# MAKING EQUAL PROTECTION PROTECT

Eighty-year-old Lavetta Langdon was convicted of shooting and killing her husband, Larry Langdon, while he slept.[1] She later described decades of abuse by her husband, including being forced to eat pet food naked in front of their children.[2] Mr. Langdon beat Ms. Langdon over their child's performance in a basketball game and for trying to protect their daughter from his abuse.[3] He controlled her finances, refusing to let her go to the doctor or go shopping alone.[4] Their daughter later told a reporter that she thought "it would be the other way around"; she anticipated hearing the news that her father had killed her mother.[5] During this time, Ms. Langdon and her children called law enforcement for help repeatedly, and Ms. Langdon even obtained a legal divorce and fled to another state.[6] But she later remarried and returned to live with Mr. Langdon.[7] On the day of the killing, Ms. Langdon called the police herself and confessed to the shooting when they arrived at her door.[8] After initially facing a first-degree murder charge (eligible for the death penalty in Nebraska[9]), she pled no contest to manslaughter and was sentenced to eight to ten years in prison.[10]

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[1] *See* Jared Leone, *80-Year-Old Woman Sentenced to Prison for Killing "Abusive" Husband While He Slept*, KIRO 7 (July 15, 2021, 6:15 PM), https://www.kiro7.com/news/trending/80-year-old-woman-sentenced-prison-killing-abusive-husband-while-he-slept/WRCO2TROTNCKFGOI74RKZ32YJU [https://perma.cc/GND7-ZF5C].

[2] *See id.*

[3] *See* Marresa Burke, *Lavetta Langdon's Daughters Share Their Mother's Story*, KNOP NEWS 2 (Nov. 1, 2021, 7:26 PM), https://www.knopnews2.com/2021/11/01/lavetta-langdons-daughters-share-their-mothers-story [https://perma.cc/FL39-JS2E].

[4] *Id.*

[5] *Id.* (quoting Lynne Kinne).

[6] *See id.*; Marresa Burke & Gray News Staff, *80-Year-Old Woman Sentenced 8 to 10 Years for Husband's Murder*, 13 ACTION NEWS WTVG (July 14, 2021, 10:31 PM), https://www.13abc.com/2021/07/15/80-year-old-woman-sentenced-8-10-years-husbands-murder [https://perma.cc/28DM-7LK9].

[7] *See Murder Defendant Bound Over to District Court*, MCCOOK GAZETTE (Sept. 11, 2020), https://www.mccookgazette.com/story/2834368.html [https://perma.cc/99QL-TF5V].

[8] Warrantless Arrest Affidavit at 6, State v. Langdon, No. CR20-312 (Red Willow Dist. Ct. filed Aug. 21, 2020).

[9] NEB. REV. STAT. §§ 28-303, 29-2519 (2024).

[10] *See McCook Woman Sentenced to 8 to 10 Years on Manslaughter Charge Related to Husband's Death,* NTV NEWS (July 13, 2021, 5:40 AM), https://nebraska.tv/news/local/mccook-woman-sentenced-to-8-to-10-years-on-manslaughter-charge-related-to-husbands-death [https://perma.cc/YZB5-PR2K]. After advocacy from Ms. Langdon's family, the Nebraska Board of Pardons commuted Ms. Langdon's sentence and made her eligible for parole. *Elderly Domestic Abuse Survivor Who Killed Husband Now Eligible for Parole*, WNDU, at 0:42 (Jan. 29, 2024, 8:58 PM), https://www.wndu.com/video/2024/01/30/elderly-domestic-abuse-survivor-who-killed-husband-now-eligible-parole [https://perma.cc/NU3K-5F6Y].

Lavetta Langdon's story is not unique.[11] No single dataset captures the number of people incarcerated at this moment for crimes arising out of domestic violence.[12] But evidence from at least one state suggests that a high percentage of women incarcerated for homicide are incarcerated for killing those who were abusive to them.[13] Domestic violence survivors[14] more broadly are likely to receive extremely long sentences when charged with killing abusive partners.[15] Nor do these homicide cases fully capture the types of cases in which evidence of abuse would be relevant and powerful for a jury to hear. Survivors who do not kill their abusive partners are often charged with other crimes.[16] Those who are involved in crimes with abusive partners, or who are witnesses or bystanders, are criminally charged too.[17] Survivors, especially women of color, who turn to drugs to cope with the trauma of abuse, or who

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[11] *See, e.g.*, Kristen Jordan Shamus, *Tina Talbot Freed from Prison After 20-Month Sentence for Killing Abusive Husband*, DET. FREE PRESS (Nov. 17, 2020, 5:00 PM), https://www.freep.com/story/news/local/michigan/2020/11/17/tina-talbot-free-after-20-months-prison-killing-abusive-husband/6319141002 [https://perma.cc/3HS5-J88A] (describing a Michigan mother who pled guilty to manslaughter for shooting her husband twice after he had relentlessly abused her for four days, leading her to be hospitalized for partially collapsed lungs, a broken arm and ribs, and a ruptured spleen).

[12] *See* Rachel Louise Snyder, Opinion, *Who Gets to Kill in Self-Defense?*, N.Y. TIMES (Sept. 4, 2024), https://www.nytimes.com/interactive/2024/09/04/opinion/women-kill-self-defense.html [https://perma.cc/6CZH-BAT8].

[13] *See, e.g.*, Victoria Law, *When Abuse Victims Commit Crimes*, THE ATLANTIC (May 21, 2019), https://www.theatlantic.com/politics/archive/2019/05/new-york-domestic-violence-sentencing/589507 [https://perma.cc/3A5Z-RB5W] (noting that "[i]n New York . . . two-thirds of women incarcerated for killing someone close to them had been abused by that person").

[14] This Note uses the terms "victims" and "survivors," reflecting that those who experience domestic or intimate partner violence may prefer either term. It uses "victims" when specifically talking about those who have experienced violence deemed a crime in the criminal legal system. *See* NATASHA ALEXENKO ET AL., SEXUAL ASSAULT KIT INITIATIVE & RTI INT'L, VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION 1, https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf [https://perma.cc/TQZ3-UABM]. This Note generally uses "domestic violence" to refer to patterns of abusive behavior in relationships. *See Domestic Violence*, OFF. ON VIOLENCE AGAINST WOMEN, U.S. DOJ, https://www.justice.gov/ovw/domestic-violence [https://perma.cc/K9UA-HBTU]. I use this term in lieu of "intimate partner violence" given how much of the legal literature on these issues adopts that term. *See, e.g.*, *id.* However, for accuracy I use "intimate partner violence" or IPV when reporting, research, or studies use that term to describe their findings.

[15] *See* Savanna Jones, Note, *Ending Extreme Sentencing Is a Women's Rights Issue*, 23 GEO. J. GENDER & L. ONLINE, no. 2, 2022, at 1, 2–4. A study of forty-two IPV survivors convicted of killing their abusive partner found that all but two received life sentences. *Id.* at 4.

[16] *See* KING CNTY. COAL. AGAINST DOMESTIC VIOLENCE, SOME ISSUES TO CONSIDER WHEN DV SURVIVORS ARE CHARGED WITH DV-RELATED CRIMES 1 (2003), https://endgv.org/wp-content/uploads/2016/03/Vic-DefIssuesforJudges1.pdf [https://perma.cc/ZF58-PQVG].

[17] *See* Shannon Heffernan, *Serving Time for Their Abusers' Crimes*, MARSHALL PROJECT (June 13, 2024, 6:00 AM), https://www.themarshallproject.org/2024/06/13/abuse-domestic-violence-survivors-liability-prison [https://perma.cc/MKP6-W5XD].

shoplift to support themselves, can likewise become ensnared in the criminal legal system.[18]

Lavetta Langdon's case illustrates the injustice of this criminalization — and the inadequacy of the criminal legal system in accounting for the harm she had already experienced. The judge at sentencing told her that "[t]here is no question that you, Lavetta, suffer from batter[ed] women's syndrome" and "[n]o question that you lived in hell," but that a noncarceral alternative like probation was insufficient.[19] There was no consideration that Ms. Langdon's history — decades of abuse, unsuccessful efforts to extricate herself, and the state's failure to keep her safe when she contacted law enforcement — had legal significance and warranted exempting her from a punitive prosecution and sentencing.[20]

This Note argues that the criminal legal system should absolve criminalized survivors,[21] or at the very least punish them less, for crimes they commit that relate to their abuse. It then offers a way to reconcile the legal system's inadequacy in dealing with criminalized survivors by refocusing the conversation on prosecutors. It makes use of a duty-to-protect reading of the Fourteenth Amendment by arguing that prosecutions of criminalized survivors[22] violate the Equal Protection Clause. And it argues that prosecutors, not the courts, are independent constitutional actors in our system who are best positioned to adopt and enforce this alternative interpretation.

The Note proceeds as follows. In Part I, this Note identifies the equal protection violation inherent in the criminalization of survivors under an alternative duty-to-protect reading of the Fourteenth Amendment. Next, Part II lays out why prosecutors have a constitutional obligation to enforce the Equal Protection Clause's guarantees, and why, as a normative matter, they should adopt this duty-to-protect interpretation. Part III suggests methods of implementing this constitutional reading in actual prosecutions, on both the individual and systemic level.

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[18] *See* DANIELLE MALANGONE, CTR. FOR CT. INNOVATION, UNDERSTANDING THE NEEDS OF CRIMINALIZED SURVIVORS 4–5 (2020), https://www.innovatingjustice.org/sites/default/files/media/document/2020/Monograph_Overview_11192020.pdf [https://perma.cc/2E57-7RD7].

[19] Burke & Gray News Staff, *supra* note 6 (quoting Judge David Urbom).

[20] *See id.*

[21] This Note uses Professor Leigh Goodmark's definition of criminalized survivors as those who "are victims of gender-based violence" and face prosecution and punishment from "the criminal legal system as a direct result of that violence." LEIGH GOODMARK, IMPERFECT VICTIMS 2, 12–13 (2023). Goodmark's working definition of gender-based violence encompasses "intimate partner violence, rape and sexual assault, and human trafficking." *See id.* This Note focuses on criminalized survivors who were victims of the first, though many of its arguments could apply more broadly.

[22] What this Note refers to as "prosecutions of criminalized survivors," or sometimes as "criminalization of survivors," are the acts of arrest and prosecution, which are the focus of this Note, not the laws themselves.

# I. DEFINING AN EQUAL PROTECTION VIOLATION

## *A. Theories of Equal Protection*

At a high level, there is a consensus that equal protection's guarantees are of special importance to groups that have been vulnerable to discrimination and are politically powerless.[23] Although men and women experience domestic violence at roughly equal (and high) rates,[24] women are more likely than men to experience severe physical intimate partner violence (IPV).[25] LGBTQ+ individuals also experience IPV at rates equal to or elevated from the general population.[26] Black, Latina, and Native women all disproportionately face violence at the hands of their partners, as do immigrant women.[27] Domestic violence is an overwhelming contributor to overall rates of violence against women,[28] including homicide.[29] Gender, race, national origin, and gender identity all implicate equal protection's powerlessness concerns, and all reflect historical axes of discrimination.[30] Equal protection, then, would seemingly have something to say about the matter.

Over the years, the Equal Protection Clause has been susceptible to multiple, competing interpretations.[31] Before proposing a working

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[23] *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138 (2011).

[24] *See* RUTH W. LEEMIS ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON INTIMATE PARTNER VIOLENCE 5, 14 (2022), https://www.cdc.gov/nisvs/documentation/NISVSReportonIPV_2022.pdf [https://perma.cc/H4YR-V22Q].

[25] *Id.* at 5.

[26] TAYLOR N.T. BROWN & JODY L. HERMAN, WILLIAMS INST., INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE 2 (2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/IPV-Sexual-Abuse-Among-LGBT-Nov-2015.pdf [https://perma.cc/5ZYN-SLEH].

[27] *See* Krim K. Lacey et al., *Severe Physical Violence and Black Women's Health and Well-Being*, 105 AM. J. PUB. HEALTH 719, 719 (2015); Jamila K. Stockman et al., *Intimate Partner Violence and Its Health Impact on Disproportionately Affected Populations, Including Minorities and Impoverished Groups*, 24 J. WOMEN'S HEALTH 62, 62 (2015).

[28] Anna Aizer, *The Gender Wage Gap and Domestic Violence*, 100 AM. ECON. REV. 1847, 1847 (2010).

[29] Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741, 741 (2017).

[30] *See* Lauren Sudeall Lucas, Essay, *Identity As Proxy*, 115 COLUM. L. REV. 1605, 1615 & n.34 (2015) (identifying race, nationality, and gender as suspect or quasi-suspect classes, in part because of "a history of past discrimination, [and] political powerlessness," *id.* at 1615) (citing, inter alia, Mark Strasser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex,* 38 PEPP. L. REV. 1021, 1025 (2011)). Although sexual orientation and gender identity are not recognized as suspect classes, many have argued persuasively that they should be based on similar reasoning. *See, e.g.*, Cross *ex rel.* Cross v. State, 560 P.3d 637, 656 (Mont. 2024) (McKinnon, J., concurring); Windsor v. United States, 699 F.3d 169, 181–82 (2d Cir. 2012), *aff'd on other grounds*, 570 U.S. 744 (2013).

[31] *See* Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 652–53 (2024) (describing the "two competing visions," *id.* at 652, of antisubordination and anticlassification as "form[ing] the very axis upon which the Equal Protection Clause turns," *id.* at 653).

equal protection doctrine for criminalized survivors, this Note breaks down each theory and what implications, if any, that reading has for criminalized survivors.

*1. Anticlassification.* — The dominant theory of the Equal Protection Clause today is anticlassification.[32] On this interpretation, the Equal Protection Clause prohibits differentiating people on the basis of certain categories — like race — at least absent sufficient justification.[33] The Court has applied this anticlassification logic to laws and policies that discriminate on the basis of gender. Such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives" to survive an equal protection challenge.[34] Proffered governmental justifications must be "exceedingly persuasive";[35] "genuine, not hypothesized or invented *post hoc*";[36] and cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[37] On anticlassification reasoning, the Court has struck down laws that discriminate on the basis of gender in distributing public benefits,[38] public university admission,[39] jury selection,[40] adoption regulation,[41] and elsewhere.

But the anticlassification model of the Fourteenth Amendment falls short of meaningfully rectifying gender discrimination, because it fails to address some of the most salient issues that differentiate women's lives. From abortion to domestic violence to economic inequality, the anticlassification model has little to say about laws and policies that disproportionately *impact* women and women's lives, but do not explicitly *classify* on the basis of gender.[42] And because prosecutions of criminalized survivors do not classify on the basis of gender or other forbidden categories and instead reflect the application of generally

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[32] *See* Aziz Z. Huq, *The Trouble with Classifications*, 100 NOTRE DAME L. REV. 1, 3, 29 (2024).

[33] *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 10 (2003).

[34] Craig v. Boren, 429 U.S. 190, 197 (1976).

[35] United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

[36] *Id.*

[37] *Id.* (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 223–24 (1977) (Stevens, J., concurring in judgment)).

[38] *See Wiesenfeld*, 420 U.S. at 641–42, 653.

[39] *Virginia*, 518 U.S. at 519; *Hogan*, 458 U.S. at 733.

[40] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

[41] Caban v. Mohammed, 441 U.S. 380, 381–82 (1979).

[42] *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 494, 496 & n.20 (1974) (rejecting an equal protection challenge to a state employment scheme that discriminated on the basis of pregnancy); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245–46 (2022) (holding that laws prohibiting abortion are not sex-based classifications and thus do not violate equal protection); CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination (1984)*, *in* FEMINISM UNMODIFIED 32, 35–36 (1987); *cf.* Jessica Mitten et al., *Equal Protection*, 23 GEO. J. GENDER & L. 267, 298–300 (2022) (describing the shortcomings of equal protection's anticlassification approach in lawsuits over domestic violence).

applicable criminal law to survivors and their actions, the anticlassification model offers little help for criminalized survivors.

*2. Antisubordination.* — An alternative theory of equal protection sees its core purpose not as the elimination of state classifications, but rather as the elimination of laws that perpetuate the subordination of certain historically disadvantaged groups to others — whether through formal classifications or practical effects.[43] "Antisubordination"[44] is a powerful alternative to anticlassification as an overarching theory of gender equality and equal protection. It lays out a roadmap to protecting a right to abortion,[45] rectifying the overcriminalization of pregnant women of color addicted to drugs,[46] and eliminating sexual harassment of our society's most vulnerable workers[47] by looking at the effect of law on women's material conditions. In this way, it offers a much more effective theory of remedying the systematic and unequal effects of gender discrimination than the anticlassification approach.[48]

However, while the antisubordination approach was possibly at the root of some of the Court's landmark equal protection cases,[49] and while some of the Court's sex discrimination cases make use of antisubordination reasoning in tandem with the anticlassification doctrine,[50] the Court

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[43] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 157 (1976) (positing a view of the Equal Protection Clause that is "a proscription against status-harm," which prohibits "state conduct that impairs the status of a specially disadvantaged group"); *see also id.* at 158 (giving examples of state action that does not discriminate, or does not discriminate on the basis of suspect criteria, that would nonetheless be unconstitutional under the antisubordination or "group-disadvantaging" theory).

[44] Balkin & Siegel, *supra* note 33, at 9 (citing Fiss, *supra* note 43); *see* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1473 n.8 (2004) (collecting scholarship on antisubordination).

[45] *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 369, 377 (1992) (arguing that abortion restrictions are suspect "under even the most constrained application of antisubordination principles," *id.* at 369, because they "compel[] women to perform the work of bearing and rearing children," and therefore "make such work a principal cause of [women's] secondary social status," *id.* at 377).

[46] *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1453–54 (1991).

[47] *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 4–7 (1979).

[48] *See* MACKINNON, *supra* note 42, at 39–41 (describing "the dominance approach" — a parallel to the antisubordination approach, *id.* at 40 — that confronts "violence against women," "women's material desperation," "the massive amount of rape and attempted rape," and more, *id.* at 41).

[49] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

[50] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) ("[C]lassifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women." (citing Goesaert v. Clearly, 335 U.S. 464, 467 (1948))).

has more recently rejected antisubordination arguments.[51] This has rendered the theory an unlikely avenue for legal change on systematic gender discrimination issues like domestic violence and the prosecution of criminalized survivors.

*3. Duty to Protect.* — A third view of the equal protection mandate, offered by Professor Robin West in response to the intractable debate between the anticlassification and antisubordination camps, posits that, at a minimum, the Equal Protection Clause means that "no state may deny to any citizen the protection of its criminal and civil law against private violence and private violation."[52] This reading of the amendment, which this Note adopts, has the virtue of being a historically sound reading consistent with the Fourteenth Amendment's clear language.

The case for a duty-to-protect reading begins with the amendment's language itself: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[53] The word "protection" should have some significant meaning, given that it was chosen for ratification into the constitutional text.[54] The phrase conveys more than a guarantee of formal equality; it prohibits a state from denying protection unequally.

Moreover, the amendment's legislative history (though arguably ambiguous as to which modern interpretation is correct[55]) offers at least some support for a duty-to-protect reading. To take one example, during the ratification debates, Representative John Bingham cited the Equal Protection Clause when discussing an 1866 New Orleans race riot in which dozens of mostly Black Republicans were killed with the sanction and assistance of the mayor of New Orleans and the Louisiana police.[56] He emphasized that ratification was necessary to prevent the state from denying protection of the law to certain groups,[57] thus explicitly linking the text of the proposed amendment with the type of violence

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51 Michael C. Dorf, *A Partial Defense of an Anti-Discrimination Principle*, ISSUES IN LEGAL SCHOLARSHIP, art. 2, 2002, at 1, 3.

52 Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 129 (1991).

53 U.S. CONST. amend. XIV, § 1.; *see* West, *supra* note 52, at 135 ("Protection is the nub of equal protection. The state must protect, and it must protect equally.").

54 *See* West, *supra* note 52, at 126 (arguing that "as noble or central as the ideal of formal justice may be, the Fourteenth Amendment does not speak of equal justice; it speaks of equal *protection*").

55 Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 16 (2008) [hereinafter Green, *Pre-Enactment History*]; *see also* Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 29 (2021) (noting that there is "no record of any extended discussion of the significance of the move to 'equal protection of the laws'").

56 Bernick, *supra* note 55, at 34; *see also* West, *supra* note 52, at 131 (noting that abolitionists advocated for the language of equal protection).

57 *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 332 (2021).

that defined the early, pre–Fourteenth Amendment Reconstruction period.

If text and legislative history provide some support for a duty-to-protect reading, the historical meaning of "equal protection" and its post-ratification implementation both robustly reinforce that reading.[58] The right to protection originated in the English common law tradition, then evolved in the American tradition until it was made explicit in the Fourteenth Amendment, by which time it included some state obligation to check private violence, enforce criminal punishment, and offer civil remedies.[59] This right had widespread acceptance in the Congress that drafted the Fourteenth Amendment and was well-known to the state legislatures that ratified it.[60]

After adopting the Fourteenth Amendment, the Reconstruction Congress would go on to enact legislation designed to protect Black Southerners from physical violence. The Enforcement Acts combatted rampant "terrorist violence" in the South by criminalizing conspiracies to deny citizens' rights to participate in the political process, giving aggrieved individuals a right to sue, and handing powerful enforcement tools to the federal government.[61] The Enforcement Act of 1871[62] — better known as the Civil Rights Act of 1871 or the Ku Klux Klan Act — adopted a duty-to-protect reading in the very language of the statute,[63] and that fact was further emphasized in floor debates on the Act.[64] Those same debates made clear that the Act itself was a response to rampant, unaddressed Klan (that is, private) violence,[65] and that many Republicans saw protection as a positive right.[66] Nor was the duty-to-protect reading confined to historical context and legislative history. Some early courts also accepted similar readings in prosecutions under the Enforcement Acts and held that equal protection encompassed failure to act.[67]

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[58] Such evidence is of particular value today, given the current Supreme Court's affinity for history in interpreting constitutional provisions. *See* Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946, 947 (2024).

[59] *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 510–14, 534 (1991) (charting the development of the right of protection from John Locke's natural rights and social contract theory to the adoption of the Fourteenth Amendment).

[60] *See id.* at 510; Green, *Pre-Enactment History*, *supra* note 55, at 44.

[61] *See* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 195–96 (1st ed. 1990).

[62] Ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985–1986).

[63] *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 225–26 (2009) [hereinafter Green, *Subsequent Interpretation*].

[64] *See id.* at 230.

[65] Bernick, *supra* note 55, at 36–37.

[66] *Id.* at 37–38.

[67] *See* Green, *Subsequent Interpretation*, *supra* note 63, at 278–79 (citing United States v. Blackburn, 24 F. Cas. 1158, 1159 (W.D. Mo. 1874) (No. 14,603); United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282)).

If the duty-to-protect reading was persuasive at the time of the Fourteenth Amendment's ratification, that prompts the question of what the Equal Protection Clause's scope and meaning are today, when law enforcement, private violence, and state neglect look very different.[68] Scholars defending a duty-to-protect reading have diverged both in the scope and application of that reading. West, who argues for the "central, minimal guarantee" of "protection against private violence,"[69] also takes the broader position that the Clause could support "minimal welfare rights, not only to shelter, food, and clothing, but also to a liveable minimum income or job."[70] Professor Christopher Green argues somewhat more narrowly that the duty-to-protect reading could require state courts to expand access to judicial relief, restrict prosecutorial discretion, and grant the federal government power "to provide enforcement and remedial services when states have failed to do so."[71] The precise contours of what, exactly, equal protection would guarantee beyond the baseline constitutional minimum are contested, and determining those contours would require judgments outside the traditional scope of judicial decisionmaking.[72]

Lastly, a note on the state action doctrine. The state action requirement is ordinarily a threshold equal protection question: no state entity action, no constitutional violation.[73] The state action requirement, however, is incompatible with the duty-to-protect theory of equal protection, both practically and historically. As a historical matter, consider the legislative debates on the Enforcement Act of 1871. There, congressional Republicans discussed the meaning of equal protection and repeatedly referenced state inaction (in enforcing laws) as a denial of equal protection.[74] Additionally, as a practical matter, if the duty to protect means states cannot *deny* protection of the law, then underenforcement — that is, state *in*action — is the crux of the violation.[75]

This Note argues that the duty-to-protect reading of the Equal Protection Clause, at a minimum,[76] requires protection from illegal private violence, especially when that violence (and the state's attendant failure

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[68] *See* Carol S. Steiker, Response, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830 (1994) (citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 813 (1994)).

[69] West, *supra* note 52, at 141.

[70] *Id.* at 145.

[71] Green, *Pre-Enactment History*, *supra* note 55, at 76.

[72] *See* West, *supra* note 52, at 153–54.

[73] United States v. Morrison, 529 U.S. 598, 621 (2000) (reiterating "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action"); *Developments in the Law — State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010).

[74] BARNETT & BERNICK, *supra* note 57, at 336–37.

[75] *See* Green, *Subsequent Interpretation*, *supra* note 63, at 293–94.

[76] This Note does not take a position on whether the duty-to-protect reading excludes other rights conferred by the Equal Protection Clause under anticlassification or antisubordination theories. In accordance with West's interpretation, it treats the duty-to-protect reading as a constitutional minimum. West, *supra* note 52, at 141.

to protect) is systematically directed toward one group.[77] This reading is incompatible with existing constitutional doctrine on the Equal Protection Clause, which is dominated by anticlassification reasoning[78] and bounded by the state action doctrine.[79] But this Note argues that it is nonetheless a valid interpretation that the relevant state actors have a constitutional obligation to act — and identifies prosecutors as the constitutional decisionmakers best equipped to make this interpretation a reality.

### *B. Documenting the State's Failure to Protect*

The state's failure to protect domestic violence survivors is a constitutional violation under the duty-to-protect theory of equal protection. First, when the state fails to adequately enforce laws intended to protect survivors of domestic violence — by failing to impose criminal penalties or not enforcing civil protective orders — the state fails to meet its duty to protect. That state inaction violates the Equal Protection Clause's requirement that the state protect individuals from private violence. Second, the state further violates its equal protection obligations when it then prosecutes domestic violence survivors.[80] Those prosecutions compound, rather than remedy, the state's first constitutional failure — thus constituting another failure to protect.[81] Put another way, if the state is going to act after having already failed in its duty to protect, that action should be corrective.

*1. State Inaction.* — The initial failure to protect begins with criminal law's underenforcement of domestic violence laws, whose shortcomings are well-documented[82] and were the subject of sustained and successful advocacy through the late twentieth century.[83] Those reforms began with taking domestic violence seriously as a public

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[77] *See id.* at 143–44.

[78] *See supra* section I.A.1, pp. 2117–18.

[79] *See supra* p. 2121.

[80] For an overview of how legal-system actors can revictimize women who have experienced domestic violence, see generally Angela de la Garza, *The Re-Victimization of Domestic Violence Victims*, 35 BYU J. PUB. L. 35 (2020).

[81] *Cf.* Deborah Hellman, *Sex, Causation, and Algorithms: How Equal Protection Prohibits Compounding Prior Injustice*, 98 WASH. U. L. REV. 481, 510, 514–19 (2020) (describing moral and constitutional objections to sex classifications that compound prior injustices).

[82] *See* DONNA COKER ET AL., ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 11–29 (2015), https://assets.aclu.org/live/uploads/publications/2015.10.20_report_-_responses_from_the_field_0.pdf [https://perma.cc/UV9Q-GF2E]; Sabrina Talukder & Kierra B. Jones, *Domestic Violence Survivors Need More Options for Accountability as the Supreme Court Prepares to Hear Major Gun Case*, CTR. FOR AM. PROGRESS (Nov. 3, 2023), https://www.americanprogress.org/article/domestic-violence-survivors-need-more-options-for-accountability-as-the-supreme-court-prepares-to-hear-major-gun-case [https://perma.cc/MWT8-9LWR].

[83] *Developments in the Law — Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1499, 1528–29 (1993).

issue warranting legal intervention, not as a private family matter.[84] Hotline and legal advocacy resources improved.[85] Pro-arrest and pro-prosecution policies for domestic violence perpetrators were a key aspect of this change,[86] and domestic violence prosecutions increased significantly — one study showed a 178% increase in criminal domestic violence cases over a decade.[87] Although mandatory arrest and no-drop prosecution policies (requiring continued prosecution even where the alleged victim declines to cooperate) fall short in addressing domestic violence in a number of ways — in no small part because they can be bad for victims[88] — their adoption at the very least shows an *effort* to remedy violence.

The modern criminal legal system fails to protect victims in a host of other ways. Victims are sometimes threatened with or subjected to material witness warrants to compel their testimony against those they have accused of abuse.[89] Others "who do involve law enforcement report having dehumanizing experiences" ranging from "discrimination and biased police misconduct" to "dismissive responses, and the perpetuation of myths about domestic violence."[90] The act of prosecuting an allegedly abusive partner can further perpetuate harm, with prosecutors recreating "the kinds of power and control dynamics" of an abusive relationship.[91] Nor do the laws used to prosecute domestic violence accurately encompass the pernicious nature of abusive power dynamics in a violent intimate relationship: The law focuses on "[e]pisodic physical violence" and ignores the "continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation" that entrench abusive

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[84] Carol Bohmer et al., *Domestic Violence Law Reforms: Reactions from the Trenches*, J. SOCIO. & SOC. WELFARE, Sept. 2002, at 71, 71.

[85] Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide*, 37 LAW & SOC'Y REV. 169, 171 fig.1 (2003).

[86] *See* Linda G. Mills, Commentary, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 557–61 (1999).

[87] SAMANTHA MOORE, CTR. FOR CT. INNOVATION, TWO DECADES OF SPECIALIZED DOMESTIC VIOLENCE COURTS: A REVIEW OF THE LITERATURE 1 (2009), https://www.innovatingjustice.org/sites/default/files/DV_Court_Lit_Review.pdf [https://perma.cc/X2HP-MVLC].

[88] *See* Andrea J. Nichols, *No-Drop Prosecution in Domestic Violence Cases: Survivor-Defined and Social Change Approaches to Victim Advocacy*, 29 J. INTERPERSONAL VIOLENCE 2114, 2116, 2118–19 (2014) (describing how no-drop policies remove control from survivors and can implicate concerns about child custody and economic security); *id.* at 2132 ("For a lot of women they feel like the system is not going to protect them." (quoting Liz, a domestic violence activist)); AYA GRUBER, THE FEMINIST WAR ON CRIME 84 (2020) (describing research on the harms of arrest on domestic violence victims).

[89] Jessica Pishko, *The Defund Movement Aims to Change the Policing and Prosecution of Domestic Violence*, THE APPEAL (July 28, 2020), https://theappeal.org/the-defund-movement-aims-to-change-the-policing-and-prosecution-of-domestic-violence [https://perma.cc/KJ64-BUUG] (describing the use of material witness warrants).

[90] Talukder & Jones, *supra* note 82.

[91] Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 17 (1999).

relationships.[92] That narrow lens means that victims sometimes only testify about physical, not emotional, abuse — and juries thus take victims' accounts less seriously.[93]

The result is a legal system that victims often distrust and refuse to make use of, for good reason. Few survivors report finding the criminal legal system useful in either recovering from crime or connecting them with resources.[94] In the aftermath of invoking the legal system's protection, Black women "routinely are dismissed, devalued and mistreated," and experience hopelessness — results that only underscore how inadequate the current system of enforcement is.[95]

This systemic neglect is not novel: Professor Zanita Fenton has compared law enforcement's refusal to protect women who are victims of domestic violence "to the police's historic refusal to enforce the law to protect Blacks," the very historical context to which the Fourteenth Amendment responded.[96] Today, the state is complicit in creating a social system where violence against victims is normalized and goes unpunished through government negligence.[97] That state neglect particularly disadvantages women of color because, in deciding whether to involve law enforcement, women of color often must choose between overenforcement or no enforcement at all.[98] Often what is most missing from criminal prosecutions is what survivors repeatedly request: a societal belief that what they experienced was real, an end to victim-shaming, and the rehabilitation of and treatment for those who committed abusive acts.[99]

Civil legal remedies, intended as noncriminal alternatives to help survivors, fall short too. Noncriminal alternatives like protective orders can be extraordinarily helpful to those who seek them, both in reducing incidents of abuse and in making the abused partner feel safer.[100] But there is no established constitutional right to enforcement of a civil

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92 Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 964–66 (2004).

93 *Id.* at 983–84, 998.

94 Talukder & Jones, *supra* note 82.

95 Ellen R. Gutowski et al., *Intimate Partner Violence, Legal Systems and Barriers for African American Women*, 38 J. INTERPERSONAL VIOLENCE, at NP1279, NP1289 (2023).

96 Zanita E. Fenton, *State-Enabled Violence: The Story of* Town of Castle Rock v. Gonzales, *in* WOMEN AND THE LAW STORIES 379, 388 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

97 *See id.*

98 *Id.* at 398.

99 *See* All Things Considered, *How Courts Fail Survivors of Domestic Violence*, NPR, at 01:51 (Feb. 25, 2023, 5:41 PM), https://www.npr.org/2023/02/25/1159565360/how-courts-fail-survivors-of-domestic-violence [https://perma.cc/W4V5-2A4D]; ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK 2022: NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE 6 (2022), https://allianceforsafetyandjustice.org/wp-content/uploads/2022/09/Alliance-for-Safety-and-Justice-Crime-Survivors-Speak-September-2022.pdf [https://perma.cc/6ZBV-UFZ6].

100 TK Logan & Robert Walker, *Civil Protective Order Effectiveness: Justice or Just a Piece of Paper?*, 25 VIOLENCE & VICTIMS 332, 342–43 (2010).

restraining order,[101] and equal protection challenges to underenforcement are rarely successful because plaintiffs are not able to establish the requisite intent.[102]

In short, the state fails to protect survivors by not adequately prosecuting abuse, enforcing other legal protections like civil restraining orders, or coming up with meaningful alternatives to these legal remedies. That state inaction constitutes a failure to protect by systematically denying domestic violence victims security from private violence, even when laws on the books prohibit such violence.

*2. State Action.* — That initial constitutional failure to protect is only exacerbated in the case of criminalized survivors. Prosecuting criminalized survivors, rather than protecting survivors from past or future private violence, instead then subjects them to *state*-sanctioned harm. Again, even before a prosecution begins, the state has already neglected its duty to protect. These prosecutions only dig the hole deeper. This section focuses on three specific forms of this equal protection violation: the prosecution of survivors for killing or attempting to kill their partners, the prosecution of survivors for crimes associated with their abuse, and the prosecution of survivors under failure-to-protect laws. It is worth noting that this is not a static area of law: States have adopted new statutes recognizing the links between domestic violence and crime, but these laws fail to adequately address the realities of those connections.[103]

First, survivors can face prosecution for killing, or attempting to kill, their abusive partners. In these cases, mitigating legal doctrines such as self-defense[104] often fall short. Self-defense ordinarily requires defendants to show an imminent or immediate danger of death or other serious harm,[105] but criminalized survivors are often unable to show imminence. In cases like that described in the Introduction,[106] where a survivor shoots her husband while he is sleeping, the ordinary scope of common law or codified self-defense is unavailable because no matter how horrific the abuse or severe the danger, it is not "imminent" within

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101 *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005).

102 *See, e.g.*, Soto v. Flores, 103 F.3d 1056, 1066–72 (1st Cir. 1997); Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1306 (2016).

103 For a thorough overview of the shortcomings of both traditional doctrines and new statutory interventions, see generally Alaina Richert, Note, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 MICH. L. REV. 315 (2021).

104 Self-defense is not the only legal doctrine that has proven itself inadequate for criminalized survivors attempting to defend themselves. Stand-your-ground laws, for example, are also applied in racialized and gendered ways that exclude abuse victims. *See* Elizabeth Flock, Opinion, *Abused Women Are Resorting to Violence to Survive. They Aren't Criminals.*, WASH. POST (Feb. 29, 2024), https://www.washingtonpost.com/opinions/2024/02/29/elizabeth-flock-furies-domestic-violence-self-
defense-law [https://perma.cc/8MWB-NKSW].

105 *See* Fritz Allhoff, *Self-Defense Without Imminence*, 56 AM. CRIM. L. REV. 1527, 1529–31 (2019).

106 *See supra* notes 1–10 and accompanying text.

the legal definition.[107] That legal distinction does not map onto the very real danger that survivors often face at the time they kill abusive partners. A recent study showed that about two-thirds of those incarcerated in women's prisons for the murder or manslaughter of their abusive partners "were in extreme danger of being killed by their partner the year before the offense."[108] Nor is substantive criminal law the only legal inadequacy in these prosecutions. Evidence law, for example, is often applied in ways that undercut survivors' legal cases.[109]

Second, even if survivors did not kill (or attempt to kill) their abusive partners, they are often charged with participating in crimes alongside them.[110] They are charged with crimes they committed to navigate and manage their own victimization.[111] And they are charged with crimes — ranging from substance abuse to petty theft — that are inextricably entangled with and a product of their abuse.[112] In some of these cases, survivors played minor roles in the crime, but still were punished harshly, including being sentenced to die in prison.[113] Six-in-ten women sentenced to life in prison in Michigan, for example, are incarcerated for homicides based solely on a theory of accomplice liability.[114] The same is true for the nearly three-quarters of women incarcerated for felony murder in California who did not kill anyone; "most of [these] women were subjected to intimate partner violence by the actual killers."[115] In other instances, survivors committed crimes because abusive partners told them to, as in the case of many survivors convicted of prostitution or other sex-trafficking crimes.[116]

Third, survivors can be charged with failure to protect children[117] under laws that criminalize caregivers who "know[ of] or suspect[] . . . abuse[] and fail[] to report it."[118] These laws are sometimes implemented unequally — ninety percent of those incarcerated for failure to protect

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107 *See* GOODMARK, *supra* note 21, at 83; Richert, *supra* note 103, at 325.

108 *See* DEBBIE MUKAMAL ET AL., STANFORD CRIM. JUST. CTR., FATAL PERIL: UNHEARD STORIES FROM THE IPV-TO-PRISON PIPELINE 9 (2024), https://law.stanford.edu/wp-content/uploads/2024/08/Fatal-Peril-Final.pdf [https://perma.cc/ZR8S-XWC9].

109 *See id.* at 12. Judges sometimes exclude evidence of a "history of abuse" in these prosecutions — even "evidence of abuse [from] the day of the killing." *Id.*

110 *See* Heffernan, *supra* note 17; GOODMARK, *supra* note 21, at 16.

111 *See* GOODMARK, *supra* note 21, at 80.

112 *See id.* at 17.

113 *See* Heffernan, *supra* note 17 (describing a woman sentenced to life without parole for sitting in car during robbery in which her abusive partner and codefendant killed two men).

114 *See* LORA BEX LEMPERT, WOMEN DOING LIFE 13 (2016).

115 GOODMARK, *supra* note 21, at 77.

116 *See id.* at 80.

117 *See generally* V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996) (describing failure-to-protect doctrines and prosecutions of domestic violence survivors).

118 Amanda Mahoney, Note, *How Failure to Protect Laws Punish the Vulnerable*, 29 HEALTH MATRIX 429, 431 (2019).

in Oklahoma are women, and they are disproportionately Black.[119] Half of those women were experiencing IPV at the time of the crime.[120] That inequality is not just a feature of who is incarcerated; it is reflected in sentences too: In some cases, the women convicted of failure to protect received longer sentences than did those who actually perpetuated the abuse.[121] Eligibility for life sentences is not uncommon.[122] The criminal legal system, which has enforced these laws against survivors even when they were actively taking steps to leave abusive circumstances,[123] thus denies survivors the ability to protect themselves from private violence by extricating themselves from the abuse.

In sum, when prosecuting criminalized survivors — whether for killing their abusive partners, committing other crimes that were a product of abuse, or failing to protect others — the state only aggravates its own failure to protect. The state first fails to protect survivors from private violence.[124] It then weaponizes the machinery of the state against them through prosecution[125] and subjects survivors to a legal system often hostile to their experiences and arguments.[126] And finally, its legal doctrines fail to account adequately for the fact that survivors charged with crimes arising out of their abuse were in danger at the time the crime was committed[127] — and that absent state protection, they did what they felt they had to do to protect themselves. The duty-to-protect reading of the Fourteenth Amendment identifies this failure as a constitutional violation in need of redress. Part II explains why prosecutors are best positioned to remedy that violation, and Part III spells out the nuts and bolts of a solution.

## II. DEFINING PROSECUTORS' CONSTITUTIONAL ROLE

The legislative, executive, and judicial branches all have a role to play in remedying the criminal legal system's constitutional shortcomings. These roles apply with equal force to survivors' criminal cases, which are often the product of the state defaulting on its obligation to protect on multiple occasions. This Part argues that prosecutors,

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119 Samantha Michaels, *She Never Hurt Her Kids. So Why Is a Mother Serving More Time than the Man Who Abused Her Daughter?*, MOTHER JONES (Aug. 9, 2022), https://www.motherjones.com/criminal-justice/2022/08/failure-to-protect-domestic-abuse-child-oklahoma-women-inequality-prison [https://perma.cc/9W8R-7J5E].

120 *Id.*

121 *Id.*

122 *Id.*

123 *See* Enos, *supra* note 117, at 240–43.

124 *See supra* section I.B.1, pp. 2122–25.

125 *See* GOODMARK, *supra* note 21, at 58–62 (detailing various motivations and mechanisms for prosecuting survivors); *cf.* MUKAMAL ET AL., *supra* note 108, at 91 (describing how abusive partners threaten to use legal system as weapon against survivors).

126 *See* MUKAMAL ET AL., *supra* note 108, at 135–39.

127 *Id.* at 9.

including prosecuting offices and individual line prosecutors,[128] can and should play a critical role in enforcing equal protection values when making independent constitutional judgments about their cases.[129] It argues for a form of "soft departmentalism"[130] by which prosecutors interpret and enact a duty to protect rooted in equal protection in their own decisionmaking process.

Modern doctrines like the tiers of scrutiny are *judicial* tools for implementing the Fourteenth Amendment's requirements.[131] But the Fourteenth Amendment applies with equal force to all branches of government.[132] Enforcing laws, in particular, requires some degree of constitutional interpretation when deciding how and in what circumstances to enforce a law that poses a constitutional question.[133] In many instances, that exercise of independent constitutional judgment is final and unreviewable.[134] For example, state prosecutors sometimes decide not to pursue the death penalty in a particular instance because doing so might violate the Eighth Amendment[135] or decline to enforce state

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[128] Line prosecutors are the prosecutors who manage individual cases, often exercise prosecutorial discretion, and are overseen by lead prosecutors. *See The Role of the Prosecutor*, VERA INST. OF JUST.: UNLOCKING THE BLACK BOX OF PROSECUTION, https://www.vera.org/unlocking-the-black-box-of-prosecution/for-community-members [https://perma.cc/M2DQ-7TRW].

[129] This argument applies with equal force to both state and federal prosecutors, although, given that the vast majority of criminal cases are heard in state courts, it is directed primarily at state prosecutors. *Compare* MORGAN MOFFETT ET AL., CT. STATS. PROJECT, 2022 CASELOAD HIGHLIGHTS: INCOMING STATE TRIAL COURT CASES 4 (2024), https://www.courtstatistics.org/__data/assets/pdf_file/0026/97514/2022-Caseload-Highlights-Trial.pdf [https://perma.cc/XS4J-XLTG] (identifying 2.9 million felony cases and 13.7 million overall criminal cases reported in state courts in 2022), *with Federal Judicial Caseload Statistics 2022*, U.S. CTS., https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2022 [https://perma.cc/QU86-7C8L] (identifying roughly 71,111 criminal defendant filings in U.S. federal district courts in 2022).

[130] Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 267 (2017) (noting that prosecutors could "expand constitutional protections . . . simply because they disagree with judicial doctrine," thus "engag[ing] in a kind of soft departmentalism").

[131] *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 42 (2001) (noting constitutional doctrine, including equal protection doctrine, "arises partly from uncertainty about which values the Constitution encompasses and about how protected values should be specified"); *see also* Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1732 (2017) (describing how equal protection's tiers of scrutiny "are not, themselves, encoded into the Constitution, of course; they are used by judges as a means of giving effect to the Constitution with some level of stability, uniformity, and predictability").

[132] *See* U.S. CONST. amend. XIV, § 1; *see also* The Civil Rights Cases, 109 U.S. 3, 58 (1883) (Harlan, J., dissenting) ("The constitutional provision, therefore, must mean that *no agency of the State*, or of *the officers or agents by whom its powers are exerted*, shall deny to any person within its jurisdiction the equal protection of the laws." (emphasis added) (quoting *Ex parte* Virginia, 100 U.S. 339, 347 (1880))); FALLON, *supra* note 131, at 5 ("[T]he Constitution does not speak exclusively, nor always primarily, to the courts.").

[133] *See* David W. Tyler, Note, *Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy*, 50 WM. & MARY L. REV. 2215, 2246–47 (2009).

[134] *See* Fish, *supra* note 130, at 259–64.

[135] Mark A. Graber, *Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice*, 58 WM. & MARY L. REV. 1549, 1579 (2017).

policies that, in their independent judgment, violate other constitutional mandates, like the Supremacy Clause.[136] These decisions are not just preliminary adjudications of constitutional questions; they are often the last word on the matter.[137]

And considering the Fourteenth Amendment's mandate as one applicable to all state actors has major benefits: It offers an opportunity to broaden the scope of constitutional obligations and reshape them to be more responsive to and, potentially, more historically accurate regarding what the amendment's language requires.[138] Prosecutors, like other executive officials, are institutionally positioned to enforce the Constitution in a different way.[139] They can be more flexible, experimental, and individualized in their interpretations.[140] And, unlike some others in the executive branch, prosecutors are not ordinarily confined to acting ex post.[141] In certain cases, they are positioned to take constitutional positions that are quite different from those that the courts have adopted.[142]

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[136] *See, e.g.*, @DATravisCounty, X (Jan. 13, 2022, 6:06 PM), https://x.com/DATravisCounty/status/1481764496066715653 [https://perma.cc/8GFA-WRTD]; *Travis Co. District Judge Sides with Man Arrested Under Operation Lone Star*, CBS AUSTIN (Jan. 14, 2022, 11:15 AM), https://cbsaustin.com/news/local/travis-co-district-judge-sides-with-man-arrested-under-operation-lone-star [https://perma.cc/LU3B-N8R5] (describing the Travis County District Attorney's Office's decision not to prosecute undocumented migrant for criminal trespass under Texas state law because that prosecution would violate the Supremacy Clause).

[137] *See* Graber, *supra* note 135, at 1583 ("The Supreme Court does not correct . . . prosecutors . . . who interpret their powers more narrowly or individual rights more broadly than warranted by existing precedent.").

[138] *See* Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 51–52 (1990).

[139] *See* Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1594–96 (2014) (arguing that prosecutors should not introduce evidence that was obtained in violation of the Fourth Amendment, even when that evidence would otherwise be judicially admissible, to improve policing and enhance overall legitimacy of criminal legal system); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 679 (2005) (arguing that the executive branch has "distinctive institutional capacities" including "ability to investigate facts and take positive action" that enable it to develop "a constitutionalism that differs substantially from what the courts devise").

[140] *See* Fish, *supra* note 130, at 252.

[141] For comparison, governors and other members of the executive branch vested with pardon or commutation powers are often limited to acting after conviction. *See* N.Y. UNIV. L. SCH., REPRIEVE POWER, https://www.law.nyu.edu/sites/default/files/Reprieve%20Power%20%28to%20post%29%20.pdf [https://perma.cc/CS23-3W2E] (documenting pardon, commutation, and reprieve power across fifty states and how that power is limited to after conviction in at least two dozen).

[142] *See* Pillard, *supra* note 139, at 693 (describing how an extremely high bar for "selective prosecution" claims "can comfortably coexist with an equal protection obligation *within* the executive to analyze its own prosecutorial practices to redress racial disparities" because of "relative institutional competence"). To again analogize to the death penalty context, in 2014 Maryland's Attorney General, Douglas F. Gansler, announced that the state lacked the legal authority to keep men on death row after the state prospectively eliminated the death penalty. *See* John Wagner, *Maryland Has No Authority to Execute its Death-Row Inmates, Attorney General Says*, WASH. POST (Nov. 6, 2014), https://www.washingtonpost.com/local/md-politics/maryland-has-no-authority-to-execute-its-death-row-inmates-attorney-general-says/2014/11/06/878427f2-65e3-11e4-9fdc-d43b053ecb4d_story.html [https://perma.cc/2JGE-R4EZ]. That statewide decision represented independent judgment on the constitutionality of a prosecutorial decision. *See id.*

In many circumstances, they are the only legal actor with the authority and ability to do so. Mandatory minimums confine judges' discretion; mandatory arrest statutes can do the same for police.[143] Prosecutors, in contrast, retain immense power and discretion with little oversight and hazy constitutional limits.[144] In effect, they "are the criminal justice system's real lawmakers."[145]

For all these reasons, prosecutors and prosecuting offices are better positioned today to revitalize the duty-to-protect reading of equal protection than the courts.[146] Yet prosecutorial decisionmaking today is often not guided by constitutional norms. Prosecutors can and do disregard constitutional rights.[147] That disregard may be traceable, in part, to the inherent tension between prosecutors' established power to exercise lenience and the expectation that they will treat cases and defendants equally.[148] From a more practical standpoint, the intense structural incentives to win and close cases do not incentivize strict adherence to established constitutional rights,[149] let alone seeking out and implementing novel equal protection arguments.

Nonetheless, prosecutors can and should take up the mantle of enforcing a duty-to-protect reading of the Fourteenth Amendment in criminalized survivor prosecutions as part of — not in opposition to — their responsibility to do justice. Equal protection norms can help rationalize and systematize an understanding of when prosecutors can and should take actions like dismissing cases, or not filing charges in cases involving criminalized survivors.[150] Though other entities could play a role in enforcing a duty-to-protect reading, a court's decision to embrace a vision of equal protection (such as a duty to protect) that is out of step with decades of Supreme Court doctrine would be almost

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143 *See* Jeffrey Bellin, *Principles of Prosecutor Lenience*, 102 TEX. L. REV. 1541, 1548 (2024).

144 *See* Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978); David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 453–56, 459–60 (2018).

145 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001).

146 *See* Fish, *supra* note 130, at 252.

147 *See* Sklansky, *supra* note 144, at 456–58. *See generally* Ken White, *Confessions of an Ex-Prosecutor*, REASON (June 23, 2016, 10:00 AM), https://reason.com/2016/06/23/confessions-of-an-ex-prosecutor [https://perma.cc/X8VU-ESTS] (describing how the culture of prosecutors' offices and the criminal legal system systematically "make prosecutors hostile to [defendants'] rights").

148 *See* Bellin, *supra* note 143, at 1557.

149 *See* White, *supra* note 147; Paul Butler, *The Prosecutor Problem*, BRENNAN CTR. FOR JUST. (Aug. 23, 2021), https://www.brennancenter.org/our-work/analysis-opinion/prosecutor-problem [https://perma.cc/8QCJ-ZZFL].

150 For an example of a prosecuting office dismissing charges against a survivor, see Victoria Law, *A Judge Dismisses the Murder Charge Against a Domestic Violence Survivor*, THE NATION (Dec. 2, 2022), https://www.thenation.com/article/society/murder-charge-dismissed-tracy-mccarter/ [https://perma.cc/4LNN-BMM7].

unthinkable.[151] But a prosecutor's individual decision to decline to move forward with a case on a novel constitutional theory still seems plausible.[152]

## III. IMPLEMENTING EQUAL PROTECTION FOR CRIMINALIZED SURVIVORS

The County Attorney who prosecuted Lavetta Langdon chose to charge her with first-degree murder and another felony.[153] He opposed setting bond, even while admitting she may not have been "a flight risk or danger to the community."[154] And he declined to give legal significance to her abuse, stating in court that "[t]here is no way under Nebraska law that this [is] a legal defense nor does it excuse or explain her conduct."[155] In doing so, he perhaps unwittingly identified the injustice in her case: that the legal system does not adequately account for the abuse that criminalized survivors experience. This Part focuses on one key aspect of criminalized survivor prosecutions: the charging decisions made by prosecutors at the outset of a case. It argues that the duty-to-protect theory of equal protection implicates prosecutors as constitutional decisionmakers who could remedy that injustice.

Prosecutors make charging decisions to commence "formal criminal proceedings."[156] That decision — whether to charge in the first place (and which charges to file) — is enormously influential to the outcome of a criminal case, especially because the vast majority of criminal cases in federal court and in many states resolve in pleas.[157] Charging decisions are also usually entirely discretionary and almost never subject to judicial review.[158] Finally, charging decisions can interact with

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151 *See* Tuerkheimer, *supra* note 102, at 1304–05 (discussing the Supreme Court's current approach to equal protection).

152 Nonenforcement decisions are not unprecedented in prosecuting offices. Elected prosecutors in jurisdictions ranging from Virginia to Los Angeles have categorically declined to prosecute certain offenses or to seek sentencing enhancements. *See* Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391, 398–410 (2022).

153 Complaint at 1, State v. Langdon, No. CR20-312 (Red Willow Cnty. Ct. 2021).

154 *See Bond Set at $5M for Elderly Woman Accused of Murder*, MCCOOK GAZETTE (Aug. 28, 2020), https://www.mccookgazette.com/story/2831474.html [https://perma.cc/XN8C-2DMX].

155 Burke & Gray News Staff, *supra* note 6.

156 *See, e.g.*, AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-4.2 (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function [https://perma.cc/79PF-VUWC].

157 Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, A New Report Finds*, NPR (Feb. 22, 2023, 5:00 AM), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice [https://perma.cc/8SK6-ZMZ7]; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUD. 459, 512 tbl.7 (2004).

158 *See* Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1260 (2011). *See generally* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973) (rejecting putative class action lawsuit seeking to compel prosecution).

mandatory minimums to exacerbate injustice, enabling prosecutors to eliminate judicial discretion even where judges might otherwise be inclined to give it.[159]

Prosecutors' considerations in making those decisions range from the formal requirements of reasonable belief in probable cause[160] and sufficient admissible evidence to obtain a conviction[161] to more indefinite requirements like whether prosecution is in the relevant public interest.[162] In practice, legal and extralegal factors such as resources, individual conceptions of justice, and even defendants' demeanors can affect charging decisions.[163] For example, in cases involving survivors as defendants, a prosecutor making a charging decision is often evaluating what degree of murder to charge, or whether to charge murder at all.[164] In more minor cases, such as drug possession or theft, prosecutors decide what charges, if any, are appropriate and whether to offer more informal resolutions, like pretrial probation or adjudication in drug court.[165]

Like all other actors in the criminal legal system, prosecutors are bound by the Fourteenth Amendment and cannot selectively prosecute in violation of the Equal Protection Clause.[166] But existing selective prosecution doctrine places the burden on the defendants, who "must prove discriminatory purpose" — a bar that is "virtually impossible" to meet.[167] However, under a duty-to-protect theory of the clause,

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159 *See* GOODMARK, *supra* note 21, at 100.

160 *See* AM. BAR ASS'N, *supra* note 156, at 3-4.3; U.S. Dep't of Just., Just. Manual § 9-27.200 (2024).

161 *See* AM. BAR ASS'N, *supra* note 156, at 3-4.3; U.S. Dep't of Just., *supra* note 160, § 9-27.220.

162 *See* AM. BAR ASS'N, *supra* note 156, at 3-4.3; U.S. Dep't of Just., *supra* note 160, § 9-27.230.

163 *See* BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUST., THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING 3–4 (2012), https://www.ojp.gov/pdffiles1/nij/grants/240335.pdf [https://perma.cc/3FCG-GFCM].

164 *See, e.g.*, Maria Papadopoulos, *"Self Defense": New Hampshire Woman Legally Justified When She Stabbed Her Husband to Death, AG Says*, BOS. 25 NEWS (Feb. 1, 2024, 3:43 PM), https://www.boston25news.com/news/local/self-defense-new-hampshire-woman-legally-justified-when-she-stabbed-her-husband-death-ag-says/FP23EOTQTVHODDPDWCVJMFY6J4 [https://perma.cc/5HST-AVGR].

165 *See, e.g.*, PATRICK GRIFFIN & DAVID OLSON, LOY. CHI. CTR. FOR CRIM. JUST., EVALUATING A PROSECUTOR-LED PRETRIAL DIVERSION PROGRAM IN WINNEBAGO COUNTY: INTERIM REPORT (2024), https://loyolaccj.org/blog/evaluating-a-prosecutor-led-pretrial-diversion-program-in-winnebago-county-interim-report [https://perma.cc/5KA5-S6UX]; MELISSA LABRIOLA ET AL., PROSECUTOR-LED PRETRIAL DIVERSION: CASE STUDIES IN ELEVEN JURISDICTIONS, at vi (2018), www.innovatingjustice.org/wp-content/uploads/2017/10/pretrial_diversion_case_study_report_final_provrel.pdf [https://perma.cc/TYX9-E8NR] (describing studies of diversion programs run by prosecutors' offices).

166 *See* United States v. Armstrong, 517 U.S. 456, 464–65 (1996) ("A defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886))).

167 *See* Guy Rubinstein, *Selective Prosecution, Selective Enforcement, and Remedial Vagueness*, 2022 WIS. L. REV. 825, 831–32.

discriminatory purpose is not at the crux of the doctrine. Instead, prosecutors simply must not prosecute cases where that prosecution is (or compounds) a denial of equal protection, specifically by failing to meet their duty to protect.

Implementing this duty to protect begins with prosecutors incorporating it as a norm into their decisionmaking. Prosecutors can and should consider their constitutional protection obligations when making charging decisions involving criminalized survivors. Prosecuting offices navigate two interrelated dilemmas. First, the individual: Should this potential defendant be charged? Second, the systemic: Should these types of cases be prosecuted? Similar considerations are relevant to both determinations.

When facing an individual survivor being charged with a crime relating to or arising out of abuse, prosecutors should first consider the extent to which the state failed to protect in that instance. For example, if the survivor had taken out an order of protection against an abusive partner,[168] had previously and repeatedly called the police and attempted to invoke the legal system as protection against the violence,[169] or simply was subject to the types of repeated illegal private violence that the legal system is supposed to mitigate, those considerations should militate against charging that survivor or warrant pursuing less punitive alternatives. In doing so, prosecuting offices would effectively incorporate the type of evidence at the front end that might later be relevant at sentencing or resentencing[170] in order to avoid the victimization of subjecting a survivor to the criminal legal system at all.

Prosecuting offices should likewise systemically reevaluate their practices of prosecuting survivors of domestic violence for crimes arising out of or related to abuse to prevent compounding the harm perpetrated by the legal system. This reevaluation might involve prosecuting offices conducting mandatory research and disclosure of the percentage of defendants who are survivors of domestic violence,[171] who committed crimes alongside or involving someone they allege[172] was abusive,[173] and a disclosure of what sentences were asked for and handed down in those cases. Prosecutors could enact office-wide policies intended to decarcerate survivors, such as defaulting to charging manslaughter

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168 *See, e.g.*, MUKAMAL ET AL., *supra* note 108, at 88 (describing how a restraining order was inadequate protection for one survivor-defendant).

169 *See, e.g.*, *id.* at 87 (describing how multiple survivor-defendants had previously called the police).

170 *See, e.g.*, N.Y. PENAL LAW § 60.12 (sentencing in domestic violence cases); N.Y. CRIM. PROC. LAW § 440.47 (resentencing in domestic violence cases).

171 *See* Richert, *supra* note 103, at 321.

172 The quantum of proof required is beyond the scope of this Note, though any rules should avoid discrediting survivors' narratives in ways that perpetuate disbelief based on bias. *See* Elizabeth Langston Isaacs, *The Mythology of the Three Liars and the Criminalization of Survival*, 42 YALE L. & POL'Y REV. 427, 435–36 (2024).

173 *See* Heffernan, *supra* note 17.

rather than murder for those who kill abusive partners and offering charges that do not carry mandatory minimums so that individuals can receive probation or other noncarceral sentences whenever possible.[174] For survivors who were prosecuted and incarcerated in the past, prosecuting offices can remedy excessively punitive charging decisions by supporting parole or cooperating on postconviction relief for those individuals.[175] Each of these policies might already operate in some offices as informal or formal practices.[176] But under the duty-to-protect theory of equal protection, prosecutors should see these policies not just as best practices but also as constitutionally directed and legitimated.

## CONCLUSION

As equality has come to subsume equal protection doctrine, protection has receded — to the detriment of many groups consistently denied the protection of the laws. The duty-to-protect reading accords with the history and purpose of the Fourteenth Amendment and offers a powerful antidote to the modern, anticlassification model of the Fourteenth Amendment. Nonetheless, that doctrine and its attendant requirements are now ossified into tiers of scrutiny that govern judicial review of state action.

But constitutional obligations do not and should not only bind state actors reviewing legislative and executive actions ex post. When it comes to equal protection in the criminal legal system, the primary constitutional decisionmakers are prosecutors. Too often, criminalized survivors have already been deprived of state protection from private violence — often in stark and heartbreaking fashions. Unenforced restraining orders, underutilized resources, dismissal and mistreatment from police and prosecutors in the past — these practices and more reflect not just a neglect, but a constitutional neglect. By taking this reading of the Equal Protection Clause seriously, the power brokers of the criminal legal system have an opportunity to enact their own constitutional remedies.

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[174] *See, e.g.*, PHILA. OFF. OF THE DIST. ATT'Y, PHILADELPHIA DAO NEW POLICIES (2018), https://phillyda.org/wp-content/uploads/2022/04/DAO-New-Policies-2.15.2018-UPDATED.pdf [https://perma.cc/7KUR-E2TG] (giving example of what office-wide nonprosecution or reduced prosecution policies can look like).

[175] *See* Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 176–83 (2005) (describing various roles that prosecutors can play in supporting defendants' postconviction relief).

[176] *Cf.* Law, *supra* note 150 (describing one such case being dropped at the request of prosecutor).