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Associate Professor, Loyola Law School, Los Angeles. This Article received Honorable Mention in the 2007 AALS Scholarly Papers Competition. Many thanks to Bill Araiza, Eve Brensike, Brietta Clark, Nestor Davidson, Sharon Dolovich, Rob Kar, Erik Luna, Eric Miller, Dan Richman, David Sklansky, Bob Weisberg, Lauren Willis, and Ron Wright. Thanks also to Rena Durrant for her research assistance. This work was supported by the Loyola Faculty Research Fellowship Program.

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ARTICLE

UNDERENFORCEMENT

Alexandra Natapoff[*]

INTRODUCTION

The United States' criminal system is infamous for its excesses: too many laws, overcriminalization, and over-punishment. Our comprehensive criminal codes, staggering incarceration rate, and their heavy impact on communities of color have made charges of overenforcement pervasive.[1] As the "politics of crime" generates new offenses and ever harsher punishments,[2] the United States puts more people in prison than any other

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1. The general concept of "overenforcement" includes a number of related phenomena, including extensive criminal codes ("overcriminalization"); harsh punishments ("over-punishment"); and heavy-handed enforcement of a particular offense or against a particular group ("overenforcement" or, sometimes, "selective enforcement"). *See, e.g.*, James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe 4 (2003) (describing the United States as "in the midst of a national get-tough movement," leaving us with a system "vastly harsher than in any other country to which the United States would ordinarily be compared" (internal quotation marks omitted)); Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. 1743, 1744 n.2 (2005) (surveying literature critical of overenforcement policies); *see also id.* at 1744-45 (distinguishing between overenforcement and over-deterrence); Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 710 (2005) (chronicling the expansion of criminal liability and the national "punishment binge"); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-enforcement*, 34 U.C. Davis L. Rev. 1005, 1008 (2001) (criminalizing African Americans "serves a repressive function"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001) (arguing that broad codes overcriminalize behavior and expand law enforcement power). *See generally* Invisible Punishment: The Collateral Consequences of Mass Imprisonment (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter Invisible Punishment] (documenting the social and economic harms of overpunishment).

2. *See* Symposium, *Overcriminalization: The Politics of Crime*, 54 Am. U. L. Rev. 541 (2005) (symposium issue devoted to overcriminalization); William Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780, 803 (2006) (describing the "academic trend" that "blames democracy" for the increased harshness of substantive criminal law).

nation. Many scholars conclude that the criminal system occupies an increasingly central role as a general governance mechanism.[3]

Criticisms of the U.S. system often revolve around the insight that a system as pervasive, harsh, and racially charged as ours requires serious rethinking. Indeed, much of the critical literature focuses on the disproportionate weight of overenforcement on minority communities.[4] The overcriminalization and mass incarceration of so much of the black male population has created a visible legal underclass, and has perpetuated the destruction of families, economic opportunities, and other human capital.[5] Overenforcement policies are also increasingly challenged as normatively counterproductive; with their draconian overkill and racial skew, they foster resentment and disrespect for the law among otherwise law-abiding members of the community and reduce social incentives to obey the law.[6] For some, the racial inequalities created by overenforcement strike at the heart of the legitimacy of the entire system. In these ways, "overenforcement" has become one of the central lenses through which the racial imbalances, inegalitarianism, and other weaknesses of the criminal justice system are viewed and understood.[7]

By comparison, underenforcement has been given short shrift, particularly in the area of street and violent crime.[8] A decade ago, Randall Kennedy argued that "the principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of

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3. *See generally* David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (2001) (describing the trend toward social control through crime policy and U.S. overreliance on criminal enforcement as a hallmark of modern governance); Luna, *supra* note 1, at 718-19 (describing overcriminalization as "part of an alarming readiness to apply the criminal justice system without limitation throughout the entirety of American life"); Jonathan Simon, *Governing Through Crime*, *in* The Crime Conundrum: Essays on Criminal Justice 171 (Lawrence M. Friedman & George Fisher eds., 1997).

4. *See, e.g.*, David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (2005) [hereinafter Cole, No Equal Justice]; Invisible Punishment, *supra* note 1; David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 Geo. L.J. 1059 (1999); Roberts, *supra* note 1.

5. *See* Invisible Punishment, *supra* note 1.

6. *See, e.g.*, James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, *in* Invisible Punishment, *supra* note 1, at 150 (arguing that racial profiling and other punitive enforcement policies encourage inner-city youth to disregard authority); *see also* Cole, No Equal Justice, *supra* note 4, at 3-4; Roberts, *supra* note 1.

7. There are, of course, other systemic criticisms that focus on different values and concerns. *See, e.g.*, Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 154 (1997) (questioning legitimacy and efficacy of criminal procedure doctrines); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911 (2006) (criticizing victims' and the general public's lack of information and access to the criminal system).

8. It has long been suggested that white-collar and environmental crimes are underenforced and under-punished. *See generally* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. Pa. L. Rev. 1295 (2001); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 Cornell J.L. & Pub. Pol'y 247, 292 (1997).

the laws."[9] More recently, a few scholars—notably William Stuntz—have suggested that underenforcement poses larger fairness problems than is usually acknowledged.[10] Nevertheless, while Kennedy's contention is widely cited, scholarly concerns with systemic unfairness still tend to revolve around the criminal system's harshness and overextensions, not its laxity.

Underenforcement deserves a more central role in the evaluation of the evenhandedness and democratic legitimacy of the criminal system. Underenforcement is a weak state response to lawbreaking as well as to victimization. It thus offers important insights into the government's relationship with vulnerable groups in the context of the criminal system. In practice, underenforcement is often linked with official discrimination, increased violence, legal failure, and the undemocratic treatment of the poor. Underenforcement can also be a form of deprivation, tracking familiar categories of race, gender, class, and political powerlessness.[11] Conceived of as a form of public policy, underenforcement is a crucial distribution mechanism whereby the social good of lawfulness can be withheld.[12]

Underenforcement is far from abstract: It embodies concrete relationships and experiences, often of violence or insecurity. Within certain communities or institutions—what I will call "underenforcement zones"—the state routinely and predictably fails to enforce the law to the detriment of vulnerable residents. Police concede that they will not arrest certain sorts of perpetrators; many victims expect that they will remain unprotected; and violators rest secure in the knowledge that their crimes are the sort that will go unpunished. This type of underenforcement deprives

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9. Randall Kennedy, Race, Crime and the Law 19 (1997).

10. William J. Stuntz, *Accountable Policing* 3-4 (Harvard Pub. Law Working Paper No. 130, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886170 ("Most American cities are seriously underpoliced .... That fact may contribute to America's enormous prison population: less policing is correlated with more punishment .... If the social science literature on American crime rates is to be believed, less policing also means more crime. And it may well mean more police violence, as understaffed police forces compensate for their small numbers with a more intimidating style of law enforcement.").

11. *See* Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1394 (1988) (conceptualizing *McCleskey* "as an instance of racial inequality in the provision of public goods," i.e., the denial of capital punishment for the murder of black victims); David Alan Sklansky, *Police and Democracy*, 103 Mich. L. Rev. 1699, 1821 (2005) (noting that "policing is among other things a 'form of redistribution'" (quoting Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 Yale L.J. 2281, 2315-17 (1998))); *see also* Barry Goetz, *Organization as Class Bias in Local Law Enforcement: Arson-for-Profit as a "Non Issue,"* 31 Law & Soc'y Rev. 557, 560 (1997) (describing white-collar crime literature that identifies class bias in the allocation of law enforcement resources). *But see* Stuntz, *supra* note 2, at 808 (arguing that policing is redistributive in that it redistributes tax dollars from rich, low-crime areas to poorer, high-crime areas).

12. *See* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 707, 720-21 (2005) (arguing that the state's failure to prevent crime should be treated affirmatively as a public policy).

residents of personal and economic security, rendering calls to the police futile or even dangerous and victimhood a routine fact of life. For residents of these zones, lawfulness is spread unevenly throughout daily life and the legal system is at best unpredictable.

In these underenforcement zones, the exercise of law enforcement discretion is a bellwether of official responsiveness with implications for the democratic legitimacy of the legal system. As Stuntz points out, "Scholars do not ordinarily think of underpolicing as a failure of political accountability. But it is . . . ."[13] When law enforcement fails to answer constituent needs, it devalues the security, property, and dignitary interests of those the law purportedly protects. More formally, such failure weakens the rule of law in those areas by neglecting the enforcement of existing legal rules. By failing to maintain an atmosphere of legality, law enforcement turns its back on victim classes twice: first, by denying them material protective resources, and second, by depriving them of a robust, responsive legal system.

The study of underenforcement thus supplements the increasingly accepted criticism that our criminal system is too punitive, too intrusive, and too enforcement-oriented.[14] These issues are typically juxtaposed as a conundrum, particularly in poor, high-crime communities of color: How can a community be simultaneously over-policed *and* under-policed? Scholars struggling with this apparent contradiction often resolve it by splitting communities into distinct "criminal" and "victim" classes, with overenforcement aimed primarily at the former while underenforcement is seen as a harm suffered by the latter, law-abiding residents.[15]

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13. Stuntz, *supra* note 10, at 13-14. "[T]he failure [to address underenforcement] is more serious than most of the legal issues scholars debate, partly because underpolicing makes all other regulatory problems worse." *Id.* at 14.

14. Am. Bar Ass'n, Justice Kennedy Comm'n, Reports with Recommendations to the ABA House of Delegates 2-3 (Aug. 2004) [hereinafter Kennedy Commission Report], *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf (responding to Justice Kennedy's description of aspects of the U.S. criminal system as overly harsh, racially imbalanced, "unwise and unjust"); *see also* Whitman, *supra* note 1, at 4.

15. *See, e.g.*, Samuel Walker, Cassia Spohn & Miriam DeLone, The Color of Justice: Race, Ethnicity, and Crime in America 94 (2000) ("Complaints about overpolicing or harassment are usually voiced by young men who are most likely to be stopped . . . and arrested on the street. Complaints of too little policing, on the other hand, are expressed by adults, especially those with families, who are worried about crime."); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. Chi. Legal F. 197, 210 ("'[R]esidents who express their concern and anger over [crime] . . . recognize that putting up gates around the entire neighborhood would not rid [it] of the problems [that residents] are experiencing because the troublemakers are natives.'" (quoting Mary Patillo, *Sweet Mothers and Gangbangers: Managing Crime in a Black Middle-Class Neighborhood*, 76 Social Forces 747 (1998))); *cf.* Bernard E. Harcourt, Illusion of Order: The False Promise of Broken Windows Policing 16-17, 135 (2001) (criticizing order-maintenance policing as "grounded in these categorical distinctions" between "honest people and . . . the disorderly").

But understanding underenforcement in its own right as a potential site for distributive and democratic failure reveals that underenforcement is not necessarily an alternative to overenforcement but often its corollary. Over- and underenforcement are twin symptoms of a deeper democratic weakness of the criminal system: its non-responsiveness to the needs of the poor, racial minorities, and the otherwise politically vulnerable.[16] Because of this weakness, justice and lawfulness are distributed unevenly and unequally across racial and class lines, crime remains rampant in some communities but not others, and some people can trust and rely on law enforcement while others cannot.[17] Official disregard of crime is part of this dynamic, as are mass imprisonment, excessive sentences, and racially skewed enforcement practices.

This Article aims to elevate underenforcement as a socio-legal, normative phenomenon in its own right, with predictable effects and distinctive legal characteristics. One byproduct of this effort is to enrich the discussion of overenforcement by providing a better appreciation of its counterpart. Part I provides a spectrum of underenforcement examples and explores their diverse implications for the criminal process, including their impact on urban residents, prostitutes, undocumented workers, and victims of domestic violence.[18] These examples illuminate how underenforcement is one way the state participates in social contests over resources, power, and legitimacy by staying its enforcement hand in selective ways. Because the losers in these contests are those who cannot command the state's full support, underenforcement reveals important facets of the distributive and normative operations of the criminal system.

In its effort to provide a factually rich description of underenforcement practices, Part I confronts a practical difficulty with obtaining direct evidence of nonenforcement.[19] While there is a myriad of data regarding

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16. The term "nonresponsive" is, by some accounts, too polite. *See, e.g.*, Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 Tul. L. Rev. 1945 (1993) (arguing that the criminal system purposely controls and suppresses African Americans).

17. *See, e.g.*, Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 Law & Soc'y Rev. 777, 783 (1998) (reviewing studies indicating that normlessness and "anomie" most affect "members of economically and racially isolated communities, that is, those who [are] least able to exercise political influence to obtain community services").

18. *See* Sklansky, *supra* note 11, at 1818 (noting that evaluating the actual (anti)democratic impact of criminal justice practices such as community policing "is an empirical question; it is a question that no theory of democracy, no matter how sophisticated, can hope to resolve"); *see also* Jerome H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 15 (1966) ("That law is an enterprise summons us to its empirical study. It reminds us that highly general propositions about law may be either circular or premature.").

19. *Cf.* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543, 554 (1960) (noting that police nonenforcement decisions are not visible to the community and relying on confidential police records to document police policies not to enforce drug laws against snitches, not to pursue assault charges when victims failed to sign the complaint, and not to arrest certain gambling offenders). Systemic underenforcement actually reduces the amount

the crimes that law enforcement chooses to pursue, much less information exists about crimes for which police fail to make an arrest or for which prosecutors decline to bring charges.[20] This makes the underenforcement phenomenon rather difficult to pin down.[21] Part I thus marshals indirect as well as anecdotal evidence in an effort to present a more complete picture of the underenforcement phenomenon.

Underenforcement encompasses a broad spectrum of state behavior, not all of which is pernicious. Sometimes underenforcement is unremarkable or an incidental byproduct of larger political or legal phenomena. Sometimes it is appropriate or even positive. The last two examples in Part II—the underenforcement of intellectual property rights on the Internet, and law enforcement restraint in the face of civil disobedience—explore the potentially positive attributes of underenforcement. Often lauded from privacy, free market, or civil liberties points of view, these examples illustrate that full enforcement of the law may not always be desirable from a democratic or distributive perspective.

With this broad range of possible interpretations, distinguishing "good" underenforcement from "bad" poses an analytic challenge. Part II surveys the sources and effects of underenforcement and proposes a descriptive framework for identifying which forms of underenforcement may be democratically or legally problematic and which are unremarkable or even positive. This framework solidifies the intuition developed through the examples in Part I: When it disadvantages already vulnerable groups or impedes their ability to participate fully in civic life, underenforcement becomes a form of public policy that deserves special scrutiny above and beyond the deference traditionally given to law enforcement discretion.

As a doctrinal matter, underenforcement tends to slip beneath the radar. Nonenforcement is neither judicially reviewable nor actionable, and thus it tends to play second fiddle to overenforcement, which is more easily documented and litigated. Part III proposes three legal conceptualizations

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of "crime" that exists because it deprives violations of official recognition and removes them from public view. *See* Goetz, *supra* note 11, at 582 ("The amount of crime that officially 'exists' depends on the state's capacity and willingness to ferret it out and label it." (citing Henry N. Pontell, Kitty Calavita & Robert Tillman, *Corporate Crime and Criminal Justice System Capacity: Government Response to Financial Institution Fraud*, 11 Just. Q. 383, 384 (1994))).

20. For example, the National Crime Victimization Survey (NCVS), which bypasses police recordkeeping to ask populations directly about their experiences with crime, shows significant divergences between experienced crime levels and crimes recorded by police. Janet L. Lauritsen & Robin Schaum, Crime and Victimization in the Three Largest Metropolitan Areas, 1980-98, at 4-7 (Mar. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv3lma98.pdf (finding higher reported victimization rates than indicated by official police crime statistics). For example, in Los Angeles between 1986 and 1998, the NCVS indicates burglary rates reported to police to be significantly higher than L.A. Police Department rates of reported burglary, although flaws in crime reporting make it impossible to attribute those divergences to any one source. *Id.* at 5.

21. It may also begin to explain the lack of attention to it. *See* Stuntz, *supra* note 1, at 522 ("[N]o one knows how any given criminal statute is enforced in any given state. Even in a single locality, only a few cops and a handful of prosecutors may know.").

of underenforcement in an effort to give it a more robust legal identity and to locate it more centrally within ongoing debates over the doctrines and structure of the American criminal system.

First, underenforcement can be understood as a direct function of the system's commitment to broad law enforcement discretion, an approach which engages two distinct facets of the underenforcement problem. As a matter of legal authority, discretionary underenforcement embodies the possibility that the law will be unevenly or unpredictably applied, raising formal rule-of-law type problems. Underenforcement is also a form of "law in action," a set of social practices that reveal—and thus permit criticism of—how police actually treat the policed, distribute law enforcement resources, and otherwise exercise their discretionary authority.

Second, underenforcement can also be conceptualized as a problem of democratic legitimacy that arises with special force when the state polices the socially disenfranchised.[22] Part III thus explores the system's undemocratic tendency to ignore or discriminate against disfavored groups and the politically powerless, and the special implications this tendency has for the police power.

Finally, underenforcement of criminal law is a subspecies of the U.S. Supreme Court's more general constitutional commitment to a "negative liberties" jurisprudence and the Court's reluctance to impose positive welfare obligations on the state. This section reconsiders that commitment in the context of policing, the recognition of lawfulness as a socially valuable good, and the state's role in maintaining individual security, social stability, and the rule of law.

Underenforcement has many faces: The United States is peppered with all sorts of underenforcement zones, arenas in which underenforcement has reached systemic proportions affecting the local quality and meaning of lawfulness. These "zones" are not necessarily geographic: Underenforcement may characterize a discrete institution or the treatment of a particular group.[23] Underenforcement, moreover, is not necessarily an evil in itself. It becomes problematic when it weakens broader values of public protection, official evenhandedness, respect for the law, and democratic responsiveness. Under other circumstances, it can reflect appropriate limits to the law enforcement function and a healthy respect for other values. The ambition of this Article is to call attention to underenforcement as a powerful phenomenon in its own right, as well as to

22. *See, e.g.*, Markus Dirk Dubber, The Police Power: Patriarchy and the Foundations of American Government, at xv (2005) (asking whether "the power to police, and the criminal law with it, can survive in a modern democratic state").

23. *Cf.* Gerald L. Neuman, *Anomalous Zones*, 48 Stan. L. Rev. 1197, 1201 (1996) (identifying Guantanamo, formal "red light districts," and the District of Columbia as "'anomalous zone[s],' [] geographical area[s] in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended").

highlight its contributions to some of the most dysfunctional aspects of the justice system.

I. THE SPECTRUM: EXAMPLES OF UNDERENFORCEMENT

Underenforcement embodies a wide spectrum of governmental responses to crime and victimization. Underenforcement can reflect official neglect, outright hostility to victimized groups, or favoritism toward an offending class. It can also be a function of broader social conflict over the meaning of the law itself and the appropriateness of full enforcement. Underenforcement can even embody a considered judgment that the government should stay its enforcement hand in the face of competing values. The following examples illustrate the range of possibilities, with special focus on the role of underenforcement as a potential vehicle for official disadvantaging and discrimination.

A. *Urban Underenforcement*

> "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."
>
> -Justice Potter Stewart, concurring in *Furman v. Georgia*, 408 U.S. 238, 308 (1972)

> "We know no one will protect us. We have to protect ourselves."[24]
>
> -Jay, age 28, resident of a high-crime Los Angeles neighborhood

A defining aspect of living in high-crime urban communities is that police often fail to respond to crime. Police openly let certain sorts of criminality slide, and residents know that their complaints may be responded to weakly or not at all. While it is commonplace to contrast official tolerance of "white-collar crime" with intolerance of "street" or traditional crime,[25] this comparison elides the fact that in some neighborhoods, street crime is officially accepted as a fact of life. Because policing traditional street crime is perhaps the quintessential police function, urban underenforcement is a paradigmatic example of the underenforcement phenomenon and its potential harms.

While some direct evidence of urban underenforcement exists, much of the data is anecdotal or indirect. As one researcher put it, urban underenforcement is "one of those things that 'everyone knows,' but for

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24. Jill Leovy & Doug Smith, *Mortal Wounds: Getting Away With Murder in South L.A.'s Killing Zone*, L.A. Times, Jan. 1, 2004, at A1.

25. *See* Brown, *supra* note 8; Goetz, *supra* note 11, at 569.

which there is no firm evidence."[26] It is generally recognized that "poor urban areas are chronically under-policed."[27] Generally speaking, sociological "research has found that . . . [c]ompared to higher status neighborhoods with lower crime rates, . . . in minority neighborhoods with high crime rates, police seem to offer less service to victims (they are less prone to offer assistance to residents and less likely to file incident reports)."[28] This urban underenforcement takes various forms, including unsolved homicides, permitted open-air drug markets, slow or nonexistent 911 responses, and the tolerance of pervasive, low levels of violence, property crimes, and public disorder. The sources of the phenomena are likewise diverse: inadequate funding for urban area services, official expectations about crime and disorder in politically weak neighborhoods, police hostility to and fear of residents,[29] and residents' distrust of police.

It is also well recognized that poor urban communities of color suffer from higher crime and victimization rates than do more affluent white neighborhoods[30] and that African Americans (who tend to live in poor urban communities) are disproportionately victimized.[31] But it is unclear precisely how law enforcement decision making contributes to these trends, in part because underenforcement is so often informal and unacknowledged by police themselves. As Kenneth Culp Davis explained thirty years ago, "The central fact is that the police falsely pretend to enforce all criminal law; the reason for the pretense is that they believe the law requires them to enforce all criminal law but they are unable to [do so]."[32]

The relationship between policing and crime is complex. Some police failures exacerbate crime, others may have no direct impact on criminality at all, and crime rates rise and fall for many reasons having nothing to do

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26. Rodney Stark, *Deviant Places: A Theory of the Ecology of Crime*, 25 Criminology 893, 902 (1987) (asserting that "stigmatized neighborhoods will suffer from more lenient law enforcement").

27. Stacy & Dayton, *supra* note 8, at 292 (arguing that in the economic "race-to-the-bottom," states tend to underregulate criminal law in ways that justify increased federal intervention in local criminal enforcement); *see also* Stuntz, *supra* note 10.

28. Sara Stoutland, *The Multiple Dimensions of Trust in Resident/Police Relations in Boston*, 38 J. Res. Crime & Delinq. 226, 231 (2001).

29. *See, e.g.*, John Hagan & Ruth D. Peterson, *Criminal Inequality in America*, *in* Crime and Inequality 14, 24 (John Hagan & Ruth D. Peterson eds., 1995) ("[There is] much evidence that [American] police perceive the attitudes and behaviors of minority youth as hostile and threatening.").

30. *Id.* at 20 ("Street crime and victimization are increasingly concentrated in the racially segregated neighborhoods of urban settings."); *see also* Carol J. DeFrances & Steven K. Smith, Bureau of Justice Statistics Crime Data Brief: Crime and Neighborhoods (June 1994), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/can.txt ("Central city households (15%) were more likely to have identified crime as a neighborhood problem . . . than suburban households (5%) or rural households (2%).").

31. Kennedy, *supra* note 9, at 19-20 (documenting high African-American victimization rates).

32. Kenneth Culp Davis, Police Discretion, at III (1975).

with policing.[33] Indeed, there is substantial scholarly skepticism about the impact that policing is capable of having on crime rates, particularly the reactive policing of the inner-city beat.[34] Accordingly, the study of underenforcement—the complex interaction of personal and institutional responses that police bring to bear on neighborhood demands—is also an inquiry into the relationship between those responses and crime.

Some leading discussions of urban crime implicitly take underenforcement for granted, in the form of the general assumption that police do not (or perhaps cannot) control crime, focusing instead on how communities fail to police themselves.[35] But even if the sources of crime lie in "community structures and cultures,"[36] community-based explanations can obscure important enforcement failures that contribute to those structures and cultures and for which state actors remain responsible. Accordingly, the discussion below probes more specifically the contributions of police underenforcement practices to urban crime and victimization, even while recognizing that these practices are at most one piece of a larger causal puzzle.

1. Underenforcement of Serious Crimes

Received wisdom has it that police and prosecutors "invariably" or "almost always" pursue, arrest, and charge perpetrators for serious felonies.[37] But this rule of thumb is imperfect. For a constellation of reasons, including under-funding, lack of political will, and poor police-community relations, serious crimes in inner cities often go unaddressed.

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33. *See* Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 Fordham Urb. L.J. 1551, 1554 (2003) (documenting a "vicious cycle" in which increased incarceration leads to increased crime which in turn leads to more arrests which increase incarceration); *see id.* at 1557 n.36 (surveying competing explanations for crime decline including policing, drug market and demand fluctuations, changes in economic and employment conditions, and demography).

34. *See, e.g.*, Michael Tonry, Thinking About Crime: Sense and Sensibility in American Penal Culture 106-09 (2004) (surveying long-term studies of the decline of crime in the nineteenth century that describe police impact on crime as "minimal," "too thin to make much difference," and generally better understood as part of larger changes in the social order).

35. *See, e.g.*, Tracey Meares & Dan Kahan, *When Rights Are Wrong: The Paradox of Unwanted Rights*, *in* Urgent Times: Policing and Rights in Inner-City Communities 3, 13-14 (Tracey Meares & Dan Kahan eds., 1999); Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime and Urban Inequality*, *in* Crime and Inequality, *supra* note 29, at 37, 38 ("[T]he macrosocial or community-level of explanation [for crime] asks what it is about community structures and cultures that produces differential rates of crime.").

36. Sampson & Wilson, *supra* note 35, at 38.

37. *See* George C. Thomas III, *The End of the Road for* Miranda v. Arizona*?: On the History and Future of Rules for Police Interrogation*, 37 Am. Crim. L. Rev. 1, 39 (2000) ("Police will almost always engage in a thorough investigation of serious crime, and prosecutors will almost always prosecute the best suspect the police can find. These are their jobs."); *see also* Erik Luna, *Principled Enforcement of Penal Codes*, 4 Buff. Crim. L. Rev. 515, 551-52 (2000) ("If there is probable cause to believe that a suspect has committed a murder, for instance, the police will invariably arrest and the prosecutors will invariably charge.").

In Los Angeles, California, for example, of the 11,000 homicides since 1988, there are nearly 6000 for which no arrest was ever made; three-quarters of those homicides are concentrated in one-quarter of the city.[38] In the neighborhood now known as South L.A. (formerly South Central), more than half of all killers are never caught. Unsolved homicide rates correlate not only to neighborhood poverty and racial segregation, but also to thinner police forces, reflecting the unequal allocation of public resources.[39] For example, while the Compton area suffers the city's highest homicide rates, it has only seventy-five full-time police deputies, while the neighboring southeast division—with dropping homicide rates—employs more than 250 officers to patrol a comparable geographical area and has an only slightly larger population.[40] Los Angeles Police Chief William Bratton criticized the city for devoting so few resources to policing "one of the most dangerous cities in America. Sorry, you get what you pay for," he said. "It's incredible what's going on over there."[41]

Baltimore, Maryland, similarly suffers from a long history of underenforcement of serious crimes in its poorest and most dangerous neighborhoods. With an overall murder rate over seven times the national average,[42] the 1998 murder rate for African Americans in Baltimore was six times higher than for whites.[43] While there are numerous contributing factors, residents and officials alike blame these trends, at least in part, on police underenforcement. Some residents perceive the police as unresponsive or even indifferent to crime and victimization, asserting that "police have become reluctant in their desire to fight crime."[44] One resident reported that she "called the police over twenty times to arrest known drug dealers in front of her house and the police still did not appear." Even the city's acting Police Commissioner, Edward T. Norris, recognized that police failure accounted for some part of the city's violence. "[Baltimore] is a city where many members of the general public have lost faith in the resolve, skill, and even integrity of their police,"[45] he said.

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38. Leovy & Smith, *supra* note 24.

39. *See id.* (documenting higher homicide caseloads in poor high-crime neighborhoods and the reluctance of city officials to shift resources to high-crime areas).

40. Megan Garvey, *Compton Killings Highest in Years*, L.A. Times, Jan. 2, 2006, at B1 (describing a sheriff's response to increased homicides as "surprisingly passive").

41. *Id.* (internal quotation marks omitted).

42. Office of the Mayor, The Mayor's Plan to Dramatically Reduce Crime in Baltimore, Executive Summary 1 (Apr. 5, 2000), *available at* http://www.ci.baltimore.md.us/downloads/pdfs/Mayor's%20Plan%20to%20Drastically%20reduce%20Crime%20in%20Baltimore.pdf [hereinafter Baltimore Mayor's Report] (noting that in 1998 Baltimore was ranked second in the nation in violent crime and second in murder rate among large cities).

43. *Id.* at 27 (describing African-American victimization); *see also* 2003 Kids Count Factbook for Baltimore City 108-09, 138-39 (2003), *available at* http://www.baltimorekidsdata.org/Factbook.pdf (documenting crime disparities between wealthy and poor neighborhoods).

44. Baltimore Mayor's Report, *supra* note 42, at 41.

45. *Id.* at 1 (Mayor's Executive Summary).

An infamous 2002 incident revealed the depths of police inattention to drug dealing and violence. Angela Dawson and her family had repeatedly called the police and 311 about drug dealing in their neighborhood, but the drug dealers about whom they complained were at best chased away, and often the police failed to respond at all. When threats against the family were relayed to the police, the police provided no additional protection. When an individual later assaulted Mrs. Dawson, he was arrested and released the next morning. Finally, after months of police inaction, drug dealers arranged a firebombing in retaliation for the family's complaints. Mrs. Dawson and five of her children died in the attack.[46]

Other cities exhibit similar underenforcement tendencies. According to a study conducted by *The Dallas Morning News*:

> The murder rate in southern Dallas [a high-poverty section of the city] is twice as high as in the rest of the city. Assaults are nearly twice as likely . . . . Business or home burglaries are one and a half times higher in the south than in the north.
>
> Police response times are slow citywide by national standards—and they're worst in the highest-crime areas. And the officers patrolling those neighborhoods are the department's least experienced . . . .
>
> . . . "We've abandoned the people and the neighborhoods," [says] Police Chief David Kunkle.[47]

The Dallas Police Department's own study indicated that "[r]andom gunfire, alleged prostitution, and other nuisance complaints get low priority and often no follow-up"; that "[p]roperty crimes are rarely investigated and are typically handled over the telephone by an expediter—most residents found this to be an unacceptable response by the police department"; and that "[t]he general feeling among members of the Hispanic community is to 'stay clear of officers.'"[48]

In a recent federal lawsuit, the predominantly Latino Unincorporated Neighborhoods (LUN) near Modesto, California, described underenforcement in their community as follows:

> Despite consistently high crime levels, the [LUN] do not receive adequate protection from the Sheriff or Modesto Police. Patrols of the

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46. Complaint of McNack, et al. v. State of Maryland (Baltimore Cir. Ct., Feb. 16, 2005); Del Quentin Wilber, *Recordings, Court Documents Show Dawson Family's Battles: 911, 311 Requests For Help Made One Month Before Fire Show Fear, Frustration*, Balt. Sun, Feb. 17, 2003, at 1B. After the Dawson's house was firebombed for the second time in a month, the city was sued in part under the theory that it had promised protection to city residents, and it never delivered. *See id.*

47. Tanya Eiserer, *Looking South: Dallas at the Tipping Point: Area's Crime Problem Scaring off Developers*, Dallas Morning News, Dec. 14, 2004, at 22A.

48. Dallas Police Department Management and Efficiency Study, Summary of Focus Groups and Meetings with Citizens and Community Representatives, at XXIII-2-4 (Berkshire Advisors, Inc. Sept. 2004), *available at* http://www.dallascityhall.com/pdf/police/CitizenParticipation.pdf.

> [LUN] by law enforcement are too infrequent and law enforcement does not respond sufficiently to calls from residents of the [LUN]. The Sheriff's office has at times responded slowly, or in some cases, did not respond at all, to reports of home break-ins or other crimes, even those in progress. As a result of the Sheriff's lack of patrols and lack of response or slow response to calls originating from the [LUN], street crime and property damage are high in these neighborhoods.[49]

Open air drug markets are another infamous example of urban underenforcement. While some cities have made concerted efforts to disperse such markets, residents and researchers alike have expressed their shock at the extent to which police tolerate such open criminality.[50]

Law enforcement unresponsiveness creates a vicious cycle: Criminals grow bold, while residents grow reluctant to cooperate with police, making serious crimes such as drug dealing and homicide harder to solve, and police more reluctant to work on them. In those "hardest-hit neighborhoods, people describe how fear, and the conviction that serious crimes are not solved, makes them reluctant to confront homicide, unwilling to cooperate with authorities or act as witnesses, and disinclined to place their faith in the police."[51] Potential victims—mostly black and Latino young men—see the police as "unreliable and hostile," and conclude that the police will not protect them.[52] Police likewise describe their alienation from residents, their fear of going into high-crime areas,[53] and their conviction that "the people here hate us."[54]

2. Petty Offenses

Recent policing reform trends such as "zero tolerance" and "quality of life" have called attention to the pervasive underenforcement of urban petty offenses such as loitering, public drunkenness and disorder, littering, and

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49. Second Amended Complaint at 8-9, CCCI v. Modesto, No. CIV-F-04-6121 (E.D. Cal. May 27, 2005) (on file with author).

50. *See* Lynn Zimmer, American Inner-Cities and Drug Policing: Strategies that Maximize Harm to Individuals and Communities (1995), *available at* www.drugtext.org/library/articles/zim1.html (surveying law enforcement efforts to eliminate open air drug dealing and concluding that while "there have been a few successes," the successes occur mainly in middle class communities and that "[i]n poor communities, the open drug markets are never dismantled"); Baltimore Mayor's Report, *supra* note 42 (residents reporting that they suspect the police routinely drive by open air drug markets and do nothing).

51. Leovy & Smith, *supra* note 24.

52. *Id.*

53. *See* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, Atlantic Monthly, Mar. 1982, at 29, 35 ("Some Chicago officers tell of times when they were afraid to enter [high crime housing projects].").

54. Leovy & Smith, *supra* note 24; *see also* Jeremy M. Wilson & K. Jack Riley, *Violence in East and West Oakland: Description and Intervention* 14 (RAND Public Safety and Justice, Working Paper No. WR-129-OJP, 2004), *available at* http://www.rand.org/pubs/working_papers/2004/RAND_WR129.pdf (describing high-crime community's "general contempt for the police").

graffiti. In many city neighborhoods, the police simply ignore such petty street crimes, requiring residents to navigate around them. Indeed, a defining difference between poor and wealthy neighborhoods is often the degree to which police tolerate visible petty offenses.

Quality-of-life reformers tend to focus on the asserted criminogenic effects of such disorder, but they implicitly accept the notion that underenforcement of the law exists and can have independent harmful effects on the communities in which it occurs.[55] In the seminal article *Broken Windows*, James Wilson and George Kelling describe the process of urban decay in large part in terms of the normative impact of law enforcement laissez-faire:

> Citizens complain to the police chief [about petty offenses], but he explains that his department is low on personnel and that the courts do not punish petty or first-time offenders. To the residents, the police who arrive in squad cars are either ineffective or uncaring; to the police, the residents are animals who deserve each other. The citizens may soon stop calling the police, because "they can't do anything."[56]

Community attitudes towards the police reflect glaring local awareness of underenforcement. Urban residents routinely assert their belief that calling the police is futile, that the "police don't do nothing,"[57] that "the police never listen[] to us,"[58] and that "you have to act hysterical when you call 911 if you want them to take you seriously."[59]

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55. The criminogenic effects of disorder are contested. *Compare* Wesley G. Skogan, Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods 10 (1990) (describing theories that attribute criminogenic properties to disorder), *with* 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, 638 (1999) (arguing that broken windows and visible disorder do not create crime but rather flow from the same underlying sources).

56. Wilson & Kelling, *supra* note 53, at 33.

57. Leovy & Smith, *supra* note 24 (quoting resident).

58. Daniel Hernandez, *A Plea for Public Safety*, L.A. Times, Oct. 18, 2004, at B3 (quoting a Crenshaw resident who repeatedly called police to report drug and prostitution activity in a neighbor's house).

59. Mike Reilly, *Other Omahans Tell of 911 Frustration Concern Not Limited to One Area of the City*, Omaha World Herald, Mar. 14, 1995, at A1. More broadly, many African Americans report that they "believe that the police and the courts fail to protect them from these growing problems of crime." Hagan & Peterson, *supra* note 29, at 24. This is not to attribute all such cynicism to criminal justice issues: African-American distrust of police and government is historical and complex and cannot be reduced to a response to crime and punishment. *See, e.g.*, Sampson & Bartusch, *supra* note 17, at 783-84 (noting that the fact that "low-income and minority-group populations are most likely to perceive injustice in the application of legal norms and to express cynicism about the legitimacy of laws and the ability of the police" is itself "contextual in origin and not reducible to differences in crime rates" but rather should be understood "in the structural context of disadvantage and resources exploitation across neighborhoods"); *see also* Sampson & Wilson, *supra* note 35 (arguing that crime and attitudes towards deviance in poor black communities are functions of broader economic and social forces of segregation and disadvantage).

3. Law Enforcement as a Public Service Resource

Criminal underenforcement is part of a larger cycle of public service failure in poor urban neighborhoods.[60] Public education is typically segregated and of poor quality;[61] housing, health, and safety codes are underenforced; and sewage, garbage pickup, and pest control services are lax.[62] These failures are symptoms of larger political disinvestments in inner cities; they also have independent force and exacerbate one another.

Service failures reflect official tolerance of violations in these communities. As explained bluntly by one housing code inspector in Boston, Massachusetts,

> Certain areas will tolerate certain violations. You adjust your enforcement to the peculiarities of the neighborhood you are in. If something doesn't upset the neighbors why stir up a bucket of [expletive deleted]?
>
> In Back Bay [a wealthy Boston neighborhood] you'll get a complaint and a woman will show you a few scraps of paper and call it rubbish . . . . In Dorchester [a poor, high-crime neighborhood], . . . there are dead rats and dogs on the streets and nobody complains. They're different environments; the people have different expectations.
>
> If you are on a spotless block and one house has a minor exterior violation you will call it. If this same violation is in a sleazy area, you ignore it . . . . How much is too much trash? It depends on the neighborhood.[63]

The under-provision of public services is, in turn, directly related to crime because it contributes to social and economic deterioration, or what Robert Sampson and William Julius Wilson call the "pattern of destabilizing feedback [that is] central to an understanding of the role of governmental

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60. *See* Gershon M. Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 Harv. C.R.-C.L. L. Rev. 1, 1-12 (1968) (documenting municipal failures to provide equal police, education, roads, trash collection, parks, and other public services to poor communities of color).

61. Jonathan Kozol, The Shame of the Nation: The Restoration of Apartheid Schooling in America 19 (2005) (documenting the continuing poor quality and pervasive segregation in U.S. public schools, with seventy-five percent of nonwhite children in predominantly nonwhite schools and two million children of color in "apartheid schools" in which ninety-nine percent of the students are nonwhite).

62. Lee Romney, *Poor Neighborhoods Left Behind*, L.A. Times, Sept. 18, 2005, at B1 (documenting lack of sewage, sidewalks, traffic controls, and other public services in poor Latino unincorporated areas); *see also* Second Amended Complaint, *supra* note 49 (alleging same); Dallas Police Department Management and Efficiency Study, *supra* note 48, at XXIII-3 (documenting residents complaints that "[c]ode violations at high-density apartment complexes cause high levels of crime").

63. H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 ABA J. Affordable Housing & Community Dev. L. 29, 35 (1996).

policies in fostering the downward spiral of high crime areas . . . [and] the institutional desertification of the urban core."[64]

One way of understanding underenforcement, therefore, is as another form of resource deprivation, such as understaffed police departments, untrained officers, and other social capital deficits. This resource deprivation is a form of social disinvestment. It reflects not only the political weakness of inner cities in the competition for resources, but also the predominant judgments about how much disorder, decay, and underenforcement poor communities should be required to tolerate.[65] In other words, the assertion that inner cities are crime-ridden because more crime is committed there reflects only half of the dilemma; the other half lurks in the state's incomplete response.

4. Constructive Underenforcement?

Despite the many harms associated with urban underenforcement, not all its manifestations carry the same negative implications. Sometimes underenforcement represents a considered judgment that arrest or other coercive response would be ineffective or overbearing. The old-fashioned beat officer model included the idea that police officers might reprimand local alcoholics, disarm but not arrest quarrelling fighters, lecture larcenous youth, and otherwise refrain from enforcing criminal laws against public drunkenness, assault, and theft. Current community policing models laud the idea that the police officer who personally knows individuals in the community need not always arrest lawbreakers, but may have more flexible and effective responses available.[66] Part II attempts the admittedly difficult

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64. Sampson & Wilson, *supra* note 59, at 48-49 ("[L]ax enforcement of city housing codes played a major role in accelerating the deterioration of inner-city Chicago neighborhoods . . . [as well as] the systematic decline of New York City's housing stock, and consequently, entire neighborhoods. . . . Decisions to withdraw city municipal services for public health and fire safety—presumably made with little if any thought to crime and violence—also appear to have been salient in the social disintegration of poor communities. . . . The loss of social integration and networks from planned shrinkage of services may increase behavioral patterns of violence that may themselves become 'convoluted with processes of urban decay likely to further disrupt social networks and cause further social disintegration.'" (quoting R. Wallace & D. Wallace, *Origins of Public Health Collapse in New York City: The Dynamics of Planned Shrinkage, Contagious Urban Decay and Social Disintegration*, Bull. N.Y. Acad. Med. 391, 427 (1990))).

65. This is not to say that disinvesting in police forces always accompanies disinvestment in other social services. A common complaint is that the government disinvests in community resources even as it calls for more police and prisons. *See, e.g.*, John R. Dunne, Op-Ed., *When Will New York Correct Its Mistake?*, N.Y. Times, May 10, 2002, at A35 (bemoaning that "[i]nstead of investing in education and services that would improve people's lives, we have chosen to invest in prisons. New York now sends more African-American and Latino men to prison each year than it graduates from its state colleges and universities"); David K. Shipler, Op-Ed., *Children Going Hungry*, Wash. Post, Feb. 27, 2005, at B7 (arguing that federal budget cuts in food stamps and housing subsidies will lead to increased social problems).

66. Brown, *supra* note 8, at 1348 (collecting stories of cooperative, nonpunitive policing); Wilson & Kelling, *supra* note 53, at 3 (describing a foot-patrol officer's order-

task of drawing lines between harmful official neglect and appropriate discretionary flexibility.

B. *Prostitution*

Prostitution is an infamous "underenforcement zone."[67] Not only is the crime of prostitution itself routinely underenforced against prostitutes, and even more so against customers (so-called "johns"),[68] but a constellation of other underenforcement practices spring up in association with the tolerance of the sex trade, including the under-protection of prostitutes from other crimes and the tolerance of criminality in prostitution-heavy areas.[69] This underenforcement contributes to the lawlessness and violence that surrounds the prostitution industry, alienates prostitutes from legal institutions, and creates distrust of the police in surrounding communities.[70]

Prostitution is in some ways a subset of the urban underenforcement phenomenon described above, often associated with urban decay and a frequent target of community policing programs. However, it has special characteristics that deserve additional attention. First, prostitution is a prime example of how underenforcement exacerbates lawlessness. Official toleration of prostitution is tied to the underenforcement of numerous other laws, driving a wedge between law enforcement and community residents, including prostitutes themselves. Prostitution also highlights the official tendency to withhold full legal protection from those who have broken the law in some way, a socially destructive and legally problematic aspect of underenforcement.

The criminal offense of prostitution is enforced infrequently and unevenly. Many prostitutes who work off the street are never arrested, while "streetwalkers," who are arrested more frequently, are often

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maintenance behavior: "Sometimes what [Officer] Kelly did could be described as 'enforcing the law,' but just as often it involved taking informal or extra-legal steps to help protect what the neighborhood had decided was the appropriate level of public order"). *But see* Harcourt, *supra* note 15, at 176, 213 (arguing that order-maintenance policing authorizes overenforcement in the form of excessive arrests).

67. *See supra* note 23 and accompanying text.

68. *See* Jonathan M. Barnett, *The Rational Underenforcment of Vice Laws*, 54 Rutgers L. Rev. 423, 425 (2002) ("[M]ost federal, state, and municipal enforcement agencies tend to monitor and punish these consensual crimes [such as prostitution] in a lax and inconsistent manner that supplies little reliable indication as to the effective legal standard."); Luna, *supra* note 37, at 552-54 (noting that the Model Penal Code drafters recognized that such "laws are continually violated"); Neuman, *supra* note 23, at 1208 ("[T]he United States . . . has a long history of informally tolerated vice zones in which brothels, while technically illegal, have been permitted to flourish.").

69. This phenomenon overlaps with the urban underenforcement phenomenon described in the previous section. *See supra* Part I.A.

70. Despite widespread underenforcement, law enforcement still expends significant resources on prostitution. *See* Julie Pearl, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 Hastings L.J. 769, 772 (1987) (estimating that in 1985 each of the nation's largest cities spent an average of $7.5 million on prostitution law enforcement).

immediately released.[71] Customers are arrested even more rarely.[72] This high level of nonenforcement is also racially skewed: Prostitutes who are arrested are overwhelmingly minority women.[73] This underenforcement is public and official: Police, prosecutors, and judges openly make resource allocation decisions based on the assumption that prostitution laws will remain underenforced.[74]

At the same time, crimes such as assault, robbery, and rape against prostitutes are common, while police responses to prostitute victimization are weak.[75] One study explained,

> Crimes against prostitutes usually go unpunished. There is a tacit acceptance of this form of violence . . . . The overwhelming majority of [prostitutes surveyed] did not go to the police after they experienced violent incidents. . . . Others who attempted to report violent crimes were told by the police that their complaints would not be accepted . . . .[76]

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71. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare is Served?*, 24 New Eng. J. on Crim. & Civ. Confinement 427, 428, 436 (1998) (noting that "[p]olice primarily arrest prostitutes from the streetwalking population," although street prostitutes comprise only ten to twenty percent of all prostitutes); *see also* Barnett, *supra* note 68, at 433 (describing "chronic underenforcement" (citing Eleanor M. Miller et al., *The United States*, *in* Prostitution: An International Handbook on Trends, Problems, and Policies 300, 308-09 (1993))).

72. *See, e.g.*, Diane Mason, *Equal Justice: Women, Men & the Law of the Land*, St. Petersburg Times, Sept. 30, 1990, at 6F (reporting a Florida study documenting harsher jail sentences given to prostitutes compared to male customers who often received only a fine); Michael Moline, *Study Says Prostitution Crime of Power, Violence*, United Press Int'l, Sept. 20, 1998 (reporting a Florida study sponsored by the state supreme court, quoting Justice Gerald Kogan, "It is almost unheard of for a male as a customer to be sent to jail"); Daria Mueller, Chi. Coal. for the Homeless, Curbing the Demand for Prostitution 1 (Fall 2005), *available at* http://www.chicagohomeless.org/factsfigures/PolicyPaper%20Fall05.pdf (documenting that in Chicago in 2004, 3204 prostitutes were arrested but only 950 "johns" were arrested).

73. Luna, *supra* note 37, at 558 ("Ninety percent of all prostitution arrests and eighty-five percent of those incarcerated are minority women.").

74. *See, e.g.*, Vince Horiuchi, *Jailers Turning Away Prostitutes*, Salt Lake Trib., Feb. 3. 1996, at E1 ("Jailers have been ordered to turn away hookers, even though new jail space opened three weeks ago to curb Salt Lake County's increasing prostitution crimes."); Terry Oblander, *Residents Criticize Freeing Prostitutes*, Plain Dealer (Cleveland), Sept. 19, 1995, at B1 (reporting that "Common Pleas Court judges had signed an order that would release women charged with prostitution when jail space for women became overcrowded" and would "also prohibit police from even booking suspected prostitutes when the jail is full").

75. *See, e.g.*, Urban Justice Ctr., Revolving Door: An Analysis of Street-Based Prostitution in New York City 8 (2003) [hereinafter Revolving Door], *available at* http://www.urbanjustice.org/pdf/publications/RevolvingDoorExecSum.pdf (documenting pervasive violence and crime against prostitutes by customers); Alan Feuer, *Guardians on the Streets of Despair: New Jersey Task Force Focuses on Crimes Against Prostitutes*, N.Y. Times, July 28, 1998, at B1 (noting that the county had "neglected" fourteen unsolved cases of homicides of black prostitutes until the election of Essex County's first black female prosecutor); Melissa Farley, Prostitution Research & Educ., Prostitution: Factsheet on Human Rights Violations (Apr. 2, 2000), http://www.prostitutionresearch.com/factsheet.html (citing various worldwide studies that estimate between sixty-eight to eighty percent of prostitutes have been raped, most of them repeatedly, and that eighty-three percent are assault victims).

76. Revolving Door, *supra* note 75, at 6.

The Los Angeles Police Department used to designate crimes against prostitutes "NHI," which stands for "no humans involved."[77] Official data, moreover, tend to understate the extent of victimization because prostitutes underreport crimes committed against them, in part for fear of arrest and in part because of their accurate perception that police do not take crimes against them seriously.

Above and beyond failing to protect prostitutes, police themselves often commit crimes against prostitutes. Common practices include demanding sex in return for the decision not to arrest, trading protection for sex, and raping prostitutes.[78] Official harassment of prostitutes also correlates with racial harassment; some studies indicate that prostitutes of color are more likely to receive illegal police treatment.[79] Unsurprisingly, these corrupt practices undermine the legitimacy of the police. According to researchers, "[S]treet women regard the police as just another gang, people from whom one can receive drugs, against whom one sometimes needs protection, and for whom sexual services may be performed in return for leniency."[80]

More broadly, underenforcement practices erode the lawfulness of the environments in which prostitution takes place. Nineteenth century red-light districts were neighborhoods officially set aside where prostitution, liquor, and gambling laws were relaxed, and other forms of criminality were notorious.[81] Today, residents of prostitution-heavy neighborhoods often complain that police do not enforce laws regarding alcohol, drugs, loitering, noise, and other public nuisances.[82] In response, many

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77. Al Martinez, *Women on the Avenue*, L.A. Times, Aug. 9, 1996, at B5 ("It was generally accepted [by the L.A. Police Department] that if a hooker was raped or murdered she got what was coming to her . . . .").

78. *E.g.*, David Kocieniewski & John Sullivan, *Newark Police Troubled: Out of Control at the Top*, N.Y. Times, Dec. 23, 1995, at A1 (documenting police rape, robbery, and beating of prostitutes that went undisciplined); Josh Kovner, *Officers Accused of Misconduct: Prostitutes' Allegations Prompt Investigation*, Hartford Courant (Conn.), Oct. 1, 1998, at B1 (reporting an investigation into widespread Hartford police practices of assaulting and extorting sex from prostitutes); Revolving Door, *supra* note 75, at 5.

79. Hagan & Peterson, *supra* note 29, at 26 ("[F]ield studies of street prostitution indicate that young minority women are routinely harassed by police, taken into custody because they are 'known' prostitutes, and sometimes brutalized.").

80. Kay Levine & Virginia Mellema, *Strategizing the Street: How Law Matters in the Lives of Women in the Street-Level Drug Economy*, 26 Law & Soc. Inquiry 169, 195-96 (2001).

81. Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 Yale J.L. & Human. 123, 125 (2004) (noting the existence of informal red-light districts in large and small cities across the country prior to 1909).

82. *See, e.g.*, Joseph P. Fried, *Flushing Goes on Patrol to Chase Off Prostitutes*, N.Y. Times, Nov. 22, 1992, at A43 (describing efforts of local residents in Queens and Harlem to drive away prostitutes and customers because they were dissatisfied with the police response to the problem); Thao Hua, *Citizen Patrol Reclaims Crime-Ridden Boulevard*, L.A. Times, Dec. 26, 1995, at B1 (same); Mike Nichols, *Quicker Police Response Sought*, Milwaukee J. Sentinel, Aug. 15, 1996, at 1 (documenting citizen complaints that "police have been slow in responding" to influx of prostitutes and quoting one resident as saying, "I called (the police) one time and they took two hours to come. . . . I am sick of this").

communities have set up private police forces—surveillance teams, patrols, and websites—to deter and punish prostitutes themselves.[83] Community members who take law enforcement matters into their own hands do so in recognition of the fact that the police function has failed them.[84]

Underenforcement is thus a defining feature of prostitution, both in how prostitution laws are put into practice and how they impact those who come into contact with them. It is also a rich example of the potentially virulent effects of underenforcement: It breeds police corruption, discrimination, violence, victimization, and distrust.[85] It also suggests that traditional law enforcement may be ill-equipped to handle illegal prostitution in an ethical way, precisely because the pervasiveness of underenforcement leaves so much room for dysfunction and error.[86]

Prostitution is an enormous, pervasive socioeconomic institution. Estimates of the number of sex workers range from 300,000 to one million.[87] Customers number in the millions, including the majority of American men,[88] and revenues number in the billions.[89] Prostitution underenforcement practices thus distort how many individuals experience the law in their most intimate, personal interactions. Underenforcement in

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83. *See, e.g.*, Fried, *supra* note 82 (describing community "prostitute patrol"); Chet Fuller, *Videotaping Posses Flush Out Criminals*, Atlanta J. Const., Apr. 8, 1996, at A5 (describing resident videotaping of prostitutes in Boston, Los Angeles, and New York).

84. *See* David Alan Sklansky, *Private Police and Democracy*, 43 Am. Crim. L. Rev. 89, 97 (2006) (describing how private policing is part of the "secession of the successful" because it permits wealthy communities to opt out of expensive, ineffective public policing); *see also* Sklansky, *supra* note 11, at 1818-23 (describing a trend toward private policing adopted by wealthier communities and institutions).

85. *See* Stuntz, *supra* note 1, at 574 (characterizing prostitution laws as having "two typical results: non-enforcement coupled with graft, with the police using the prostitution laws as devices for extracting payoffs, or enforcement targeted mostly at poor immigrant neighborhoods"). Studies also suggest that prostitution is often a link in a chain of victimization. *See, e.g.*, Diane Mason, *supra* note 72 (reporting a Florida study finding that nearly all prostitutes are victims of incest).

86. *See, e.g.*, Harcourt, *supra* note 15, at 224 (considering the potential effect of legalization on the improved enforcement of assault and other protective laws).

87. Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 Cornell J.L. & Pub. Pol'y 99, 103 (1996) (estimating between 300,000 and 500,000 sex workers); SAGE Project, Standing Against Global Exploitation, http://www.sageprojectinc.org/html/info_briefs_effects.htm (last visited Nov. 12, 2006) (estimating that "one million girls and women are in prostitution" and "at least 300,000 of the individuals in prostitution in the U.S. are children" (citing JoAnn L. Miller, *Prostitution in Contemporary American Society*, *in* Sexual Coercion: A Sourcebook on its Nature, Causes, and Prevention 44 (Elizabeth Grauerholz & Mary A. Koralewski eds., 1991) and U.S. Department of Health and Human Services)).

88. Ellis E. Conklin, *Expert Sets Record Straight on Dark Realities of Prostitution; Conference an Eye-Opener for County Social Workers*, Seattle Post-Intelligencer, Dec. 14, 1991, at B1 (citing estimates that seventy percent of American men will visit a prostitute at least once).

89. Conant, *supra* note 87, at 103 (estimating that revenues from prostitution are $20 billion (citing Carl Simon & Ann D. White, Beating the System: The Underground Economy 249-55 (1982))).

this realm injects concrete experiences of violence, legal failure, and victimization into millions of American lives.

C. *Undocumented Workers*

Illegal immigration is a complex phenomenon that goes beyond mere underenforcement, indeed well beyond the purview of the criminal law. Nevertheless, like prostitution, the illegal immigration quandary is in part a function of a disingenuous enforcement message sent by the government: The underlying immigration prohibition is openly underenforced while violators are penalized indirectly by the underenforcement of other legal protections to which they are legally entitled. The government thus handles both undocumented workers and prostitutes in part by rolling back the carpet of the law, a scenario under which these two vulnerable classes of workers suffer significant harms. Moreover, illegal immigration is for many a paradigmatic example of the failure of the governmental enforcement apparatus. It is thus briefly considered here as an illumination of the workings of underenforcement.

There are currently nine million estimated undocumented immigrants in the United States.[90] The underground economy in which they typically work—"unregulated by the institutions of society"—represents nearly ten percent of the U.S. gross domestic product.[91] Far from invisible, undocumented immigrants work in manufacturing, construction, restaurants, childcare, and individual homes.[92] They are employed by major corporations and prominent political figures.[93] They pay tens of billions of dollars in state and federal taxes.[94]

At the heart of the undocumented worker phenomenon lies a tangle of official practices involving the selective underenforcement of immigration, labor, and criminal laws. Immigrants enter, live, and work in the United States in violation of the law.[95] Immigrants are also victimized by employers and workplace conditions that violate numerous workplace and criminal laws. The underenforcement of these protective laws contributes

90. Jennifer Gordon, Suburban Sweatshops: The Fight for Immigrant Rights 1 (2005).

91. *Id.* at 47 (citing an International Monetary Fund study).

92. *Id.*

93. Helen Huntley, *Illegal Hiring Goes on, Largely Unseen*, St. Petersburg Times, Jan. 10, 2001, at 1A (noting that high-level nominations of Kimba Wood, Zoe Baird, and Linda Chavez failed because they hired illegal immigrants).

94. *See* Karin Brulliard, *Study: Immigrants Pay Tax Share*, Wash. Post, June 5, 2006, at B1 (citing a study finding that illegal immigrants in the Washington D.C. area contributed $1 billion in taxes in 1999); Lourdes Medrano Leslie & Neal St. Anthony, *Illegal Immigrants Fuel State's Economy, Report Says*, Minneapolis Star Trib., Sept. 7, 2000, at D1 (reporting a study that found that the approximately 48,000 undocumented workers in the Minneapolis area paid over $600 million in state, local, and federal taxes).

95. This description is not intended to downplay either the massive and expensive law enforcement efforts to make border crossings more difficult or the suffering of immigrants who are deported. It rather describes the reality that these efforts are ineffective at preventing entry and re-entry.

to the dangerous and often lawless conditions that characterize undocumented immigrant life.[96]

The first piece of the puzzle lies in the underenforcement of immigration laws themselves. Government officials freely admit that the government does not and cannot fully enforce immigration laws generally and that the presence of illegal immigrants in U.S. society is a fact of life.[97] Immigration law also makes it illegal for employers to hire undocumented workers, but immigration officials openly acknowledge that they do not enforce these provisions, but rather that the government "turns a blind eye" to immigration violations in the workplace.[98] Many argue that notwithstanding the massive, expensive, and dangerous (to immigrants) enforcement efforts to close the border, U.S. policy makers recognize that full enforcement of restrictive entry laws would harm the economy.[99]

Workplaces are heavily regulated arenas, covered by wage and labor standards, as well as health, safety, and antidiscrimination laws. Congress has decreed and courts have held that the Fair Labor Standards Act, the National Labor Relations Act, and Title VII apply to all workers, regardless of their immigration status.[100] These laws, however, go underenforced as well. Undocumented workers are typically paid subminimum wages in unsafe working conditions, discriminated against based on their race and language, and fired for exercising their rights or for joining or organizing unions.[101]

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96. Undocumented status does not deprive immigrants of bedrock entitlements to due process, equal protection, and other guarantees of basic lawfulness. *See* Plyler v. Doe, 457 U.S. 202, 213-15 (1982) ("[The illegal alien] is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish.").

97. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.-C.L. L. Rev. 345, 360 (2001); Rachel L. Swarns, *Tough Border Security Bill Nears Passage in the House: Omits Guest Worker Plan Urged by Bush*, N.Y. Times, Dec. 14, 2005, at A30 (noting the admissions of various lawmakers); *see also* Stephen Dinan, *Judge Tells Police to Lay Off Immigration Enforcement*, Wash. Times, Aug. 13, 2005, at A3 (reporting that a New Hampshire judge forbade local police to enforce criminal trespass laws against illegal aliens after concluding that immigration enforcement was a federal matter).

98. Louis Uchitelle, *I.N.S. is Looking the Other Way as Illegal Immigrants Fill Jobs: Enforcement Changes in Face of Labor Shortage*, N.Y. Times, Mar. 9, 2000, at A1 (citing Immigration and Naturalization Service statistics showing that arrests of undocumented workers for deportation dropped to about 8600 in 1999 as compared with 22,000 two years earlier).

99. *See* Swarns, *supra* note 97 (documenting business and political opposition to tougher immigration worker controls).

100. *See, e.g.*, Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (holding that undocumented workers are protected by the National Labor Relations Act); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (holding that undocumented workers are included within the meaning of "employee" under Title VII of the Civil Rights Act of 1964).

101. *See* Nessel, *supra* note 97. Local newspapers often document the abuse of undocumented workers. *See, e.g.*, Diane E. Lewis, *40 Immigrant Workers Fired After*

When law enforcement finally steps in, all too often it does so to protect the interests of employers for whom the immigrant has become inconvenient. Workers who file health and safety claims, attempt to collect unpaid wages, or try to organize unions are subject to deportation.[102] Immigration officials acknowledge that when immigration laws are enforced, they are enforced selectively: "[T]he only workers at risk of deportation for unauthorized employment are those reported by the employer in retaliation for protected organizing activities or 'that kind of stuff.'"[103] At least one appellate court has validated such practices by declining to create an exclusionary rule, holding that information about immigration status from employers in violation of labor laws can form a basis for deportation.[104]

These conditions have led observers to label such workplaces "lawless," not because they lack pertinent laws, but because those laws are openly and officially flouted.[105] According to Jennifer Gordon, underenforcement is central to the problem:

> Thanks to decades of work by unions and reformers, most immigrant workers, even the undocumented, have the right—on paper, at least—to a minimum wage, to overtime wages, to protection from discrimination, and to safe and healthy working conditions. Enforcing existing laws is thus a major thrust of the current fight against sweatshops. Yet sweatshops are founded on—are literally defined by—their refusal to comply with . . . basic laws governing the workplace. The underground economy is structured to avoid detection . . . .
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> Compounding this is the fact that the government agencies responsible for enforcing protective labor laws are sorely underfunded [and understaffed].[106]

Lawsuit Filed, Boston Globe, Dec. 23, 2004, at C3 (Brazilian workers fired after suing roofing employer for failing to pay more than $1 million in overtime and wages).

102. *See generally* Nessel, *supra* note 97.

103. *Id.* at 361.

104. Montero v. INS, 124 F.3d 381 (2d Cir. 1997).

105. *See* Gordon, *supra* note 90, at 23.

106. *Id.* at 23-24. The phenomenon is not limited to small employers or sweatshops. *See* M. Schacht et al., A 2004 Survey of 1,028 California Agricultural Workers Found Widespread Wage and Hour Violations (Jan. 2005), *available at* http://www.crlaf.org/2004CAWSWP.pdf (documenting widespread wage and hour violations among California farm workers). Wal-Mart, the nation's largest retailer, recently paid an $11 million settlement for its widespread practice of hiring undocumented workers at subminimum wages to clean its facilities. According to one attorney, James L. Linsey, "at least 250 illegal immigrants . . . were employed by janitor contracting services and hired by [Wal-Mart] in 21 states. Many of the janitors—from Mexico, Russia, Mongolia, Poland and a host of other nations—worked seven days or nights a week without overtime pay or injury compensation. . . . Those who worked nights were often locked in the store until the morning." *Wal-Mart Mops Up Immigrant Flap*, CBSNews.com, Mar. 18, 2005, http://www.cbsnews.com/stories/2005/03/18/national/main681593.shtml; *see also* Rhonda Cook, *Smuggling of Immigrants is Continuing: Enforcement Lax; Economy Needs Workers*, Atlanta J. Const., Jan. 22, 2002, at D5 (documenting indictments of Tyson's Food executives

Even where a government enforcement apparatus exists, it is often openly hostile to immigrant workers.[107]

Because of their alienation from legal and political institutions, undocumented workers are substantially under-protected by criminal and other laws. Such workers suffer indentured servitude, high rates of assault, theft, rape, domestic violence, and homicide.[108] They experience open sexual harassment,[109] race discrimination, and hate crimes.[110] The neighborhoods in which they live are under-policed and often lack basic services and amenities.[111] Nonresident aliens, documented and undocumented alike, report deep distrust of police, disrespect from police, and a fear that they will be deported if they report crimes. While some police departments recognize that they cannot play their traditional protective role if they are perceived as immigration enforcers,[112] undocumented workers typically have strained relations with police and do not receive the full protection of the criminal law.[113]

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for paying smugglers to bring illegal Mexican workers to jobs in nine Tyson plants in fifteen states).

107. Gordon, *supra* note 90, at 25-26 ("Over and above these staffing problems, immigrant workers in low wage industries hit brick walls when they tried to file claims with Long Island labor enforcement offices. . . . Those who penetrated the translation system were met with insult and outright rejection: inspectors told immigrants, 'I don't like to take claims for domestic workers and restaurant workers,' lectured them about not paying taxes, complained to them that 'illegal aliens' rob the taxpayers of money, and dissuaded them from filing cases.").

108. *See, e.g.*, Editorial, *Smuggled Newcomers*, Dallas Morning News, July 25, 1997, at 26A (relating how Chinese and Mexican illegal immigrants were held in involuntary servitude subject to physical and sexual abuse); Greg Bloom, Frontera NorteSur, *El Paso Immigrant Law Enforcement Monitoring Project*, Nov. 2000, http://www.nmsu.edu/~frontera/nov00/feat3.html (relating how "undocumented women residing near the border in Texas are often afraid to call the police in situations of domestic violence . . . because Border Patrol often ride with local law-enforcement agents").

109. *See, e.g.*, Amanda Clark, *A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska*, 16 Hastings Women's L.J. 139 (2004).

110. *See, e.g.*, Interview by In Motion Magazine with Roberto Martinez, Dir., U.S./Mex. Border Program and Immigration Law Enforcement Monitoring Project of the Am. Friends Serv. Comm. (July 7, 2001), *available at* http://www.inmotionmagazine.com/hrcr/rm2001a.html (describing how "groups of white kids in pickup trucks . . . shoot[] at migrants as they cross the border"); Patrick McDonnell, *Crime and Violence Against Illegal Crossers Prompts Promise of More Patrols*, L.A. Times, June 14, 1990, at B1 (documenting pervasive violence including murder against immigrants crossing the border).

111. *See supra* Part I.A.

112. *See* Karen Brandon, *U.S. Weighs Local Role on Immigration*, Chicago Trib., Apr. 14, 2002, at A10 (quoting a police chief saying that "'[i]t would be virtually impossible to [fight crime] effectively if witnesses and victims, no matter what their residency status, had some reluctance to come forward for fear of being deported'"); Michael Riley, *Immigration Bill Has Police Uneasy*, Denver Post, Apr. 22, 2002, at A1 (quoting a police chief saying that "'[c]ommunication is big in inner-city neighborhoods and the underpinning of that is trust. . . . If a victim thinks they're going to be a suspect (in an immigration violation), they're not going to call us, and that's just going to separate us even further.'").

113. *See, e.g.*, Solomon Moore, *LAPD Enlisted in Fight on Human Smuggling*, L.A. Times, Jan. 25, 2005, at B1 (documenting lax enforcement and revealing that the federal

The underenforcement of criminal, labor, and public welfare laws is thus a defining fingerprint of the conflicted relationship that the U.S. legal system has with these workers and residents. This "zone" reveals that underenforcement is also selective enforcement: Here it operates as a subsidy to the illegal conduct of the industries and employers who rely on undocumented workers. At the same time, it devalues those workers' rights and dignitary interests by tolerating their economic and personal victimization in violation of existing laws. The combination of selective enforcement, widespread victimization, and open, official disdain for a wide array of laws results in a violent, lawless atmosphere.

D. *Reversing Underenforcement: Domestic Violence*

The domestic violence reform movement offers a telling example of how underenforcement can become publicly recognized—and challenged—as a form of social disadvantage and dismissal. Prior to such reform movements of the 1970s and 1980s, domestic violence was an arena of widespread public underenforcement. Police routinely declined to intervene in what was deemed a private family matter.

In response, reform efforts specifically aimed at eliminating underenforcement and ensuring that police and prosecutors enforced existing laws. Two staples of this effort were mandatory arrest rules and no-drop prosecution policies—in effect, the curtailing of police and prosecutorial authority to underenforce the law.[114] As a result of these reform efforts, not only are domestic violence laws more routinely and vigorously enforced today, but far greater legal resources are devoted to the domestic violence issue.[115]

Domestic violence reform highlights the normative and distributional power of official underenforcement. Central to the reform argument was the understanding that underenforcement of domestic violence offenses represents a form of male favoritism, an implicit devaluation of women, and the authorization of male violence against them.[116] Fuller enforcement of antiviolence laws thus serves a vital function, not merely of physical protection, but of value reversal, in which the state steps in to protect female victims and revises traditional male violent prerogatives. Such challenges to underenforcement are not merely raw demands for law enforcement resources, but more fundamentally for changes in the culture

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government filed only twelve human trafficking cases in 2003 and only ten in both 2002 and 2001 even though the problem is widespread).

114. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 Hous. L. Rev. 237, 239-41 (2005).

115. Lisae C. Jordan, *Introduction* to *Special Issue on Domestic Violence*, 39 Fam. L.Q. 1, 1-2 (2005) (documenting increased programs and expenditures on domestic violence).

116. *See, e.g.*, Miccio, *supra* note 114, at 240 ("[M]andatory arrest provisions . . . placed male intimate violence at the center of law enforcement policy by criminalizing conduct that the justice system and society previously had sanctioned.").

of acceptance, a new assertion that the failure to enforce certain laws is an unacceptable social practice.

The domestic violence debate also highlights a recurring theme in underenforcement, which is that traditional law enforcement is not a cure-all for crime. Even in the face of stepped-up enforcement, intimate violence against women remains pervasive, and there is growing evidence that law enforcement intervention may itself exacerbate such violence or give rise to other forms of discrimination.[117] Like urban policing of disorder and prostitution, domestic violence policy is conflicted over the enforcement question: It has not yet answered the threshold question of the proper role of law enforcement or figured out the extent to which traditional law enforcement methods provide a meaningful solution to intimate violence. The domestic violence debate does, however, illustrate the centrality of underenforcement within this larger debate: It is precisely by considering the extent to which we should tolerate underenforcement that we gain insight into the deeper problem of the appropriate relationship between the criminal law and individual destructive behavior.

E. *Positive Faces of Underenforcement: The Internet and Civil Disobedience*

The four preceding examples reveal that official underenforcement can be a form of unequal distribution of resources and official disrespect for under-protected groups. But underenforcement can also be a form of nonintervention or deference to nongovernmental decision makers.[118] When law enforcement recedes to leave room for individual autonomy, creativity, or the expression of democratic challenges to authority, it can be an important ingredient in maintaining freedom of the public sphere. At the far end of the spectrum, underenforcement may delineate the proper balance between state coercive authority and individual freedom.

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117. *See* Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 Buff. Crim. L. Rev. 801 (2001) (challenging mandatory law enforcement policies as anti-feminist); Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. Cal. Rev. L. & Women's Stud. 81, 85 (2003) (arguing that mainstream feminist concepts of gender and sexuality are too narrow and impede the protection of same-sex couples and generally weaken domestic violence law); Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 Cardozo Women's L.J. 303, 317-18 (2005) (recognizing that the underenforcement of domestic violence laws harms women generally even while arguing that aggressive mandatory arrest and no-drop prosecution rules may disproportionately harm women of color).

118. *See generally* Wayne A. Logan, *Criminal Law Sanctuaries*, 38 Harv. C.R.-C.L. L. Rev. 321 (2003) (criticizing governmental respect for and resulting nonintervention into church, corporate, and family zones as misplaced deference and a failure to enforce criminal law).

1. Intellectual Property Rights on the Internet

Perhaps nowhere has the liberating, creative potential of underenforcement been more celebrated than in connection with the Internet. As scholars have long pointed out, the sheer size and fluidity of the Internet makes enforcement of copyright and other traditional property laws difficult, if not impossible.[119] As Lawrence Lessig puts it, "[c]yberspace is the single largest location of violations of intellectual property precepts of any place in human history."[120] Of course, copyright holders are not the only potential victims of Internet crime: The FBI's high-profile effort to police child pornography is a testament to the difficulty of enforcing conventional laws in the virtual world of electronic communication.[121] For the purposes of this analysis, however, the value of the example flows not from the government's inefficacy but from the various meanings attributed to underenforcement, and the impact of those enforcement choices on the shape of cyberspace itself.

Lessig, among others, argues that in the cyberspace context, underenforcement is a good thing, preservative of freedom and liberty and the original promise of Internet creativity. Such scholars emphasize that enforcement is not neutral executive activity but a thumb on the scales of an undecided issue, to wit, the nature of virtual intellectual property rights in the first place.[122] In this context, the official choice to over- or under-police is subject as much to democratic pressures as technological ones and reflects governmental responsiveness to competing, legitimate claims over the Internet.[123]

The debate over Internet underenforcement also reveals the factual sensitivity of the underenforcement question. While there is no upside to the underenforcement of homicide laws, there may be strong arguments for the underenforcement of other kinds of prohibitions, depending on whom they disadvantage and whom they protect. Under such circumstances, the political process of allocating the valuable resource of law enforcement can be a useful and appropriate vehicle for mediating those competing, highly contested claims.

The Internet example also reveals how nonenforcement choices can affirmatively shape the nature of the spaces they regulate. Lessig's

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119. *See, e.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996).

120. Lawrence Lessig, *The Death of Cyberspace*, 57 Wash. & Lee L. Rev. 337, 343 (2000).

121. Susan W. Brenner, *Toward a Criminal Law for Cyberspace: Product Liability and Other Issues*, 8 U. Pitt. J. Tech. L. & Pol'y 1, 48-49 & nn.188-89 (2005).

122. *See, e.g.*, Adam Mossoff, *Is Copyright Property?*, 42 San Diego L. Rev. 29, 30-32 (2005) (describing the debate among "Internet exceptionalists").

123. *See* Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 Nw. U. L. Rev. 655, 714-15 (2006) (arguing that congressional prohibitions against music downloading represent a political compromise between music producers who want strong prohibitions and the electronics industry that benefits from underenforcement).

argument for Internet underenforcement is a structural one: He does not assert that government should enforce the law less vigorously, but rather that government Internet enforcement is a function of the way the Internet is structured in the first place.[124] The idea is that the very architecture of cyberspace—its "code"—can either establish government control or impede it and that underlying codes will effectively determine the extent of individual freedom and privacy.[125]

Lessig's argument about the architecture of control has resonance for underenforcement in more conventional criminal law settings, as Lessig himself points out.[126] The insight—that enforcement practices reflect not just individual official decisions but the publicly chosen structures of cyberspace—could apply equally to public housing, prostitution districts, or sweatshops. In each of these "spaces," enforcement decisions and control mechanisms reflect how those spaces are legally and socially constructed. A growing literature on legal boundaries, criminogenic spaces and the social construction of identity likewise recognize the significance of such architectural choices.[127] On this view, underenforcement is not merely a paucity of police on the streets or FBI agents trolling the Internet. Rather, underenforcement is a combination of public value judgments, resource allocations, structural choices about how public spaces function, and, most importantly, the power of residents of those spaces to make their demands heard.

2. Civil Disobedience

Sometimes lawbreaking embodies broader values: free speech, political protest, public debate, and the ability of citizens to challenge the government.[128] When it does, the underenforcement of criminal laws

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124. *See generally* Lawrence Lessig, Code and Other Laws of Cyberspace (1999) (advocating "digital commons" and warning against government and corporate attempts to control cyberspace).

125. *See id.* at 6-8 (arguing that code ownership leads to control of cyberspace and the demise of Internet privacy and freedom). Specifically, Lessig argues that ownership of the code leads inexorably to governmental and private control, and that only "free" or "open source" code can provide the "structural guarantee of constitutionalized liberty" that can maintain freedom and privacy on the Internet. *Id.* at 7, 224.

126. Lessig points out similarities between his work and that of Tracey Meares, who argues that the social architecture of the inner-city community shapes law enforcement effectiveness far more than individual police decisions. *Id.* at 94.

127. *See generally* Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 Stan. L. Rev. 1365 (1997); Neal Kumar Katyal, *Architecture as Crime Control*, 111 Yale L.J. 1039 (2002) (arguing that physical architecture plays an important role in crime control); *see also* Jane Jacobs, The Death and Life of Great American Cities (1993).

128. Daniel Markovits, *Democratic Disobedience*, 114 Yale L.J. 1897, 1898-99 (2005) (describing classic theories of liberal civil disobedience in which civil disobedience marks a boundary between individual expression and state authority); *see also id.* at 1903 (arguing that democratic disobedience as a form of protest and political participation enhances democracy).

reflects a broader social commitment to a public space that is not fully occupied or controlled by government. Although protesters often violate trespass, loitering, and other criminal laws, police routinely do not fully enforce these laws, opting for symbolic or partial enforcement in the spirit of the expressive nature of the protest.[129] We take it as a sign of social maturity that police do not fully enforce criminal laws against protesters, and we fear for our democracy when protesting lawbreakers are treated like traditional criminals without regard for the expressive or First Amendment values at stake.[130] In this context, underenforcement is a sign of truly responsive government, one that recognizes that not all laws deserve to be enforced all of the time and that principles of democratic accountability sometimes require law enforcement to make room for public deviance.

Of course, one group's freedom may be another's shackles, and neither the Internet nor the civil disobedience examples are one-sided. Copyright and license holders see themselves as victims of underenforcement,[131] and civil disobedience likewise has its costs. For example, some argue that the permissive and anti-law enforcement culture of the anti-Vietnam and civil rights movements eroded public safety and even the moral fabric of the nation.[132] The point is not to deny the existence of victimization, but to recognize that law enforcement sensitivity to competing values may properly result in the underenforcement of existing criminal laws.

The examples described above illustrate the power-laden, normative, constitutive nature of underenforcement. They are also the tip of the iceberg. U.S. society is rife with underenforcement practices. They include official tolerance of personal drug use,[133] medical marijuana, gay sex prior to *Lawrence v. Texas*,[134] illegal gun ownership,[135] illegal hunting

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129. Protests in which no arrests are made are common. *See, e.g.*, Michael Slackman & Ann Farmer, *25,000 Abortion-Rights Advocates March to City Hall*, N.Y. Times, Aug. 29, 2004, at A27 (noting that no arrests were made in a half-mile long procession).

130. *See* Kareem Fahim, *Civil Liberty Report Assails Police Over 2004 Protests*, N.Y. Times, Aug. 31, 2005, at B2 (describing citywide outrage at police treatment of protestors at the Republican National Convention); *see also* Ronald Dworkin, A Matter of Principle 105 (1985) ("Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community."); Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 Hofstra L. Rev. 67, 68 (1990) ("[Even when not protected by the First Amendment,] civil disobedience nevertheless has become an established part of American political life.").

131. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345, 1349 (2004) ("[Copyright holders] see themselves as under threat from a flood of cheap, easy copies and a dramatic increase in the number of people who can make those copies.").

132. *See* Markovits, *supra* note 128, at 1898 (noting that sometimes "political disobedience risks becoming itself a form of oppression, in which protesters attempt improperly to impose their personal political preferences upon others").

133. *See* Barnett, *supra* note 68, at 426 (describing the "chronic underenforcement of vice laws" and arguing that minimal enforcement plus strong public education best preserves general normative commitments to anti-drug behavior).

134. 539 U.S. 558 (2003). Just because a law is symbolic or rarely enforced does not render it toothless. *See* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 Cal. L. Rev. 643 (2001) (arguing that unenforced

accidents,[136] and a host of others. Each example reflects a complex set of public policies, social norms, and governmental decisions that give rise to the unique expectations and understandings of the civilians and law enforcement officials who populate these zones. Because of this diversity, the normative significance of underenforcement practices can only be discerned contextually and empirically by looking at the values served and at who is protected or harmed by the practices. Or, as David Sklansky puts it in a slightly different context, "[t]he presence of this redistributive dimension [to policing] makes it particularly important, from a democratic perspective, to identify the beneficiaries of particular forms of policing. Whether the redistribution at issue advances or retards the cause of anti-inegalitarianism will depend on who stands to win and who stands to lose."[137]

II. SOURCES AND EFFECTS: DIAGNOSING UNDERENFORCEMENT

Some underenforcement practices are unfair, undemocratic, and harmful; others may be empowering, responsive, and helpful. But what, exactly, makes them so? Are there objective, identifiable characteristics of "bad" underenforcement that distinguish it from the "good"?

Drawing from the examples in Part I, Part II attempts to evaluate which forms of underenforcement are democratically or otherwise troublesome, and which are not. Part II categorizes underenforcement practices by their "sources" and "effects," and considers which sorts of sources and effects consistently pose fairness, accountability, and efficacy problems.

To be clear, the "source and effect" approach is just one possible way of parsing the question.[138] But it is appealing because it borrows an important insight from the familiar terrain of antidiscrimination law and its distinction

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sodomy laws nevertheless cause lesbians and gays to self-police and otherwise powerfully shape social understanding and tolerance of homosexuality).

135. *See* Bryan v. United States, 524 U.S. 184, 186 n.1 (1998) (quoting congressional findings that "there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce . . . [and] that the ease with which any person can acquire firearms . . . (including criminals, juveniles . . . [,] narcotics addicts, mental defectives, armed groups . . . [,] and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States"); *see also* Fox Butterfield, *Study Exposes Illegal Traffic in New Guns: Licensed Dealers Sell Many Used in Crimes*, N.Y. Times, Feb. 21, 1999, at A22 (reporting on a government study indicating that "large numbers of new guns are being sold illegally").

136. *See generally* John F. Decker, *Don't Forget to Wear Your Hunter Orange (or Flack Jacket): A Critique on the Lack of Criminal Prosecution of Hunting "Accidents,"* 56 S.C. L. Rev. 135 (2004) (documenting the pervasive lack of prosecution of hunting accidents that harm or kill the victim even where there is evidence of recklessness or other fault on the part of the hunter).

137. Sklansky, *supra* note 11, at 1822-23.

138. For example, underenforcement could be sorted by the intent of the public policy-maker; the nature of the underlying law; the "zone" in which the underenforcement occurs; the identity of the official making the decision (police, prosecutor, legislative funding decision, etc.); or the kinds of victims it leaves behind. The "source and effect" framework accounts for some but not all of these factors.

between discriminatory intent and disparate impact. That body of law both acknowledges that there is something especially pernicious about intentional, hostile, official action directed against individuals and groups, while at the same time recognizing that public policies may have unacceptable effects even when they do not flow from any identifiable official intent. The dichotomy thus allows us simultaneously to distinguish between the hostile or benign official intentions behind underenforcement, even while criticizing the unintended effects of these practices. The effect inquiry, in particular, permits appreciation of the experiences of underenforcement victims: their loss of personal security, their sense of government unresponsiveness, and their devalued relationship to the law itself.[139]

A. *Sources*

Underenforcement can be a result of intentional, official hostility towards specific victim groups: racial minorities, for example, or undocumented workers or prostitutes. This hostility can take numerous forms, from public policies that openly discriminate against these groups by failing to protect them, to the personal biases of individual enforcement officers that lead to inaction. Allegations of such intentional discrimination underlie the *Modesto* lawsuit described above[140] and are often implicit in allegations of under-funding of urban policing and other services.[141]

Intentional, official hostility towards specific victim groups is the most problematic source of underenforcement. When the government's hostility is based on race or some other impermissible criteria, of course, it constitutes an equal protection violation.[142] But even when the group is not

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139. Admittedly, enforcement practices impact individuals in so many different ways that characterizing the "effect" or harmfulness of any such practice is potentially quite subjective. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. Crim. L. & Criminology 109, 113 (1999) ("Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate."). It is, however, arguably no less so than the wide range of current literature that attempts to identify the expressive, normative, or psychological "effects" of criminal laws and practices. *See, e.g.*, Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85, 114-15 (2004) (arguing that additional procedures for expressing remorse in criminal sentencing would improve defendant rehabilitation and victim satisfaction); Meares & Kahan, *supra* note 35, at 21 (arguing that when "residents of the inner city . . . are free to adopt or approve [more vigorous policing]" it enhances their "healthy democratic political life" which in turn reduces "atomization and distrust").

140. *See supra* note 49.

141. *See* Kennedy, *supra* note 9, at 20 ("[R]acist discrimination by law enforcement officers has often played a role in creating the conditions that make blacks more vulnerable than whites to destructive criminality."); *see also id.* at 72 ("[T]here does exist a kernel of truth in the general complaint that . . . networks of decisionmakers [including] legislators . . . respond differently—more attentively—when whites rather than blacks are victimized by crime or other injurious activity.").

142. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 n.3 (1989) ("The State may not . . . selectively deny its protective services to certain disfavored

entitled to heightened protection, the purposeful withholding of law enforcement resources due to official dislike offends concepts of neutrality at the heart of rule of law. While the rule-of-law argument is explored in greater depth below,[143] at the very least it embodies the idea that the protections of the law should not be subject to the personal biases of law enforcement officials.

Underenforcement can also result from the political system's general tendency to under-serve the politically weak, by failing to allocate resources and attention. This underenforcement is marked not so much by overt, intentional hostility as indifference, although in practice the two are often intimately related.[144] The result is the inability of these groups to gain attention and responsiveness from their political representatives and institutions. As described above, this would include police indifference to crimes in urban areas, or to prostitutes' and undocumented workers' victimization.

In a similar vein, underenforcement may result from the intersection of political weakness with increased need: Some communities need more law enforcement resources but are in a politically poor position to obtain them. As Stuntz points out, poor high-crime communities effectively require law enforcement subsidies from richer, lower-crime communities, an arrangement nearly guaranteed to lead to under-funding in poor neighborhoods.[145]

The mere fact that the political process distributes law enforcement resources unequally does not, alone, make those distributions illegitimate. Interest group jockeying typically leads to unequal distributions, and law enforcement funding in that sense is not unique. The fact that some communities have greater need does not, without more, render such allocations suspect either; indeed the government's failure to meet the needs of the disadvantaged is a quintessential issue of political distribution in which the Supreme Court has been careful not to intervene.[146] This does not mean that all political distributions are acceptable. Rather, it is merely to note that the political system tends to distribute resources unequally and that this fact of life should not, by itself, invalidate the outcome of that process.

Conversely, underenforcement can represent a form of favoritism towards powerful offender groups, such as corporate wrongdoers or church officials.[147] New Republican or Democratic administrations may soft-pedal

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minorities without violating the Equal Protection Clause."); *see also* Romer v. Evans, 517 U.S. 620, 631 (1996).

143. *See supra* Part III.B.1.

144. *See, e.g.*, Michael Tonry, Malign Neglect—Race, Crime, and Punishment in America 4-7 (1995).

145. *See* Stuntz, *supra* note 10, at 10-12 (arguing that state and federal funding should be devoted to remedying this imbalance).

146. *See DeShaney*, 489 U.S. at 196 (citing abortion and housing cases in which the U.S. Supreme Court declined to intervene).

147. Logan, *supra* note 118.

laws passed by previous Congresses, while local law enforcement agencies may decline to enforce state or national laws against targets for whom they have sympathy.[148] There is typically disagreement over whether such underenforcement decisions represent undemocratic sabotage or a healthy expression of the system of checks and balances, and the courts leave such favoritism to resolution by the political process.[149]

Underenforcement also occurs when the class of offenders is large and the underlying offenses are perceived as minor. As Margaret Raymond has pointed out, law enforcement may be reluctant to divert resources toward offenses such as underage drinking or speeding; there may even be a social consensus that full enforcement of such laws would be unreasonable.[150] More dramatically, underenforcement can also indicate that the underlying law itself is morally contested, such as assisted suicide or medical marijuana use, in which law enforcement lassitude may reflect a lack of general social consensus about whether to criminalize the underlying behavior at all. Such underenforcement is a form of responsiveness to social demands and therefore cannot be easily repudiated, even though it undermines the strength and uniformity of the law as written.

More generally, the structural overbreadth of the law itself naturally generates underenforcement. Broad criminal codes guarantee underenforcement, simply because the law offers the police and prosecutors many options and does not anticipate full enforcement.[151] The underenforcement of a particular crime may reflect the availability of proxies—comparable offenses that can be more easily prosecuted[152]—or civil remedies.[153] For some laws, the sheer scale of the enforcement task

148. *See, e.g.*, Richard S. Kay, *Causing Death for Compassionate Reasons in American Law*, 54 Am. J. Comp. L. 693, 694 (2006) (stating that despite the existence of thousands of assisted-suicide cases "[o]nly rarely do prosecutors choose to initiate legal proceedings"); Dean E. Murphy, *California Patrol Won't Seize Marijuana Used as Medicine*, N.Y. Times, Aug. 30, 2005, at A15 (describing local law enforcement's "hands-off" position even in the face of federal criminalization of medical marijuana).

149. *See* Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745 (2005) (describing how local decision makers can wield state power on behalf of minority positions). My thanks to Nestor Davidson for this larger point.

150. Margaret Raymond, *Penumbral Crimes*, 39 Am. Crim. L. Rev. 1395, 1400 nn.16-18 (2002) (identifying speeding, public drunkenness in university towns, and underage drinking as crimes which are widely violated by otherwise law-abiding people in ways that both public and police accept as appropriate).

151. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretexual Prosecution*, 105 Colum. L. Rev. 583, 613 (2005) (describing how the "extreme disjunction between federal jurisdiction and federal resources has bred a norm of radical underenforcement").

152. *See, e.g.*, Cheng, *supra* note 123; Stuntz, *supra* note 1. *But see* Richman & Stuntz, *supra* note 151, at 587 (criticizing federal prosecutors' tendency to substitute pretextual offenses in order to ease prosecution).

153. Darryl K. Brown, who examines the underenforcement of white-collar criminal laws, argues that underenforcement often reflects an official conclusion that alternative, noncriminal methods are more effective enforcement mechanisms. He interprets "[w]idespread declination," i.e., failure to enforce criminal laws, as embodying a tradeoff between criminal and civil penalties. Brown, *supra* note 8, at 1296. In other words, he

makes full enforcement literally impossible. In the above examples of drug enforcement, prostitution, and Internet copyright enforcement, the magnitude of the enforcement task guarantees some level of underenforcement. The impossibility of full enforcement has garnered scholarly attention: Several scholars have identified the systemic harms to rule of law, accountability, and transparency that flow from such overbreadth.[154] On the other hand, they also acknowledge that some overbreadth—and therefore underenforcement—is inevitable and sometimes unobjectionable.[155]

Finally, underenforcement can flow from institutional or historical factors: differences in federal and state law enforcement jurisdiction or priorities, police training or familiarity with new or complex laws, or technological advances to which the law has not yet caught up.[156] And, of course, the underenforcement of any particular law is likely to be the result of multiple forces.[157] In sum, underenforcement is built into many basic features of the criminal system: political competition over policing resources, overbroad codes, and decentralized executive control over the enforcement of generally applicable laws. While official hostility towards victim groups casts a shadow over the legitimacy of the resulting underenforcement practices, these other sources are harder to categorize. In general, they suggest that extremely harmful underenforcement can often occur for a combination of routine, structural, or even benign reasons.

B. *Effects: In Search of Harm Principles*

The most obvious harmful effect of underenforcement is that it leaves victims unprotected. Not only does it permit individual victimization, but systemic underenforcement contributes to the creation of recognizable classes of victims and entrenched patterns of victimization.[158]

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assumes that the failure to enforce criminal laws against white-collar offenders means that some other governmental enforcement mechanism has been deployed. *Id.* at 1312-14 (describing the alternative enforcement mechanisms that substitute for white-collar criminal prosecutions).

154. Richman & Stuntz, *supra* note 151, at 585-87; *see also* Luna, *supra* note 1, at 717.

155. Richman & Stuntz, *supra* note 151, at 612, 623-24; *see also* Luna, *supra* note 37, at 535 (recognizing the impossibility of full enforcement).

156. *See, e.g.*, Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. Rev. 371, 433 (2006) (discussing a proposed House bill and concluding that "[b]ecause of the nature of the Internet, legislative attempts to prohibit Internet gambling are unlikely to be effective").

157. *See supra* Part I.B (indicating that police under-protection of prostitutes flows from a combination of hostility, indifference, corruption, the lack of self-reporting, and the scale of the prostitution phenomenon).

158. *See e.g.*, Gordon, *supra* note 90, at 15-16 (stating that undocumented workers experience higher levels of workplace injury and death); Kennedy, *supra* note 9, at 19-20 (noting that black men are homicide victims at higher rates than any other population group); Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 191 (2002), *available at* http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section3.pdf (revealing in Table 3.4 that African-American rape rates are three times that of whites).

Underenforcement is not, of course, the sole cause of such high levels of victimization. Rather, the examples above reveal more precisely how official underenforcement practices contribute to these victimization patterns.

Underenforcement can also create or reinforce certain forms of material disadvantage. As described above,[159] underenforcement in inner cities is a form of social disinvestment that contributes not only to crime, but also to other forms of social decay. High nonenforcement rates can depress property values, impede economic opportunity, reduce the quality of life in neighborhoods and schools, and stimulate middle-class flight.[160]

Underenforcement has expressive effects: It can validate private violence and lawbreaking by others or send an official message of dismissal and devaluation.[161] Domestic violence activists have long pointed out that inattention to battered women validates male violence.[162] Similarly, the under-protection of socially vulnerable groups can be a form of discrimination, or an invitation to violence, hate crimes, or other forms of civic terrorism.[163] As Randall Kennedy put it a decade ago, "[d]eliberately withholding protection against criminality . . . is one of the most destructive forms of oppression that has been visited upon African-Americans."[164] Ten years earlier, Catharine MacKinnon described the law's disregard for crimes against women as a form of sex discrimination: "[r]ape, battery, sexual harassment, sexual abuse of children, prostitution, and pornography . . . . These abuses are as allowed de facto as they are prohibited de jure."[165] Such instances of systemic underenforcement are forms of official subordination and deprivation precisely because the state tolerates illegal harms against vulnerable groups that, for more favored constituents, would be intolerable.

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159. *See supra* Part I.A.

160. *See supra* Part I. Underenforcement of certain crimes may also exacerbate racial segregation. One study found that high robbery rates stimulated white flight from suburban communities, thereby increasing the concentration of black residents. Allen E. Liska, John R. Logan & Paul E. Bellair, *Race and Violent Crime in the Suburbs*, 63 Am. Soc. Rev. 27, 28 (1998).

161. *See, e.g.*, Peter C. Yeager, *Law, Crime, and Inequality: The Regulatory State*, *in* Crime and Inequality 247, 268 (John Hagan & Ruth D. Peterson eds., 1995) ("To the public mind, enforcement is the centerpiece of legal regulation, whether for conventional criminal offenses or for business infractions. Both symbolically and practically, enforcement is the capstone, a final indicator of the state's seriousness of purpose . . . ."); *id.* (arguing more generally that the state's failure to enforce environmental laws sheds light on the law's efficacy and fairness).

162. *See supra* Part I.D.

163. Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1431-35 (1992) (arguing that anti-sodomy laws constitute official legitimation of homophobic violence and thus violate a constitutional principle of "corporal integrity" located in the Eighth Amendment's prohibition against cruel and unusual punishment).

164. Kennedy, *supra* note 9, at 29.

165. Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 5 (1987).

Underenforcement can also have a devastating normative impact on those who live in underenforcement zones. Underenforcement weakens the expectations of individuals that the law will protect them from violators or that (from the violators' perspective) the law will intervene in their wrongdoing. In underenforcement zones, criminal proscriptions are weakened by their open underenforcement. Inner-city residents, prostitutes, and undocumented workers each express some version of the perception that police departments are equivalent to gangs—that they are unprincipled, biased, and unreliable.[166] For these individuals, enforcement failures not only weaken the force of anti-victimization laws, but also erode their belief in and commitment to law-abiding norms and the legal system itself.

The criminal-law-and-social-norms movement, led by Dan Kahan and Tracey Meares, implicitly recognizes these normative harms of underenforcement.[167] It does so in its central contention that law enforcement practices should be evaluated in light of the messages that they send to residents and that less-than-vigorous law enforcement—through, for example, the curtailment of police power through criminal procedure[168]—sends the inappropriate message that crime is tolerable.[169] "Broken windows" or zero-tolerance policing efforts likewise rely on the same intuition: that the tolerance of petty criminality sends destructive messages about the extent to which disorder will be officially tolerated.[170]

Under other circumstances, underenforcement can have positive, even empowering effects. As discussed above, underenforcement of Internet

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166. *See supra* Part I.

167. *See generally* Meares & Kahan, *supra* note 35.

168. *See generally* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 Geo. L.J. 1153 (1998) (arguing that criminal procedure is overextended and interferes with crime control).

169. Margaret Raymond similarly argues that the underenforcement even of petty crimes that no one thinks should be fully enforced—such as speeding and underage drinking—causes harmful normative dissonance because it undermines compliance norms, breeds disorder, and promotes duplicity in law enforcement. Raymond, *supra* note 150.

170. *See, e.g.*, Wilson & Kelling, *supra* note 53. This is not to assume that "broken windows" and "zero tolerance" policing have correctly diagnosed the source of crime, but merely to note that they recognize the potential normative harms of underenforcement. The empirical literature has been unable to establish the effectiveness of broken windows or zero tolerance policing. Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. Chi. L. Rev. 271 (2006) (finding that increased misdemeanor arrests correlated with an increase in crime). *Compare* Wilson & Kelling, *supra* note 53 (noting that increased misdemeanor arrests reduced violent crime), *with* Sampson & Raudenbush, *supra* note 55, at 608 (finding that disorder policing does not reduce crime and that disorder should be understood as flowing from the same sources as crime rather than as an independent cause). The impact of policing all forms of crime is complex—arresting more people does not necessarily reduce crime. *See* Jeffrey Fagan et al., *The Bustle of Horses in a Ship: Drug Control in New York City Public Housing* 19-20 (Columbia Law School Pub. Research Paper No. 05-89, Aug. 30, 2005), *available at* http://ssrn.com/abstract=716821 (finding that while some forms of localized patrol in public housing decreased crime precinct-wide, they had no discernable effects on the actual housing projects being policed, and that, moreover, increased drug arrests were associated with increased homicides, potentially as a result of destabilized drug markets).

property laws enhances creativity and the development of new technologies, while the underenforcement of criminal laws in the face of civil disobedience can promote political discourse and change.[171]

Because underenforcement of criminal laws leaves room for alternative responses, it can also increase other social benefits.[172] Darryl Brown points out that white-collar criminal law has a long tradition of constructive underenforcement in which the government relies on alternative civil sanctions as a means of improving corporate compliance, ensuring corporate survival, and other utilitarian benefits.[173] He argues that comparable underenforcement in the realm of street crime, coupled with alternative sanctions, could likewise produce better compliance and less recidivism. Drug court and restorative justice models likewise implicitly advocate underenforcement of traditional criminal sanctions on the theory that mental health and substance abuse treatment, social shaming, and other alternative sanctions offer greater benefits.[174]

Underenforcement can have the additional effect of strengthening trust between individuals and the state. In his discussion of corporate sanctions, Brown describes how the withholding of criminal sanctions can facilitate ongoing "trust [and] cooperation" between businesses and the government.[175] Similarly, the old-fashioned street-policing model revolves heavily around the ideas that the beat cop with good relationships with local individuals will not always enforce the letter of the law and that this form of underenforcement strengthens trust and ties between police and community.[176]

Finally, as noted above, underenforcement can have the effect of validating competing values, sending the message that free speech, political activism, or individual autonomy are more important than the routine enforcement of criminal laws.[177] Some such validations can, of course, be negative, especially when they leave competing interests unprotected. Wayne Logan, for example, documents and criticizes the historical underenforcement of proscriptions against crime occurring within families, corporations, and the church as an unwarranted subsidy to male-head-of-household, corporate, and religious interests.[178] Nevertheless, as Logan also recognizes, underenforcement can be a positive expression of

171. *See supra* Part I.E.1.

172. Evaluating the economic benefits of underenforcement of different sorts of rules is a long-standing theme in contract law. *See, e.g.*, Ian Ayres & Eric Talley, *Distinguishing Between Consensual and Nonconsensual Advantages of Liability Rules*, 105 Yale L.J. 235 (1995).

173. Brown, *supra* note 8, at 1312-14.

174. *See, e.g.*, Erik Luna, *Introduction* to *The Utah Restorative Justice Conference*, 2003 Utah L. Rev. 1 (describing the restorative justice movement).

175. Brown, *supra* note 8, at 1352 (arguing that such results are replicated in drug courts).

176. *Id.*; *see also supra* note 66 and accompanying text.

177. *See supra* Part I.E.2.

178. *See* Logan, *supra* note 118.

governmental restraint in the face of competing values and individual or institutional autonomy.[179]

These positive examples reveal underenforcement as a potential form of responsiveness and a welcome alternative to punitive harshness. In exposing the potential for positive underenforcement, the examples embody the recognition that traditional criminal sanctions may be heavy-handed and ineffectual and that the criminal law should recede in the face of other options for social control. Responsive underenforcement can have the effect of empowering and benefiting the individuals at issue: enhancing their dignity, independence, and potential for growth that criminal intervention might stifle or destroy.

C. *Diagnosing Underenforcement*

This Article shows that not all sources of underenforcement are facially suspect, nor are all effects of underenforcement harmful. Rather, the discussion suggests five triggering factors by which to distinguish unobjectionable or even positive forms of underenforcement from those that should trigger concern and reform. These factors are (1) official discriminatory intent, (2) group disadvantage, (3) interference with basic life functions, (4) undermining civilian relations with law enforcement, and (5) the lack of countervailing values.[180]

First, when public officials intentionally discriminate against socially vulnerable groups by withholding legal protection, as discussed above, it constitutes a form of discrimination and taints the neutrality of the law itself. Intentional discrimination also famously triggers concerns about the potentially illegitimate exercise of majoritarian power.[181] Underenforcement practices traced to such sources are thus particularly suspect.

This raises a special point about the legal protection due to those who themselves break the law—in our examples, prostitutes, undocumented workers, or the young men who populate the illegal drug economy. Part of the victimization of these groups flows from the hostility of law enforcement officials, who may perceive these groups as threatening, uncooperative, or at least undeserving.

The Supreme Court has made clear that as a constitutional matter, the mere fact that a person has committed a crime does not relieve the state of

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179. *Id.*

180. *Cf.* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 749 (2005) ("[T]he common features of overcriminalization include[]: (1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources.").

181. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 76-77 (1980); *see also* Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 Yale L.J. 111 (1983).

its obligations to that person under due process and equal protection principles.[182] But even more fundamentally, the choice to extend universal legal protection to criminals and noncriminals alike is a species of commitment to the rule of law. The neutrality and universality of the law is weakened if a person's general entitlement to state protection against violence and crime turns on their own good or bad behavior. Moreover, as seen from the examples above, rolling legal protections back from those who violate the law is part of a vicious cycle which exacerbates violence and lawlessness within those underenforcement zones. The fact that enforcement officials consciously discount the safety and security of those who violate the law, while understandable as a matter of human nature, is counterproductive as a legal policy.

Second, even absent intentional discrimination, however, underenforcement is problematic when it reinscribes and reinforces existing group disadvantage. Underenforcement is at its most harmful when it systematically fails in what Sklansky calls "the egalitarian project of protecting all citizens from private violence."[183] When underenforcement affects socially vulnerable groups, fairness concerns are at their height. It also becomes a strong form of inegalitarian redistribution as public resources are channeled away from impoverished and politically weak groups or communities.[184]

Conversely, if an underenforcement practice is widely scattered, if the practice does not affect a discernable group, or if the group affected by the practice is politically powerful in its own right, then the practice is arguably better left to the political and criminal process.[185] This is not because the practice inflicts no harm, but rather because it embodies the recognition that as long as police and prosecutors retain the authority to make choices, some victimization and/or favoritism will inhere in the discretionary selection process.

Third, underenforcement should also be scrutinized when it significantly interferes with victims' ability to engage in basic functions such as the maintenance of personal security, work, health, or economic advancement. When this happens, criminal underenforcement becomes a strong form of social welfare policy and deserves special attention. In under-policed urban communities, for example, underenforcement prevents people from

182. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 833 (1994) (describing prison officials' duty to protect prisoners from rape and assault); Plyler v. Doe, 457 U.S. 202, 215 (1982).

183. Sklansky, *supra* note 11, at 1822.

184. *See, e.g.*, Kennedy, *supra* note 11, at 1394; Sklansky, *supra* note 84, at 98 ("[P]olicing is among other things a form of redistribution.").

185. The recent spate of white-collar prosecutions have been interpreted by some as a political backlash against the long-standing underenforcement of white-collar crimes. *See* Pamela H. Bucy, *"Carrots and Sticks": Post-Enron Regulatory Initiatives*, 8 Buff. Crim. L. Rev. 277 (2004) (documenting new criminal sanctions after the Enron corporate scandal); Kurt Eichenwald & Alexei Barrionuevo, *Tough Justice for Executives in Enron Era*, N.Y. Times, May 27, 2006, at A1 (describing differences between recent stepped-up enforcement against white-collar offenders and previous enforcement practices).

engaging in fundamental functions such as getting jobs, forming institutional relations, and obtaining education. This stunts their ability to participate fully in society.[186] Likewise, for undocumented workers, underenforcement prevents them from engaging in basic social activities such as joining unions and collective bargaining to which they are legally entitled. These effects take underenforcement out of the narrow realm of law enforcement policy and place it squarely within larger public concerns about social capital and organization. Conversely, when underenforcement risks marginal or non-fundamental benefits, the demands of law enforcement discretion may outweigh the interests of those whose benefits or activities are affected.

Fourth, because enforcement practices are central to maintaining the legitimacy of law enforcement, underenforcement should trigger special concern when it undermines civilians' ongoing relationships with law enforcement officials, their adherence to law-abiding norms, or public perceptions about the system's evenhandedness and legitimacy. As discussed above, underenforcement can generate widespread distrust of law enforcement, increase offending rates, and exacerbate crime. When underenforcement undermines the effectiveness of law enforcement in these ways, this effect should cast doubt on the underenforcement practice at issue.

On the other hand, all underenforcement potentially leaves some victim disillusioned with the state of the law. Underenforcement also takes place routinely without affecting the overall viability or legitimacy of the criminal system.[187] If the normative effects of underenforcement are random—or do not otherwise affect the general quality of lawfulness or police relations in the community, group, or institution—then it may not justify tampering with law enforcement choices. Indeed, policing is an infamously unpopular job, and the ebb and flow of public opinion and community-police relations are important indicators of the strength of laws themselves. Public dissatisfaction should thus not be treated as an easy basis for jettisoning enforcement policies.

Finally, underenforcement should be rationalized and justified by independent, countervailing values above and beyond the raw exercise of political power.[188] The discussion above illustrates the sorts of positive values that can be served by underenforcement and that can render underenforcement an appropriate governmental response. The exception for the exercise of political power is important because underenforcement skews the ability of groups to exercise political power in the first instance. Although, as noted above, normal political competition will often lead to unequal distributions, when those distributions result in unjustified group

186. *See supra* Part I.A.

187. *See, e.g.*, Brown, *supra* note 8; Raymond, *supra* note 150.

188. *See, e.g.*, Davis, *supra* note 32, at v (arguing that police should have to publicly defend their underenforcement policies in open administrative processes).

handicaps or pervasive disadvantages, the political process alone cannot validate such results. The Machiavellian fact that inner-city residents cannot wrest sufficient resources from state and local legislatures should not itself form a normative justification for the underenforcement policies resulting from that weakness. However, law enforcement decisions necessarily compete with other values and priorities, and independent values such as free speech, privacy, or even efficacy may be powerful reasons to tolerate some levels of underenforcement.

Obviously, each of the five factors suffers from problems with measurement and subjectivity. Who is to say whether music copyright holders are the sort of "group" entitled to special consideration, or whether a particular policy fails to protect a life function that is "basic"? These are subjects for debate, not scientific resolution. Indeed, the factors highlight the perspectival nature of underenforcement in which the same law enforcement practice can simultaneously oppress one constituency while appearing judicious and appropriate to another.[189] Moreover, no one factor should be seen as automatically invalidating an underenforcement policy. Rather, taken together, the factors suggest ways of discussing the differences between problematic underenforcement practices and routine, perfectly appropriate allocations of police resources. In effect, these factors embody the conclusion that when underenforcement makes vulnerable groups or communities into lesser citizens, depriving them of fundamental benefits of citizenship and social belonging without serious justifications, it should no longer be committed to the unfettered discretion of individual police and prosecutors, or the democratic free-for-all through which we typically allocate such social resources.

III. CONCEPTUALIZING UNDERENFORCEMENT

Although underenforcement is a well-known phenomenon, it tends to get sidelined in debates over criminal doctrine and institutional structure. This section presents three conceptualizations of underenforcement: law enforcement discretion, democratic responsiveness, and the constitutional contours of the social safety net. These conceptualizations are an effort to enrich the theoretical understanding of underenforcement and to elevate it within extant debates over the effectiveness and legitimacy of the criminal system. They also suggest how an enhanced appreciation for the hazards of underenforcement puts new pressures on standard doctrinal treatments of policing.

189. This dissonance is reflected, for example, in current debates over whether "zero tolerance" quality-of-life policing is inappropriately heavy-handed towards the poor and dispossessed, or whether it represents a newly respectful attitude toward low-income communities. *Compare* Harcourt, *supra* note 15, *with* Meares & Kahan, *supra* note 35.

A. *Current Underenforcement Doctrine*

Jurisprudentially speaking, underenforcement is a non-issue.[190] Two strands of jurisprudence render this so. First is the Supreme Court's highly deferential treatment of enforcement decisions—to arrest or not to arrest, to charge or not to charge—rendered by law enforcement officials. The Supreme Court consistently treats underenforcement of the criminal law as a necessary incident of law enforcement discretion, which in turn is practically unreviewable.[191] Absent unconstitutional motivations, a single instance of non-enforcement triggers no cognizable legal concerns.[192] Police may decline to arrest a person whom they have probable cause to believe has committed a crime. Likewise, prosecutors routinely and properly decide not to press charges that are legally supportable. Indeed, we recognize that police and prosecutors cannot and should not pursue every case they might, and the Supreme Court has made clear that individual police failures to enforce laws and even direct court orders are not actionable.[193]

Even when nonenforcement decisions reach systemic proportions, law enforcement decision makers are well shielded from judicial scrutiny. In *United States v. Armstrong*, the Court declined to permit discovery regarding racially suspect prosecutorial charging patterns based in large part on the understanding that prosecutorial discretion is the "special province of the Executive," entitled to a "presumption of regularity."[194] This sort of judicial cloaking of prosecutorial decisions tends to validate all under- and overenforcement policies; it also ensures that the public will rarely be able to obtain information about actual enforcement patterns. Even more definitively, in *McCleskey v. Kemp*,[195] the Court declined to invalidate

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190. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1492 (1989) (noting that in general the Constitution imposes no obligation on the government to provide services and therefore "random underenforcement is not constitutionally objectionable"); *see also* Cheng, *supra* note 123, at 661 n.20 ("The Supreme Court has never struck down a law for underenforcement . . . .").

191. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("[T]he decision whether or not to prosecute . . . generally rests entirely in [the prosecutor's] discretion." (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978))); *see also* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973) (holding that prosecutors' discretionary decisions not to charge prison officials who killed inmates were unreviewable).

192. *See Armstrong*, 517 U.S. at 464 (prosecutorial discretion "is subject to constitutional constraints [such as] equal protection" (internal quotation marks omitted)).

193. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (finding no cause of action against police who failed to enforce a domestic violence restraining order); *see also* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (concluding that a mother lacked standing to complain of the state's failure to prosecute a father for failure to pay child support where the prosecution would result in prison term but not necessarily payment, noting that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another").

194. *Armstrong*, 517 U.S. at 464; *see also id.* at 465 (holding that in order to obtain discovery regarding prosecutorial choices suggesting race discrimination, petitioners must already have credible evidence that similarly situated defendants were not prosecuted).

195. 481 U.S. 279 (1987).

discretionary prosecutorial decisions that resulted in statistically significant racial disparities in the treatment of capital defendants. The decision reads like a treatise on discretion, in which the Court describes the near-sanctity of law enforcement choice and the central role that discretionary decisions by police, prosecutors, and juries play throughout the criminal system.[196] *Armstrong* and *McCleskey* have been widely interpreted to preclude meaningful judicial review of the systemic impact of law enforcement discretion.[197]

This jurisprudential deference to discretion renders underenforcement practices legally invisible, even when those enforcement practices are facially suspect. *McCleskey*, in particular, illustrates the Court's recognition that things can go very wrong with enforcement practices without triggering judicial responses. As the U.S. Court of Appeals for the Second Circuit explained, courts will avoid intervening in prosecutorial discretionary decisions even where "serious questions are raised as to the protection of the civil rights and physical security of a definable class of victims of crime and as to the fair administration of the criminal justice system."[198] Even the most problematic underenforcement practices are thus rendered legally subsidiary to the system's larger commitment and deference to broad law enforcement discretion.

The second strand of jurisprudence that shields criminal underenforcement from review is the Court's long-standing commitment to a "negative" theory of constitutional rights, under which the state is not constitutionally obligated to provide for basic human needs, even when such needs are themselves necessary to preserve life, liberty, or material equality.[199] This general approach characterizes the Court's treatment of a

196. *McCleskey*, 481 U.S. at 296 ("[T]he policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties." (quoting Wayte v. United States, 470 U.S. 598, 607 (1985))); *id.* at 297 ("Implementation of the[] [criminal] laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."); *see also id.* at 293 n.12 (noting that cases in which the Court has invalidated government action based on statistical patterns of discrimination are "rare").

197. Richard H. McAdams has pointed out that information about similarly situated individuals will rarely be available because non-charge and non-arrest decisions are rarely documented, and there are few independent sources of data on crime commission that could shed light on underenforcement rates. *See* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 Chi.-Kent L. Rev. 605, 618-19 (1998); *see also* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13 (1998) (documenting the pervasiveness of race in prosecutorial decision making and the barriers to revealing it created by the *Armstrong* standard).

198. Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) (refusing to direct prosecutors to investigate and prosecute cases involving prison guards who murdered inmates and committed other civil rights violations).

199. Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 Mich. L. Rev. 982, 1010-11 (1996) (describing the "negative liberties" theory and defending the Court's "failure-to-protect" jurisprudence as appropriately deferential to political budget allocation decisions); *see also* David A. Sklansky, *The Private Police*, 46

wide range of social services, from education to abortion.[200] Absent any racial or other independently unconstitutional basis for the inequality, the state's failure to provide services, or even failure to provide them in equal measure,[201] rarely triggers constitutional concern.

In the criminal law context, this negative rights philosophy is embodied in *DeShaney v. Winebago County Department of Social Services*, in which the Court held that the state's failure to protect an individual from private violence does not violate substantive due process.[202] As the Court stated,

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.[203]

That holding has been widely interpreted as the final word on the question of whether some level of minimally adequate policing might be constitutionally required.[204]

More recently, the Court extended its position in *DeShaney*, holding in *Town of Castle Rock v. Gonzales* that even where a court orders police to perform a protective function—in that case by issuing a domestic violence protective order—and even where state law mandates police protection, this does not give rise to a protected property interest as a matter of procedural due process.[205] In denying Jessica Gonzales's claim that police failure to enforce a restraining order violated her property interest, the Court concluded broadly that "the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 . . . did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented."[206]

Together, *DeShaney* and *Gonzales* stand for the proposition that the Constitution does not mandate police protection. Even court orders and legislative enactments that call for police protection in specific instances will not give rise to constitutionally protected interests. In effect, police

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UCLA L. Rev. 1165, 1280-87 (1999) (describing the traditional view of police protection as an allocative and therefore essentially political decision against which due process claims are unavailable).

200. *See* Harris v. McRae, 448 U.S. 297 (1980) (holding that the state is not obligated to fund abortion); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (finding no fundamental right to education).

201. *See McRae*, 448 U.S. at 315-16 (concluding that the state is permitted to unequally subsidize medically necessary abortion in relation to other medical options even when such policies prevent indigent women from obtaining abortions).

202. DeShaney v. Winebago County Dep't of Soc. Servs., 489 U.S. 189 (1999) (holding that the state was not liable for failure to protect a child who was beaten to the point of brain damage by his father even though the state department knew of and documented the danger of abuse).

203. *Id.* at 195.

204. *See* Sklansky, *supra* note 199, at 1281 & nn. 620-24, 1282 & n.625.

205. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2810 (2005).

206. *Id.*

and prosecutors retain their discretion to underenforce the law and allocate resources as they please even in the face of judicial and legislative mandates to the contrary.

B. *Discretion*

Judicial commitment to law enforcement discretion lies at the heart of the system's tolerance for underenforcement. A large literature is devoted to criticizing the scope and effects of discretion. While this scholarship does not zero-in on underenforcement per se—indeed it tends to focus on selective enforcement and overenforcement rather than underenforcement[207]—it provides a useful conceptual framework for the phenomena discussed above. In particular, it offers two perspectives on the problematic quality of discretionary underenforcement: first, as a lack of regularity and accountability that threatens rule of law; and second, as a socially harmful exercise of official power as embodied in actual law enforcement practices.

1. Underenforcement as a Rule-of-Law Problem

Scholars have long pointed out that law enforcement discretion is so broad, unregulated, and opaque that it weakens many precepts of rule of law and democratic accountability.[208] Francis Allen identifies enforcement discretion as a species of normlessness and lawlessness at the center of the struggle to maintain a fair criminal system consistent with the rule of law.[209] Stuntz describes the system of police and prosecutorial discretion as "the antithesis of the rule of law"[210] and as "suffering from a kind of lawlessness."[211] He points out that broad codes further exacerbate the problem by overcriminalizing behavior and thus expanding law enforcement choice.[212] Erik Luna argues that discretionary enforcement

207. *See, e.g.*, Davis, *supra* note 197 (describing racially selective enforcement); Luna, *supra* note 37, at 557-58 (criticizing prosecutorial discretion for its tendency to overenforce drug laws in minority communities); Stuntz, *supra* note 1 (criticizing tendency of law enforcement discretion to focus on unpopular or politically convenient targets). *But see* Richman & Stuntz, *supra* note 151, at 613 (arguing that the "extreme disjunction between federal jurisdiction and federal resources has bred a norm of radical underenforcement").

208. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1566 (1981) (arguing that with respect to prosecutorial discretion generally, "[w]e presently tolerate a degree of secrecy in one of our most crucial decisionmaking agencies that is not only inconsistent with an open and decent system of justice, but that may not even be efficient in avoiding the additional effort necessary to make the system accountable"); *see also id.* at 1525 ("[P]rosecutors' virtually unlimited control over charging [i]s inconsistent with a system of criminal procedure fair to defendants and to the public.").

209. *See* Francis A. Allen, The Habits of Legality: Criminal Justice and the Rule of Law 22-23 (1996).

210. Stuntz, *supra* note 1, at 578.

211. *Id.* at 597.

212. *Id.* at 550 (arguing that prosecutorial agency costs such as fixed salaries, professional incentives, and convenience, coupled with unfettered discretion, generate a "tendency

practices bereft of public rules tend to undermine the law's legitimacy.[213] Angela Davis describes prosecutorial discretion as a window through which racial bias distorts the system.[214] The police's nearly unfettered ability to decide when to arrest has been pinpointed as a structural invitation to racism, corruption, and inefficiency.[215]

The specific pathologies of underenforcement are partially explicable in terms of these broad criticisms of discretion. Pervasive underenforcement can indicate that rules are not being predictably or regularly followed, that law enforcement actors lack accountability, and that the rule of law is wearing thin. It provides the authority and opportunity to single out groups for neglect, reflecting racism, sexism, or other forms of official hostility. It undermines crucial police habits such as following rules and acting evenhandedly. In this sense, underenforcement is a familiar figure lurking within the discretion debate.

Indeed, underenforcement can be understood as a concrete erosion of some classic rule-of-law principles. The "rule of law" is, of course, not reducible to one definition or set of requirements,[216] but the concept typically contains some demand that the law be universal and consistent and that those applying the law be bound by the universality and consistency demands.[217] Two leading descriptions of "rule of law" illustrate the central role of consistent enforcement. According to Richard Fallon,

> First, the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.[218]

Margaret Radin identifies three different conceptions of rule of law. The "instrumental" version, drawn from Lon Fuller's work, includes a requirement of "congruence," which means that "explicitly promulgated

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toward underenforcement" which legislatures compensate for by broadening criminal codes); *see also* Luna, *supra* note 1.

213. Luna, *supra* note 37, at 523 ("[T]he gap between the penal code and its administration tends to undermine the legitimacy of legal commands."); *see also* Erik Luna, *Transparent Policing*, 85 Iowa L. Rev. 1107 (2000) (arguing that opaque, discretionary policing undermines democratic values).

214. *See* Davis, *supra* note 197.

215. *See, e.g.*, Cole, No Equal Justice, *supra* note 4; David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 275-88 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 342-62 (1998); *see also* Skolnick, *supra* note 18, at 88-89 (describing how police discretion in relation to race varies according to context).

216. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 7 (1997) (describing various versions of the rule-of-law ideal and noting that the ideal is "what some philosophers have called an 'essentially contestable concept'").

217. Margaret Jane Radin, *Reconsidering The Rule of Law*, 69 B.U. L. Rev. 781 (1989).

218. Fallon, *supra* note 216, at 7-8.

rules must correspond with the rules inferable from patterns of enforcement by functionaries."[219] The "substantive conception," drawn from the work of John Rawls, includes the idea that rule of law is necessary "to control Leviathan [because] 'the dangers to liberty are less where the law is impartially and regularly administered in accordance with the principle of legality.'"[220] Radin proposes an additional conception, based on a Wittgensteinian "social practice conception of rules," in which rules emerge not from formal edifices but shared practices, or "agreement in responsive action."[221] Under this social practice conception of rules, a rule is public and provides notice "whenever strong social agreement exists in practice."[222] In other words, the existence of consistent, shared social practices determines whether official action can be considered public, universal, and nonarbitrary, or whether individuals are in fact subject to the "rule of men" and not the rule of law.

Even at this level of generality, systemic underenforcement of the sort described above is in obvious tension with these rule-of-law principles.[223] Rule of law requires that enforcement practices make real the law's promises of universality, publicity, and predictability. They should also maintain the security of social interactions to "protect[] against anarchy"[224] and permit the possibility of personal liberty. These values, however, are precisely the ones eroded by underenforcement. Pervasive underenforcement is a form of "official arbitrariness" that perpetuates the "Hobbesian war of all against all," preventing people from knowing in advance the "legal consequences of various actions."[225] It undermines the "congruence" of promulgated rules with official action; and it weakens shared social practices and agreement about what the rules actually are. If, as so many scholars fear, discretion inherently threatens rule of law, systemic underenforcement is one of the ways that threat becomes real.

2. Underenforcement as a Social Practice Problem

Even as underenforcement's inconsistencies render it formally problematic, its concrete operation and harms are still not fully captured by general complaints about discretion's lawlessness. Noting the formal lawlessness of discretion, or the fact that a particular code provision has not been enforced, does not necessarily tell us who or what has been harmed. More generally, it does not reveal at what point underenforcement morphs

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219. Radin, *supra* note 217, at 784-85.
220. *Id.* at 789 (quoting J. Rawls, A Theory of Justice 241 (1971)).
221. *Id.* at 798.
222. *Id.* at 815.
223. Both Fallon's and Radin's work reflect a preoccupation with judicial, rather than executive, discretion in the maintenance of rule of law. *See id.* at 790-91, 796; Fallon, *supra* note 216, at 24-36.
224. Fallon, *supra* note 216, at 7-8.
225. *Id.*

from the perfectly legitimate, individual law enforcement choice not to investigate, arrest, or prosecute, into something problematic.

As Radin puts it, "In order to find out what rules exist . . . we must 'look and see' what the practice is."[226] In order to understand the nature of discretion we need a further layer of description of the actual social practices that constitute underenforcement. A glimpse of those practices is offered above. Problematic underenforcement practices have symptoms: official hostility towards victims, increased group disadvantage, impaired life functions, weakened community-law enforcement relations, and the lack of countervailing justifications.[227] These are the poisonous fruits, so to speak, of underenforcement. When enforcement patterns reflect these symptoms, it is a sign that law enforcement discretion is being exercised in problematic ways. Conversely, when underenforcement practices do not manifest these symptoms, it suggests that discretionary exercises of power are well tailored to individual and community needs.[228]

Treating discretion as a set of legally significant social practices builds on foundations laid by pragmatist, critical race, feminist, social norm, and other scholarships that insist on locating the "law" in actual legal practices.[229] In Radin's words, "[M]aking rules and applying rules cannot be radically separate activities. . . . Every time we apply a rule we also make it."[230] These scholarships share the insight that social (here enforcement) practices are not secondary effects of, but rather are integral to, the law, giving it social and normative meaning without which it could not function. Such pragmatic approaches run counter to formalist tendencies within criminal law that treat the "law" and its enforcement as two distinct, hermetically sealed bodies of concern.[231] Indeed, the focus on enforcement generally, and underenforcement in particular, reflects an implicit assertion that the "criminal law" cannot be understood or evaluated

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226. Radin, *supra* note 217, at 808.

227. *See supra* Part II.C.

228. *See, e.g.*, Raymond, *supra* note 150 (discussing the primarily normative impact of underenforcement of petty offenses that the public does not believe should be fully enforced).

229. *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law of Tort*, 77 Cal. L. Rev. 957, 1008 (1989) ("[I]n everyday life we . . . experience privacy . . . as an inherently normative set of social practices that constitute a way of life, our way of life."); *see, e.g.*, Lawrence M. Friedman, The Legal System: A Social Science Perspective 1-2 (1975) ("Almost everyone concedes that law is to some degree a social product; and that law on the books and law in action are not invariably the same."); Radin, *supra* note 217, at 807; *see also* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 Mich. L. Rev. 821 (1997).

230. Radin, *supra* note 217, at 807.

231. *See, e.g.*, Markus Dirk Dubber, *Reforming American Penal Law*, 90 J. Crim. L. & Criminology 49, 50 (1999). Stuntz has long made the point that criminal law is not merely a set of formal rules but rather is a set of institutional relationships by which power and accountability are distributed. Stuntz, *supra* note 1, at 528; *see also id.* at 508 & n.4 (bemoaning the lack of scholarly attention to enforcement).

apart from the official practices through which the meaning of formal criminal rules are realized.[232]

To conceptualize underenforcement as a set of social practices is, in some sense, merely a way of voicing that general antiformalist position. But even more than other aspects of the criminal law, underenforcement demands this approach because enforcement discretion is peculiarly devoid of formal rules.[233] It embodies the turn toward "law-in-action" precisely because the substantive criminal law does not contain its own rules of application.[234] The absence of enforcement, in turn, makes room for the expression of powerful nonlegal forces such as economic and political hegemony, bias, and violence. Underenforcement is marked, moreover, by extreme judicial deference to whatever practices in which law enforcement actors happen to engage. The specific nature of these practices determines the true meaning and character of enforcement and thus the quality of justice that the system actually delivers. It is these practices, therefore, and the extent to which they permit lawlessness and inequality, that fully reveal underenforcement's proper place in the debate over the legitimacy of law enforcement discretion.

C. *Democratic Policing*

Francis Allen wrote that the problem of discretionary enforcement reflects an ongoing compromise between rule-of-law precepts and the realities of democratic pluralism, as "the habits of legality struggle against the social and political fragmentation of a pluralistic society."[235] Underenforcement is paradigmatic of this struggle: It is a concrete example of how abstract lawfulness—full and equal enforcement of the law—gives

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232. A more thorough exploration of the nature of the "law" is beyond this piece. The antiformalist position captures some piece of this insistence on locating law in practice. *See* Christopher Kutz, *Pragmatism Regained*, 100 Mich. L. Rev. 1639, 1652-54 (2002) (book review) (sketching the positions of key pragmatic legal philosophers and their positions on the role of morality and social facts in defining authoritative "law").

233. *See, e.g.*, Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 Law & Soc'y Rev. 893 (2005) (documenting how variations in local meanings of hate crime in California stem in part from law enforcement discretion and divergent practices).

234. Markus Dubber, for example, has called for a practical focus in understanding the meaning of substantive law, arguing that "artificial distinctions" between criminal rules and their applications threaten to render criminal scholarship irrelevant. Dubber, *supra* note 231, at 50. He argues for "the transformation of penal law scholarship into a praxis oriented, and in this sense positivistic, discipline," with a focus on the codified nature of criminal law and its applications. *Id.* at 58 ("The new discipline of penal law begins and ends with praxis."); *see also id.* at 59 ("The analysis of the rules of penal law must take into consideration their application. Still, that consideration should not come at the expense of considering the rule itself."). Enforcement discretion creates an even stronger demand for such a shift because it is characterized precisely by the lack of codified or formal rules.

235. Allen, *supra* note 209, at 95; *see also* Dubber, *supra* note 22, at xv (asking whether "the power to police, and the criminal law with it, can survive in a modern democratic state").

way to pluralistic pressures, resulting in the uneven distribution of law enforcement resources. In particular, when underenforcement rests on official indifference to the needs and suffering of disadvantaged groups, it reflects a breakdown in the state's responsiveness to its most vulnerable constituents, one of pluralism's infamous dangers. When this responsiveness failure leads in turn to the inegalitarian distribution of one of society's most valuable resources—the protection of the law itself—this is a harm of significant democratic proportions. It is all the more notable for the fact that judicial doctrines of discretion dismiss nonenforcement as a cognizable harm.[236]

There is renewed scholarly interest in the democratic character of policing.[237] To survey the many contributions would require a separate article, but a few examples highlight the democratic dimensions of underenforcement.

Although Sklansky does not dissect underenforcement practices per se, he argues broadly for a democratic theory of policing based on concerns about responsiveness and redistribution. Taking the "perspective from which democracy is . . . about opposition to entrenched patterns of unjustified inequality," Sklansky maintains that policing is a central democratic function because police "are both a uniquely powerful weapon against private systems of domination and a uniquely frightening tool of official domination."[238] Democratized policing should "give[] voice to disempowered groups and marginalized perspectives [rather than] simply grant[ing] another avenue of access to people and viewpoints already well served by the political process."[239]

This approach clarifies why underenforcement is not merely an inefficiency but a potential blot on the legitimacy of the criminal system: It represents the state's failure to make good on its democratic obligation to protect against the private domination of physical and economic victimization, itself a classic justification for the existence of the coercive powers of the state in the first instance.[240] Sklansky's formulation also nicely reframes the salience of the under- and overenforcement phenomena: Together, they represent a sort of ultimate failure in which police

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236. *See supra* Part II.A.

237. Both these terms "democratic" and "policing" are contested and used differently by scholars. *Compare* Dubber, *supra* note 22, at xi (describing the power to police generally as the innate authority of the government to regulate the public welfare), *with* Meares & Kahan, *supra* note 35 (referring to policing more narrowly as the criminal law enforcement function carried out by police officers).

238. Sklansky, *supra* note 11, at 1808.

239. *Id.* at 1812. Sklansky also describes how those who cannot afford private police protection may suffer from underenforcement. *Id.* at 1820.

240. Thomas Hobbes, Leviathan: Or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill 124 (Barnes & Noble Books 2004) (1651) ("The final cause, end, or design of men, who naturally love liberty, and dominion over others, in the introduction of that restraint upon themselves, in which we see them live in commonwealths, is the foresights of their own preservation . . . ; that is to say, of getting themselves out from that miserable condition of war . . . .").

simultaneously fail to protect victims against "private systems of domination" even as they overreach with their "tool[s] of official domination."[241] Sklansky's cure for both is making law enforcement actors—from police to prosecutors to lawmakers and judges—more responsive to the multiple and sometimes competing demands of those who populate policed communities.

As Sklansky points out, treating enforcement as a problem of democratic responsiveness resonates with some of the central insights of community policing. Although "community policing" has become a catchall descriptor for myriad police practices, it is generally characterized by its attention to relationships between police and community and by an appreciation of the value of police responsiveness.[242] With its emphasis on foot patrols, officer training, and individual relationships rather than command-and-control tactics, it recognizes that law enforcement presence can be positive or negative depending on how authority is wielded. Part of the appeal of community policing is that its effectiveness is not measured solely in terms of its impact on crime statistics, but by improvements in the democratic responsiveness of the state, embodied in its agents, the police. In these senses, community policing is inherently sympathetic to treating the problem of underenforcement as a lack of democratic responsiveness.

On the other hand, as Sklansky also argues, "community policing" is not a talismanic solution. Demanding increased police responsiveness does not answer the question, To whom in the "community" should law enforcement be responsive? Critics of "community policing" charge that it elides or even replicates inequalities by assuming that communities are homogenous or that there even is such a thing as the "community" which can legitimately authorize the police to infringe the liberties of (some of) its residents.[243] This elision is of particular concern in the underenforcement context. Insofar as the groups who tend to suffer most from underenforcement victimization are also the ones that may lack a voice in their own community and institutions—the poor, people of color, prostitutes, or illegal immigrants—community policing merely postpones the question of true egalitarian responsiveness to another day.[244]

Meares and Kahan also call for more democratic forms of policing, by which they mean policing that is more responsive to certain sorts of community demands. In particular, they call for broader policing authority such as curfews, anti-gang ordinances, and expanded search powers when

241. Sklansky, *supra* note 11, at 1808.

242. *See* Wesley G. Skogan, Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods 92 (1990) ("Community Policing requires that police be responsive to citizen demands when they decide what local problems are, and set their priorities.").

243. *E.g.*, Harcourt, *supra* note 15; Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 Utah L. Rev. 343.

244. *See supra* notes 233-41 and accompanying text (pointing out that whether a particular underenforcement practice is beneficial or harmful depends on which community constituency is being analyzed).

the community being policed demands them.[245] Their controversial assertion that inner-city residents should be permitted to retract constitutional constraints on police in pursuit of safer neighborhoods is centrally an argument about the role of participatory democracy in establishing the parameters of the police state. Specifically, they argue that some constitutional constraints on police efficacy have a

> disempowering effect on inner-city communities. Criminologists have long recognized that inner-city crime both creates and is sustained by atomization and distrust, which in turn make it harder for individuals to engage in the cooperative self-policing characteristic of crime-free communities. A healthy democratic political life can help repair these conditions. That is precisely what residents of the inner city enjoy when they are free to adopt or approve building searches, gang-loitering ordinances, curfews, and the like.[246]

Criticisms of the Meares and Kahan proposals, in turn, revolve mainly around assertions that they have gotten their democratic theory wrong. Joel Handler and Carol Steiker dispute the underlying assertion that African Americans have become sufficiently politically empowered to warrant tinkering with constitutional protections.[247] Steiker further argues that an important part of our democratic tradition includes inalienable constitutional protections against police overreaching that are not subject to political negotiation.[248] Others scholars agree, however, that the drive for a better "organizational framework for dialogue and decision-making"[249] and "more democracy"[250] is the right approach, even as they dispute Meares and Kahan's conclusions about the process.[251]

These debates share the intuition that police responsiveness is a central feature of democratic policing and therefore of the legitimacy of the state itself. To whom the police should respond, and what the police should do in response, remain hotly contested. Nevertheless, the notion that police should react directly to individual and community needs is increasingly accepted. Such theories suggest that underenforcement is problematic

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245. *See generally* Meares & Kahan, *supra* note 15; *see also* Meares & Kahan, *supra* note 35, at 5, 16-17.

246. Meares & Kahan, *supra* note 35, at 21.

247. Joel F. Handler, *It's Not So Simple*, *in* Urgent Times: Policing and Rights in Inner-City Communities, *supra* note 35, at 45, 47 (calling Meares and Kahan's faith in African-American political power "truly amazing" and "naïve"); Bernard Harcourt, *Matrioshka Dolls*, *in* Urgent Times: Policing and Rights in Inner-City Communities, *supra* note 35, at 81, 82-84 (criticizing Meares and Kahan's "political-process theory" for failing to define adequately the "African American community" or its interests); Carol S. Steiker, *More Wrong Than Rights*, *in* Urgent Times: Policing and Rights in Inner-City Communities, *supra* note 35, at 49, 52-53 (calling this "rosy picture . . . utterly implausible").

248. Steiker, *supra* note 247, at 55-56.

249. Wesley Skogan, *Everybody's Business*, *in* Urgent Times: Policing and Rights in Inner-City Communities, *supra* note 35, at 58, 60.

250. Harcourt, *supra* note 247, at 85-86.

251. *See* Stuntz, *supra* note 10, at 2 ("Politically accountable policing is key to preserving democracy.").

precisely because it is the ultimate form of official non-responsiveness. Underenforcement is what happens when the police simply do not show up. It thus represents the failure of a core function of law enforcement—namely, its responsibility not merely to enforce the laws as written, but to do so in a way that validates the democratic vitality of those laws in practice.

Treating the underenforcement problem as one of "democratic responsiveness" is also useful in thinking about solutions to crime, particularly when it comes to policing the disenfranchised. It shifts our focus away from crime-like problems (low arrest and prosecutions rates, high victimization rates) towards democratic-type problems (unequal resource distributions, officials' unresponsiveness and unaccountability). Possible solutions to the former (more police, greater governmental power, more punishments) are not necessarily the sorts of solutions that address the latter. Increasingly punitive sanctions, the reduction of individual protections against governmental overreaching, and heightened crackdowns (for example on prostitutes or illegal immigration) will tend to increase the victimization of those same groups and thus do not address the democratic deficit. Indeed, as seen from the examples above, they may well make it worse.

Rather, democratic ills demand democratic cures such as accountability, transparency, and resource redistribution. To return to the three core examples above, in the urban enforcement context this might mean better staffed and trained urban police departments that would permit fuller responses to citizen complaints;[252] police officers and departments sensitized to the needs of vulnerable constituents; fully funded public defender offices; institutional transparency mechanisms;[253] and alternative sanctions.[254] Such measures are designed not simply to "fight crime" but to extend meaningful and dignified protection and service to the underserved. For prostitutes, this would mean improved police response to rape and assault crimes, as well as the provision of health and education services that would permit prostitutes to take advantage of the institutional protections that are theoretically already available to them.[255] For undocumented workers, the enforcement of existing wage and workplace safety laws would mitigate the illegal working conditions that effectively "punish" such workers for their immigration violations. In general, the democratic-responsiveness focus suggests that law enforcement should be treated as a

252. *See* Stuntz, *supra* note 10, at 51-54 (arguing that federal and state governments should have greater control over both funding and regulation of local policing in order to make policing more politically responsive).

253. *See generally* Sklansky, *supra* note 11 (advocating for increased transparency, police training, and police-resident communications); *see also* Luna, *supra* note 37 (making similar arguments).

254. *See* Brown, *supra* note 8, at 1345 (arguing that "street crime enforcement could take strides toward preventive, compliance-oriented, less punitive, regulatory strategies that we have devised for white-collar wrongdoing").

255. *See supra* Part I.B.

mechanism by which disadvantaged groups are integrated into the law-abiding community, not exiled from it.

D. *Equal and Adequate Policing?*

An alternative way of appreciating underenforcement is by putting pressure on the Supreme Court's commitment to a negative rights jurisprudence in the area of police protection. The *DeShaney* and *Gonzales* cases treat law enforcement as a public service like trash collection, health care, or housing,[256] subject to the more general proposition that the state is not obligated to provide such services in the first place, and therefore the failure to provide is not a constitutional harm. Underlying this characterization is an implicit rejection of any special, democracy-maintaining quality of policing, or the idea that policing could be a unique state obligation to which citizens might have a right above and beyond their entitlement to conventional government benefits. While this conclusion is deeply entwined with the Court's general commitment to law enforcement discretion,[257] it provides additional, independent grounds for judicial deference to that discretion by its narrow and materialistic characterization of the benefit under consideration.

The richer, democratically laden understanding of underenforcement offered here poses a potential challenge to this narrow conceptualization of policing. Community-policing advocates focus on responsiveness because responsive policing is a measure of the appropriately respectful and accountable posture of the state vis-à-vis its constituents.[258] The state's failure to provide such policing indicates not merely distributive inequality but political failure. Trash collection, health care, and housing are therefore not the best models because under current doctrine they represent the failure to provide services which are not essential to a functioning democracy.[259]

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256. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

257. Town of Castle Rock v. Gonzales, 545 U.S. 748, 125 S. Ct. 2796, 2803 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion." (citing Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 462-63 (1989))); *see also id.* at 2806 (stating that "seemingly mandatory legislative commands" should be interpreted against the backdrop of "[t]he deep-rooted nature of law-enforcement discretion"); *see also id.* ("It is . . . simply 'common sense that *all* police officers must use some discretion in deciding when and where to enforce city ordinances.'" (quoting Chicago v. Morales, 527 U.S. 41, 62 (1999))).

258. *See* Part IV.B. It is in this sense that Stuntz argues for "accountable policing," police that answer to constituents and not merely to fluctuations in crime statistics. Stuntz, *supra* note 10, at 2.

259. I do not mean to discount arguments that housing and other basic material needs *should* be constitutionally mandated, only to note that under current doctrine they are not. *See* Frank I. Michelman, *The Supreme Court 1968 Term—Foreword—On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969) (arguing that poverty and material deprivation prevent the poor from participating in the democratic process); Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 St. Louis U. L.J. 665 (2002) (describing home-ownership as a fundamental source of American wealth and how it has been historically withheld from African Americans).

A better model might be education. In 1973, the Supreme Court decided that education is not a "fundamental right" and that therefore the state's failure to provide education in an equitable or adequate way violated no constitutional mandate.[260] This decision triggered loud dissents, one of which involved the argument that education is not like trash collection or other municipal services but rather is "inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment."[261]

While the Court never reversed its holding in *Rodriguez*, it subsequently recognized the special social and democratic functions of education, thereby distinguishing it from other social welfare services. In *Plyler v. Doe*,[262] the Court held that the state could not totally deprive the children of undocumented aliens of public education, based in part on the Court's view of the special role that education plays in participatory citizenship. As the Court stated,

> [While] [p]ublic education is not a right granted individuals by the Constitution[,] . . . neither is it merely some governmental benefit indistinguishable from other forms of social welfare legislation . . . . We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government . . . . [S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. . . . In sum, education has a fundamental role in maintaining the fabric of our society. . . .
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> . . . .
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> The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. . . .
>
> . . . .
>
> By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.[263]

Structurally, the dual commands of the Due Process and Equal Protection Clauses, as well as the language of most state constitutions, have shaped the education debate into a dual inquiry of adequacy and equality. The former

260. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
261. *Id.* at 63 (Brennan, J., dissenting) (citing *id.* at 28 (Marshall, J., dissenting)).
262. 457 U.S. 202 (1982).
263. *Id.* at 202, 221-23 (internal citations and quotation marks omitted).

represents a due process or minimal entitlements type of challenge: Has the state provided an adequate minimum threshold of education? The second is a comparative inquiry reflecting equality demands: Has the state provided equal access to education as between jurisdictions or groups?[264]

The education framework is suggestive in the policing context. After *DeShaney*, some scholars argued that, like education, certain forms of public protection might constitute special entitlements of the democracy-preserving sort.[265] Moreover, the policing question naturally lends itself to the dual adequacy-equality inquiry: whether the state has provided sufficient enforcement protection to ensure minimal levels of citizenship, and whether the disparities between policing resources give rise to impermissible inequalities.

For example, as noted above, policing is the material distribution of the rule of law.[266] Like education, policing has a "fundamental role in maintaining the fabric of our society"[267] because it provides the "protect[ion] against anarchy and the Hobbesian war of all against all"[268] that is an essential role of the state. Underenforcement is the maldistribution of this fundamental good: It means that rules are not uniformly or predictably enforced, and individuals may not be on notice about when their conduct will be tolerated or punished by the state. As a matter of the integrity of the criminal system and its commitment to rule of law, therefore, some level of policing could be required in order to guarantee that the law is meaningful in all four corners of the system. In this sense, law enforcement is not only a material resource but an enabling condition. In the same way that education enables citizenship, or the right to counsel enables the exercise of all other procedural rights,[269] law enforcement enables the exercise of the substantive law.

The theories of democratic policing discussed above also suggest that, like education, policing has participatory and citizenship implications.

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264. *See* Alexandra Natapoff, Commentary, *1993: The Year of Living Dangerously: State Courts Expand The Right to Education*, 92 Educ. L. Rep. 755 (1994). The debate over the citizenship-enabling aspects of education has been muted on a federal level by the existence of state constitutional provisions. Since every state constitution provides in some form for a public education system, many of them mandating "equal" or "adequate" education, the right-to-education debate has turned to these guarantees. *See id.*

265. *See, e.g.*, Akhil Reed Amar, *Remember the Thirteenth*, 10 Const. Comment. 403 (1993) (arguing that DeShaney's subordination to his father triggered the Thirteenth Amendment's prohibition against private slavery and, more generally, that the Amendment might require state action in response to other forms of private violence and subordination); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991) (arguing that the framers originally intended a constitutional right to protection). *But see* Armacost, *supra* note 199 (defending *DeShaney* against these alternative theories).

266. *See supra* Part III.B.1.

267. *Plyler*, 457 U.S. at 221.

268. Fallon, *supra* note 216, at 7-9 (defining essential elements of rule of law).

269. Gideon v. Wainwright, 372 U.S. 335, 343 (1963) ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" (quoting Johnson v. Zerbst, 304 U.S. 458 (1938))).

Insofar as policing represents the state's respectful and responsive engagement with its citizens, the state's failure to engage through underenforcement is a nonmaterial, democratic harm—"a failure of political accountability."[270] Under this analysis, some level of underenforcement may be constitutionally suspect because it indicates that victims have been excluded from participation in, and the benefits of, the democratic system.[271]

This argument holds strongest for the socially vulnerable and politically disempowered. These groups are the least able to obtain adequate or equal enforcement through the political system. In addition, the lack of enforcement actually exacerbates their social disadvantage, creating the vicious cycles described above.[272] Such constituents should have strong claims to an extra-political check on the level of protection they receive, precisely because the political system is likely to fail them in self-reinforcing ways.

These kinds of arguments illustrate how underenforcement intersects with bedrock issues of minimal citizenship and equality. As a result, they also reveal the narrowness of current underenforcement doctrine. In its single-minded focus on discretion, the doctrine lacks the capacity to appreciate the deeper democratic ramifications of systemic nonenforcement. These expanded conceptualizations suggest that new doctrinal tools are needed to evaluate enforcement decision making; like education, it is too central to the state's overall function to be delegated wholly to the unfettered discretion of law enforcement officials.

IV. RETHINKING UNDERENFORCEMENT

A. *Subordination and the City: Simultaneous Over- and Underenforcement*

Urban law enforcement is infamous for its overenforcement practices: racial profiling, disproportionate drug arrests in inner cities, and police disrespect and brutality—not to mention the harsh punishments that result from such intense police attention.[273] These forms of overenforcement have become increasingly recognized as a socially destructive, racially charged, and counterproductive force in poor, high-crime communities.

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270. Stuntz, *supra* note 10, at 13.

271. Insofar as it represents a general challenge to the constitutional non-protection of the poor, this argument is neither new nor specific to policing. *See* Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword—Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. Pa. L. Rev. 1277 (1993) (arguing that poverty impedes the poor from participating in the democratic process); Michelman, *supra* note 259, at 38-39.

272. Stuntz, *supra* note 10, at 14 ("[T]he failure [to address underenforcement] is more serious than most of the legal issues scholars debate, partly because underpolicing makes all other regulatory problems worse.").

273. *See supra* notes 1-6 and accompanying text.

In these very same communities, underenforcement produces a complementary dynamic. The failure to enforce exposes residents to crime and insecurity, while reinforcing the idea that they have been abandoned by the state. As numerous black men are imprisoned for long periods of time for nonviolent, economically motivated drug crimes, others criminals who steal, assault, and even kill remain free.[274] Even as female-headed households struggle economically for lack of partners, they must contend with high crime rates and personal victimization tolerated by the very same law enforcement system that locks up their husbands, brothers, and sons.

Indeed, over- and underenforcement can converge in the very same person. A young black male who illegally carries a weapon because he fears for his life is a victim of underenforcement; he believes, often accurately, that the police will not protect him. When he is arrested on a pretext[275] and given a longer sentence than his similarly situated white counterpart,[276] he is also a victim of overenforcement.[277] The confluence of over- and underenforcement in the same individual and community is thus particularly destructive. It combines the harshest of punishments with visible inaction, appearing at once unfair and ineffective.

Simultaneous over- and underenforcement also creates a gap between police and community that undermines the police function. It deters citizens from turning to the police, both because they fear the police will mistreat them and because they lack faith that the police will protect them from crime. This, in turn, makes law enforcement efforts to work with residents appear futile; police often complain that they cannot solve cases because residents do not cooperate with them.[278] As a result, police and policy makers shift blame for crime back on to the community and its lawbreakers. In effect, the gap validates police inaction and nonattention to community needs. In a vicious cycle, underenforcement makes those communities seem more "high-crime" and intractable which, in turn, justifies even more punitive overenforcement. Sociologist Eric Monkkonen labels this ragged urban justice system "a failure of the state," comparable to state failures in developing nations.[279]

In such communities, over- and underenforcement are not mutually exclusive alternatives. Rather, they are dual symptoms of the breakdown in relations between law enforcement and the community. They arise from the

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274. *See* Sentencing Project, Facts About Prisons and Prisoners, http://www.sentencingproject.org/pdfs/1035.pdf (reporting that seventy-six percent of state prisoners were incarcerated in 2002 for nonviolent offenses).

275. *See, e.g.*, Harris, *supra* note 215, at 275-88.

276. Kennedy Commission Report, *supra* note 14, at 48-63 (documenting racial disparities in sentencing).

277. *See, e.g.*, Hagan & Peterson, *supra* note 29, at 23 ("For many ghetto youth . . . [s]ometimes victimization can lead to offending. Some crime in minority neighborhoods may be a product of retaliation, a form of what one researcher calls 'self-help.'" (internal citation omitted)).

278. *See* Stoutland, *supra* note 28; Leovy & Smith, *supra* note 24.

279. Leovy & Smith, *supra* note 24 (quoting Eric Monkkonen).

same kinds of sources: official non-responsiveness, hostility towards victims, and disrespect for individual dignity and rights. They also have similar effects: group victimization, normative decay, increased violence, and social distrust. In the end, they are both ways that the state abandons its caretaking responsibilities, the one by over-punishing, the other by under-protecting.

In the urban policing context, underestimating the complexity of underenforcement creates problems of its own. When treated quantitatively as "too little policing," underenforcement is transformed from a resource problem into a tragedy, because the putative cure, "more policing," is seen as an invitation to the harms associated with overenforcement.[280] Urban law enforcement thus becomes a "no-win" situation: Urban residents must give up the benefits of weak policing—personal privacy, civil liberties, and protection against police overreaching—in exchange for greater police protection against criminals and private violence.[281] This increased policing, however, is associated with racial profiling, police disrespect, and harsh punishments.[282] In other words, they must trade underenforcement for overenforcement.

But, as this Article has tried to show, underenforcement is not merely quantitative—a lack of police. Rather, it reflects qualitative, dynamic flaws in the ways police exercise discretion, in relationships between police and residents, and the political system's overall responsiveness to the policed. After all, some communities manage to have quite satisfactory relationships with their police forces. As Sklansky points out, wealthy employers of private police are increasingly able to buy responsive "proactive" policing, even as inner-city residents are being left with less responsive, less effective "reactive" policing.[283] The differences between good and bad underenforcement turn on the intentions, relationships, and consequences of police practices, characteristics that may be shared by overenforcement practices as well.

Indeed, addressing underenforcement may even solve some kinds of overenforcement problems. The solution to underenforcement will often not be "more policing" or more arrests, but more or different policing of the kind that remedies the specific harms of underenforcement such as official hostility, group disadvantage, and the decay of police-civilian relations. Remedies for these sorts of problems demand increased police responsiveness and democratic sensitivity to all the stakeholders in the policing process. These are the sorts of remedies that could potentially address overenforcement concerns as well.

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280. Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 Cal. L. Rev. 617, 618 (2006) (describing tension between the dual harms of crime and policing in urban communities as a "profound paradox").

281. *See, e.g.*, Meares & Kahan, *supra* note 35, at 14-15.

282. *See* Steiker, *supra* note 247, at 47.

283. Sklansky, *supra* note 11, at 1820.

B. *Underenforcement as an Expression of State Power*

Underenforcement practices reveal the deep contours of state power. Although the exercise of that power takes the form of inaction, the "inaction" is fundamental to the state function because it consists of the systematic failure to apply the rules. Or, as Cass Sunstein and Adrian Vermeule have argued, "[w]here government is concerned, failures of protection, through refusals to punish and deter private misconduct, cannot be justified by pointing to the distinction between acts and omissions."[284] Underenforcement thus reflects the state's abdication: its failure to address social harm, to attend to the consequences of lawbreaking, and generally to care for its constituents. Far from neutral, underenforcement is a powerful way that the state weighs in on many distributive and democratic issues. It also illustrates society's background assumptions about who matters and who is entitled to public support. Predictably, underenforcement "zones" rise up around groups and issues to which the state is generally inattentive, namely, the dispossessed, the unpopular, and the politically silent.[285]

Underenforcement practices thus reveal the gap between what the state promises under the law and how it actually allocates scarce resources and political legitimacy under the pressures of democratic pluralism.[286] In that gap, underenforcement leaves room for the rawest jockeying among political interest groups, power imbalances, and social hierarchies, for race and sex discrimination, violence, and all the other Hobbesian phenomena that the Rule of Law is designed to mitigate.

The inattentiveness surrounding underenforcement contrasts strongly with the Byzantine attention to detail that characterizes full-enforcement zones. The American legal system is infamous for its legalistic, overdetermined regulatory system and the pervasiveness with which this system creeps into the interstices of everyday life.[287] But such attentiveness characterizes those areas to which the state apparatus is truly committed. Underenforcement zones represent precisely those areas of the social fabric to which state law enforcement actors are indifferent or even hostile. Urban residents, prostitutes and their customers, and undocumented workers represent many millions of people for whom underenforcement—the lack of official protection and attention—is a daily reality and for whom the law is an absentee landlord. This fact about the American legal system sits in constant tension with the system's infamous thoroughness and harshness,

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284. Sunstein & Vermeule, *supra* note 12, at 707; *see also* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 296-97 (1990) (Scalia, J., concurring) (describing as tenuous the distinction between "action" and "inaction").

285. *See* Rodney Stark, *Deviant Places: A Theory of the Ecology of Crime*, 25 Criminology 893, 902 (1987) (asserting that "[s]tigmatized neighborhoods will suffer from more lenient law enforcement").

286. *See generally* Allen, *supra* note 209.

287. Deborah L. Rhode, *Legal Scholarship*, 115 Harv. L. Rev. 1327, 1348 (2002) (documenting the popular perception that the U.S. suffers from "too much law").

particularly in communities that suffer simultaneously from the worst aspects of both.[288]

To appreciate the significance of underenforcement is not, of course, to advocate full enforcement. Nor is it a prescription for any particular level or form of enforcement practice per se. Rather, it is a call for attentiveness to the phenomenon itself, its central role in shaping the criminal system, and the ways that underenforcement replicates and strengthens existing social inequalities. In particular, it calls for recognition that the state's inaction with respect to the criminal law can be as profound and destructive as its overly harsh applications.

CONCLUSION

Our criminal system is rife with inegalitarian enforcement failures—pervasive, yet little-noticed ways that the state predictably abandons its constituents by failing to enforce the rules. In underenforcement "zones," social life vacillates between lawfulness and lawlessness: While some aspects of the law are enforced, others are not; some victims are protected while others are not. This is the lawlessness of the frontier and of fledgling democracies that makes people insecure and distrustful of government. It is the sort of localized unpredictability that implicates many of the same rule-of-law concerns associated with transitional justice,[289] states of emergency,[290] and other extraordinary circumstances where the law fails to operate in a coherent, rule-bound fashion. And yet it exists openly in well-lit places throughout American society.

Underenforcement casts a long shadow over the viability and legitimacy of our criminal system. Like overenforcement, rampant underenforcement makes the rule of law into a democratic luxury; it renders full, fair, and balanced law enforcement an experience limited to those who can bend the government to their will. To address this democratic deficit, underenforcement should be better recognized as a potentially destructive phenomenon in its own right. In recognition of the linkages between over- and underenforcement, underenforcement needs to be approached qualitatively, as a call not for harsher but for more responsive policing. Structural and doctrinal criticisms of our criminal system should better account for the role of underenforcement in eroding the system's efficacy,

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288. *See supra* Part IV.A.

289. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harv. L. Rev. 762 (2004) (arguing that many of the disjunctive qualities of transitional justice exist in domestic law); Joachim J. Savelsberg, *Crime, Inequality, and Justice in Eastern Europe: Anomie, Domination, and Revolutionary Change*, *in* Crime and Inequality, *supra* note 29, at 206, 213-23 (describing soaring crime rates in post-Cold War Eastern European countries and correlating it with political dislocation and weakened public confidence in the state).

290. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 Yale L.J. 1011, 1023 (2003) (arguing that traditional constitutional rule of law should occasionally give way in the face of violent attacks on the state).

fairness, and democratic accountability. Perhaps most importantly, it demands that we attend more carefully to the experiences of the system's many clients, including the vulnerable and the disadvantaged, who, while sometimes criminals themselves, remain entitled to the protections of the law.