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UNDERENFORCEMENT AS UNEQUAL PROTECTION

DEBORAH TUERKHEIMER*

Abstract: Rape law is largely underenforced. Yet criticism of policing practices has myopically focused on enforcement excesses, thus overlooking the problem of the state withholding protective resources. This neglect is particularly troubling where sexual violence is at issue. Empirical evidence demonstrates the operation of pervasive biases in police officers' decisions not to pursue an investigation. Over time, law enforcement officers have discriminated against rape victims with immunity. Recently, however, this has changed. This Article is the first to describe a new effort by the United States Department of Justice to hold law enforcement officers accountable for failing to protect victims of sexual assault. In important respects, this turn is unprecedented. But insofar as the latest developments target violence without redress, the assertion of federal power in this domain possesses a venerable historical pedigree. When the Equal Protection Clause was conceived, the framers were chiefly concerned with the states' failure to provide black citizens with protection from private violence. After passage of the Fourteenth Amendment, the "protection model" of equal protection, along with the federal power to enforce it, lay dormant. Recent events have revived this model and this power, allowing us to glimpse a modern version of what the 39th Congress intended. The Justice Department's latest deployment of its "pattern or practice" enforcement authority may come as close as any intervention since Reconstruction to addressing the framers' core concern with underenforcement. Notwithstanding the Supreme Court's divergent jurisprudential framework, the original meaning of equal protection has begun to resurface.

INTRODUCTION

The excesses of criminal justice are problems of growing national preoccupation.¹ A primary, and increasingly visible, challenge is to practices of dis-

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criminy over-policing.² Whether manifested in the decision to stop, to search, to arrest, or to employ (sometimes lethal) force, police bias exerts a powerful and pernicious influence. This reality is now recognized as among the pressing problems of our time.³

In contrast, discriminatory under-policing receives scant attention.⁴ As is true of underenforcement generally,⁵ under-policing tends to result from a de-

¹ Bill Keller, *Prison Revolt*, NEW YORKER (June 29, 2015), <http://www.newyorker.com/magazine/2015/06/29/prison-revolt> [<https://perma.cc/CF3M-2RLY>]. As Bill Keller notes, “These days, it is hard to ignore a rising conservative clamor to rehabilitate the criminal-justice system.” *Id.* Keller continues:

In Congress and the states, conservatives and liberals have found common ground on such issues as cutting back mandatory-minimum sentences; using probation, treatment, and community service as alternatives to prison for low-level crimes; raising the age of juvenile-court jurisdictions; limiting solitary confinement; curtailing the practice of confiscating assets; rewriting the rules of probation and parole to avoid sending offenders back to jail on technicalities; restoring education and job training in prisons; allowing prisoners time off for rehabilitation; and easing the reentry of those who have served time by expunging some criminal records and by lowering barriers to employment, education, and housing.

Id.

² Over-policing constitutes just one component of the contemporary criminal justice critique. Perhaps the dominant strand focuses on sentencing; in particular, on mass incarceration rates that disproportionately affect communities of color. Increasingly, attention to punishment also encompasses the collateral consequences that attend a conviction. The criminal justice system’s treatment of misdemeanors is yet another important area of reform efforts. For a fine-grained analysis of the overuse of the criminal justice system, see generally Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L. J. ANN. REV. CRIM. PROC., at iii (2015).

³ See Ronald Weitzer, *American Policing Under Fire: Misconduct and Reform*, 52 SOCIETY 475, 475 (2015). As Ronald Weitzer explained,

A cluster of recent police killings of African American men has sparked an unprecedented amount of public debate regarding policing in the United States. Critics and protesters have made sweeping allegations about the police; a presidential commission has been formed to study police misconduct; and reforms are being debated. . . . This is a fairly unique moment in American history.

Id.; see also Nick Wing, *16 Numbers That Explain Why Police Reform Became an Even Bigger Story in 2015*, HUFFINGTON POST (Dec. 29, 2015, 8:00 AM), http://www.huffingtonpost.com/entry/police-reform-numbers-2015_us_5672e150e4b0688701dc7a54 [<https://perma.cc/Z7LN-JJM4>] (discussing the police killings, mainly of African American men, that occurred in 2015).

⁴ See Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716 (2006) (explaining the relationship between “under-policing” and “underenforcement”); see also William J. Stuntz, *Accountable Policing* 14 (Harvard Pub. Law Working Paper No. 130, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886170 [<https://perma.cc/9GNR-NS56>] (“[T]he failure [to address underenforcement] is more serious than most of the legal issues scholars debate, partly because underpolicing makes all other regulatory problems worse.”) (alteration in original).

⁵ See Natapoff, *supra* note 4, at 1716 (“[U]nderenforcement has been given short shrift, particularly in the area of street and violent crime.”). Underenforcement involves “a weak state response to lawbreaking as well as to victimization.” *Id.* at 1717. Alexandra Natapoff is one of the few scholars to analyze a range of underenforcement practices outside the white-collar context. See *id.* at 1716. As I

valuing of the harms caused by a specific crime, the harms suffered by members of a certain demographic group, or both. When the protection of the state is withheld for reasons stemming from bias, underenforcement—specifically under-policing⁶—implicates core constitutional norms.

The widespread neglect of underenforcement in both scholarly and popular discourses is therefore especially troubling. The conventional story tells that the remedy for too much policing is always less policing; if the former is important, the latter cannot be a worry. This version, however, is overly simplistic. A more comprehensive account, and the one I advance here, acknowledges underenforcement and overenforcement as related problems.⁷ Both underenforcement and overenforcement manifest the state’s implementation of its police power in ways that disadvantage the most vulnerable among us.⁸ On this view, underenforcement and overenforcement *together* undermine equal protection norms.⁹

will argue, the rubric of “underenforcement” includes “under-policing”—policing that, due to the operation of systemic biases, falls below an optimal level.

⁶ Although this discussion centers on policing, many of its arguments apply to prosecution. Underenforcement directly implicates prosecution, and perhaps under narrower circumstances, even the functioning of judges and juries. Nonetheless, policing raises a unique set of concerns. Moreover, because a police investigation can, and often does, terminate the criminal process at the outset, policing is an obvious starting point for consideration of the dynamics and impact of underenforcement. *Cf. Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, U.S. DEP’T OF JUSTICE 3 (Dec. 15, 2015), <http://www.justice.gov/opa/file/799476/download> [<https://perma.cc/994N-9CDH>] [hereinafter *Gender Bias in Law Enforcement*]. The Justice Department noted:

In the sexual assault and domestic violence context, if gender bias influences the initial response to or investigation of the alleged crime, it may compromise law enforcement’s ability to ascertain the facts, determine whether the incident is a crime, and develop a case that supports effective prosecution and holds the perpetrator accountable.

Id.

⁷ See Natapoff, *supra* note 4, at 1719 (observing that underenforcement “is not necessarily an alternative to overenforcement but often its corollary”); see also *infra* notes 133–135 and accompanying text.

⁸ Natapoff, *supra* note 4, at 1719. Natapoff explained:

[U]nderenforcement is one way the state participates in social contests over resources, power, and legitimacy by staying its enforcement hand in selective ways. Because the losers in these contests are those who cannot command the state’s full support, underenforcement reveals important facets of the distributive and normative operations of the criminal system.

Id. See generally Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211 (2015) (challenging the notion that criminalization is the appropriate solution for addressing crimes against minorities).

⁹ This Article advances a conceptual framework that rests on constitutional underpinnings. It is also the case, however, that protection from private violence constitutes a civil right. See Robin West, *Toward a Jurisprudence of the Civil Rights Acts*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY 98* (Samuel Bagenstos & Ellen Katz, eds., 2014) (observing that “[t]he thoroughly positive right to thoroughly positive, state-provided protection against thoroughly private

In underenforced arenas,¹⁰ the criminal justice system withholds its protective resources from groups deemed unworthy of protection. Evidence of this dynamic can be found across a range of law enforcement responses, including black-on-black homicide,¹¹ hate crimes,¹² and unlawful police violence against civilians.¹³ In each of these categories, failures of criminal justice can be attributed, not to too much enforcement, but to too little. In turn, underenforcement both evinces and perpetuates vexing relations between the state and members of groups granted only limited protection from violence.¹⁴

Unremedied injuries suffered by women, in particular, have historically been the norm,¹⁵ just as gender bias has long been an intractable feature of our criminal justice landscape.¹⁶ Across the spectrum of violence—domestic¹⁷ and

violence is a—maybe the—quintessential civil right: it is a right that can only be realized through the enactment of positive law and its fair enforcement”). The implications of a civil rights-based understanding of underenforcement merit separate consideration.

¹⁰ The focus throughout this discussion remains on the underenforcement side of systemic bias. As will become apparent, my claims regarding equal protection also have purchase on the overenforcement side although I do not develop the argument for reforms that shrink the criminal justice system overall or that specifically target inequities in incarceration and the collateral consequences of conviction.

¹¹ See generally JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015) (examining the disproportionate rate of murdered African American men in the United States).

¹² See generally Avlana Eisenberg, *Expressive Enforcement*, 61 *UCLA L. REV.* 858 (2014) (analyzing how prosecutors implement hate crime laws).

¹³ See Mario L. Barnes, *Criminal Justice for Those (Still) at the Margins—Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 *U.C. IRVINE L. REV.* 711, 714 (2015). As Barnes explains, the Black Lives Matter movement arose to

challeng[e] the perceived injustice surrounding these unnecessary deaths and proclaim the societal worth of those who were killed. The campaign adopted the tagline “Black Lives Matter.” The message of the phrase is obvious: only in a society where Blacks are considered to be of low social value could their deaths under such circumstances routinely result in neither criminal prosecution nor civil sanction.

Id. (alteration in original); see also Editorial, *Voters Tell Prosecutors, Black Lives Matter*, *N.Y. TIMES* (Mar. 16, 2016), http://www.nytimes.com/2016/03/18/opinion/voters-tell-prosecutors-black-lives-matter.html?_r=0 [https://perma.cc/4DB2-NURY] (describing the electoral defeats of two incumbent prosecutors perceived to have mishandled cases involving police killings of unarmed black citizens).

¹⁴ See Natapoff, *supra* note 4, at 1717 (asserting that underenforcement “offers important insights into the government’s relationship with vulnerable groups in the context of the criminal system”).

¹⁵ See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 5 (1987). For example:

Since 1970, feminists have uncovered a vast amount of sexual abuse of women by men. Rape, battery, sexual harassment, sexual abuse of children, prostitution, and pornography, seen for the first time in their true scope and interconnectedness, form a distinctive pattern: the power of men over women in society. These abuses are as allowed de facto as they are prohibited de jure.

Id.

¹⁶ See *Gender Bias in Law Enforcement*, *supra* note 6, at 3 n.2. The Justice Department noted that:

sexual¹⁸—substantive law reform has not readily translated into law enforcement.¹⁹ Instead, to this day, the same biases reflected in repudiated legal regimes continue to influence the implementation of more progressive laws that have emerged in their stead.²⁰

Rape law’s enforcement gap is the focus of the remaining discussion, which proceeds from the premise that effective policing serves a number of valuable functions.²¹ The discussion also develops the idea that a duty to pro-

[G]ender bias—both explicit and implicit—exists throughout society, and as a result, it can arise in various aspects of the criminal justice system. Explicit and implicit gender bias can undermine the effective handling of sexual assault and domestic violence cases at any point from report to adjudication or closure.

Id.; see also *infra* notes 133–134 and accompanying text (discussing the intersectional nature of gender bias).

¹⁷ The example of domestic violence is instructive:

Until recently, privacy-based rationales for non-intervention in domestic crimes saturated the criminal justice system at all levels—police, prosecutors and bench. Confronting a legal apparatus wholly unresponsive to battering, domestic violence advocates focused their reform efforts, quite sensibly, on forcing police and prosecutors to enforce the laws already on the books; that is, to treat crimes “equally” whether the victim and perpetrator were strangers or intimates. Proponents of mandatory arrest and “no drop” prosecution policies argued that constraining law enforcement discretion would tend to result in fuller enforcement of existing substantive criminal laws.

Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 970–71 (2004); see also Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1856 n.24 (1996) (noting that “state response to battering, particularly in the criminal system, has been rooted primarily in gender discrimination”). For a discussion of the federal funding implications of discriminatory local policing of domestic violence, see Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U.L. REV. 870, 913–15 (2015). Interestingly, important parallels between domestic and sexual violence are dwarfed by their divergent treatment in both state and federal justice systems—a subject worth further exploration.

¹⁸ According to the Justice Department’s Bureau of Justice Statistics, ninety percent of all cases of rape involve female victims. MICHAEL PLANTY ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010, at 3 (2013). Although the data on violence against transgender individuals is sparse, “community-based studies indicate high levels of victimization” of transgender individuals. *Gender Bias in Law Enforcement*, *supra* note 6, at 5.

¹⁹ See *infra* notes 25–65 and accompanying text.

²⁰ Cf. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2119 (1996) (“When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend.”). It is useful to notice that the underenforcement of “new rules” can likewise function to protect status privileges.

²¹ Policing involves ascertaining the facts in order to determine whether probable cause exists to believe that a crime has been committed. If so, effective policing entails building a case that enables prosecutors to hold the perpetrator accountable. See *infra* notes 267–283 and accompanying text (detailing how the Justice Department’s guidance on reducing gender bias could result in better policing); see also Ta-Nehisi Coates, *Bill Cosby and His Enablers*, ATLANTIC (Jan. 16, 2016), <http://www.theatlantic.com/politics/archive/2016/01/bill-cosby-and-his-enablers/422448/> [<https://perma.cc/E7FR->

tect equally is constitutionally mandated. Part I documents the operation of gender bias in police responses to sexual assault.²² Part II traces the changing meaning of equal protection as it pertains to discriminatory policing, showing that underenforcement was central to what the 39th Congress intended the Equal Protection Clause to redress.²³ Notwithstanding this historical pedigree, equal protection jurisprudence has evolved to effectively foreclose “failure to protect” claims. Part III explains how the Justice Department has recently reinvigorated the federal obligation to hold police departments accountable for providing unequal protection.²⁴ A conclusion addresses the implications of this new enforcement paradigm for the policing of sexual assault and beyond.

I. RAPE LAW ON THE GROUND

A majority of sexual assault victims never relate the occurrence of the crime to law enforcement officials.²⁵ According to recent Justice Department estimates, females ages eighteen to twenty-four,²⁶ the population most vulnerable to sexual assault, reported to police at rates of only twenty percent for college students and thirty-two percent for non-college students.²⁷ Research

TDFK] (“Criminals flourish when no credible system exists to adjudicate the claims of their victims.”); cf. Harmon, *supra* note 17, at 913 (observing, in the domestic violence context, that arrests not only channel cases to the prosecutorial stage of the criminal process, but can also deter further violence and serve a symbolic function).

²² See *infra* notes 25–65 and accompanying text.

²³ See *infra* notes 66–118 and accompanying text. As Part II will describe, the failure of state and local law enforcement officials to protect blacks from white violence in the South was a primary impetus for enacting the Equal Protection Clause. See *infra* notes 68–83 and accompanying text.

²⁴ See *infra* notes 119–283 and accompanying text.

²⁵ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (2006) (reporting that, among rape victims, 19.1% of adult women and 12.9% of adult men reported the crime to police); see David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1222 (1997) (suggesting that “unreported rapes are, disproportionately, acquaintance rapes”).

²⁶ See SOFI SINOZICH & LYNN LANGTON, U.S. DEP’T OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, 1, 5 (2014) (finding that “[f]or the period 1995–2013, females ages eighteen to twenty-four had the highest rate of rape and sexual assault victimizations compared to females in all other age groups,” and that “[c]ollege-age male victims accounted for seventeen percent of rape and sexual assault victimizations against students and four percent against nonstudents”).

²⁷ *Id.* Women of color, both on and off campus, may be even less likely to report sexual assault than their white counterparts. See Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report It*, CHRON. HIGHER EDUC. (June 18, 2015), <http://chronicle.com/article/Another-Challenge-on-Campus/230977> [<https://perma.cc/C68R-YQ5R>] (describing the reporting gap between white college women and college women of color and positing that the “layers of privilege” required to pursue a complaint through the college administrative process are often less available to minority students). As one commentator has observed, an “impossible hierarchy of acceptable victimhood,” means that “black women who walk willingly into the rooms of men they call ‘brother’ are considered undeserving of protection from any violence that happens therein.” Hannah

suggests that one reason (though certainly not the only reason²⁸) is the predictability of a non-response.²⁹ Among non-students, nearly one in five surveyed did not report the rape because “police would not or could not do anything to help.”³⁰ Other studies further indicate that rape survivors are foregoing reliance on the criminal justice system in anticipation of how their case will be (mis)treated.³¹

In many jurisdictions, the widespread perception that law enforcement officers will likely not pursue allegations of rape is entirely accurate.³² Police inaction is a particularly acute problem in cases involving women of color,

Giorgis, *Many Women of Color Don't Go to the Police After Sexual Assault for a Reason*, THE GUARDIAN (Mar. 25, 2015), <http://www.theguardian.com/commentisfree/2015/mar/25/women-of-color-police-sexual-assault-racist-criminal-justice> [<https://web.archive.org/web/20160418215410/http://www.theguardian.com/commentisfree/2015/mar/25/women-of-color-police-sexual-assault-racist-criminal-justice>]. There are additional reasons for women of color to avoid reporting rapes to police:

If we report our assaults to police, we risk being retraumatized . . . by the violence of the criminal justice system itself, which treats rape victims like suspects. Worse yet, the police themselves commit assault with impunity; often, they target black women in particular, knowing our existence at the intersections of racism and misogyny make crimes against us far less likely to be investigated. To be “a good rape victim” is to immediately report your assault to the police (even knowing you will likely never see “justice”), but to be a good *black person* is to avoid the police entirely because your life quite literally depends on it. The tightrope walk is impossible.

Id.

²⁸ See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 465, 473–81 (2005) (discussing the civil legal needs that tend to impact victims of sexual violence, including privacy, immigration status, medical care and counseling, protective orders, safe housing, education, employment, and financial stability); see also *infra* note 33 and accompanying text (urging an intersectional understanding of what equal protection requires).

²⁹ See SINOZICH & LANGTON, *supra* note 26, at 9.

³⁰ *Id.* This same concern was expressed by survivors of sexual assault in testimony to Congress, ultimately leading to passage of the Violence Against Women Act (“VAWA”). See Victoria Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 11 WIS. WOMEN’S L.J. 1, 9–12 (1996).

³¹ Nourse, *supra* note 30, at 9–12; Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS NEWSHOUR (Dec. 11, 2014), <http://www.pbs.org/newshour/rundown/four-five-acts-campus-sexual-assault-go-unreported-police/> [<https://perma.cc/J3BJ-XS7G>] (explaining the massive underreporting of campus rape as significantly attributable to the fact that victims “know in our society that the only rapes that are taken seriously are those committed by strangers and are significantly violent”).

³² See Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 155 (2012) (documenting the attrition of rape allegations as cases progress through the criminal justice system); see also TJADEN & THOENNES, *supra* note 25, at 33 (reporting that “among all women who were raped since age eighteen, only 7.8 percent said their rapist was criminally prosecuted, 3.3 percent said their rapist was convicted of a crime, and a mere 2.2 percent said their rapist was incarcerated”).

immigrants, LGBTQ individuals, women in poverty, and sex workers.³³ Moreover, as compared to cases involving strangers, law enforcement tends to view non-stranger rape with greater skepticism.³⁴

With regard to both stranger and acquaintance rapes, police failure to investigate sexual assault cases is well documented.³⁵ Consistent with the nation-

³³ See generally ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING (Oct. 2015). The nationwide survey of more than 900 advocates, service providers, and attorneys confirmed “the entrenched nature of long-recognized, gender-driven biases by police against domestic violence or sexual assault claims.” *Id.* at 40. The survey also underscored the problem of police bias against “survivors of color, and against survivors who are poor, Native American, immigrant, or LGBTQ.” *Id.*; see also *infra* notes 47–54 and accompanying text (describing similar findings of the Detroit Sexual Assault Kit Action Research Project). An intersectional approach to equal protection requires accounting for the multitudinous ways that bias confronts victims. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991); see also CASSIA SPOHN & KATHARINE TELLIS, NAT’L CRIMINAL JUSTICE 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 134–39 (2012) (explaining that sexual assault victims may experience a range of needs, including those related to immigration status, safe housing, job security, and financial stability).

³⁴ See, e.g., SPOHN & TELLIS *supra* note 33, at 134–39 (analyzing rapes reported to the Los Angeles Police Department from 2005–2009 and finding that the existence of a relationship between the victim and the suspect influenced case processing); *infra* notes 48–55 and accompanying text; see also David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 317–18 (2000). As Bryden explains:

Whatever their other disputes, rape-law scholars agree about several fundamental realities. They agree that, for practical purposes, forcible rape is really two crimes. The consensus is that the criminal justice system performs at least reasonably well in dealing with “aggravated” rapes, defined as rapes by strangers, or men with weapons, or where the victim suffers ulterior injuries. With equal unanimity, scholars agree that the justice system often has performed poorly in cases involving rapes by unarmed acquaintances (dates, lovers, neighbors, co-workers, employers, and so on) and in which the victim suffers no additional injuries. Victims are less likely to report these acquaintance rapes (or even to recognize that they are rapes); if a victim does report it, the police are less likely to believe her; prosecutors are less likely to file charges; juries are less likely to convict; and any decision by an appellate court is more likely to be controversial.

Id.

³⁵ See Bryden & Lengnick, *supra* note 25, at 1230, 1233 (“[T]he unounding rate for rape is roughly four times than for other major crimes.”). An ongoing three-year study funded by the National Institute of Justice is exploring the factors that influence the continuing attrition of rape cases. See Sandra Seitz, *\$1.2M Funds Study on Sexual Assault Case Processing*, UMASS LOWELL (Mar. 29, 2013), <http://www.uml.edu/News/stories/2013/SexualAssaultGrant.aspx> [<https://perma.cc/GAP8-4QFH>]. According to the study:

The researchers will establish partnerships with up to eight communities—urban, suburban and rural—to explore the various and diverse elements that may be contributing to successful completion or attrition in sexual violence cases. They will study the case records from the first report through lodging of criminal charges, arrest, prosecution and sentencing. They will collect quantitative and qualitative data and interview those

wide data,³⁶ close examination of particular jurisdictions,³⁷ including Los Angeles,³⁸ Baltimore,³⁹ St. Louis,⁴⁰ New Orleans,⁴¹ New York,⁴² Salt Lake County,⁴³ and Missoula, Montana,⁴⁴ underscores that poor handling of rape cases by police is rampant.⁴⁵

A 2015 study of the policing of sexual assault in Detroit provides the latest evidence of gender bias⁴⁶ in case processing.⁴⁷ In the most thorough exam-

involved in the decision making, including patrol officers, detectives, prosecutors, victims and victim advocates.

Id.

³⁶ See *Reporting Rates*, RAINN, <https://rainn.org/get-information/statistics/reporting-rates> [<https://perma.cc/252V-DYVL>] (last visited Jan. 14, 2016) (estimating, based on recent FBI and DOJ figures, that out of every one thousand rapes, 344 are reported to the police; only sixty-three lead to an arrest); see also *supra* note 32 and accompanying text.

³⁷ For a helpful overview, see generally *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the S. Comm. on the Judiciary Subcomm. on Crime & Drugs*, 111th Cong. (2010) (testimony of Carol E. Tracy, Exec. Dir., Women's Law Project), <http://www.judiciary.senate.gov/imo/media/doc/09-14-10%20Tracy%20Testimony.pdf> [<https://perma.cc/3H92-6TBC>].

³⁸ See generally SPOHN & TELLIS, *supra* note 34 (detailing policing and prosecution of sexual assault in Los Angeles).

³⁹ See Justin Fenton, *City Rape Statistics, Investigations Draw Concern*, BALT. SUN (June 27, 2010), http://articles.baltimoresun.com/2010-06-27/news/bs-md-ci-rapes-20100519_1_rosalyn-branson-police-detective-police-figures [<https://perma.cc/5LPN-XT4A>] (reporting that, from 2003–2010, police detectives investigated only four of ten emergency rape calls).

⁴⁰ See Jeremy Kohler, *What Rape?: Abused by the System*, ST. LOUIS POST-DISPATCH, Aug. 28, 2005, at A1 (reporting on the police practice of diverting rape complaints from formal processing channels).

⁴¹ See Laura Maggi, *NOPD Downgrading of Rape Reports Raises Questions*, TIMES-PICAYUNE (New Orleans) (July 11, 2009), http://www.nola.com/news/index.ssf/2009/07/nopd_downgrading_of_rape_repor.html [<https://perma.cc/DRU8-UQ3A>] (reporting that a majority of reported rapes were classified as noncriminal).

⁴² See John Eligon, *Panel Seeks More Police Training on Sex Crimes*, N.Y. TIMES (June 2, 2010), http://www.nytimes.com/2010/06/03/nyregion/03rape.html?pagewanted=all&_r=0 [<https://perma.cc/WLK7-9PTZ>] (reporting that the number of forcible rape complaints deemed unfounded had dramatically increased and that the category of sex crimes classified as misdemeanors had grown by six percent).

⁴³ See Erin Alberty & Janelle Stecklein, *Study: Most Cases in Salt Lake County Never Prosecuted*, SALT LAKE TRIB. (Jan. 7, 2014), <http://archive.sltrib.com/story.php?ref=sltrib/news/57323282-78/cases-rape-police-victim.html.csp> [<https://perma.cc/Z2RH-D5JT>] (reporting on an audit of 270 rape cases in Salt Lake County showing that 6% were prosecuted).

⁴⁴ See *infra* notes 208–266 and accompanying text.

⁴⁵ See Todd Lighty et al., *Few Arrests, Convictions in Campus Sex Assault Cases*, CHI. TRIB. (June 16, 2011), http://articles.chicagotribune.com/2011-06-16/news/ct-met-campus-sexual-assaults-0617-20110616_1_convictions-arrests-assault-cases [<https://perma.cc/C827-D753>]. Regarding campus sexual assault allegations in particular, one study of six Midwestern campuses found that 171 reports to police resulted in only twelve arrests. See *id.*

⁴⁶ See *Gender Bias in Law Enforcement*, *supra* note 6, at 3.

Gender bias in policing practices is a form of discrimination that may result in [law enforcement agencies] providing less protection to certain victims on the basis of gender, failing to respond to crimes that disproportionately harm people of a particular gender

ination of untested (or “shelved”) rape kits to date,⁴⁸ researchers discovered that cases involving non-strangers, in which suspect identity was not an issue, were typically not considered worthy of investigation.⁴⁹ Contrary to conventional wisdom, police officers repeatedly indicated that the failure to submit a

or offering reduced or less robust services due to a reliance on gender stereotypes. Gender bias, whether explicit or implicit, conscious or unconscious, may include police officers misclassifying or underreporting sexual assault or domestic violence cases, or inappropriately concluding that sexual assault cases are unfounded; failing to test sexual assault kits; interrogating rather than interviewing victims and witnesses

Id. (alteration in original). According to a recent summary of the relevant social science, “[o]fficers tend to overestimate the percentage of false reports . . . , reflecting the myth that rape is rare.” Karen Rich & Patrick Seffrin, *Police Interviews of Sexual Assault Reporters: Do Attitudes Matter?*, 27 VIOLENCE & VICTIMS 263, 265 (2012). Researchers have documented a relationship between unfounding decisions and negative beliefs about victims. *Id.*

⁴⁷ See generally REBECCA CAMPBELL ET AL., NAT’L CRIMINAL JUSTICE REFERENCE SERV., THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP), FINAL REPORT (2015) (detailing findings of study of Detroit’s policing of sexual assault). The Detroit Study, which was funded by the National Institute of Justice, provides the most comprehensive examination of why police officers fail to test rape kits. The practices described clearly extend far beyond Detroit or any particular jurisdiction. In fact, the evidence is mounting that untested rape kits are a national problem: last summer, the “most detailed nationwide inventory of untested rape kits . . . found at least 70,000 neglected kits in an open-records campaign covering 1,000-plus police agencies—and counting.” See Steve Reilly, *Tens of Thousands of Rape Kits Go Untested Across USA*, USA TODAY (July 16, 2015), <http://www.usatoday.com/story/news/2015/07/16/untested-rape-kits-evidence-across-usa/29902199/> [<https://perma.cc/24CR-WUUG>]. As the report noted, “Despite its scope, the agency-by-agency count covers a fraction of the nation’s 18,000 police departments, suggesting the number of untested rape kits reaches into the hundreds of thousands.” *Id.*

⁴⁸ Researchers counted over 11,000 sexual assault kits in police custody, of which 1600 were randomly selected for further study. CAMPBELL ET AL., *supra* note 47, at iii, v; see also Carrie Bettinger-Lopez, *The Sexual Assault Kit Initiative: An Important Step Toward Ending the Rape Kit Backlog* (Mar. 15, 2016), <https://www.whitehouse.gov/blog/2016/03/15/sexual-assault-kit-initiative-important-step-toward-ending-rape-kit-backlog> [<https://perma.cc/58PY-JWTS>] (describing the Obama Administration’s response to the problem of untested rape kits); CAMPBELL ET AL., *supra* note 47, at 3–7 (summarizing evidence that untested rape kits are a national problem).

⁴⁹ CAMPBELL ET AL., *supra* note 47, at 121.

[T]he attitudes and beliefs among crime lab personnel were similar to those of the police in that victims suspected of prostitution, adolescent victims, and victims of non-stranger rape were not deemed credible and/or worthy of investigational and testing resources. Of course, we cannot disentangle whether the attitudes expressed by crime lab personnel were due to messages they had received from the police over the years (either at an individual level or at the institutional level, given that they were part of same organization), or whether these were, more or less, their own beliefs about victims. At the very least, both crime lab personnel and police confirmed that they regularly discussed how some victims, some cases were not worthy of the investment of testing.

Id. A major finding of the study was that, among those kits submitted for testing, there was no statistically significant difference in “hit” rates for stranger and non-stranger sexual assaults. *Id.* at 172 (“If the DNA from a SAK [sexual assault kit] matches to other sexual assault offenses . . . the hit reveals a pattern of serial sexual offending . . .”) (alteration in original). Based on the “hit rate” equivalency, researchers concluded, “[T]hese data do *not* support prioritization of testing on the basis of victim-offender relationship” *Id.* at 228.

rape kit for testing was reflective of a decision *not* to pursue the case, rather than a decision to pursue it without additional corroboration.⁵⁰ Put differently, the kits were shelved because the allegations had already been disregarded, not because the case was perceived as sufficiently strong that the cost of testing was unjustified.⁵¹ Researchers explained:

In many respects, the untested kits were a tangible sign about the dispositions of these cases—the case had been shelved, figuratively; the kit had been shelved, literally. . . . [A]s one police official put it: “*The kits [that weren’t] tested were cases that we couldn’t or wouldn’t do anything about.*”⁵²

The notion that the police “wouldn’t do anything” about certain cases was confirmed by data suggesting the operation of “negative beliefs and stereotypes about victims, which adversely affected the quality of the investigation.”⁵³ One frequent practice was “to disbelieve victims who knew their assailants: police doubted victims’ credibility if they knew or were even minimally acquainted with the assailant.”⁵⁴ Asked “how common it was that known associates, friends, and/or partners rape their partners, police acknowledged that it does happen, but, in their belief, not that often.”⁵⁵

⁵⁰ See *id.* at 104–05; Kathy Dobie, *To Catch A Rapist*, N.Y. TIMES MAG. (Jan. 5, 2016), <http://www.nytimes.com/2016/01/10/magazine/to-catch-a-rapist.html> [<https://perma.cc/GJ98-3FUL>] (“[A]quaintance-rape cases with DNA evidence do better in court—not only are these cases more likely to be pursued by prosecutors, but they’re also more likely to end in a successful conviction.”).

⁵¹ CAMPBELL ET AL., *supra* note 47, at 137 (noting that “many police heard these messages as: SAK [sexual assault kit] testing is extra work and it probably won’t matter anyway, and I don’t have time to do this, and I don’t believe the victim and no else does either, so why invest in this case”) (alteration in original). For a description of the kinds of evidence contained in a rape kit, see generally Lynn Hecht Schafran, *Medical Forensic Sexual Assault Examinations: What Are They, and What Can They Tell the Courts?*, 54 JUDGES’ J. 16 (2015).

⁵² CAMPBELL ET AL., *supra* note 47, at 105.

⁵³ *Id.* at 109 (describing police attitudes as “rooted in sexism, racism, and classism”); see also *id.* at 101 (reporting one interviewee’s assessment that “*this is a crime that affects women, and in this city, that means Black women, poor Black women. . . there’s a good chunk of the explanation [for the failure to submit the kits] right there*”) (alteration in original).

⁵⁴ *Id.* at 115. Other specific attitudes that “appear to have negatively impacted case investigations (and ultimately [sexual assault kit] submissions)” were that victims were engaged in prostitution/sex work, and that adolescent victims were claiming rape to “cover up for ‘bad’ behavior.” *Id.* at 109–13 (alteration in original). In order to analyze the influence of police attitudes toward sexual assault on case processing, the study utilized investigator reports “to illustrate how these beliefs appear to be enacted in practice.” *Id.* at 118. Although “acknowledg[ing] that police reports do not tell the full story of an investigation,” researchers underscored that “what *was* expressed, clearly and frequently, in the reports we reviewed was a wide-spread disbelief of victims, particularly those who might have been involved in sex work, those who were adolescents, and those who knew their offenders.” *Id.* (alteration in original).

⁵⁵ *Id.* at 115 (“When asked about how common it was that known associates, friends, and/or partners rape their partners, police acknowledged that it does happen, but, in their belief, not that often: ‘*Truly rape? Sometimes. But not most of the time.*’”).

Shelved rape kits in Detroit and elsewhere across the nation⁵⁶ are tangible representation of a massive policing failure—a failure that is multi-faceted. Consider the enormous gap between commonplace practices and best practices.⁵⁷ A thorough sexual assault investigation requires fairly evaluating complainant credibility,⁵⁸ collecting and preserving all relevant and corroborative evidence,⁵⁹ identifying and documenting injuries (physical and psychological),⁶⁰ and interviewing the complainant,⁶¹ in addition to all possible witnesses⁶² and suspects.⁶³ Unless and until police conduct a competent investigation, the case should not be closed.⁶⁴

⁵⁶ See *id.* at v.

⁵⁷ See *Gender Bias in Law Enforcement*, *supra* note 6, at 10–22. These “best practices” have recently been described and recommended by the Justice Department. See *infra* notes 270–283 and accompanying text (discussing the practical and conceptual significance of Justice Department guidance in this area).

⁵⁸ See *Gender Bias in Law Enforcement*, *supra* note 6, at 11.

A victim’s nonconformance with behavior stereotypes should not impact the way law enforcement officers evaluate the complaint. Biases should also not prevent officers from taking a report or detectives from conducting a full investigation of all complaints received. Thus, the following factors, standing alone, are not dispositive in determining a victim’s credibility: delayed reporting; the victim’s history of making similar reports; the victim’s sexual history; the victim’s emotional state (e.g., whether a victim appears calm versus emotional or visibly upset); the victim’s lack of resistance; the victim’s criminal history or history of prostitution; evidence that the victim has a mental illness; evidence that the victim has a history of abusing alcohol or drugs; what the victim was wearing at the time the victimization occurred; whether the victim is of comparable size/strength to the assailant; the lack of any obvious signs of physical harm to the victim; the victim’s sexual orientation or gender identity; and whether the victim was attacked by a person of the same sex.

Id.

⁵⁹ *Id.* at 16. The guidance specifically mentions the importance of “ensuring that forensic medical exams, including ‘rape kits,’ are completed and analyzed in a timely manner . . .” *Id.*

⁶⁰ *Id.* This includes injuries observed at the time of the incident and during subsequent interactions. *Id.*

⁶¹ See *Gender Bias in Law Enforcement*, *supra* note 6, at 12.

Although law enforcement agencies will often need to ask difficult questions on the above topics to get information necessary to fully investigate a complaint or prepare a case for successful prosecution, *how* and *when* difficult questions are asked is an important consideration. By taking affirmative steps to respect the dignity of all complainants, law enforcement officers may be able to increase the quality and quantity of the information they receive. In addition, there are also some questions that are inappropriate to ask at any point during the investigation, no matter how they are phrased. These types of questions ignore the trauma that victims experience and, whether intentionally or not, suggest that blame should be placed on the victim or that the victim should not have reported the incident to the police at all.

Id.

⁶² *Id.* at 16. Each interview should be conducted separately. *Id.*

⁶³ *Id.*

⁶⁴ See *id.* at 17.

In reality, police officers routinely opt not to thoroughly investigate, much less arrest, in sexual assault cases. Victims thus confront a law enforcement regime systemically predisposed to dismiss, rather than pursue, their complaints.⁶⁵ As a consequence, rape survivors are effectively denied the protective resources of the state.

I turn now to the constitutional dimensions of this unequal police protection.

II. THE CONSTITUTIONAL STATUS OF PROTECTION

The meaning of equal protection has constricted since it was originally conceived. Although the 39th Congress chiefly intended the clause to protect those most vulnerable to police inaction, the Supreme Court's subsequent interpretations have substantially foreclosed the possibility of legal redress for discriminatory underenforcement. Section A explains the 39th Congress's concern that all citizens be protected from private violence.⁶⁶ Section B explains how the Supreme Court has obscured the clause's core purpose.⁶⁷

A. Protection as Paramount: The 39th Congress

As the 39th Congress debated the Fourteenth Amendment, a particular concern loomed large.⁶⁸ Although slavery had been formally abolished, white violence against blacks remained rampant and unpunished.⁶⁹ Without federal intervention,⁷⁰ this denial of protection was bound to perpetuate the subservi-

All sexual assault or domestic violence complaints should be investigated, regardless of any of the following circumstances: the victim has gaps in memory; there are potential conflicts in the victim's statements; the victim is reluctant to share his or her story; the victim expresses concern over having the alleged assailant charged with a crime; the victim expresses self-blame (e.g., suggests that she/he didn't fight hard enough to stop the assault); the victim is emotionally distraught and unable to discuss the incident; or the victim was under the influence of alcohol or drugs at the time of the incident.

See *Gender Bias in Law Enforcement*, *supra* note 6, at 17. A police investigation should "ascertain the facts, determine whether the incident is a crime, and [if so] develop a case that supports effective prosecution and holds the perpetrator accountable." *Id.* at 3. (alteration in original).

⁶⁵ See *supra* note 46 and accompanying text (citing the Justice Department's description of the effects of gender bias in sexual assault investigations).

⁶⁶ See *infra* notes 68–93 and accompanying text.

⁶⁷ See *infra* notes 94–118 and accompanying text.

⁶⁸ See JACOBUS TENBROEK, *EQUAL UNDER LAW* 116–31 (1965).

⁶⁹ See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 119–23 (Harper Perennial Modern Classics 2014) (1988).

⁷⁰ See generally Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986). The Civil Rights Act of 1866, which was incorporated into the Fourteenth Amendment, declared that "citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is en-

ent legal status of black citizens.⁷¹ The promise of equality could not possibly be achieved unless the laws against private violence were applied regardless of the race of its victims.⁷²

With this imperative in mind, the framers included a provision squarely aimed at the state's failure to protect.⁷³ In order to ensure that the laws against violence would be uniformly enforced, the Equal Protection Clause was embedded in the Fourteenth Amendment.⁷⁴

This history is not generally contested.⁷⁵ Indeed, among scholars whose work reflects a range of methodological approaches to constitutional interpretation,⁷⁶ there is widespread agreement about the relevant history: the central concern of the Equal Protection Clause was protection from violence—that is, a need for criminal law enforcement.⁷⁷ Consider a non-exhaustive sample of

joyed by white citizens . . .” 42 U.S.C. § 1981 (1866) (amended 1991). The Act, moreover, granted the federal courts jurisdiction to “dispense the protection that was being denied.” See Robert J. Kaczorowski, *Congress's Power to Enact Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 258 (2005). As Robert Kaczorowski explains, “[T]he framers devised a truly extraordinary remedy for violations of civil rights caused by state action or inaction: they conferred jurisdiction on the federal courts to the exclusion of the states, to administer civil and criminal justice in actions arising under state law.” *Id.* at 282. The Supreme Court, however, quickly curtailed this jurisdictional grant. For a thorough account, see generally Robert D. Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469 (1989).

⁷¹ See TENBROEK, *supra* note 68, at 116–31; see also Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 126–34 (1991) (developing the idea of equal protection as a guarantor of “sole sovereignty”).

⁷² It should be emphasized that the framers were concerned with protection “not only from private violence, but also from the economic isolation, deprivation, dependence, and ultimate economic subjugation that would inevitably result from the withdrawal of the state's private law.” West, *supra* note 71, at 144. The modern day implications of this concern are profoundly important and worthy of further exploration.

⁷³ See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1436–38, 1447–51 (1992); see also *supra* note 70 and accompanying text.

⁷⁴ See *infra* notes 75–83 and accompanying text.

⁷⁵ See West, *supra* note 71, at 132. West writes:

As far as I can tell, this particular history is not controversial; indeed, this can fairly be called the *uncontested* meaning of the Fourteenth Amendment. Given the degree of discord among legal theorists regarding the meaning of the equal protection clause, it is, at first blush, somewhat remarkable that there is such widespread consensus among historians, including those same legal theorists when wearing their “historian” hats, that this abolitionist meaning, or something closely akin to it, *is* the meaning of the equal protection clause which was embraced by those who most actively campaigned for its inclusion in the Constitution, from the 1830's all the way through the passage of the Amendment itself.

Id.

⁷⁶ For a sociology of the constitutional law that emerged during Reconstruction, see generally PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION* 47–55 (1999).

⁷⁷ This is not to suggest that the paradigmatic equal protection violation was the only kind of violation contemplated by the framers. Many of the constitutional claims subsequently placed within the ambit of the Equal Protection Clause may have been conceived originally as violations of either

this scholarly consensus.⁷⁸ Akhil Amar explains that equal protection “at its core affirms the rights of victims to be equally protected by government from criminals.”⁷⁹ Randy Barnett notes that the Clause “mandates that *protection* of proper laws be provided equally to all persons.”⁸⁰ Cass Sunstein and Adrian Vermeule observe that “[t]he very idea of ‘equal protection of the laws,’ in its oldest and most literal sense, attests to the importance of enforcing the criminal and civil law so as to safeguard the potential victims of private violence.”⁸¹ William Stuntz writes:

In criminal justice as elsewhere, discretion and discrimination travel together. Hence the need to ensure that the government offers the “protection of the laws”—a great constitutional phrase, often lost in the shadow cast by the modifier “equal”—to all its citizens. That need was especially salient to the men who wrote and ratified the Fourteenth Amendment. Discrimination and lawlessness dominated post-Civil War Southern justice, as private vigilantes enforced vicious racist codes and government officials refused to stop them. Offering the law’s protection to ex-slaves was one of the chief goals of the Amendment’s drafters.⁸²

As Robin West emphasizes, “[T]he state’s protection against private violence is the central, minimal guarantee of the equal protection clause.”⁸³

One need not be an originalist⁸⁴ to care about the origins of equal protection.⁸⁵ I certainly do not claim that a historical understanding of the concept

the Due Process Clause or the Privileges and Immunities Clause. *See infra* note 104 and accompanying text (discussing the implications of a counterfactual *Slaughter-House* ruling).

⁷⁸ For a collection of the sources cited in *infra* notes 79–83 and others like them, see Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L. J. 1, 5–10 (2008). Green also defends a “duty-to-protect” meaning of the Clause. *See id.* at 14.

⁷⁹ Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 102 (2000).

⁸⁰ Randy E. Barnett, *Foreword: What’s So Wicked About Lochner?*, 1 N.Y.U. J. L. & LIBERTY 325, 331 (2005).

⁸¹ Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and the Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 708 (2005).

⁸² William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 821 (2006).

⁸³ West, *supra* note 71, at 141.

⁸⁴ *See* Andrew Koppelman, *Originalism, Abortion & the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1921 (2012).

Originalism is fundamentally about a narrative of rhetorical self-identification with the achievements of a founding historical moment. That is the real basis of its power. An originalist argument will succeed to the extent that it can persuade its audience that it can keep faith with that identification. Originalist argument is a kind of constitutional rhetoric, connecting us with the past, constructing a narrative of national identity.

must dictate its contemporary meaning. Indeed, the 39th Congress was not interested in prohibiting sex discrimination.⁸⁶ Nonetheless, the framers' vision of what the Clause essentially required—referred to in this discussion as the “protection model”⁸⁷—matters for several reasons.

As I will demonstrate, the protection model represents a concrete alternative to the Supreme Court's quite divergent rendition of what equal protection requires,⁸⁸ placing existing jurisprudential limitations in stark relief.⁸⁹ This is

Id.

⁸⁵ See, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1066–67. Barnes and Chemerinsky explain their interpretative stance:

[W]e are not suggesting that the only way to understand present-day Equal Protection Doctrine is as a function of the legislative impetus and societal conditions that gave rise to the Fourteenth Amendment and its companion Reconstruction Amendments. Inquiring into structure and history, as well as the intent of the drafters, are but a few of the several tools useful for interpreting the Constitution. . . . [R]ather than espousing the competing virtues of particular ideological commitments to interpretation, our point is merely to suggest that in divining the contemporary meaning of equality, it is helpful in part to look to the structure, historical, and textual contours of the Reconstruction Amendments.

Id.; see also *infra* note 89 and accompanying text.

⁸⁶ For competing accounts of the constitutional significance of this fact, see generally Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011); Reva R. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

⁸⁷ The approach has been variously described.

⁸⁸ See *infra* notes 94–104 and accompanying text.

⁸⁹ This observation is consistent with Robin West's defense of a constitutional methodology that contemplates the relevance of history:

[T]he history and text being shed, although no doubt in large part a succession of waves of brutality and oppression, may also contain moments of real nobility and courage, and the text that is the culmination of those moments may embody and express part of a profoundly moral social vision. If we turn our backs on history and text, in short, we may be turning our backs on imaginings more worthy than our own. The Fourteenth Amendment, in fact, may be just such a text; its passage may have been just such a moment, and its normative implications just such a vision. If we abandon the history and text of the Fourteenth Amendment as possible guides to at least its possible meanings, whether or not those meanings exhaust the possibilities and whether or not we should regard them as “authoritative,” we may be abandoning a source of moral insight and a vision of the just society that is superior to those visions our current ahistoric and parochial “selves” have managed to envision. . . . Even if we assume, or insist, that the intended meaning should not be regarded as the only possible meaning—that there may have been several and conflicting intended meanings, and that the historical meaning carries no modern legal mandate—the possibility that the originally intended meaning is normatively superior to modern interpretations is surely a sufficient reason to reacquaint oneself with the text and origins of the constitutional text.

West, *supra* note 71, at 123–24.

true generally but also with specific regard to failures to police gender violence.⁹⁰

Apart from the realm of doctrinal critique, the protection model highlights the importance of Congress's "Reconstruction Power"⁹¹ in ensuring a remedy for unchecked private violence.⁹² The protection model thus facilitates more expansive thinking about the federal obligation to dismantle regimes of discriminatory underenforcement. This insight has special force in the policing realm.

The framework that emerges from this discussion allows us to situate the under-policing of rape law in constitutional context. In Part III, I will describe recent moves by the Justice Department to hold law enforcement officers accountable for failing to protect victims of sexual assault. In important respects, this turn is unprecedented.⁹³ Yet insofar as the latest developments reflect an enduring concern for violence without redress, the (re)emergence of federal power should be understood to possess deep historical roots.

B. Protection as Peripheral: The Supreme Court

Soon after the Supreme Court began hearing cases involving the Equal Protection Clause, without fanfare, it displaced the protection model with the familiar anti-classification approach that today remains the animating feature of equal protection jurisprudence.⁹⁴ According to the Court, the Equal Protection Clause is essentially meant to prohibit legislative and administrative distinctions that rest on an improper basis.⁹⁵

⁹⁰ See *infra* notes 107–108 and accompanying text.

⁹¹ Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1801 (2010).

⁹² See *infra* notes 94–104 and accompanying text.

⁹³ See *infra* note 132 and accompanying text.

⁹⁴ See Green, *supra* note 78, at 278, 290–91. Early cases from the 1870s were more consistent with a "duty-to-protect reading." *Id.* By the mid-1880s, however, class-discriminating legislation had become the focus. *Id.* at 288–91 (tracing the jurisprudential evolution). In 1886, the U.S. Supreme Court explained its understanding in *Yick Wo v. Hopkins*, "[T]he equal protection of the laws is a pledge of the protection of equal laws." 118 U.S. 356, 369 (1886). A decade later, the anti-classification principle was more fully articulated:

[T]he mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification

Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 165 (1897).

⁹⁵ See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9–10 (2003) (discussing the interplay between anti-subordination norms and the anti-classification approach). Although anti-classification has, over time, described the Court's dominant mode of understanding the meaning of equal protection, "American civil rights jurisprudence vindicates both anticlassification and antisubordination commitments, even

In the course of elaborating on this principle, the Court has crafted a set of doctrinal parameters that have further directed *equal protection* away from *protection*.⁹⁶ Both the state action requirement, which tends to eliminate inaction as a concern,⁹⁷ and the tiered levels of scrutiny that vary depending on group composition⁹⁸ may be viewed as by-products of the Court's move to an anti-classification regime.

The turn away from a protection model also facilitated the creation of a discriminatory intent requirement. In a line of cases beginning in 1976 with *Washington v. Davis*,⁹⁹ continuing to 1977 with *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁰⁰ and culminating in 1979 with *Personnel Administrator of Massachusetts v. Feeney*,¹⁰¹ the U.S. Supreme Court announced its insistence on a showing of "discriminatory purpose,"¹⁰² which necessitated that "the decisionmaker . . . selected or reaffirmed a partic-

as the antisubordination principle sits in perpetual judgment of American civil rights law, condemning its formalism, compromises, and worldly limitations, and summoning it to more socially transformative ends." *Id.* at 10–11. For a discussion of how the protection model (referred to as the "abolitionist understanding") differs from anti-subordination and anti-classification approaches, see West, *supra* note 71, at 134–38 (arguing that formalist and anti-subordinationist models both reflect (conflicting) interpretations of *equality*, rather than elaborating on the meaning of *equal protection*).

⁹⁶ See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 189 (1989). To grasp the extent to which the U.S. Supreme Court has refashioned the Equal Protection Clause, we might observe that its two seminal cases of police failures to protect victims from private violence were not even framed as equal protection claims. See *Town of Castle Rock*, 545 U.S. at 768; *DeShaney*, 489 U.S. at 189. In 1989, in *DeShaney v. Winnebago County Department of Social Services*, the Court addressed (and limited the reach of) substantive due process. See *DeShaney*, 489 U.S. at 189. In 2005, in *Town of Castle Rock, Colorado v. Gonzalez*, the Court addressed (and contracted the scope of) procedural due process. See *Town of Castle Rock*, 545 U.S. at 768. Neither case, according to the Court, involved a constitutional duty to protect. See *id.*; *DeShaney*, 489 U.S. at 189.

⁹⁷ For historical analysis, see generally Pamela Brandwein, *A Judicial Abandonment of Blacks? Reconsidering the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343 (2007). For one of many jurisprudential critiques, see generally Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481 (2006). For a more recent assessment in light of the U.S. Supreme Court's decision in 2015 in *Obergefell v. Hodges*, see generally James M. Oleske, "State Inaction," *Equal Protection, and Religious Resistance to LGBT Rights*, 87 COLO. L. REV. 1 (2016).

⁹⁸ Kermit Roosevelt III, *What If Slaughter-House Had Been Decided Differently?*, 45 IND. L. REV. 61, 73 (2011). As Kermit Roosevelt has written:

[E]xceptions must be made to the anti-classificationist command. Sometimes discrimination (by which I mean merely differential treatment) is morally required And sometimes it is in keeping with our idea of merit and desert Rational basis review in the absence of a suspect classification, and the related rule that disparate impact by itself merits only rational basis review, limit judicial interference.

Id.

⁹⁹ *Washington v. Davis*, 426 U.S. 229, 235 (1976).

¹⁰⁰ *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977).

¹⁰¹ *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

¹⁰² *Id.* at 279.

ular course of action at least in part ‘because of’ not merely ‘in spite of’ its adverse effects upon an identifiable group.”¹⁰³

One striking feature of the intent requirement is how it derives from the anti-classification approach to equal protection. Kermit Roosevelt explains the logic as follows:

Under our current anti-classificationist approach . . . [w]ithout intentional discrimination, there can be no anti-classification claim. That makes some sense as far as anti-classification is concerned. . . . Governmental sorting of individuals into racial categories—regardless of whether this sorting is the basis for oppression, or even for differential treatment of the categories—is itself the harm the clause seeks to avert. Unintentional discrimination does not involve any such classification and, therefore, it is reasonable that unintentional discrimination cannot create a claim under anti-classificationist equal protection. But from the failure to protect perspective, the harm more likely lies in the actual injury suffered, which the state has failed to avert or remedy. Intent is far less relevant. Put another way, failure to protect seems to demand equality of outcome in a way that anti-classification does not.¹⁰⁴

¹⁰³ *Id.* To evaluate whether a law enforcement activity was motivated by discriminatory intent, courts are instructed to consider the totality of circumstances and are to consider factors that indirectly indicate an intent to discriminate, including evidence of discriminatory impact, evidence of departures from proper procedures, and contemporaneous statements by a decisionmaker or by responding officers. See *Vill. of Arlington Heights*, 429 U.S. at 265–66. Notwithstanding this directive, courts are generally skeptical of the use of discriminatory impact to establish discriminatory intent. See, e.g., *Ricketts v. City of Columbia*, 36 F.3d 775, 781 (8th Cir. 1994).

¹⁰⁴ Roosevelt, *supra* note 98, at 75–76. Roosevelt’s larger point is that the Court’s decision in the *Slaughter-House Cases* to exclude Bill of Rights liberties from the protections of the Privileges or Immunities Clause may have resulted in an undue narrowing of the Equal Protection Clause. *Id.* As Roosevelt puts it, “By forcing Equal Protection and Due Process to shoulder a burden that Privileges or Immunities let slip, *Slaughter-House* prevented them from performing other functions.” *Id.* at 70. What is especially intriguing about this idea is that, had Equal Protection not been tasked with this burden, it may well have evolved to fulfill its intended function. In this counterfactual,

Equal protection would be understood to be focused on the failure of state officials to enforce state law to the benefit of certain individuals or groups. Such selective enforcement would be the core Equal Protection violation, rather than the somewhat marginal one it is today. We would understand Equal Protection as a positive right, as guaranteeing some affirmative assistance and protection from the state. . . . And we would have a greater receptivity to the idea that failure to protect is constitutionally problematic.

Id. at 72–73. Doctrinally, were these claims to be considered paradigmatic, disparate impact would trigger more aggressive judicial scrutiny. *Id.* at 77. In a similar vein, a differently decided *Slaughter-House* may well have resulted in a subordination-oriented Due Process Clause—one that would require “more searching judicial review . . . where government action burdens a subset of a vulnerable

The Court's inattention to equality of outcome—disparate impact—has translated into an intent requirement that does not map well onto the workings of bias.¹⁰⁵ This is a significant problem in the policing context, which the Court has utterly failed to connect with animating equal protection concerns.¹⁰⁶ Even in cases alleging paradigmatic failure to protect violations, the Court's demand for a showing of intentional discrimination has often proved to be an insurmountable barrier.¹⁰⁷ For instance, despite pervasive gender bias in law enforcement's response to violence over time, women's underenforcement related claims have fared poorly. By requiring proof of intentional discrimination, the Court has largely immunized the underenforcement of laws against private violence¹⁰⁸—a problem that the Equal Protection Clause was specifically designed to redress.¹⁰⁹

group.” *Id.* at 86. See generally *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872) (holding that the Bill of Rights liberties are excluded from the protections of the Privileges and Immunities Clause).

¹⁰⁵ See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that racial discrimination is substantially motivated by unconscious bias); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281, 1321 n.170 (1991) (noting that intent “requires perpetrators to know what they are doing and why” and that “[m]ost discrimination does not happen this way”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1138 (1997) (stating that discriminatory purpose “is a juridical concept that does not reflect prevailing understandings of the ways in which racial or gender bias operates”). For a collection of work focused on the problem of implicit bias, see Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 978 n.45 (2006). See also Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 750–59 (1995) (reviewing the relevant social-psychological literature).

¹⁰⁶ See *Town of Castle Rock*, 545 U.S. at 768; *DeShaney*, 489 U.S. at 189.

¹⁰⁷ See, e.g., *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Ricketts*, 36 F.3d at 780–82; *Eagleston v. Guido*, 41 F.3d 865, 876 (2d Cir. 1994); *McKee v. City of Rockwall*, 877 F.2d 409, 415–16 (5th Cir. 1989); *Watson v. City of Kansas City*, 857 F.2d 690, 694–97 (10th Cir. 1988); *Soto v. Carrasquillo*, 878 F. Supp. 324, 329–30 (D.P.R. 1995); *Cellini v. City of Sterling Heights*, 856 F. Supp. 1215, 1220 (E.D. Mich. 1994). For a notable exception to the rule of no liability, see *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527–29 (D. Conn. 1984); see also *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 700–01 (9th Cir. 1988). It is worth noting, as compared to the domestic violence arena, that police failures to protect sexual assault victims have generated far less constitutional litigation. This landscape, however, may be on the cusp of change. See, e.g., *Complaint at 2, Marlowe v. City and County of San Francisco*, No. 4:16-cv-00076-KAW (N.D. Cal. Jan. 7, 2016) (on file with author) (alleging that police officers violated plaintiff's rights to equal protection and due process by engaging in a policy of failing to diligently investigate sexual assault allegations).

¹⁰⁸ See, e.g., *Soto*, 103 F.3d at 1066; *Soto*, 878 F. Supp. at 329–30. Gender-based “failure to protect” litigation has mostly involved domestic violence and rarely prevailed. See Niji Jain, Comment, *Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability Through the Equal Protection Clause*, 60 EMORY L. J. 1011, 1011 (2011). Niji Jain noted:

[T]he Supreme Court has substantially limited the possible § 1983-based causes of action a victim of gender-based violence can bring against a police officer. The only remaining avenue for liability is an equal protection claim. However, equal protection challenges have met such consistent rejection in the lower federal courts that many scholars believe they are not a tenable strategy for police accountability.

This disconnect may result, at least in part, from the dictates of institutional competence. As Robin West suggested decades ago in an influential discussion of marital rape,¹¹⁰ “Jurisprudential reasons may draw the Court to a rationality model of equal protection analysis.”¹¹¹ The dominant, anti-classification approach to equal protection—the “rationality model”—is attractive precisely because it corresponds to how judges decide cases. West explained:

The rationality model requires state legislators and lawmakers to “treat like groups alike” and requires Courts to see that they do so. Any legislative classification, then, must be based upon a difference between the groups that is relevant to a legitimate state interest. . . . [T]he model has an important virtue from a judicial perspective: it limits the Court’s role to the familiar one of ensuring legal justice. To do justice, a Court must treat like cases alike. For the most part, appellate courts, including the Supreme Court, simply police against lower court infractions of this principle. The rationality model simply imposes an equivalent duty on legislators. Thus, while judges must treat like cases alike, legislators, who deal with groups instead of cases, also must treat like groups alike. The Court’s duty under the equal protection clause, then, is to ensure that the legislature metes out equal justice to the groups before it, just as the Court’s appellate function is to ensure that lower courts mete out equal justice to the individuals who appear before them. The rationality model of equal protection may be the only model that so neatly dovetails with the most traditional, and even classical, view of judicial functions and domain.¹¹²

Id.

¹⁰⁹ See *supra* notes 68–83 and accompanying text.

¹¹⁰ See generally Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990) (positioning the marital rape exemption as a violation of equal protection). West’s conception of equal protection, as well as her proposed Married Women’s Privacy Act, inspired Victoria Nourse, then a staffer on the Judiciary Committee, to pursue the idea for legislation that would eventually become the VAWA. FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 328–37 (2009). West’s theory of the source of equal protection formalism has yet to receive the scholarly attention it deserves.

¹¹¹ West, *supra* note 110, at 73.

¹¹² *Id.* at 73–74. To underscore the intractability of the dynamics involved, the passage continues:

By construing the equal protection clause as a source of “law” to be applied by Courts, the general legal culture may have to a considerable degree determined its meaning, not only because we have rendered it subject to the Court’s own sense of the pragmatic limits of its powers, but also because of the nature of law. As long as courts interpret and enforce the equal protection clause, it should not be surprising that they interpret the clause as requiring “legal justice,” or like groups must be treated alike, rather than dis-

On this view, given the Court's institutional orientation and expertise, it was (and it remains) unlikely to adopt a more protection-based interpretation of equal protection. Under a pluralistic conception of constitutional meaning, it would fall to Congress and the executive branch to ensure that the state is providing the requisite protection from private violence.¹¹³

Those critical of a "juricentric approach to enforcing the Equal Protection Clause"¹¹⁴ stress the potential for Congress to advance a more ambitious civil rights agenda.¹¹⁵ This vision, however, is necessarily tempered by the Court's

tributive or even compensatory justice. There is no reason to think that the Supreme Court is not fully confident of its ability to oversee the quality of formal, legal justice dispensed by lower courts: that is the Court's traditional, appellate function. The rationality model of the fourteenth amendment extends the obligation of doing legal justice to legislators, but it makes absolutely no fundamental change in the Court's social role. In this area as in any other, the Court continues to oversee the quality of legal justice meted out by other institutional and governmental bodies. Consequently, the ultimate judicial embrace of the rationality model, including the formal understanding of the requirement of legal justice, the antidiscrimination principle, the intent requirement, the two-tiered or three-tiered levels of review, and the "real differences" rule in the gender cases, may have been inevitable, regardless of the political composition of the Court. The Court simply may be unable and unwilling to sustain, for any length of time, any reading of equal protection that would be less legalistic and more substantive.

Id. at 74.

¹¹³ *Id.* at 75.

Under a pluralistic approach to constitutional meaning, the equal protection clause might require (1) that legislative classifications treat like groups alike; (2) that legislation not insulate or further the social subordination of women, blacks, or other suspect classes; and (3) that states ensure that all citizens enjoy the protection of its laws against private wrongdoing. . . . [If] we expand our conception of who and what is obligated to ensure equal protection under the fourteenth amendment, then pluralistic conceptions of equal protection meaning begin to look plausible. The Court could continue to ensure that legislation treat like groups alike. However, Congress could ensure that state laws prohibit subordination. Lastly, the executive branch and Congress jointly could ensure that the state supply the fundamental benefits and burdens of the social contract to all citizens equally. The state would provide security against private violence and wrongdoing in exchange for abidance with the obligations of citizenry under a rule of law regime.

Id. (alteration in original).

¹¹⁴ See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *YALE L. J.* 441, 525 (2001). Robert Post and Reva Siegel have persuasively argued that "the Court will sometimes require the assistance of Congress to succeed in the very task of constitutional interpretation" and that "Congress's understanding of equality is a vital resource for the Court to consider as it interprets the Equal Protection Clause." See *id.* at 519–20. Notwithstanding the ways in which Congress is uniquely situated to vindicate equal protection norms, the Court has at times "seem[ed] to reason from the premise that its own authority in enforcing the Equal Protection Clause renders Congress's role in enforcing the Clause incidental and a ready target of judicial discipline." *Id.* at 522. (alteration in original).

¹¹⁵ See Balkin, *supra* note 91, at 1846–56 (discussing how Congress could enforce the equal protection guarantee while transcending the limits imposed by the Court's faulty constructions). See generally DAVID H. GANS & DOUGLAS T. KENDALL, *CONST. ACCOUNTABILITY CTR., THE SHIELD OF*

hostility to legislative enforcement mechanisms.¹¹⁶ Where the failure to police gender violence is concerned, commentators understandably speak of useful Congressional action in mostly aspirational terms.¹¹⁷

This framing is perfectly understandable: after passage of the Fourteenth Amendment, the protection model of equal protection, along with the federal power to enforce it, lay dormant. Recent events, however, have revived this model and this power, allowing a glimpse of a modern version of what the 39th Congress intended.¹¹⁸ As I will show, the Justice Department's latest deployment of its "pattern or practice" enforcement authority—authority granted over two decades ago by statute—may come as close as any intervention since Reconstruction to addressing the framers' chief concern with underenforcement. Notwithstanding the Court's divergent path, the original meaning of equal protection has begun to resurface.

NATIONAL PROTECTION: THE TEXT AND HISTORY OF SECTION 5 OF THE FOURTEENTH AMENDMENT (2009) (arguing that the Enforcement Clauses grant Congress the power to regulate private action).

¹¹⁶ See Balkin, *supra* note 91, at 1820 (noting that the Court has "systematically undermined Congress's powers to enforce the Reconstruction Amendments"). In 2000, the U.S. Supreme Court, in *United States v. Morrison*, invalidated the civil rights provision of the VAWA, curtailing Congress's authority to enforce equal protection. As Vicki Jackson explains:

In *United States v. Morrison* . . . the Court treats the arguments for congressional power to enact the Violence Against Women Act's civil rights remedy under the Commerce Clause as a matter separate and distinct from the question of congressional power under the Fourteenth Amendment. The history of state officials' failures to respond to violence directed at women because of their gender, and the effects of such unremedied violence on women's abilities to participate in public life (including the economy), is absent from the Commerce Clause discussion. Although some amici had argued that whatever the limits of the commerce power, Congress surely had the authority to remove obstacles that stood in the way of full and equal participation in national economic life by a traditionally disadvantaged group, the suggestion that "equal protection" (or equality) concerns might inform analysis of the scope of the Commerce Clause was not even acknowledged by the Court. The Commerce Clause and the Fourteenth Amendment's Equal Protection Clause were like ships in different seas of argument, the one bearing no connection to the other and analyzed in isolation from each other.

Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1276 (2001); see Post & Siegel, *supra* note 114, at 481–86.

¹¹⁷ See, e.g., Balkin, *supra* note 91, at 1850 (suggesting that Congress consider "two basic models for remedying state neglect—one focused on protecting *rights* and the other focused on protecting *classes*").

¹¹⁸ See THOMAS E. PEREZ & MICHAEL W. COTTER, U.S. DEP'T OF JUSTICE, RE: THE UNITED STATES' INVESTIGATION OF THE MISSOULA POLICE DEPARTMENT 3 (2013), available at https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/missoulapdfind_5-15-13.pdf. I do not claim that this application reflects the closest possible resemblance to the originally intended regime. See Kaczorowski, *Congress's Power to Enact Fourteenth Amendment Rights*, *supra* note 70. Nor do I assume that existing enforcement mechanisms are superior to the possible alternatives. See Balkin, *supra* note 91, at 1850–56 (proposing various ways for Congress to ensure that states provide protection from violence).

III. THE NEW POLICE ACCOUNTABILITY

Section 14141, 42 U.S.C., authorizes the Justice Department to bring suit against police departments engaged in a “pattern or practice” of unconstitutional conduct.¹¹⁹ The statute was enacted in 1994, after the videotaped police beating of Rodney King and its aftermath brought to the fore limitations of extant legal responses to police misconduct.¹²⁰ Structural reform litigation, in particular, had been substantially foreclosed by the Supreme Court’s issuance of a series of standing decisions restricting plaintiffs’ rights to sue a police department for equitable relief under 42 U.S.C. § 1983.¹²¹

Since the enactment of § 14141, most Justice Department investigations have been resolved by a negotiated settlement,¹²² although a number of en-

¹¹⁹ The statute reads:

§ 14141. Cause of action

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

42 U.S.C. § 14141 (2012).

¹²⁰ See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 8–13 (2009); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1356–58 (2015) (providing a thorough account of the origins of § 14141); see also Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 155 (2015) (arguing that the Justice Department can increase the effectiveness of § 14141 by placing greater reliance on newly amassed federal datasets).

¹²¹ See *City of L.A. v. Lyons*, 461 U.S. 95, 105–10 (1983); *Rizzo v. Goode*, 423 U.S. 362, 371–73 (1976); *O’Shea v. Littleton*, 414 U.S. 488, 493–99 (1974); Harmon, *supra* note 120, at 11–12. Rachel Harmon noted,

As a result [of the Court’s decisions in this area], § 1983 is a weaker tool for seeking institutional reform in police departments than it has been in other civil rights contexts. Prior to § 14141, no statute other than § 1983 authorized suits for equitable relief against police departments for officer misconduct, and it remains the case that no other statute authorizes private equitable suits.

Harmon, *supra* note 120, at 11–12 (alteration in original).

¹²² Harmon, *supra* note 120, at 16–17. As Harmon has explained:

Consent decrees and memoranda of agreement are negotiated settlements in which a city does not admit liability, but nevertheless agrees to adopt specific remedial measures to end the matter and avoid litigation. Consent decrees are more formal and are contained in a court order. Thus, a district court must agree to terminate a consent decree. The memoranda, by contrast, are drafted as private contracts between the city at

forcement actions are currently pending in federal court.¹²³ Unsurprisingly, the Justice Department's enforcement capability has been constrained by resource limitations,¹²⁴ and commentators have proposed various ways of improving the statute's implementation.¹²⁵

For most of its history, the use of § 14141 was aimed at a specific type of constitutional violation—namely, misconduct falling within the ambit of discriminatory over-policing.¹²⁶ In a subtle and unremarked shift, however, § 14141 investigations have lately grown to encompass patterns of biased *underenforcement*. This development has special significance for groups afforded

issue and the United States. Parties can enforce them only by suing for breach of contract. Both the Justice Department's memoranda of agreement and consent decrees have provided for independent auditors to monitor and report on the police department's compliance with the agreement.

Id.

¹²³ See generally Complaint, United States v. Colorado City, No. 3:12-cv-08123-HRH (D. Ariz. June 21, 2012) (detailing enforcement action against Colorado City, Arizona); Complaint, United States v. Maricopa County, No. 2:12-cv-00981-ROS (D. Ariz. May 10, 2012) (describing enforcement action against Maricopa County Police Department). The outcome of these cases will likely bear on the scope of future enforcement efforts. Cf. Rushin, *Structural Reform Litigation*, *supra* note 120, at 1417–18. Relatedly, Stephen Rushin has questioned whether “the DOJ [can] force reform on a municipality that adamantly opposes it?” *Id.* He concluded:

This represents that most important question facing SRL [structural reform litigation] in the future. The answer will define the future usefulness of this regulatory mechanism. Thus far, the DOJ has not fully pursued SRL against municipalities that ardently oppose federal oversight.

Id. (alteration in original).

¹²⁴ See Rushin, *Structural Reform Litigation*, *supra* note 120, at 1415–16. As Rushin notes,

Another potential drawback of § 14141 is that the federal government simply lacks the resources necessary for aggressive enforcement. Remember that the DOJ has only investigated around three police agencies each year pursuant to § 14141 As one former DOJ litigator complained, “I can tell you . . . that there are far more agencies that . . . have some sort of a problem of constitutional dimensions than we would ever get to.”

Id.; see Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3244–47 (2014) (documenting spotty Justice Department enforcement and pointing to causal shifts in enforcement policies that are partly based on Administration priorities).

¹²⁵ See, e.g., Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 515–19 (2008); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1396–1407 (2000); Harmon, *supra* note 120, at 20–23; Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479, 536–42 (2009).

¹²⁶ Writing in 2009, just before the onset of developments described in these pages, Rachel Harmon observed, “All of the Justice Department’s § 14141 investigations have focused on a few key kinds of misconduct, including racial profiling and other forms of discriminatory harassment, the use of excessive force, false arrests, and illegal stops and searches.” Harmon, *supra* note 120, at 18.

relatively scant access to criminal justice, including victims of gender violence.

Section A discusses how § 14141 was first applied to the phenomenon of gender-biased underenforcement, examining four “pattern or practice” investigations initially focused on overenforcement.¹²⁷ Section B describes the groundbreaking investigation into the underenforcement of rape law in Missoula, Montana.¹²⁸ Section C details successful efforts to incentivize departmental reform in the area of sexual assault.¹²⁹

A. § 14141 and the Exposure of Gender Bias

Since 2009, the Justice Department has begun attending to systemic failures to police gender violence.¹³⁰ In four cases that prominently featured familiar problems of affirmative misconduct and overenforcement, gender-biased underenforcement materialized as a separate but much-related concern.¹³¹ This small set of § 14141 investigations can be viewed as precursors to the intervention in Missoula, which was the first to exclusively target an inadequate response to sexual violence and the first to find that a failed response to such violence was unconstitutional.¹³² This shift in the meaning of law enforcement accountability began with the four investigations that zeroed in on gender discrimination.

A close look at these cases enriches conventional understandings of how biased policing works on the ground. As the Justice Department discovered, bias may be leveled at more than one demographic group simultaneously,¹³³

¹²⁷ See *infra* notes 130–207 and accompanying text.

¹²⁸ See *infra* notes 208–266 and accompanying text.

¹²⁹ See *infra* notes 267–283 and accompanying text.

¹³⁰ See generally THOMAS E. PEREZ, U.S. DEP’T OF JUSTICE, RE: UNITED STATES’ INVESTIGATION OF THE MARICOPA COUNTY SHERIFF’S OFFICE (2011); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011) [hereinafter U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT]; U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT (2011) [hereinafter U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT]; U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. & U.S. ATTORNEY’S OFFICE, DIST. OF N.J., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT (2014). This coincides with a greater overall emphasis on civil rights enforcement. See Sarah Childress, *How the DOJ Reforms a Police Department Like Ferguson*, FRONTLINE (Mar. 4, 2015), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/how-the-doj-reforms-a-police-department-like-ferguson/> [<https://perma.cc/J99F-78LQ>] (“The Obama administration has used its power aggressively to take on widespread problems of police brutality, discrimination and other abuse in local jurisdictions, negotiating more settlement agreements than either the Clinton or George W. Bush administrations.”).

¹³¹ See *supra* note 8 and accompanying text.

¹³² See *infra* notes 208–266 and accompanying text.

¹³³ Cf. *Gender Bias in Law Enforcement*, *supra* note 6, at 3 n.2 (noting that “gender bias can occur alongside other types of unlawful discrimination, including racial bias, exacerbating any deficien-

and biased policing tends to produce both over- and under-inclusive practices. Apart from providing an extraordinary vantage on the intersectional nature of unequal protection, the Justice Department findings in the pre-Missoula cases reveal how the under-policing of gender violence finally came to matter. Close attention to these findings exposes subtle differences in enforcement actions that on first glance look similar; together, the findings show how ideas about the contours of accountability take shape.¹³⁴

1. Maricopa County, Arizona

The Justice Department's three-year investigation of the Maricopa County Sheriff's Office ("MCSO")¹³⁵ was initiated in March 2009 and ultimately resulted in the filing of a federal suit.¹³⁶ A letter extensively documenting investigators' findings¹³⁷ concluded that MCSO was engaged in a "pattern or practice of unconstitutional policing" of Latinos that included racial profiling, unlawful detentions, and unlawful arrests.¹³⁸ Police were between four to nine times more likely to stop Latino drivers than similarly situated non-Latino drivers,¹³⁹ and the vast majority of "immigration-related" stops were pretextual.¹⁴⁰

cies in the criminal justice system's response to reports of sexual assault and domestic violence and further undermining access to safety for those victims").

¹³⁴ Thanks to Rachel Harmon for raising this possibility.

¹³⁵ PEREZ, *supra* note 130, at 1.

During our investigation, aided by four leading police practice experts, one jail expert, and an expert on statistical analysis, we reviewed tens of thousands of pages of documentary evidence; toured MCSO's jails; and interviewed over 400 individuals, including approximately 150 former and current MCSO jail inmates, and more than 75 former and current MCSO personnel, including the Sheriff, the Chief of Enforcement, the Chief of Patrol, the Administrative Investigative Commander, the Sergeant heading MCSO's Criminal Employment Squad, and the Lieutenant heading MCSO's Human Smuggling Unit.

Id.

¹³⁶ *Id.* at 1 n.1. Unlike most Justice Department interventions, including the others described here, this enforcement action was treated by the targeted law enforcement agency as adversarial rather than cooperative. *Id.* (noting that MCSO "repeatedly refused to provide the United States with access to pertinent material and personnel," resulting in litigation that was ultimately resolved). After the Justice Department issued its findings letter, it was unable to reach an agreement with MCSO, and it filed suit. *Id.*

¹³⁷ See *id.* at 5–17. Many of these conclusions are reiterated in the complaint that was filed in federal court. See Complaint at 1, U.S. v. Maricopa County, No. 2:12-cv-00981-LOA (D. Ariz. May 10, 2012).

¹³⁸ See PEREZ, *supra* note 130, at 2. Other documented unconstitutional practices included unlawful retaliation and operation of the jails in a manner that discriminated against Latinos with limited English proficiency. *Id.*

¹³⁹ *Id.* at 6.

¹⁴⁰ *Id.* at 6–7.

In addition to these and other constitutional violations, the Justice Department identified additional “areas of serious concern,” including the “[r]eduction of policing services to the Latino community,” and “[g]ender and/or national origin bias by failing to investigate sex crimes.”¹⁴¹ Of particular note, more than four hundred cases of sexual assault and child molestation “were not properly investigated over a three-year period ending in 2007.”¹⁴² Moreover, “many of the victims [in these cases] may have been Latino.”¹⁴³

In sum, discriminatory policing in Maricopa County was not simply a matter of too much or too little.¹⁴⁴ Rather, bias tended to lead to both overenforcement and underenforcement; in each case, equal protection norms were undermined.¹⁴⁵ The Justice Department findings expressly captured this dynamic, noting connections between the reduction of policing services to Latinos, the failure to adequately investigate sex crimes, and MCSO’s unconstitutional practices of disproportionately stopping, detaining, and arresting Latinos.¹⁴⁶ As the report emphasized:

A deliberate failure to provide policing services, or a deliberate indifference to public safety needs of certain communities, implicates important constitutional protections It does not matter for the purposes of the Constitution and federal laws whether it is an act of commission or omission.¹⁴⁷

2. Puerto Rico

In the fall of 2011, the Justice Department announced findings from its extensive investigation into the Puerto Rico Police Department (“PRPD”).¹⁴⁸ According to the report, PRPD was “broken in a number of critical and fun-

¹⁴¹ *Id.* at 14–15. An additional area of concern was the use of excessive force against Latinos. *Id.* at 15.

¹⁴² *Id.* at 16. The Justice Department noted that it would continue to investigate any allegations that this practice continued after 2007. *Id.*

¹⁴³ *Id.* (alteration in original). The Justice Department added: “If established, this may constitute a failure to provide police services in a manner that constitutes gender and/or national origin discrimination in violation of the Equal Protection guarantee of the United States Constitution.” *Id.*

¹⁴⁴ See *supra* notes 7–14 and accompanying text.

¹⁴⁵ See Press Release, Office of Pub. Affairs, Dep’t of Justice, Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff’s Office, and Sheriff Joseph Arpaio (May 10, 2012), <http://www.justice.gov/opa/pr/departments-justice-files-lawsuit-arizona-against-maricopa-county-maricopa-county-sheriff-s> [<https://perma.cc/VEG9-Q8V6>] (characterizing MCSO practices as resulting from a “culture of disregard for Latinos” and describing a “culture of bias” that contributes to discriminatory policing).

¹⁴⁶ PEREZ, *supra* note 130, at 15–16.

¹⁴⁷ *Id.* at 15; see *supra* note 97 and accompanying text (noting scholarly critiques of the state action requirement).

¹⁴⁸ See generally U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT, *supra* note 130.

damental respects,”¹⁴⁹ with biased policing a particular problem.¹⁵⁰ In addition to pervasive discrimination against Dominican community members—discrimination that encompassed excessive force and unjustified stops¹⁵¹—the Justice Department uncovered indicators of gender bias.¹⁵² Citing the underreporting of sex crimes¹⁵³ and a “longstanding failure to effectively address domestic violence and rape,”¹⁵⁴ the report expressed “serious concerns” about PRPD’s response to sexual assault.¹⁵⁵

Ultimately the PRPD and the Justice Department reached a settlement¹⁵⁶ governing both the over-policing and the under-policing that results from bias.¹⁵⁷ Guidelines for the investigation of sexual assault allegations require po-

¹⁴⁹ *Id.* at 2.

¹⁵⁰ *See id.* at 55. The Department of Justice emphasized that:

[d]iscriminatory policing can take many forms, including reliance on bias-based profiling, in which an officer impermissibly decides whom to stop, search, or arrest based upon characteristics such as race, ethnicity, or national origin. It can also include instances in which a law enforcement agency targets certain communities using particular enforcement and crime prevention tactics on the basis of stereotypes or biased decision-making.

Id.

¹⁵¹ *Id.* at 55–56.

¹⁵² *Id.* at 57.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 58.

¹⁵⁵ *Id.* at 57.

Based on our investigation, we have serious concerns that PRPD is failing to adequately address sexual assault in Puerto Rico and to prevent and address domestic violence committed by PRPD officers. While we do not currently have sufficient evidence to find that PRPD systematically denies adequate policing services to women, we believe there are sufficient indicators of a problem to require immediate and sustained remedial efforts.

Id. As the Justice Department insisted, “A law enforcement agency that systematically fails to address the needs of discrete, recognized communities violates the Fourteenth Amendment.” *Id.* at 58.

¹⁵⁶ *See* Agreement for the Sustainable Reform of the Puerto Rico Police Department at 1, *U.S. v. Puerto Rico*, No. 3:12-cv-2039 (D.P.R. July 17, 2013) [hereinafter Agreement]; Joint Motion Submitting Agreement and Requesting a Stay of Proceedings at 1, *U.S. v. Puerto Rico*, No. 3:12-cv-2039 (D.P.R. Dec. 21, 2012). The agreement requires the parties to select a Technical Compliance Advisor to assess and report whether the terms have been implemented, as well as “whether this implementation is resulting in constitutional and effective policing, professional treatment of individuals, and increased community trust of PRPD.” Agreement, *supra* note 156, at 71.

¹⁵⁷ *See, e.g.,* Agreement, *supra* note 156, at 38.

PRPD shall apply and administer all programs, initiatives, and activities without discriminating on the basis of race, color, ethnicity, national origin, religion, gender, disability, sexual orientation, gender identity, gender expression, or political ideology or affiliation. PRPD shall develop policies and practices to prohibit selective enforcement or non-enforcement of the law based on these characteristics.

Id. For the provisions pertaining to equal protection, see *id.* at 36–40.

lice to operate in a manner “free of gender-based bias,”¹⁵⁸ while specifically mandating the creation of policies and procedures based on recognized models¹⁵⁹ and the tracking of all investigative outcomes.¹⁶⁰ A comprehensive evaluation of PRPD’s progress in implementing the terms of the agreement is due in 2020.¹⁶¹

3. Newark, New Jersey

In July 2014, the Justice Department reported findings from its three-year investigation of the Newark Police Department (“NPD”).¹⁶² The investigation was triggered by allegations of excessive force and discriminatory stops and arrests,¹⁶³ all of which eventually would be documented.¹⁶⁴ The Justice Department’s ultimate determination, however, was that problems with NPD were even more far reaching than initially suspected.¹⁶⁵

¹⁵⁸ *Id.* at 40.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 41.

¹⁶¹ *See id.* at 84–85; *see also* Press Release, Office of Pub. Affairs, Dep’t of Justice, District Court Approves Selection of Arnaldo Claudio as Technical Compliance Advisor to Oversee Critical Reforms of Puerto Rico Police Department (June 5, 2014), <http://www.justice.gov/opa/pr/district-court-approves-selection-arnaldo-claudio-technical-compliance-advisor-oversee> [https://perma.cc/6ZX9-NZ2H].

¹⁶² *See* U.S. DEP’T OF JUSTICE & U.S. ATTORNEY’S OFFICE, *supra* note 130, at 7–45. The Justice Department opened the investigation, which it conducted jointly with the U.S. Attorney’s Office for the District of New Jersey, after receiving “serious allegations of civil rights violations by the NPD, including that the NPD subjects Newark residents to excessive force, unwarranted stops, and arrests, and discriminatory police actions.” *Id.* at 1. The investigation consisted of

intensive on-site review of NPD practices and procedures. The team conducted interviews and meetings with NPD officers, supervisors, and command staff, and participated in “ride-alongs” with officers and supervisors. The team also met with representatives of police fraternal organizations, conducted numerous community meetings, met with advocates and other individuals, and interviewed a wide array of local, regional, and federal stakeholders in the Newark criminal justice system, including representatives of the Essex County Prosecutor’s Office (“ECPO”), the Essex County Public Defender’s Office, the Newark Municipal Prosecutor’s Office, and the Federal Bureau of Investigation. The team set up a toll-free number and email address to receive information related to the NPD. The DOJ also worked with NPD’s contracted data management vendor to obtain substantial amounts of data related to NPD stops and arrests.

Id. at 5.

¹⁶³ *Id.* at 1.

¹⁶⁴ *Id.* at 8–11.

¹⁶⁵ *See id.* at 1.

[T]his investigation showed a pattern or practice of constitutional violations in the NPD’s stop and arrest practices, its response to individuals’ exercise of their rights under the First Amendment, the Department’s use of force, and theft by officers. The investigation also revealed deficiencies in the NPD’s systems that are designed to prevent and detect misconduct, including its systems for reviewing force and investigating complaints regarding officer conduct. The investigation also identified concerns that do

Discriminatory practices were widespread. Newark's black residents "[bore] the brunt of the NPD's pattern of unconstitutional policing,"¹⁶⁶ including unconstitutional stop practices,¹⁶⁷ unconstitutional arrests,¹⁶⁸ and unconstitutional searches.¹⁶⁹ The disparity between the treatment of black residents and their white and Hispanic counterparts was "stark and unremitting."¹⁷⁰ Without insisting that this disparity reflected intentional race discrimination,¹⁷¹ the Justice Department emphasized that "regardless of *why* the disparity occurs, the *impact* is clear: . . ." ¹⁷² "black residents, and particularly black men, fear law enforcement action, regardless of whether such action is warranted by individualized suspicion."¹⁷³

NPD's discriminatory practices encompassed more than over-policing.¹⁷⁴ Gender-biased under-policing¹⁷⁵ and under-policing related to sexual orientation and gender identity were identified as separate areas of concern.¹⁷⁶ The

not appear to amount to patterns of constitutional misconduct, but which nonetheless are significant and warrant consideration by the NPD. These concerns relate to the NPD's practices in dealing with potentially suicidal detainees, the NPD's sexual assault investigations, and the impact of the NPD's policing on the LGBT community.

Id.; see also *id.* at 2–3 (summarizing evidence of unconstitutional practices). The remainder of the discussion centers on concerns related to equal protection.

¹⁶⁶ *Id.* at 2, 17 (alteration in original).

¹⁶⁷ *Id.* at 8–11.

¹⁶⁸ See *id.* at 11–16.

¹⁶⁹ *Id.* at 15–16.

¹⁷⁰ *Id.* at 16. For example,

Approximately 80% of the NPD's stops and arrests have involved black individuals, while Newark's population is only 53.9% black. Black residents of Newark are at least 2.5 times more likely to be subjected to a pedestrian stop or arrested than white individuals. Between January 2009 and June 2012, this translated into 34,153 more stops of black individuals than white individuals. The disparity persists throughout the city regardless of whether sectors have highly concentrated black residential populations or comparatively fewer black residents.

Id.

¹⁷¹ *Id.* at 16; see *supra* notes 99–109 and accompanying text (discussing the difficulty of establishing intentional discrimination under the Court's equal protection framework).

¹⁷² U.S. DEP'T OF JUSTICE & U.S. ATTORNEY'S OFFICE, *supra* note 130, at 17.

¹⁷³ *Id.* The Justice Department added: "This undeniable experience of being disproportionately affected by the NPD's unconstitutional policing helps explain the community distrust and cynicism that undermines effective policing in Newark." *Id.*

¹⁷⁴ *Id.* at 22, 30. The findings also detailed a "pattern or practice of unconstitutional force in violation of the Fourth Amendment" and a "pattern or practice of theft from civilians." *Id.*

¹⁷⁵ *Id.* at 46–47.

¹⁷⁶ *Id.* at 48. A list of other "potential issues or deficiencies . . . that warrant[ed] further examination by the NPD" included the inadequate attention given by police to detainee's vulnerability to suicide. *Id.* at 46–48. (alteration in original). With respect to each of these additional issues, the available evidence did "not support a finding of a pattern or practice of misconduct," but still rose to the level of concern. *Id.* at 46. For a discussion of the difficulty of establishing intentional discrimination under the Court's equal protection framework, see *supra* notes 99–109 and accompanying text.

practice of gender-biased policing encompassed “crucial deficiencies” in the way NPD handled sexual assault complaints.¹⁷⁷ As the Justice Department explained:

This deficiency is, in part, grounded in what appears to be ignorance or bias concerning victims of sexual assault, as evidenced by comments made by several command staff during interviews and a review of a sample of sexual assault investigative files. Specifically, there is evidence that some NPD officers and detectives have made mistaken assumptions about who can or cannot be a “true” victim of sexual assault. This includes views that sex workers, employees of nightclubs or adult establishments, and women who consumed alcohol with an assailant cannot be legitimate sexual assault claimants.¹⁷⁸

The Justice Department further found “anecdotal evidence” that NPD had “engaged in discriminatory policing practices based on sexual orientation or gender identity,” which included a “lack of responsiveness to complaints about violent assaults against LGBT individuals.”¹⁷⁹

The report closed by noting that NPD and the City of Newark had reached an agreement designed to remedy problems identified by the Justice Department investigation.¹⁸⁰ The agreement includes a section on “Bias Free Policing” that requires NPD to collect and review data on race, ethnicity and gender, and to “incorporate regular analysis of this data into its routine operational decisions.”¹⁸¹ The department is also obligated to provide training “that sufficiently addresses the prevention of bias based on race, ethnicity, national origin, sexual orientation, gender and gender identity.”¹⁸² Importantly, training must “not focus solely on the effects of bias on the subjects of law enforcement

¹⁷⁷ U.S. DEP’T OF JUSTICE & U.S. ATTORNEY’S OFFICE, *supra* note 130, at 46.

¹⁷⁸ *Id.* According to the Justice Department, “The NPD’s problematic response to sexual assault complaints is also structural, embedded in procedural problems with the way the NPD has handled sexual assault investigations.” *Id.* These problematic procedures included a lack of support for victims, premature closure of investigations, and a tendency to “ignore basic investigatory steps, such as checking the alleged assailant’s criminal record even when the assailant’s name and date of birth are known.” *Id.* at 47.

¹⁷⁹ *Id.* at 48. The Justice Department also found “harassment of female transgender persons by NPD officers—including the mistaken assumption that all female transgender persons are prostitutes.” *Id.* In this case, the same population was at once subjected to both overenforcement and underenforcement of the laws. *See supra* note 133 and accompanying text (describing this dynamic).

¹⁸⁰ U.S. DEP’T OF JUSTICE & U.S. ATTORNEY’S OFFICE, *supra* note 130, at 48; *see supra* note 123 and accompanying text (noting the importance of police department cooperation to the success of enforcement actions to date).

¹⁸¹ *City of Newark and United States of America Agreement in Principle 5* (July 22, 2014), http://www.justice.gov/crt/about/spl/documents/newark_prinagree_7-22-14.pdf [<https://perma.cc/H86T-VSR4>].

¹⁸² *Id.* “The curriculum will include discussion of the causes of bias, as well as strategies to avoid and mitigate its effects.” *Id.*

activity, but will also address officers' interactions with victims of crime, such as the potential impacts of bias in the response to and in the investigation of sexual assaults."¹⁸³

In Newark, the Justice Department recognized that both underenforcement and overenforcement are corollaries of discrimination.

4. New Orleans, Louisiana

The 2011 Justice Department investigation into the New Orleans Police Department ("NOPD")¹⁸⁴ resulted in a two-part conclusion: "In the absence of mechanisms to protect and promote civil rights, officers too frequently use excessive force and conduct illegal stops, searches and arrests with impunity. In addition, the Department's culture tolerates and encourages under-enforcement and under-investigation of violence against women."¹⁸⁵

The Justice Department determined that NOPD engaged in a "pattern or practice of discriminatory policing," which occurred "when police officers and departments unfairly enforce the law—or *fail to enforce the law*—based on characteristics such as race, ethnicity, national origin, sex, religion, or LGBT status."¹⁸⁶

¹⁸³ *Id.*

¹⁸⁴ See generally U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, *supra* note 130 (providing summary of the Department of Justice's findings regarding the New Orleans Police Department). For a summary of the investigation's scope, see Consent Decree Regarding the New Orleans Police Department at 2, U.S. v. City of New Orleans, No. 2:12-cv-01924-SM-JCW (E.D. La. July 24, 2012). The summary notes that

[a]s part of its investigation, DOJ, in conjunction with its police-practices consultants, conducted a detailed fact-finding review, including numerous tours of NOPD facilities; interviews with New Orleans officials, NOPD command staff, supervisors, and police officers; review of more than 36,000 pages of documents; and meetings with residents, community groups, and other stakeholders within the City. In addition, DOJ participated in detailed exit interviews between its police-practices consultants and NOPD officials following each investigatory tour.

See *id.*

¹⁸⁵ U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, *supra* note 130, at v.

¹⁸⁶ *Id.* at 31 (emphasis added). For instance,

Discriminatory policing may take the form of bias-based profiling, in which an officer decides whom to stop, search, or arrest based upon one of the above-mentioned characteristics, rather than on the subject's behavior or on credible information identifying the subject as having engaged in criminal activity. Denying police services to some persons or communities because of bias or stereotypes, or failing to take meaningful steps to enable communication, also constitute discriminatory policing. Discriminatory policing may also result when a police department selects particular enforcement and crime prevention tactics in certain communities or against certain individuals for reasons motivated by bias or stereotype.

In the realm of overenforcement, the Justice Department uncovered “troubling disparities in treatment of the City’s African-American community,”¹⁸⁷ along with evidence that Latino residents were often stopped “for unknown reasons or for minor offenses that would not ordinarily merit police attention.”¹⁸⁸ Members of the LGBT community were targeted for prostitution arrests, and police would reportedly charge transgender residents with soliciting “crimes against nature,” which required sex offender registration upon conviction.¹⁸⁹

On the underenforcement side, the Justice Department found that “[i]nadequate policies and procedures, deficiencies in training, and extraordinary lapses in supervision” had resulted in a “systemic breakdown in NOPD handling of sexual assault investigations.”¹⁹⁰ Misclassification of “large numbers of possible sexual assaults” translated into a “sweeping failure to properly investigate” these cases.¹⁹¹ Even where sexual assault complaints were pursued, “the investigations were seriously deficient” and “replete with stereotypical assumptions and judgments about sex crimes and victims of sex crimes, including misguided commentary about the victims’ perceived credibility [and] sexual history.”¹⁹²

The extensive designation of sexual assault allegations as “Signal 21s,”¹⁹³ or non-criminal complaints, was especially problematic.¹⁹⁴ In the “vast majori-

See id. at 31–32. The Justice Department found that NOPD engaged in numerous patterns of unconstitutional conduct, including the infliction of excessive force and violation of the Fourth Amendment. *See id.* at 1–30.

¹⁸⁷ *Id.* at 35.

¹⁸⁸ *Id.* at 36. NOPD routinely questioned Latino residents regarding their immigration status, resulting in a “strong belief among some segments of the Latino community that reporting crime to NOPD may subject the reporter to unwanted attention or harassment. As one participant in a community meeting told [investigators]: ‘Out of fear, we stay quiet.’” *Id.* (alteration in original).

¹⁸⁹ *Id.* As the Justice Department’s description illustrates, this policing practice discriminated across multiple dimensions of vulnerability:

Persons convicted only of soliciting crimes against nature make up nearly 40 percent of the Orleans Parish sex offender registry. NOPD is charged with monitoring all registrants’ compliance with sex offender registry requirements, raising questions about efficient and effective use of resources to ensure public safety. Further, for the already vulnerable transgender community, inclusion on the sex offender registry further stigmatizes and marginalizes them, complicating efforts to secure jobs, housing, and obtain services at places like publicly-run emergency shelters. Of the registrants convicted of solicitation of a crime against nature, 80 percent are African American, suggesting an element of racial bias as well. Indeed, community members told us they believe some officers equate being African American and transgender with being a prostitute.

Id. at 36–37.

¹⁹⁰ *Id.* at 43; *see id.* at 49–51 (summarizing NOPD’s inadequate response to domestic violence).

¹⁹¹ U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, *supra* note 130, at 43.

¹⁹² *Id.*

¹⁹³ *Id.* at 45.

ty” of these cases, sex crimes detectives would complete a Major Offense Report (“MORF”) and take no further action.¹⁹⁵ As one detective acknowledged, “If we can prove that the allegation is false during the initial investigation, that’s a MORF.”¹⁹⁶ Consistent with this orientation, “the Signal 21 reports often expressed skepticism about victims’ credibility” and “opined on victims’ possible motivations for lying.”¹⁹⁷ In interviews, “detectives asked leading or blaming questions,”¹⁹⁸ relying on “stereotypes regarding how a victim behaves in a ‘real’ case of rape.”¹⁹⁹

The parties ultimately reached a settlement and, in early 2013, a consent decree was entered that provides for close independent monitoring to ensure that the NOPD complies with the terms.²⁰⁰ The 124-page order includes a section on “bias-free policing” that requires comprehensive annual training to “emphasize that discriminatory policing in the form of either selective enforcement or non-enforcement of the law, including the selection or rejection of particular tactics or strategies based upon stereotypes or bias, is prohibited.”²⁰¹

¹⁹⁴ *Id.* For example:

By mid-August 2010, the Unit had classified 81 out of 184 complaints of possible sexual assault received in 2010, or about 44 percent, as Signal 21s. In the vast majority of these cases, sex crimes detectives filled out a Major Offense Report Form (“MORF”), coded the disposition as “NAT,” or “Necessary Action Taken,” and undertook no further review, victim follow-up, or investigation.

Id.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 46. The Justice Department underscored that the Signal 21 reports that were reviewed “clearly reflected a focus on and effort to, from the outset, ‘prove an allegation is false’—a conclusion that is virtually impossible to draw based on a cursory investigation or preliminary victim interview.”

Id.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Investigators often questioned victims about why they did not resist and why they “put themselves in certain situations.” *Id.*

¹⁹⁹ *Id.* at 47. Here is one example of this dynamic:

In one interview, of a teenager who reported being assaulted by her mother’s boyfriend, the detective wrote that the “victim was asked if she resisted and asked to explain. The victim stated that she told him to stop and he didn’t. She stated she didn’t yell or scream, nor did she try to use her cell phone to call her mom or the police. The victim states that the accused never threatened or implied to have a weapon or cause her physical harm. In fact, the victim states that accused is smaller than her in weight and around the same height.” The detective also noted that the “victim’s demeanor and her mother’s were very nonchalant and unwavered by the *police inquisition*.”

See id. at 47–48 (emphasis added).

²⁰⁰ *See* Consent Decree, *supra* note 184, at 108–22 (outlining measures of implementation and enforcement and specifically defining the role of a monitor).

²⁰¹ *Id.* at 48. Several provisions are aimed at remedying the over-policing of Latinos and transgender residents. *See, e.g., id.* at 50 (noting that officers may not “construe sexual orientation, gender identity, or gender expression as reasonable suspicion or probable cause that an individual is or has engaged in any crime.”).

A section on “policing free of gender bias” outlines a framework for improving NOPD policies and procedures governing sexual assault.²⁰² The extensive list of areas that the department must address includes documentation, victim interviews, on-scene and follow-up investigation, evidence collection, and training on responding to non-stranger assault.²⁰³ As well, specific protocols for coding sexual assaults limit the discretion afforded patrol officers and detectives, along with imposing substantially heightened supervision and transparency.²⁰⁴ Finally, NOPD must incorporate a set of accepted best practices for investigating violence against women.²⁰⁵

The most recent monitoring report found cause for cautious optimism.²⁰⁶ Although many of the reforms detailed in the consent decree are still unrealized, progress has been made. As the Monitor concluded, “Change is coming. Some will resist it, but it is coming regardless.”²⁰⁷

B. *The Paradigm: Missoula, Montana*

In the spring of 2013, the Justice Department issued findings in a § 14141 enforcement action that, for the first time, exclusively concentrated on the discriminatory policing of sexual assault.²⁰⁸

A year earlier, the Justice Department had launched a comprehensive, system-wide investigation into the underenforcement of rape law in Missoula, Montana.²⁰⁹ At the time, Attorney General Eric Holder cautioned, “The allega-

²⁰² *Id.* at 54–57; *see id.* at 58–60 (addressing the policing of domestic violence).

²⁰³ *Id.* at 55–56.

²⁰⁴ *Id.* at 56.

²⁰⁵ *Id.* at 55. For a more detailed description of the International Association of Chiefs of Police (“IACP”) guidelines, which were expressly referenced in the NOPD agreement, *see infra* note 246 and accompanying text.

²⁰⁶ *See New Orleans Consent Decree Monitor Third Quarterly Report 75* (Aug. 31, 2014), http://www.justice.gov/crt/about/spl/documents/nopd_3rdmtr_8-31-14.pdf [<https://perma.cc/H47L-WGB5>] (“The positive developments noted throughout this report and our prior reports fuel our optimism. Our optimism, however, is not without reservation.”).

²⁰⁷ *Id.* at 76.

²⁰⁸ PEREZ & COTTER, *supra* note 118, at 3. In a brief footnote, the letter contained reference to the precursors of Missoula. *Id.* at 3 n.6 (“In the past five years, the Special Litigation Section has investigated and publicly issued findings regarding the response to sexual assault by four law enforcement agencies: New Orleans (LA) Police Department, the Maricopa County (AZ) Sheriff’s Office; [and] the Puerto Rico Police Department . . .”) (alteration in original). Although the Newark Police Department was already under investigation, findings in the case had not yet been issued. *See supra* note 162 and accompanying text.

²⁰⁹ In addition to initiating a Title IX investigation of the University of Montana, the Justice Department simultaneously announced that it had opened a pattern or practice investigation into the University of Montana’s Office of Public Safety (“OPS”), the Missoula Police Department (“MPD”) and the Missoula County Attorney’s Office. *See* Press Release, Office of Pub. Affairs, Dep’t of Justice, Justice Department Announces Investigations of the Handling of Sexual Assault Allegations by the University of Montana, the Missoula, Mont., Police Department and the Missoula County Attorney’s Office (May 1, 2012), <http://www.justice.gov/opa/pr/justice-department-announces-investigations->

tions that the University of Montana, the local police department and the County Attorney's Office failed to adequately address sexual assaults are very disturbing."²¹⁰

As the investigation progressed, it became clear that gender bias was indeed undermining the response of the Missoula Police Department ("MPD") to sexual assault.²¹¹ In May 2013, the Justice Department issued a report finding that "deficiencies in MPD's response to sexual assault compromise the effectiveness of sexual assault investigations from the outset, make it more difficult to uncover the truth, and have the effect of depriving female sexual assault victims of basic legal protections."²¹² Also in May 2013, the Justice Department entered into a settlement with MPD, which had cooperated with the investigation from the outset.²¹³

Two years later, the Justice Department announced that MPD had fully implemented the terms of the agreement and "achieved the overall purpose of the agreement," to improve the police response to sexual assault.²¹⁴ The head

handling-sexual-assault-allegations-university [<https://perma.cc/TGH7-BR5N>]. As the Justice Department characterized it at the time, the comprehensive investigation would "focus on allegations that OPS, MPD and the Missoula County Attorney's Office are failing to adequately investigate and prosecute alleged sexual assaults against women in Missoula, due to gender discrimination." *See id.* The remainder of this discussion describes the Justice Department's findings and ensuing action with respect to the police department, in particular. For resolution of the investigations into the University of Montana and the County Attorney's Office (the latter of which followed prolonged non-cooperation by the County Attorney), see generally Memorandum of Understanding Between, the Montana Attorney General, The Missoula County Attorney's Office, Missoula County, and the United States Department of Justice (June 10, 2014), http://www.justice.gov/crt/about/spl/documents/missoula_settle_6-10-14.pdf [<https://perma.cc/78WR-DCJV>]; Memorandum of Agreement Between the United States Department of Justice and the University of Montana Regarding the University of Montana Office of Public Safety's Response to Sexual Assault (May 9, 2013), http://www.justice.gov/crt/about/spl/documents/missoulasettle_5-9-13.pdf [<https://perma.cc/HAM9-J2YC>].

²¹⁰ Press Release, *supra* note 209. Despite rapid, widespread association of the city as the "Rape Capital of America," Missoula's sexual assault statistics, troubling as they were, were not aberrational. Katie J.M. Baker, *My Weekend in America's So-Called Rape Capital*, JEZEBEL (May 10, 2012), <http://jezebel.com/5908472/my-weekend-in-americas-so-called-rape-capital> [<https://perma.cc/9XPH-GVXM>] (citing statistics showing that rapes in Missoula appeared to be "on par with national averages for college town's of Missoula's size"). In reality, "Missoula is just like any other college town. What is happening in Missoula can—and is—happening all around us." *See id.*

²¹¹ PEREZ & COTTER, *supra* note 118, at 1. For resolution of the investigations into the University of Montana and the County Attorney's Office (the latter of which followed the initiation of adversarial proceedings by the County Attorney), see generally Memorandum of Understanding Between, the Montana Attorney General, *supra* note 209.

²¹² PEREZ & COTTER, *supra* note 118, at 1.

²¹³ 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 I (May 13, 2013), http://www.justice.gov/crt/about/spl/documents/missoulapdsettle_5-15-13.pdf [<https://perma.cc/N97F-4XP6>].

²¹⁴ Press Release, Office of Pub. Affairs, Dep't of Justice, Justice Department Announces Missoula Police Department Has Fully Implemented Agreement to Improve Response to Reports of Sex-

of the Civil Rights Division, Deputy Attorney General Vanita Gupta, was effusive in her appraisal, suggesting:

[A]s a result of these reforms, the women of Missoula are safer, more trusting of the criminal justice system, and subject to more fair and respectful treatment by local law enforcement. Missoula's police department had the courage and leadership to acknowledge that it had a problem and to address it, and as a result, is poised to become a model for communities struggling with these issues around the country.²¹⁵

Missoula is a landmark intervention. It introduces a novel way of catalyzing the enforcement of rape law—a development well worth examining, especially for what it portends.²¹⁶ Missoula also represents a significant conceptual breakthrough because it is premised on an understanding of gender-based under-policing as an equal protection violation; one demanding a federal response.

Before positioning the case of Missoula in this wider context, I examine MPD's turnaround. As will become clear, the gender bias that existed within the police ranks prior to the Justice Department's involvement is unusually well documented, though it is not inconsistent with the results of other investigations.²¹⁷ The terms of the settlement are unprecedented, however, as is the collaboration's apparent success in improving the police response to sexual violence.²¹⁸ As a blueprint for remedying underenforcement, Missoula warrants attention and analysis.

1. The Findings

The Justice Department trained its sights on Missoula after learning of a number of sexual assault allegations that were investigated inappropriately.²¹⁹

ual Assault (May 11, 2015), <http://www.justice.gov/opa/pr/justice-department-announces-missoula-police-department-has-fully-implemented-agreement> [https://perma.cc/3DNX-6J5U].

²¹⁵ *Id.*

²¹⁶ See *infra* note 269 (discussing how under-policing can give rise to discriminatory policing and thus a violation of the Equal Protection Clause).

²¹⁷ See *supra* notes 206–264 and accompanying text.

²¹⁸ See *infra* notes 261–265 and accompanying text.

²¹⁹ PEREZ & COTTER, *supra* note 118, at 2. A series of articles by local reporter Gwen Florio began to expose a failed systemic response to sexual assault. See, e.g., 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 [https://perma.cc/K9WJ-D2NT]; 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 [https://perma.cc/MTQ5-REJC]; Gwen Florio, *UM Football Players Allegedly Involved in Sexual Assault on*

Based on its poor handling of rape cases, MPD was widely perceived as denying women access to justice. As a result, many victims of sexual assault, college students and non-college students alike, were opting not to report the crime to the police.²²⁰

The Justice Department's investigation, with which MPD was fully cooperative,²²¹ was comprehensive. The review entailed interviews with law enforcement officers, advocates, witnesses, and community members; an evaluation of policies, training materials, and court filings; and a thorough examination of the case files for the more than 350 reports of sexual assault received by MPD from January 2008 to May 2012.²²² While this effort was underway, the Justice Department was also investigating deficient responses to sexual assault on the part of both the University of Montana and the Missoula County Attorney's Office.²²³

In May 2013, the Justice Department issued a letter detailing "practices that undermine [MPD's] ability to fully and fairly investigate reports of sexual assault," including "discourag[ing] female victims of sexual assault from cooperating with law enforcement."²²⁴ Notably, the investigation "showed that there is no legitimate law enforcement or other reason for these inadequacies. Rather, these investigative weaknesses appear due, at least in part, to stereotypes and misinformation about women and victims of sexual assault."²²⁵ The

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 [https://perma.cc/AJ6Z-DQPW]. Writer Jon Krakauer later popularized an account of several women who were sexually assaulted in Missoula during this same time period and, in various ways and to differing degrees, were failed by the University of Montana and by the criminal justice system. *See generally* JON KRAKAUER, MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN (2015) (describing experiences of women sexually assaulted in Missoula, Montana).

²²⁰ PEREZ & COTTER, *supra* note 118, at 2; *see supra* notes 25–32 and accompanying text (discussing the connection between the underenforcement of rape law and the underreporting of rape).

²²¹ PEREZ & COTTER, *supra* note 118, at 1 ("Given the cooperation and commitment to improvement demonstrated by MPD during the investigation, we have high confidence that MPD can correct the problems we identified quickly and effectively.").

²²² *Id.* at 4 (adding, "[w]e made every effort to confirm witness accounts, where possible, with other evidence, including police reports, transcripts, and video recordings of investigative interviews, and gave weight only to those statements we could corroborate or otherwise deem credible").

²²³ *See supra* note 209 and accompanying text.

²²⁴ PEREZ & COTTER, *supra* note 118, at 6 (alteration in original).

²²⁵ *Id.* The Justice Department further declared:

The deficiencies in MPD's sexual assault investigations and its cooperation with law enforcement and community partners in the response to sexual assault have an unjustified disparate impact on women . . . Further, the nature of these investigative deficiencies, e.g., inadequate probing of suspects' accounts of alleged assaults, and a lack of support for women who report sexual assault, is in striking contrast to the quality of its investigations more generally, and indicates that these deficiencies may be motivated at least in part by gender-based stereotypes in violation of the Fourteenth Amendment.

Id. at 11–12.

Justice Department concluded that MPD's failed response to sexual assault violated the Equal Protection Clause.²²⁶

a. Practices of Underenforcement

Deficiencies in MPD's sexual assault investigations were especially pronounced in cases of non-stranger assault.²²⁷ Overall, officers "fail[ed] to employ" key techniques essential to proving the absence of consent, including collecting evidence,²²⁸ interviewing witnesses in a timely fashion,²²⁹ and questioning suspects.²³⁰ In particular, when handling drug- and alcohol-facilitated rapes, "officers often investigate[d] the allegations as if the victim alleged physical force had been used."²³¹ Unsurprisingly, weaknesses at the investigative stage "could substantially influence" a later decision not to pursue a case.²³²

Related to these investigative practices, MPD detectives actively encouraged women not to participate in the criminal process.²³³ Sexual assault complainants were routinely asked "at the outset" whether they wished to prosecute the case.²³⁴ As the Justice Department report observed,

²²⁶ *Id.* at 6. The Justice Department also found MPD in violation of the Safe Streets Act. *Id.* ("Because the vast majority of victims of sexual assault are women, MPD's failure to adequately respond to reports of sexual assault has an unjustified disparate impact on women and thus violates the Safe Streets Act."); see *infra* note 270 and accompanying text (discussing the Safe Streets Act).

²²⁷ PEREZ & COTTER, *supra* note 118, at 7. A subsequent analysis by MPD of its data (per its agreement with the Justice Department) showed that 80% of reported rapes were committed by a non-stranger. Mike Brady, Chief, City of Missoula Police Dep't, Remarks at U.S. Dep't of Justice Press Conference (May 11, 2015), <http://www.ci.missoula.mt.us/ArchiveCenter/ViewFile/Item/9040> [<https://perma.cc/AF7Y-DV7U>].

²²⁸ PEREZ & COTTER, *supra* note 118, at 7 (alteration in original).

²²⁹ *Id.* at 8.

Our review also showed that MPD detectives all too often do not make sufficient efforts to obtain statements from suspects and witnesses quickly. For example, instead of conducting field interviews in sexual assault cases, MPD detectives generally call to make appointments with suspects, scheduling them sometimes weeks or more in advance. They make no attempt to conduct telephone or field interviews to obtain preliminary interviews in the interim. This practice undermines the integrity of sexual assault investigations by denying detectives the ability to compare the suspect's and victim's accounts early on in the investigation, and by allowing suspects too much time to modify or coordinate their stories.

Id.

²³⁰ *Id.*

²³¹ *Id.* at 7 (alteration in original).

²³² *Id.* at 8 (noting that the omission of relevant facts from a police officer's report "could substantially influence both MPD's and, later, MCAO's determination about whether to seek criminal prosecution").

²³³ *Id.*

²³⁴ *Id.* As the Justice Department explained, this practice substantially undermines the integrity of the investigative process, "increas[ing] the chance that the woman will decline to participate in the

Especially when a woman may already have encountered skepticism by responding officers and detectives, such a question 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.²³⁵

The Justice Department determined that MPD's pattern of sexual assault practices facilitated the ready exit of victims, and thus their cases, from the criminal process.²³⁶ So, too, did this pattern of practices reflect the operation of gender-based stereotypes.²³⁷

The implications were significant. In order to "fully address and correct the inadequacies of MPD's response to reports of sexual assault," it was essential for the department to explicitly confront the "role that gender stereotypes play in potentially compromising the law enforcement response."²³⁸

b. The Harm of Underenforcement

For the first time in a § 14141 investigation, the Justice Department in Missoula explicitly described the harm of gender-based underenforcement.²³⁹ Discriminatory policing "place[s] women at an increased risk of harm."²⁴⁰ Whenever "police refuse to investigate or arrest people who commit crimes

investigation, in some instances causing MPD to end its investigation before it has begun." *Id.* at 9 (alteration in original).

²³⁵ *Id.* at 8–9; *see also id.* at 14 (noting that MPD detectives tended to "overemphasize the emotional toll of prosecution and minimize the seriousness of rape in their communications with women reporting sexual assault," thereby deterring women from pursuing a criminal case).

²³⁶ For a description of practices specifically deemed to "create unnecessary barriers to building trust and rapport with women reporting sexual assault, and make the process of reporting unnecessarily burdensome for women," *see id.* at 9.

²³⁷ This finding was expressed repeatedly. *See, e.g., id.* ("[T]he manner in which MPD conducted its investigations of reports of sexual assault was almost entirely subject to the discretion of MPD detectives, and thus was particularly susceptible to being influenced by MPD detectives' stereotypes and assumptions about the victims of those assaults."). In addition, the investigation "found that MPD's interactions with women reporting sexual assault all too often reflect reliance on gender-based stereotypes and similar discrimination, and that this discrimination is responsible in part for the deficiencies in MPD's response to sexual assault." *Id.* at 12. Furthermore, "MPD's sexual assault practices, taken together with statements made by MPD officers, indicate that MPD's inadequate response to women's reports of sexual assault occurs, at least in part, because of gender-based stereotypes." *Id.*

²³⁸ *Id.* at 12; *see supra* note 108 and accompanying text (discussing a disconnect between the operation of gender stereotypes and the test for purposeful discrimination).

²³⁹ This is apart from the more general observation that MPD's inadequacies "compromise[d] the search for truth." PEREZ & COTTER, *supra* note 118, at 7 (alteration in original).

²⁴⁰ *Id.*

against a particular [protected class] Would-be criminals will act with a greater impunity,” and crimes against that group will increase.²⁴¹

The Missoula report raised another fundamental, albeit less tangible, danger: law enforcement practices that reflect discrimination also perpetuate it.²⁴² The Justice Department pointed to two features of this dynamic: stereotypes about women become further entrenched, and public confidence in the justice system, particularly its competence to remedy sexual assault, is undermined.²⁴³

2. The Settlement

In May 2013, the Justice Department resolved its investigation by entering into an agreement with MPD designed to improve its response to sexual assault, “including by combating gender bias.”²⁴⁴ A key component of the agreement required MPD to modify its policies and procedures to comport with best practices.²⁴⁵ Specifically, the department was mandated to incorporate the International Association of Chiefs of Police (“IACP”) Model Policy on Investigating Sexual Assaults.²⁴⁶ MPD was also required to conduct thor-

²⁴¹ *Id.* (quoting *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010)) (alteration in original).

²⁴² *See id.* at 14 (“As is generally the case, in Missoula, constitutional policing and effective law enforcement go hand-in-hand: the same practices that prevent law enforcement from determining whether a sexual assault allegation is true often reflect or perpetuate gender discrimination.”).

²⁴³ *Id.*

²⁴⁴ Memorandum of Understanding, *supra* note 213, at 1.

²⁴⁵ *Id.* at 4.

²⁴⁶ *Id.* The IACP Model Policy, which is generally considered the gold standard for sexual assault investigations, addresses such topics as:

- a. Initial officer response to a report of sexual assault, including requirements specific to assisting the victim, evidence collection, and the identification and location of witnesses;
- b. Response to stranger and non-stranger sexual assault;
- c. The preliminary victim interview, including the development of a victim interview protocol, and the comprehensive, follow-up victim interview;
- d. Contacting and interviewing suspects;
- e. Medical forensic examinations and coordination with the forensic examiner;
- f. Participation of victim advocates;
- g. Investigative considerations regarding alcohol and drug-facilitated sexual assault, including requirements specific to evidence collection and the forensic examination of victims;
- h. The role of the supervisor; and
- i. Procedures for blind reporting of sexual assault.

Id. *See generally* *Sexual Assault Incident Reports*, International Association of Chiefs of Police, <http://www.theiacp.org/portals/0/pdfs/SexualAssaultGuidelines.pdf> [<https://perma.cc/2FCE-3MTQ>] (last visited July 29, 2016) (providing the entire policy). For a discussion of the settlement between the Justice Department and the New Orleans Police Department, specifically the requirement to incorporate IACP best practices, see Consent Decree, *supra* note 182, at 108–22 and accompanying text.

ough trainings on an ongoing basis;²⁴⁷ to enhance its investigation of non-stranger sexual assault and alcohol- or drug-facilitated sexual assault,²⁴⁸ and to design a victim-centered response to increase the likelihood of victim participation.²⁴⁹

In critical provisions on oversight, the agreement spelled out a range of mechanisms for limiting the discretion of MPD detectives to close an investigation without an arrest.²⁵⁰ Cases not referred for prosecution would be closely scrutinized, both by internal supervisors²⁵¹ and by an external review group.²⁵² In addition, MPD would be obliged to coordinate efforts with the University and with the County Attorney's office,²⁵³ as well as to enhance its data collection, analysis, and reporting.²⁵⁴

3. The Aftermath

On May 11, 2015, the Justice Department announced that MPD had fully implemented the terms of its agreement.²⁵⁵ Deputy Attorney General Gupta heralded the community for “com[ing] together to institute long-term, systemic change.”²⁵⁶ This was, she added, “a success story.”²⁵⁷

By a number of measures, the response to sexual assault had already improved.²⁵⁸ Community advocates reported better communication and coordina-

²⁴⁷ Memorandum of Understanding, *supra* note 213, at 5.

²⁴⁸ *Id.* at 7.

²⁴⁹ *Id.* at 8.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 11–12.

²⁵³ Memorandum of Understanding, *supra* note 213, at 9.

²⁵⁴ *Id.* at 10.

²⁵⁵ Press Release, *supra* note 214.

²⁵⁶ Remarks, Office of Pub. Affairs, Dep't of Justice, Head of Civil Rights Division Vanita Gupta Delivers Remarks at Press Conference Announcing Missoula Police Department's Full Compliance with Justice Department Agreement Over Response to Reports of Sexual Assault (May 11, 2015) (alteration in original), <http://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-press-conference-announcing> [<https://perma.cc/E968-VZ7Z>].

²⁵⁷ *Id.* As Deputy Attorney General Gupta remarked, “This multi-pronged approach to combating sexual assault from the campus to the courthouse door used all of our applicable civil rights laws (Title IX, Title IV, the Safe Streets Act and Section 14141) and was unparalleled in its scope.” *Id.* Gupta added:

I want to highlight that a common factor critical to all of the progress that we have seen across different agencies and agreements is the meaningful engagement of the community providing input at every stage of our work—during the investigation, the development of the agreement and now the implementation of the agreement. Under all of the agreements, the entities involved agreed to establish sustainable mechanisms that allow for input from key stakeholders about their practices and procedures.

Id.

²⁵⁸ See Remarks, Office of Pub. Affairs, Dep't of Justice, U.S. Attorney Michael W. Cotter Delivers Remarks on the Missoula Police Department's Full Compliance with Agreement (May 11,

tion with local law enforcement.²⁵⁹ Victim surveys indicated “significant satisfaction with police officers’ and detectives’ treatment of victims reporting sexual assault to law enforcement.”²⁶⁰ More rape victims were apparently disclosing the crime to police²⁶¹ and choosing to pursue their complaint.²⁶²

It is too soon to tell whether changes in MPD investigative practices will endure²⁶³ and whether they will ultimately increase the prosecution of rape.²⁶⁴ Regardless, the Justice Department undoubtedly accomplished many of its intended goals,²⁶⁵ positioning Missoula as a prototype for future § 14141 actions.²⁶⁶

2015), <http://www.justice.gov/opa/speech/united-states-attorney-michael-w-cotter-delivers-remarks-missoula-police-departments-full> [<https://perma.cc/5NYK-7JPN>] (“Today, under new protocols, victims are heard, they are not blamed and they are no longer stereotyped.”).

²⁵⁹ Press Release, *supra* note 214.

²⁶⁰ *Id.*

²⁶¹ See Brady, *supra* note 227. From 2012, when the department began improving its response, to 2014, reports of rape to police more than doubled. *Id.* Because reports to victim advocates did not also increase during this period, the greater frequency of police reports was likely a reflection of heightened public trust in police, rather than the commission of more sexual assaults. See Keila Szpaller, *Missoula Improves Process for Victims After Rape Crisis*, MISSOULIAN (Apr. 19, 2015), http://missoulia.com/news/local/missoula-improves-process-for-victims-after-rape-crisis/article_f13c9e79-3582-5ac4-b8a8-22f4f84b57b2.html [<https://perma.cc/M9RE-AM7Q>].

²⁶² See Brady, *supra* note 227 (reporting a 16% drop in cases ending with victim “discontinuing” the investigation).

²⁶³ See Szpaller, *supra* note 261 (reporting detective division captain’s insistence that the police department would not “go backwards and undo all of this work that we’ve accomplished”). For a cautionary perspective on § 14141 regulation generally, see Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. (forthcoming 2017).

²⁶⁴ See *Missoula Police Department Reforms Rape Case Procedures After Investigation*, THE GUARDIAN (May 11, 2015), <http://www.theguardian.com/us-news/2015/may/11/missoula-montana-police-university-rape-reforms> [<https://perma.cc/K5QD-L2C9>] (reporting that the Justice Department had not yet found an increased rate of prosecutions). Last spring, the county attorney suggested that it was still too soon to see changes in the prosecution rate, while emphasizing that her office had “made a huge shift from being process-driven to being victim-centered.” *Id.* Ideally, the incidence of rape would itself decrease as a result of reform.

²⁶⁵ The U.S. Attorney’s remarks were encouraging:

When the Department of Justice demonstrated that gender bias was undermining Missoula’s law enforcement response to sexual assault, both the Missoula Police and University of Montana immediately agreed to a broad set of fundamental changes that began to dramatically improve their ability to protect victims of sexual assault. These reforms have made the Missoula Police Department more accountable, transparent and credible. With accountability, transparency and credibility comes community trust. Today, the Missoula Police Department is stronger and trusted.

Remarks, *supra* note 258.

²⁶⁶ See *id.* (“Missoula is a model for every town in this nation to emulate.”).

C. Inducing Reform

In late 2015, the Justice Department reconfigured federal involvement in eliminating gender bias in local policing. Issuing new guidance for law enforcement,²⁶⁷ the Justice Department reiterated that gender bias in policing practices results in diminished protection²⁶⁸ and that discriminatory underenforcement implicates the Equal Protection Clause,²⁶⁹ along with various federal funding provisions.²⁷⁰

The document is notable for its explicit definition of gender bias and its recognition of how gender bias “undermines” the police response to sexual assault.²⁷¹ The guidance proceeds to outline a set of “basic principles” for

²⁶⁷ *Gender Bias in Law Enforcement*, *supra* note 6, at 3.

The Department of Justice (department) is committed to assisting law enforcement agencies in their efforts to reduce sexual and domestic violence, and to administer justice when these crimes occur. . . . One critical part of improving [law enforcement agencies’] response to allegations of sexual assault and domestic violence is identifying and preventing gender bias in policing practices.

Id. (alteration in original). Although the guidance also addresses law enforcement’s response to domestic violence, this discussion centers on the provisions related to sexual assault.

²⁶⁸ *Id.*

Gender bias in policing practices is a form of discrimination that may result in [law enforcement agencies] providing less protection to certain victims on the basis of gender, failing to respond to crimes that disproportionately harm people of a particular gender or offering reduced or less robust services due to reliance on gender stereotypes.

Id. (alteration in original).

²⁶⁹ *Id.* at 23.

The Equal Protection Clause of the U.S. Constitution prohibits discriminatory enforcement of the law. Discriminatory policing occurs when police officers and departments selectively enforce the law—or fail to enforce the law—based on characteristics such as race, color, national origin, sex or religion. Denying police services to some persons or communities due to bias or stereotypes related to these characteristics is a form of discriminatory policing.

Id.

²⁷⁰ *Id.* at 24–25. For a critical analysis of the Safe Streets Act and other federal funding provisions as mechanisms for reforming police practices, see generally Harmon, *supra* note 17.

²⁷¹ *Gender Bias in Law Enforcement*, *supra* note 6, at 3, 7–10. The guidance resulted from years of coordinated advocacy on the part of women’s rights organizations, beginning in 2009 with the formation of a group working to revive the VAWA civil rights remedy and to include in the legislation a provision that would hold law enforcement accountable for gender-biased policing. In 2011, several advocates met with representatives of the Justice Department and the White House to discuss implementing a path-breaking decision by the Inter-American Commission on Human Rights recommending systemic reforms to eliminate gender bias in the policing of domestic violence and sexual assault. See generally Jessica Lenahan (Gonzales) v. U.S.A., Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011), available at <http://ww3.lawschool.cornell.edu/AvonResources/USPU12626EN.pdf> [<https://perma.cc/5TVA-NU8S>]. In 2012, a small group of organizations met with representatives from the Justice Department, calling for the issuance of guidance to law enforcement on how gender bias undermines the policing of domestic violence and sexual assault. In 2015, the group of organizations delivered to the Attorney General a letter, joined by eighty-eight national groups and

eliminating bias in investigations²⁷² and to provide concrete illustrations of these principles in practice.²⁷³ Finally, the guidance urges law enforcement agencies to incorporate these principles into departmental policies, training programs and—perhaps most importantly—“supervision protocols and systems of accountability” that ensure officer compliance.²⁷⁴

The Justice Department’s decision to issue this guidance is consistent with a next generation approach to “pattern or practice” enforcement of gender biased policing.²⁷⁵ Outside the context of a particular investigation, the Department has now announced its position that police departments have a “legal obligation” to eliminate gender bias.²⁷⁶ Additionally, a set of principles has been articulated for assessing whether this obligation is satisfied.²⁷⁷

ninety-eight state and local organizations, urging the Justice Department to issue guidance on gender-biased policing. Subsequent meetings between representatives of the Justice Department and the Police Executive Research Forum, along with the publication of a number of reports documenting the continuing effects of police bias in domestic violence and sexual assault investigations, culminated in the issuance of the December 2015 guidance. Along the way, efforts by the following participants and organizations (among others) were critical: Caroline Bettinger-Lopez, Cristina Finch, Terry Fromson, Julie Goldscheid, Lisalyn Jacobs, Risa Kaufman, Lenora Lapidus, Vania Leveille, Sandra Park, Maya Raghu, Lynn Hecht Schafran, Carol Tracy, June Zeitlin; the ACLU Women’s Rights Project, Amnesty International, the Columbia Human Rights Institute, The Leadership Conference on Civil and Human Rights, Legal Momentum, and the Women’s Law Project. *See generally* E-mail from Lynn Hecht Schafran, Director, National Judicial Education Program, Legal Momentum (July 17, 2016) (on file with author).

²⁷² *Gender Bias in Law Enforcement*, *supra* note 6, at 4. For a summary of these recommendations, see *supra* notes 57–64 and accompanying text.

²⁷³ As one example, the recommendation to “Treat All Victims with Respect and Employ Interviewing Tactics That Encourage a Victim to Participate and Provide Facts About the Incident”—the principle—is demonstrated in practice with this admonition:

[O]fficers should not make statements or engage in acts that indicate to the victim that they doubt the victim’s credibility, or that [they] otherwise exhibit any bias towards the victim based on gender. Such statements and judgments could include: stereotyped assumptions about the truth of a reported assault (*e.g.*, that women are likely to report “regretted sex” as rape, that transgender women and men are unlikely to be raped, that people engaged in prostitution cannot be raped, or that certain ethnicities or races are more “promiscuous”); automatically believing the alleged assailant’s claim that the sex was consensual; or subtly, even blatantly, coercing the victim to recant the allegation of sexual assault by blaming the victim for being assaulted or for making unwise or dangerous choices.

Gender Bias in Law Enforcement, *supra* note 6, at 12, 14 (alteration in original).

²⁷⁴ *Id.* at 4.

²⁷⁵ To be sure, the guidance does not explicitly adopt a new approach to accountability in the gendered underenforcement space. Instead, the document purports only to “reflect and further the department’s partnership with the police leaders, line officers and detectives who work tirelessly to ensure that policing is free from bias and to uphold the civil and human rights of the communities they serve,” while expressly disclaiming the creation of any enforceable rights or responsibilities. *Id.* at 3.

²⁷⁶ As the guidance explains,

The department outlines these legal principles to help [law enforcement agencies] further understand the source of their duty to eliminate policing practices that may be bi-

Taken together, these moves tend to incentivize proactive departmental reform.²⁷⁸ By implementing the recommended guidance, an agency can avoid costly federal intervention.²⁷⁹ At the same time, the Justice Department, which lacks the resources needed to sue even a fraction of the departments engaged in unconstitutional patterns of policing²⁸⁰ can motivate the elimination of biased enforcement practices.²⁸¹

The effectiveness of this incentive structure hinges on the costs of federal intervention (including its likelihood) and the extent to which police departments take these costs into account.²⁸² The impact of the guidance might also

ased. [Law enforcement agencies] that integrate the basic principles described in this guidance into their policies, trainings and practices will be able to respond to allegations of sexual assault and domestic violence more effectively and will more readily fulfill their own legal obligations.

Id. at 23 (alteration in original).

²⁷⁷ See *supra* notes 57–64 and accompanying text. By articulating its view of what police departments must do to identify and respond to gender bias, the Justice Department has “lower[ed] the information barriers to reform.” See Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 54–55 (2012) (alteration in original).

²⁷⁸ See Harmon, *supra* note 120, at 49. Harmon argues that:

the Justice Department can most easily reduce the costs of reform by reducing information costs for police departments. Lowering the information costs of reform requires two tasks: (1) developing the relevant information on what causes and cures misconduct and (2) disseminating it to police leadership in a manner that facilitates departmental reform.

Id.

²⁷⁹ *Id.* at 23–24 (explaining that the threat of a § 14141 investigation and lawsuit can increase the expected costs of misconduct and thereby induce proactive reform).

²⁸⁰ Harmon, *supra* note 277, at 44.

[Section 14141] is expensive for the Department of Justice to employ. There are more than fifteen thousand local police departments and sheriff’s offices in the United States. Assuming even a small minority of them is engaged in a pattern or practice of constitutional violations, the Department of Justice cannot achieve national reform by suing every department with a pattern of widespread constitutional violations.

Id. (alteration in original).

²⁸¹ Harmon, *supra* note 120, at 23.

There are three primary ways in which the Justice Department can promote reform by changing the cost/benefit calculus of misconduct and reform for departments. It can: (1) raise the expected costs of engaging in misconduct; (2) lower the costs of preventing misconduct; and (3) raise the benefits of preventing misconduct.

Id. My contention here is that the Department’s recently issued guidance on gender bias in policing effectively lowers prevention costs. Of course, the Justice Department might also raise the expected costs of discriminatory underenforcement and increase the benefits that accrue to departments that prevent (or curtail) such discrimination. How best to accomplish these goals merits separate consideration.

²⁸² See *id.* at 23–24.

depend on whether separate benefits flow to law enforcement agencies willing to proactively implement the recommended measures.²⁸³ In short, it remains to be seen whether the guidance does in fact trigger a new era of policing reform.

Even so, the Justice Department's most recent intervention is promising. As a starting proposition, this much was made incontestable: the underenforcement of rape law is a problem of constitutional dimension; unequal protection is a federal concern.

CONCLUSION

The Justice Department's efforts to curtail gender bias in policing are best viewed against the backdrop of a deeply flawed jurisprudence of equal protection. Notwithstanding the absence of a developed legal theory of the protection model, the Justice Department has moved to implement its "pattern or practice" enforcement authority in a manner true to the origins of equal protection norms.

For the first time, the Justice Department concluded that the police response to sexual assault constituted an equal protection violation. In so doing, the Justice Department conceived the discrimination at issue in a manner consonant with ideas that animated the Equal Protection Clause. As the Missoula findings underscore, "Because the vast majority of victims of sexual assault are women, MPD's failure to adequately respond to reports of sexual assault has an unjustified disparate impact on women." By deeming this fact to be of crucial importance, the Justice Department advanced a more robust interpretation of equal protection than the Court has yet to embrace.

The Justice Department's stance emanated from its factual findings, not only in Missoula, but also in other recent investigations, which revealed that the practice of gender-biased policing is not fairly reduced to the question of intent. Biases underlying underenforcement are implicit, not explicit; intersectional not isolated; layered not unitary. Regardless, withholding protective resources from a group of crime victims violates the Equal Protection Clause.

This idea is not new; indeed it animated passage of the Clause. Placed in context, the reemergence of the protection model can be understood as a historically iterated assertion of a federal obligation to protect civil rights. The protection model advances the equality of those whom the state would discriminate against in enforcing the laws against violence.

The expected cost of § 14141, *E*, to any municipality is at least p , the probability perceived by the municipality that its police department will be subject to a full investigation under § 14141 (regardless of the outcome) multiplied by c , the cost a municipality expects to incur as a result of that investigation.

Id.

²⁸³ See *supra* notes 110–113 and accompanying text.

As often occurs, new practices inform theory. The Justice Department's unfolding approach to law enforcement accountability provides the grounding for a more nuanced account of equal protection. By situating the underenforcement of rape law as a modern paradigm of unequal protection, we open lines of inquiry that bear directly on policing, but also extend to the state's obligations beyond criminal law enforcement.

The implementation of a lost strand of thought, equal protection as protection from violence, reframes important questions about an evolving constitutional duty to protect. Beyond private violence, how expansive is the category of harms requiring state protection? What is the baseline level of protection against which deviation is measured, and might it be consistent with, or even demand, a ratcheting down of the carceral state? As we reconstruct the meaning of equal protection, do anti-subordination imperatives become newly salient?

However these inquiries are resolved, they follow from a basic proposition: the denial of state protection is a hallmark of legal inequality. Federal intervention in cases of pervasive underenforcement—in the gender violence context and in others—proceeds from this premise while refusing to concede its intractability. Future law reform, and the theory that seeks to advance it, should also accept this starting point. Without protection from violence, the promise of equality cannot but remain beyond reach.

