

UNTESTED AND NEGLECTED: CLARIFYING THE COMPARATOR REQUIREMENT IN EQUAL PROTECTION CLAIMS BASED ON UNTESTED RAPE KITS

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ABSTRACT—Rape kits are important tools used to store the evidence that is collected from a victim’s body and clothing following a sexual assault. Although the DNA evidence stored in rape kits is crucial to rape investigations, police departments throughout the country have routinely failed to test rape kits. This remains true despite the national funding allocated specifically for rape kit testing. This widespread neglect hinders justice and renders community members unprotected from sexual violence. The national rape kit backlog has sparked legal challenges; six lawsuits have been filed against police departments for systematically refusing to test rape kits, alleging equal protection violations based on gender under 42 U.S.C. § 1983. This Note discusses the two lawsuits that have reached the circuit court level. These two suits illustrate the difficulty in establishing discriminatory intent—a necessary component of an equal protection claim. Ultimately, this Note argues that courts should recognize police refusal to test rape kits as a violation of the Equal Protection Clause of the Fourteenth Amendment and should not require plaintiffs to plead a specific comparator to establish discriminatory intent.

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INTRODUCTION

In police-department warehouses across the country, thousands of small cardboard boxes are stacked haphazardly on shelves from floor to ceiling, collecting dust.¹ Rows and rows of boxes—“[ten] inches tall and a foot wide”—are tucked away, unopened and unexamined.² Some have not been touched for more than thirty years.³ These are not boxes storing evidence from solved cases—these are “rape kits,” the colloquial name for the box containing the physical evidence that is collected after someone reports a sexual assault, that have *never* been tested.⁴ For many victims of rape, these boxes contain the only hope of ever identifying their assailant and obtaining justice.⁵ Although they may be small, their importance cannot be overstated—rape kits contain crucial forensic evidence often necessary to solve sexual assault investigations.⁶ Yet instead of being sent to laboratories,

¹ See, e.g., Barbara Bradley Hagerty, *An Epidemic of Disbelief*, ATLANTIC, Aug. 2019, at 74 (describing a warehouse in Detroit with untested rape kits).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See *infra* Section I.A.

⁶ Stephanie Fulton, Note, *The Rape Kit Backlog: The Continuous Hampering of Society’s Protection and Liberty Interests*, 40 WOMEN’S RTS. L. REP. 43, 45 (2018).

this evidence degrades in hot and musty warehouses—untested and neglected.⁷

The criminal justice system and our society at large are currently grappling with how to effectively handle claims of rape and sexual assault. Rape is one of the most underreported crimes in the United States.⁸ Even when the odds are defied and rape is reported, victims are often disbelieved and no criminal charges materialize.⁹ This remains true even when potentially corroborating physical evidence is present.¹⁰ In the last few years, reports have surfaced that a multitude of police departments across the country have neglected to test rape kits for DNA evidence.¹¹ As this issue has gained widespread attention, victims have started suing the cities responsible.¹²

Lawsuits have been filed over police departments' systematic failure to test rape kits in six cities: San Francisco, Memphis, Houston, Austin, Baltimore, and the Village of Robbins, Illinois.¹³ The plaintiffs in these cases allege violations under the Equal Protection Clause of the Fourteenth Amendment.¹⁴ The plaintiffs argue that police departments routinely

⁷ Hagerty, *supra* note 1, at 74.

⁸ *The Criminal Justice System: Statistics*, RAINN (2019), <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/D5JZ-54BV>] (noting that about three out of four sexual assaults go unreported); *see also* LYNN LANGTON, MARCUS BERZOFKY, CHRISTOPHER KREBS & HOPE SMILEY-MCDONALD, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010, at 4 (2012), <https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf> [<https://perma.cc/YVK9-NCUD>] (stating that 65% of rapes and sexual assaults went unreported in the specified time period in comparison with 56% of simple assaults, 44% of aggravated assaults, and 41% of robberies). The percentage of victims of violent crimes that did not report because they “believed the police would not or could not do anything to help doubled from 10% in 1994 to 20% in 2010.” *Id.* at 1. Victims listed police bias and police not thinking that “the crime was important enough to address” as reasons to not report. *Id.* at 3.

⁹ *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017) (arguing that victims who report rape suffer from a “credibility discount” in which police officers, prosecutors, juries, and judges disbelieve victims due to prejudice and thus fail to pursue charges); Hagerty, *supra* note 1, at 74.

¹⁰ *See* Tuerkheimer, *supra* note 9, at 33–35.

¹¹ *See* Hagerty, *supra* note 1, at 79.

¹² *See infra* notes 34–36 and accompanying text for an explanation of this Note’s focus on women. *See* Hagerty, *supra* note 1, at 84 (describing civil lawsuits by sexual assault victims after police or prosecutors refused to investigate or charge their claims).

¹³ *Beckwith v. City of Houston*, 790 F. App’x 568, 570–71 (5th Cir. 2019); *Doe v. City of Memphis*, 928 F.3d 481, 485 (6th Cir. 2019); *Marlowe v. City of San Francisco*, 753 F. App’x 479, 479 (9th Cir. 2019); *Borkowski v. Baltimore County*, 414 F. Supp. 3d 788, 797 (D. Md. 2019); Complaint at 1–2, *Smith v. City of Austin*, No. 18-CV-00505-LY (W.D. Tex. June 18, 2018) [hereinafter *Smith* Complaint]; Complaint at 10, *Doe v. Village of Robbins*, No. 17-CV-00353 (N.D. Ill. Jan. 17, 2017) [hereinafter *Village of Robbins* Complaint].

¹⁴ Sources cited *supra* note 13.

discriminate against victims of rape—who are overwhelmingly female—by deprioritizing proper testing and investigation of cases, thus denying them equal protection of the law based on their gender.¹⁵ Two of these suits have led to disparate results in the Sixth and Ninth Circuits. Though the plaintiffs in the two cases pled very similar claims, the Sixth Circuit permitted the case to move into discovery¹⁶ while the Ninth Circuit dismissed the case.¹⁷ The difference in outcomes reflects confusion in the lower courts as to what evidence plaintiffs must produce in order to establish discriminatory intent. The Supreme Court recently denied a writ of certiorari to resolve the discord and clarify the standard for plaintiffs in similar cases.¹⁸ However, the issue of untested rape kits is ubiquitous; hundreds of thousands of untested kits have been found in cities across the country.¹⁹ Thus, despite the denial of certiorari, more lawsuits will likely arise as this issue continues to gain attention. This Note argues that the Supreme Court should accept certiorari on a future case in order to set a standard that prevents unequal access to justice.

This Note builds on prior scholarship regarding the Equal Protection Clause and its potential to be an effective tool for victims who are denied police protections to seek redress. Professor Deborah Tuerkheimer has argued that the 39th Congress—the Congress that embedded the Equal Protection Clause within the Fourteenth Amendment—was centrally concerned with the Clause protecting citizens from violence through providing equal access to police protections.²⁰ She describes how the Supreme Court has moved away from this original “protection model” towards an “anti-classification approach”—one that focuses equal protection

¹⁵ Sources cited *supra* note 13.

¹⁶ *City of Memphis*, 928 F.3d at 485.

¹⁷ *Marlowe v. City of San Francisco*, 753 F. App'x 479, 479 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 244 (2019).

¹⁸ *Marlowe*, 140 S. Ct. at 244; Nicholas Iovino, *Supreme Court Asked to Revive Lawsuit over Rape-Kit Backlog*, COURTHOUSE NEWS SERV. (July 31, 2019), <https://www.courthousenews.com/supreme-court-asked-to-revive-lawsuit-over-rape-kit-backlog> [<https://perma.cc/VH4G-SQBS>].

¹⁹ See *Where the Backlog Exists and What's Happening to End It*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/where-backlog-exists-and-whats-happening-end-it> [<https://perma.cc/2LRK-N4V9>]; Meaghan Ybos, *No Backlog: Why the Epidemic of Untested Rape Kits Is Not a Symbol of Insufficient Police Budgets but Instead a Failure to Investigate Rape*, APPEAL (Oct. 11, 2017), <https://theappeal.org/no-backlog-why-the-epidemic-of-untested-rape-kits-is-not-a-symbol-of-insufficient-police-budgets-but-instead-a-failure-to-investigate-rape> [<https://perma.cc/HQ3Y-TV4K>].

²⁰ See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1299–1301 (2016) (noting that “equal protection ‘at its core affirms the rights of victims to be equally protected by government from criminals’” (quoting Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 102 (2000))).

doctrine on prohibiting legislative and administrative discrimination.²¹ The Court’s anticlassification model requires showing the intent to discriminate, which she claims is often an “insurmountable barrier” when it comes to police bias.²² Despite this obstacle, Professor Tuerkheimer illustrates that since 2009, the Justice Department has been investigating and intervening when police departments systemically fail to address gender violence, specifically labeling this failure as a violation of the Equal Protection Clause.²³ Professor Tuerkheimer is cautiously optimistic that this could signal a reemergence of the “protection model” in Supreme Court jurisprudence.²⁴ In a later article, Professor Tuerkheimer posited that Heather Marlowe’s case in the Ninth Circuit, discussed at length later in this Note, could foreshadow a new “model for future Equal Protection litigation.”²⁵

This Note expands on Professor Tuerkheimer’s conception for future litigation by exposing the central obstacle to establishing discriminatory intent in equal protection claims based on police failure to test rape kits: the role of comparators. In discrimination jurisprudence, comparators are individuals who are similar to the plaintiff in all respects except they are not members of the plaintiff’s protected class.²⁶ Thus, disparate treatment between the plaintiff and comparator evinces discriminatory intent.²⁷ While comparators can provide useful evidence of discrimination, courts increasingly rely on them as the sole means of establishing discriminatory intent, often to the detriment of litigants.²⁸

Notwithstanding discriminatory intent, the elements of a successful equal protection claim are present in this type of litigation. Supreme Court precedent establishes that police withholding protective services is sufficient

²¹ *Id.* at 1303–04.

²² *Id.* at 1306. Milli Kanani Hansen has similarly argued that an equal protection claim based on the failure to test rape kits is unlikely to be successful given the high bar to show intent to discriminate. Milli Kanani Hansen, Note, *Testing Justice: Prospects for Constitutional Claims by Victims Whose Rape Kits Remain Untested*, 42 COLUM. HUM. RTS. L. REV. 943, 983–85 (2011).

²³ Tuerkheimer, *supra* note 20, at 1310–34.

²⁴ *Id.* at 1334–35.

²⁵ Tuerkheimer, *supra* note 9, at 53.

²⁶ Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011). For example, a Black job applicant seeking to bring a discrimination claim would likely rely on white applicants with the same qualifications as her comparator. The comparator would differ from the plaintiff only in race, thus allowing a judge or jury to infer race-based discrimination based on disparate treatment.

²⁷ *See id.*

²⁸ *See generally id.* (discussing why courts rely on comparators to establish discriminatory intent and the shortfalls of this approach); *see also infra* Section II.A (providing more information on comparators).

to constitute a custom or practice under § 1983 litigation.²⁹ Despite the lack of precedent on this exact issue, the refusal to test rape kits would likely not survive intermediate scrutiny based on gender.³⁰ Therefore, the biggest barrier to successful equal protection claims of this nature is requiring comparator evidence to show discriminatory intent.³¹ Although still a requirement in the Ninth Circuit, the Sixth Circuit allows plaintiffs to proceed on their claims without pleading specific facts pertaining to comparators.³² This Note expands upon prior scholarship to argue that courts can uphold the core tenets of equal protection while maintaining its current framework by allowing discriminatory intent to be shown without comparators. This Note posits that while comparators may be sufficient to show discrimination, they should not be required.

This Note proceeds in three parts. Part I documents the widespread refusal by police to investigate rape complaints, as evidenced by warehouses full of untested rape kits. After demonstrating the importance of rape kits, it explores the prevailing theory that police bias causes officers to disbelieve reports of rape at disproportionately high levels and thus prematurely end investigations before rape kits are tested. Part II provides an overview of gender-based equal protection doctrine. It then introduces two circuit cases that have addressed municipalities' failure to test rape kits, resulting in different pleading standards. Part III analyzes the disparities between the Sixth and Ninth Circuits' approaches. Then, it proposes a path forward for successful equal protection claims based on police failure to test rape kits. By exploring this underdeveloped area of equal protection law, this Note ultimately argues that systematically refusing to test rape kits for potentially inculpatory evidence violates the Equal Protection Clause of the Fourteenth Amendment.

²⁹ See *infra* Section III.B (explaining that denial of police protective services based on a protected trait violates the Equal Protection Clause).

³⁰ See *infra* Section III.C (explaining that intermediate scrutiny is the constitutional standard for gender-discrimination cases).

³¹ See Goldberg, *supra* note 26, at 751 (explaining that the comparator requirement is an obstacle to discrimination claims “both practically and conceptually”).

³² Compare *Doe v. City of Memphis*, 928 F.3d 481, 494, 496 (6th Cir. 2019) (allowing plaintiffs to reach discovery), with *Marlowe v. City of San Francisco*, 753 F. App'x 479, 479–80 (9th Cir. 2019) (affirming dismissal for failure to state a claim).

I. WHAT HAPPENS AFTER A RAPE REPORT

Every seventy-three seconds someone is sexually assaulted in the United States.³³ “[One] out of every [six] American women has been the victim of an attempted or completed rape in her lifetime.”³⁴ Despite these sobering statistics, less than 0.5% of rapes will make it through the criminal justice system to conviction.³⁵ One of the goals of the criminal justice system is to protect victims of crimes; however, more often than not the system subjects rape victims to institutionalized sexism, beginning with their treatment by the police and continuing throughout the legal process.³⁶ One palpable example of this ongoing injustice is the failure of police officers to test rape kits.³⁷ This Part begins by defining the concept of a rape kit and detailing its importance to police investigations of rape. It then describes the pervasive police bias against victims of sexual assault and the resulting failure to investigate reports and test rape kits for evidence. Lastly, it argues that this failure constitutes a threat to public safety and the credibility of the criminal justice system.

A. *The Importance of Rape Kits*

Rape kits contain not only vital evidence for police investigations but also the opportunity to obtain justice for victims. “Rape kit” is the common term for the box of evidence that is collected during a forensic sexual assault

³³ *Statistics*, RAINN, <https://www.rainn.org/statistics> [<https://perma.cc/GM7L-X4MQ>]. Due to the nature of quoting statistics or other materials that use the terms “rape” and “sexual assault” interchangeably, rape and sexual assault are also used interchangeably throughout this Note.

³⁴ *See Scope of the Problem: Statistics*, RAINN, <https://www.rainn.org/statistics/scope-problem> [<https://perma.cc/KS8U-628Z>]; MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2010), https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf [<https://perma.cc/CV2M-ZUQB>] (finding that 18.3% of women reported being raped at some point in their lifetime). Although men, of course, are also raped (1.4% of men reported being raped at some point their lifetime), the focus of this Note is an equal protection violation based on gender. *Id.* Therefore, this discussion focuses on the impact of this violation on women and generally uses female pronouns when discussing victims of rape.

³⁵ *The Criminal Justice System: Statistics*, *supra* note 8.

³⁶ *See* LaVerne McQuiller Williams, *Women, Crime, and Criminal Justice*, 32 *WOMEN’S STUD. Q.* 6, 6, 9–12 (2004).

³⁷ Lux Alptraum, *Opening a Pandora’s Box of Truths About Rape Kits*, *VOX* (Feb. 19, 2020, 6:50 AM), <https://www.vox.com/the-highlight/2020/2/12/21121379/rape-kits-aliza-shvarts-safe-kits-anthem-exhibit> [<https://perma.cc/RP8T-N2BA>] (stating that despite rape kits being “a concrete object that could render the truth unimpeachable” and “often the only physical evidence a survivor can present in court, . . . they’re frequently lost in the system”).

examination.³⁸ When a victim reports a sexual assault to the police, she is given the option to go to a hospital to undergo a sexual assault examination³⁹ because “[t]he victim’s body is a part of the sexual assault crime scene” and can contain crucial forensic evidence.⁴⁰ The sexual assault examination, which can last hours, is typically conducted by a specialized Sexual Assault Nurse Examiner (SANE)⁴¹ and includes an invasive physical examination for any evidence of the assault.⁴² This will often include a vaginal exam, photos of injuries, and samples of hair fibers, blood, semen, and saliva.⁴³ Most importantly, this evidence can contain the DNA of the victim’s attacker as well as corroborating physical evidence of assault.⁴⁴ DNA is a “powerful tool to solve and prevent [future] crime” because it can both identify the attacker and tie him to other crime scenes to determine if he is a serial offender.⁴⁵ A DNA identification may also be used to exonerate innocent suspects.⁴⁶

³⁸ *What Is a Sexual Assault Forensic Exam?*, RAINN, <https://www.rainn.org/articles/rape-kit> [<https://perma.cc/YP4H-TWRG>].

³⁹ Fulton, *supra* note 6, at 44–45. Most DNA evidence must be collected within seventy-two hours to be viable; however, other forensic evidence can still be collected after this timeframe. *What Is a Sexual Assault Forensic Exam?*, *supra* note 38. Bathing or showering following an assault—often an instinctual reaction—can destroy forensic evidence. *See id.* The limited time frame and circumstances under which evidence can be collected further underscores how rare it is to have a viable rape kit and thus how devastating it can be when it is never tested.

⁴⁰ Fulton, *supra* note 6, at 44.

⁴¹ *See* Glenna Ellen Fucci, Note, *No Law and No Order: Local, State and Federal Government Responses to the United States Rape Kit Backlog Crisis*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 193, 196 (2015).

⁴² Fulton, *supra* note 6, at 45 (“The testing consists of a . . . nurse photographing, swabbing, and conducting an exhaustive and invasive exam of the victim’s full body. . . . Unfortunately for the victim, the process takes many grueling hours to complete.”).

⁴³ *See* Tuerkheimer, *supra* note 9, at 34.

⁴⁴ Hansen, *supra* note 22, at 943–44 (“Rape kits help identify unknown assailants, confirm the presence of a known suspect’s DNA, corroborate a victim’s version of events in a contested assault, and exonerate innocent suspects.”).

⁴⁵ Fulton, *supra* note 6, at 45 (“The DNA evidence can be, and is frequently, a ‘powerful tool to solve and prevent [future] crime.’ The rape kit can identify the assailant It affirms the victim’s account of the attack, providing her with justice. The rape kit can connect the attacker to other crime scenes, and potentially identify repeat offenders.” (quoting *What Is a Rape Kit Backlog?*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/what-rape-kit-backlog> [<https://perma.cc/CG3Y-8RFW>])).

⁴⁶ Hansen, *supra* note 22, at 943–44. Since the late 1980s, DNA has been accepted as evidence in criminal cases. *Id.* at 947–48. DNA profiles are stored in the Combined DNA Index System (CODIS)—the national DNA databank—to which samples are compared in hopes of finding a match. Tom Jackman, *Advocates Implore Congress to Reauthorize Funds for Backlogged DNA Rape Kits Before Sept. 30 Expiration*, WASH. POST (Sept. 7, 2019, 5:00 AM), <https://www.washingtonpost.com/crime-law/2019/09/07/advocates-implore-congress-reauthorize-funds-backlogged-dna-rape-kits-before-sept-expiration> [<https://perma.cc/L33B-ABQE>] (reporting that there are about 17 million profiles in CODIS); *Frequently Asked Questions on CODIS*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> [<https://perma.cc/CS8V-YR8Z>].

Following the examination, evidence recovered from the victim's body and clothes is sealed up and stored, typically in a rectangular cardboard box.⁴⁷ The rape kit is then turned over to the police, who, in theory, should send the rape kit to a laboratory for testing as part of their investigation.⁴⁸ However, despite DNA's potential probative value and reliability, police officers regularly leave rape kits to sit on shelves in warehouses, untested, as the forensic evidence slowly loses its viability. As many as 400,000 rape kits have never been tested by police departments in the United States,⁴⁹ which is often referred to as a national "rape kit backlog."⁵⁰ This estimate is potentially conservative because there is no comprehensive national data on the size of the rape kit backlog.

Yet it is clear that this malfeasance occurs nationwide. In 1999, New York City's police storage facilities housed roughly 16,000 untested rape kits.⁵¹ In 2009, Detroit had a backlog of 11,341 untested rape kits, some dating back over thirty years,⁵² and Los Angeles County had approximately 12,669 untested rape kits.⁵³ In 2014, Memphis had a backlog of 7,000 untested rape kits.⁵⁴ Although some larger cities, in response to public pressure, have taken steps to determine the size of their backlog and eliminate it,⁵⁵ many smaller cities or towns have not even begun the process

⁴⁷ Lynn Hecht Schafran, *Medical Forensic Sexual Assault Examinations: What Are They, and What Can They Tell the Courts?*, 54 JUDGES' J. 16, 17–18 (2015).

⁴⁸ Police officers in most states have the sole discretion to decide whether to send rape kits for testing. See Fulton, *supra* note 6, at 46. Currently, only five states make rape kit testing mandatory. Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 207 (2017). There is no federal law that mandates "testing, tracking, or reporting of rape kit[s]." Fucci, *supra* note 41, at 219.

⁴⁹ See Caitlin Dickson, *How the U.S. Ended up with 400,000 Untested Rape Kits*, DAILY BEAST (Apr. 14, 2017, 2:51 PM), <https://www.thedailybeast.com/how-the-us-ended-up-with-400000-untested-rape-kits> [<https://perma.cc/33TU-YQZ3>].

⁵⁰ Madison Pauly, *Women All over the Country Are Suing Police for Failing to Test Their Rape Kits*, MOTHER JONES (Oct. 8, 2019), <https://www.motherjones.com/crime-justice/2019/10/women-all-over-the-country-are-suing-police-for-failing-to-test-their-rape-kits> [<https://perma.cc/NTR6-6D8A>]. One woman whose rape kit was not tested argued that "backlog" is really just "a euphemism for police neglect." *Id.*

⁵¹ Fucci, *supra* note 41, at 198.

⁵² Hagerty, *supra* note 1, at 74.

⁵³ Fucci, *supra* note 41, at 198.

⁵⁴ *Id.* at 209.

⁵⁵ For example, Detroit is one city that has eliminated its backlog—after ten years, all 11,341 rape kits have been tested. Sarah Cwiek, *After Ten Years, Detroit Rape Kit Backlog Cleared, but Still "a Long Way to Go,"* NPR (Aug. 14, 2019), <https://www.michiganradio.org/post/after-ten-years-detroit-rape-kit-backlog-cleared-still-long-way-go> [<https://perma.cc/6J4W-U5TJ>]. This has led to 197 convictions and a finding of 824 repeat offenders. *Id.*

of counting their untested rape kits.⁵⁶ Therefore, the magnitude of the problem is potentially even worse than predicted.

Despite federal funds specifically designated to test rape kits, the backlogs persist, leading to the conclusion that police departments have other motives for their neglect.⁵⁷ Law enforcement officials blame the lack of testing on high laboratory costs,⁵⁸ but this argument founders due to the federal funds that have been designated specifically for rape kit testing. For instance, in 2004, Congress passed the Debbie Smith Act in order “to assess the extent of the backlog in DNA analysis of rape kits and to improve investigation and prosecution of sexual assault with DNA evidence.”⁵⁹ The Act includes the Debbie Smith DNA Backlog Grant Program, which provides specific funding to test rape kits across the United States.⁶⁰ This allocation of substantial federal funds to help state and local governments work through DNA evidence backlogs has led some to call the Act “the most

⁵⁶ Fucci, *supra* note 41, at 200 (“[T]hese numbers fail to tell the whole story because only some of the largest cities in the nation have been put under public and governmental scrutiny to eliminate their backlogs. These statistics fail to explain how many small cities, cities with limited resources, counties in rural areas and towns with a small police force also have handled their backlogged kits. The limited number of cities which have undertaken testing of their backlogged kits, counting their untested kits or eliminating their backlog entirely, indicates that the majority of localities have not taken steps to analyze their backlog, nor have they made this a high priority issue.”).

⁵⁷ REBECCA CAMPBELL, GIANNINA FEHLER-CABRAL, STEVEN J. PIERCE, DHURV B. SHARMA, DEBORAH BYBEE, JESSICA SHAW, SHEENA HORSFORD & HANNAH FEENEY, U.S. DEP’T OF JUST., THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP), FINAL REPORT 101–37 (2015) (finding that “resource depletion” is not the sole cause of untested rape kits) (“When we asked stakeholders why they thought there were so many unsubmitted SAKs in Detroit, nearly all mentioned that gender was undoubtedly a key factor. As one stakeholder said, ‘I think that’s probably the #1 reason [why kits aren’t submitted], it affects mostly women . . . if men were getting raped, I think that it wouldn’t be like that.’ Similarly, another member of the collaborative said, ‘It’s not that complicated to figure out . . . this is a crime that affects women, and in this city, that means Black women, poor Black women . . . there’s a good chunk of the explanation right there.’”).

⁵⁸ Hansen, *supra* note 22, at 949.

⁵⁹ Fucci, *supra* note 41, at 218 (citing Debbie Smith Act, 42 U.S.C. § 13701); Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54. The Debbie Smith Act was named for a survivor of sexual assault who advocated for legislation after the DNA evidence in her rape kit was crucial to later identifying and prosecuting her attacker. Fucci, *supra* note 41, at 218.

⁶⁰ Fucci, *supra* note 41, at 218. While the Debbie Smith Act has helped reduce the backlog, activists are puzzled as to why the backlog persists. Sofia Resnick, *Rape Kits: A Decade and A Billion Dollars Later, Why Can’t We Fix the Backlog?*, REWIRE NEWS GRP. (May 19, 2015, 4:05 PM). <https://rewirenewsgroup.com/article/2015/05/19/rape-kits-decade-billion-dollars-later-cant-fix-backlog/> [<https://perma.cc/B8PB-5G8K>]. The Government Accountability Office investigated and found that the National Institute of Justice (NIJ), which oversees the Act, “could not adequately explain its DNA-related grant-funding decisions and could not adequately determine if award recipients met their funding goals outlined in their grant applications.” *Id.* One explanation may be that Debbie Smith Act funding is not exclusively earmarked for rape kits but can be used for DNA testing more generally. *Id.*

important anti-rape legislation ever signed into law.”⁶¹ Yet despite funds being made available, the backlogs have persisted.⁶² In 2013, Congress passed the Sexual Assault Forensic Evidence Reporting (SAFER) Act, which included best practices to manage and test rape kits.⁶³ One goal of the SAFER Act was to streamline funds more directly to state and local governments in order to clear their rape kit backlogs.⁶⁴ In 2016, President Obama announced an additional \$41 million would be allocated from the Justice Department’s Grant Program for a “Sexual Assault Kit Initiative” to help state and local law enforcement test backlogged rape kits.⁶⁵ Yet the ongoing backlog suggests that many cities have not taken advantage of these available funds.⁶⁶ Much of the money has instead been spent on general DNA testing improvements, administrative costs, or even unrelated purposes.⁶⁷ Thus, the question remains: why do police departments neglect rape kits? Researchers who have worked with and helped train the police point to one factor: “law enforcement’s abiding skepticism of women who report being raped.”⁶⁸ Consequently, despite the importance and promise of rape kits, police bias more often than not stands in the way of justice.

⁶¹ Fucci, *supra* note 41, at 218 (“[S]ome have called the Debbie Smith Act ‘the most important anti-rape legislation ever signed into law because it provides substantial federal funds to help states and localities work through DNA evidence backlogs.’” (quoting Press Release, Carolyn B. Maloney, Bill to Reauthorize Maloney’s Debbie Smith Act Headed for President’s Desk (Sept. 18, 2014), <http://maloney.house.gov/media-center/press-releases/bill-to-reauthorize-maloney-s-debbie-smith-act-headed-for-president-s> [<https://perma.cc/XG5S-GWYX>]); *see also* Jackman, *supra* note 46 (noting that around 42% of DNA matches in the national database “came as a direct result of the Debbie Smith Act,” establishing suspects for “about 200,000 cases which might otherwise have gone unsolved”).

⁶² See *Where the Backlog Exists and What’s Happening to End It*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/where-backlog-exists-and-whats-happening-end-it> [<https://perma.cc/EG4H-ZDX3>], for the most up-to-date information regarding the size of the backlog.

⁶³ Fulton, *supra* note 6, at 48 (“[T]he SAFER Act outlines parameters for the identification, prioritization, and testing periods of rape kits . . . including communication procedures for conveying valuable information about the collections, and auditing protocols for rape kits.” (footnote omitted)).

⁶⁴ See Fucci, *supra* note 41, at 219.

⁶⁵ Off. of the Press Sec’y, *Fact Sheet: Investments to Reduce the National Rape Kit Backlog and Combat Violence Against Women*, WHITE HOUSE (Mar. 16, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/03/16/fact-sheet-investments-reduce-national-rape-kit-backlog-and-combat-viole> [<https://perma.cc/5SPQ-KBT9>].

⁶⁶ Fucci, *supra* note 41, at 219–20 (“[P]umping millions of dollars into the backlog did not lead to national clearance, suggesting that the backlog does not exist purely because of a lack of financial resources.”).

⁶⁷ Steve Reilly, *No Action on Rape Kits Despite New Laws, Federal Money*, USA TODAY (July 17, 2017, 7:20 AM), <https://www.usatoday.com/story/news/2015/07/17/1b--rape-kit-funding-not-being-spent--fix-problem/29902283> [<https://perma.cc/NMF3-R3GB>].

⁶⁸ Hagerty, *supra* note 1, at 81.

B. *The Impact of Police Bias*

Research indicates that police hold negative and prejudicial attitudes toward victims of sexual assault, which causes police to “blame the victim, question the victim’s credibility, imply that the victim deserved being raped, denigrate the victim, and trivialize the rape experience.”⁶⁹ Police disbelieve rape victims far more than the general public⁷⁰ and at a higher rate than other professionals involved in rape investigations.⁷¹ Thus, many rape cases are closed or ignored after the initial report to a police officer, which also means that the rape kits associated with those cases are not tested. Multiple studies illustrate that police officers wrongly believe that women lie about being raped in staggeringly high numbers.⁷² For example, in one survey of nearly 900 police officers, more than half of the officers stated that 11% to 50% of sexual assault complainants lie about being assaulted, and 10% of respondents even asserted that the number of false reports is as high as 51% to 100%.⁷³ In reality, false reports account for only about 2% to 6% of rape allegations.⁷⁴

⁶⁹ Barbara Nagel, Hisako Matsuo, Kevin P. McIntyre & Nancy Morrison, *Attitudes Toward Victims of Rape: Effects of Gender, Race, Religion, and Social Class*, 20 J. INTERPERSONAL VIOLENCE 725, 726 (2005); Hagerty, *supra* note 1, at 81.

⁷⁰ Studies show that the public generally believes that about 19%–22% of rape allegations are false, whereas police officers believe that 10%–50% are false in one study, 40%–80% in another study, and an average of 53% in a third study. Katie M. Edwards, Jessica A. Turchik, Christina M. Dardis, Nicole Reynolds & Christine A. Gidycz, *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 767 (2011); Tuerkheimer, *supra* note 9, at 16; Charlie Huntington, Alan Berkowitz & Lindsay Orchowski, *False Accusations of Sexual Assault: Prevalence, Misperceptions, and Implications for Prevention Work with Men and Boys*, in ENGAGING BOYS AND MEN IN SEXUAL ASSAULT PREVENTION (forthcoming 2021) (manuscript at 3) (on file with journal). See *infra* note 74 and accompanying text for a discussion of the actual statistics on false reporting.

⁷¹ Yung, *supra* note 48, at 209 (referring to statistics regarding lawyers, doctors, and counselors).

⁷² See, e.g., MARTIN D. SCHWARTZ, NATIONAL INSTITUTE OF JUSTICE VISITING FELLOWSHIP: POLICE INVESTIGATION OF RAPE—ROADBLOCKS AND SOLUTIONS 11, 27–28 (2010) (presenting a study of forty-nine police officers who specialized in sexual assault revealing that more than half of those with less than seven years of experience believed that 40%–80% of sexual assault complaints were false). Other studies “have found that officers often hold the ‘baseline expectation that approximately [60%] of complainants are either untruthful or mistaken.’” Hansen, *supra* note 22, at 944.

⁷³ Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers’ Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 52, 55 (2008).

⁷⁴ See David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1329–30 (2010) (finding that 5.9% of rape reports to a university police department were false and collecting studies with similar figures); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1028 (1991) (noting that 2% of rape reports are estimated to be false). Additionally, “there is no empirical data to prove that there are more false charges of rape than of any other violent crime.” Torrey, *supra*, at 1028. Many scholars believe the real numbers for false rape reports could be even lower due to the difficulties inherent in calculating false

As the first point of contact in the criminal justice system, police are in the unique and powerful position of deciding which cases to advance and which cases to drop without further investigation.⁷⁵ Thus, it is particularly problematic that police officers, who often lack training on dealing with sexual assault cases,⁷⁶ frequently rely on erroneous beliefs about victim credibility to conclude that rape complaints are false.⁷⁷ Police officers often make this determination without investigating or, in some cases, even interviewing the victim.⁷⁸ When police do conduct investigations, studies have shown that they are less likely to believe victims who do not exhibit the stereotypical behaviors they anticipate, such as fear, anger, crying intensely, or lack of hesitation.⁷⁹ One Detroit detective stated that “a victim should be ‘a complete hot mess. They should be crying. They should be very, very traumatized.’”⁸⁰ But each victim has a different reaction to assault, and often it does not match this description.⁸¹ Even when victims have displayed

reports. Often the rates of false accusations rely on either a police officer’s assessment that a report was false or an accuser recanting; however, neither of these measures definitively indicates that the accusation was in fact false. See Tuerkheimer, *supra* note 9, at 17–18; Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths: In Review*, 18 PSYCH. WOMEN Q. 133, 135–36 (1994). Some victims recant accusations out of fear of retaliation, public ridicule, or even pressure from the police themselves. See Ken Armstrong & T. Christian Miller, *An Unbelievable Story of Rape*, MARSHALL PROJECT (Dec. 16, 2015), <https://www.themarshallproject.org/2015/12/16/an-unbelievable-story-of-rape> [<https://perma.cc/PEW3-XXQX>].

⁷⁵ Yung, *supra* note 48, at 206 (“Police across the United States regularly act as hostile gatekeepers who prevent rape complaints from advancing through the criminal justice system by fervently policing the culturally disputed concept of ‘rape.’”).

⁷⁶ See ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 10–11, 35–36 (2015) (recommending training in trauma, cultural sensitivity, bias, primary-aggressor analysis, and interviewing based on survey results from over 900 people, including advocates, service providers, attorneys, and people working in membership-based organizations, regarding concerns and improvements for policing domestic violence and sexual assault).

⁷⁷ Hagerty, *supra* note 1, at 74.

⁷⁸ *Id.* at 77, 83 (noting that in 65% of rape cases in Minneapolis, “investigators failed to interview the victim,” and in 40% of cases in Cleveland, “detectives never contacted the victim” and in 75% “they never interviewed her”).

⁷⁹ Fulton, *supra* note 6, at 47–48 (“A ten-year research study of reported instances of sexual assault inform us that when victims lack or do not express stereotypical behaviors anticipated by police, such as demonstrating fear or anger, crying intensely, or reporting the crime without hesitation, the police were more inclined to believe the victim was lying and constructing a fabricated report.”).

⁸⁰ Hagerty, *supra* note 1, at 84.

⁸¹ PATRICIA L. FANFLIK, OFF. ON VIOLENCE AGAINST WOMEN, VICTIM RESPONSES TO SEXUAL ASSAULT: COUNTERINTUITIVE OR SIMPLY ADAPTIVE? 2 (2007), https://www.nsvrc.org/sites/default/files/publications/2018-10/pub_victim_responses_sexual_assault.pdf [<https://perma.cc/4R8B-RVVU>].

emotional reactions, some surveyed officers have actually weighed this against their credibility if they became “overemotional.”⁸²

One of the reasons that police officers disbelieve rape victims at such high rates is sexism. When reading police reports from Los Angeles and Detroit and interviewing detectives, researchers found a “subterranean river of chauvinism” in which “the fate of a rape case usually depends on the detective’s . . . view of the victim—not the alleged perpetrator.”⁸³ Many officers in this study described a “righteous victim” who they would take seriously—“[a] woman who [did not] know her assailant, who fought back, [and] who has a clean record.”⁸⁴ However, four out of five victims of rape know their assailant.⁸⁵ Because police are likely to severely underestimate this number,⁸⁶ their image of the “righteous victim” has very little overlap with victims in actual rape cases. One officer described acquaintance complaints as reflecting “buyer’s remorse,” meaning a woman who had been out drinking “ha[d] sex with a man ‘willingly’ and later regret[ted] it.”⁸⁷ Indeed, 19.7% of officers surveyed agreed or did not disagree that “many women secretly wish to be raped,” and 34.2% agreed or did not disagree that “promiscuous” women with “bad reputations” make the most rape complaints.⁸⁸ On top of this deeply entrenched sexism, many victims must also face added layers of skepticism and discrimination as racial or religious minorities, members of the LGBTQIA+ community, immigrants, or sex workers.⁸⁹

⁸² See Morgan Namian, *Hypermasculine Police and Vulnerable Victims: The Detrimental Impact of Police Ideologies on the Rape Reporting Process*, 40 WOMEN’S RTS. L. REP. 80, 102 (2018) (citing Emma Sleath & Ray Bull, *Police Perceptions of Rape Victims and the Impact on Case Decision Making: A Systematic Review*, 34 AGGRESSION & VIOLENT BEHAV. 102, 108 (2017)) (“Victims who have emotional reactions during the reporting process were viewed as more credible; however, overemotional reactions were viewed as cutting against credibility, suggesting that the rape claim was false.”).

⁸³ Hagerty, *supra* note 1, at 83.

⁸⁴ *Id.*

⁸⁵ *Perpetrators of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence> [<https://perma.cc/2G49-FDZU>]; Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 921–22 (2001). Even if the identity of a rapist is known, testing rape kits can still provide the valuable corroborative evidence of physical trauma needed to pursue charges. See Hansen, *supra* note 22, at 943–44. It can also validate the victim’s experience and signal a response that the community and government will take her assault seriously. See *id.* at 958.

⁸⁶ See Tuerkheimer, *supra* note 9, at 29–30, 30 n.161.

⁸⁷ Hagerty, *supra* note 1, at 83–84.

⁸⁸ Amy Dellinger Page, *Judging Women and Defining Crime: Police Officers’ Attitudes Toward Women and Rape*, 28 SOCIO. SPECTRUM 389, 402 tbl.4 (2008).

⁸⁹ ACLU, *supra* note 76, at 17–24 (including survey and anecdotal evidence regarding police bias against racial minorities, immigrants, Muslims, LGBTQ people, poor people, Native Americans, non-English speakers, sex workers, youth survivors, and survivors with mental-health or substance-abuse

These statistics and anecdotal findings are apparent in police departments across various cities and states. An Idaho sheriff stated that “the majority of our rapes that are called in[] are actually consensual sex.”⁹⁰ Similarly, a college police chief in Georgia asserted that “[m]ost of these sexual assaults are women waking up the next morning with a guilt complex. That ain’t rape, that’s being stupid. When the dust settles, it was all consensual.”⁹¹ Rebecca Campbell, a professor of psychology at Michigan State University who analyzed police responses to reports of rape in multiple cities, stated that “[the police] fundamentally did not believe what happened to [victims] was a crime, they did not believe that what happened to them merited their attention. We read police reports where victims were called bitches, hoes, whores, heifers.”⁹² Police officers’ prejudice against victims of rape and sexual assault is most palpably manifested in the systematic failure to ensure that rape kits are tested.

C. *The Systemic Ramifications*

The failure of police to adequately investigate and address rape reports allows dangerous individuals to pose an ongoing threat to public safety, tells survivors that their rape does not matter, and sends a message to women that their “bodily integrity does not warrant protection.”⁹³ Police officers’ disregard of rape kits has broad impacts on the criminal justice system and public safety. About 125,000 rapes are reported each year across the country.⁹⁴ Twenty percent of these reports lead to an arrest, and only 4% are referred to prosecutors.⁹⁵ This means that the vast majority of rape cases end when police officers fail to adequately investigate the claims. Furthermore, only 23% of sexual assaults are even reported to the police to begin with,

problems). Eighty percent of respondents surveyed “believed that police–community relations with marginalized communities influenced survivors’ willingness to call the police.” *Id.* at 1.

⁹⁰ Tuerkheimer, *supra* note 9, at 32.

⁹¹ *Id.*

⁹² I AM EVIDENCE (HBO Documentary Films 2018).

⁹³ Fucci, *supra* note 41, at 195 (“The failure of government, at all levels, allows dangerous individuals to pose a threat to communities while leaving survivors of sexual assault with the message that their attack, their rape, their violation of bodily integrity does not warrant protection or validation from those whom are charged with doing so.”).

⁹⁴ Hagerty, *supra* note 1, at 74.

⁹⁵ *The Criminal Justice System: Statistics*, *supra* note 8; *see also* Hagerty, *supra* note 1, at 74 (“From the moment a woman calls 911 . . . a rape allegation becomes, at every stage, more likely to slide into an investigatory crevice. Police may try to discourage the victim from filing a report. If she insists on pursuing a case, it may not be assigned to a detective. If her case *is* assigned to a detective, it will likely close with little investigation and no arrest. If an arrest *is* made, the prosecutor may decline to bring charges: no trial, no conviction, no punishment.”).

meaning that over 540,000 rapes go unreported each year.⁹⁶ Many victims do not report assaults because they do not believe they will receive justice.⁹⁷ In one Department of Justice survey, nearly one in five women who had suffered a past sexual assault named the fact that “police would not or could not do anything to help” as the reason for not reporting their assault.⁹⁸ Reporting an assault can be a difficult and humiliating experience. Thus, many victims will forgo reporting based on their assessments that their rapists would neither be arrested nor punished as a result.⁹⁹ These statistics reflect a dangerous negative-feedback loop: police officers do not believe victims of assault, which discourages other victims from reporting to police officers and ultimately leaves offenders free to rape again with impunity.¹⁰⁰ In sexual assault cases, the presumption of guilt is often flipped; instead of assuming the suspect is guilty, many police assume that the victim is guilty of lying.¹⁰¹ In some cases, this presumption has even led police to charge women with false reporting—despite truthful reports that are later vindicated—instead of investigating and charging rapists.¹⁰² The lack of investigation, potentially symbolized by the refusal to test rape kits, adds to the trauma for survivors of sexual assault by making it clear that the criminal justice system will not protect them.¹⁰³

⁹⁶ *The Criminal Justice System: Statistics*, *supra* note 8; Hagerty, *supra* note 1, at 74.

⁹⁷ See W. David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. J. 623, 627 (2007).

⁹⁸ Tuerkheimer, *supra* note 9, at 28–29 (noting the statistic refers specifically to female college students ages eighteen to twenty-four); SOFI SINOZICH & LYNN LANGTON, U.S. DEP’T OF JUST. BUREAU OF JUST. STATS., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 1, 9 (2014) <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/M3ZC-SNJ3>].

⁹⁹ Yung, *supra* note 48, at 236.

¹⁰⁰ *Id.* at 233 (“Ignoring rape complaints emboldens and reinforces the criminal behavior of rapists who can continue their sexual violence with impunity.”).

¹⁰¹ Tuerkheimer, *supra* note 9, at 33 (“The typical law enforcement investigation is guilt-presumptive (and potentially problematic for that reason). In sexual assault cases, this presumption is flipped. Investigators start from the proposition that the complainant is lying and act to confirm this belief.”).

¹⁰² See, e.g., Armstrong & Miller, *supra* note 74 (reporting that a woman was raped, forced to recant by the police, and prosecuted for making a false accusation before her rapist was apprehended for raping multiple other victims); Joanna Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction*, WASH. POST (Mar. 12, 2015), https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story.html [<https://perma.cc/7DWV-DJ9E>] (reporting that an eleven-year-old girl was abducted and raped twice by the same men, but the police refused to investigate and charged her with lying and false reporting).

¹⁰³ Hansen, *supra* note 22, at 958 (“The rape kit backlog has also ‘negatively affect[ed] women’s perceptions of justice by implying that the system does not care enough about them.’” (quoting Katherine L. Prevost O’Connor, Comment, *Eliminating the Rape-Kit Backlog: Bringing Necessary Changes to the Criminal Justice System*, 72 UMKC L. REV. 193, 199 (2003))).

Not only does a lack of testing harm present victims, but it also disadvantages future ones. By the time many rape kits are tested, the cases for which they were collected have passed beyond the statute of limitations to press charges.¹⁰⁴ In 2009, when Los Angeles began testing its rape kit backlog, over 300 of the kits were older than the ten-year statute of limitations for prosecuting sexual assault.¹⁰⁵ This neglect is significant, not only because it is horrific for survivors, but also because it undermines the credibility of the criminal justice system as a whole and threatens public safety.¹⁰⁶ In fact, more than 99% of rapes do not end in a conviction.¹⁰⁷ As more studies emerge, serial rapists are being found to be much more common than experts previously believed.¹⁰⁸ One study of 120 undetected rapists showed that 63% of them would go on to offend again.¹⁰⁹ When rape kits are entered into the national DNA database, one in five “generates a match pointing to a serial rapist.”¹¹⁰ Rape “is by far the easiest violent crime to get away with.”¹¹¹ The failure of police departments to test rape kits has inspired some victims to take matters into their own hands in the form of lawsuits against city police departments.

II. LEGAL ACTION

Six cities—San Francisco, Memphis, Houston, Austin, Baltimore, and the Village of Robbins, Illinois¹¹²—have been separately sued by women

¹⁰⁴ Additionally, the evidence can degrade during this time, particularly if the rape kits are not stored properly. *DNA Evidence: What Law Enforcement Officers Should Know*, 249 NAT’L INST. JUST. J. 10, 11, 13 (2003) (noting that direct sunlight, heat, and humidity harm DNA evidence). This degradation can make later testing more difficult, if not impossible.

¹⁰⁵ See Fucci, *supra* note 41, at 204.

¹⁰⁶ See Lori Jane Gliha & Bryan Myers, ‘Is Rape Really Illegal’ When Rape Kits Go Untested?, AL JAZEERA AM. (May 6, 2014, 10:00 AM), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/5/when-rape-kits-gountestedaisrapereallyillegal.html> [<https://perma.cc/6NNE-YMBN>]. In 2003, a woman was raped at knifepoint, but her rape kit was not tested for nearly ten years. Her rapist had raped at least six more women before eventually being arrested in 2012. *Id.*

¹⁰⁷ *The Criminal Justice System: Statistics*, *supra* note 8 (reporting that less than 0.5% of rapes will end in a conviction). Furthermore, incarceration is distributed unequally, as young white men are less likely to be punished than men of color. See, e.g., Gabby Bless, *How Racial Bias Influenced Stanford Swimmer’s Rape Case*, VICE (June 7, 2016, 3:25 PM), https://www.vice.com/en_us/article/bjgg95/brock-turner-rape-case-sentencing-racial-bias [<https://perma.cc/8CQD-GWYC>].

¹⁰⁸ Hagerty, *supra* note 1, at 78.

¹⁰⁹ Hansen, *supra* note 22, at 946.

¹¹⁰ Jackman, *supra* note 46.

¹¹¹ Hagerty, *supra* note 1, at 74 (noting that rape is easier to get away with than murder, robbery, or assault).

¹¹² *Beckwith v. City of Houston*, 790 F. App’x 568, 570–71 (5th Cir. 2019); *Doe v. City of Memphis*, 928 F.3d 481, 485 (6th Cir. 2019); *Marlowe v. City of San Francisco*, 753 F. App’x 479, 479 (9th Cir.

whose rape kits were never tested and who allege violations under the Equal Protection Clause of the Fourteenth Amendment. These lawsuits, brought under 42 U.S.C. § 1983, allege that police departments routinely discriminate against women by deprioritizing proper testing and investigation of rape cases, thereby denying those women equal protection of the law based on their gender.¹¹³ Some of these cases are still pending further litigation and review,¹¹⁴ and one has resulted in an undisclosed settlement.¹¹⁵ However, two of these suits reached the circuit court level with disparate results. The Supreme Court recently denied a writ of certiorari to resolve the discord and chart a path forward for inevitable future litigation.¹¹⁶ Despite the denial of certiorari, it is highly likely that more lawsuits will arise as this issue continues to gain attention and the backlog of rape kits continues to go untested. This Part will provide background on equal protection doctrine and introduce the Sixth Circuit and Ninth Circuit cases that have considered these equal protection claims.

A. Equal Protection

The Equal Protection Clause refers to this phrase within the Fourteenth Amendment: “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁷ This clause was initially conceived in order to protect Black citizens from violence.¹¹⁸ But, in 1971, *Reed v. Reed* became the first Supreme Court case to declare that discrimination based on gender also violates the Equal Protection Clause and is therefore unconstitutional.¹¹⁹ Since *Reed v. Reed*, a number of cases have developed the law of gender-based equal protection. While the Supreme Court has resisted classifying women as a suspect class deserving of strict scrutiny, it has established a level of intermediate scrutiny for gender classifications.¹²⁰ Intermediate scrutiny means that “state-sponsored gender

2019), *cert. denied*, 140 S. Ct. 244 (2019); *Borkowski v. Baltimore County*, 414 F. Supp. 3d 788, 797 (D. Md. 2019); *Smith* Complaint, *supra* note 13, at 1–2; *Village of Robbins* Complaint, *supra* note 13, at 10.

¹¹³ See sources cited *supra* note 112.

¹¹⁴ *Borkowski*, 414 F. Supp. 3d 788; *Smith* Complaint, *supra* note 13. As of March 2021, the lawsuit against Baltimore is in discovery, and the lawsuit against Austin has an appeal pending in the Fifth Circuit.

¹¹⁵ Consent Judgment at 1, *Village of Robbins*, No. 17-CV-00353 (N.D. Ill. Oct. 30, 2018).

¹¹⁶ *Marlowe*, 753 F. App’x 479, *cert. denied*, 140 S. Ct. 244 (2019); *Iovino*, *supra* note 18.

¹¹⁷ U.S. CONST. amend. XIV, § 1.

¹¹⁸ *Tuerkheimer*, *supra* note 20, at 1287.

¹¹⁹ 404 U.S. 71, 73, 77 (1971) (finding unconstitutional a code that specified “males must be preferred to females” when appointing administrators of estates).

¹²⁰ *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing that gender is a quasi-suspect class that warrants intermediate scrutiny for equal protection claims). The Court has established groups of “discrete and insular minorities” as suspect or quasi-suspect protected classes warranting heightened constitutional

discrimination violates equal protection unless it serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives.”¹²¹ In current jurisprudence, to bring a valid *prima facie* equal protection claim based on gender, a plaintiff must show that state action discriminated against her and did not advance important governmental objectives.¹²² Additionally, if the state action in question is not based on a facially discriminatory custom or practice, the plaintiff must show an intent or purpose to discriminate.¹²³

To make this showing, a plaintiff must establish that “she is a member of a protected class” and was intentionally discriminated against as a member of that protected class.¹²⁴ Because the Court has already established that state-sponsored gender discrimination warrants intermediate scrutiny,¹²⁵ women bringing these lawsuits are unquestionably members of a protected class based on their gender. Showing discriminatory intent, however, proves much more difficult.

The courts have established three main avenues to show discriminatory intent, only the last of which is applicable to these cases. Nevertheless, understanding the first two avenues illuminates the difficulty of proving discriminatory intent in all but the most obvious cases. The first is express discrimination.¹²⁶ A policy, custom, or practice that is facially discriminatory is sufficient to establish intent to discriminate; in *Reed*, for example, a statute that expressly preferred males over females to administer estates was held unconstitutional.¹²⁷ The practice at issue here—police not testing rape kits—is due to a discriminatory pattern of neglect, not a policy that instructs officers to treat rape victims differently. Therefore, these plaintiffs cannot allege express discrimination to prove discriminatory intent.

The second method is to show that a facially neutral custom or practice has been applied in an intentionally discriminatory manner.¹²⁸ Since the

scrutiny. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

¹²¹ *Hansen*, *supra* note 22, at 984 (quoting *United States v. Morrison*, 529 U.S. 598, 620 (2000)).

¹²² *See id.*

¹²³ *Id.*

¹²⁴ *Doe v. City of Memphis*, 928 F.3d 481, 487 (6th Cir. 2019).

¹²⁵ *Craig*, 429 U.S. at 197.

¹²⁶ *See Reed v. Reed*, 404 U.S. 71, 77 (1971) (holding a statute that expressly stated a preference for males over females to administer estates violated equal protection).

¹²⁷ *Id.*

¹²⁸ *See Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

plaintiffs in these cases cannot point to a facially discriminatory policy, custom, or practice that causes the discriminatory impact, the plaintiffs must show that the state actors had discriminatory intent. If a clear pattern inexplicable on grounds other than gender discrimination results from a facially neutral state action, the intent is clearly discriminatory.¹²⁹ However, these cases are rare;¹³⁰ this only applies when the discrimination would be completely inexplicable on other grounds,¹³¹ which is a high bar. Because police can often rationalize their refusal to pursue rape complaints due to lack of funding, lack of evidence, or lack of resources, it is difficult to definitively establish intent. Therefore, cases based on the failure to test rape kits must fit within the third category.

The third avenue is to show that a facially neutral custom or practice has an adverse effect on a protected class and was motivated by discriminatory animus.¹³² The discriminatory animus does not need to be the only ground for the adverse action, but it must be a motivating factor.¹³³ Even if lack of funding, lack of evidence, or lack of resources also contributed to the refusal to pursue rape complaints, if this neglect was also motivated by discriminatory animus against women, that can be sufficient to prove discriminatory intent. Therefore, plaintiffs in cases regarding rape kits tend to pursue this avenue of showing discrimination.

In order to determine whether discrimination was a motivating factor, courts look to both direct and circumstantial evidence of intent.¹³⁴ The totality of the facts, including whether the state action “bears more heavily on one [gender] than another,” is relevant to this analysis.¹³⁵ The vast majority of rape complaints are brought by women, and rape cases are the least indicted and convicted amongst all violent crimes.¹³⁶ However,

¹²⁹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also Yick Wo*, 118 U.S. at 373; *Gomillion v. Lightfoot*, 364 U.S. 339, 346–47 (1960).

¹³⁰ *See Village of Arlington Heights*, 429 U.S. at 266.

¹³¹ *See Washington v. Davis*, 426 U.S. 229, 242 (1976).

¹³² *See Village of Arlington Heights*, 429 U.S. at 265–66.

¹³³ *Id.* at 265.

¹³⁴ *Id.* at 266.

¹³⁵ *Id.* at 266–68 (quoting *Davis*, 426 U.S. at 242) (noting that other circumstantial and direct evidence of intent are relevant factors, such as historical background, the events leading up to the challenged action, or departures from normal procedure).

¹³⁶ Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK L. REV. 467, 472 (2005) (“[R]ape is the least reported, least indicted, and least convicted non-property felony in America.”).

additional facts beyond those that show discriminatory impact must be shown in order to prove discriminatory intent.¹³⁷

Some courts have held that in order to show intent to discriminate, a plaintiff must provide evidence of comparators.¹³⁸ A comparator is an individual that is similarly situated to a member of the protected class but falls outside that class.¹³⁹ The theory is that by proffering evidence of two similarly situated individuals—one in a protected class and one not—who are treated differently, the only explanation for their disparate treatment is the membership in a protected class, thereby proving intent.¹⁴⁰

The idea of a comparator is commonly associated with employment discrimination claims under Title VII,¹⁴¹ but is also used by courts to establish intent to discriminate in equal protection claims.¹⁴² In *McDonnell Douglas Corp. v. Green*, the Court first established the comparator framework used in employment discrimination litigation.¹⁴³ In evaluating a discrimination claim brought by a Black employee, the Court explained that evidence that the employer treated comparable white workers better “would be ‘[e]specially relevant’ to showing discrimination.”¹⁴⁴ Courts have increasingly relied on the comparator standard to prove discriminatory intent,¹⁴⁵ although definitions vary for how “similarly situated” a comparator must be to the member of the protected class.¹⁴⁶ While some courts use a

¹³⁷ *Davis*, 426 U.S. at 242 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious . . . discrimination forbidden by the Constitution.”).

¹³⁸ Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839–49 (2002) (overviewing each circuit’s comparator requirement in employment discrimination cases); see also Goldberg, *supra* note 26, at 750 (“[Comparators] constitute, to many courts, a threshold requirement of a discrimination claim and, in that sense, part of discrimination’s very definition. On this view, discrimination occurs only when an actor has differentiated between two groups of people because of a protected trait, which means that the absence of a comparator signals the absence of discrimination.”).

¹³⁹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

¹⁴⁰ See *id.* For example, if two employees have the exact same degree, qualifications, and job performance but the female employee is paid less, that can show intent to discriminate on the basis of sex.

¹⁴¹ Goldberg, *supra* note 26, at 743–49.

¹⁴² See, e.g., *Klinger v. Dep’t of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994) (rejecting female inmates’ equal protection claims without proceeding to the merits because they were not “similarly situated” to the male inmates).

¹⁴³ Goldberg, *supra* note 26, at 745; *McDonnell Douglas*, 411 U.S. at 804.

¹⁴⁴ Goldberg, *supra* note 26, at 745 (quoting *McDonnell Douglas*, 411 U.S. at 804).

¹⁴⁵ *Id.* at 748–49 (observing that courts treat comparators “as their preferred lens for evaluating discrimination claims”).

¹⁴⁶ *Compare Coleman v. Donahoe*, 667 F.3d 835, 841 (7th Cir. 2012) (using a “flexible, common-sense” standard in employment discrimination cases that requires “sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow . . . comparison” (quoting

“strict” standard and others take a more “flexible” approach, the comparator requirement is often still relatively stringent in the equal protection context.¹⁴⁷ As the use of comparators has grown, what began as merely a helpful heuristic for establishing discrimination has since become almost a “threshold requirement.”¹⁴⁸

However, some courts have held that comparators, while helpful, are not the only way to establish discriminatory intent and are unnecessary to establish a valid claim.¹⁴⁹ If other evidence establishes discrimination because of membership in a protected class, the court can still find intent without the need for a comparator. In two cases with very similar facts, the Sixth and the Ninth Circuits disagreed over whether a comparator should be a threshold requirement when assessing discriminatory intent.

B. The Sixth and Ninth Circuits’ Approaches to Equal Protection Claims

I. Doe v. City of Memphis

On March 30, 2001, Jane Doe and her children were asleep in their home.¹⁵⁰ Around 2:00 AM, an intruder violently kicked in a window and broke in.¹⁵¹ He then bound Doe’s arms and feet and sexually assaulted her multiple times.¹⁵² That very same day, “Doe reported the sexual assault to the Memphis Police Department [(MPD)].”¹⁵³ She was subsequently “transported to the Rape Crisis Center for treatment and the collection of

Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007)), with Lewis v. City of Union City, 918 F.3d 1213, 1218 (11th Cir. 2019) (holding the proper test for evaluating comparators in employment discrimination claims is that they must be “similarly situated in all material respects” to the plaintiff).

¹⁴⁷ See, e.g., David A. Perkins, *The Similarly Situated Analysis for Equal Protection Claims Remains Stringent*, 21 ILL. DEF. COUNS. Q. 31, 31–32 (2011) (describing the Seventh Circuit’s strict approach). Despite having a flexible standard in the employment discrimination context, the Seventh Circuit appears to have a stricter standard for comparators in equal protection claims. See Harvey v. Town of Merrillville, 649 F.3d 526, 531 (7th Cir. 2011) (noting that while there is no “precise formula” under equal protection, “similarly situated individuals must be very similar indeed” (quoting LaBella Winnetka, Inc. v. Village of Winnetka, 628 F.3d 937, 942 (7th Cir. 2010))).

¹⁴⁸ Goldberg, *supra* note 26, at 750; see also Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 204–06 (2009) (observing that, while not statutorily required, “the absence of a comparator is often fatal to a claim”).

¹⁴⁹ See, e.g., Bryant v. Aiken Reg’l Med. Ctrs. Inc., 333 F.3d 536, 546 (4th Cir. 2003) (“However helpful a showing of a . . . comparator may be to proving a discrimination claim, it is not a necessary element of such a claim.”).

¹⁵⁰ Second Amended Complaint at 10, Doe v. City of Memphis, No. 2:13-CV-03002, 2014 WL 11514980 (W.D. Tenn. Dec. 10, 2014), *rev’d*, 928 F.3d 481 (6th Cir. 2019), *reh’g denied*, (6th Cir. July 31, 2019).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

evidence.”¹⁵⁴ While at the Rape Crisis Center, a SANE nurse conducted a sexual assault examination resulting in a rape kit.¹⁵⁵ An officer transported the rape kit to the MPD “ostensibly for testing and to be used as evidence” against the assailant.¹⁵⁶ Yet “[o]ver the next thirteen . . . years, [the] City of Memphis never submitted . . . Doe’s [rape kit] for testing.”¹⁵⁷

Doe contacted the MPD multiple times to inquire about the status of her kit.¹⁵⁸ She was informed that the DNA in her kit did not match any third parties.¹⁵⁹ However, she later discovered that her kit was never actually tested.¹⁶⁰ MPD officers told her that the DNA did not result in a match in order to conceal the fact that her kit had not been tested and to prevent her from inquiring further.¹⁶¹ The man whose DNA was eventually matched to Doe’s rape kit had been convicted of multiple felonies prior to Doe’s assault, including aggravated rape.¹⁶² During the time that Doe’s rape kit remained untested, the rapist sexually assaulted other women.¹⁶³ In February 2014, he was finally indicted for aggravated rape based in part on the DNA recovered from Doe’s rape kit.¹⁶⁴

In addition to Doe’s case, the MPD failed to test over 15,000 Sexual Assault Evidence Kits over a period of several decades, and a disproportionate number of the rape kits belonged to women.¹⁶⁵

2. *The Sixth Circuit’s Analysis*

In 2013, Doe brought a class action lawsuit alleging that the city of Memphis had a “policy, practice and/or custom” of failing to submit sexual assault evidence kits for testing in violation of her constitutional rights.¹⁶⁶ The complaint alleged that the city of Memphis continually afforded less protection to female victims of rape and sexual assault than to victims of other crimes.¹⁶⁷ Doe represented a class consisting of at least 15,000 women—including some of her rapist’s other victims—who reported sexual

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 11.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 12.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 17.

¹⁶⁶ Complaint at 8, *City of Memphis*, 2014 WL 11514980.

¹⁶⁷ Amended Complaint at 6–8, *City of Memphis*, 2014 WL 11514980.

assaults and whose rape kits were turned over to the Memphis Police Department for testing.¹⁶⁸ These women sought a preliminary injunction prohibiting defendants from refusing to test rape kits.¹⁶⁹

The District Court for the Western District of Tennessee allowed Doe's equal protection claim for sex discrimination under § 1983 to survive a motion to dismiss and enter discovery.¹⁷⁰ The defendants filed a motion to dismiss Doe's claim, arguing that she failed to allege disparate treatment "with a discriminatory purpose *or* that similarly situated males received more favorable treatment."¹⁷¹ The "or" in this statement may be read to suggest that defendants concede that comparators are not the only way to show discriminatory purpose. Although the district court stated that the plaintiff must plausibly plead that she was treated "disparately as compared to similarly situated persons,"¹⁷² the court went on to explain that in order to allege a valid equal protection claim, plaintiffs must "show that it is the policy or custom of [defendant] to provide less protection to victims of [sexual assaults] than those of other crimes, and that gender discrimination was the motivation for this disparate treatment."¹⁷³ Despite no specific or particularized pleadings related to comparators, the court proceeded to hold that the plaintiff had provided sufficient factual allegations to survive a motion to dismiss because she alleged a policy of not testing rape kits, "which are almost *exclusively* used on women."¹⁷⁴ The court inferred intent to discriminate based on "the lack of testing, the severe discriminatory effect, and the factual allegations that Defendant's agents were consistently untruthful."¹⁷⁵ The court denied the motion to dismiss as to the equal protection claim and did not require the plaintiff to produce specific comparators; even though she drew a generalized comparison to victims of other crimes, she was not required to produce particular facts about other victims who were similarly situated in all respects besides gender.¹⁷⁶

Following the district court ruling, the plaintiffs engaged in discovery lasting two years before the district court granted summary judgment in favor of the city.¹⁷⁷ However, the Sixth Circuit reversed the summary judgment and

¹⁶⁸ *Id.* at 5, 13–14.

¹⁶⁹ *Id.* at 29.

¹⁷⁰ *City of Memphis*, 2014 WL 11514980, at *5–6.

¹⁷¹ *Id.* at *5 (emphasis added).

¹⁷² *Id.* at *6 (quoting *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011)).

¹⁷³ *Id.* (quoting *Jones v. Union County*, 296 F.3d 417, 426 (6th Cir. 2002)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See id.*

¹⁷⁷ *Doe v. City of Memphis*, 928 F.3d 481, 481, 484 (6th Cir. 2019).

remanded for further discovery, briefly affirming the lower court's implication that specific pleadings concerning comparators were not required for the equal protection claim to move forward in the process.¹⁷⁸ The Sixth Circuit further argued that “[a]bsent direct evidence of discriminatory motivation, ‘[a] discriminatory effect which is severe enough can provide sufficient evidence’ of such motivation under appropriate circumstances.”¹⁷⁹ Therefore, the Sixth Circuit ruling aligns with the view that a precise comparator is not required to establish discriminatory intent at the pleading stage when a comparison may be inferred from the totality of the evidence.

3. Marlowe v. City of San Francisco

On April 6, 2010, Heather Marlowe was drugged and sexually assaulted after participating in San Francisco's Bay to Breakers race.¹⁸⁰ Following the race, “Marlowe was handed a beer in a red plastic cup by a male attendee.”¹⁸¹ After drinking the beer, “Marlowe began feeling much more inebriated than would have been normal given her moderate alcohol consumption up to that point. Marlowe regained consciousness inside an unfamiliar home approximately [eight] hours after she was last seen at Bay to Breakers. Marlowe was physically injured, experienced vaginal and pelvic pain, was nauseous and vomited several times, was dazed, confused, and had no memory of what had occurred in the house.”¹⁸² Realizing that she had been raped, “Marlowe went to the nearest emergency room” to undergo a sexual assault examination conducted by a SANE nurse.¹⁸³ The San Francisco Police Department (SFPD), which took Marlowe's report at the hospital, indicated that the rape kit would be processed in the next fourteen to sixty days.¹⁸⁴

Marlowe later contacted Police Officer Joe Cordes, the SFPD officer investigating her allegation, with an indication of who she suspected was the man who raped her.¹⁸⁵ “Cordes instructed Marlowe to make contact with Suspect, and flirt with him in order to elicit a confession that he had indeed

¹⁷⁸ *Id.* at 493–94, 496, 497.

¹⁷⁹ *Id.* at 487 (quoting *United States v. Thorpe*, 471 F.3d 652, 661 (6th Cir. 2006) (quoting *United States v. Tuitt*, 68 F. Supp. 2d 4, 10 (D. Mass. 1999))).

¹⁸⁰ Complaint at 2–3, *Marlowe v. City of San Francisco*, No. 3:16-CV-00076, 2017 WL 5973505 (N.D. Cal. Jan. 10, 2017), *aff'd*, 753 F. App'x 479 (9th Cir. 2019), *cert. denied*, 140 S. Ct 244 (2019) [hereinafter *Marlowe Complaint*].

¹⁸¹ *Id.* at 3.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 3–4.

raped Marlowe. Cordes also instructed Marlowe to set up a date with Suspect to prove that Marlowe could identify Suspect in a crowd. Cordes told Marlowe that if she refused to engage in [this] action[], SFPD would cease its investigation of her rape.”¹⁸⁶ Cordes later “strongly discouraged Marlowe from further pursuing her case” because it “was too much work for the SFPD to investigate and prosecute a rape in which alcohol was involved.”¹⁸⁷ After repeatedly attempting to set up a “date,” Marlowe contacted Cordes to inform him “that she refused to continue to privately investigate her case.”¹⁸⁸ Only then did SFPD inform Marlowe that the suspect had been taken in for questioning and his DNA sample collected.¹⁸⁹ Marlowe was told that the suspect’s DNA was being processed at the lab and that her rape kit results would be available shortly.¹⁹⁰

Over the course of the next two years, Marlowe unsuccessfully sought testing of her rape kit.¹⁹¹ She was told that there was a “backlog” at the lab because of the priority to test evidence from “more important” crimes.¹⁹² At one point, “Marlowe was told that due to the passage of time, her case was considered ‘inactive’ and was placed in a storage facility. SFPD also told Marlowe that because she was ‘a woman,’ ‘weighs less than men,’ and has her ‘menstruations,’ that Marlowe should not have been out partying” on the day of the incident.¹⁹³ Marlowe eventually discovered that her experience was not unusual.¹⁹⁴ In 2014, after first denying the existence of a backlog, SFPD acknowledged that “several thousand” rape kits dating back to 2003 remained untested.¹⁹⁵

4. *The Ninth Circuit’s Analysis*

Similar to Doe, Heather Marlowe’s experience illustrates the deficiencies of police responses to reports of rape and sexual assault. Although her exact circumstances are unique, police inaction unfortunately is not. In 2016, Marlowe sued the city of San Francisco, along with various top police officials, alleging a violation of equal protection and seeking to

¹⁸⁶ *Id.* at 4.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 5–6.

¹⁹² *Id.* at 5.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 6.

¹⁹⁵ *Id.*

compel San Francisco to test her rape kit.¹⁹⁶ The complaint charged that the police department “had the policy, practice and/or custom of failing to diligently investigate sexual assault allegations,” as evidenced by its failure to test thousands of rape kits.¹⁹⁷

Despite the clear disregard the police showed Marlowe in their investigation of her sexual assault, the District Court for the Northern District of California dismissed Marlowe’s case on two grounds: Marlowe “fail[ed] to allege any facts to . . . support a determination that similarly situated persons were treated more favorably than Marlowe,” and her claim was barred by the applicable two-year statute of limitations.¹⁹⁸ The district court stated that in order to allege a valid equal protection claim, Marlowe would need to show “facts to support [her] conclusory allegations that defendants treat persons who report sexual assaults less favorably than persons who are similarly situated.”¹⁹⁹ The defendants argued that the proper comparison group would be male rape victims whose rape kits were treated differently.²⁰⁰ Conversely, Marlowe alleged a difference in treatment between sexual assault victims and victims of other crimes without specific pleadings pertaining to comparators.²⁰¹ Part of her theory of discriminatory intent rested on the statement by police that other crimes were “more important” and therefore merited a higher priority for DNA testing.²⁰²

Nonetheless, the district court held that Marlowe failed to allege any facts to substantiate that persons who reported other types of crimes were treated more favorably and dismissed her claim.²⁰³ The district court further held that Marlowe was not eligible for an exception to the statute of limitations.²⁰⁴ The Ninth Circuit upheld the district court’s dismissal in a

¹⁹⁶ *Id.* at 2.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ *Marlowe*, 2017 WL 5973505, at *1–2 (quoting Order Granting Motion to Dismiss at 2, *Marlowe*, 2017 WL 5973505).

¹⁹⁹ *Id.* at *1.

²⁰⁰ Defendants’ Notice of Motion & Motion to Dismiss Plaintiff’s Complaint at 8–9, *Marlowe*, 2017 WL 5973505.

²⁰¹ Appellant’s Reply at 3, 5, *Marlowe*, 753 F. App’x 479 (9th Cir. 2019) (No. 17-15205) (acknowledging that male rape kits were similarly disregarded, which caused them to be “swept up in the discrimination that routinely plagued women,” but arguing that this does not exculpate the SFPD but rather further demonstrates the lack of regard given to victims of rape).

²⁰² *Id.* at 4; see *Navarro v. Block*, 72 F.3d 712, 713, 717 (9th Cir. 1995) (reversing summary judgment as to plaintiff’s equal protection claim for a “discriminatory policy and custom of according lower priority to 911 calls related to domestic violence than to non-domestic violence calls”).

²⁰³ *Marlowe*, 2017 WL 5973505, at *1–2.

²⁰⁴ *Id.* at *2.

brief memorandum.²⁰⁵ Although the Ninth Circuit did not describe the contours of the comparator requirement,²⁰⁶ the lower court only listed two grounds for dismissal—the statute of limitations and comparators.²⁰⁷ After briefly dispensing with the statute of limitations, the Ninth Circuit stated that Marlowe’s claims were conclusory and “fail[ed] on the merits.”²⁰⁸ The dismissal on the merits hinged on the lack of specific pleadings pertaining to comparators; therefore, by affirming, the Ninth Circuit agreed with the comparator standard. In reaching its conclusion, the lower court quoted an earlier Ninth Circuit opinion which held that an “equal protection claim requires a showing of ‘unequal treatment of people in similar circumstances,’”²⁰⁹ which further establishes that the Ninth Circuit adheres to the comparator requirement and will not infer discriminatory intent from the totality of the evidence.

On July 22, 2019, Marlowe petitioned the Supreme Court to hear her case.²¹⁰ The Supreme Court denied certiorari on October 7, 2019.²¹¹ In her petition for certiorari, Marlowe argued that not testing rape kits was a symptom of “underenforcement of rape complaints—90[%] of which are brought by women”—and that public policy supported enabling valid equal protection claims on those grounds.²¹² She further argued that the Supreme Court needed to step in because of the differences between the Sixth Circuit’s analysis and the Ninth Circuit’s approach under incredibly similar facts.²¹³ To this day, she has not received the results from her rape kit, despite the San Francisco Police Department alleging that it has cleared its rape kit backlog.²¹⁴

²⁰⁵ *Marlowe*, 753 F. App’x at 479.

²⁰⁶ *See id.* at 479–80.

²⁰⁷ *Marlowe*, 2017 WL 5973505, at *1–2.

²⁰⁸ *Marlowe*, 753 F. App’x at 480.

²⁰⁹ *Marlowe*, 2017 WL 5973505, at *1 (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995)).

²¹⁰ *Iovino*, *supra* note 18; Petition for Writ of Certiorari at 26, *Marlowe v. City of San Francisco*, 140 S. Ct. 244 (2019) (No. 19-116).

²¹¹ *Marlowe*, 140 S. Ct. at 244.

²¹² Petition for Writ of Certiorari, *supra* note 210, at 4, 18.

²¹³ *Id.* at 21–23.

²¹⁴ *See Heather Marlowe Files Sexual Assault Case to Supreme Court*, S.F. NEWS (Aug. 1, 2019), <http://www.thesfnews.com/sf-woman-files-sexual-assault-case-to-supreme-court/50028> [https://perma.cc/2Y3B-SPUQ]; Raven Rakia, *Rape Survivor Petitions Supreme Court over How Police Handled Her Case*, APPEAL (Aug. 15, 2019), <https://theappeal.org/activist-petitions-supreme-court-over-untested-rape-kits-but-says-the-problem-lies-deeper/> [https://perma.cc/F9ND-CEZL]. Marlowe has described her experience with the police as “traumatizing.” Evan Sernoffsky, *Woman Files Suit Charging S.F. Cops Not Investigating Her Rape*, SFGATE (Jan. 13, 2016), <https://www.sfgate.com/news/article/Woman-files-suit-charging-S-F-cops-not-6754375.php> [https://perma.cc/6RGW-XFEJ].

C. Circuit Court Comparison

While these circuits relied on the same rule in theory, they diverged in application, which ultimately resulted in disparate pleading standards. While in the Ninth Circuit, a plaintiff would need to plead specific facts pertaining to a comparator to survive a motion to dismiss,²¹⁵ a plaintiff in the Sixth Circuit would not.²¹⁶ More specifically, the Sixth Circuit permitted a finding of intent that rested on the totality of the circumstances, including the pervasive lack of testing that disproportionately impacted women and specific untruthful statements made by the defendants, thus not requiring specific facts pertaining to a comparator.²¹⁷ On the other hand, the Ninth Circuit sought specific facts of persons who are similarly situated to the plaintiff, or comparators, who did not face the same denial of police protective services in order to find discriminatory intent.²¹⁸ Marlowe, the Ninth Circuit plaintiff, pleaded specific facts showing that the SFPD had a longstanding practice of deprioritizing and refusing to properly investigate rape complaints, even outsourcing the investigations to the victims themselves, shelving thousands of rape kits for years, lying about the quantity of untested kits, and actively discouraging rape victims from pursuing cases.²¹⁹ Under the Sixth Circuit standard, these facts would appear more than sufficient to establish a prima facie pleading of discriminatory intent. The Court must clarify the proper pleading standard in order to ensure fairness and uniformity of law.²²⁰ Jurisdiction alone should not determine whether a plaintiff receives justice.

III. EQUAL PROTECTION ANALYSIS

Although the Supreme Court denied certiorari in *Marlowe*,²²¹ the Court should accept certiorari in a future case in order to clarify the appropriate

²¹⁵ *Marlowe v. City of San Francisco*, 753 F. App'x 479, 479–80 (9th Cir. 2019), *cert. denied*, 140 S. Ct 244 (2019); *see supra* notes 206–209 and accompanying text.

²¹⁶ *Doe v. City of Memphis*, 928 F.3d 481, 493–94 (6th Cir. 2019); *see supra* notes 166–179 and accompanying text.

²¹⁷ *Doe*, 928 F.3d at 493–94.

²¹⁸ *Marlowe*, 753 F. App'x at 479–80; *see supra* notes 206–209 and accompanying text.

²¹⁹ *Marlowe*, 753 F. App'x at 479–80; *Marlowe v. City of San Francisco*, No. 16-CV-00076, 2017 WL 5973505, at *1–2 (N.D. Cal. Jan. 10, 2017), *aff'd*, 753 F. App'x 479 (9th Cir. 2019), *cert. denied*, 140 S. Ct 244 (2019).

²²⁰ *See* Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 436–37 (2004) (“[T]he strong policy in favor of uniformity is reflected in the Constitution itself, which vests the ‘one supreme Court’ with the judicial power to uphold and interpret federal law as ‘the supreme Law of the Land.’” (first quoting U.S. CONST. art. III, § 1; and then quoting *id.* art. VI)).

²²¹ *Marlowe*, 140 S. Ct. at 244.

standard for similar equal protection cases. There are multiple pending lawsuits in other circuits alleging equal protection violations based on similar facts,²²² and likely even more suits have yet to be filed. As these lawsuits continue, courts should follow the Sixth Circuit's ruling that to state a prima facie equal protection claim, plaintiffs must show that the defendants engaged in a custom or practice to provide less protection to victims of sexual assaults than other crimes and that this was motivated by gender discrimination.²²³ At the pleading stage, discrimination can be inferred based on the totality of the circumstances; this standard does not require a threshold pleading of specific comparators.²²⁴

Besides the difficulty of proving discriminatory intent, plaintiffs in similar cases are very likely to satisfy the other elements of a successful equal protection claim, including proving that the constitutional denial resulted from state action and that the lack of testing did not advance a legitimate government interest. This Part will analyze and apply the requirements of an equal protection claim brought under § 1983 in order to illustrate how requiring specific comparators to show discriminatory intent hinders effective equal protection litigation. This Part ultimately argues that the Sixth Circuit correctly held that specific pleadings pertaining to comparators are not necessary to establish discrimination and that the Supreme Court should adopt this standard in a future case.

A. *Discrimination Without Comparators*

The Sixth Circuit standard to not require pleading specific facts related to comparators is built on a foundation of other circuit courts' holdings in related cases, illustrating that plaintiffs can demonstrate a legally sufficient equal protection claim without the need for comparators. In *Watson v. City of Kansas City*, the Tenth Circuit considered a claim brought by a woman alleging an equal protection violation due to police refusal to respond to her reports of domestic violence.²²⁵ The court held that in order to survive summary judgment, she must "demonstrate that it is the policy or custom of the defendants to provide less police protection to victims of domestic assault than to other assault victims, . . . provide evidence that discrimination was a motivating factor for the defendants," and show "that she was injured by operation of the policy or custom."²²⁶ Although the court relied in part on

²²² See *Borkowski v. Baltimore County*, 414 F. Supp. 3d 788, 797–800 (D. Md. 2019); *Smith Complaint*, *supra* note 13, at 1–2.

²²³ See *Doe v. City of Memphis*, 928 F.3d 481, 487 (6th Cir. 2019).

²²⁴ *Id.* at 493.

²²⁵ 857 F.2d 690, 692–93 (10th Cir. 1988).

²²⁶ *Id.* at 694.

statistical evidence that nondomestic assault cases were more likely to lead to an arrest than domestic assault cases in order to show discriminatory impact, the court did not require specific facts pertaining to individual assault victims who were similarly situated to domestic violence victims.²²⁷ Following the ruling of the Tenth Circuit, at least six other circuits have adopted the *Watson* standard for equal protection claims brought by victims of domestic violence.²²⁸ These holdings establish that various types of evidence, such as anecdotal or statistical evidence, can be sufficient to show discriminatory intent, thereby clearly negating the requirement to plead specific facts relating to a comparator.²²⁹ When adopting the *Watson* standard, the Fifth Circuit noted that “the standard articulated in *Watson* represents a coherent approach for courts to review Equal Protection claims pertaining to law enforcement’s practices, policies, and customs toward domestic assault cases.”²³⁰ The Fifth Circuit opinion is

²²⁷ *Id.* at 695–96 (“[The plaintiff] presented evidence showing that out of 608 nondomestic assault cases in Kansas City, Kansas, from January 1, 1983, to September 8, 1983, where there was a known perpetrator, there were 186 arrests for an arrest rate of 31%. Out of 369 domestic assaults, there were only 69 arrests for a rate of 16%.”).

²²⁸ *Jones v. Union County*, 296 F.3d 417, 426 (6th Cir. 2002) (“Plaintiff must show that it is the policy or custom . . . to provide less protection to victims of domestic violence than those of other crimes, and that gender discrimination was the motivation for this disparate treatment.”); *Shipp v. McMahon*, 234 F.3d 907, 914 (5th Cir. 2000) (“[T]oday we join the circuits that have adopted *Watson*’s approach.”); *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997) (“Under the standard we adopt today, Soto must show that there is a policy or custom of providing less protection to victims of domestic assault than to victims of other crimes, that gender discrimination is a motivating factor, and that Soto was injured by the practice.”); *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994) (stating that plaintiff must adduce “evidence sufficient to sustain the inference that there is a policy or a practice of affording less protection to victims of domestic violence than to other victims of violence in comparable circumstances, that discrimination against one sex was a motivating factor, and that the policy or practice was the proximate cause of plaintiff’s injury”); *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994) (applying the *Watson* standard to an equal protection claim against a municipality); *Hynson v. City of Chester*, 864 F.2d 1026, 1031 (3rd Cir. 1988) (noting that in order to survive summary judgment on an equal protection claim, “a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom”).

²²⁹ See *Ricketts*, 36 F.3d at 782 (implying that discriminatory intent could be established by evidence of statistics or remarks by defendants yet finding plaintiff’s evidence insufficient); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701–02 (9th Cir. 1988) (noting that officer remarks that plaintiff’s husband was entitled to hit her because she was “carrying on” suggested “an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women” sufficient to allow plaintiff’s complaint to survive motion to dismiss); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1530 (D. Conn. 1984) (denying a motion to dismiss an equal protection claim based on a series of acts and omissions on the part of the defendant police officers showing deliberate indifference to domestic violence complaints).

²³⁰ *Shipp*, 234 F.3d at 914.

significant because while the other circuits do not explicitly address the exclusion of similarly situated comparators, the Fifth Circuit holds that similarly situated individuals are still necessary in “class of one” causes of action.²³¹ To state a class-of-one equal protection claim, a single plaintiff must allege that a similarly situated individual was treated more favorably for no rational purpose.²³² Lower courts citing to the Fifth Circuit decision specifically mention its reference to comparators in class-of-one cases.²³³ By mentioning comparators in class-of-one claims but not in claims based on membership in a protected class, the Fifth Circuit suggests that courts do not require similarly situated comparators under the *Watson* standard. This opinion establishes that there is no linguistic ambiguity—the courts do not require comparators under the *Watson* standard.

The Second Circuit has also adopted the *Watson* standard.²³⁴ Additionally, the Second Circuit has taken the standard further by affirmatively stating that there is no need for comparators in equal protection claims based on a facially neutral custom or practice that was motivated by discriminatory animus. In *Pyke v. Cuomo*, the Second Circuit held that when plaintiffs “alleg[e] an equal protection claim under a theory of discriminatory . . . motivation underlying a facially neutral [custom or practice, they] need not plead or show the disparate treatment of other similarly situated individuals.”²³⁵ The Second Circuit relied on Supreme Court reasoning to argue that while selective-prosecution equal protection claims must plead and establish similarly situated comparators due to the need for special deference to the Executive Branch in prosecution, no such requirement applies to *refusal* to provide police protection.²³⁶ The court expressly held that “[s]o long as [plaintiffs] allege and establish that the defendants discriminatorily refused to provide police protection because [of the plaintiffs’ membership in a protected class,] plaintiffs need not allege or establish the disparate treatment of otherwise similarly situated” comparators.²³⁷

²³¹ *Id.* at 916 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)) (noting that “the Equal Protection Clause can give rise to a cause of action on behalf of a ‘class of one’ even when the plaintiff does not allege membership in a protected class or group”).

²³² *Id.*

²³³ *See, e.g.*, *Lefebure v. Boeker*, 390 F. Supp. 3d 729, 762 (M.D. La. 2019).

²³⁴ *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994).

²³⁵ 258 F.3d 107, 108–09 (2d Cir. 2001).

²³⁶ *Id.* at 109 (distinguishing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)).

²³⁷ *Id.*

Part of the court’s reasoning was that it “would be difficult, if not impossible, to find” comparators.²³⁸ In *Pyke*, the plaintiffs were Native Americans living on a reservation who were allegedly denied adequate police protections.²³⁹ Since the plaintiffs’ living arrangement and governance were unique to the Native American community, the plaintiffs would be incapable of finding similarly situated non-Native American individuals who were treated differently.²⁴⁰ If the court enforced a need for comparators in order to make a successful equal protection claim, and comparators were impossible to find, the police “could lawfully ignore the needs of Native Americans for police protection on the basis of discriminatory . . . animus.”²⁴¹ This would enable discrimination without any possible remedy. The Second Circuit held that “[t]his is clearly not the law.”²⁴²

Similarly, although plaintiffs may be able to draw a generalized comparison to victims of other crimes, it could be difficult or impossible to find an exact comparator in cases of rape due to the unique circumstances. Courts typically construe the “similarly situated” requirement narrowly, so while some differences seem minimal on the surface, more often than not they disqualify potential comparators.²⁴³ For example, although other crimes do result in DNA evidence, such evidence is not necessarily collected or handled in the same manner as rape kits, which could disqualify comparators.²⁴⁴ Additionally, comparators could be difficult or impossible to find because although the vast majority of rape claims are brought by women, even the claims brought by men are disbelieved and disregarded, albeit for distinct reasons.²⁴⁵ Many police departments have a culture of “hegemonic masculinity,” which leads to bias rooted in sexist stereotypes

²³⁸ *Id.*

²³⁹ *Id.* at 108, 110.

²⁴⁰ *Id.* at 109.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See Goldberg, *supra* note 26, at 751–64 (noting that some courts require comparators to be “nearly identical”); see, e.g., Ryan v. City of Detroit, 698 F. App’x 272, 277, 279–80 (6th Cir. 2017) (finding that a victim of domestic violence who was murdered by her ex-husband who was a police officer was not similarly situated enough to other female victims of domestic violence that were murdered by police officers merely because she did not give her name to the detective when she first reported the domestic violence so he did not know her identity).

²⁴⁴ For example, for many crimes the DNA evidence is often collected from the crime scene itself and is not stored in a uniform “kit.” See JOSEPH PETERSON, IRA SOMMERS, DEBORAH BASKIN & DONALD JOHNSON, NAT’L INST. OF JUST., THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 90, 93 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf> [<https://perma.cc/5P7S-2P2R>].

²⁴⁵ Yung, *supra* note 48, at 230 (only 48% of police officers in one survey “said they would believe a male victim”).

against not only female victims but male victims of rape as well.²⁴⁶ Accordingly, officers may believe that men cannot really be raped and thus dispose of cases accordingly.²⁴⁷ Unfortunately, this not only prevents male rape victims from obtaining justice but also disqualifies them as a useful comparator class, despite the fact that they are the most similarly situated to female victims of sexual violence yet fall outside the protected class. This is similar to the problem of the “‘equal opportunity’ harasser” in employment-based sex-discrimination claims; in cases when an employer harasses both men and women, courts have found that this is not discrimination “because of sex” and thus the employees are left without a remedy despite suffering from sexual harassment.²⁴⁸ From the reasoning of *Pyke*, enforcing a comparator standard for equal protection claims based on untested rape kits would be contrary to law and policy because it would enable police to “lawfully ignore the need of [women] for police protection on the basis of discriminatory . . . animus.”²⁴⁹ If there is no comparator that would be similarly situated enough for the courts to hear a claim, then police can effectively ignore the needs of victims of sexual assault with impunity.

Furthermore, the comparator requirement belies the reality of intersectional identities. Intersectionality theory recognizes that people are often subject to unequal treatment based on “their identity as a whole, [not] individual traits in isolation.”²⁵⁰ Race, poverty, and sexual violence are inextricably linked.²⁵¹ As a result, it can be difficult to determine the exact

²⁴⁶ Namian, *supra* note 82, at 100, 103–15.

²⁴⁷ *Id.* at 100.

²⁴⁸ See, e.g., *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000) (“Title VII does not cover the ‘equal opportunity’ or ‘bisexual’ harasser, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).”).

²⁴⁹ See *Pyke v. Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001).

²⁵⁰ Goldberg, *supra* note 26, at 736. Professor Suzanne Goldberg explains that the “theory emerged in legal scholarship in the early 1990s,” *id.* at 736 n.20, pioneered by scholars who argued that “the experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and . . . tend not to be represented within the discourses of either feminism or antiracism,” Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243–44 (1991) (footnote omitted), and who “characteriz[ed] and criticiz[ed] ‘gender essentialism—the notion that a unitary, “essential” women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience,’” Goldberg, *supra* note 26, at 736 n.20 (quoting Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990)).

²⁵¹ See Thema Bryant-Davis, Sarah E. Ullman, Yuying Tsong, Shaquita Tillman & Kimberly Smith, *Struggling to Survive: Sexual Assault, Poverty, and Mental Health Outcomes of African American Women*, 80 AM. J. ORTHOPSYCHIATRY 61, 61 (2010) (noting Black women’s “increased risk for sexual assault and . . . persistent poverty”). See generally EMILY AUSTIN & LORENA CAMPOS, CAL. COAL. AGAINST SEXUAL ASSAULT, ENDING SEXUAL VIOLENCE: AN INTERSECTIONAL APPROACH (2017),

reason why a victim's rape complaint is mishandled—it could be her gender, her race, her socioeconomic status, her sexual orientation, her employment (e.g., as a sex worker), or, most likely, some combination of these traits. Although this Note centers its discussion on equal protection claims based on gender, with the widespread and increasing recognition of police bias against the Black community,²⁵² it would be remiss to fail to acknowledge how comparators particularly fail women of color. A Black woman who is neglected by police after a rape may have a harder time proving an equal protection claim because it would be unclear which aspect of her identity triggered the nonresponse and who the appropriate comparator should be.²⁵³

Professor Suzanne B. Goldberg has identified the incompatibility of intersectionality as one of the key issues with comparator requirements.²⁵⁴ Although some courts have attempted to address this by considering “a limited idea of ‘sex plus’ or ‘race plus’ discrimination,” each must be proven individually, which fails to consider how various forms of discrimination coincide.²⁵⁵ Professor Shreya Atrey has also discussed the problem of comparators in effectively addressing intersectionality, further pointing out that comparators inherently create a binary that is antithetical to modern conceptions of identity: “So if a disabled Black woman brings a discrimination claim on the basis of her disability, race, and gender, who would her comparator(s) be? . . . Could we also consider comparators beyond the trite binaries of disabled/non-disabled, white/Black, women/men to see comparator groups more closely based on their nature of disabilities, ethnicities, and genders?”²⁵⁶ Courts accepting evidence other than

<https://www.calcsa.org/wp-content/uploads/2017/03/SAAM-2017-reduced-size-edited.pdf> [<https://perma.cc/E75W-WZ9K>] (describing how sexual violence overlaps with other systems of oppression, including racial and economic justice); Crenshaw, *supra* note 250, at 1243.

²⁵² See, e.g., Mary-Elizabeth Murphy, *Black Women Are the Victims of Police Violence, Too*, WASH. POST (July 24, 2020, 5:00 AM), <https://www.washingtonpost.com/outlook/2020/07/24/police-violence-happens-against-women-too> [<https://perma.cc/88S4-LMCU>] (noting a history of gendered police violence and how “white police officers seem[] to relish the opportunity to assert racial and sexual dominance over black women”); see also *Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force*, PRISON POL’Y INITIATIVE (May 14, 2019), <https://www.prisonpolicy.org/blog/2019/05/14/policingwomen> [<https://perma.cc/69KR-HS9A>] (observing that “women make up an increasingly large share of all arrests,” with Black women more likely to be subjected to arrests and use of force than white or Latina women).

²⁵³ Goldberg, *supra* note 26, at 764–66, 772–77 (“Because all individuals have multidimensional aspects of their identities, as current iterations of intersectionality theory show, very close comparators are hard to come by even for a relatively simple discrimination claim.”).

²⁵⁴ *Id.*

²⁵⁵ Shreya Atrey, *Comparison in Intersectional Discrimination*, 38 LEGAL STUD. 379, 381 (2018).

²⁵⁶ *Id.* at 380–81; see also Ben Smith, *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*, 16 EQUAL RTS. REV. 73, 81 (2016) (noting that discrimination

comparators to prove discriminatory intent would help alleviate this problem.

Without comparators, “plaintiffs must still allege facts supporting a plausible inference that ‘discriminatory intent was a motivating factor’ in order to state an equal protection claim.”²⁵⁷ Under this standard, plaintiffs could “show discriminatory intent by pointing to animus on the part of individual officers . . . or a pattern of failing to provide an adequate police response to a protected class.”²⁵⁸ Intent can be inferred (like in *Doe v. City of Memphis*) from evidence that police generally fail to respond adequately to victims of sexual assault as opposed to the victims of other violent crimes, even if there are not specific individuals similarly situated enough to be considered comparators by the court.²⁵⁹ For example, plaintiffs could allege that DNA evidence from other crimes was statistically more likely to be tested than the DNA evidence contained in rape kits.

Plaintiffs could also use specific facts to show explicit evidence of discriminatory animus, such as evidence from police reports and statements by police that they do not believe victims of sexual assault. In *Chase v. Nodine’s Smokehouse*, the court followed the Second Circuit ruling in *Pyke* in holding that the “[p]laintiff need not plead disparate treatment of similarly situated individuals” but rather “must allege facts supporting a plausible inference that discriminatory intent was a motivating factor behind the denial of police protection.”²⁶⁰ Discriminatory intent could be found by “evidence of animus on the part of individual officers, including pointing to demeanor and specific statements.”²⁶¹ In *Chase*, the police allegedly mocked the victim’s complaint of sexual assault and harassment by “recharacterizing [her] allegations . . . as ‘flirting.’”²⁶² During an interview with the defendant, the investigating officer exhibited “disdain for the case by saying he knew [the defendant] was not a ‘menace to society’ and that there was no need to

jurisprudence often “essentialize[s] the experiences of identity groups,” meaning “the law assumes individuals can be characterized by one dominant ground, leaving those with complex identities outside the scope of protection”).

²⁵⁷ *White v. City of New York*, 206 F. Supp. 3d 920, 930–31 (S.D.N.Y. 2016) (quoting *Okin v. Vill. of Cornwall-on-Hudson Police Dep’t*, 577 F.3d 415, 438 (2d Cir. 2009)); see also *Okin*, 577 F.3d at 439 (holding that a victim of domestic violence making an equal protection claim need not necessarily allege similarly situated comparators but is still required “to show that it was her gender, and not some other characteristic, that motivated the treatment she received”).

²⁵⁸ *White*, 206 F. Supp. 3d at 930–31.

²⁵⁹ See *Doe v. City of Memphis*, 928 F.3d 481, 493 (6th Cir. 2019).

²⁶⁰ No. 3:18-CV-00683, 2019 WL 1469412, at *2 (D. Conn. Apr. 3, 2019) (citing *Pyke v. Cuomo*, 258 F.3d 107, 108–09 (2d Cir. 2001)).

²⁶¹ *Id.* (citing *White*, 206 F. Supp. 3d at 932).

²⁶² *Id.*

‘track down every lead.’”²⁶³ The officer also “set out a plan to ‘turn the tables’ on [the plaintiff] and bragged about flipping a prior sexual assault case on the victim by bringing a false statement case against her.”²⁶⁴

Heather Marlowe similarly pled evidence of specific statements by the police to establish discriminatory animus. An officer said to Marlowe that if she refused to flirt with and set up a date with the defendant, the “SFPD would cease its investigation of her rape.”²⁶⁵ The officer “strongly discouraged Marlowe from further pursuing her case, indicating that it was too much work for the SFPD to investigate and prosecute a rape in which alcohol was involved.”²⁶⁶ Instead of thoroughly investigating, the officers blamed Marlowe and told her “that because she was ‘a woman,’ [who] ‘weighs less than men[]’ and has her ‘menstruations,’ that [she] should not have been out partying” on the day of the incident.²⁶⁷ Like in *Chase*, these facts should be sufficient to make a showing of discriminatory intent regardless of comparators.

B. State Action

In addition to establishing discrimination, in order to bring a claim against police, a plaintiff would need to meet the requirements of 42 U.S.C. § 1983. Section 1983 was passed shortly after the Fourteenth Amendment in order to provide a remedy for victims whose federal or constitutional rights have been violated by an actor proceeding under state authority.²⁶⁸ Section 1983 imposes liability on a state actor who deprives a person “of any rights, privileges, or immunities secured by the Constitution.”²⁶⁹ In order to state a claim under § 1983, the plaintiff must allege facts that satisfy two requirements: first, that there was a “violation of a right secured by the Constitution and laws of the United States,” and second, “that the alleged deprivation was committed by a person acting under color of state law.”²⁷⁰

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Marlowe Complaint, *supra* note 180, at 4.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 5.

²⁶⁸ Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691–92 (1978) (“[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress” (emphasis in original) (quoting 42 U.S.C. § 1983)).

²⁶⁹ 42 U.S.C. § 1983.

²⁷⁰ West v. Atkins, 487 U.S. 42, 48 (1988).

The refusal to test rapes kits en masse, as seen in *Marlowe*, violates the right to equal protection “secured by the Constitution and laws of the United States.”²⁷¹ Following the Court’s holding in *Monell v. Department of Social Services*, municipal entities may be liable under § 1983 when their policies, customs, or practices cause a constitutional deprivation.²⁷² Police departments and the cities they serve can both be held liable under this standard.²⁷³ In order to establish a custom, the custom must be “founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.”²⁷⁴ The Ninth Circuit has held that a dozen cases of denying medical treatment was sufficient to constitute a custom or practice.²⁷⁵ Therefore, the refusal to test thousands of rape kits in *Marlowe* should pass this threshold to establish a custom or practice by state actors—police officers—denying equal protection of services under color of state law.²⁷⁶

Police officers are indisputably actors proceeding under state authority.²⁷⁷ The denial of police protective services has been held to be sufficient to make an equal protection claim under § 1983. In fact, the selective withdrawal of police protection is the “prototypical denial of equal protection,” such as when the Reconstruction Era Southern states refused police protection to Black citizens.²⁷⁸ Although “there is no constitutional right . . . to be protected against being attacked or raped by a member of the general public,” if “the state discriminates in providing [its] protection to members of the public[,] those situations ‘of course violate the equal protection clause of the Fourteenth Amendment.’”²⁷⁹ Police officers have a

²⁷¹ *See id.*

²⁷² 436 U.S. 658, 707–08 (1978).

²⁷³ *See id.* at 701.

²⁷⁴ *Oyenik v. Corizon Health Inc.*, 696 F. App’x 792, 794 (9th Cir. 2017) (quoting *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996), *holding modified by* *Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001)).

²⁷⁵ *Id.* at 794–95. While *Oyenik* found a “custom or practice of deliberate indifference to prisoners’ serious medical needs,” the case may also provide guidance for establishing a custom or practice in the equal protection context. *See id.*

²⁷⁶ *Heather Marlowe Files Sexual Assault Case to Supreme Court*, S.F. NEWS (Aug. 1, 2019), <http://www.thesfnews.com/sf-woman-files-sexual-assault-case-to-supreme-court/50028> [<https://perma.cc/X2XD-E7PF>] (“SFPD’s own internal audit [revealed] they only tested ‘753 of the several thousand untested rape kits’ in 2014.”).

²⁷⁷ *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988) (noting that police officers did not contest that their actions occurred under color of state law); *Hynson v. City of Chester, Legal Dep’t*, 864 F.2d 1026, 1029 (3d Cir. 1988) (finding “no dispute that the police officers were acting under color of state law”).

²⁷⁸ *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000).

²⁷⁹ *Lowers v. City of Streator*, 627 F. Supp. 244, 246 (N.D. Ill. 1985) (quoting *Bowers v. De Vito*, 686 F.2d 616, 618 (7th Cir. 1982)); *see also* *Watson*, 857 F.2d at 694 (“[F]ailing to provide police

duty to protect people in their city and “must do so on a fair and equal basis.”²⁸⁰ In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court noted that “[t]he State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”²⁸¹ Multiple courts have further acknowledged that this reasoning can specifically apply to intentionally discriminatory policies, practices, and customs of law enforcement with regard to domestic violence and sexual assault cases.²⁸² In the past few decades, there has been a “growing trend” of § 1983 claims against the police alleging violations of equal protection for female domestic violence and sexual assault victims.²⁸³ Valid equal protection claims have even been substantiated when police departments have failed to properly collect and test rape kits.²⁸⁴ Police officers often have sole discretion concerning whether to submit rape kits for testing.²⁸⁵ Therefore, by refusing to test rape kits, they are exerting their state authority to deny equal protection of their services and leave victims without any possible recourse for redress.

Thus, lawsuits that allege equal protection violations for police refusal to test rape kits meet the necessary components of sufficient state action for a successful § 1983 equal protection claim.

protection is subject to the equal protection clause under section 1983. . . . Although there is no general constitutional right to police protection, the state may not discriminate in providing such protection.”); *Bowers*, 686 F.2d at 618 (“Discrimination in providing protection against private violence could of course violate the equal protection clause of the Fourteenth Amendment.”); *Smith v. Ross*, 482 F.2d 33, 36–37 (6th Cir. 1973) (“[A] law enforcement officer can be liable under § 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly, and thereby denies equal protection to persons legitimately exercising rights guaranteed them under state or federal law.”); *Bartalone v. County of Berrien*, 643 F. Supp. 574, 577 (W.D. Mich. 1986) (“[I]f officials have notice of the possibility of attacks on women in domestic relationships or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. Failure to perform this duty would constitute a denial of equal protection of the laws.” (quoting *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984))).

²⁸⁰ *Bartalone*, 643 F. Supp. at 576–77.

²⁸¹ 489 U.S. 189, 197 n.3 (1989).

²⁸² *Lefebure v. Boeker*, 390 F. Supp. 3d 729, 746–48 (M.D. La. 2019) (holding the plaintiff alleged a valid equal protection claim based on the failure of city officials to investigate her rape and test her rape kit); *Chase v. Nodine’s Smokehouse, Inc.*, No. 3:18-CV-00683, 2019 WL 1469412, at *3 (D. Conn. Apr. 3, 2019) (noting that “the police may not choose to shirk their duty to pursue a criminal sexual assault complaint because of some animus against women who make such claims”); *Lowers*, 627 F. Supp. at 246 (holding a § 1983 claim was sufficiently stated when the plaintiff alleged that the police failure to investigate and arrest her rapist “was a result of her being a woman”).

²⁸³ *Hynson v. City of Chester, Legal Dep’t*, 864 F.2d 1026, 1027 (3d Cir. 1988); see sources cited *supra* note 282.

²⁸⁴ *Lefebure*, 390 F. Supp. 3d at 762–63; Consent Judgment, *supra* note 115, at 1.

²⁸⁵ See *Fucci*, *supra* note 41, at 204.

C. Intermediate Scrutiny

Once a plaintiff establishes a prima facie equal protection claim based on state action under § 1983 and discriminatory intent, the courts will assess gender-based equal protection claims under an intermediate scrutiny standard. This standard means that gender distinctions must serve important governmental objectives and must be substantially related to the achievement of those objectives in order to be considered constitutional.²⁸⁶

Although no case alleging these specific facts has come before the Supreme Court yet, police refusal to test rape kits would likely not survive intermediate scrutiny. There is no important government objective served by failing to test rape kits. In fact, not testing rape kits is anathema to the important government interests of public safety and public trust in the government. In *Craig v. Boren*, the Court stated that “the protection of public health and safety” clearly represents an important government objective.²⁸⁷ Testing rape kits would only serve to enhance public safety by identifying offenders and bringing them to justice.

Defendants may argue that not testing rape kits serves the important government objectives of efficiency and saving money; however, the Court held in *Frontiero v. Richardson* that these are not compelling government interests.²⁸⁸ Regardless, not testing rape kits would not be substantially related to the achievement of those objectives. There are already federal funds granted to states for testing rape kits, so refusing to test rape kits does not save the state money.²⁸⁹ One study even shows that testing all backlogged sexual assault kits is actually more cost effective as it averts future sexual assaults that will ultimately cost more money.²⁹⁰

Additionally, as more rape kits are tested, the CODIS database grows, which enhances the ability of law enforcement to find perpetrators of all

²⁸⁶ *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that a state’s lower drinking age for women than for men does not survive intermediate scrutiny).

²⁸⁷ *Id.* at 199–200.

²⁸⁸ *See* 411 U.S. 677, 690 (1973) (“[T]he Constitution recognizes higher values than speed and efficiency.” (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972))). In *Frontiero*, the Court held a statute that enabled female spouses of members of the military to receive dependent benefits but prevented male spouses of female service members from receiving dependent benefits violated the equal protection requirement under the Fifth Amendment. *Id.* at 690–91. The Court, using a strict scrutiny standard, stated that administrative convenience was not a justifiable reason for this discrimination. *Id.* at 690.

²⁸⁹ *See supra* notes 59–66 and accompanying text; *see also* Jackman, *supra* note 46 (noting that the current Act authorizes “the Justice Department to spend up to \$151 million in grants to states and localities for costs associated with testing DNA evidence”).

²⁹⁰ Can Wang & Lawrence M. Wein, *Analyzing Approaches to the Backlog of Untested Sexual Assault Kits in the U.S.A.*, 63 J. FORENSIC SCIS. 1110, 1117 (2018) (explaining that “spending \$1,641 to test [a rape kit] averts \$133,484 in future [sexual assault]-related costs on average”).

crimes, not just rapes.²⁹¹ This would actually improve efficiency because instead of multiple officers running parallel investigations on the same suspect, having a robust system of DNA could help link crimes committed by one perpetrator.²⁹² Therefore, it is likely that police arguments defending their refusal to test rape kits would not survive intermediate scrutiny.

This analysis makes clear that proving intent to discriminate is the main barrier to successful equal protections claims.

D. The Future of Rape Kit Litigation

This Note attempts to fill the gap in scholarly engagement around equal protection claims in the hopes that courts will realize the problems with the comparator requirement and adjust discrimination standards accordingly. While equal protection claims are not the only option for eliminating the rape kit backlog, they represent a promising and increasing area of litigation that has yet to be explored by professors and academics. There is a paucity of scholarship regarding rape kit equal protection claims. Lawsuits alleging equal protection violations based on the failure to test rape kits are relatively new—all have occurred within the last few years.²⁹³ While student-written scholarship has extensively documented issues with the rape kit backlog,²⁹⁴ there has been little attention given specifically to equal protection cases. Thus, there is limited academic foundation to ground an analysis for potential plaintiffs.

Although other authors have proposed efforts to tackle the backlog, these options likely lack popular support as well as effective enforcement mechanisms. In her note, Glenna Ellen Fucci proposes legislative efforts to tackle the rape kit backlog, such as state legislation that makes testing mandatory and requires a timeline for compliance.²⁹⁵ She outlines the various legislative efforts already taken by some state and local governments to address the backlog: inventory bills to determine the size of the backlog; future testing bills to mandate testing of incoming rape kits; comprehensive testing bills to both test future rape kits and clear the existing backlog; and survivor bills that grant victims rights to certain information regarding their

²⁹¹ Jackman, *supra* note 46 (“[CODIS] has produced more than 475,000 matches, solving crimes across the spectrum from murder to rape to burglary to vandalism.”).

²⁹² *See id.*

²⁹³ *See* sources cited *supra* note 13.

²⁹⁴ Fucci, *supra* note 41, at 196–201; Fulton, *supra* note 6, at 44–51; Hansen, *supra* note 22, at 943–949. Scholarship from professors and academics is, unfortunately, lacking in this area.

²⁹⁵ Fucci, *supra* note 41, at 220.

rape kits.²⁹⁶ Despite the effectiveness of some of this legislation, few states have enacted such policies.²⁹⁷ Unfortunately, the comprehensive bills, which are particularly effective, have only been implemented in four states.²⁹⁸ Fucci argues that politicians and local leadership must take action to allocate funding for testing, remove police discretion by mandating testing, enforce timelines to clear backlogs, and “ensure that no new backlog[s] develop.”²⁹⁹ However, the question remains: how do we get them to do so?

Stephanie Fulton has similarly argued that increased funding coupled with mandatory testing laws would remedy the issue.³⁰⁰ However, given police departments’ widespread failure to make effective use of federal funding and the difficulty of providing legislative oversight, it is tough to imagine successful implementation of these measures without some type of enforcement mechanism. Fulton proposes that noncompliance could be penalized by withholding funds for grants or other programs; however, this presumes that legislation would be passed initially.³⁰¹ Although some states have made progress in this direction,³⁰² mandatory-testing laws often promise prospective relief for future victims without systems in place to ensure that testing actually occurs. For example, Illinois passed a bill in 2017 to create a rape kit tracking system, but the system is still not fully operative, and not all hospitals are participating, which limits its effectiveness.³⁰³ Notably, the federal government passed the DNA Analysis Backlog Elimination Act in 2000,³⁰⁴ yet the backlog persists. Over the years, legislative efforts to combat sexual violence have been slow and fraught with resistance.³⁰⁵ Thus, it is difficult to imagine that mandatory-testing laws will yield different results without an enforcement mechanism.

²⁹⁶ *Id.* at 208–17.

²⁹⁷ *Id.* at 208–09.

²⁹⁸ *Id.* at 213.

²⁹⁹ *Id.* at 227.

³⁰⁰ Fulton, *supra* note 6, at 67–68.

³⁰¹ *See id.* at 70.

³⁰² *Starting 2019 Off Strong: 28 Rape Kit Reform Bills in 19 States*, END THE BACKLOG (2019), <http://www.endthebacklog.org/blog/starting-2019-strong-28-rape-kit-reform-bills-19-states> [<https://perma.cc/NT6G-THYZ>].

³⁰³ 725 ILL. COMP. STAT. 202/50 (2017); Alison Bowen, *Illinois Launches Online System to Track Rape Kits in New Cases. But Not Every Hospital Is on Board.*, CHI. TRIB. (Sept. 23, 2020, 11:49 AM), <https://www.chicagotribune.com/living/health/ct-life-rape-kit-online-tracking-system-illinois-tt-20200923-svmwwxdedvdgkjtzn2cuatsfa-story.html> [<https://perma.cc/4CY5-Q72X>].

³⁰⁴ O’Connor, *supra* note 103, at 207.

³⁰⁵ *See* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 17–44 (1998) (describing the legal history of rape and why the states have failed to meaningfully reform rape laws).

An equal protection claim would provide that enforcement mechanism. Fulton acknowledges that “agencies that do not comply with [mandatory-testing laws] must be penalized.”³⁰⁶ But her proposed solution—decreasing funding for other agency programs³⁰⁷—appears unworkable; decreased funding for police departments will likely not gain the popular support needed to be implemented.³⁰⁸ Further, without investing the diverted funds into alternative community-based strategies, policing may only become more problematic as police deprioritize funding from the very initiatives advocates want them to expand.³⁰⁹

While mandating and funding rape kit testing could address part of the greater problem, it fails to address the root of the systemic police bias that prevents women from bringing their cases forward to begin with.³¹⁰ Studies show that sexual misconduct is the “second most common complaint against [police] officers,” with an officer being accused of sexual misconduct “at least once every five days in the [United States].”³¹¹ If the very same police that are charged with serving and protecting survivors of sexual violence are the ones perpetrating sexual violence, there needs to be a higher mechanism that holds police departments accountable. If courts—and particularly the Supreme Court—take a stand in favor of providing protection for victims of sexual assault, that would signal to police departments that they must take

³⁰⁶ Fulton, *supra* note 6, at 70.

³⁰⁷ *Id.*

³⁰⁸ See Scott Neuman, *Police Viewed Less Favorably, but Few Want to ‘Defund’ Them, Survey Finds*, NPR (July 9, 2020, 10:55 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/09/889618702/police-viewed-less-favorably-but-few-want-to-defund-them-survey-finds> [<https://perma.cc/JV9H-RVJZ>] (noting that a majority of survey respondents want individual officers held accountable for violations but do not support defunding police departments).

³⁰⁹ See Simone Weichselbaum & Nicole Lewis, *Support for Defunding the Police Department Is Growing. Here’s Why It’s Not a Silver Bullet.*, MARSHALL PROJECT (June 9, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/06/09/support-for-defunding-the-police-department-is-growing-here-s-why-it-s-not-a-silver-bullet> [<https://perma.cc/N99L-7E6D>]; see also @LAPPL, TWITTER (June 8, 2020, 1:19 PM), <https://twitter.com/lappl/status/1270057916943314944?s=21> [<https://perma.cc/X2LE-BU89>] (“Cutting the #LAPD budget means . . . rape, murder [and] assault investigations won’t occur or will take forever to complete.”).

³¹⁰ See *infra* Section I.B; see also Gaby Lion, Note, *Bringing Untested Rape Kits out of Storage and into the Courtroom: Encouraging the Creation of Public–Private Partnerships to Eliminate the Rape Kit Backlog*, 69 HASTINGS L.J. 1009, 1018–21 (2018) (noting that gender bias is a “root cause” of the backlog).

³¹¹ Sam Levin, *‘I Didn’t Think I’d Survive’: Women Tell of Hidden Sexual Abuse by Phoenix Police*, GUARDIAN (Aug. 10, 2020, 8:00 AM), <https://www.theguardian.com/us-news/2020/aug/10/phoenix-police-officers-rape-sexual-assault> [<https://perma.cc/G9EB-2KPL>].

rape cases seriously and to victims that they will truly be treated equally under the law.³¹²

To be clear, this Note does not argue that legislative and fiscal efforts should be abandoned but rather that equal protection claims could be an additional tool to ensure justice for victims.³¹³ Milli Kanani Hansen has documented how other constitutional remedies, such as substantive or procedural due process claims, have been effectively foreclosed.³¹⁴ Hansen argues that, following *Town of Castle Rock v. Gonzalez*, “it would be exceedingly difficult for a plaintiff to establish a protected interest in investigation [that] would trigger procedural due process protection.”³¹⁵ While a victim could try to claim a property interest in the DNA in her rape kit, Supreme Court jurisprudence has made this path unlikely to succeed.³¹⁶ Hansen additionally details how courts have been unsympathetic to plaintiffs bringing claims alleging violations of their constitutional liberty interests in rape kit testing as victims of crimes.³¹⁷ In terms of substantive due process, Hansen notes that in *Osborne*, the Supreme Court refused to acknowledge a due process right to DNA evidence.³¹⁸ Hansen does leave open the remote possibility that a substantive due process claim could be brought under the guise of privacy rights,³¹⁹ but given the current makeup of the Court, this seems unlikely. Hansen argues that equal protection claims may be similarly futile,³²⁰ but her note was written prior to the recent wave of equal protection rape kit litigation.

³¹² Rape kits have themselves become a “symbol of justice.” Andrea Quinlan, *Visions of Public Safety, Justice, and Healing: The Making of the Rape Kit Backlog in the United States*, 29 SOC. & LEGAL STUD. 225, 226 (2020).

³¹³ One possibility is that the Department of Justice could even use its authority to investigate police departments and bring suits against cities for injunctive relief. See Joe Davidson, *Justice Department Has a Tool to Make Police Forces Better. It’s Not Using It.*, WASH. POST. (June 2, 2020, 12:05 AM), https://www.washingtonpost.com/politics/justice-department-has-a-tool-to-make-police-forces-better-its-not-using-it/2020/06/02/96caf940-a451-11ea-8681-7d471bf20207_story.html [<https://perma.cc/J9WY-W64K>].

³¹⁴ See Hansen, *supra* note 22, at 965–89.

³¹⁵ *Id.* at 972–74. In *Town of Castle Rock v. Gonzalez*, a woman who had a restraining order against her husband was ignored by police when she reported that her husband kidnapped her three children, who he ultimately murdered. 545 U.S. 748, 751–54 (2005). The Supreme Court found that she did not have a protected property interest in police enforcement of the restraining order and noted the “deep-rooted nature of law-enforcement discretion.” *Id.* at 761, 768.

³¹⁶ Hansen, *supra* note 22, at 974–77.

³¹⁷ *Id.* at 977–80.

³¹⁸ *Id.* at 980–81; Dist. Att’y’s Off. for the Third Jud. Dist. v. *Osborne*, 557 U.S. 52, 55–56 (2009).

³¹⁹ Hansen, *supra* note 22, at 981.

³²⁰ *Id.* at 983–85.

Thus, although the continuing problematic use of comparators in equal protection claims will be a difficult obstacle to overcome, particularly with the Court's composition today, equal protection claims present a rare opportunity for successfully eliminating the backlog and obtaining justice for victims. Of course, comparison is necessary to some degree when establishing discriminatory treatment of a protected group.³²¹ However, the crux of the disagreement between various courts is whether a plaintiff must expressly plead the disparate treatment of otherwise similarly situated individuals in order to show intent to discriminate. The requirement of comparators to show discriminatory intent is embedded in discrimination law concerning not only equal protection but also Title VII; therefore, it would be difficult to adjust this requirement despite the rulings of various circuit courts. However, the comparator requirement is not strictly applied to all discrimination cases, even by the Supreme Court. In *Price Waterhouse v. Hopkins*, the Court upheld a Title VII claim that an accounting firm discriminated impermissibly against a female employee seeking to become partner despite the fact that there was no comparator.³²² Instead of relying on a comparator, the Court looked to specific sexist remarks made about the female employee to find evidence of discriminatory intent.³²³ Although this case was distinct from the equal protection claims on which this Note focuses, it demonstrates that the Court is already willing to find intent to discriminate without comparators.³²⁴

Legally, it is also consistent with the rulings of various circuit courts to establish intent to discriminate without a comparator. Notably, the Sixth Circuit opinion in *Doe v. City of Memphis* adapts the *Watson* standard based on police protections for domestic violence complaints to apply to police

³²¹ See, e.g., *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 439 (2d Cir. 2009) (“Any equal protection claim is grounded on a comparison between the treatment the state gives similarly situated individuals.”).

³²² 490 U.S. 228, 248 (1989) (“We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today.”); Goldberg, *supra* note 26, at 784.

³²³ *Price Waterhouse*, 490 U.S. at 235 (including statements by some partners that she was “macho,” that she “overcompensated for being a woman,” that she should take “a course at charm school,” and that, “to improve her chances for partnership . . . [she] should ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry’”).

³²⁴ See also *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598–600 (1999) (holding that the Americans with Disabilities Act requires states to place mentally disabled individuals in community settings rather than in segregated institutions when certain conditions are met); Goldberg, *supra* note 26, at 783 (“[T]he Court [in *Olmstead*] saw that the segregation of mentally disabled individuals was discrimination because of disability not by comparing the act to the treatment of others, but instead by looking more broadly at the segregating act’s social meaning and its injurious effect.”).

protections for sexual assault complaints.³²⁵ Because the Sixth Circuit essentially applies the *Watson* standard in *Doe*, the Ninth Circuit's pleading standard in *Marlowe* is at odds not only with the Sixth Circuit but also with the six other circuits that have adopted the *Watson* standard. Furthermore, a class action lawsuit alleging police discrimination against victims of sexual assault for not testing rape kits is currently pending appeal in the Fifth Circuit.³²⁶ Since the Fifth Circuit has adopted the *Watson* standard for domestic violence cases, it is wholly possible that, if the court accepts the case, it will agree with the Sixth Circuit's reasoning and extend the *Watson* standard to sexual assault claims. The Ninth Circuit has even briefly referenced the *Watson* standard in an opinion.³²⁷ It truly defies reason not to extend the existing case law regarding the deliberate underenforcement of domestic violence to the similar deliberate under-investigation of rape. Disparate pleading standards are problematic in part because they distribute justice unequally based on where a plaintiff is able to bring a claim. The Supreme Court needs to step in to resolve the confusion between the lower courts regarding the pleading standard and compensate for the lack of scholarship in this area. As more of these cases arise, the Supreme Court should take its next opportunity to hold with the Sixth Circuit that comparators may be sufficient to show intent to discriminate, but they are not necessary. Plaintiffs should be able to state a prima facie equal protection claim by alleging a police custom or practice to provide less protection to victims of sexual assault than those of other crimes by refusing to investigate rape claims and test rape kits, and that gender discrimination was the motivation for this discriminatory treatment.

CONCLUSION

The Supreme Court should remove the need for comparators in equal protection claims—particularly in cases concerning the denial of police protections to victims of sexual assault—because this requirement is contrary to precedent and public policy. That the comparator requirement is

³²⁵ 928 F.3d 481, 487 (6th Cir. 2019). The Sixth Circuit applied the *Watson* standard in 2002 in *Jones v. Union County*, 296 F.3d 417, 427–28 (6th Cir. 2002). In *Doe*, the court cites directly to *Jones v. Union County* to explain the nearly identical standard espoused in *Doe*. 928 F.3d at 487 (“For a plaintiff to succeed on an Equal Protection claim of sex discrimination, she ‘must show that she is a member of a protected class and that she was intentionally and purposefully discriminated against because of her membership in that protected class.’ . . . The latter showing requires a demonstration that it is the policy or custom . . . to provide less protection to victims of sexual assault than those of other crimes, and that gender discrimination was the motivation for this disparate treatment.” (quoting *Jones v. Union County*, 296 F.3d at 426)).

³²⁶ *Smith Complaint*, *supra* note 13, at 3–5.

³²⁷ *Navarro v. Block*, 72 F.3d 712, 717 (9th Cir. 1995).

inconsistently defined and inconsistently applied across discrimination cases illustrates that comparators should not be strictly necessary to illustrate discriminatory intent. This uncertain and piecemeal status quo is detrimental to victims and undermines the rule of law by creating a system in which two plaintiffs can be subject to different pleading standards based solely on where they live. In fact, the comparator requirement could serve to entrench inequality by imposing a potentially insurmountable obstacle to women attempting to seek redress for the violation of their constitutional rights. Mandating specific comparator evidence could deny the possibility of legal relief to women who are needlessly suffering at the hands of the criminal justice system.³²⁸ Many other constitutional remedies have already been foreclosed.³²⁹ Additionally, legislative efforts to secure funding have not been fruitful because they do not target the root issue of systemic bias.³³⁰ Allowing equal protection claims to move forward would not only provide a remedy to individual victims of sexual assault, but it could also improve the likelihood of other victims coming forward in the future,³³¹ thereby increasing public safety.³³²

The Supreme Court has stated that “[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”³³³ The original aim of the Equal Protection Clause was to protect citizens from violence through providing equal access to police protections.³³⁴ The Ninth Circuit’s dismissal of Marlowe’s claim flies in the face of this purpose by sanctioning a widespread law enforcement culture of denying equal protection to women by purposefully deprioritizing rape investigations and failing to test rape kits. By enforcing an inconsistent and rigid comparator standard in equal

³²⁸ Better alternatives include looking at the totality of the circumstances to infer intent or considering a more flexible comparator standard. *See* *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012) (holding that a “flexible, common-sense” comparator standard applies to the “similarly situated” prong).

³²⁹ *See supra* notes 312–320 and accompanying text. For a more robust discussion of other constitutional claims regarding untested rape kits, see Hansen, *supra* note 22, at 965–89.

³³⁰ *See supra* Section I.B.

³³¹ Tuerkheimer, *supra* note 9, at 11 (“[A] rape victim’s willingness to report an incident to law enforcement . . . frequently turns on an appraisal of the probability that—as a starting proposition—she will be believed.”).

³³² Hagerty, *supra* note 1, at 80 (“I don’t think there will ever be another time in history when so many criminals can be arrested so easily, so quickly, so inexpensively, and with such certainty.” (quotation marks omitted) (quoting Tim McGinty, former Cuyahoga County, Ohio prosecutor)).

³³³ *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1917).

³³⁴ Tuerkheimer, *supra* note 20, at 1299–1301.

protection claims, the Ninth Circuit—as well as any other court that adopts this standard—systematically denies women remedies for serious constitutional violations. Systematically refusing to test rape kits for potentially inculpatory evidence meets the elements to constitute a violation under the Equal Protection Clause of the Fourteenth Amendment of the Constitution. The Court should uphold the promise of the Equal Protection Clause by granting certiorari in a future case and deeming the comparator requirement sufficient but not necessary.