

Policing and Equal Protection

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For urban policing, it is the best of times and the worst of times. The innovative policing techniques that have come into widespread use over the past decade are credited by many with producing significant reductions in urban crime. The vocal and numerous critics of these tactics, however, claim that the cure has been worse than the disease.

In recent years, big-city police have increasingly come to utilize a proactive approach to policing, frequently labeled “problem-oriented policing.”¹ The advocates of problem-oriented policing argue that rather than merely trying to solve crimes after they are committed, the police should study crime patterns in order to identify underlying conditions that stimulate the commission of crimes, and then move proactively to eliminate them.² One particularly important—and controversial—problem-oriented approach is order-maintenance policing. This approach is predicated on the view that visible signs of disorder on the streetscape stimulate the commission of more serious crimes; therefore, an order-maintenance strategy seeks to minimize visible disorder through enforcement of curfew, truancy, anti-loitering, public intoxication and similar public order laws.³ Order-maintenance advocates credit these tactics as a major force behind the precipitous reduction in the crime rate during the 1990s, especially in New York City, where their use has been particularly aggressive and widespread.⁴ Moreover, scholarly observers of urban policing are coming

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1. See, e.g., HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING 32-70 (1990); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 573-91 (1997).

2. For the seminal work on problem-oriented policing, see Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQUENCY 236 (1979). A particular problem-oriented iteration that has come into widespread use is community-oriented policing, in which the police seek input from the community in order to help define problems to be targeted. See, e.g., GOLDSTEIN, *supra* note 1, at 24-27, 70-71. For present purposes, community-oriented policing poses the same issues as other forms of problem-oriented policing, and hence it will not receive separate consideration below.

3. For the classic statement of this thesis, see James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 31-38.

4. See, e.g., WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 152-56, 228-29, 233-39 (1998).

to agree that policing tactics contributed to the substantial declines in urban crime rates experienced in the 1990s.⁵ But this approach to urban policing is not without its critics. Their essential argument is that this new brand of aggressive policing imposes an extremely harsh regime of surveillance and control, promotes heavy-handed police tactics based on highly ambiguous or innocuous conduct, endorses racial profiling and similar abuses, and falls disproportionately on persons of color.⁶

The problems posed by proactive law enforcement are brought into even sharper focus by the terrorist attacks of September 11, 2001. Since then, prominent among the investigative tactics adopted by the federal government has been an effort to target non-citizens residing in the United States for special scrutiny if they come from Middle Eastern nations in which anti-American terrorist organizations have been known to operate.⁷ Yet this approach could also be fairly characterized as discrimination on the basis of national origin; indeed, many have attacked the law enforcement response to September 11 as rife with improper racial profiling.⁸ As Ibrahim Hooper of the Council on American-Islamic Relations told *The New York Times*: “[T]o single people out solely on their religion and ethnicity goes against longstanding values of equal protection of the law.”⁹

5. See, e.g., John E. Eck & Edward R. McGuire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA* 235-51 (Alfred Blumstein & Joel Wallman eds., 2000) [hereinafter *THE CRIME DROP*]; Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1313-16 (1998); Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 410-22 (2000); George L. Kelling, *Why Did People Stop Committing Crimes?: An Essay About Criminology and Ideology*, 28 FORDHAM URB. L.J. 567, 574-85 (2000); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1273, 1283-84 (2000).

6. See *infra* text accompanying notes 23-31.

7. See, e.g., *Department of Justice Oversight: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong., 2001 WL 1553668, at 6 (F.D.C.H. Dec. 4, 2001) (testimony of Viet Dinh, Assistant Attorney General, Office of Legal Policy); *Department of Justice Oversight: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong., 2001 WL 1519740, at 35 (F.D.C.H. Nov. 28, 2001) (testimony of Michael Chertoff, Assistant Attorney General, Criminal Division); Lynette Holloway, *For Refugees, a Longer Wait at America's Door*, N.Y. TIMES, Jan. 20, 2002, at 16; Neil A. Lewis, *INS to Focus On Muslims Who Evade Deportation*, N.Y. TIMES, Jan. 9, 2002, at A12; Philip Shenon, *Justice Dept. Wants To Query More Foreigners*, N.Y. TIMES, Mar. 21, 2002, at A19.

8. See, e.g., Farah Brelvi, *Racial Profiling and the Backlash After Sept. 11*, FED. LAW., Nov.-Dec. 2001, at 69; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Liam Braber, Comment, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451 (2002); Huang Vu, Note, *Us Against Them: The Path to National Security Is Paved by Racism*, 50 DRAKE L. REV. 661 (2002); Frank Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese Internment*, CRIM. JUST., Summer 2002, at 52; Elisabeth Bumiller & David Johnston, *Bush Sets Option of Military Trials in Terrorist Cases*, N.Y. TIMES, Nov. 14, 2001, at A1; David A. Harris, *Race Wars*, WKLY. STANDARD, Feb. 4, 2002, at 6; Joseph Kahn, *Raids, Detentions and Lists Lead Muslims to Cry Persecution*, N.Y. TIMES, Mar. 27, 2002, at A11; Sasha Polakow-Suransky, *Flying While Brown: Must Arab Men Be Racially Profiled?*, AM. PROSPECT, Nov. 19, 2001, at 14; Naseem Stecker, *Worrying About Civil Liberties*, 81 MICH. B.J., Jan. 2002, at 46; Sam Howe Verhovek, *Views on Curbs on Freedom Range from Qualified Support to Outrage: In Liberal Enclave, Dose of Skepticism*, N.Y. TIMES, Dec. 4, 2001, at B7.

9. Lewis, *supra* note 7, at A12.

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Hooper has a point. Any effort to make investigative decisions based on race or national origin would seemingly violate the settled rule—derived from the Equal Protection Clause of the Fourteenth Amendment—that “the Constitution prohibits selective enforcement of the law based on considerations such as race.”¹⁰ And yet, if an effort to target individuals of Middle Eastern origin for special scrutiny is a prudent effort to allocate limited investigative resources in a fashion most likely to prevent terrorist acts, then perhaps equal protection should be understood to permit such targeting, especially in the face of such a grave threat. After all, “while the Constitution protects against invasions of individual rights, it is not a suicide pact.”¹¹ Surely the specter of terrorism should provoke us to ask whether the Constitution’s promise of “equal protection” is made only to those suspected of crime, or also involves the “protection” that most of us seek from government against threats to public safety.

The debate over the efficacy of a proactive, problem-oriented approach to law enforcement—what some have called the “New Policing”¹²—is one that I have entered elsewhere.¹³ I will only touch on it here, using it as a starting point for a broader inquiry into the constitutional principles at stake in the formulation of law enforcement strategy. The constitutional argument against proactive policing has undeniable force—no one can doubt, for example, that order-maintenance tactics afford the police discretion to exert considerable control over conduct that is frequently ambiguous or even innocuous. Similarly, policies that encourage officers to target those who they believe are most likely to be involved in criminal activities effectively enable police to act on the basis of what may be little more than racial or ethnic prejudice.¹⁴ This problem is

10. *Whren v. United States*, 517 U.S. 806, 813 (1996). Discrimination on the basis of ancestry or national origin is also treated as a racial classification. *See, e.g., Rice v. Cayetano*, 528 U.S. 495, 514-17 (2000); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *Oyama v. California*, 332 U.S. 633, 646 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). For an example of the kind of argument that can be made against any consideration of race or ethnic origin when making investigative decisions based on rather settled principles of equal protection jurisprudence, see David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 322-29 (2001). At least one circuit seems to agree. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1131-35 (9th Cir.) (en banc), *cert. denied sub nom. Sanchez-Guillen v. United States*, 531 U.S. 889 (2000). Although by its terms the Equal Protection Clause only applies to the states, an equivalent guarantee of equal protection has long been applied to the federal government through the Fifth Amendment’s Due Process Clause. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

11. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

12. There is no terribly precise definition of “New Policing,” but in general that phrase is used to refer to law enforcement tactics designed to prevent crime rather than to identify and prosecute offenders after the fact. It therefore can include tactics ranging from the aggressive use of stop-and-frisk tactics in high-crime neighborhoods to the provision of intensive social services to at-risk youth. *See, e.g., Heymann, supra* note 5, at 422-41.

13. *See* Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99 (2000).

14. *See, e.g.,* BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 166-79 (2001); David Cole, *Foreword: Discretion and Discrimination Reconsidered—A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1074-82 (1999); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-*

highlighted by the current state of Fourth Amendment jurisprudence, which affords the police substantial discretion to search and seize individuals thought to be acting suspiciously—authority frequently directed at persons of color.¹⁵ The constitutional argument against racial profiling is powerful as well: the Equal Protection Clause ordinarily forbids any use of race or national origin as a basis for governmental decisionmaking, and there is little reason to believe that this rule is less applicable to investigations focused on non-citizens thought to hale from countries where terrorist groups are active than to any other law enforcement context.¹⁶ Yet, for those of us actually engaged in law enforcement in one capacity or another, there is a troubling sterility to most of the academic attacks on prophylactic policing. All too often, they ignore one of the powerful realities underlying preventative law enforcement strategies: Reactive law enforcement strategies generally fail to provide truly “equal” protection to all, but instead leave the poorest and most vulnerable among us subject to a far greater risk of crime than the wealthy and powerful ever experience.

In the post-September 11 landscape, proactive and prophylactic policing seems especially appropriate. Nevertheless, advocates of that approach have yet to make the case that New Policing can be reconciled with settled constitutional principles.¹⁷ It will be my task to attempt to reconcile with the Constitution a prophylactic approach in which law enforcement can rely on proxies for likely criminal activity—such as visible disorder, geography, or even, at least in some circumstances, race or national origin—in order to prevent crime before it occurs. I will do so by taking issue with the conventional notion that equal protection calls for uniform law enforcement tactics. Instead, I will advocate the perhaps surprising position that the Equal Protection Clause not only tolerates, but may well require the use of non-uniform law enforcement techniques in order to provide effectively equal protection from the threat of crime.

Part I below outlines the New Policing debate as a backdrop for consideration of the import of the Equal Protection Clause for law enforcement strategy and tactics. Part II then advances an understanding of equal protection

Maintenance Policing, 89 J. CRIM. L. & CRIMINOLOGY 775, 799-818 (1999).

15. See, e.g., Tovah Renee Calderón, *Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOW. L.J. 73 (2000).

16. For an illustration of the argument that can be made against consideration of race or national origin in the context of immigration enforcement, relying on seemingly conventional principles of equal protection jurisprudence, see Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825 (2001).

17. Indeed, it is striking how those willing to make the case for racial profiling tend to do so nearly exclusively in terms of its efficacy. See, e.g., William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002); Heather MacDonald, *The War on the Police*, WKLY. STANDARD, Dec. 31, 2001, at 26; Peter H. Schuck, *A Case for Profiling*, AM. LAW., Jan. 2002, at 59.

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quite different from its conventional characterization as a prohibition on arbitrary or discriminatory governmental classifications. Instead, Part II contends that the Equal Protection Clause is not merely prohibitory, but also contains an affirmative command. This affirmative component identifies a substantive good—security against lawbreakers—and commands that it be provided to all residents of a jurisdiction equally. While institutional and prudential concerns limit the courts’ willingness to enforce this affirmative aspect of equal protection, it fully binds the other branches of government. Very often, government officials will find that they cannot discharge their obligation to ensure that protection is “equal” unless they allocate resources in a manner that recognizes that threats to public safety are not uniform—that is, unless they employ non-uniform tactics. Part III attempts to apply this understanding of equal protection to conventional policing—a largely reactive strategy of uniform patrol and response to calls for police service. Although this strategy seems to create a form of equal protection by making police deployments and response appear uniform, I will argue that the equality that conventional policing offers is frequently illusory. Among the insights that underlie New Policing is that conventional policing will systematically disadvantage poorer, less stable, and disproportionately minority neighborhoods. For that reason, conventional policing may fail to provide “equal protection” as that concept is described here. Part IV considers the implications of an affirmative conception of equal protection for law enforcement strategies that move beyond the conventional model by examining policing styles, order-maintenance policing, and claims of discrimination in law enforcement.

I. THE POLICING DEBATE

I begin with a brief summary of the debate among legal scholars over the propriety of a prophylactic and proactive approach to policing. I will focus at the outset on order-maintenance policing, not because the concerns addressed here are limited to the debate about order maintenance, but because that debate so well illustrates the character of legal debate over preventative law enforcement strategies.

Legal scholars who advocate New Policing make two principal arguments. First, they claim that enforcement of public order laws reinforces social norms in a manner that can stabilize high-crime communities.¹⁸ For example, Wesley

18. See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1177-84, 1238-46 (1996); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367-77 (1997); Livingston, *supra* note 1, at 578-84; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 219-27 (1998); Waldeck, *supra* note 5, at 1299-1308. This point is often made by referring to the impact that disorder can have on norms of law-abidingness. Professor Kahan, for example, has written: “Norms of order are critical to keeping social influence

Skogan, one of the principal academic advocates of order maintenance, has amassed considerable empirical evidence suggesting that high levels of disorder erode the willingness of community residents to work to stabilize troubled neighborhoods, encourage out-migration by those law-abiding residents who can afford to do so, and stimulate the commission of crimes.¹⁹ Moreover, Professor Livingston has observed that disorder has particular significance when the police are seen as indifferent to it. When the police do not suppress visible disorder in distressed neighborhoods, the frequently impoverished and powerless residents of those areas

are then the losers: for though the street harassment and threatening behavior in many poor neighborhoods may not be deemed serious by law enforcement officials, they are "not perceived to be minor by the victims in the community" and they contribute "to a generalized fear that alters the social fabric of a neighborhood."²⁰

Second, advocates of order-maintenance and problem-oriented policing argue that because these tactics involve proactive efforts to prevent crime through the prosecution of relatively minor offenses, they impose far less draconian sanctions than conventional law enforcement tactics.²¹ And the New Policing's emphasis on prevention as opposed to investigation and punishment has particular appeal in the wake of September 11, since the need for prophylactic law enforcement has been made particularly clear by the nature of the terrorist threat. Obviously, it is unacceptable to wait until terrorist crimes occur and then prosecute the wrongdoers; the efficacy of criminal sanctions as a deterrent is particularly doubtful when the offenders are willing to commit suicide in the course of their offenses. Prophylactic measures must be taken to prevent this type of crime *ex ante*, rather than relying on a reactive strategy that endeavors to punish wrongdoers *ex post*.²²

Perhaps the leading critic of order-maintenance policing among legal scholars is Professor Harcourt. He attributes the success of order-maintenance policing not to any strengthening of social norms, but rather to the harsh regime of surveillance and control that it imposes, by authorizing police intervention

pointed away from, rather than toward, criminality; the spectacle of open gang activity, vandalism, aggressive panhandling, and other forms of disorder transmit signals that cause both law-breakers and law-abiders to behave in ways conducive to crime." Kahan, *supra* at 391 (footnote omitted).

19. See WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 65-84 (1990); see also Ralph B. Taylor, *The Incivilities Thesis: Theory, Measurement, and Policy*, in MEASURING WHAT MATTERS: PROCEEDINGS FROM THE POLICING RESEARCH INSTITUTE MEETING 65, 72-74 (Robert H. Langworthy ed., 1999) [hereinafter MEASURING WHAT MATTERS].

20. Livingston, *supra* note 1, at 581 (quoting Gary W. Sykes, *The Functional Nature of Police Reform: The "Myth" of Controlling the Police*, 2 JUST. Q. 51, 62 (1985)).

21. See, e.g., Kahan, *supra* note 18, at 381-88; Meares, *supra* note 18, at 198-226; Rosenthal, *supra* note 13, at 142-48; William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1836-38 (1998).

22. See generally, e.g., John Deutsch & Jeffrey H. Smith, *Smarter Intelligence*, FOREIGN POL'Y, Jan. 1, 2002, at 64.

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even when conduct is at most ambiguous.²³ Moreover, the widespread and aggressive use of public order laws, he contends, stigmatizes those who are labeled disorderly, and may for that reason undermine efforts to reinforce social norms in troubled neighborhoods and may promote discrimination or brutality against those who are labeled as “disorderly.”²⁴ Professors Cole and Roberts have added that public order laws, by permitting the police to make enforcement decisions on the basis of highly ambiguous conduct, enable officers to act on the basis of their own prejudices, and thus facilitate discrimination against minorities.²⁵ Critics have argued, for example, that New York City’s program of aggressive order-maintenance policing is responsible for a substantial escalation in the rate of police abuse of minorities.²⁶

Critics also argue more generally that aggressive policing inevitably compromises the rights of minorities. They contend that police officers all too frequently equate black or brown skin with criminality, and hence will unfairly target minorities whenever they are encouraged to make enforcement decisions based on something short of an overt breach of the peace.²⁷ In fact, there is considerable research suggesting that police officers tend to perceive minority youth as more hostile and threatening than similarly situated non-minorities, and take enforcement action on that basis.²⁸ And police officers inclined to view minorities with suspicion have ample discretion to act on that view under the authority that the Supreme Court has given them to search and seize individuals on “reasonable suspicion,” a standard that even the Court acknowledges permits search and seizure based on highly ambiguous conduct frequently consistent with innocence.²⁹ Indeed, there has been much scholarly criticism of the “reasonable suspicion” standard precisely because it readily

23. See HARCOURT, *supra* note 14, at 98-104; Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 308-42 (1998).

24. See HARCOURT, *supra* note 14, at 166-79; see also Bernard E. Harcourt, *After the “Social Meaning Turn”: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC’Y REV. 179, 200-02 (2000); Harcourt, *supra* note 23, at 368-84.

25. See Cole, *supra* note 14, at 1089-92; Roberts, *supra* note 14, at 799-818; see also HARCOURT, *supra* note 14, at 171-75.

26. See, e.g., Roberts, *supra* note 14, at 813-15. There is some statistical evidence, for example, suggesting that New York City’s aggressive program of “street stops” has unfairly targeted minorities. See, e.g., Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 477-83 (2000).

27. See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 16-62 (1999); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 136-67 (1997); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS 33-46 (1998); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999); Randall S. Susskind, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994).

28. For a helpful review of the pertinent research, see John Hagan & Ruth D. Peterson, *Criminal Inequality in America: Patterns and Consequences*, in CRIME AND INEQUALITY 24-28 (John Hagan & Ruth D. Peterson eds., 1995).

29. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 125-26 (2000).

permits the police to act on what may be racist assumptions even when enforcing otherwise uncontroversial laws, such as traffic regulations.³⁰ Professor Massaro has added that because order-maintenance policing is justified in light of its supposed efficacy, it relies on a premise deeply subversive of constitutional norms: a belief that it is more important to stop crime than to hew to the Constitution. She characterizes the argument for order-maintenance policing as based on the view that the affected communities “are willing to pay whatever price—in terms of wrongful arrests and curtailment of liberty—that the new, get-tough regime may entail, but they would prefer, in a better world, that the constitutional process norms, including their most expansive formulations, were preserved.”³¹ This observation, if anything, has even greater resonance since the September 11 attacks, as the nation ponders whether to compromise ordinarily cherished civil liberties in order to combat a profound terrorist threat.

The leading attempt to formulate an answer to the critique of New Policing has been made by Professors Kahan and Meares. They observe that minorities exercise effective political power in most major urban areas and frequently support order-maintenance policing because “[g]iving the police the authority to control low-level disorder is perceived as essential to deterring more serious crimes.”³² Moreover, the coercive effects of order-maintenance policing “pale[] in comparison to the destructive impact of the mass incarceration of young African-American men that has been the centerpiece of American criminal-law enforcement since the 1980’s.”³³ And because the minority community itself participates fully in the urban political process and shares in the burden imposed by the New Policing, there is no reason to distrust the balance between order and liberty that local political institutions strike when setting law enforcement policy.³⁴ Professors Kahan and Meares acknowledge that even within the minority community, only a small fraction of residents—primarily youth—will be likely to experience the curtailment of liberty associated with order-maintenance policing, but they argue that this fact should not render order-maintenance policing suspect, because “[i]nner-city teens and even gang

30. See, e.g., David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975 (1998); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy*, 72 ST. JOHN’S L. REV. 1271 (1998); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

31. Toni Massaro, *The Gang’s Not Here*, 2 GREEN BAG 2d 25, 32 (1998); see also Carol L. Steiker, *More Wrong Than Rights, in URGENT TIMES: POLICING AND RIGHTS IN INNER CITY COMMUNITIES* 49, 50-51 (Joshua Cohen & Joel Rogers eds., 1999).

32. Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1163 (1998).

33. *Id.* at 1165 (footnote omitted).

34. See *id.* at 1172-82.

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members are linked to the majority by strong social and familial ties.”³⁵ This “pervasive sense of ‘linked fate’ between the majority of inner-city residents and the youths affected by curfews and gang-loitering ordinances furnishes a compelling reason *not* to second-guess the community’s determination that such measures enhance rather than detract from liberty in their communities.”³⁶

This position has been challenged at every turn. Critics argue that despite the relative empowerment of urban minorities in recent years, racism still plays an important role in urban politics and policing;³⁷ that even within inner-city communities where majorities may support order-maintenance policing, aggressive policing tactics adversely affect only a small fraction of residents, such as young African-American males;³⁸ that Professors Kahan and Meares’ effort to solve this problem through the concept of “linked fate” among all members of the inner-city minority community rests on an assertion supported by little if any empirical evidence;³⁹ and that the minority community actually has deep misgivings about aggressive policing and in any event lacks any reliable political mechanisms to set policing policy for itself.⁴⁰ Finally, an approach that trusts the political process to strike the balance between liberty and order is of little use in evaluating law enforcement tactics targeted against groups who are unlikely to be fairly represented in the political process, such as counterterrorist tactics directed disproportionately at non-citizens.

If nothing else, this critique makes plain that Professors Kahan and Meares’ position ultimately rests on a variety of empirical questions about urban politics that are difficult to answer satisfactorily. My own experience lends limited support to the “linked fate” hypothesis; I have found that inner-city residents tend to express great fear of crime, especially gang crime, but generally tend to discount the possibility that their own children or friends are involved in it. Nor is it an easy thing to determine what level of support any particular law enforcement policy has within the minority community or elsewhere; as Professor Massaro observes, policy preferences, especially when it comes to

35. *Id.* at 1175.

36. *Id.* at 1176 (footnote omitted). Mark Rosen has taken a similar position, arguing that non-uniform policing tactics are appropriate when they are applied in discrete communities facing special law enforcement problems, when “the policies at issue were shaped by experts familiar with the communities’ needs,” and there is “a communal understanding” of what conduct has been proscribed, unless “authorities had abusively deployed the legal edict in question or were likely to do so in the future.” Mark D. Rosen, *Our Nonuniform Constitution: Geographic Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1180-81 (1999).

37. *See, e.g.*, Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights? A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 221-25; Cole, *supra* note 14, at 1080-82.

38. *See, e.g.*, Alschuler & Schulhofer, *supra* note 37, at 241-42; Cole, *supra* note 14, at 1082-88.

39. *E.g.*, Alschuler & Schulhofer, *supra* note 37, at 243; Cole, *supra* note 14, at 1088.

40. *See, e.g.*, Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1262-70 (2000); Cole, *supra* note 14, at 1088; Roberts, *supra* note 14, at 822-33.

law enforcement, are frequently the result of tradeoffs that the public would rather not have to make. That is likely to be especially true of the minority community's views on urban policing; the available polling data shows, for example, that African-Americans are more concerned about both crime and police misconduct than non-minorities.⁴¹ And the suggestion that judicial deference to law enforcement policymakers should turn on the level of political support that policing policy enjoys in the minority community is open to serious question; the judiciary's competence to engage in such an assessment is hardly self-evident.⁴² But regardless of how any of these disputes are settled, Professors Kahan and Meares' approach will have little appeal for those unpersuaded by political process-oriented theories of constitutional law.⁴³ Certainly, many will share Professors Alschuler and Schulhofer's view that "[o]ur Constitution does not permit a majority to limit individual rights simply by offering to share the burden."⁴⁴

Thus, to date, order-maintenance policing has been defended largely in terms of political process theory, which is itself a far from unassailable approach to constitutional law. Even more important, an implicit premise of both advocates and critics has been that order-maintenance policing imposes a burden on the affected communities that, if not subject to appropriate safeguards, is constitutionally suspect. The disagreement between the two sides of the debate is over whether the Constitution envisions political or judicial checks on such burdens. I mean to offer a different way to think about these constitutional questions. From the standpoint of the Constitution, aggressive policing may be a necessity, not merely a burden which, if not appropriately shared by the affected community, should be viewed as constitutionally suspect.

II. THE RIGHT TO EQUAL PROTECTION AGAINST LAWBREAKERS

The Supreme Court typically describes the Equal Protection Clause as if it

41. Compare BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 2000, at 109 tbl.2.16, 116 tbl.2.25, 119 tbls.2.29 & 2.30, 124 tbl.2.35 (2001) [hereinafter 2000 SOURCEBOOK] (showing greater concern among African-Americans that police do not treat all races fairly and stop individuals who are innocent), with *id.* at 125 tbl.2.37, 126 tbl.2.39, 127-28 tbl.2.41, 134-35 tbl.2.52 (showing greater concern among African-Americans about crime).

42. The question of institutional competence is a particularly serious problem for Professor Rosen's approach, which requires courts to address nuanced policy questions. See *supra* note 36. For a detailed and rich account of the difficulties in determining whether aggressive inner-city law enforcement can fairly be said to further the ability of inner-city communities to control their own destiny, see Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 416-59 (2001).

43. For what likely is the leading critique of a political process-oriented view of the Constitution, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). This view has been effectively deployed against Professors Meares and Kahan's position. See Alschuler & Schulhofer, *supra* note 37, at 239-40; Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 451-54 (1999).

44. Alschuler & Schulhofer, *supra* note 37, at 240.

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were an all-purpose antidiscrimination statute, forbidding all arbitrary or unwarranted differences in the manner in which the government treats individuals or groups.⁴⁵ I hope to demonstrate that this characterization is at best incomplete. The guarantee of equal protection is not only a constraint on the manner in which the government imposes obligations or distributes its largesse; it also contains an affirmative command with respect to the manner in which the government protects people from crime. I begin with an account of the origins of the Fourteenth Amendment, because it provides a useful reminder that the concept of equal protection was not intended solely to grant a new civil right for the individual against the government; that Amendment's Equal Protection Clause was in large part an effort to guarantee that the criminal law would be vigorously and effectively enforced.

A. *Protection Against Lawbreakers and the Original Meaning of the Equal Protection Clause*

The conventional account of the origin and purpose of the Fourteenth Amendment goes something like this: The guarantees now contained in Section One of the Amendment, as well as the congressional enforcement power in Section Five, were a response to concerns that the nation's first civil rights law, the Civil Rights Act of 1866, might have exceeded Congress's constitutional authority, as well as a concern that a future Congress might repeal the Act.⁴⁶ Indeed, when the Fourteenth Amendment was before Congress, many of its proponents explained that the Amendment was needed to ensure the constitutionality of the Civil Rights Act as well as to protect the rights it secured from future Congresses.⁴⁷

The conventional account unquestionably explains a great deal of what motivated the drafters of the Fourteenth Amendment, but by stressing the importance of protecting individual civil rights, it obscures at least part of the core purpose of the Equal Protection Clause. At the outset, viewing the Fourteenth Amendment as an effort to codify the Civil Rights Act of 1866 overlooks important differences between the two.⁴⁸ The Civil Rights Act of

45. See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); *Vacco v. Quill*, 521 U.S. 793, 799 (1997); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

46. See, e.g., CHESTER JAMES ANTIEAU, *THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT* 2-5 (1981); HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 19-40, 55-57 (Peter Smith 1965) (1908); HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE: EQUALITY AND JUSTICE DEFERRED—THE HISTORY OF THE FOURTEENTH AMENDMENT* 56-57 (Madison Books 2000) (1973); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5 (1949).

47. See, e.g., *CONG. GLOBE*, 39th Cong., 1st Sess. 2498 (1866) (remarks of Rep. Broomall); *id.* at 2462 (Rep. Garfield); *id.* at 2459 (Rep. Stevens); *id.* at 2465 (Rep. Thayer); *id.* at 2511 (Rep. Eliot); *id.* at 2896 (Sen. Doolittle).

48. It also overlooks the fact that the first proposal for a Fourteenth Amendment actually predated the introduction of the Civil Rights Act. On December 6, 1865, Representative Bingham introduced a

1866 reads like a conventional antidiscrimination statute intended to secure the rights of individuals. For example, section 1 of the 1866 Act provided:

[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to previous condition of slavery or involuntary servitude, except as a punishment for crime wherof the party shall have been duly convicted, shall have the same right, in every State and Territory of the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁴⁹

This formulation—identifying particular criteria, such as race, that may not be used when making certain kinds of decisions—is repeated in many modern antidiscrimination laws.⁵⁰ During Reconstruction, Congress used this formulation repeatedly; it appeared, for example, in critical provisions of the Ku Klux Klan Act of 1871 and the Civil Rights Act of 1875.⁵¹ Indeed, during Reconstruction, Congress utilized this formulation in the Constitution itself; the Fifteenth Amendment contains similar phraseology.⁵² The Fourteenth Amendment, however, employs a different phraseology: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁵³ The Equal Protection Clause is not limited to securing equality with respect to particular *civil* rights granted individuals under the law; the criminal laws afford “protection” as well. Indeed, the most obvious type of “protection” that the government provides under the law is the protection against lawbreakers offered by the criminal justice system. Yet in legal scholarship there has been surprisingly little effort to consider the relationship between the Fourteenth Amendment’s use of the term “protection” and the law enforcement function.⁵⁴

proposed constitutional amendment granting Congress authority to “make all laws necessary and proper to secure to all person in every State equal protection in their rights of life, liberty and property.” CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865). Senator Lyman Trumbull did not introduce the Civil Rights Act until January 5, 1866. See CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

49. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2000)).

50. See, e.g., 42 U.S.C. §§ 2000e-2, 3604 (2000).

51. See Act of Mar. 1, 1875, ch. 114, 18 Stat. 235; Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

52. “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

53. U.S. CONST. amend. XIV, § 1.

54. Although the history of the Fourteenth Amendment has been extensively studied by legal scholars, there has been little effort to consider the significance of that history for the law enforcement function. The only scholarly effort of which I am aware was made by Steven Heyman, although his concerns are considerably different than mine. Professor Heyman has advanced the view that the concept of “protection” includes protection against private violence, but his concern is not with “equal protection” at all; rather, he has argued that the Constitution contains a substantive right of protection

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It was Representative John Bingham of Ohio who was responsible for inserting the concept of “equal protection” into the Constitution. Bingham, with some difficulty, convinced the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, to substitute the eventual text of the Equal Protection Clause for Representative Thaddeus Stevens’s original proposal.⁵⁵ Stevens’s language, like that of the Civil Rights Act, was phrased in conventional antidiscrimination terms: “No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.”⁵⁶ The most obvious difference between Bingham’s and Stevens’s formulations, of course, is that Bingham’s makes no explicit mention of race. But that cannot be the sole significance of the difference between the competing formulations; if the only objective were to frame the amendment in race-neutral terms, the drafters could have simply lopped off everything in the Stevens draft after the word “persons.”⁵⁷ Stevens’s language also limited the amendment to “civil” rights; Bingham’s language was not limited in this respect.⁵⁸ And the Fourteenth Amendment’s Due Process and Equal Protection Clauses employ significantly different formulations. The former applies only when the state itself deprives a person of life, liberty, or property, but the latter’s reference to state action is not so direct; the Equal Protection Clause does not require that the state itself deprive a “person” of anything; it more generally applies to any “denial” of “the equal protection of the laws.”

Stevens evidently believed that Bingham’s formulation embodied a general antidiscrimination principle similar to his own proposal.⁵⁹ But Bingham claimed that his proposal had a somewhat different point; he asserted that the concept of equal protection merely codified what was already in the

that he employs to quarrel with the Supreme Court’s holding that the Fourteenth Amendment contains no right to governmental protection from private violence in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 557-71 (1991).

55. See JOURNAL OF THE JOINT COMM. ON RECONSTRUCTION, 39TH CONG., 1ST SESS., S. DOC. NO. 711, 63d Cong., 3d Sess. 28-44 (1915).

56. *Id.* at 28.

57. While the Joint Committee recorded its votes, it did not record the substance of its discussions; to determine the Committee’s thinking on this issue requires a good deal of speculation. Much of the scholarly speculation about the committee’s thinking revolves around the race-neutral character of Bingham’s proposal. See, e.g., EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 79-92 (1990); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 48-58 (1998).

58. Moreover, as Alexander Bickel first observed, the use of a race-neutral and quite general formulation suggests at a minimum that the framers of the Equal Protection Clause may have been hoping to constitutionalize a general principle rather than the precise formulation found in the Civil Rights Act. Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60-63 (1955).

59. “This amendment . . . allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.” CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (remarks of Rep. Stevens).

Constitution. When placing the Fourteenth Amendment before the House of Representatives, Bingham argued: "No State ever had the right . . . to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy."⁶⁰ That remark is important in two respects. It suggests not only that Bingham believed that the antebellum constitution already recognized the rights that the Equal Protection Clause secured, but also that the states were routinely violating these constitutional rights. And that leads to the context in which Bingham spoke.

In the aftermath of the Civil War, violence against the newly freed slaves as well as Union sympathizers became widespread in the South.⁶¹ The source of that violence was not only the southern governments themselves; private acts of terrorism against the newly freed slaves were also common:

Besides militia units and county patrols, irregular bands of marauders and desperados preyed on blacks. Such attacks were often unprovoked and against inoffensive individuals. Mounted outlaws and "regulators" rode about the countryside whipping, hanging, and murdering blacks, immune to capture by local authorities or federal soldiers. Driving freedmen from their homes and threatening witnesses with swift retribution, they perpetrated such punishments as lashing their victims on their bare backs with cowhide whips. In Pitt County, North Carolina, a group of former Confederate soldiers met a black man on the road, castrated him, and later killed him. A ruffian in Edgefield, South Carolina, claimed to have cut eight ears off eight Negroes and he carried the lobes in an envelope to display to friends and acquaintances.⁶²

State and local officials provided no effective redress against this epidemic of violence:

Justice appeared to be blind to crimes by whites against blacks. Courts seldom heard complaints involving white assaults on blacks because officials helped white defendants escape prosecution. Local authorities did little to apprehend roving bands of whites who killed freedmen, and in many communities the murder of a black person was not considered a serious crime. If arrests were made, white mobs released the guilty parties, and in the rare case of a conviction of a white man for an assault on or murder of a freedman, the punishment was usually minimal or ludicrous. John Bate of Mariana, Florida, guilty of vicious attacks on a black woman, was sentenced only to pay court costs and a fine of five cents. The combination of public apathy, uneven justice, and inefficient or prejudiced officials made prosecuting whites for crimes against blacks almost impossible. General Philip Sheridan summed up the situation: "My own opinion is that the trial of a

60. *Id.* at 2542. Bingham made a similar point in defense of his original draft of the Fourteenth Amendment. In response to claims that the proposed amendment would radically alter the rights of states, Bingham claimed that no state had ever had a "right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty, and property." *Id.* at 1090; *see also id.* at 1088.

61. *E.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 119-23 (1988); JOHN HOPE FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 51-53 (1961); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION: 1865-1877, at 75 (1965).

62. GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 28 (1984) (footnote omitted).

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white man for the murder of a freedman in Texas would be a farce.”⁶³

Reports of violence and oppression of the newly freed slaves and Union sympathizers became widespread in the Northern press, and provoked public demands for a response.⁶⁴ In the face of that demand, on December 13, 1865, the newly assembled Thirty-Ninth Congress created the Joint Committee on Reconstruction (of which Bingham was a member), charged with investigating conditions in the southern states and determining whether these states were entitled to representation in Congress.⁶⁵ In the following months, the Joint Committee heard extensive testimony on conditions in the South, providing vivid documentation of the extent of the violence against newly freed slaves and Union sympathizers.⁶⁶ Jacobus tenBroek summarized the proceedings thusly: “Witness after witness spoke of beatings and woundings, burnings and killings, as well as deprivations of property and earnings and interference with family relations—and the impossibility of redress or protection except through the United States Army and the Freedmen’s Bureau.”⁶⁷ John Hope Franklin called the testimony “a dreary recital of inhumanity.”⁶⁸ This testimony produced considerable congressional doubt that “the Southern states could be trusted to manage their own affairs without federal oversight.”⁶⁹

In its report recommending the adoption of the Fourteenth Amendment, the Joint Committee found that there were in the South “acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish.”⁷⁰ Absent federal protection, “the colored people would not be permitted to labor at fair prices, and could hardly live in safety.”⁷¹ Thus, the need for federal “protection” became clear to the committee, and the public at large.⁷² And the

63. *Id.* at 21 (footnote omitted).

64. See FONER, *supra* note 61, at 224-27; FRANKLIN, *supra* note 61, at 55-56; JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 51-52 (1956); NELSON, *supra* note 57, at 42-44; STAMPP, *supra* note 61, at 73-81. The northern public was particularly excited by the report of Carl Schurz, who had toured the South at the request of President Johnson, and found violence against the freed slaves and Northern sympathizers to be widespread. See FRANKLIN, *supra* note 61, at 55; STAMPP, *supra* note 61, at 73-74; see also SEN. EXEC. DOC. NO. 2, 39th CONG., MESSAGE OF THE PRES. OF THE UNITED STATES 14, 17, 19-20, 77-78 (1865).

65. See CONG. GLOBE, 39th Cong., 1st Sess. 6, 30, 46-47 (1865).

66. The volume of testimony of this type found in the appendices to the Joint Committee’s report is enormous. For testimony of newly freed slaves, see REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. No. 30-39, pt. 2, at 50-60 (1866). For an example of one of the reports of the United States Army regarding conditions in the South, see *id.* pt. 3, at 41-48.

67. JACOBUS TENBROEK, EQUAL UNDER LAW 203-04 (Collier Books 1965) (1951) (footnote omitted).

68. FRANKLIN, *supra* note 61, at 58.

69. FONER, *supra* note 61, at 246.

70. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. Rep. No. 39-30, at xvii (1866).

71. *Id.*

72. Indeed, in its first encounter with the Fourteenth Amendment, the Supreme Court described Congress’s desire to combat lawlessness in the South as one of the Amendment’s principal objectives. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873); see also *Dist. of Columbia v. Carter*, 409 U.S. 418, 426 (1973) (noting that unwillingness of Southern states to enforce their own laws against those violating the civil rights of others was the principal motive of § 1 of the Ku Klux Klan Act of

problem, of course, was not confined to laws expressly discriminating against the newly freed slaves. As the preceding discussion should make clear, in the wake of the Civil War, even the most basic facially neutral laws that purported to protect everyone—such as homicide laws—were frequently not enforced when the victims were African-Americans. The need to secure protection against widespread violence in the South was thus a central part of the original understanding of the concept of “equal protection.”

The original understanding of “equal protection” also had particular significance with respect to the government’s obligation to protect the populace from lawbreakers. The notion that the government is under a constitutional obligation to protect the citizenry from lawbreakers may seem novel today, but at the time that the Fourteenth Amendment was drafted, that concept was anything but radical; indeed, it was widely thought that the antebellum constitution had itself secured such a right.⁷³ Nineteenth century legal thinkers believed that one of the basic obligations that the government owed its people was to protect their persons and property, a consequence of the social contract theory that was widely thought to be implicit in the antebellum constitution.⁷⁴ Indeed, a government’s obligation of protection was frequently invoked in the Thirty-Ninth Congress.⁷⁵ In particular, it was widely believed that Article IV of the antebellum constitution afforded all citizens of the United States a right to protection from lawbreakers through its Privileges and Immunities Clause.⁷⁶ In his famous opinion discussing the privileges and immunities protected under Article IV in *Corfield v. Coryell*,⁷⁷ Justice Washington had described the Privileges and Immunities Clause as embodying the concept that all “citizens of free governments” held certain “fundamental” rights, one of which was the

1871); *Monroe v. Pape*, 365 U.S. 167, 175 (1961) (same).

73. It would have been particularly important to Bingham and the other drafters to be able to link their proposal to settled constitutional arrangements, since the principal objection to Bingham’s original and unsuccessful proposed Fourteenth Amendment was that it would have granted Congress a radical new power to prescribe what rights persons would enjoy to life, liberty and property under state law. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1063-64 (1866) (remarks of Rep. Hale); *id.* at 1083-87 (Rep. Davis); *id.* at 1095 (Rep. Conkling).

74. *See, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1435-36 (1992); Heyman, *supra* note 54, at 512-45; Earl M. Maltz, *The Concept of Equal Protection of the Laws: A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 507-10 (1985).

75. For example, in supporting the proposed Fourteenth Amendment, Senator Luke P. Poland argued: “All the people, or all the members of a state or community, are equally entitled to protection.” CONG. GLOBE, 39th Cong., 1st Sess. 2962 (1866). Senator Benjamin F. Wade characterized the purpose of the Equal Protection Clause as to provide “protection of person and property to all persons . . .” *Id.* at 2769. These are but two of numerous statements to the same effect. *See, e.g., id.* at 342 (remarks of Sen. Cowan); *id.* at 570 (Sen. Morrill); *id.* at 1152 (Rep. Thayer); *id.* at 1263 (Rep. Broomall); *id.* at 1293-94 (Rep. Shellabarger); *id.* at 1757 (Sen. Trumbull); *id.* at 1832 (Rep. Lawrence); *id.* at 2799 (Sen. Stewart); *id.* at 2918 (Sen. Willey). *See generally* Alfred Avins, *The Equal “Protection” of the Laws: The Original Understanding*, 12 N.Y.L. F. 385 (1966).

76. *See* U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

77. 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

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right to “protection by the government.”⁷⁸ The framers of the Fourteenth Amendment were well aware of this discussion in *Corfield*; indeed, Senator Jacob Howard, a member of the Joint Committee, quoted it when presenting the Fourteenth Amendment to the Senate on behalf of the Committee.⁷⁹ Although Bingham did not himself invoke *Corfield* explicitly in the floor debates, when arguing that the Fourteenth Amendment merely enabled Congress to enforce longstanding constitutional rights, he claimed that the Privileges and Immunities Clause of Article IV recognized an entitlement “to be protected in life, liberty, and property.”⁸⁰

Moreover, as Jacobus tenBroek demonstrated long ago, the phrase “equal protection” had deep origins in abolitionist rhetoric, referring to the “protection” that all persons—including slaves and free African-Americans—were entitled to receive from the law against private violence. Abolitionists argued that because slaves were denied any legal protection against their masters or other white citizens, they were denied “equal protection” in a manner inconsistent with both the Due Process and Privileges and Immunities Clauses of the antebellum constitution.⁸¹ Bingham himself, while acknowledging that slaves could not be considered citizens under the antebellum constitution, advanced this position prior to the war to defend the rights of free blacks under the Constitution.⁸² With the ratification of the Thirteenth Amendment having eliminated any constitutional basis for treating slaves differently from other persons,⁸³ the obligation of states to provide

78. See *id.* at 551-52.

79. See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). The sponsors of the Civil Rights Act of 1866 also relied on this discussion in *Corfield* when defending the constitutionality of that legislation. See, e.g., *id.* at 474-75 (remarks of Sen. Trumbull); *id.* at 1117-18 (remarks of Rep. Wilson).

80. See *id.* at 2542; see also *id.* at 1088. See generally HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 406-07 (1982). This point becomes somewhat more complicated since Bingham, during the debate on his original proposal, also made references to the Fifth Amendment’s Due Process Clause as securing a right to equal protection. See CONG. GLOBE, 39th Cong., 1st Sess. 1090, 1292 (1866). Yet in the same debate, he also acknowledged that the Supreme Court had held that the Bill of Rights was inapplicable to the states. See *id.* at 1089-91. The most likely explanation for this apparent muddle is that Bingham thought that the Privileges and Immunities Clause made the Fifth Amendment applicable to the states, and that the Fourteenth Amendment would provide a vehicle for enforcement of the Fifth Amendment’s guarantee of due process not available under existing law. See, e.g., MALTZ, *supra* note 57, at 114-15.

81. See TENBROEK, *supra* note 67, at 51-55, 66-93, 117-20; see also JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 62-64, 77 (1983); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 42-56 (1986). See generally ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73-102 (1970); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 20-30 (1994).

82. See, e.g., CONG. GLOBE, 35th Cong., 2d Sess. 981-85 (1859); see also Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881 (1988); Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995).

83. “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

“equal protection” would have appeared to Bingham and other abolitionists to follow a fortiori.⁸⁴ In any event, the critical point for present purposes is that the concept of “equal protection” was not limited to protection from discriminatory state laws—achieving equal protection against lawbreakers was at the core of the Clause’s objectives. This idea would not have seemed radical to the Clause’s authors, but rather a codification of what was widely regarded as already within the Constitution.

The understanding of the Equal Protection Clause expressed by the Congress as it enforced the Fourteenth Amendment in the immediate wake of its ratification reinforces the view that a principal purpose of the Clause was to secure equal governmental protection against private lawbreakers. The primary congressional response to continued lawlessness in the postwar South was the Ku Klux Klan Act of 1871, which afforded civil and criminal remedies against both governmental and private action that deprived individuals of civil rights.⁸⁵ The supporters of this legislation repeatedly argued that the southern states’ failure to protect African-Americans and Union sympathizers in their midst from crime violated the Equal Protection Clause.⁸⁶ Representative James A. Garfield, for example, made plain that malicious or inept enforcement of even facially non-discriminatory laws violated the Equal Protection Clause:

[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe that the last clause of the first section [of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.⁸⁷

Similarly, Senator John Pool argued:

Rights conferred by laws are worthless unless the laws be executed. The right to personal liberty or personal security can be protected only by execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves.⁸⁸

84. Indeed, this was the view on which the Civil Rights Act of 1866 was enacted. Its principal sponsors defended the constitutionality of the bill by arguing that the Thirteenth Amendment’s ratification had entitled the newly freed slaves to all rights of citizens, relying in significant part on *Corfield*. See CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866) (remarks of Sen. Trumbull); *id.* at 1117-18 (Rep. Wilson).

85. See 17 Stat. 13, ch. 22 (1871) (repealed in part, otherwise codified as amended at 42 U.S.C. §§ 1985-86 (2000)).

86. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. App. 69, 71 (1871) (remarks of Rep. Shellabarger); *id.* at 332, 334 (Rep. Hoar); *id.* at 339 (Rep. Kelley); *id.* at 334-36 (Rep. Lowe); *id.* at 428 (Rep. Beatty); *id.* at 448 (Rep. Butler); *id.* at 459 (Rep. Coburn); *id.* at 481-84 (Rep. Wilson); *id.* at 501 (Sen. Frelinghuysen); *id.* at 506 (Sen. Pratt); *id.* at 696-97 (Sen. Edmunds); *id.* at App. 251 (Sen. Morton). The Supreme Court recently made this same point. See *United States v. Morrison*, 529 U.S. 598, 624-25 (2000).

87. CONG. GLOBE, 42d Cong., 1st Sess. App. 153 (1871).

88. *Id.* at 608. There were also references to the southern states’ failure to effectively enforce the law in the statements made in support of the Civil Rights Enforcement Act of 1870, 16 Stat. 140, ch. 114

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And, as the Supreme Court observed in *Briscoe v. LaHue*⁸⁹ as it held that witnesses are immune from liability for damages under the civil remedy found in the 1871 Act,⁹⁰ its legislative history reflects considerable congressional concern not with unjust or discriminatory prosecutions and convictions, but with unjust acquittals of those accused of crimes against African-Americans and Union sympathizers.⁹¹ In short, while we have become used to thinking of the concept of equal protection as a right of the individual against the state, its original meaning had much more to do with guaranteeing that law enforcement would be equally *effective* against all threats to public peace and safety.⁹²

B. *Protection Against Lawbreakers and the Contemporary Understanding of the Equal Protection Clause.*

I myself find originalism a far less determinate and disciplined method of constitutional interpretation than do its advocates, since debates about the original meaning of constitutional provisions so frequently devolve into unsatisfying disputes over what weight should be afforded to the various bits of frequently conflicting evidence about the original understanding of the constitutional text.⁹³ In the context considered here, for example, one can fairly

(1870). *E.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 1956 (1870) (remarks of Sen. Edmunds); *id.* at 2718-20 (remarks of Sen. Pool).

89. 460 U.S. 325 (1983).

90. That civil remedy is now codified as 42 U.S.C. § 1983 (2000).

91. 460 U.S. at 337-41. The Court observed:

The bill's proponents were exclusively concerned with perjury resulting in unjust *acquittals*—perjury likely to be committed by private parties acting in furtherance of a conspiracy—and not with perjury committed “under color of law” that might lead to unjust *convictions*. In hundreds of pages of debate there is no reference to the type of alleged constitutional deprivation at issue in this case: perjury by a *government official* leading to an unjust conviction. Indeed, the legislative history is virtually silent even with regard to perjury by *private* persons leading to convictions of innocent defendants. There is a simple enough reason for this lacuna: the Klan had other, more direct, means of dealing with its victims.

Id. at 339-40 (footnote omitted).

92. Indeed, the abundant evidence that providing protection against lawbreakers was one of the objectives of the Fourteenth Amendment has enabled some to argue that the Supreme Court erred by limiting that Amendment's scope to state action. *See, e.g.*, Alan R. Madry, *Private Accountability and the Fourteenth Amendment: State Action, Federalism and Congress*, 59 MO. L. REV. 499 (1994). The position advanced here, however, is considerably narrower. As Professor Currie has argued, even if the state action requirement was correctly read into the Fourteenth Amendment, a state's own failure to provide its residents with equal protection against lawbreakers plainly was within the scope of the Fourteenth Amendment's intended objectives. *See* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 397-98 (1985).

93. Indeed, some have even argued, relying on the Reconstruction Congress's understanding of the character of the obligation of “protection,” that the Equal Protection Clause was not intended to confer any general protection against discriminatory state legislation, but instead only promises equal protection against threats to the security of their persons or property. *E.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 198-220* (2d ed. 1997); Avins, *supra* note 75, at 425-29. There are, however, plenty of statements in the floor debates suggesting that the Fourteenth Amendment provides general protection against discriminatory legislation. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2539 (1866) (remarks of Rep. Farnsworth); *id.* at 2549 (Rep. Stevens); *id.* at 2765-66 (Sen. Howard). Moreover, some scholars have argued that the

debate how much weight to give Bingham's view that the Fourteenth Amendment merely enabled Congress to enforce preexisting constitutional rights against the states. After all, in critical respects Bingham's view of the antebellum constitution was obviously not shared by the majority of his colleagues, who enacted the Civil Rights Act over his objection.⁹⁴ And even putting aside the many difficulties in reliably ascertaining the original meaning of this or any other constitutional provision, there are, of course, powerful arguments that the Constitution should not be chained to a static conception of its original meaning or intent.⁹⁵ None of this, however, should mean that the historical context in which the Fourteenth Amendment was written and ratified should be without significance, even for those who reject original meaning as a satisfactory method of constitutional interpretation. The historical context of the Fourteenth Amendment should at least provoke inquiry into the applicability of the Equal Protection Clause to the manner in which otherwise neutral laws are enforced.⁹⁶ And that leads to consideration of the constitutional text itself.

The conventional view of the Equal Protection Clause as primarily directed at discriminatory state legislation makes little effort to account for the use of the word "protection," and for that reason deserves to be viewed with some skepticism. As Professor Currie has noted, "'protection of the laws' is, after all,

evidence suggesting that the Equal Protection Clause was not intended to be a general prohibition against discrimination suggests that the broader statements of some of the framers indicating that the Fourteenth Amendment prohibited many forms of governmental discrimination were directed to the Fourteenth Amendment's Privileges or Immunities Clause, which, they argue, provides more comprehensive protection against state discrimination than is commonly understood. *See, e.g.*, CURRIE, *supra* note 92, at 342-51; Harrison, *supra* note 74, at 1414-51. The weight to be given this conflicting evidence, as Bret Boyce has persuasively argued, ultimately depends on what proof is required before the original meaning of a constitutional provision is considered established, a question for which there is no entirely satisfactory answer. *See* Brett Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1998).

94. Indeed, a number of powerful attacks have been launched against the soundness of Bingham's constitutional reasoning. *See, e.g.*, BERGER, *supra* note 93, at 198-220; Fairman, *supra* note 46, at 25-37, 51-54. *But see, e.g.*, Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993). And at least when it came to the constitutionality of the Civil Rights Act, which Bingham opposed as beyond congressional power, *see, e.g.*, FLACK, *supra* note 46, at 30-32; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1290-94 (1866) (remarks of Rep. Bingham), Bingham turned out to be wrong. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-44 (1968).

95. For a recent and quite powerful summary of the case against originalism that can be made along these lines, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13-25 (2001).

96. Indeed, I have engaged in an examination of the original intent behind the Equal Protection Clause not because I mean to suggest that a constitutional provision's original meaning is the only legitimate way to construe its scope, but instead in regard of Justice Holmes's aphorism that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). An evaluation of the scope of the Equal Protection Clause is surely aided by consideration of its origins, even if that inquiry is not dispositive for any number of reasons. For example, Professor Perry ascribes significance to the desire of the Fourteenth Amendment's framers to end discrimination in law enforcement, and he is not one to confine the Constitution to the original understanding of its text. *See* MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 54-57, 82-87 (1999).

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a peculiar way to express a general freedom from discrimination.”⁹⁷ Professor Harrison has similarly noted, “the word protection is not doing much work in the standard reading of the text. Nothing is gained by going from ‘equal laws’ to ‘the equal protection of the laws.’ If orthodoxy is correct, the noun in the Equal Protection Clause is, at best, surplusage.”⁹⁸ That noun, moreover, seems to have plain application to the manner in which the government provides protection against lawbreakers.

Under the Equal Protection Clause, accordingly, the government is obligated to provide effectively equal protection against all threats to public peace and safety. Indeed, “protection” is the substantive value identified by the Clause that must be “equal”; government has an affirmative obligation to ensure that the security it provides against the threat of private lawbreaking is “equal.”⁹⁹ Thus, protection against lawbreakers is a type of governmental service of special constitutional significance. On this view, it would even be appropriate to characterize the right to protection against lawbreakers as “fundamental”; it is expressly protected by the Constitution, and under the case law, when a right that enjoys express or implicit constitutional protection is at issue, strict judicial scrutiny is ordinarily required.¹⁰⁰

To the extent that judicial precedents are on point, they support this understanding of equal protection. If, for example, municipal policymakers decided to deploy their police department primarily in wealthy neighborhoods, in order to please their most influential constituents, while leaving disadvantaged, predominantly minority neighborhoods to the predations of gang and drug dealers, applicable precedent readily suggests that there would be an equal protection violation. This is the implication of *Yick Wo v. Hopkins*,¹⁰¹ in which the Court reversed a conviction under a facially non-discriminatory municipal ordinance requiring laundries to be licensed, but which had been applied only against Chinese businesses.¹⁰² *Yick Wo* has come to stand for the proposition that judicial relief will issue under the Equal Protection Clause when a litigant “demonstrate[s] that the administration of a criminal law is ‘directed so exclusively against a particular class of persons . . .

97. CURRIE, *supra* note 92, at 349.

98. Harrison, *supra* note 74, at 1434.

99. Linking the Equal Protection Clause to the entitlement to receive protection against lawbreakers accordingly answers Professor Westen’s charge that the Equal Protection Clause is essentially meaningless because it does not identify any external standard against which equality must be measured. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). On the view advanced here, the “protection” that the government provides against lawbreakers is the substantive benefit that must be distributed equally.

100. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 124-28 (1996); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904-06 (1986); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183-85 (1979); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 262-63 (1974).

101. 118 U.S. 356 (1886).

102. See *id.* at 374.

with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law."¹⁰³ Indeed, the case law does not limit the guarantee of equal protection to racial or ethnic discrimination; the Supreme Court has construed the Equal Protection Clause to forbid the unwarranted denial of government services to even a single individual.¹⁰⁴ It should follow that when the government fails to provide meaningful police protection for an identifiable class or individual, while protecting others far more effectively, that is a denial of the right to equal protection.¹⁰⁵

C. *Equal Protection Against Lawbreakers as a Judicially Underenforced Norm*

One could well ask why, if my account of the meaning of the Equal Protection Clause is persuasive, there are no precedents announcing this right to "equal protection" from the predations of criminals that I have argued is to be found in the constitutional text, its history, and related precedents. The answer, I suggest, is that this aspect of equal protection is a paradigmatic example of a judicially underenforced norm.

As Professor Sager has taught us, for a variety of prudential and institutional reasons, courts frequently "fail[] to enforce a provision of the Constitution to its full conceptual boundaries."¹⁰⁶ In particular, the Supreme Court's willingness to recognize and enforce the commands of the Constitution "may be truncated for reasons which are based not upon analysis of the constitutional concept but upon various concerns of the Court about its institutional role."¹⁰⁷ Indeed, Professor Sager has identified the reluctance of courts to enforce the Equal Protection Clause absent explicit racial or similarly "suspect" classifications as "[a] prominent example of this phenomenon . . ."¹⁰⁸ Nevertheless, Professor Sager reminds us that

103. *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (quoting *Yick Wo*, 118 U.S. at 373). See also *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989).

104. See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam).

105. The Supreme Court came close to acknowledging this point in *United States v. Morrison*, 529 U.S. 598 (2000). While holding that the Violence Against Women Act was not a proper exercise of congressional remedial power under Section 5 of the Fourteenth Amendment, the Court acknowledged that a state's failure to provide effectively equal protection to a class of its residents would violate the Fourteenth Amendment, and found the Act invalid only because it provided no remedy against state officials that had failed to discharge their own constitutional obligations. See *id.* at 624-26.

106. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

107. *Id.* at 1214.

108. *Id.* at 1215. He identified some of the prudential concerns underlying judicial hesitancy to enforce the Equal Protection Clause to its full conceptual limits: "In the most general of terms, the claims for restraint typically turn on the propriety of unelected federal judges' displacing the judgments of elected state officials, or upon the competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them." *Id.* at 1217 (footnotes omitted).

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“constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts’ role in enforcing the norm.”¹⁰⁹

The affirmative conception of equal protection advanced here is almost certain to be judicially underenforced. Consider what would happen if a minority resident of a high-crime neighborhood—even one who had been the victim of a crime—brought suit alleging that the failure of the local authorities to offer police protection as efficacious as that enjoyed by upper-income, predominantly non-minority neighborhoods violated the Equal Protection Clause. A court would likely reject the claim, but for reasons having little to do with its merits. If the plaintiff sought injunctive relief requiring the police to provide improved service in the plaintiff’s high-crime neighborhood, a court would likely rule that the plaintiff lacked standing to seek such relief, reasoning that the possibility that the plaintiff would be victimized by a criminal act in the future was too speculative to permit a claim for injunctive relief to proceed.¹¹⁰ Whatever “chilling effect” that the plaintiff felt from fear of crime would be considered too subjective to permit the case to proceed.¹¹¹ The court would probably add that it is entirely speculative whether whatever injunctive relief the court might issue would in fact reduce crime, and for that reason the plaintiff’s injury would not be considered fairly redressable by judicial decision.¹¹² The court could bolster its ruling by reference to federalism and separation of powers principles, noting that courts should ordinarily not supervise policing tactics or other inherently executive functions.¹¹³ If, conversely, the plaintiff sought damages for injuries incurred as a result of the crime of which the plaintiff had been a victim, the court would most probably rule that the legal or “proximate” cause of those damages was the criminal act

109. *Id.* at 1221. This thesis enjoys wide support among legal scholars. *See, e.g.*, FALLON, *supra* note 95, at 31-34; Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1524, 1594-96 (2000); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 866-69 (1999); Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1642-44 (1999); Robert C. Post & Reva B. Sigel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 467-73 (2000); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 321-24 (1987).

110. *See generally, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-10 (1983); *Ashcroft v. Mattis*, 431 U.S. 171 (1977) (per curiam); *Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976); *O’Shea v. Littleton*, 414 U.S. 488, 496-99 (1974).

111. *See generally, e.g.*, *Rizzo*, 423 U.S. at 375-77; *O’Shea*, 414 U.S. at 496-97; *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

112. *See generally, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-71 (1992); *Allen v. Wright*, 468 U.S. 737, 757-59 (1984); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40-46 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-19 (1973).

113. *See generally, e.g.*, *Allen*, 468 U.S. at 759-61; *Rizzo*, 423 U.S. at 377-80; *Gilligan v. Morgan*, 413 U.S. 1, 9-11 (1973); *Laird*, 408 U.S. at 14-16.

of a third party, not the law enforcement policies of the government.¹¹⁴ If the court reached the merits, it would likely apply a highly deferential rule—as long as the policing policies of the defendant government were not expressly based on a suspect criterion such as the race, they would withstand constitutional attack if they have a conceivable rational relationship to a legitimate governmental interest.¹¹⁵ Yet, even this seemingly substantive rule of constitutional law reflects the institutional and prudential constraints on the judiciary; the Supreme Court has acknowledged that it adopted this deferential “rational basis” test for facially neutral laws because of its concern that a more demanding approach would jeopardize an unacceptably large number of legislative judgments.¹¹⁶ In the law enforcement context in particular, courts are particularly eager to defer to the judgments of policymakers having what they view as greater expertise on how to best protect the public.¹¹⁷ Indeed, in the handful of cases to consider claims that the police have failed to provide the plaintiff with effectively equal protection against lawbreakers, courts have uniformly rejected such claims, stressing the limited scope of judicial review and the importance of judicial deference in this area.¹¹⁸ For just this reason, even if a court were willing to conclude that the right to equal protection against lawbreakers was fundamental, it would question whether courts can fashion a remedy that will ensure that protection is truly equal; in an unjustly neglected portion of the decision in *San Antonio Independent School District v. Rodriguez*,¹¹⁹ the Court made the important point that even when it confronts a right that it considers fundamental, when it cannot be sure whether the remedy that a plaintiff seeks will actually allocate that right equally, it should stay its hand.¹²⁰

114. See generally, e.g., *Martinez v. California*, 444 U.S. 277 (1980). See also *Brower v. Inyo County*, 489 U.S. 593, 599 (1989).

115. See, e.g., *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273-79 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

116. See *Washington v. Davis*, 426 U.S. at 247.

117. See generally, e.g., *Rizzo*, 423 U.S. at 377-80; *Laird*, 408 U.S. at 14-16. This point is of particular significance. As I will explain in some detail below, determining how best to provide equal protection against lawbreakers is laden with policy judgments largely beyond judicial expertise, and for this reason the constitutional norm at issue is one that inevitably will be judicially underenforced.

118. See, e.g., *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007-08 (7th Cir. 2000), cert. denied, 531 U.S. 1080 (2001); *Harvey v. City of Conroe*, 148 F. Supp. 2d 783, 787-89 (S.D. Tex. 2000); *Pariseau v. City of Brockton*, 135 F. Supp. 2d 257, 263-64 (D. Mass. 2001); *Walker v. Shepard*, 107 F. Supp. 2d 183, 186-89 (N.D.N.Y. 2000).

119. 411 U.S. 1 (1973).

120. In that case, the Court confronted a claim that the Equal Protection Clause requires equalizing expenditures on education between school districts. The Court reasoned that even if there were a fundamental right to equal educational opportunity triggering strict judicial scrutiny, because it is difficult for a court to assess the relationship between expenditures and educational opportunities, the Court could not reliably determine whether equalizing expenditures would equalize educational opportunities as well. See *id.* at 40-44. *Rodriguez* accordingly illustrates a critical point for present purposes—there are some values that the judicial process may not be able to reliably allocate in an equal fashion, even if the Constitution considers them fundamental.

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In short, to reject a claim of the type that I have argued the Equal Protection Clause supports would invoke a host of reasons that have little to do with the conceptual reach of the Equal Protection Clause, but which are instead based on a variety of institutional concerns.¹²¹ Perhaps on an unusually powerful showing that the police have failed to provide adequate protection to a discrete community or from a discrete threat a court might be persuaded to provide a remedy on the theory advanced here, but in general, institutional concerns would counsel strongly toward deference even if a court were persuaded that the Equal Protection Clause contains an affirmative guarantee of equally effective protection from lawbreakers. And, as Professor Sager has taught us, that kind of ruling does not mean that the constitutional principles at stake do not exist; it only means that for institutional reasons, the courts will not enforce them.¹²²

121. The closest that the federal courts have come to recognizing this type of equal protection claim is a line of cases leaving open the possibility that if a victim of domestic violence could establish that the police treat domestic violence allegations less seriously than other offenses because of an intent to discriminate against women, such proof would support an equal protection claim. *See Shipp v. McMahon*, 234 F.3d 907, 913-14 (5th Cir. 2000), *cert. denied*, 532 U.S. 1052 (2001); *Hayden v. Grayson*, 134 F.3d 449, 453 (1st Cir. 1998); *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Navarro v. Block*, 72 F.3d 712, 716 (9th Cir. 1995); *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994); *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990); *Hynson v. City of Chester*, 864 F.2d 1026, 1031 (3d Cir. 1988); *Watson v. Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988); *see also* Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help When the Police Won't?*, 95 YALE L.J. 788 (1986). These claims at least have a fighting chance because classifications involving sex invoke heightened judicial scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531 (1996). But this line of cases illustrates the many difficulties in pursuing such claims. First, courts caution that proof that a challenged law enforcement policy disproportionately disadvantages female victims of crime is insufficient to show discriminatory intent. *See Shipp*, 234 F.3d at 913; *Hayden*, 134 F.3d at 453; *Soto*, 103 F.3d at 1067; *Navarro*, 72 F.3d at 716; *Eagleston*, 41 F.3d at 878; *Ricketts*, 36 F.3d at 781. Second, the cases also caution that something more than speculation is required to prove proximate causation; specific evidence is required that the crime would not have occurred had a different enforcement policy been utilized. *See id.* at 779-80. Third, when an intent to discriminate against women cannot be proven, as long as the enforcement decisions at issue were rational, they will be upheld, at least absent a showing of animus against the victim. *See Shipp*, 234 F.3d at 916-17; *Fajardo v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1998).

122. It bears acknowledging that in some of its recent cases restricting the scope of congressional remedial power under Section 5 of the Fourteenth Amendment, the Supreme Court has characterized the rational basis test as a substantive rule of equal protection jurisprudence rather than a product of the institutional constraints on judicial authority. I refer particularly to *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), holding that the prohibition on employment discrimination on the basis of disability in the Americans with Disabilities Act was not within the scope of congressional authority under Section 5, and *Kimel v. Florida Board of Education*, 528 U.S. 62 (2000), holding the same for the Age Discrimination in Employment Act. Unlike other recent cases finding challenged legislation beyond the scope of congressional authority under Section 5 when Congress, in the Court's view, had failed to identify a sufficient pattern of constitutional violations prior to enacting assertedly remedial legislation, *see Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640-48 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 530-35 (1997), *Garrett* and *Kimel* do more than require a greater factual predicate for remedial legislation; they characterize the rational basis test used to judge claims of disability and age discrimination as a substantive rule of constitutional law that Congress is not free to disregard when exercising its remedial powers. *See Garrett*, 531 U.S. at 365-68; *Kimel*, 528 U.S. at 83-85. Of course, the propriety of the Court's approach in these cases is far from self-evident. *See, e.g.*, *Garrett*, 531 U.S. at 383-85 (Breyer, J., dissenting); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 189-92 (1997). But even

Accordingly, like most other judicially underenforced norms, the obligation to provide equal protection from lawbreakers depends primarily on the political branches of government to give it meaning and substance.¹²³ There is, moreover, good reason to believe that the political process will be cognizant of this norm. For one thing, voters consider crime to be an issue of considerable importance.¹²⁴ Protection against lawbreakers therefore is something that the political process is likely to endeavor to provide. And as for “equal” protection, voters tend not to think of police protection as a type of political pork that officeholders should be able to dole out to favored constituents. Instead, a norm of equal protection in policing is deeply rooted. In fact, conventional policing strategies, as I will now endeavor to demonstrate, were developed in an effort to conform to this norm; they stress uniformity and reactivity in an effort to provide all communities what appears to be an “equal” level of police service. I will also argue, however, that it has become increasingly evident that uniform and reactive policing is a seriously deficient means to achieve the norm of equal protection from lawbreakers.

III. CONVENTIONAL POLICING AND EQUAL PROTECTION

The idea that law enforcement strategy is driven by a constitutional norm

if the Court’s approach in these cases is thought to undermine Professor Sager’s view that the rational basis test reflects institutional constraints on the judiciary rather than the conceptual reach of equal protection, that should not undermine the power of his insight for cases in which facially neutral law enforcement practices fail to provide victims with effectively equal protection. The approach taken in *Garrett* and *Kimel* appears to rest at least in part on the Court’s view that the type of discrimination at issue in those cases was justifiable at least in terms of cost or efficiency; the Court appears to believe that employers have legitimate reasons to take the age and disabilities of employees or applicants into account. See *Garrett*, 531 U.S. at 367-68 (governmental employers “could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled”); *Kimel*, 528 U.S. at 84 (“[A] State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State’s legitimate interests.”). At the same time, the Court has been careful to acknowledge the existence of congressional power to proscribe facially neutral practices with discriminatory results, see, e.g., *Garrett*, 531 U.S. at 373-74; *City of Boerne*, 521 U.S. at 525-26, and in the case most analogous to the context considered here, the Court acknowledged that if states failed to provide effective protection against private violence to a class of their residents, Congress would have authority to fashion a remedy against the offending state officials under Section 5 of the Fourteenth Amendment. See *United States v. Morrison*, 529 U.S. 598, 624-26 (2000).

123. The notion that a core objective of the Equal Protection Clause was left largely to the political branches for its enforcement should not be surprising. As the account of the origin of the Equal Protection Clause advanced above should make plain, its framers were primarily concerned about securing congressional authority to combat conditions in a particular portion of the country. Section 5 of the Fourteenth Amendment, of course, accomplishes just that, by granting Congress “power to enforce [this Amendment] by appropriate legislation.” U.S. CONST. amend. XIV, § 5. Moreover, as the discussion above reflects, those who crafted the Clause were primarily concerned with securing congressional authority to address abuses found only in a particular region. Thus, I quite agree with Professor Strauss’s characterization of the Fourteenth Amendment as an “outlier” amendment—one designed to address practices that have come to be considered outside of the constitutional mainstream. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001). And in that sense, the political process would have been thought capable of enforcing this constitutional norm.

124. See, e.g., 2000 SOURCEBOOK, *supra* note 41, at 101 tbls.2.2 & 2.3.

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rather than the more mundane political considerations that usually bear on local government decisionmaking is not as radical as it may seem at first blush. There is actually widespread agreement that law enforcement is not a perquisite to be doled out to politically favored constituents, but instead should be provided “equally.” What I hope to demonstrate below, however, is that in terms of this norm of “equal protection,” conventional policing strategies are frequently deficient.

A. *The Emergence of the Conventional Policing Model*

In the middle of the nineteenth century, urban police forces gradually emerged, acquiring from local sheriffs and constables the primary responsibility for law enforcement in most large cities.¹²⁵ The spoils system being a central feature of local politics, most positions on the newly created police forces were awarded on the basis of patronage and other political considerations.¹²⁶ But patronage was not the only attraction that policing had for politicians. As Robert Fogelson has demonstrated, the rapidly rising immigrant populations of the late nineteenth and early twentieth centuries brought with them values that were often quite different from those reflected in the frequently puritanical American legal codes. By controlling law enforcement, politicians could exploit the increasing clash of cultures between traditional elites and newer immigrant populations, currying favor with one side or another:

[T]hose who controlled the police had the opportunity to implement a policy about vice consistent with the prevailing life-style and underlying morality of their constituents. As the moral and cultural conflict between the natives and the ethnics intensified, many politicians found this opportunity a heavy burden, but not one that they dared turn over to anyone else.¹²⁷

This system created ample opportunities for corruption, not only among politicians willing to overlook unlawful activities, but among the police as well. Officers generally walked a beat, and because supervisors lacked radios or other means of establishing a reliable command-and-control system, officers on patrol exercised enormous discretion.¹²⁸ In this environment, brutality and

125. See generally, e.g., SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 4-7 (1977).

126. See, e.g., ROBERT M. FOGELSON, *BIG-CITY POLICE* 13-31 (1977); WALKER, *supra* note 125, at 8-12; George L. Kelling & Mark H. Moore, *From Political to Reform to Community: The Evolving Strategy of Police*, in *COMMUNITY POLICING: RHETORIC OR REALITY* 8-9 (Jack R. Greene & Stephen D. Mastrofski eds., 1988); Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, in *MODERN POLICING* 67-70 (Michael Tonry & Norval Morris eds., 1992) [hereinafter *MODERN POLICING*].

127. FOGELSON, *supra* note 126, at 21. Fogelson adds that many of the vice laws enacted during the so-called Progressive Era around the turn of the century can be viewed as an effort by traditional elites to regulate what they perceived as dangerous signs of disorder and cultural conflict among immigrant populations. See *id.* at 20-21.

128. See, e.g., WALKER, *supra* note 125, at 13-14; Reiss, *supra* note 126, at 59-61.

corruption flourished.¹²⁹ This state of affairs, however, eventually produced a backlash—a powerful reform movement that, in fits and starts, transformed the character of urban policing, creating a new model of policing that we now take for granted as the “conventional” approach to policing strategy.¹³⁰

The reform movement had two central objectives. The first was to remove patronage from policing by creating civil service systems in which police would be hired and promoted using “merit-based” procedures—often administered by commissions insulated from political influence.¹³¹ The second was an emphasis on centralized command and control. Patrol officers were assigned to conduct motorized patrol throughout an assigned beat, responding speedily to orders from centralized dispatchers directing them to the scene of a reported crime or breach of the peace, with detectives and other specialized personnel later assigned to engage in retrospective investigation of offenses when necessary.¹³² In this way, the reform movement fought the evils of discretionary justice in a classic way—it sought to bureaucratize policing by creating an effective hierarchy that was able to control a large workforce by routinizing organizational behavior.¹³³

In an era in which political machines controlled virtually every aspect of urban governance, the success of the reform movement was remarkable: “In all but a handful of cities, [the reformers] weakened the position of the ward leaders, undermined the influence of the precinct captains, severed the connections between them, and thereby destroyed the territorial basis of decentralization that had heretofore been an integral feature of the American police.”¹³⁴ Indeed, as George Kelling and Mark Moore have observed:

So persuasive was the argument of reformers to remove political influences from policing that police departments became one of the most autonomous public organizations in urban government. Under such circumstances, policing a city became a legal and technical matter to be left to the discretion of professional police executives, under guidance of law. Political influence of every kind came to be seen as a failure of police leadership and as corruption in policing.¹³⁵

The success of the reformers’ policing model reflects the power and appeal of what I have called the norm of equal protection against lawbreakers. While

129. See, e.g., FOGELSON, *supra* note 126, at 22-35, 148-49; WALKER, *supra* note 125, at 15-18, 25-26; Kelling & Moore, *supra* note 126, at 8-9; Reiss, *supra* note 126, at 79-82.

130. See, e.g., FOGELSON, *supra* note 126, at 41-53; WALKER, *supra* note 125, at 56-68; Reiss, *supra* note 126, at 70-71.

131. See, e.g., FOGELSON, *supra* note 126, at 58-60; WALKER, *supra* note 125, at 39, 74, 168; Reiss, *supra* note 126, at 57, 70-72.

132. See, e.g., GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 13-14 (1996); WALKER, *supra* note 125, at 128, 136-37; Kelling & Moore, *supra* note 126, at 13-14; Mark Harrison Moore, *Problem-Solving and Community Policing*, in *MODERN POLICING*, *supra* note 126, at 108-11; Reiss, *supra* note 126, at 58-61.

133. See, e.g., GOLDSTEIN, *supra* note 1, at 6-7; Reiss, *supra* note 126, at 57-58, 70-72.

134. FOGELSON, *supra* note 126, at 226.

135. Kelling & Moore, *supra* note 126, at 11 (citation omitted).

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the reform movement did not frame its argument in explicitly constitutional terms, in effect the reformers' argument was that the law enforcement function was subject to the same equality principle that I have suggested can be found in the Fourteenth Amendment—the law must be enforced equally, impartially, and apolitically, without distinction between those who are favored by the local authorities and those who are not. As Robert Fogelson put it: “The reformers were uncompromising. To arguments that vice should be confined to certain neighborhoods and regulated by the police they responded that it should be eliminated forthwith everywhere in the city.”¹³⁶ The reformers denied that politicians had anything relevant to contribute to law enforcement precisely because protection was a legal rather than a political entitlement; to them, “the police force was . . . an administrative rather than a legislative body; the preservation of order, the protection of property, and enforcement of law were not policy issues.”¹³⁷

At first blush, the reform policing model seems to comport quite nicely with the norm of equal protection against lawbreakers. There are two respects in which the public expects police protection, reflecting *ex ante* and *ex post* perspectives on the policing function: the public expects the police to deploy and patrol in a fashion that will prevent crime; and it expects prompt police response to, and effective investigation of, crimes once they have been committed. The reform model endeavored to provide equal protection from both perspectives: Uniform and motorized patrol deterred crime by signaling potential lawbreakers that the police might appear at any place or time, and central command and control ensured that police responded quickly and on an impartial basis to calls for service. But the ability of the conventional policing model adopted in the wake of the reform movement to provide effectively equal protection deserves greater scrutiny, especially from the *ex ante* perspective.

B. *The Non-Uniform Character of Crime*

It was Clifford Shaw who first demonstrated that crime is in large part a function of geography. Analyzing Chicago crime data in the first decades of the twentieth century, he showed that crime rates were much higher in certain neighborhoods than others, and that these neighborhood crime rates are remarkably stable over time.¹³⁸ In the intervening decades, it has come to be well understood that crime tends to cluster in discrete geographic areas and is

136. FOGELSON, *supra* note 126, at 41.

137. *Id.* at 49.

138. See CLIFFORD R. SHAW ET AL., *DELINQUENCY AREAS: A STUDY OF THE GEOGRAPHIC DISTRIBUTION OF SCHOOL TRUANTS 198-206* (1929). For a useful discussion of the import of the findings of Shaw and his colleagues, see ROBERT J. BURSİK & HAROLD G. GRASMICK, *NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL 29-45* (1993).

relatively stable within those areas.¹³⁹ There are a variety of likely explanations for this phenomenon. Empirical evidence, for example, consistently demonstrates that crime rates, especially for violent crime, are particularly high in areas of concentrated poverty.¹⁴⁰ That, in turn, means that crime frequently clusters geographically, since urban poverty is generally highly concentrated in discrete and usually racially segregated neighborhoods.¹⁴¹ Moreover, it has become a fairly widespread view among urban sociologists that communities experiencing concentrated poverty suffer from an isolation effect, in which the absence of middle-class role models promotes a culture that rejects middle-class values, including norms of law-abidingness.¹⁴² Urban sociologists also frequently argue that communities experiencing concentrated poverty tend to lack mechanisms of social control—social arrangements by which norms of law-abidingness are inculcated and enforced.¹⁴³ Sampson, Roudenbush and Earls have used the concept of “collective efficacy” to make this point; in a particularly influential paper, they demonstrated that rates of violent crime in communities are highly related to indicia of collective efficacy—community residents’ sense that the community as a whole effectively endeavors to prevent crime.¹⁴⁴ But whatever the explanation for the relationship between community

139. See, e.g., John E. Eck, *Preventing Crime at Places*, in PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS 7-1 (Lawrence W. Sherman et al. eds., 1997) [hereinafter PREVENTING CRIME]; William Spelman, *Criminal Careers of Public Places*, in CRIME AND PLACE 115-44 (John E. Eck & David Weisburd eds., 1995) [hereinafter CRIME AND PLACE].

140. For useful surveys of the research on the relationship of poverty, family instability, and crime, see ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 120-47 (1998), and GARY LAFREE, *LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA* 117-34 (1998).

141. See, e.g., PAUL JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 59-88 (1997); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 115-47 (1993). A number of studies vividly demonstrate the relationship between highly concentrated poverty and neighborhood rates of violent crime. See, e.g., JAMES F. SHORT, JR., *POVERTY, ETHNICITY, AND VIOLENT CRIME* 50-54 (1997); Kenneth C. Land et al., *Structural Covariates of Homicide Rates: Are There Any Invariances Across Time and Social Space?*, 95 AM. J. SOC. 922 (1990); Douglas S. Massey, *Getting Away With Murder: Segregation and Violent Crime in America*, 143 U. PA. L. REV. 1203 (1995).

142. See, e.g., SHORT, *supra* note 141, at 55-74; WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 7-9, 46-62 (1987); Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. FORCES 619 (1997); Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 SOC. FORCES 1325 (1996).

143. See, e.g., BURSIK & GRASMICK, *supra* note 138, at 15-18, 34-35; JOHN HAGAN, *CRIME AND DISREPUTE* 67-99 (1994); DAN A. LEWIS & GRETA SALEM, *FEAR OF CRIME: INCIVILITY AND THE PRODUCTION OF A SOCIAL PROBLEM* 11-22 (1986); Francis T. Cullen, *Social Support as an Organizing Concept for Criminology: Presidential Address to the Academy of Criminal Justice Sciences*, 11 JUST. Q. 527 (1994). The most prominent dissenters from this view are Gottfredson and Hirschi, who generally attribute crime to low self-control, while acknowledging that certain demographic groups experience higher crime rates, a phenomenon that they speculate may relate to child-rearing practices. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* 154-59 (1990). This view is accordingly consistent with the theory that poverty is the principal social component of crime, given the adverse effects of poverty on child rearing. See sources cited *supra* note 140.

144. See Robert J. Sampson, Stephen W. Roudenbush, & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997); see also Robert J. Sampson,

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and crime, there is no doubt that it exists; research consistently discloses much higher crime rates in communities that display various indicia of instability.¹⁴⁵ Indeed, this fact largely explains the seeming relationship between race and crime—racial minorities are more likely to live in areas of concentrated poverty and instability.¹⁴⁶

Of particular note is the fact that persons who commit crimes are not only disproportionately likely to live in disadvantaged neighborhoods, but also are likely to commit their crimes in those neighborhoods. At least for economically-motivated crimes, one might think that the crime rates should be highest in relatively affluent neighborhoods, where presumably the most lucrative targets can be found. Yet that is not the case, even for property crime.¹⁴⁷ Rates of violent victimization in particular are far higher among the poor; between 1993 and 2001, the rate of victimization for violent crimes among persons with a household income of less than \$7,500 was consistently more than twice as high as the rate among those with a household income in excess of \$75,000.¹⁴⁸ Studies examining the relationship between violent victimization and neighborhood instability are harder to come by, but the available evidence suggests that poverty alone does not predict rates of violent crime in an area as well as a more comprehensive set of indicia of community instability, such as high population density and resident mobility, low levels of family stability, and a lack of strong community organizations.¹⁴⁹ Krivo and Peterson, for example, using data from Columbus, Ohio, found that rates of property crime were somewhat higher, and rates of violent crime were dramatically higher, in communities that experienced greater indicia of community instability.¹⁵⁰

The geographic “lumpiness” of crime, however, is not solely a function of community. Even within what are considered high-crime communities, crime tends to cluster in discrete places.¹⁵¹ This phenomenon is explained by the

Jeffrey D. Morenoff & Felton Earls, *Beyond Social Capital: Spatial Dynamics of Collective Efficacy for Children*, 64 AM. SOC. REV. 633 (1999).

145. The literature is helpfully reviewed in Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 123 (2000).

146. See, e.g., Janet L. Lauritsen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, in THE HANDBOOK OF CRIME AND PUNISHMENT 58, 65-70 (Michael Tonry ed., 1998).

147. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION 2001, CHANGES 2000-01 WITH TRENDS 1993-2001, at 5-7 (2002).

148. See *id.* at 15, App. tbl.1.

149. See, e.g., Robert J. Sampson & Janet L. Lauritsen, *Violent Victimization and Offending: Individual, Situational and Community-Level Factors*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE 43-64 (Albert J. Reiss & Jeffrey A. Roth eds., 1994); Sampson, Roudenbush & Earls, *supra* note 144, at 921-23.

150. See Krivo & Peterson, *supra* note 142, at 628-31.

151. See, e.g., Ralph B. Taylor, *Crime and Small-Scale Places: What We Know, What We Can Prevent, and What Else We Need To Know*, in CRIME AND PLACE: PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION 3-9 (U.S. Dep't of Justice 1998);

“routine activities” approach to criminology, which analyzes crime the way that other routine activities are analyzed to determine how they come to be performed as they are. The advocates of the routine activities approach posit that crime rates will be highest where three things intersect—motivated offenders, desirable targets, and a lack of guardians, such as parents, friends, neighbors, private security guards, or police, who occupy space in a manner that deters crime.¹⁵² The routine activities approach adds that criminals tend to identify as desirable targets persons or locations in their own communities, since they feel more comfortable in those environments and, as with other routine activities, are relatively less willing to travel considerable distances for an uncertain reward.¹⁵³

All of this should cast considerable doubt on the efficacy of conventional policing strategy to deploy police where they are most needed. Areas at which motivated offenders, desirable targets, and a lack of guardians intersect are not randomly distributed; and it is those locations at which the police are most needed to provide “guardianship” that would otherwise not be present. It follows that when the police are deployed in random and uniform patrol, they will frequently not be present where they can do the most good. As Ralph Taylor has observed:

Even in a high-crime neighborhood, most blocks will have low crime rates, and most addresses will have no reported crimes. Links between crime and community do not provide the data on specific places needed to guide deployment of police officers. Police hope to be more efficient and productive by focusing on high-crime places (or hot spots), rather than on high-crime communities. Crime data and police service calls that are “geocoded” reveal concentrations of crime in a few hot places. Increasing patrol deployments to higher crime neighborhoods appears to produce only modest gains in crime control. If we know exactly where and when crimes are taking place, we should be able to control crime more effectively.¹⁵⁴

Indeed, the current enthusiasm for mapping crime among urban police departments reflects the growing consensus that effective police deployment must be directed toward deterring crime at the locations where it is most likely to occur.¹⁵⁵

The empirical evidence concerning the effect of policing tactics on crime also suggests the inadequacy of random patrol and retrospective investigation of completed criminal offenses to help high-crime neighborhoods and the “hot

Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27 (1989).

152. See, e.g., BURSIK & GRASMICK, *supra* note 138, at 62-72; GOTTFREDSON & HIRSCHI, *supra* note 143, at 22-44; John E. Eck & David Weisburd, *Crime Places in Crime Theory*, in CRIME AND PLACE, *supra* note 139, at 7-18; Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rate Trends: A Routine Activities Approach*, 44 AM. SOC. REV. 588 (1979).

153. See, e.g., BURSIK & GRASMICK, *supra* note 138, at 71-72; KEITH HARRIES, U.S. DEP'T OF JUSTICE, MAPPING CRIME: PRINCIPLE AND PRACTICE 26-28 (1999).

154. Taylor, *supra* note 151, at 2.

155. See HARRIES, *supra* note 153, at 67-89.

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spots” they contain. In a particularly useful summary of recent research, Lawrence Sherman found no evidence that increasing random patrols or reactive arrests, or reducing response time to calls for emergency service, reduced crime rates.¹⁵⁶ Similarly, Eck and McGuire’s review of some twenty-seven recent studies showed no effect on crime of increasing the number of police officers.¹⁵⁷ In fact, among criminologists, something of a consensus has developed that increasing the number of officers on patrol does not reduce crime.¹⁵⁸ Given the relationship between place and crime, this result is not surprising; deploying police randomly makes no effort to place officers where they are most needed. Patrol targeted to crime “hot spots,” in contrast, better reflects the differential needs of different communities and places for police protection. This conclusion is increasingly supported by impressive evidence suggesting that directed patrol targeting high-crime “hot spots” produces significant reductions in crime rates.¹⁵⁹

Of course, if police resources were disproportionately targeted at crime “hot spots,” one might expect criminals simply to move to other, less intensively patrolled locations. The available evidence, however, suggests that crime is not geographically fungible in this sense; the great majority of studies have found that the displacement effects that follow geographically targeted policing are limited.¹⁶⁰ Routine activities analysis helps explain this result. There are only a limited number of locations where offenders and targets intersect, and when those locations are well-policed, offenders will be reluctant to move to other locations less conducive to offending. And even when displacement occurs, it imposes costs on offenders. As John Eck has observed, illicit markets, such as markets in drugs and prostitution, can maximize revenues only if they are widely accessible, and this requires establishing geographically stable marketplaces where buyers can confidently expect to find willing sellers.¹⁶¹ If police pressure forces these markets to continually relocate, their profitability

156. See Lawrence W. Sherman, *Policing For Crime Prevention*, in PREVENTING CRIME, *supra* note 139, at 8-8 to 8-13, 8-16 to 8-20.

157. See Eck & McGuire, *supra* note 5, at 209-17.

158. See, e.g., GOLDSTEIN, *supra* note 1, at 12-13; Moore, *supra* note 132, at 111-12.

159. See Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 29-33 (Michael Tonry ed., 1998); Sherman, *supra* note 156, at 8-13 to 8-15; Anthony A. Braga, *The Effects of Hot Spot Policing on Crime*, 578 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 113-19 (2001).

160. See, e.g., Eck, *supra* note 139, at 7-40 to 7-41; Eck & Weisburd, *supra* note 152, at 19-20; Renee B.P. Hesseling, *Displacement: A Review of the Empirical Literature*, in 3 CRIME PREVENTION STUDIES 197-230 (Ronald V. Clarke ed., 1994); Braga, *supra* note 159, at 120.

161. See John E. Eck, *A General Model of the Geography of Illicit Retail Marketplaces*, in CRIME AND PLACE, *supra* note 139, at 67-93. This helps to explain, for example, the popularity of outdoor drug markets, which at first blush seem irrational since they should be more vulnerable to detection by the police. For data on the prevalence of outdoor drug sales, see, for example, K. JACK RILEY, U.S. DEP’T OF JUSTICE, CRACK, POWDER COCAINE AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES 16-17 (1997); BRUCE G. TAYLOR ET AL., NAT’L INST. OF JUSTICE, ADAM PRELIMINARY 2000 FINDINGS ON DRUG USE AND DRUG MARKETS—ADULT MALE ARRESTEES 24-25 (2001).

will decline.¹⁶²

In short, current thinking about the relationship between crime and place suggests that the conventional model of policing is at best a grossly inefficient means of deploying police officers where they are most needed. Of course, evaluating empirical evidence about policing and crime is a tricky business since so many factors affect crime rates, and their relative influence remains poorly understood. But the importance of targeted patrol seems self-evident; as a matter of common experience, we know that some places within cities are more dangerous than others, and for just this reason there is little basis for believing that deploying the police randomly and uniformly, and summoning them to a particular location only after a crime has occurred, is likely to maximize police effectiveness.¹⁶³ Moreover, because conventional policing is almost entirely reactive—assigning patrol officers virtually no responsibility for preventing crime other than driving through an assigned area on an essentially random basis—the ability of police on random patrol to equalize the effective protection that residents receive from lawbreakers is sharply circumscribed. A reactive strategy—waiting for a crime to be committed and reported before officers commence enforcement action—means that the police do little to reduce the disparities in crime rates between communities.¹⁶⁴

C. *The Inadequacy of Conventional Policing To Provide Equal Protection*

My concern here, however, is not primarily with police efficacy, but instead with constitutional principle. Under the norm of equal protection advanced

162. My own advocacy of anti-loitering laws as a means to disrupt patterns of drug trafficking is based largely on this point. See Rosenthal, *supra* note 13, at 139-42.

163. Zimring and Hawkins have made this point in the context of drug crime:

An emphasis on high-crime zones meshes well with other priorities that should govern the allocation of discretionary resources in drug control. High-crime areas in the city are precisely where children and youth are most at risk of becoming involved in crime and delinquency, where drug traffic is most demoralizing to the middle class, and where social structure is most at risk of disorganization. Crime rates can thus serve as a proxy for a complex set of factors that represent a concentration of the greatest costs associated with illicit drugs in modern America. We thus regard crime-impacted areas in American cities as high-priority candidates for any resources targeted to combat urban problems and would regard drug control funds as no exception.

FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 155 (1992).

164. Mark Moore has added that because this strategy makes police enormously reliant on the willingness of community residents to report crime, that also limits its effectiveness:

[T]he reactive strategy is systematically unable to deal with crimes that do not produce victims and witnesses. This has long been obvious in trying to deal with so-called victimless crimes such as prostitution, gambling, and drug dealing. It has recently become clear, however, that many other crimes do not produce victims or witnesses ready to come forward. Sometimes people have been victimized and know it but are reluctant to come forward because they are afraid or are closely related to the offender and reluctant to see him or her arrested, or some combination of the two. It is hard for the reactive strategy to reach systematic extortion or wife battering or child abuse, for the victims do not give the alarm. It may even be hard to get at robbery in housing projects where the victims and witnesses fear retaliation.

Moore, *supra* note 132, at 112-13 (citation omitted).

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above, uniform policing tactics—in which the police make no effort to identify where crime is more likely to occur and allocate resources accordingly—are enormously suspect. Those tactics create a kind of formal equality—every neighborhood should be patrolled equally, and every call for police service should be answered with equal speed—but in effect provide only the form, and not the substance, of equal protection. Random patrol will systematically disadvantage the poorest, least stable neighborhoods—those in which a police presence is most needed to bolster inadequate non-governmental controls.¹⁶⁵ And the communities most disadvantaged by this approach are likely to be disproportionately minority—a particularly troubling outcome in light of the Fourteenth Amendment’s objective to equalize the protection that African-Americans were to receive under the law. It should be plain from the discussion above, moreover, that the norm of equal protection against lawbreakers is not satisfied by the form of equal protection without the substance. If the Equal Protection Clause identifies a substantive good—such as security against lawbreakers—that must be provided equally, then the residents of high-crime neighborhoods have good reason to complain that conventional policing tactics will frequently deny them that equality.

Of course, one can argue that because the factors that produce high crime rates in some neighborhoods and places but not others are not attributable to the government itself, a government’s failure to respond to them by shifting policing resources and altering policing tactics is not a constitutional concern—at least given the current understanding of the Equal Protection Clause’s state action requirement¹⁶⁶—regardless of whether it is wise policy. But this objection overlooks the import of the text itself—it requires equal “protection”; and residents of high-crime neighborhoods can legitimately argue that a policing model that works for some neighborhoods but not others fails to provide “protection” that is “equal” in the constitutional sense. This objection also overlooks the history of the Fourteenth Amendment. The origin of much of the violence directed at the newly freed slaves and Union sympathizers in the wake of the Civil War was non-governmental, and the southern states’ failure to meet it with meaningful efforts to enforce the law was the evil that gave rise to the Equal Protection Clause. To be sure, the magnitude of the southern states’ defaults far exceed the flaws of conventional policing tactics, but those

165. Indeed, Bursik and Grasmick persuasively argue that the leading flaw in most accounts of social organization and its effect on the crime rate is that they ignore the differing ability of communities to call upon governmental resources to supplement those in the community itself. Less stable, socially disorganized neighborhoods are less effective in pressing their claims upon local government, and thus are less able to obtain governmental resources that can work to increase the level of social organization and control in a neighborhood. See BURSİK & GRASMICK, *supra* note 138, at 34-45.

166. In general, the state action requirement is thought to prohibit only governmentally sanctioned discrimination, even if governmental policies are influenced by some forms of private discrimination such as racially segregated residential patterns. See, e.g., *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

are differences of degree only. If the Equal Protection Clause is understood to require more than formal equality—if law enforcement must endeavor to make the protection equally meaningful for everyone—then government must devise policies that acknowledge that some persons live under far greater threats than others, and hence cannot receive effectively equal protection unless law enforcement resources are deployed to meet those threats.¹⁶⁷ A policing strategy based on uniform patrol, however, will leave some communities and locations far more vulnerable to crime than others, and for that reason it is unlikely to provide substantively equal protection.¹⁶⁸

To give conventional policing its due, in at least one sense it provides much more than formal equality. That is because conventional, reactive policing will result in greater investment of those resources in high-crime neighborhoods that generate a disproportionate number of calls for service and crimes requiring investigation. That point, however, does not mean that conventional policing approaches are likely to yield effective equality in protection from lawbreakers—whatever the resources devoted to high-crime areas under conventional policing models, they obviously are insufficient to equalize crime rates. Conventional policing therefore may provide the substance of equal protection in the *ex post* sense, but surely not in the *ex ante*. Accordingly, the politically accountable branches of government could well conclude that the residents of high-crime neighborhoods are entitled to a more effectively “equal” level of security than they receive under conventional policing models.

Of course, it is difficult to treat equal protection, as that concept is advanced here, as anything more than an aspiration—providing effectively equal protection involves enormous practical difficulties, which helps to explain why this is a constitutional norm that the courts cannot practicably enforce to its conceptual limits.¹⁶⁹ Moreover, I make no claim that the view of conventional policing advanced here is the only acceptable understanding of the constitutionality of that approach under the Equal Protection Clause. The norm of equal protection against lawbreakers is one that has largely been left to the political process, and the politically accountable branches of government may reach a wide variety of conclusions about how best to provide equal protection, any number of which might be consistent with the Constitution. Precisely because decisions about how to achieve equal protection against lawbreakers are rife with policy judgments, government officials might reach

167. Professor Rosen has demonstrated that geographic non-uniformity in the law is far from uncommon in constitutional law; in fact, it is frequently employed when necessary to acknowledge the special needs of particular communities, such as Indian reservations or military bases. See Rosen, *supra* note 36, at 1138-66.

168. Professor Meares is one of the few legal scholars to focus on the significance of geographic character of crime for law enforcement, although her approach is rather different than that found here. See Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669 (1998).

169. See *supra* text accompanying notes 106-122.

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divergent views of how best to pursue this objective—even on my view of the affirmative character of equal protection, only in unusual cases will a court be able to offer relief to the residents of high-crime neighborhoods without transgressing the institutional constraints on the judiciary and substituting its own views on policing policy for those of politically accountable officials. My point is not that courts should routinely order local officials to move beyond the conventional policing model; it is instead that local officials could permissibly conclude that the kind of formal equality provided by the conventional model of policing is constitutionally unsatisfactory. If they do so, and alter policing strategy in order to provide a more substantive form of equality in protection, that approach would be entirely consistent with constitutional aspirations.

IV. APPLYING THE AFFIRMATIVE EQUAL PROTECTION CLAUSE

It remains to be considered how policing approaches that move beyond the conventional model fare under the affirmative conception of equal protection. In the discussion that follows, I consider the implications of this view of equal protection for policing styles in general, for order-maintenance policing in particular, and finally, for claims of discrimination in policing.

A. *Policing Styles and Equal Protection*

The great virtue of problem-oriented policing, in terms of the view of equal protection advanced here, is that it acknowledges the non-uniform character of crime, and addresses it proactively. A problem-oriented approach begins by identifying the locations at which crime occurs, and attempts to identify criminogenic conditions related to those locations, such as poorly run taverns, abandoned buildings, or locations that attract unruly loiterers.¹⁷⁰ Then, proactive tactics are adopted to target these conditions, such as building a case for revocation of a liquor license, demolishing buildings that are unlikely to be rehabilitated, or aggressively targeting loiterers for public-order law enforcement.¹⁷¹ Officers are instructed to concentrate enforcement efforts on particular areas where they are most likely to be needed.¹⁷² This necessarily requires police to abandon the reform-era view that they do not make policy but instead merely respond impartially to calls for service; police must overtly make policy in order to take a problem-oriented approach.¹⁷³

To provide more effective protection for high-crime neighborhoods, however, not only must the police make policy, but they then must be

170. See, e.g., GOLDSTEIN, *supra* note 1, at 32-41, 66-70.

171. See *id.* at 45-49.

172. See *id.* at 132-41.

173. The empirical data to date provides grounds for optimism about problem-oriented policing, at least when it involves adoption of a highly focused crime prevention strategy. See Sherman, *supra* note 156, at 8-30 to 8-34.

aggressive when executing it. An effective policing style is about more than patterns of deployment; passively driving along in squad cars until patrol officers see someone foolish enough to commit an offense as a marked squad car passes by is not likely to accomplish much, no matter how astutely police are deployed. As Mark Moore has observed, “[p]olice on patrol cannot see enough to intervene very often in the life of the community.”¹⁷⁴ To make a real difference, there is no avoiding the need for aggressive enforcement tactics.¹⁷⁵

The most important empirical work in the field to date is likely a study by Robert Sampson and Jacqueline Cohen. Building on a prior study that had suggested that increased police aggressiveness reduced crime,¹⁷⁶ Sampson and Cohen, with data from the 171 largest cities, used as a proxy for police aggressiveness the number of arrests per officer for disorderly conduct and driving while intoxicated.¹⁷⁷ They found that aggressive policing had a substantial inverse relationship to robbery rates.¹⁷⁸ A recent study of policing tactics in New York City similarly found that there was a significant relationship between levels of misdemeanor arrest rates in police precincts and reductions in the rate of violent crime.¹⁷⁹ These results are consistent with a number of other studies suggesting that proactive arrest policies reduce crime.¹⁸⁰ There is evidence that this pattern holds for two particular types of crime of special concern in high-crime urban neighborhoods: firearms crime¹⁸¹ and drug crime.¹⁸² And Professor Skogan makes a case for policing disorder not only to show an aggressive police presence, but because he believes that the

174. Moore, *supra* note 132, at 112.

175. Of course, problem-oriented policing is not exclusively about enforcement tactics; it also endeavors to redesign public places and patterns of use in order to reduce the number of desirable targets and the points at which they intersect with motivated offenders. See, e.g., Ronald V. Clarke, *Situational Crime Prevention*, in BUILDING A SAFER SOCIETY: STRATEGIC APPROACHES TO CRIME PREVENTION 101-22 (Michael Tonry & David P. Farrington eds., 1995). Nevertheless, no one thinks that these tactics alone can eliminate crime at places where guardianship is weak. Indeed, the empirical evidence to date suggests that it is frequently difficult to ensure that motivated offenders and desirable targets do not intersect. See Eck, *supra* note 139, at 7-41 to 7-44; Sherman, *supra* note 156, at 8-30 to 8-34. And the evidence on neighborhood watch tactics as a way of improving guardianship is quite discouraging. See *id.* at 8-25 to 8-27.

176. See James Q. Wilson & Barbara Boland, *The Effect of the Police on Crime*, 12 LAW & SOC'Y REV. 367 (1978).

177. See Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 LAW & SOC'Y REV. 163, 169 (1988).

178. See *id.* at 176-82. Sampson and Cohen employed robbery statistics because “reported robbery offenses are highly reliable and comparable across jurisdictions.” *Id.* at 172 (citation omitted).

179. See GEORGE L. KELLING & WILLIAM H. SOUSA, DO POLICE MATTER?: AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS 6-10 (Manhattan Inst. 2001).

180. See, e.g., Sherman, *supra* note 156, at 8-20 to 8-25.

181. See, e.g., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, PROMISING STRATEGIES TO REDUCE GUN VIOLENCE 95-124 (1999); Garen Wintemute, *Guns and Gun Violence*, in THE CRIME DROP, *supra* note 5, at 70-73, 83-85.

182. See, e.g., Eck & McGuire, *supra* note 5, at 238-43; Lawrence Sherman & Dennis P. Rogan, *Deterrence Effects of Police Raids on Crack Houses: A Randomized, Controlled Experiment*, 12 JUST. Q. 755 (1995); David Weisburd & Lorraine Green, *Policing Drug Hot Spots: The New Jersey City Drug Market Analysis Experiment*, 12 JUST. Q. 711 (1995).

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available data suggests that disorder stimulates the commission of violent crime.¹⁸³

Perhaps the leading academic skeptic of the relationship between aggressive policing and reductions in crime is Bernard Harcourt, who analyzed Skogan's data and found that the relationship between disorder and crime essentially disappears when neighborhood poverty, stability and race are held constant,¹⁸⁴ and observed that Sampson and Cohen did not determine whether aggressive policing reduces crime by increasing the rate at which offenders are apprehended, or by reducing levels of disorder.¹⁸⁵ Indeed, more recent work by Sampson places into additional doubt the nature of the relationship between disorder and crime by suggesting that disorder and crime both stem from the characteristics of high-crime neighborhoods, especially concentrated poverty.¹⁸⁶ But while the relationship, if any, between disorder and crime may be of importance to criminological theory, from the standpoint of policing it hardly matters. The data unquestionably demonstrates that the presence of disorder, whether it causes or is merely correlated with crime, provides a signal that aggressive policing is necessary. Public order laws, in turn, increase sanctioning power available to the police, and therefore enable them to create a more aggressive presence on the streetscape, maximizing their deterrent effect. For example, it should be obvious that when offenders perceive that the risk that they will be stopped and searched has risen appreciably, they are more likely to be deterred from carrying firearms or contraband. Enforcement of public order or traffic laws involving low-level offenses, in turn, is the best way to maximize this kind of deterrence, because these laws permit the police to increase markedly the rate at which they stop and search persons found in high-crime hot spots. Conventional, reactive policing could not hope to produce this kind of deterrent effect, but aggressive and widespread enforcement of public order and similar laws can.¹⁸⁷ To be sure, aggressive policing may stigmatize or alienate those who become its targets, but without it there is little reason to believe that the police can provide effectively equal protection to high-crime neighborhoods.¹⁸⁸

183. SKOGAN, *supra* note 19, at 9-11, 73-75.

184. See HARCOURT, *supra* note 14, at 59-78.

185. See *id.* at 78-80.

186. See Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603 (1999); see also HARCOURT, *supra* note 14, at 80-88.

187. Indeed, even Professor Harcourt acknowledges that New York City's use of public order law enforcement likely has reduced crime by facilitating police surveillance and control of potential offenders. HARCOURT, *supra* note 14, at 98-104.

188. Interestingly, anecdotal evidence has begun to accumulate suggesting that crime rates rose after police forces that had been employing aggressive tactics retrenched as a consequence of public criticism. See, e.g., Jayson Blair, *Police Official Blames News Coverage for Murder Increase*, N.Y. TIMES, Oct. 9, 1999, at B5; Joseph H. Brown, *Cops Aren't Biggest Threat to Blacks*, TAMPA TRIB., July 15, 2001, at 6; Francis X. Clines, *Police in Cincinnati Pull Back in Wake of Riots*, N.Y. TIMES, July 19,

B. *Order-Maintenance Policing and Equal Protection*

Because order-maintenance is of special significance to proactive policing, and of special concern to its critics, it merits special consideration. While the critics of order-maintenance policing claim that it unreasonably facilitates discrimination against minorities, on the view of equal protection advanced here, order maintenance policing plays a special role in securing the guarantee of equal protection—in particular, equal protection in the *ex ante* sense. Policing disorder makes a special contribution toward equalizing *ex ante* protection because it ameliorates one of the conditions that most directly contributes to the disparity between many communities in the extent to which they experience *ex ante* protection from lawbreakers—that is, the degree to which those who live in disordered versus highly-ordered communities experience fear of crime.

Even the critics of order-maintenance policing do not question the relationship between disorder—behavior or physical conditions that signal to law-abiding persons that there are others in the community who do not share their norms of order¹⁸⁹—and fear of crime. Indeed, “[t]he empirical literature provides strong evidence that the perception of high levels of disorder in a neighborhood is associated with relatively high fear of crime”¹⁹⁰ In fact, disorder seems to have a greater impact on residents’ fear of crime than the crime rate itself.¹⁹¹ Visible signs of disorder on the streetscape signal to the community the presence of a frightening instability in its midst:

[R]esidents perceiving more “clues” as to the underlying level of disorder in their immediate environment feel more vulnerable and thus more fearful. The “clues”—termed incivilities—may either be social, such as public drinking, drug use, fighting and arguing; or physical, such as litter, graffiti, abandoned lots, and vacant

2001, at A1; Kevin Flynn, *Rebound in City Murder Rate Puzzling New York Officials*, N.Y. TIMES, Nov. 5, 1999, at A1. There is also some anecdotal evidence suggesting that crime rates increased after the terrorist attacks of September 11 required urban police to devote increased resources to antiterrorism efforts, and therefore to reduce the resources devoted to high-crime neighborhoods. See Fox Butterfield, *Killings Increase in Many Big Cities*, N.Y. TIMES, Dec. 21, 2001, at A1.

189. This is the sense in which Wesley Skogan, for example, employs the concept of “disorder.” See SKOGAN, *supra* note 19, at 3-9.

190. BURSIK & GRASMICK, *supra* note 138, at 104; see, e.g., *id.* at 101-04; LEWIS & SALEM, *supra* note 143, at 59-77; SKOGAN, *supra* note 19, at 47-48, 76-77; Jeanette Covington & Ralph B. Taylor, *Fear of Crime in Urban Residential Communities: Implications of Between-and Within-Neighborhood Sources for Current Models*, 32 SOC. Q. 231 (1991); Stephanie W. Greenberg, *Fear and Its Relationship to Crime, Neighborhood Deterioration, and Informal Social Control*, in THE SOCIAL ECOLOGY OF CRIME 47-62 (James M. Byrne & Robert J. Sampson eds., 1986); Ralph B. Taylor & Margaret Hale, *Testing Alternative Models of Fear of Crime*, 77 J. CRIM. L. & CRIMINOLOGY 151 (1986). For example, in a recent Department of Justice survey, residents of twelve cities identified open drinking and drug use, open drug sales and loitering as factors that they believed affected their own safety. See BUREAU OF JUSTICE STATISTICS & OFFICE OF CMY.-ORIENTED POLICING, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES, 1998, at 17 & tbl.18 (1999).

191. Lewis and Salem provide a particularly good explication of this phenomenon, observing that since only a small fraction of the residents of any community are actual crime victims, the crime rate itself only slightly affects perception, while highly visible disorder on the streetscape has a far more widespread impact on community perceptions. See LEWIS & SALEM, *supra* note 143, at 45-51.

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buildings. These incivilities “warn” the resident that he or she is at risk of victimization.¹⁹²

There is, moreover, an important interaction between rates of violent crime, disorder, and fear, albeit one that is difficult to quantify. When persons residing in neighborhoods with relatively high rates of violent crime then observe disorder on the streetscape, this likely reinforces fear by confronting them with visual reminders of the threat of crime.¹⁹³ Therefore, disorder may be an even greater stimulant of fear in high-crime neighborhoods than elsewhere.

Fear of crime, in turn, should not be dismissed as a matter of mere perception irrelevant to sound policing strategy. When the fear of crime induced by disorder rises, law-abiding residents become demoralized and withdraw from public spaces, further eroding guardianship and informal mechanisms of social control.¹⁹⁴ Skogan’s study also provides particularly powerful evidence that disorder depresses housing values and induces those who can afford to out-migrate from communities to do so.¹⁹⁵ And when those who can afford to move out of troubled neighborhoods do so, and the middle class is afraid to move in, the “isolation effect” that sociologists argue undermines norms of law-abidingness is exacerbated.¹⁹⁶ Thus, whether or not it has any direct effect on crime rates, “disorder is an instrument of destabilization and neighborhood decline.”¹⁹⁷ That, in turn, ultimately leads to increased crime, given the relationship between crime and community instability.¹⁹⁸ Thus, whether there is any direct relationship between disorder and crime is largely beside the point; the impact of disorder on neighborhood stability leaves little doubt that disorder is, at least in the long run, a powerfully criminogenic condition.

And protection—indeed, equal protection—from this kind of threat is

192. Covington & Taylor, *supra* note 190, at 232.

193. Zimring and Hawkins have made the point this way:

James Q. Wilson and George Kelling argued persuasively in their “Broken Windows” article that indications of incivility and disorder produce citizen fear and the demand for law enforcement and social control. One reason such indications could arouse fear is that they convey to many persons the message that they are vulnerable to more direct and more violent predation. But will the level of fear produced by disorder and incivility be as great where rates of lethal violence are low as they will be where those rates are high? The context in which the broken-window argument was made was urban conditions with high rates of lethal violence.

The extent to which fear of lethal violence and fear of concentrated threats to public order feed off each other should be a priority concern in the social psychology of crime fears.

FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* 14 (1997) (citation omitted). Lewis and Salem’s work supports this suggestion; they found that information suggesting that crime rates are rising becomes a more potent stimulant of fear when it is reinforced by signs of disorder on the streetscape. LEWIS & SALEM, *supra* note 143, at 76.

194. See, e.g., BURSİK & GRASMICK, *supra* note 138, at 46-51, 101-04; KELLING & COLES, *supra* note 132, at 11-14; LEWIS & SALEM, *supra* note 143, at 62-77; SKOGAN, *supra* note 19, at 13, 47-50.

195. See SKOGAN, *supra* note 19, at 77-84.

196. See *supra* text accompanying note 142.

197. SKOGAN, *supra* note 19, at 3.

198. See *supra* text accompanying notes 138-144.

surely something that community residents are entitled to demand from politically accountable institutions. It is difficult to quarrel with Herman Goldstein's observation that "dealing with fear and enforcing public order . . . are appropriate functions for the police; from the perspective of the community, they may be as important as the tasks the police perform in dealing with behavior labeled criminal."¹⁹⁹ Indeed, the failure of police to respond to public disorder exacerbates fear of crime; Lewis and Salem's study, for example, provided powerful evidence that when local government appears unresponsive to public disorder, law-abiding citizens experience heightened fear of crime.²⁰⁰ Accordingly, there is considerable virtue in an order-maintenance strategy that targets enforcement not at what are conventionally understood to be the most "serious" offenses, but instead at the conditions most likely to stimulate fear of crime, through enforcement of curfew, truancy, anti-loitering, public intoxication and similar public order laws. Order-maintenance policing combats fear of crime in the most direct possible way, by demonstrating a visible and proactive police presence directed at those conditions that are most likely to stimulate fear of crime.²⁰¹ Order-maintenance policing, moreover, signals to law-abiding residents of the community that its fears are being taken seriously by the authorities, and therefore can be an important factor in community stabilization.²⁰² Thus, there is ample reason to conclude that equal protection in the *ex ante* sense is critical to sound policing—it is unrealistic to think that neighborhoods can ever be stabilized when their residents perceive them as unsafe.

Accordingly, if the police do not attack disorder, they cannot provide the substance of equal protection in critical respects—most important, they cannot adequately address the fear of crime, which is the type of protection that the community itself may well value most. The result, of course, is a system in

199. GOLDSTEIN, *supra* note 1, at 11.

200. LEWIS & SALEM, *supra* note 143, at 93-109. Mark Moore has similarly observed that "police often discover that citizens are less interested in talking about robbery and burglary than the police expected. Instead, they seem to focus on 'quality of life' problems such as noisy kids, visible drug dealing, graffiti, and dangerous-looking, rotted-out buildings." Moore, *supra* note 132, at 115 (citation omitted).

201. That was the conclusion of one of the few studies to consider this phenomenon. See Wesley G. Skogan, *Measuring What Matters: Crime, Disorder, and Fear*, in MEASURING WHAT MATTERS, *supra* note 19, at 47-50.

202. Even as they questioned whether there is any direct relationship between disorder and crime, Sampson and Roudenbush made just this point:

Although our results contradict the strong version of the broken windows thesis, they do not imply the theoretical irrelevance of disorder. After all, our theoretical framework rests on the notion that physical and social disorder comprise highly visible cues to which neighborhood observers respond. According to this view, disorder may turn out to be important for understanding migration patterns, investment by businesses, and overall neighborhood viability. Thus, if disorder operates in a cascading fashion—encouraging people to move (increasing residential instability) or discouraging efforts at building collective responses—it would indirectly have an effect on crime.

Sampson & Roudenbush, *supra* note 186, at 637 (citations omitted).

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which people can obtain protection from both the fear and reality of crime only by paying for it—those who can afford to do so will move to low-crime, relatively affluent neighborhoods, invest in private security to supplement inadequate police resources, or both.²⁰³ Protection from the threat of crime therefore becomes a commodity to be allocated by the market. In contrast, “a fear reduction policy, like a poverty reduction strategy, attempts to redistribute a value, in this case security.”²⁰⁴ And if the view of equal protection advanced here is correct, then one of the implications of the Equal Protection Clause is that government is required to equalize the distribution of security; it may not permit “protection” to be just another commodity allocated by market forces, even when threats to security are not of its own making. Indeed, the racial implications of this form of unequal protection are in themselves cause for concern—polling data shows that fear of crime is much higher among African-American central city residents than any other demographic group.²⁰⁵ There is also evidence that fear of crime is higher in disadvantaged neighborhoods even when other variables are held constant.²⁰⁶ Failing to take steps that can ameliorate fear of crime, accordingly, will systematically disadvantage poor, disproportionately minority communities. Adopting an order-maintenance strategy in order to distribute more equally a constitutionally recognized substantive good—fear from crime—is therefore consistent with constitutional aspirations.

C. *Discrimination in Policing*

While I have made the case that aggressive policing promotes compliance with the Equal Protection Clause, it is the claim that aggressive policing is instead likely to lead to racial profiling and other discriminatory practices that are at the heart of the case against it.²⁰⁷ The view of equal protection advanced here, however, has significant implications for claims of discrimination in policing. In particular, because the norm of equal protection against lawbreakers celebrates non-uniform enforcement practices as a necessary response to the non-uniform character of crime, discrimination claims based on evidence that the authorities fail to enforce the law uniformly should be viewed with considerable caution.

In particular, the view of equal protection advanced here means that the

203. See, e.g., Clifford D. Shearing, *The Relation Between Public and Private Policing*, in MODERN POLICING, *supra* note 126, at 408-21.

204. LEWIS & SALEM, *supra* note 143, at 130.

205. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PERCEPTIONS OF NEIGHBORHOOD CRIME, 1995, at 2 tbl.1 (1998).

206. Covington and Taylor found that “even when crime, victimization, and signs of disorder are controlled, lower status neighborhoods have higher fear levels.” Covington & Taylor, *supra* note 190, at 239-40.

207. See *supra* text accompanying notes 27-36.

Supreme Court was right in concluding in *United States v. Armstrong*²⁰⁸ that a showing that a particular racial group has been prosecuted out of proportion to its representation in the general population does not make out a claim of discriminatory enforcement.²⁰⁹ When enforcement resources are properly targeted at high-crime neighborhoods, this type of racial skewing may well result.²¹⁰ The view of equal protection advanced here suggests that proof that law enforcement is more proactive and aggressive in some neighborhoods than others should count for little. Aggressive and proactive policing may be far more necessary in some neighborhoods than others, and the use of a non-uniform policing strategy may reflect compliance with, rather than a violation of, equal protection principles. As I have argued above, targeted policing that endeavors to provide effectively equal protection properly focuses most heavily on disadvantaged neighborhoods, which are disproportionately likely to have disproportionately minority populations. It follows that proof that minorities are searched or arrested at disproportionate rates should not in itself establish a violation of the Equal Protection Clause. To the contrary, on the view advanced here, such evidence may establish *compliance* with equal protection.

For example, Professor Harris identifies what he takes to be improper racial profiling by pointing to evidence that even when minorities are disproportionately stopped by police, the rate at which evidence of a crime is found during stops is generally about the same for minorities and non-minorities.²¹¹ But this demonstrates no more than that the police utilize equally reliable indicia of suspicion when deciding whether to stop minorities and non-minorities alike. Similarly, when statistics show that minorities are being searched at higher rates than their representation among those actually charged with street-level crime, that may not suggest that race is being used as a proxy for criminality, but instead the use of properly targeted policing tactics. Street stops, for example, are likely to be utilized most heavily in areas where the carrying of guns or the outdoor sale of drugs is a particular problem, and precisely because minorities are more likely to reside in such high-crime neighborhoods, enforcement efforts focusing on street stops in these communities will disproportionately target minorities. Thus, unless they take account of neighborhood crime rates and the use of targeted policing tactics, differential stop rates, as well as differential rates at which minorities and non-minorities are searched without finding evidence of a crime, will prove little.²¹²

208. 517 U.S. 456 (1996).

209. *See id.* at 465-68.

210. *See supra* text accompanying notes 138-46.

211. DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 78-84 (2002).

212. Fagan and Davies stress statistical evidence that in New York City, minorities were stopped and searched out of proportion to their representation among those charged with street crime, even after adjusting for neighborhood crime rates. *See Fagan & Davies, supra* note 26, at 475-84; *see also* David

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It may well be that nothing short of the use of “testers” in a particular neighborhood who can demonstrate that race alone is the basis for enforcement decisions will suffice to demonstrate the existence of anything that can fairly be called racial discrimination in law enforcement.²¹³

Moreover, even when a litigant can demonstrate that the authorities considered a suspect’s race when making an investigative or prosecutive decision, the question remains whether that violates equal protection. The easy case, of course, is when the authorities use race alone as the criterion by which they decide who will be investigated or prosecuted. Settled equal protection doctrine tells us that the Constitution ordinarily forbids government from utilizing racial classifications, and thus when law enforcement decisionmaking is explicitly racial, it is usually unconstitutional.²¹⁴ An officer who believes that young Latinos are likely to be trafficking narcotics may claim to be relying on his experience, but in reality that so-called experience has caused him to utilize a racial classification, which equal protection forbids. But not every instance in which a police officer considers a suspect’s race when deciding whether to target or even stop that suspect can fairly be characterized as the use of a racial classification. Although most of the leading scholars who have written in this area simply overlook the point, sometimes race must be considered in order to determine how an investigation should proceed.²¹⁵ The use of a suspect’s description that includes a racial identification illustrates the point.

Consider what happens when police officers are dispatched to an address in response to a resident’s request for police assistance stating that shots have been fired by “a young black male.” When the officers arrive on the scene and decide that the first person they will approach is a young African-American male who is walking away from the scene—even if they observe an otherwise similarly situated white male also walking away—are they utilizing an impermissible racial classification? Virtually all courts and commentators seem to agree that in such a case, the authorities are basing enforcement decisions on the similarity between a suspect and a witness’s description, rather than on

A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. 237, 255-57 (2001). Even this approach, however, has its pitfalls. It is difficult to determine what the underlying rate of drug or firearms crime is; these are victimless crimes, and hence neither reported crime rates nor the rate at which minorities and nonminorities are charged with these crimes are good indicators of the underlying rate at which persons actually carry guns or drugs unlawfully.

213. A type of “testing,” involving the use of similarly situated minority and nonminority motorists in order to determine which would be stopped and searched, was employed in at least one recent case. *Chavez v. Ill. State Police*, 251 F.3d 612, 636-37 (7th Cir. 2001). Perhaps a more extensive pattern of testing of this type would provide compelling support for a racial profiling claim.

214. See, e.g., *Armstrong*, 517 U.S. at 464-65.

215. It is striking how even the most astute commentators assume that the authorities would have no reason to consider a suspect’s race except as a proxy for criminality. See, e.g., COLE, *supra* note 27, at 41-55; KENNEDY, *supra* note 27, at 136-63; Harris, *supra* note 27, at 291-94; Rudovsky, *supra* note 10, at 306-17.

race.²¹⁶ Doctrinally, this conclusion seems impeccable; under ordinary equal protection principles, a racial classification is present only when “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ and not merely ‘in spite of,’ its adverse effects upon an identifiable group.”²¹⁷ In my hypothetical case, the police have focused their attention on individuals who match a description, and not because of a desire to investigate only members of a particular racial grouping. That is not an impermissible racial classification.²¹⁸ It is far from clear, however, that my hypothetical case is different in any meaningful sense from what many consider to be impermissible racial profiling. Imagine that the police obtain intelligence indicating that drug trafficking in a particular neighborhood is controlled by an exclusively African-American gang, which sells drugs in open air markets and utilizes a network of lookouts to warn sellers of approaching police. If undercover officers attempting to penetrate the network begin their investigations by surveilling the young African-Americans that they see loitering in areas where drugs are sold, or if officers on patrol enforce anti-loitering and other public order laws with particular vigor on young African-Americans seen loitering in proximity to open air drug markets, they are no more engaging in a racial classification than are officers that rely on a racial identifier contained in a witness’s description of a suspect. Instead, they are merely conforming their tactics to the intelligence they have obtained.²¹⁹

216. See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000), *cert. denied*, 122 S. Ct. 44 (2001); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 242-43 (1983).

217. *Wayte v. United States*, 470 U.S. 598, 610 (1985) (ellipsis in original) (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

218. To my knowledge, the only dissenter from this view is Professor Banks, who has argued that there is no principled distinction between race-based suspect descriptions and racial profiling, both of which he believes should be treated as racial classifications subject to strict judicial scrutiny, although he confesses that there is no practical means to eliminate race-based suspect descriptions. See R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1108-22 (2001). I quite agree that there is little difference between the two practices, but I disagree that they must necessarily be treated as racial classifications. As Professor Banks acknowledges, witnesses generally find race a useful way to describe an individual. See *id.* at 1109-12. Accordingly, when relating race as an identifying characteristic, the witness is endeavoring to identify a particular individual involved in an offense, rather than suggesting that individuals be treated differently by the police *because* of their race. And under current equal protection jurisprudence, it is only when an individual is treated differently because of his race that strict scrutiny is triggered.

219. Professor Stuntz has made a somewhat different but closely related point:

Crime corresponds to local demographic patterns; in any given city, the population of burglars or arsonists is bound to belong disproportionately to one or another ethnic group. Some patterns transcend local conditions: Everywhere, young men commit a hugely disproportionate number of crimes. Police know these things. They can hardly be expected to forget what they know.

In a world where criminal organizations buy and sell drugs—and where other sorts of criminal organizations use hijacked airplanes to blow up buildings—the problem is worse still. Criminal enterprises are not equal opportunity employers. . . . [W]here legal protections do not operate, ethnic bonds can serve as a substitute, a means by which market actors reduce the risk of cheating by those with whom they deal. The same idea applies to illegal enterprises. It follows that drug distribution networks and terrorist organizations, like Mafia families, are

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The same point can be made in terms of the justification for non-uniform law enforcement that I advance above. The Equal Protection Clause does not forbid the authorities from taking aggressive action to prevent crime only if they do so uniformly and, hence, inefficiently. There is no requirement that the police, in order to devote sufficient resources where they are needed, must also devote equal resources where they are not needed, creating a formal, but highly inefficient, conception of equality.²²⁰ Indeed, the law enforcement response to the threat of terrorism illustrates this point. If the authorities learn of a plot to smuggle bombs aboard an airliner organized by a terrorist cell based in the Middle East, for example, an effort to target passengers of Middle Eastern origin for special scrutiny is an appropriate allocation of limited resources to respond to a specific threat, rather than racial discrimination. As Professor Stuntz has observed, “[t]he inefficiency of treating all airplane travelers the same—should airport security officials really regard travelers with Danish visas and travelers with Yemeni visas as equally risky?—is both great and obvious.”²²¹ Instructing immigration officials to devote additional resources to investigating foreigners who arrive from countries in which terrorist organizations are known to operate, similarly, is simply a response to the character of the threat.²²² Indeed, the authorities would hardly be providing effectively equal protection from this type of terrorist threat if they fail to

bound to have a racial or ethnic cast. The police, whether FBI agents looking for members of al Qaeda or local cops trying to break up a heroin ring, are bound to know what the relevant racial or ethnic cast is. If the law asks them to feign ignorance, the likely effect is not to reduce the role that ethnicity plays in policing, but rather to reduce the respect the law enjoys among the police.

Stuntz, *supra* note 17, at 2178-79 (internal citation omitted).

220. The Supreme Court made a somewhat similar point in *Wayte v. United States*, 470 U.S. 598 (1985), as it considered a policy of prosecuting only individuals who had announced their unwillingness to register for the draft. The policy—seemingly based on an individual’s exercise of rights protected by the First Amendment—was nevertheless upheld since, despite its non-uniformity, the policy promoted efficient use of limited resources:

First, by relying on reports of nonregistration, the Government was able to identify and prosecute violators without further delay. Although it still was necessary to investigate those reported to make sure that they were required to register and had not, the Government did not have to search actively for the names of these likely violators. Such a search would have been difficult and costly at that time. Indeed, it would be a costly step in any “active” prosecution system involving thousands of nonregistrants. The passive enforcement program thus promoted prosecutorial efficiency. Second, the letters written to Selective Service provided strong, perhaps conclusive evidence of the nonregistrant’s intent not to comply—one of the elements of the offense. Third, prosecuting visible nonregistrants was thought to be an effective way to promote general deterrence, especially since failing to proceed against publicly known offenders would encourage others to violate the law.

Id. at 612-13 (internal citation omitted).

221. Stuntz, *supra* note 17, at 2179.

222. In one of the few decisions to date considering this type of problem, the court hinted at an approach along the lines I have suggested, acknowledging that an evenhanded policy to focus antiterrorism investigations on individuals of Middle Eastern origin would be proper if the “defendant matched the alleged terrorist profile, and the government’s newfound proactivity with regard to passport violations was not a one-time selective exercise” *United States v. Al Jibori*, 90 F.3d 22, 26 (2d Cir. 1996).

acknowledge its non-uniform character. In short, when the threat is non-uniform, the view of equal protection advanced here permits law enforcement to make a non-uniform response.

Of course, at some point the information in the hands of the authorities is so non-specific that it amounts to the use of race as a proxy for criminality, as when narcotics officers tail individuals of apparent Hispanic appearance on the view that the drug trade is largely controlled by Latinos, or when a vague description of an offender results in the detention of virtually every African-American male that the police encounter. While the norm of equal protection against lawbreakers suggests that when government perceives a specific threat, it may allocate resources to that specific threat even if it results in non-uniform enforcement, no one could plausibly argue that the risk of crime is so racially skewed that the government could justify the use of race alone as a basis for making investigative or prosecutive decisions. As Ira Glasser of the American Civil Liberties Union has put it in the context of drug-law enforcement, “[e]ven if most of the drug dealers in the Northeast corridor or in any particular neighborhood or city are black or Latino, it does not follow that most blacks and Latinos are drug dealers”²²³ Thus, the norm of equal protection against lawbreakers does not suggest that law enforcement is free to engage in any type of racial discrimination in response to a perceived threat. At some point, the relationship between the nature of the perceived threat and race or national origin becomes so attenuated that the only fair characterization of a particular enforcement decision is that it involves the use of a racial classification.²²⁴ And even apart from equal protection principles, the Fourth Amendment requires a sufficient quantum of individualized evidence of wrongdoing before the police

223. Ira Glasser, *Racial Profiling and Selective Enforcement: The New Jim Crow*, BRIEF, Summer 2001, at 30, 35. For additional critical analysis of the claim that racial profiling can be considered a “rational” form of discrimination, see, for example, HARRIS, *supra* note 211, at 73-90; Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1427-36 (2002); Harris, *supra* note 27, at 294-97; Rudovsky, *supra* note 10, at 306-14.

224. For example, in condemning the use of Hispanic appearance as a basis for making decisions about which motorists to stop at an immigration checkpoint near the Mexican border, the Ninth Circuit noted that the majority of people who pass through the checkpoint are Hispanic, making that factor essentially meaningless:

One area where Hispanics are heavily in the majority is El Centro, the site of the vehicle stop. As Agent Johnson acknowledged, the majority of the people who pass through the El Centro checkpoint are Hispanic. His testimony is in turn corroborated by more general demographic data from that area. The population of Imperial County, in which El Centro is located, is 73% Hispanic. In Imperial County, as of 1998, Hispanics accounted for 105,355 of the total population of 144,051. More broadly, according to census data, five Southern California counties are home to more than a fifth of the nation’s Hispanic population. During the current decade, Hispanics will become the single largest population group in Southern California, and by 2040, will make up 59% of Southern California’s population. Accordingly, Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens.

United States v. Montero-Camargo, 208 F.3d 1122, 1133-34 (9th Cir.) (en banc) (footnotes and citations omitted), *cert. denied sub nom. Sanchez-Guillen v. United States*, 531 U.S. 889 (2000).

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can detain an individual.²²⁵ But it should be plain that it is far too facile to characterize any consideration of race by law enforcement as impermissible.²²⁶ The critical question should be whether law enforcement is responding to a meaningful threat from offenders of a particular race or national origin, or whether it is merely employing race or national origin as a proxy for criminality.

It should be added that the conception of equal protection advanced here surely does not argue for a policing strategy based on the most heavy-handed tactics possible within constitutional limitations. In fact, some evidence suggests that aggressive policing is more effective when it is conducted in a polite and respectful manner because it is less likely to delegitimize the police in the eyes of community members.²²⁷ Aggressive policing need not be disrespectful policing. Indeed, there is every reason to insist that the police remain polite and respectful even during aggressive patrol, and, through the use of undercover “testers,” to discipline officers who fail to comply with such an approach. But respectful policing need not be reactive policing. In my view, reactive policing will frequently offer no realistic hope of providing effectively equal protection, and that is a constitutionally impermissible result.

In any event, under a norm of effectively equal protection against lawbreakers, the argument that utilizing aggressive policing should be forbidden because the police cannot be fair to minorities is deeply problematic. The residents of impoverished high-crime neighborhoods should not be denied equal protection from lawbreakers because the police cannot be trusted to comport with other constitutional principles; it should be plain that the Constitution demands that both of these norms be honored.²²⁸ The answer to

225. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Indeed, the discussion in *Montero-Camargo* on this point rests on the Fourth Amendment in addition to the Equal Protection Clause. See 208 F.3d at 1134-35.

226. At least at one point, the Supreme Court appeared to be struggling toward a rule along these lines in decisions suggesting that, at least for purposes of the Fourth Amendment, race can be one but not the only factor that the authorities utilize when deciding whether there is a sufficient basis to detain or search an individual. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-64 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975); see also Thompson, *supra* note 30, at 1005-08.

227. See, e.g., Sherman, *supra* note 156, at 8-24 to 8-25; see also Stuntz, *supra* note 17, at 2171-74. While the argument that aggressive policing may increase community resentment to the point that it undermines norms of law-abidingness deserves to be taken seriously, the limited empirical data available does not suggest that aggressive policing has this type of counterproductive consequence. See *supra* text accompanying notes 176-182. And in any event, a respectful and courteous policing style is likely to minimize this problem.

228. One of the few studies to test the attitudes of African-Americans toward the police and crime suggests that this very point has not escaped the residents of disadvantaged and disproportionately minority urban communities. Professor Brooks's analysis of a nationwide survey of African-American households found that higher-income African-Americans are more likely than poorer African-Americans to view the legal system as unfair to African-Americans, even though poorer African-Americans are more likely to view the police as “gang-like.” Brooks, *supra* note 40, at 1246-52. These seemingly inconsistent findings suggest that the residents of high-crime neighborhoods themselves believe that they should not have to choose between ineffective and abusive policing:

One might infer that poor blacks view the legal system as fair despite (or perhaps because of)

racial discrimination in law enforcement is improved training, supervision, discipline for misconduct, and judicial oversight, rather than confining the police to tactics that have no hope of affording the residents of disadvantaged neighborhoods the same security enjoyed by the wealthy.²²⁹ No one would argue that the police ought to refrain from engaging in searches and seizures because it is inevitable that when they do so, they will occasionally violate the Fourth Amendment; there is no more reason to refrain from aggressive patrol merely because that tactic, if abused, will lead to constitutional violations as well.²³⁰ And the same point holds for other non-uniform threats to public peace and order, such as the threat of terrorism: The nation as a whole is entitled to effectively equal protection from terrorist threats, even though effectively equal protection requires that additional resources be allocated to scrutinize individuals who come from areas in which terrorist groups operate. In short, equal protection permits a non-uniform law enforcement response to a non-uniform threat.

CONCLUSION: POLICING AND CONSTITUTIONALISM

The view advanced here—that a more aggressive and proactive strategy than that which inheres in the conventional policing model can be defended in terms of a constitutional imperative—offers a new line of defense when policing tactics come under attack as discriminatory. This understanding of equal protection suggests that non-uniform policing tactics are not only constitutionally defensible, but may well be essential to secure compliance with the dictates of equal protection. But the implications of this view of equal

the differentially tough legal enforcement in their communities. This inference is consistent with the argument that poor African Americans desire disproportionately tough legal enforcement in their communities. However, data also indicate that poor blacks have little confidence in the police. Poor blacks are more inclined to report that the police behave too much like a gang to be an effective response to gang-related crimes. In the context of the urban frustration argument, these findings suggest that aggressive enforcement with limited police discretion may be consistent with high-crime black communities' desire for safety and fairness. On the other hand, one may question whether it is sufficient that individuals in these communities "choose" (from a truncated set of alternatives) to have harsher penalties. That is, the basis of these choices must be considered when informing legal policy.

Id. at 1271.

229. There is a steadily growing body of literature describing the type of reforms that can be utilized to combat racial profiling. *See, e.g.,* HARRIS, *supra* note 211, at 145-222; Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. REV. 41 (2001); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409 (2000); Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways To Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413 (2001).

230. Significantly, even the harshest critics of order-maintenance policing do not argue that the police should abandon high-crime neighborhoods. *See supra* text accompanying notes 22-31. The question they do not confront, of course, is what the police should do if more restrained tactics prove ineffective in these neighborhoods. One could, of course, conclude that it is impossible to provide such neighborhoods with effectively equal protection, but, at least in my view, a local government that concludes that more aggressive tactics are warranted in an effort to provide police protection more equal to that enjoyed elsewhere displays no infidelity to constitutional aspirations.

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protection are not confined to the analysis of policing tactics offered here; it also bears on the character of the constitutional debate over policing. The norm of equal protection against lawbreakers suggests that much of the current debate over the constitutional principles at stake in policing is incomplete, if not misguided.

All too often, the police are viewed as merely a constitutional evil—a necessary one to be sure—but an evil nevertheless. In most discussions of constitutional law, the police are relevant to the Constitution only because they violate it: They search, they seize, they restrain liberty—their very mission is at odds with the Bill of Rights. Much of the criticism of aggressive policing is in that spirit—whatever its benefits, the critics contend, aggressive policing creates an unacceptable risk that constitutional guarantees will be violated. Once a constitutional obligation to protect everyone equally from lawbreakers is recognized, however, the inquiry becomes very different. Aggressive policing creates a risk of constitutional violations, but so does a failure to take sufficiently potent steps to suppress crime. And for just that reason, whatever its benefits, a reactive strategy for law enforcement cannot be defended on the ground that it offers an approach that minimizes the likelihood of constitutional violations. The argument for aggressive policing is not that the curtailment of liberty it entails yields offsetting benefits, but instead that it may well be a critical means by which one of our most essential constitutional aspirations can be realized. The government may violate the Constitution when law enforcement becomes too aggressive, but it may do the same when the police are too meek. Let this be added to the many other dilemmas that those responsible for law enforcement policy face.

