one woman on the street implicates gender and hierarchy in complicated ways that may go unrecognized by either party. When women refer to the power that a harasser wields, we allude to the power that he has by virtue of his maleness. On the street, a successful female executive can be made to feel powerless by a teenage boy who, by his words alone, “expresses male control over sexual access” to her.²³⁵

Thus, street harassment is problematic both in and of itself *and* as a reminder of the pervasive threat of literal sexual violation women face. While street harassment is far more pervasive than the threat of physical sexual assault, the latter is common enough that women experience the connection between rape and street harassment on a subjective level.²³⁶ Because of its oppressive and sexualized nature, street harassment “reminds women of their vulnerability to violent attack in American urban centers and to sexual violence in general.”²³⁷

The most extreme view holds that street harassment forms a part of

²²⁹ Williams, *supra* note 228, at 151–52.

²³⁰ Davis, *supra* note 228, at 136.

²³¹ *Id.* at 146.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Deborah Tuerkheimer, *Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm*, 12 WIS. WOMEN’S L.J. 167, 182 (1997) (citing Catharine A. MacKinnon, *Sex and Violence: A Perspective*, in FEMINISM UNMODIFIED 85, 92 (1987)).

²³⁶ Davis, *supra* note 228, at 141; Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149 (2000).

²³⁷ Elizabeth Arveda Kissling & Cheris Kramarae, *Stranger Compliments: The Interpretation of Street Remarks*, 14 WOMEN’S STUD. COMM. 75, 76 (1991).

“sexual terrorism”—“men’s systematic control and domination of women through actual and implied violence.”²³⁸ In a worst-case scenario, potential rapists can use street harassment to figure out how vulnerable a target may be to intimidation.²³⁹ But even the perception that this could be the case can cause a range of psychological and physiological responses in a victim. This is particularly true for a victim who is already the survivor of sexual assault, for whom street harassment might be particularly frightening or traumatic.²⁴⁰ One 2014 study found that nearly two-thirds of female respondents reported being at least somewhat concerned that the harassment would escalate into something far worse.²⁴¹

C. PROSECUTING HARASSMENT

Perhaps due to the complex and heavily gender-specific nature of street harassment, the measures to combat it taken by various jurisdictions (and those proposed in the literature) take many forms. Unfortunately, nearly all of these measures face either theoretical or pragmatic obstacles. Before considering how the law might address the harms of street harassment, one must consider the operation of the First Amendment.²⁴² Street harassment is an exercise of speech—an obnoxious, harmful exercise of speech, but perhaps no more so than much political speech that falls squarely within the heartland of the First Amendment’s protections against laws that would regulate speech based on content.²⁴³ Any attempt to regulate speech purely on the basis that it expresses a demeaning view of gender or sexualizes the female identity would run into problems on this ground.

Nonetheless, the First Amendment provides no absolute protections.²⁴⁴ A state may regulate speech based on the time, place, or manner in which it

²³⁸ Davis, *supra* note 228, at 140 (citing Carole J. Sheffield, *Sexual Terrorism: The Social Control of Women*, in *ANALYZING GENDER* 171, 171 (Beth B. Hess & Myra Marx Ferree eds., 1987)).

²³⁹ Davis, *supra* note 228, at 140–41.

²⁴⁰ See Bowman, *supra* note 219, at 536.

²⁴¹ KEARL, *supra* note 210, at 20.

²⁴² U.S. CONST. amend. I.

²⁴³ The concept of content-neutrality has become the constitutional lodestar of the Supreme Court’s First Amendment jurisprudence. Compare *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 826–27 (2000) (invalidating, on the grounds that it regulated speech based on content, the portions of the Telecommunications Act of 1996 requiring cable companies to ensure that no unauthorized receipt of sexual images occurred), with *Hill v. Colorado*, 530 U.S. 703, 719–20, 725–35 (2000) (upholding a law prohibiting protestors from approaching within eight feet of someone outside of a health clinic, on the grounds that the restrictions “apply equally to all protestors, regardless of viewpoint, and the statutory language makes no reference to the content of the speech”).

²⁴⁴ U.S. CONST. amend. I.

takes place, where the mode of expression is “basically incompatible with the normal activity of a particular place at a particular time.”²⁴⁵ Such restrictions will pass constitutional muster so long as they are: 1) content-neutral; 2) narrowly tailored; 3) serve a significant state interest; and 4) leave open alternative channels of communication.²⁴⁶ This framework is crucial to the merits of the various proposed approaches to street harassment.

Consistent with that basic rule, certain categories of speech have been found generally excluded from First Amendment protection. *Miller v. California* created a community-based test for defining obscenity, allowing states to regulate certain forms of extremely offensive speech.²⁴⁷ *Chaplinsky v. New Hampshire* recognized the so-called “fighting words” doctrine, allowing states to prohibit a narrow category of abusive language likely to contribute to a breach of the peace.²⁴⁸ As the *Chaplinsky* Court noted, “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁴⁹ In *Cohen v. California*, the Court narrowed this test, clarifying that it applied only to personal insults expressed to their target face-to-face, thereby excluding communications that contribute to public discourse.²⁵⁰

Relatedly, the “true threats” doctrine excludes threats against another person from the purview of the First Amendment.²⁵¹ The Supreme Court, though, has yet to fully settle whether, for constitutional purposes, a “true” threat need be defined subjectively—based on the intent of the defendant—or whether it is constitutionally permissible to punish someone for speech that would be objectively threatening by the standards of a reasonable person, in the absence of proof of intent.²⁵²

Beyond these categories, the First Amendment has not been held to bar

²⁴⁵ *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

²⁴⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 788–90, 791–803 (1989).

²⁴⁷ 413 U.S. 15, 24 (1973). To pass the *Miller* test the state must show: 1) that the average person, “applying [] community standards,” would find that the speech appeals to the prurient interest; 2) that the work depicts, in a patently offensive way, sexual acts or excretory functions (as defined by state law); and 3) that the work, taken as a whole, lacks political, artistic, or scientific value (as defined according to the standards of the U.S. generally).

²⁴⁸ 315 U.S. 568, 571–72 (1942).

²⁴⁹ *Id.* at 572.

²⁵⁰ 403 U.S. 15, 23–24 (1971).

²⁵¹ *Watts v. United States*, 394 U.S. 705, 708 (1969).

²⁵² *See United States v. Elonis*, 135 S. Ct. 2001, 2005 (2015) (concluding, as a matter of statutory interpretation, that a conviction for threatening someone over state lines, under eighteen U.S.C. § 875(c), requires a showing of subjective intent, and thus declining to reach the constitutional question).

regulations in cases where speech is deeply intertwined with physical action, such as under the laws of assault (discussed in detail in Section C.3, *infra*). Similarly, the federal Civil Rights Act of 1968²⁵³ and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act together allow federal prosecutors to charge defendants who injure or intimidate victims based on race, gender, religion, or sexual orientation.²⁵⁴ Such hate crimes laws have resisted First Amendment scrutiny as they punish bias-motivated *conduct*—including threats—as opposed to purely thoughts or words.²⁵⁵ Finally, private suits for torts such as intentional infliction of emotional distress, libel, slander, and the like do not generally run afoul of the First Amendment when brought by private figures.²⁵⁶ The Supreme Court has, however, required that “public” figures prove actual malice on the part of the defendant, in order to protect political speech and satire.²⁵⁷

This quick overview highlights a couple of features of First Amendment jurisprudence relevant to the various legal options for combatting street harassment. Roughly speaking, there is leeway for punishing threatening or genuinely dangerous behavior, particularly when directed at an individual, in the absence of a broader political message. Yet speech falling short of these categories may be protected from blanket exclusion. Against this backdrop, I now consider several of the means by which street harassment might be regulated.

1. Blanket Statutory Bans on Street Harassment

Many critics of street harassment have argued that jurisdictions should draft new legislation specifically targeting street harassment as a distinct practice.²⁵⁸ Currently, only one U.S. city, Kansas City, Missouri, has such

²⁵³ Pub. L. No. 90-284, 82 Stat. 73, 74–75 (2013).

²⁵⁴ Pub. L. No. 111-84, 123 Stat. 2835, 2835 (2009).

²⁵⁵ *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993).

²⁵⁶ *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

²⁵⁷ *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). *See also Snyder v. Phelps*, 562 U.S. 443, 458–59 (2011) (holding that speech on a public sidewalk, about a public issue, cannot be liable under an intentional infliction of emotional distress theory, even when the speech is “outrageous”). The Court has not provided precise guidance on the definition of “public figure.” *See* Kate M. Adams, *(Re)defining Public Officials and Public Figures: A Washington State Primer*, 23 SEATTLE U. L. REV. 1155, 1155–56 (2000). The touchstone appears to be whether an individual is involved in public affairs, as opposed to simply involved in issues of public interest. *See Time, Inc. v. Firestone*, 424 U.S. 448, 454–55 (1976) (holding for that reason that the wife of a wealthy businessman did not qualify as a public figure requiring proof of actual malice).

²⁵⁸ *See, e.g.*, HOLLABACK!, <http://www.ihollaback.org/> (last visited Jan. 20, 2017); *Street Harassment*, ROGERS PARK YOUNG WOMEN’S ACTION TEAM, <http://www.rogersparkywat.org/street-harassment/> (last visited Jan. 20, 2017); STOP STREET HARASSMENT, <http://stopstreetharassment.org/> (last visited Jan. 20, 2017); *Creating Safe Public Spaces*, UN

an ordinance, which makes it a crime to engage in behavior meant to threaten or intimidate cyclists, pedestrians, and wheelchair users.²⁵⁹ The statute prohibits not only threats but also lower-level behavior such as honking, shouting, or “otherwise directing rude or unusual sounds” toward a victim. However, it also includes the specific intent requirement that the perpetrator have “the purpose of intimidating or injuring” the victim.²⁶⁰ For that reason, proponents of broader “Safe Spaces” legislation argue that even the *sui generis* Kansas City provision fails to capture much behavior that is actually harmful toward women.²⁶¹ Such scholars urge that new legislation targeting street harassment should exclude specific intent requirements and require only that the harasser intend to engage in the conduct itself.²⁶²

The problem, of course, is that in the absence of an intent requirement it is difficult to draft a workable definition of street harassment that turns on anything other than the content of the speech itself, thereby running afoul of current First Amendment requirements. Bowman has argued that street harassment is analogous to workplace sexual harassment prohibitions, upheld as falling into the “captive audience” exception to the First Amendment.²⁶³ Yet she acknowledges that the Supreme Court might strike down street harassment legislation under its decision in *R.A.V. v. City of St. Paul*, which declared unconstitutional a hate crimes ordinance that prohibited symbolic expression “one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, religion or gender.”²⁶⁴

In *R.A.V.*, the Court held that, while the city could outlaw all “fighting words,” it could not “regulate use based on hostility—or favoritism—towards the underlying message expressed.”²⁶⁵ If it is to avoid requiring the state to prove a threatening purpose, any workable definition of street harassment would seem to turn on whether the offending speech aroused gender-specific feelings of sexual or bodily discomfort, which would fall exactly into the category of content-based speech protected by *R.A.V.* The alternative, banning all speech—or even all objectively upsetting speech—to strangers in public places, would be content neutral but patently absurd.

WOMEN, <http://unwomen.org/en/what-we-do/ending-violence-against-women/creating-safe-public-spaces> (last visited Jan. 20, 2016).

²⁵⁹ Kan. City, Mo., Ordinances ch. 50, art. VI, § 50-205 (2014), available at https://library.municode.com/mo/kansas_city/codes/code_of_ordinances?nodeId=COORKA_MIV0II_CH50OFMIPR_ARTVIOFAGPUSA_S50-205HABIPewHOP.

²⁶⁰ *Id.*

²⁶¹ See, e.g., Roenius *supra* note 225, at 833.

²⁶² *Id.* at 859. See also Bowman, *supra* note 219, at 574.

²⁶³ Bowman, *supra* note 219, at 544.

²⁶⁴ *Id.* at 546 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

²⁶⁵ *Id.* at 546–47 (quoting *R.A.V.*, 505 U.S. at 377).

Sopen Shah has argued that the most promising way around these obstacles to statutory innovation may be the yet-underdeveloped “true threats” doctrine.²⁶⁶ The Supreme Court has justified the “true threats” exception as necessary “to protect[] individuals from the fear of violence” and to prevent “the disruption that this fear engenders.”²⁶⁷ Shah concludes that because fear is a reasonable, near-universal reaction to street harassment, recognizing it as a true threat would be consistent with the purposes of the exception.²⁶⁸ Unfortunately, because the Court has declined to determine whether subjective intent to threaten is a necessary requirement for states to punish such conduct, the doctrine leaves any potential prohibition vulnerable if it lacks a subjective intent element. There is currently a circuit split on the question.²⁶⁹

Finally, some states in fact punish speech under the “fighting words” exception, for conduct tending to incite a breach of the peace in violation of prohibitions sometimes known as “dueling statutes.”²⁷⁰ Yet such statutes do not serve the same function as a general street harassment statute, as they focus not on the harasser’s conduct but on the victim’s likely reactions to it. Consistent with the stated purpose of the exception in *Chaplinsky*, the question is whether the victim would be likely moved to violence by the speech; as Bowman observes, even if we focus on the emotional distress caused by fighting words, other than a purpose of keeping the peace, “the assumption that outrage and injury is proved by evidence of violent reaction simply does not fit women’s typical response to psychic injury.”²⁷¹

Thus, the logic upon which courts reconcile fighting words statutes with the First Amendment does not provide much traction for drafting a street harassment prohibition.

2. Existing Harassment Statutes

While street harassment is a *sui generis* context which the vast majority of jurisdictions have not addressed, a number of states and municipalities do

²⁶⁶ Sopen B. Shah, *Open Season: Street Harassment as True Threats*, 18 U. PA. J. L. & SOC. CHANGE 377, 392–93 (2016).

²⁶⁷ *Virginia v. Black*, 538 U.S. 343, 360 (2003).

²⁶⁸ Shah, *supra* note 266, at 394.

²⁶⁹ *Id.* at 395.

²⁷⁰ *See, e.g.*, MISS. CODE ANN. § 97-39-1 (2010) (criminalizing “[e]very person who shall challenge another to fight a duel, or who shall send, deliver, or cause to be delivered, any written or verbal message purporting or intended to be such challenge”); *see also* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1054 (1936).

²⁷¹ Bowman, *supra* note 219, at 561.

criminalize harassment in a public place.²⁷² For example, Colorado's harassment statute, which is representative, states:

A person commits harassment if, with intent to harass, annoy, or alarm another person, he or she:

(a) Strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact; or

(b) In a public place directs obscene language or makes an obscene gesture to or at another person; or

(c) Follows a person in or about a public place; or

...

(g) Makes repeated communications at inconvenient hours that invade the privacy of another and interfere in the use and enjoyment of another's home or private residence or other private property; or

(h) Repeatedly insults, taunts, challenges, or makes communications in offensively coarse language to, another in a manner likely to provoke a violent or disorderly response.²⁷³

While some of these theories of liability initially seem applicable to street harassment, they contain various requirements, common to other states' versions, which make them ill-suited to capturing much relevant conduct of street harassers.²⁷⁴ Their reach is limited by 1) the requirement of specific intent to harass; 2) the requirement, under most sub-sections, that the offending behavior be repetitive; and 3) in sub-section (b), the requirement that the content of the language meet the very high constitutional threshold of obscenity. Furthermore, in a review of the case law construing such statutes, Bowman notes that—while they almost certainly could be applied to at least *some* forms of street harassment—few convictions have been upheld, in part due to stated judicial reluctance to construe them so as to criminalize behavior that is so common.²⁷⁵

It is clear that the attempt to punish street harassment *as* harassment has been unfruitful within the framework of the First Amendment. And, while tort liability offers some options for victims to seek redress as individuals,²⁷⁶

²⁷² See ALASKA STAT. § 11.61.1210 (2012); ARK. CODE ANN. § 5-71-208 (2013); COLO. REV. STAT. ANN. § 18-9-111 (2013); DEL. CODE ANN. TIT. 11, § 1311 (2007); HAW. REV. STAT. ANN. § 711-1106 (LexisNexis 2007); N.H. REV. STAT. ANN. § 644:4 (LexisNexis 2007); N.J. REV. STAT. § 2C:33-4 (West 2005); N.Y. PENAL LAW § 240.25 (McKinney 2017); OR. REV. STAT. § 166.065 (2013).

²⁷³ COLO. REV. STAT. ANN. § 18-9-111.

²⁷⁴ See Bowman, *supra* note 219, at 556.

²⁷⁵ *Id.* at 558.

²⁷⁶ See Maeve Olney, Note, *Toward a Socially Responsible Application of the Criminal Law to the Problem of Street Harassment*, 22 WM. & MARY J. OF WOMEN & L. 129, 150–51

it does not serve the same expressive function as the criminal law, as discussed in Part III. Part IV will develop a workable proposal for prosecuting street harassment, instead, as simple assault, and will explore the potential Broken Windows effects of such enforcement on the more serious problem of sexual assault.

IV. COMBATTING SEXUAL ASSAULT THROUGH STREET HARASSMENT ENFORCEMENT

Thus far, this article has identified two separate but related problems in criminal justice: the expressive crisis in rape law and the lesser but significant problem of rampant, yet largely legal, street harassment. In this Part, I argue that prosecutors should turn their attention to street harassment in cases where it violates existing laws. Not only can they do so constitutionally, but in doing so they will, over time, prevent more serious, harder-to-prove crimes of sexual assault.

A. STREET HARASSMENT AS ASSAULT

A person is typically guilty of assault when, “without lawful authority, he or she knowingly engages in conduct which places another in reasonable apprehension of receiving a battery.”²⁷⁷ As the definition of a battery includes “physical contact of an insulting or provoking nature,” it is clear that the offence can include threatened, but uncompleted, physical contact short of actual violence.²⁷⁸ Some states, such as New York, have narrowed that common law understanding to require a showing of physical injury.²⁷⁹ Yet such states generally penalize attempted unwanted touching under related offenses such as menacing²⁸⁰ or attempted forcible touching.²⁸¹ Furthermore, all states but Mississippi and Idaho²⁸² criminalize groping (and its attempt) as a form of sexual or indecent assault.²⁸³ In short, through one or another theory of assault, attempted assault, or attempted sexual assault, street harassment violates these existing criminal laws on the occasions where the perpetrator has the intent to touch or to put his victim in immediate apprehension of unwanted touching.

(2015) (discussing the availability of tort remedies under theories of invasion of privacy, intentional infliction of emotional distress, and assault).

²⁷⁷ 720 ILL. COMP. STAT. 5/12-1 (2012).

²⁷⁸ 720 ILL. COMP. STAT. STAT. 5/12-3.

²⁷⁹ N.Y. PENAL LAW 120.00(1) (2008).

²⁸⁰ Oregon Rev. STAT. § 2903.22 (2013).

²⁸¹ N.Y. PENAL LAW 130.52 (2014).

²⁸² Emily Shugerman, *Two U.S. States Don't Count Groping as a Crime*, REVELIST (Dec. 15, 2016), <http://www.revelist.com/politics/legal-groping-united-states/6262>.

²⁸³ See, e.g., 18 PA. STAT. AND CONS. STAT. ANN. § 3126 (West 2010).

While this admittedly captures only particularly egregious examples of street harassment, it escapes the First Amendment problems that would arise with a statute targeting harassment *qua* harassment: when accompanied by a threat of physical contact harassment is no longer in the sphere of pure speech. Indeed, prosecutors do, in some cases, already pursue the worst forms of public groping, at least when there's public demand. For example, Washington, D.C. photographer Liz Gorman prompted public outrage at the so-called Dupont Circle "bicycle groper," who, after assaulting her, became the target of an unusually thorough investigation and was ultimately apprehended and convicted of four counts of sexual abuse.²⁸⁴ Credit for that conviction goes to the police who spent many hours conducting witness interviews and reviewing security footage, as well as to Gorman herself who, having failed to chase her assailant down, called the police and wrote a blog post that stirred up an outpouring of public response and new reports from subsequent victims.²⁸⁵

Yet critics have pointed out that such prosecutions have been few and far between for a number of reasons.²⁸⁶ Two are substantive: the need to prove the defendant's intent to put the victim in apprehension of touching and the reciprocal requirement that the victim's fear of touching be objectively reasonable.²⁸⁷ Certainly, even setting aside First Amendment concerns, these difficulties are insurmountable in the vast majority of "hey baby" situations, where the words alone do not trigger an apprehension of touching but merely awareness of being observed. And they are, of course, easily met (and irrelevant) in cases where actual groping occurs.

The difficult cases are in the middle ground. Suppose a man steps out of the shadows while a woman is walking alone at night, moves aggressively close to fall into step alongside her and hisses in her ear "I would fuck you right now if I could." One could argue that the harasser's use of the subjunctive tense evinces a *lack* of intent to follow through on the assault. But at the same time, the speed with which he darted into the victim's personal space, the surprise element, the darkness, the intimations of barely suppressed sexual violence all suggest beyond a reasonable doubt that he had

²⁸⁴ Peter Hermann, *Bicycle Groper Pleads Guilty to August Attacks in Dupont Circle*, WASH. POST (Nov. 8, 2012), https://www.washingtonpost.com/local/crime/bicycle-groper-pleads-guilty-to-august-attacks-in-dupont-circle/2012/11/08/7a06d34c-29f7-11e2-b4e0-346287b7e56c_story.html?utm_term=.25e6f8229a1d.

²⁸⁵ Petula Dvorak, *Dupont Circle Bicycle Groper Committed a Crime, not a Misdemeanor*, WASH. POST (Aug. 30, 2012), https://www.washingtonpost.com/local/dupont-circle-bicycle-groper-committed-a-crime-not-a-misdemeanor/2012/08/30/5feb118-f2de-11e1-adc6-87dfa8eff430_story.html?tid=a_inl&utm_term=.7f7b82b93013.

²⁸⁶ See, e.g., Bowman, *supra* note 219, at 549.

²⁸⁷ *Id.*

at least knowledge that his behavior would put the victim in apprehension of at least some form of unwanted touching. It is a basic principle of evidence law that a factfinder may infer intent from a defendant's actions.²⁸⁸ For example, if the accused puts a gun to someone's head and pulls the trigger, it is hardly problematic to find him guilty of murder without delving deep into his psyche to prove *mens rea*. When verbal street harassment is accompanied by sudden physical movements, an element of surprise, and intimations of real violence, fact-finders should be allowed similar inferences.

As to the element of the victim's reasonableness, Cynthia Bowman points out that the use of the "reasonable man" standard can thwart liability due to the fact that male judges and lawyers do not see street harassment as objectively intimidating.²⁸⁹ She is quite correct that "because of her constant awareness of the violent consequences of male hostility to women and her realistic fears of rape" even though "only a minority of harassment incidents may lead to an 'offensive touching,' a reasonable woman cannot know which will be the one."²⁹⁰ Therefore, the attempt to use existing assault laws to prosecute street harassment must be accompanied by both prosecutorial and judicial awareness and appropriate jury instructions to the effect that "reasonableness" include the general circumstances of both halves of the population.²⁹¹

With greater attention to how women may experience aggressive street harassment, even short of physical touching, prosecutors can and should bring many more charges against perpetrators of this middle category. Setting aside broader Broken Windows effects, which the next two sections discuss, the law of assault provides a limited, constitutional ground of liability for the very real social, psychological, cultural, and physical injuries street harassers impose on their victims and society in general. By ignoring these injuries, prosecutors fail to protect the public interest in their charge.

Obviously, in a world of plea bargains and limited prosecutorial resources, the charging decision drives who and what the justice system

²⁸⁸ See, e.g., *United States v. Nelson*, 277 F.3d 164, 197 (2d Cir. 2002) (approving jury instruction allowing inference that a person intends the natural and probable consequences of his actions).

²⁸⁹ Bowman, *supra* note 219, at 553.

²⁹⁰ *Id.*

²⁹¹ For a discussion of the gender implications of objective reasonableness standards in the law, see Margo Schlanger, *Gender Matters: Teaching A Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS L.J. 769, 769 (2001) (noting that "one very standard doctrinal move is to conceptualize reasonable care as that care shown by a 'reasonable person' under like circumstances" and noting the paucity of case law taking into account whether and how a reasonable man might differ from a reasonable woman).

actually criminalizes.²⁹² Expansive criminal codes give prosecutors massive discretionary leeway, some of which they use at the macro to distinguish “real” crimes as enforcement priorities, in contrast to “technical” crimes.²⁹³ To the extent that prosecutors take assault seriously as a crime, it is crucial that they come to recognize assaultive street harassment as part of that category of offenses, and prioritize it along with other crimes against the body.

The literature on prosecutorial discretion suggests that charging decisions often turn on such case-by-case factors as the defendant’s prior record, the level of violence involved, and the intimacy between the defendant and the accused (the last of which has been shown to cut *against* enforcement).²⁹⁴ Other structural factors affecting charging decisions include “perceived inconsistency between the law’s requirements and common sense notions of justice” and “uncertainty regarding the impact of criminal prosecutions on crime rates.”²⁹⁵ In considering how to apply the law with “common sense,” prosecutors may in fact invoke “stereotypes or common sense assumptions about crime and criminals that lead them to focus on some offenses and offenders more than others.”²⁹⁶ To the extent that community stereotypes about street harassment being harmless fun, or women inviting it due to attire or geography, affect charging decisions in these cases, prosecutors must seek to avoid them. Even the understanding of what constitutes “violence” for charging purposes could be improved by increased education about the nature and harms of street harassment.

Obviously, one of the most important criteria prosecutors use to determine whether a case will move forward is the likelihood of conviction.²⁹⁷ Prosecutors’ offices have formal charging policies, which generally list likelihood of conviction as a significant factor in deciding how

²⁹² See generally Bibas, *supra* note 119 (discussing the role of prosecutorial discretion in charging).

²⁹³ See VERA INST. JUST., FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY’S COURTS xiii (rev. ed. 1981).

²⁹⁴ See W. BOYD LITRELL, BUREAUCRATIC JUSTICE: POLICE, PROSECUTORS, AND PLEA BARGAINING 129–41 (1979); VERA INST. JUST., *supra* note 293, at 133; Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 53 EMORY L.J. 691, 692–93 (2006).

²⁹⁵ Levine, *supra* note 294, at 698.

²⁹⁶ Myra Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking Over Time*, 38 L. & SOC’Y REV. 105, 106 (2004).

²⁹⁷ Celesta Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 L. & SOC’Y REV. 291, 311 (1982).

to wield discretion and resources.²⁹⁸ Indeed, sociologist Lisa Frohmann has found that prosecutors justify charging decisions based on predictions about whether juries will empathize with the victim.²⁹⁹ Yet, as Frohmann suggests, and as I discussed in the context of general sexual assault in Part I, when prosecutors act based on these predictions, they are only reinforcing stereotypes about gender-appropriate behavior and creating a class of people who go under-protected.³⁰⁰ Indeed, the ABA's standards for criminal justice explicitly state that a prosecutor should give no weight, in charging, to his or her own record of conviction.

It may well be the case that assault-based street harassment convictions are challenging, for both the doctrinal and cultural reasons discussed above. Yet prosecutors can and should *use* their discretion to combat the very stereotypes that result in so much explicit and symbolic sexual violence against women. And in any case, "charging policies tend to have little impact on case-specific evaluations" but, rather, focus on offense categories generally.³⁰¹ As assault is a non-controversially significant offense category, my proposal does not likely run afoul of charging policies, any more than it does the First Amendment.

In addition to simply enforcing the laws of assault against assaultive street harassment, prosecutors should engage in some kind of outreach to advertise that fact. The D.C. bicycle groper was a perfect example of how public outreach, by both the victim and the D.C. Metro Police, resulted in more evidence: four new victims spoke out after Gorman's blog post was circulated and it became clear that the police were taking her allegations seriously.³⁰² While many episodes of assaultive street harassment occur so quickly that they are difficult to report, if victims believe there is a point in reporting, they will be more likely to do so, and the general public can assist where appropriate.³⁰³

This Section has demonstrated that not only is it possible, doctrinally

²⁹⁸ Kenneth J. Mellili, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 684.

²⁹⁹ Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC'Y REV. 531, 536 (1997).

³⁰⁰ *Id.*

³⁰¹ Mellili, *supra* note 298, at 683.

³⁰² Dvorak, *supra* note 285.

³⁰³ In a recent *New Yorker* article, Syracuse University Professor Mary Karr describes how she was nearly deterred from reporting a man who had grabbed her crotch in broad daylight on a New York City street by the potential futility, but how after overcoming those concerns, she succeeded in getting him arrested. Mary Karr, *The Crotchgrabber*, NEW YORKER (Aug. 11, 2016), <http://www.newyorker.com/culture/culture-desk/the-crotchgrabber>.

and pragmatically, to use existing laws to pursue the most severe cases of street harassment, but also that there are important reasons for doing so. The most important reason, however, relates to the factor of violence in influencing charging decisions. While episodes like the ones described in this Section do not involve physical injury or high-level violence, they are significant due to their relationship to more extreme forms of violence. In the following Sections, I will argue that prosecutors should take into account the likely Broken Windows effect of charging assaultive street harassers on the most severe forms of sexual violence against women.

B. THE STRONG BROKEN WINDOWS EFFECT

As discussed in Part II, the empirical literature on Broken Windows policing remains mixed. Yet at least some research suggests it does indeed have what I will refer to as the “strong” effect: in some cases enforcing laws against lower-level crimes appears to modestly but statistically significantly reduce more serious offenses.³⁰⁴ Most significantly, Anthony Braga and Brenda Bond found such positive effects to be correlated with community involvement in policing, emphasizing the need for a “tradition of stable relationships [between the police and] the community and responsiveness to local concerns.”³⁰⁵

If Broken Windows can even modestly reduce violent crime through targeting completely unrelated misdemeanors, it stands to reason that it could be even more powerful at reducing serious sex crimes when applied to lower level sexually based offenses like assaultive street harassment. Both from the perspective of victims (for whom street harassment is the regular manifestation of fears about more serious sexual assault) and perpetrators, who participate in, and are emboldened by, the same culture of physical sexual violation as rapists, the two categories of conduct go hand in hand. The victims’ perspective is not simply relevant symbolically: we know that many victims decide not to report sexual assault due to a fear that the justice system will not help them.³⁰⁶ It stands to reason that the state cracking down on assaultive street harassment will serve a pragmatic expressive purpose, as evidence that the system does care about punishing sexual violations. And to the extent that Broken Windows theory works best where the police and community cooperate with one another, the public nature of street harassment is a ripe context for such cooperation.

Furthermore, pursuing street harassment may be much easier, from an

³⁰⁴ See *supra* notes 144–156 and accompanying text.

³⁰⁵ Braga & Bond, *supra* note 166, at 600.

³⁰⁶ See *supra* Section I.D; see also *supra* notes 17–19.

evidentiary standpoint, than pursuing sexual assault. Many sexual assaults occur behind closed doors, which poses evidentiary challenges for prosecutors and factfinders, who must ensure that the standard of proof beyond a reasonable doubt is met. Even if the system works harder, as it should, to aggressively pursue sexual assault cases in the face of various cultural rape myths, there will necessarily be fewer convictions than warranted. Street assault occurs in broad daylight, often in situations with many witnesses. It does not involve expensive DNA evidence and, because it is nearly always between strangers, presents few if any defenses that the victim consented to the assault. While the problem of under-reporting is likely as big or bigger than in rape cases, prosecutors and police can combat that through greater public outreach. In sum, assaultive street harassment is low-hanging fruit. If the strong version of Broken Windows theory is correct, and there are good reasons to believe it might be in this context, we can reduce rape and more extreme versions of sexual assault by targeting this behavior when it meets the legal definition of assault.

C. THE WEAK BROKEN WINDOWS EFFECT

Let us assume for a moment that the strong version of Broken Windows is ineffective. Perhaps all we get by punishing broken windows is fewer broken windows. Even then, that “aesthetic” effect is uniquely important and effective in cases of sexual assault. As discussed in Section I.B, the substantive definition of sexual assault is in transition. There is growing social and psychological awareness that a mere lack of physical force does not render sex consensual, due to the many reasons a woman might have for failing to physically resist. Yet the literature suggests that neither enforcement nor popular belief has caught up to this understanding. Rape mythology persists and charging decisions and jury verdicts replicate it. To use Adam Samaha’s “clock” model of policy-making, we can say that when it comes to the definition of sexual assault, we lack a stable, shared meaning for the term “noon.” As a society, we need to come to a shared formal understanding that tracks with the reality of how rape truly occurs. We need a “clock” that tells would-be perpetrators that their default posture should be to leave a woman alone.

Given the expressive crisis surrounding sexual assault enforcement, aggressively prosecuting assaultive street harassment will have the Broken Windows effect Samaha attributes to the clock: it will serve as an aesthetic mechanism for coordinating the minds of all of the citizens to create the relevant reality.³⁰⁷ We need a reality in which a woman’s body and sexual

³⁰⁷ Samaha, *supra* note 144, at 1584–85.

identity are not considered a resource for the male population unless they explicitly say otherwise. And we need substantive legal definitions of rape, enforcement patterns, and jury verdicts to reflect this unitary reality. In short, enforcing assault laws to create a legal reality of presumed bodily freedom from assaultive harassment at the street level will contribute to more stable definitions of assault and consent systemically. In addition to the benefits for actual prosecution of rapists, such a policy would reduce the expressive failures that have led many women to feel alienated and unprotected by our laws.

That said, there is a secondary expressive benefit to this sort of Broken Windows effect. In Section II.C, I explored the ways in which widespread condemnation of “rape culture” has been a double-edged sword. Defining so much of male conduct as rape-supportive risks creating a black and white dichotomy in public discourse between either denying that rape culture exists at all or branding anything and everything as part of it at a cost to actual crime victims.³⁰⁸ It has also, as mentioned, created a cultural narrative about campus rape that may not only compromise notions of due process in those cases but de-emphasize the more pervasive problem outside of campuses.³⁰⁹

Should prosecutors begin to charge street harassment as assault, they would serve a useful secondary expressive function: applying the law with precision to designate the most troubling conduct as illegal. The proposals for new legislation specifically targeting harassment not only run afoul of the First Amendment but also risk further intensifying the polarized cultural debate over acceptable male behavior. Indeed, female respondents to at least one 2000 study generally opposed straightforward legislation against speech-based street harassment on a number of grounds, including concerns for their own autonomy, should the state step in to defend them against such a common problem.³¹⁰ An assault-based approach holds the promise of common ground, and of workable, fixed rules that can combat antiquated beliefs about female sexual availability without entering the domain of witch hunts, gender wars, or excessive state intrusion into cultural life.

³⁰⁸ James Hamblin makes this point nicely, noting “incendiary as reactions on the topic can be, though, at least some of the polarization is media spectacle. Ultimately, everyone wants the same thing: no rape. Posing choices between prosecuting rapists or fixing systems and realigning expectations, between the rights of one gender and the other, thwarts progress.” James Hamblin, *How Not to Talk About the Culture of Sexual Assault*, ATLANTIC (Mar. 29, 2014), <https://www.theatlantic.com/health/archive/2014/03/how-not-to-talk-about-the-culture-of-sexual-assault/359845/>.

³⁰⁹ See Volokh, *supra* note 102 and accompanying text.

³¹⁰ Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment*, 34 L. & SOC’Y REV. 1055, 1076–80 (2000).

D. POTENTIAL CONCERNS FOR APPLICATION

I have already addressed many of the common arguments against prosecuting street harassment in and of itself.³¹¹ And I have reviewed the empirical criticism of Broken Windows as an enforcement practice generally and argued that, even if the staunchest critics are correct, it nonetheless holds unique promise in the sexual assault context.³¹² Yet applying Broken Windows in the specific manner I suggest may attract a few additional objections.

Most importantly, the specter of race-based enforcement—already well-documented in current Broken Windows policing³¹³—may be even more of a problem when we use it to address such a ubiquitous form of behavior, particularly in urban spaces. As William Stuntz has observed of vice crimes, due to the impossibility of policing all qualifying behavior, the decision to investigate is the primary determinant of who gets punished.³¹⁴ It cannot be emphasized enough that any effort to operationalize this proposal must be accompanied by additional scrutiny to ensure even-handed enforcement. And the proposed limitation on enforcement to only those cases that meet the elements of assault—as opposed to adopting a generalized harassment statute—goes a long way toward limiting illegitimate discretion.³¹⁵ Furthermore, unlike drug use, prostitution, sodomy, or other offenses that have, in the past, been only selectively enforced to target either certain individuals or groups, street harassment has both a victim and, usually, third-party witnesses. The need for these actors’ involvement before an investigation can even take place is another important limit on police and prosecutorial abuse.

Furthermore, street harassment—due in part to its very ubiquity—tracks somewhat less with socio-economic conditions than other misdemeanor offenses like vandalism and petty theft.³¹⁶ Critics of the now-famous “Hollaback!” video made by filmmaker Bob Bliss point out the racially fraught implications of the fact that he documented ten hours of primarily minority men harassing a white woman, suggesting that the moment of feminist backlash against such conduct was motivated by implicit racism or

³¹¹ See *supra* Section IV.A.

³¹² See *supra* Section II.A–C.

³¹³ See *e.g.*, Fagan & Garth, *supra* note 173.

³¹⁴ See William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1875 (2000); see also Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. 157, 159 (2014) (arguing that selective media reporting of uniquely high sanctions against particular defendants may distort public perceptions of enforcement regimes by shifting attention away from smaller, but unjust, sanctions against a greater number of others).

³¹⁵ See discussion at Section IV.B, *supra*.

³¹⁶ See Bowman, *supra* note 219, at 531.

classism.³¹⁷ But evidence suggests that street harassment is a problem that transcends class and race. In a 1984 study, sociologists Cheryl Benard and Edit Schlaffer, acting as their own guinea pigs on the streets, reported that age, education, and income bore little relation to harassing behavior (although younger men tended to be more aggressive, and older men tended to lower their voices).³¹⁸ And, indeed, the Office of Civil Rights' campaign against campus sexual assault is only a part of a generalized campaign against sexual harassment.³¹⁹ Whatever the constitutional merits of OCR's approach to combatting the problem, its involvement has clearly emphasized that young, educated men form a high-priority part of it. Because street harassment occurs anywhere and everywhere³²⁰—as does the sexual assault this article's theory of Broken Windows targets—it can and should be enforceable in a racially just manner.

CONCLUSION

On January 21, 2017, the day after Donald Trump's inauguration, hundreds of thousands of protesters gathered to participate in the Women's March in Washington, D.C.³²¹ While the gathering—joined by parallel demonstrations in most major U.S. cities and around the world—was a widespread reaction to many values already expressed by the then-President-elect, the women's rights focus of the March originated with his casual boast that when “you're a star,” you can “do anything” to women, even “grab them by the pussy.”³²² In a world where a candidate for President of the United States gets elected after openly endorsing sexual assault, and in doing so galvanizes the largest day of protests in U.S. history, it is unsurprising that every aspect of sexual assault enforcement is at an expressive crossroads.

³¹⁷ Kay Himowitz, *Street Harassment Isn't About Sexism—It's About Privilege*, TIME (Nov. 4, 2014), <http://time.com/3556523/street-harassment-isnt-about-sexism-its-about-privilege/>.

³¹⁸ Alison M. Jaggar & Paula S. Rothenberg, *The Man in the Street: Why He Harasses*, in FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN 70, 72 (Alison M. Jaggar & Paula S. Rothenberg eds., 2d ed. 1984). See also Carol B. Gardner, *Passing By: Street Remarks, Address Rights, and the Urban Female*, 50 SOC. INQUIRY 328, 333 (1980).

³¹⁹ Off. of the Assistant Secretary, *Dear Colleague Letter*, U.S. DEP'T OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

³²⁰ See Georgina Rannard & Will Dahlgreen, *100 Women 2016: A Weekend of Street Harassment Mapped*, BBC NEWS (Dec. 9, 2106), <http://www.bbc.com/news/magazine-38236694>.

³²¹ Erica Chenoweth & Jeremy Pressman, *This is What We Learned By Counting the Women's Marches*, WASH. POST (Feb. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/?utm_term=.1cd49209b6b0.

³²² Bullock, *supra* note 2.

This article provides a moderate proposal to decrease sexual assault by applying the lessons learned from Broken Windows policing to the related problem of assaultive street harassment. Due to the cyclical relationship between appearance and reality, which appears to contribute to rapes being under-reported, under-investigated, and under-prosecuted, it is clear that the criminal justice system is failing at its expressive functions, with significant consequences for substantive justice. If the “strong” view of Broken Windows works, then by targeting street harassment as assault we can reduce much harder-to-prove sexual assaults over time. Yet even if only the “weak” view of Broken Windows applies, we can still make substantial strides towards resolving the expressive crisis over the definitions of sexual assault and consent. Such enforcement would disrupt the cultural norm of default male access to female bodies in a manner less polarizing than that of the current extra-legal critique of “rape culture.” In either case, it would also encourage more victims to report sexual assaults of all varieties by expressing that the state cares about prosecuting sex offenses. All of these effects would serve, directly or indirectly, to reduce the incidence of sexual assault. Either way, prosecutors and courts need to think about the big-picture relationship between street harassment and sexual assault and enforce existing laws with an eye toward this connection.