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Blue Lives Have Always Mattered: The Usurping of Hate Crime Laws for an Unintended and Unnecessary Purpose

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ARTICLES

BLUE LIVES HAVE ALWAYS MATTERED: THE USURPING OF HATE CRIME LAWS FOR AN UNINTENDED AND UNNECESSARY PURPOSE

LISA M. OLSON*

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INTRODUCTION

In 2016, Louisiana became the first state in the nation to enact a so-called “Blue Lives Matter Law.”¹ House Bill 953 amended the definition of hate crime, providing for a protected class of victims based on “actual or perceived employment as a law enforcement officer or firefighter.”² The law applies to offenses against persons and property.³ Louisiana law provides for sentencing enhancements pursuant to a conviction for a hate crime, increasing the permissible punishment for misdemeanor offenses by a fine of up to \$500 and up to six months in prison.⁴ Felony offenses may receive a sentence enhancement of up to five years in prison and a fine up to \$5,000.⁵ Based upon the wording of the Louisiana law, an offender who vandalizes a police car may be charged with a hate crime and receive enhanced punishment.⁶

Similar bills that give law enforcement officers protected status under existing hate crimes laws were introduced in several other states⁷ and at

1. H.B. 953, 2016 Reg. Sess. (La. 2016) (enacted). Governor John Bel Edwards signed H.B. 953 into law on May 26, 2016. *HB953 by Representative Lance Harris*, LA. ST. LEGISLATURE, <http://www.legis.la.gov/legis/BillInfo.aspx?i=230171> [<https://perma.cc/U3SC-WTR11>] (last visited Sept. 21, 2017). The provisions of the law became effective on August 1, 2016. *Id.*

2. H.B. 953, 2016 Reg. Sess., at 2 (La. 2016) (enacted).

3. LA. STAT. ANN. § 14:107.2(A) (2016).

4. *Id.*

5. *Id.*

6. *See id.*(including simple or aggravated criminal damage to property as an offense for which the offender can be charged with a hate crime).

7. *See, e.g.*, Chi., Ill., Ordinance O2016-4878, at 1 (proposed June 22, 2016) (proposing to include the selection of a victim based on employment as a police officer or firefighter in the definition of a hate crime); S.B. 2469, 2017 Reg. Sess. (Miss. 2017) (died in committee on Feb. 28, 2017) (proposing to amend the current definition of hate crimes to include crimes targeting employment as a law enforcement officer); *Governor Abbott Announces Police Protection Act*, OFF. OF TEX. GOVERNOR GREG ABBOTT (July 18, 2016), https://gov.texas.gov/news/post/governor_abbott_announces_police_protection_act [<https://perma.cc/74T7-W112N>] (announcing that the proposal of the Police Protection Act would make it a hate crime to target a victim based on law enforcement employment).

the federal level.⁸ In January and February of 2017 alone, thirty-two such bills were introduced in fourteen states, though most were not successful.⁹ In March of 2017, two states—Kentucky¹⁰ and Mississippi¹¹—enacted changes to their existing hate crime law that mirrored the changes made to Louisiana’s amended law. Arizona¹² and Oklahoma¹³ enacted similar Blue Lives Matter laws. However, the Oklahoma and Arizona laws do not amend the definition of a hate crime to include officers of the law as a protected class.¹⁴ Rather, Arizona allows for increased penalties for assaulting police officers, even those who are off-duty,¹⁵ and Oklahoma increased the minimum penalty for first-degree murder of a police officer to either life without parole or death.¹⁶

Extending hate crime protections to law enforcement officers is problematic and inconsistent with the original purpose of hate crime legislation.¹⁷ Hate crime laws were enacted due to a recognition of the

8. *E.g.*, Blue Lives Matter Act, H.R. 4760, 114th Cong. (2016) (making it a hate crime under federal law to purposely attack a law enforcement officer).

9. *See* Julia Craven, *32 Blue Lives Matter Bills Have Been Introduced Across 14 States This Year*, HUFFINGTON POST (Mar. 01, 2017, 5:47 AM), http://www.huffingtonpost.com/entry/blue-black-lives-matter-police-bills-states_us_58b61488e4b0780bac2e31b8 [<https://perma.cc/6A5A-7MZK>] (tracking the bills that have been introduced to extend protection to police officers under current hate crimes laws).

10. *See* H.B. 14, 2017 Reg. Sess. (Ky. 2017) (enacted) (amending KY. REV. STAT. § 532.031 “to include offenses committed against an individual because of the individual’s actual or perceived employment as a city, county, state, or federal peace officer, member of an organized fire department, emergency medical services personnel” within the definition of a hate crime); *see also* Ryland Barton, *Bevin Signs ‘Blue Lives Matter’ Bill Into Law*, WFPL (Mar. 21, 2017), <https://wfpl.org/bevin-signs-blue-lives-matter-bill-into-law> [<https://perma.cc/6NJF-7QJ3>] (commenting on Kentucky’s signing of the bill).

11. MISS. CODE ANN. § 99-19-301 (West 2017) (classifying offenses against “actual or perceived employment as a law enforcement officer” as a hate crime in Mississippi).

12. ARIZ. REV. STAT. ANN. § 13-1204 (2017).

13. OKLA. STAT. tit. 21, § 701.9 (2017).

14. *See id.* (noting the absence of law officers from the protected class of people); ARIZ. REV. STAT. ANN. § 13-1204 (2017) (noting the absence of law officers from the protected class of people).

15. S.B. 1366, 53d Leg., 1st Sess., at 1 (Ariz. 2017) (omitting the language “engaged in the execution of any official duties” in the statute, thereby making it a crime to assault an off-duty officer and allowing the doubling of penalties for the offense).

16. H.B. 1306, 56th Leg., 1st Sess. (Okla. 2017).

17. *See* Steve Miller, *States Act to Protect Cops with Hate Crime Laws*, REAL CLEAR INVESTIGATIONS (May 16, 2017), http://www.realclearinvestigations.com/articles/2017/05/15/hate_crimes.html [<https://perma.cc/A3S2-K2BK>] (discussing critics’ views that Blue Lives Matter

greater level of harm experienced by hate crime victims, which extends to the entire targeted community, in contrast to crimes not motivated by bias.¹⁸ The severe impact of criminal victimization is tied to the history of disparate treatment, including prejudice and violence toward marginalized groups.¹⁹ This disparate treatment has the potential to create rifts between the targeted community and the larger community within which it resides, resulting in further alienation of the targeted group.²⁰ The larger community can reduce the alienation of marginalized groups by reaching out to the victim and addressing the underlying issues of the criminal behavior, especially through prosecution.²¹ Hate-crime laws are intended to send a message to society that bias-motivated offenses will be severely punished.²²

Law enforcement officers are not a marginalized group, nor have they experienced a history of prejudice, discrimination, or systemic violence.²³ They are not vulnerable members of society who are specifically targeted for characteristics that are beyond their control.²⁴ As such, amending existing hate crime laws to include law enforcement officers is an inappropriate application of the protections afforded by law.

laws contradict the concept of “immutability”). Employment as a police officer is merely a choice and not an immutable characteristic.

18. See Daniel M. Levy, *Hate Crime Laws: Cure or Placebo?*, 79 MICH. B. J. 674, 674–76 (2000) (asserting bias-motivated crimes that target a specific class of people also harm the communities who share the victim’s identity).

19. See *id.* at 675 (explaining hate-crime victims are selected because of *what they are*, which has a greater negative effect on the victim) (emphasis added).

20. See *id.* at 674–75 (indicating the history of prejudice and violence against a marginalized class may cause tension between the targeted community and the community at large, which may result in further alienation of the targeted group).

21. *Id.* at 675.

22. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860, 869 (2014).

23. See Mary Altaffer, *Blue Is Not a Race*, SALON.COM (Sept. 18, 2017, 9:57 PM), <http://www.salon.com/2017/09/18/blue-is-not-a-race> [<https://perma.cc/6RZR-C8BG>] (emphasizing police officers are not an oppressed and marginalized racial group). Furthermore, framing the police as victims of violent discrimination is a method to justify police brutality. *Id.*

24. See Amber Phillips, *The State Where Targeting a Police Officer is a Hate Crime*, WASH. POST (JULY 8, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/07/08/the-state-where-targeting-a-police-officer-is-a-hate-crime/?utm_term=.81daccf0d26f [<https://perma.cc/NTG2-SVSP>] (distinguishing the immutability of a person’s identity and the non-immutability of the police profession as a choice rather than a characteristic).

I. THE HISTORY OF HATE CRIME LEGISLATION

One of the first laws passed in America addressing discrimination based upon immutable characteristics was the Civil Rights Act of 1964.²⁵ Protected classes under this legislation included race, color, religion, and national origin.²⁶ The Act provided that individuals from these protected classes could not be discriminated against based on their immutable characteristics when engaged in a limited number of federally protected activities such as voting, attending schools, using public facilities, public accommodation of interstate commerce, and using training facilities.²⁷ In 1978, California enacted the nation's first state hate crime legislation.²⁸ Most states followed suit with thirty-seven states passing hate crime legislation by 1995.²⁹ Presently, the District of Columbia and forty-five states have enacted hate crime laws.³⁰ However, protected classes vary greatly from state to state.³¹ For example, while race, religion, and ethnicity are protected classes in states with hate crime laws, only thirty states recognize sexual orientation as a protected class, and just sixteen states extend protections based upon gender identity.³²

State laws typically take one of two approaches in treating hate crime.³³ The first approach to hate crime provides a sentence enhancement for an existing offense under the criminal law.³⁴ The

25. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

26. *See id.* at § 201 (codified as amended at 18 U.S.C. § 245 (2012)).

27. *Id.*

28. *See* CAL. PENAL CODE § 190.2(a)(7), (16) (West 2014) (added Nov. 7, 1978 by Proposition 7) The California Penal Code enumerates special circumstances for punishment for the crime of murder, allowing a sentence of life without the possibility of parole when a defendant is convicted of first-degree murder; § 190.2(a)(16) reads "The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin."

29. Sarah A. Soule & Jennifer Earl, *The Enactment of State-Level Hate Crime Law in the United States: Intrastate and Interstate Factors*, 44 SOC. PERSP. 281, 282 (2001).

30. *See* ANTI-DEFAMATION LEAGUE, ANTI-DEFAMATION LEAGUE STATE HATE CRIME STATUTORY PROVISIONS, <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/2014-adl-updated-state-hate-crime-statutes.pdf> [<https://perma.cc/5ZFJ-5H2G>] [hereinafter *Anti-Defamation League*] (last updated Sep. 2014) (indicating Georgia, South Carolina, Wyoming, Indiana, and Arkansas do not currently have hate crime laws).

31. *See id.* (showing some states include political affiliation and sexual orientation as protected classes).

32. *State Maps of Law & Policies*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/state-maps/hate-crimes> [<https://perma.cc/B27Y-VBXP>] (last updated Apr. 25, 2017).

33. Anne Daugherty Leiter, *Hate Crimes*, 2 GEO. J. GENDER & L. 243, 247 (2000).

34. *Id.*

second approach defines a separate hate crime offense altogether that includes bias motivation as one element of the offense itself.³⁵ The types of acts punishable as a hate crime vary from state to state, with some states recognizing only violent offenses, while other states recognize broader non-violent, bias-motivated acts.³⁶

The Hate Crimes Statistics Act, enacted in 1990, required states to collect and disseminate data related to hate crime incidents that occurred from 1990 to 1994.³⁷ Offenses for which data was collected included murder, non-negligent manslaughter, rape, assault, arson, and vandalism.³⁸ Identified categories of victims included those targeted because of race, religion, sexual orientation, and ethnicity.³⁹

Protection against discrimination first addressed in the Civil Rights Act of 1964 was not revisited by Congress until 1994 with the Violent Crime Control and Law Enforcement Act (VCCLEA).⁴⁰ The VCCLEA extended protections beyond the protected-class categories initially identified in the Civil Rights Act (1968).⁴¹ The VCCLEA also provided for federal sentencing enhancements for hate crime convictions.⁴² The VCCLEA defined a hate crime as an offense where the victim or property was targeted due to “actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.”⁴³ Sentencing

35. *Id.*

36. *Id.* at 247-48.

37. Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (1990)).

38. 28 U.S.C. § 534 (1990).

39. *Id.*

40. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 280003, 108 Stat. 1796 (1994) (codified as amended at 28 U.S.C. § 994 (1994)) (extending the protections to classes identified by gender, disability, and sexual orientation). The Federal Fair Housing Act of 1968 (42 U.S.C. § 3601) extended protections for purchasing, renting, and financing a home based upon race, religion, national origin, and gender. Federal Fair Housing Act of 1968, 42 U.S.C. § 3601 (2016). Protections were extended in a 1988 amendment by including disability and familial status as protected classes. Federal Fair Housing Act of 1968, 42 U.S.C. § 3601 (2016), *amended by* 42 U.S.C. §§ 3601(h) (o). No other federal legislation provided protection from discrimination between 1964 and 1994.

41. Civil Rights Act of 1968, Pub. L. No. 90-284, § 800, 82 Stat. 73 (1968) (codified at 42 U.S.C. § 3601 (1970)) (extending protections for purchasing, renting, and financing a home based upon race, religion, national origin, and gender).

42. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 280003, 108 Stat. 1796 (1994).

43. 28 U.S.C. § 994 (1994).

enhancements for hate crimes increase the offender's base offense level by at least three levels, potentially adding a substantial amount of time to the offender's prison sentence.⁴⁴

Two violent, hate-based homicides occurred in 1998 which brought hate crimes to the forefront of national conversation.⁴⁵ On June 7, 1998, James Byrd Jr., a forty-nine-year-old African-American man from Jasper, Texas, accepted a ride from three individuals—one of whom he was acquainted with—that culminated in Byrd being chained to the bumper of a truck and dragged to his death.⁴⁶ The county prosecutor described the incident as “probably the most brutal” homicide that he had encountered in his twenty years of experience.⁴⁷ The second incident occurred four months later in Laramie, Wyoming.⁴⁸ Matthew Shepard, a gay twenty-one year old college student was violently beaten, tied to a fencepost, and left for dead on a country road.⁴⁹ After four days in a coma, Shepard succumbed to his injuries on October 12, 1998.⁵⁰

Both crimes were commonly believed to be the result of the perpetrators' prejudice towards characteristics of the victims; Byrd was murdered because he was African-American; Shepard was murdered because he was gay.⁵¹ Both incidents captured the attention of the nation.⁵² Byrd's murder brought about an FBI investigation, received

44. *Id.*

45. Carol Marie Cropper, *Black Man Fatally Dragged in a Possible Racial Killing*, N.Y. TIMES (June 10, 1998), <http://www.nytimes.com/1998/06/10/us/black-man-fatally-dragged-in-a-possible-racial-killing.html>; Jason Marsden, *The Murder of Matthew Shepard*, WYOHISTORY.ORG, <http://www.wyohistory.org/encyclopedia/matthew-shepard> [<https://perma.cc/9E88-29HE>] (last visited Aug. 26, 2017) (regarding the death of Matthew Shepard).

46. Cropper, *supra* note 45.

47. *Id.* James Byrd, Jr. was dragged for two miles while chained behind the vehicle occupied by the three offenders. *Id.* Parts of his body, including his severed head and an arm, were found over a one-mile stretch of road. *Id.*

48. Marsden, *supra* note 45.

49. *Id.* Mathew Shepard was tied to a fence in a remote area outside of town and struck nineteen to twenty-one times in the head with a firearm causing irreparable damage to his brain stem. *Id.* He was found eighteen hours later by a passing bicyclist who initially thought Shepard was a scarecrow. *Id.*

50. *Id.*

51. Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1869 (2012).

52. See Scott W. Hoffman, “Last Night, I Prayed to Matthew”: Matthew Shepard, Homosexuality, and Popular Martyrdom in Contemporary America, 21 RELIGION & AM. CULTURE: J. INTERPRETATION 121, 121 (2011) (detailing the national discussion and reaction to

worldwide media attention, and caused various organizations, including racial fringe groups such as the Ku Klux Klan and the Black Panthers, to descend upon Jasper in protest.⁵³ Shepard's attack also brought the town into the media spotlight with candlelight vigils, statements from public figures, and national news organizations on a twenty-four hour watch outside of Shepard's Laramie hospital.⁵⁴ In the eyes of some Americans, Shepard was transformed into a gay martyr.⁵⁵

Although these two extreme incidents attracted substantial media coverage, they were by no means isolated incidents of bias-motivated violence.⁵⁶ One outcome of these incidents was the passage of federal legislation aimed at combatting hate crimes.⁵⁷ The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (HCPA)⁵⁸ was enacted to address hate crimes at the federal level, recognizing the divisiveness and far-reaching consequences of such offenses.⁵⁹ Through the HCPA, which permits federal prosecution of crimes typically under

the murder of Matthew Shepard); *see also* Cropper, *supra* note 45 (explaining the public's reaction to the murder of James Byrd, Jr.).

53. Thomas Wicke & Roxane Cohen Silver, *A Community Responds to Collective Trauma: An Ecological Analysis of the James Byrd Murder in Jasper, Texas*, 44 AM. J. COMTY. PSYCHOL. 233, 242-43 (2009).

54. Hoffman, *supra* note 52, at 121.

55. *Id.* at 122. Though the reaction to Shepard's murder was largely secular in nature, some Americans attempted to draw parallels between the murder and the crucifixion of Christ, likely in reaction to Shepard's initial misidentification as a scarecrow by the bicyclist who found Shepard. *Id.* There was a common misconception that Mathew Shepard was affixed to the fence post with his hands spread to his sides, a pose reminiscent of crucifixion. *Id.* at 130. Three events at Mathew Shepard's funeral served to solidify this connection: (1) he was described in the *New York Times* as an altar boy wearing white Episcopal robes; (2) Matthew's cousin Megan Shepard's eulogy described him as a martyr and painted Matthew in a religious light; and (3) antigay protesters were present at the funeral. Within several months of the murder, national publications such as *The Advocate*, *Time*, *Newsweek*, and *Vanity Fair* used religious imagery when describing Shepard. *Id.* at 132.

56. Simmons, *supra* note 51, at 1870.

57. *See id.* at 1882 (2012) (recognizing the brutal murder of Shepard and Byrd prompted federal legislation, such as the "Local Law Enforcement Hate Crime Prevention Act ("HCPA"), commonly known as the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act").

58. Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 114-84, 123, Stat. 2835 (2009) (codified at 18 U.S.C. § 249 (2012)).

59. 18 U.S.C. § 249 (2012); *see also* Simmons, *supra* note 51, at 1866 ("[T]he HCPA grants broad authority to the federal government to prosecute defendants accused of perpetrating violent acts because of the victim's actual or perceived race, color, religion, national origin, and, unlike other federal legislation, the HCPA expands this class of victims to also include those victimized because of gender, sexual orientation, gender identity, or disability").

state purview,⁶⁰ federal protection extends to individuals who have been targeted by criminal activity due to perceived or actual LGBTQ status.⁶¹ The Act also provides for federal assistance for local prosecutors in state hate crime prosecutions.⁶² Unlike previous federal laws addressing crimes of prejudice, the HCPA does not limit protections to a short list of federally protected activities or those occurring on federal property, but extends broader protections.⁶³

II. EMPLOYMENT AS A PROTECTED STATUS

Employment is recognized as a federally-protected activity.⁶⁴ However, employment is typically not a protected category under current hate crime legislation.⁶⁵ Race, religion, and ethnicity are specifically designated under every existing state hate crime statute.⁶⁶ Many hate-crime laws also recognize sexual orientation, gender, and disability as protected groups.⁶⁷ Prior to the changes to the Louisiana hate crime law enacted in May of 2016, Section 107.2 provided protections to individuals based upon “actual or perceived membership or service in, or employment with, an organization.”⁶⁸ The previous language of the law could be read to include employment with a law enforcement organization.⁶⁹ Arguably, the change to the Louisiana hate crime law was unnecessary, as the previous version could have been actionable for acts of violence or property damage directed at a police officer.⁷⁰

60. *See id.* § 249(b)(1) (describing conditions that, if met and certified by the Attorney General, will permit federal prosecution of hate crimes under this section).

61. *Id.* § 249(a)(2) (2012); Simmons, *supra* note 51, at 1866 (2012).

62. 42 U.S.C. § 3716 (2009) (making available to State or local law enforcement agencies technical, forensic, prosecutorial, or other resources to investigate or prosecute, among others, crimes “motivated by prejudiced based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim”).

63. Simmons, *supra* note 51, at 1866.

64. *See* 18 U.S.C. § 245(b)(2)(C) (2012) (identifying employment and employment-related activities that are federally protected).

65. *But see* H.B. 953, 2016 Reg. Sess. (La. 2016) (enacted) (showing Louisiana only recently changed its hate crime statutes to reflect employment).

66. *Anti-Defamation League*, *supra* note 30.

67. *See id.* (listing the States with hate crime laws and protected classes).

68. LA. STAT. ANN. § 14:107.2 (2015).

69. *Id.* § 14:107.2(D)(3).

70. H.B. 953, 2016 Reg. Sess. (La. 2016) (enacted).

Though Louisiana's law includes such a provision, employment cannot be defined as an immutable characteristic, which typically refers to a characteristic a person is unable to change, such as race, or a characteristic one should not be forced to change, such as religion.⁷¹ Hate crime statutes were enacted to provide protection to vulnerable groups, which have historically suffered discriminatory treatment and are typically identified by one or more immutable characteristics.⁷² Employment does not fit into the definition of immutable characteristics, as it is easily changed and most working individuals have several different jobs over their lifetime.⁷³

Extending protections based upon employment is additionally problematic as it does not extend protections to everyone; protection is limited to those whose employment is specified.⁷⁴ Other categories enumerated under hate crime laws do not exclusively protect certain groups; their protections extend to all persons who may be targeted due to race, sexual orientation, or other specified characteristics.⁷⁵ Therefore, a person targeted for being white, heterosexual, or Christian enjoys the same protections as one targeted for being black, gay, or Jewish.⁷⁶ Blue Lives Matter laws do not provide protections to all persons targeted due to their employment, but only protect law enforcement and certain public service occupations.⁷⁷

71. See Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 4–5 (2015) (noting immutable characteristics are central to a person's identity).

72. Kamban Naidoo, *The Origins of Hate-Crime Laws*, 22 FUNDAMINA 53, 62 (2016).

73. See Innokenty (Kes) Grekov, *Violence Against Police Should Not Be Prosecuted as Hate Crime*, HUFFINGTON POST (Jan. 06, 2015, 4:38 PM), http://www.huffingtonpost.com/innokenty-kes-grekov/violence-against-police-s_b_6421080.html [<https://perma.cc/X5ZW-6TX8>] (explaining an occupation is not a fundamental characteristic such as race).

74. See Altaffer, *supra* note 23 (explaining the problematic issues of extending protection to hate crimes based upon employment as a police officer).

75. See Miller, *supra* note 17 (“Hate crimes usually involve race, gender, religion, disability, or sexual orientation.”).

76. See Ave Mince-Didier, *Is Everyone Protected by Hate Crime Laws*, CRIM. DEF. LAW., <http://www.criminaldefenselawyer.com/resources/hate-crime-laws-protection.html> [<https://perma.cc/T7NN-UWWY>] (last visited Sept. 23, 2017) (emphasizing hate-crime laws “protect everyone from bias crimes”).

77. See, e.g., KY. REV. STAT. ANN. § 532.031 (West 2016) (including “offenses committed against an individual because of the individual's actual or perceived employment as a city, county, state, or federal peace officer, member of an organized fire department, emergency medical services personnel” within the definition of a hate crime).

Employment is not an appropriate category for hate crime protection.⁷⁸ The uniform worn for employment purposes is shed at the end of the workday. The employee becomes just another person who is not defined by his or her status as an employee. A police officer can take off the uniform, put the gun and badge away, drive a private vehicle, and not be immediately recognizable as a member of the law enforcement community while in public. In most instances, the same cannot be said of an individual who possesses an immutable characteristic.⁷⁹ Persons of African-American descent cannot shed their blackness at the end of the day; their race is part of their identity and a defining characteristic that is often immediately cognizable.⁸⁰ Likewise, other protected group members are unable to or should not be forced to change their characteristics or shed outward indicators that represent their inclusion in protected groups in an attempt to pass as a member of the majority.⁸¹ The intention of hate crime laws of providing protection to groups that were historically subjected to disparate treatment is misappropriated by the inclusion of employment as a protected class. Employment is an easily-shed characteristic that does not identify the fabric of the individual as a protected class.

III. ACTS OF VIOLENCE AGAINST LAW ENFORCEMENT OFFICERS AND EXISTING PROTECTIONS

A. *Homicidal Violence*

Policing is a potentially dangerous job with a particularly high risk of gun violence.⁸² In 2014, the number of on-duty police officer homicides was second only to on-duty homicides of first-line supervisors of retail sales workers, a category that includes convenience store and gas station

78. Clarke, *supra* note 71, at 12; see Miller, *supra* note 17 (“By enshrining a new class of protected victims, they further complicate an area of jurisprudence long beset by doubts about the fairness of qualifying objective crimes with subjective judgments of the intent behind the acts.”).

79. See Clarke, *supra* note 71, at 4–5, 14 (discussing immutability).

80. See *id.* at 20 (“Jews cannot change or conceal their religion, while blacks generally cannot conceal their race.”).

81. See *id.* at 5 (acknowledging persons with immutable characteristics should not be forced to change).

82. David M. Bierie et al., *Firearm Violence Directed at Police*, 62(4) CRIME & DELINQ. 501, 515 (2016).

supervisors.⁸³ In 2013, homicide rates for on-duty police officers were greater than for any other profession except taxi drivers and chauffeurs.⁸⁴ Homicidal violence against officers peaked in 1973, when 134 officers were killed.⁸⁵ Thousands of law enforcement officers were murdered in the line of duty in subsequent decades.⁸⁶ Between 2006 and 2015, 491 law enforcement officers were feloniously killed in the United States, an average of 49.1 police officers per year.⁸⁷ The lowest number of homicides during this time period occurred in 2013 with twenty-seven officers killed. The highest number of officers feloniously killed was seventy-two for the year 2011.⁸⁸ This figure decreased most recently in 2016 with sixty-six officers feloniously killed in the line of duty.⁸⁹

In 2008, law enforcement agencies employed a total of 1.2 million full and part-time employees, including sworn personnel.⁹⁰ This represents a rate of 5.5 officers feloniously killed per 100,000 in 2016; slightly higher than the national homicide rate of 4.9 officer homicides per 100,000.⁹¹ However, 2016 may have been an anomaly. The homicide

83. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., FATAL OCCUPATIONAL INJURIES RESULTING FROM TRANSPORTATION INCIDENTS AND HOMICIDES BY OCCUPATION, ALL UNITED STATES, 2014 at 8, 10 (2016), <https://www.bls.gov/iif/oshwc/foi/cftb0287.pdf> [<https://perma.cc/UXS6-IIAKL>] (reporting the total number of fatal injuries for police officers as ninety-eight, while first-line supervisors was 124).

84. See Max Ehrefreund, *Charted: The 20 Deadliest Jobs in America*, WASH. POST: WONKBLOG (Jan. 28, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/28/charted-the-20-deadliest-jobs-in-america/?utm_term=.63f43ed6a0d9 [<https://perma.cc/53YU-EMQD>] (reporting the number of homicide victims in 2013 by their occupation).

85. Lorie Fridell et al., *The Impact of Agency Context, Policies, and Practices on Violence Against Police*, 37 J. CRIM. JUST. 542, 551 (2009).

86. See *id.* at 551 (reporting over 2,500 police officer deaths since 1973).

87. *Law Enforcement Officers Feloniously Killed*, UCR.FBI.GOV, https://ucr.fbi.gov/leoka/2015/tables/table_2_leos_fk_population_group_agency_type_2006-2015.xls [<https://perma.cc/NL76-ZTFD>] (last visited Aug. 26, 2017).

88. *Id.*

89. *FBI Releases 2016 Preliminary Statistics for Law Enforcement Officers Killed in the Line of Duty*, FBI.GOV (May 15, 2017), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-preliminary-statistics-for-law-enforcement-officers-killed-in-the-line-of-duty> [<https://perma.cc/PG5D-JWXJ>] [hereinafter *FBI Release 2016*].

90. BRIAN A. REAVES, U.S. DEP'T OF JUST. CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 at 1 (Catherine Bird & Jill Thomas, eds., 2011), <https://www.bjs.gov/content/pub/pdf/esllea08.pdf> [<https://perma.cc/X6WJ-T7RK>].

91. *Crime in the United States*, UCR.FBI.GOV, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-1> [<https://perma.cc/FSD3-KAF3>] [hereinafter *Crime in the U.S.*] (last visited Sept. 9, 2017).

rate for law enforcement officers based upon the annual average number of police-officer homicides over the ten years prior to 2016 is 4.1 per 100,000; a rate that is below the national homicide rate.⁹²

Acts of homicidal violence against law enforcement officers have a significantly higher clearance rate⁹³ than other homicides in the United States.⁹⁴ Of the 14,392 homicides that occurred in the United States in 2015, 8,851 (61.5%) were cleared by arrest or exceptional means.⁹⁵ Between 2004 and 2013, there were only three surviving offenders of nearly six hundred known offenders involved in the homicide of a police officer who were not arrested for the offense,⁹⁶ resulting in a clearance rate of 99.5% for the ten-year period.⁹⁷ When an offender suspected of the murder of a police officer is not physically apprehended, it is typically due to the death of the suspect.⁹⁸

The act of killing a law enforcement officer is considered an aggravating factor that would make the defendant eligible for the death penalty in most jurisdictions where capital punishment is permitted.⁹⁹ In twenty-seven out of the thirty-one states that employ the death penalty,

92. See *FBI Release 2016*, *supra* note 89 (providing statistics on police officer deaths in 2016).

93. See *Clearance Rate*, WIKIPEDIA, https://en.wikipedia.org/wiki/Clearance_rate [<https://perma.cc/V3CK-DN89>] (last visited Sept. 30, 2017) (“In criminal justice, clearance rate is calculated by dividing the number of crimes that are ‘cleared’ (a charge being laid) by the total number of crimes recorded. Clearance rates are used by various groups as a measure of crimes solved by police.”).

94. According to the Uniform Crime Reports, 64.5% of murder and non-negligent manslaughter incidents were cleared by arrest in 2014. *Percent of Offenses Cleared by Arrest or Exceptional Means by Population Group, 2014*, UCR.FBI.GOV, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-25> [<https://perma.cc/Z5Y2-5TDF>]; see *Crime in the U.S.*, *supra* note 91 (reporting 14,164 murders and non-negligent manslaughters in 2014).

95. *Percent of Offenses Cleared by Arrest or Exceptional Means by Population Group, 2015*, UCR.FBI.GOV, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-25> [<https://perma.cc/4B3S-VVPII>] (last visited Sept. 18, 2017).

96. *Table 46: Law Enforcement Officers Feloniously Killed: Disposition of Known Offender, 2004-2013*, UCR.FBI.GOV, https://ucr.fbi.gov/leoka/2015/tables/table_46_lcos_fk_disposition_of_known_offender_2004-2013.xls [<https://perma.cc/6EF5-VRG7>] [*hereinafter Table 46*] (last visited Sept. 18, 2017).

97. *Id.*

98. *Id.*

99. See *Aggravating Factors for Capital Punishment By State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/aggravating-factors-capital-punishment-state> [<https://perma.cc/YB4V-FZC2>] (last visited Aug. 24, 2017) (reporting the aggravating factors including murder of a police officer—by each state).

the capital statute either specifically indicates killing a law enforcement officer or peace officer is an aggravating factor¹⁰⁰ or defines the act itself as a capital¹⁰¹ or capital-eligible offense.¹⁰² The remaining four states cite murder committed while evading arrest to be an aggravating factor, especially when a police officer is targeted during such an evasion.¹⁰³ Nearly every non-death penalty jurisdiction either mandates¹⁰⁴ or allows life without parole for the killing of a police officer¹⁰⁵ or mandates life

100. ALA. CODE § 13A-5-40(a)(5) (2016); ARK. CODE ANN. § 5-10-101(a)(3) (West 2008); CAL. PENAL CODE § 190.2(a)(7) (West 2014); COLO. REV. STAT. ANN. § 18-13-1201(5)(c)(I) (West 2013); FLA. STAT. § 921.141(6)(J) (2016); GA. CODE ANN. § 17-10-30(b)(8) (West 2014); IND. CODE § 35-50-2-9(b)(6) (2016); KY. REV. STAT. ANN. § 532.025(2)(a)(7) (2017); MONT. CODE ANN. § 46-18-303(1)(b) (2017); MO. REV. STAT. § 565.032(2)(5) (2016); NEB. REV. STAT. § 29-2523(1), (g) (i) (2016); NEV. REV. STAT. § 200.033(7) (2015); N.C. GEN. STAT. § 15A-2000(e)(8) (2017); OR. REV. STAT. § 163.095(2)(a) (2015); 42 PA. CONS. STAT. § 9711(d)(1) (2016); S.C. CODE ANN. § 16-3-20(C)(a)(7) (2017); S.D. CODIFIED LAWS § 23A-27A-1(7) (2017); TENN. CODE ANN. § 39-13-204(i)(9) (2017); WASH. REV. CODE § 10.95-020(1) (2016).

101. ARIZ. REV. STAT. ANN. § 13-751(F)(10) (2010); MISS. CODE ANN. § 97-3-19(2)(a) (2017); N.H. REV. STAT. ANN. § 630:1(1)(a) (2016); TEX. PENAL CODE ANN. § 19.03(a)(1) (2017); VA. CODE ANN. § 18.2-31(6) (2017).

102. *See, e.g.*, IDAHO CODE §§ 18-4003(b), -4004 (2017) (mentioning murdering a peace officer is murder in the first degree and punishable by death or life in prison); LA. STAT. ANN. § 14:30(a)(2), (C)(1) (2016) (punishing murder of a peace officer with death or life in prison without parole); OKLA. STAT. tit. 21, §§ 701.9(a), 701.12(8) (2017) (killing a peace officer is an aggravating factor).

103. KAN. STAT. ANN. § 21-6624(e) (2016); UTAH CODE ANN. § 76-5-202(1)(f) (West 2017); OHIO REV. CODE ANN. § 2929.04(A)(3) (West 2016); WYO. STAT. ANN. § 6-2-102(h)(v) (2017).

104. *See, e.g.*, CONN. GEN. STAT. §§ 53a-54b (2012) (mandating life imprisonment without the possibility of release for the murder of a police officer); HAW. REV. STAT. §§ 707-701(b), 706-656 (2016) (mandating first degree murder shall be sentenced to life in prison without the possibility of parole); IOWA CODE §§ 707.2(1)(d), 902.1(1) (2017) (mandating that only upon the governor's commuting the sentence, a person convicted of intentionally killing a police officer is not to be released on parole); MICH. COMP. LAWS § 750.316(1)(c) (2015) (knowingly murdering a peace officer while the officer is engaged in official duties mandates life without parole); MINN. STAT. § 609.185(a)(4) (2016) (mandating life without parole for the killing of a peace officer engaged in official duties); N.J. REV. STAT. § 2C:11-3(b)(2) (2015) (causing the death of a peace officer while the officer is engaged in official duties mandates life without parole); 11 R.I. GEN. LAWS §§ 11-23-1, -2 (2016) (mandating life without parole for the murder of a peace officer).

105. 720 ILL. COMP. STAT. 5/9-1 (2016). Since the death penalty was abolished in 2011, the maximum penalty in Illinois is life in prison without the possibility of parole. *Illinois*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/illinois-1> [<https://perma.cc/3TET-4QEN>] (last visited Sept. 24, 2017). Alaska is also a unique jurisdiction, mandating a sentence of ninety-nine years for first degree murder of an identifiable peace officer killed while performing official duties. ALASKA STAT. ANN. § 12.55.125(a)(1) (2007).

sentences for first degree murder generally.¹⁰⁶ Four states require indeterminate sentences of up to life in prison for murder convictions.¹⁰⁷

The clearance rate for officer homicides is nearly 100%;¹⁰⁸ perpetrators are nearly always apprehended or justifiably killed prior to apprehension.¹⁰⁹ In every capital punishment jurisdiction, the law recognizes execution as an appropriate penalty in cases involving the murder of a police officer in the line of duty.¹¹⁰ When comparing clearance rates of law enforcement homicides to all homicides, there is a higher likelihood that the perpetrator who killed a police officer will be apprehended or justifiably killed prior to being apprehended.¹¹¹ Additionally current laws permit some of the harshest punishments allowed under American law, specifically due to the fact that the victim was a police officer. The penalties allowed for murder of a law enforcement officer cannot be logically enhanced through additional

106. N.M. STAT. ANN. §§ 30-2-1, 31-18-14 (2015); N.D. CENT. CODE §§ 12.1-16-01, -32-01(a) (2017); WIS. STAT. §§ 939.50(3)(a), 940.01(1)(a) (2017).

107. ME. STAT. tit. 17-A, §§ 201, 1251 (2016) (stating the minimum term of twenty-five years imprisonment for murder but allows for a sentence up to life imprisonment); N.Y. PENAL LAW §§ 125.27(1)(a)(i), 70.00(2)(a), (3)(i) (McKinney 2009) (establishing a mandatory minimum sentence of twenty to twenty-five years in prison for murdering a police officer in the first degree); VT. STAT. ANN. tit. 13, § 2301, 2303 (2017) (mandating a term of thirty-five years to life in prison for a first degree murder); W. VA. CODE § 61-2-1 to -3 (2016) (mandating life for first degree murder and a term of ten to forty years for second degree murder).

108. See *Table 46, supra* note 96 (reporting clearance rates).

109. See *id.* (reporting rates of arrests and charges and non-arrests).

110. See *Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/methods-execution> [<https://perma.cc/V3C6-DF49>] (last visited Sept. 11, 2017) (listing the capital punishment jurisdictions and their methods of execution).

111. Compare *Table 46, supra* note 96 with *Table 25: Percent of Offenses Cleared by Arrest or Exceptional Means: Percent Cleared by Arrest* UCR.FBI.GOV, https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic_final [<https://perma.cc/359G-E5L4>] (last visited Nov. 7, 2017). From 2004 to 2008, there were 284 known offenders who killed police officers. 204 offenders were apprehended and charged, 148 of whom were found guilty of murder and sentenced to death, life in prison, or received a prison term. Eighty were not arrested because they were “justifiably killed,” committed suicide, murdered while at large, or died under other circumstance. This resulted in all police homicide fugitives accounted for between 2004 and 2008. *Table 46, supra* note 96. Alternatively, about 64% of murder and nonnegligent manslaughter incidents were cleared by arrest in 2013. *Table 25: Percent of Offenses Cleared by Arrest or Exceptional Means: Percent Cleared by Arrest* UCR.FBI.GOV, https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic_final [<https://perma.cc/359G-E5L4>] (last visited Nov. 7, 2017).

legislation, such as hate crime laws, as the perpetrator is already facing the toughest sentences the American criminal justice system offers.

B. *Assaults Against Police Officers*

In 2015, law enforcement agencies reported 50,212 incidents of assault on a law enforcement officer, a rate of 9.9:100 officers.¹¹² This rate is significantly higher than the assault rate for the general population aged twelve or older which, according to the National Crime Victimization Survey (NCVS) estimates assaults at a rate of 14.8 per 1,000 persons,¹¹³ and even higher still than the Uniform Crime Reporting's (UCR) reported aggravated assault rate of 237.8 incidents per 100,000 persons in 2015.¹¹⁴

The differences in rates of victimization reflected in these data sets are likely due to discrepancies in reporting.¹¹⁵ Citizens often do not report crime victimization for a number of reasons, including feeling the incident was not important enough to report to the police.¹¹⁶ Between 2006 and 2010, 43% of violent victimizations resulting in injury reported to the NCVS were not reported to the police, including nearly 80,000 incidents that resulted in serious injuries such as “gunshot or stab wounds, broken bones, internal injuries, and unconsciousness.”¹¹⁷ In 2010, 61% of aggravated assaults disclosed to NCVS interviewers were not reported

112. *Officers Assaulted*, UCR.FBI.GOV, https://ucr.fbi.gov/leoka/2015/officers-assaulted/assaults_topic_page_-2015 [<https://perma.cc/SY6X-GUTT>] (last visited Sept. 9, 2017).

113. JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION, 2015 at 7 (Monika Potemra & Jill Thomas, eds., 2016), <https://www.bjs.gov/content/pub/pdf/cv15.pdf> [<https://perma.cc/3EVW-7XPX>].

114. *Aggravated Assault*, UCR.FBI.GOV, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/aggravated-assault> [<https://perma.cc/3L58-AR8N>] (last visited Sept. 24, 2017).

115. See Eric P. Baumer & Janet L. Lauritsen, *Reporting Crime to the Police, 1973-2005: A Multivariate Analysis of Long-Term Trends in the National Crime Survey (NCS) and National Crime Victimization Survey (NCVS)*, 48 CRIMINOLOGY 131, 133 (2010) (suggesting possible reasons for discrepancy in reporting rates); see also TRUMAN & MORGAN, *supra* note 113, at 4 (“The NVCS obtains estimates of crimes both reported and not reported to police, while the UCR collects data on crimes known to and recorded by law enforcement.”).

116. LYNN LANGTON ET. AL., U.S. DEP'T OF JUST., VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 at 1 (Vanessa Curto & Jill Thomas, eds., 2012), <https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf> [<https://perma.cc/VRN8-2KJN>].

117. See *id.* at 5 tbl.2 (providing data on “violent victimizations”, such as crimes of sexual assault, robbery, aggravated assault, and simple assault, which were not reported to the police).

to the authorities.¹¹⁸ As the NCVS typically includes many incidents not reported to the police, it is viewed as a more accurate representation of actual victimization occurring in the United States than the official data reflected in the UCR.¹¹⁹ It is unlikely that an injury such as those that go unreported by ordinary citizens would likewise be unreported by a law enforcement officer injured while on-duty, suggesting statistics on officer injuries are relatively accurate and officers are more likely to experience an aggravated assault than the average citizen.

Of the reported incidents where an officer was assaulted, 14,281 resulted in an injury to the officer victim: a rate of 2.8 per 100 officers.¹²⁰ The FBI does not define “injury,” making further investigation difficult.¹²¹ While some injuries are undoubtedly serious and life-threatening, less serious injuries are far more commonplace.¹²² The substantial data reflecting sustained injuries is likely a function of reporting requirements imposed upon law enforcement officers requiring that all injuries of *any nature* be documented.¹²³ Official data from 2015 indicate 192 injurious assaults involved the use of a firearm; 113 injuries resulted from the use of a knife or other cutting instrument; 1,876 injuries resulted from the use of “other dangerous weapons”; and 12,102 injuries resulted from the use of “personal weapons”.¹²⁴ In 2003, Brandl and Strohinc revealed in their article, *Towards an Understanding of the*

118. *Id.* at 12 app. tbl.2.

119. TRUMAN & MORGAN, *supra* note 113, at 4.

120. *Table 70: Law Enforcement Officers Assaulted: Region and Geographic Division, 2015*, UCR.FBI.GOV, https://ucr.fbi.gov/leoka/2015/tables/table_70_leos_asltd_region_and_geographic_division_2015.xls [<https://perma.cc/Y7RN-3SM6>] (last visited Sept. 24, 2017).

121. *See About Law Enforcement Officers Killed and Assaulted*, ucr.fbi.gov, https://ucr.fbi.gov/leoka/2015/resource-pages/about_leoka_-2015 [<https://perma.cc/9MPU-2HPP>] (last visited Sept. 24, 2017) (lacking any definition of injury within the data and criteria presented).

122. Kate Lyons et al., *A Profile of Injuries Sustained by Law Enforcement Officers: A Critical Review*, INT’L J. ENVTL. RES. PUB. HEALTH, Feb. 3, 2017, at 1 (stating the most common type of injury were soft-tissue sprains).

123. *See* INT’L ASS’N OF CHIEFS OF POLICE, REDUCING OFFICER INJURIES FINAL REPORT 5, http://www.theiacp.org/portals/0/pdfs/IACP_ROI_Final_Report.pdf [<https://perma.cc/VAX9-KCVC>] (last visited Sept. 4, 2017) (“Agencies should closely track *officer injuries of all types* with circumstantial data in order to identify possible patterns of incidences and to develop prevention strategies.”) (emphasis added).

124. *Table 28: Law Enforcement Officers Feloniously Killed: Type of Weapon, 2006-2015*, https://ucr.fbi.gov/leoka/2015/home/tables/table_28_leos_fk_type_of_weapon_2006-2015.xls [<https://perma.cc/NM5V-GB7R>] (last visited Sept. 24, 2017). “Personal weapons” include hands, fists, or feet. *Id.*

Physical Hazards of Police Work, that assaults perpetrated against officers rarely were severe enough to require time off from work.¹²⁵ The most common injuries reported include contusions, human bites, muscle pain, lacerations, and contact with bodily fluids.¹²⁶ A follow-up study conducted a decade later found similar results and noted decreased rates of injurious assaults against officers.¹²⁷ These results were confirmed in a recent meta-analysis analyzing existing literature on injuries sustained by officers and found sprains and strains were the most common injuries reported by law enforcement personnel.¹²⁸

Assaults against law enforcement officers have a much higher clearance rate than other assaults.¹²⁹ UCR data reflects a clearance rate of over 89% for assaults against officers, a rate far greater than the 54% clearance rate for reported aggravated assaults occurring in the general population.¹³⁰ In many jurisdictions, a suspect arrested for an assault against a police officer finds the penalty tends to be harsher than if the victim were not an officer.¹³¹ Therefore, not only are assaults perpetrated against police officers more likely to be reported, the

125. Steven G. Brandl & Meghan S. Stroshine, *Towards An Understanding of the Physical Hazards of Police Work*, 6 POLICE QUARTERLY 172, 183-86 & tbl. 2 (2003) (finding accidents rather than assaults to be the greatest source of injuries suffered by police officers that require medical attention).

126. *Id.* at 183 tbl. 2 (2003).

127. Steven G. Brandl & Meghan S. Stroshine, *The Physical Hazards of Police Work Revisited*, 15 POLICE QUARTERLY 262, 262 (2012).

128. Lyons et al., *supra* note 122, at 1.

129. *Table 73: Law Enforcement Officers Assaulted: Circumstances at Scene of Incident by Population Group and Percent Cleared, 2015*, UCR.FBI.GOV, https://ucr.fbi.gov/leoka/2015/tables/table_73_leos_asltd_circum_at_scene_of_incident_by_population_group_and_percent_cleared_2015.xls [<https://perma.cc/WZZ6-QXE2>] (last visited Sept. 24, 2017).

130. *Id.*

131. *See, e.g.*, CAL. PENAL CODE § 241(a), (c) (West 2014) (doubling the penalty when the victim is a peace officer); 720 ILCS §5/12-3.05(a)(3) (2016) (upgrading a battery on a peace officer engaged in official duties to aggravated battery, a felony); MO. REV. STAT. § 565.050(2) (2016) (upgrading the offense to a class B felony when the victim is a law enforcement officer who is assaulted while working in an official capacity); OHIO REV. CODE ANN. § 2903.13 (West 2006) (upgrading the offense when the victim is a peace officer and imposing a mandatory minimum when the victim suffers serious physical harm); 18 PA. CONS. STAT. § 2702.1 (2016) (upgrading assault of an officer to the first degree felony); VA. CODE ANN. §18.2-57(c) (2017) (imposing a mandatory minimum for assaults on certain public officials, when subject knows or has reason to know of the person's public position); WASH. REV. CODE § 9A.36.031(1)(g) (2016) (assaulting a law enforcement officer while "performing his or her official duties" is a class C felony).

offenders are more likely to be apprehended and face more serious consequences than when an assault victim is not a police officer.¹³²

C. *Reducing Acts of Violence Against Law Enforcement Officers*

Law enforcement agencies concerned about the rates of assaults against officers can implement policies that work to accomplish the goal of reducing these types of incidents.¹³³ Policing style is one factor that has been identified as a predictor of citizen-perpetrated violence against law enforcement officers.¹³⁴ Police agencies that partner with communities utilizing community policing strategies tend to see fewer instances of violence directed toward officers.¹³⁵ Citizen confidence is also much higher in law enforcement agencies that implement community policing techniques.¹³⁶ A positive effect on community confidence is also achieved with the greater use of volunteers within an agency.¹³⁷ Volunteers are a key component of many community policing programs and can bridge the gap between the agency and the community.¹³⁸ The rate of officers injured by assault decreased as the number of community agencies the law enforcement agency regularly met with increased, suggesting a stronger relationship between a law

132. See *Officers Assaulted*, *supra* note 112 (reporting in 2015, “law enforcement agencies cleared 89.3% of the 50, 212 reported assaults on law enforcement officers”).

133. Dale W. Willits, *The Organizational Structure of Police Departments and Assaults on Police Officers*, 16 INT’L J. POLICE SCI. & MGMT. 140 (2014) (examining the possibility that “organizational structure” within police departments can influence officer safety).

134. See U.S. DEP’T OF JUST., CMTY. REL. SERV., PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 2 (2003) [hereinafter *Principles*] (stating good policing practices will result in less police brutality and will improve police community relationships); see also Willits, *supra* note 133 at 147 (noting prior research indicates that policing practices, such as community policing, is a “predictor of violence against police officers”).

135. See Willits, *supra* note 133 at 150 (noting community policing may result in less violence against police officers because its advocates strongly recommend “spatial differentiation,” which is the degree to which police agencies allocate strategy and management issues over geographical areas). The more police officers are seen in the community, the less likely the community will see them as invading their presence. *Id.*

136. See Ling Ren, et al., *Linking Confidence in the Police with the Performance of the Police: Community Policing Can make a Difference*, 33 J. CRIM. JUST. 55, 62 (2005) (conducting a study on the effectiveness of community policing and finding “voluntary contacts with the police involving citizens in various community policing programs tended to increase confidence in the police”).

137. See *id.* (finding volunteer participation was the strongest predictor of confidence in the police).

138. *Id.*

enforcement agency and the community can decrease the number of attacks perpetrated against police officers resulting in injury.¹³⁹ Agencies should increase the diversity of the police force; implement training aimed at combatting implicit biases officers may hold; and establish early intervention systems to identify and address officer misconduct, which prevents problem officers from engaging in continued misconduct.¹⁴⁰ These measures have been effective in improving police–community relations.¹⁴¹

In contrast, agencies that utilize a strict crime-control model of policing tend to exhibit more aggressive police tactics, which are generally associated with higher rates of citizen complaints and greater dissatisfaction with the police agency.¹⁴² Aggressive policing tactics are correlated with higher rates of resisting arrest.¹⁴³ It is theorized that increased interaction between aggressive law enforcement officers and citizens results in a higher likelihood that citizens will be offended by officer behavior characterized as harassment unrelated to their own criminal behavior.¹⁴⁴ Where drug-related offenses are aggressively enforced, indicated by high levels of arrests, there is a corresponding increase in the rates of injurious assaults perpetrated against officers.¹⁴⁵ The use of controversial policing tactics based on deterrence and broken

139. See Steve Wilson & Jihong Zhao, *Determining the Correlates of Police Victimization: An Analysis of Organizational Level Factors on Injurious Assaults*, 36 J. CRIM. JUST. 461, 465–66 (2008) (conducting a study on community policing).

140. Roger G. Dunham & Nick Petersen, *Making Black Lives Matter: Evidence-Based Policies for Reducing Police Bias in the Use of Deadly Force*, 16 AM. SOC'Y CRIM. 341, 343–44 (2017).

141. See *id.* at 343–344 (responding to a 2017 article that analyzed race in police fatal shootings, providing policy recommendations that will reduce police bias in the use of deadly force).

142. See Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQ. 171, 185 (1999) (arguing police-community problem solving produces more effective crime control than “zero-tolerance policing”). Lawsuits alleging civil rights violations filed against the New York City Police Department increased by 75% with an increase in the number of citizen complaints filed after the implementation of “zero tolerance policing,” which cracked down on minor offenses such as panhandling and public urination. *Id.* at 171.

143. Craig Hemmens & Daniel Levin, *Resistance is Futile: The Right to Resist Unlawful Arrest in an Era of Aggressive Policing*, 46 CRIME & DELINQ. 472, 488 (2000).

144. *Id.*

145. See Wilson & Zhao, *supra* note 139, at 466 (“Findings also suggest that injurious assault rates increase when arrest rates for drug related crimes were high.”).

windows policing (zero-tolerance strategies) “produce[s] an atmosphere conducive to violence against officers.”¹⁴⁶ Where there is a culture of aggressiveness within a police department, identified by a greater use of force against citizens, there is also a greater rate of violence by community members against officers.¹⁴⁷

While it certainly cannot be said that law enforcement policies *cause* violence to be perpetrated against officers, there are policing techniques that have been found to reduce violence directed at officers that may be implemented by agencies.¹⁴⁸ Such techniques build stronger relationships between the community and the police agency by increasing trust, cooperation and communication; making officers more accessible to members of the community; and creating a safer working environment for the officers.¹⁴⁹ When a community views law enforcement agencies and officers as accessible and cooperative neighborhood partners rather than an entity to be feared and avoided, its citizens are less likely to react in an aggressive manner toward officers, thereby creating a safer environment for both officers and community members.¹⁵⁰

IV. LAW ENFORCEMENT OFFICERS AND THE DISPARATE TREATMENT OF MINORITY CITIZENS

A. *The Racialized History of Policing*

Southern slave patrols are often regarded as our nation’s first efforts at a formal policing system.¹⁵¹ Organized slave patrols were firmly in place decades before the establishment of the Boston Police Department, which is commonly recognized as the nation’s first police force.¹⁵² The formal policing and regulation of slaves through legislation came about

146. *Id.* at 465.

147. See Fridell et al., *supra* note 85, at 550 (examining agency-level factors impacting the level of violence against police officers).

148. See *Principles*, *supra* note 134 (discussing good policing practices that may assist law enforcement agencies in reducing violence between citizens and police officers).

149. See Wilson & Zhao, *supra* note 139, at 466 (2008) (suggesting community policing is an effective method to reduce violence between police and the public).

150. *Id.*

151. SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 52 (2d ed. 1998).

152. See *id.* at 51–52 (stating that by 1822 the slave patrol system in South Carolina was 100-members strong; the Boston Police Department was not established until 1838).

in the early 1800s.¹⁵³ Slave patrollers were appointed officials paid by the community and tasked with recapturing runaway slaves before the slaves left the jurisdiction.¹⁵⁴ Slave patrols were responsible for “maintaining the system of enslavement and the established racial order, preventing rebellions and uprisings, and capturing runaway slaves”¹⁵⁵ through their three primary functions: (1) locating and returning runaway slaves to their owners; (2) deterring slave revolts using “organized terror”; and (3) disciplining unruly slaves.¹⁵⁶ Patrollers engaged in systematic abuses of slaves including: theft, harassment, humiliation, religious discrimination, invasion of privacy, mutilation, and sexual assaults,¹⁵⁷ feeling it was their civic duty to impart violence onto slaves.¹⁵⁸ However, patrols were somewhat constrained due to the slaves’ legal status as valuable chattel which offered some protections insofar as owners did not want their slaves to sustain injuries that would depreciate their value as laborers.¹⁵⁹ Slave patrols continued in some jurisdictions up to and following the end of the Civil War in 1865, but were phased out over the next several years with much resistance.¹⁶⁰

The South was left in ruins following the Civil War.¹⁶¹ One response by the South to the emancipation of millions of slaves was the passage of “black codes,” which served to “govern the Negroes.”¹⁶² Laws were passed which made very minor offenses illegal such as proselytizing

153. E. Russ Williams, Jr., *Slave Patrol Ordinances of St. Tammany Parish, Louisiana, 1835-1838*, 13 J. LA. HIST. ASS'N 399, 399 (1972).

154. See SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 80–81 (2001) (describing slave patrollers and their duties).

155. Cassandra Chaney & Ray V. Robertson, *Armed and Dangerous? An Examination of Fatal Shootings of Unarmed Black People by Police*, 8 J. PAN AFRICAN STUD. 45, 51 (2015).

156. Gary Potter, *The History of Policing in the United States, Part 1*, EASTERN KY. U. POLICE STUD. ONLINE (June 25, 2013), <http://plsonline.eku.edu/insideloook/history-policing-united-states-part-1> [https://perma.cc/Q83R-GPCQ].

157. HADDEN, *supra* note 154, at 118, 123–24, 126.

158. Larry H. Spruill, *Slave Patrols: “Packs of Negro Dogs” and Policing Black Communities*, 53 PHYLON 42, 51 (2016).

159. See *id.* at 51–52 (2016) (discussing slave owners’ views that slaves were “chattels” and losing them would result in economic loss of valuable property).

160. HADDEN, *supra* note 154, at 198.

161. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 27 (2012).

162. *Id.* at 28 (quoting WILLIAM COHEN, *AT FREEDOM’S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL* 28 (1991)).

without a license and making “insulting gestures.”¹⁶³ Vagrancy, defined as not having a job and enforced solely against black citizens, was another popular black code in the South.¹⁶⁴ These laws conveniently supported the convict-lease system, which allowed for the leasing out of prisoners to those of means wishing to hire labor.¹⁶⁵ Business owners in need of free or cheap labor could make agreements with local law enforcement officers to arrange for the arrest of appropriate laborers, for a fee of course.¹⁶⁶ Though the 13th Amendment to the Constitution abolished slavery, it contained a loophole; slavery and involuntary servitude were declared unconstitutional “except as punishment for a crime,” which allowed for the continued enslavement of African-Americans through the convict lease system.¹⁶⁷

Another racial injustice in which law enforcement officers played a part was lynching. Lynching is defined as the “extrajudicial killing perpetrated by three or more individuals who claim their murderous actions were intended to uphold justice or tradition.”¹⁶⁸ Such acts of murder marked by collective violence were first documented in at least forty-four incidents of hanging and burning of slaves in the early 1800s when slavery was still permitted.¹⁶⁹ Between 1882 and 1968 there were 4,743 lynchings,¹⁷⁰ typically occurring in Southern states with most

163. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 84–85 (1997).

164. ALEXANDER, *supra* note 161, at 28.

165. *Id.*

166. Cassandra Chancy & Ray V. Robertson, “Can We All Get Along?” *Blacks’ Historical and Contemporary (In) Justice with Law Enforcement*, 38 W. J. BLACK STUD. 108, 110 (2014).

167. U.S. CONST. amend. XIII, § 1; see Angela F. Chan, *America Never Abolished Slavery*, HUFFINGTON POST (Mar. 2, 2015, 1:15 PM), http://www.huffingtonpost.com/angela-f-chan/america-never-abolished-slavery_b_6777420.html [https://perma.cc/VX6W-9J4G] (“The 13th Amendment did not abolish slavery but rather moved it from the plantation to the prison.”).

168. Amy Kate Bailey & Karen A. Snedker, *Practicing What They Preach? Lynching and Religion in the American South, 1890-1929*, 117 AM. J. SOC. 844, 845 (2011) (internal citation omitted).

169. Michael J. Pfeifer, *The Northern United States and the Genesis of Racial Lynching: The Lynching of African Americans in the Civil War Era*, 97 J. AM. HIST. 621, 622 (2010).

170. *Lynching Statistics*, CHESTNUTTARCHIVE.ORG (Jan. 1999), <http://www.chesnuttarchive.org/classroom/lynchingstat.html>. [https://perma.cc/PG9K-7872] 1882 marked the beginning of keeping reliable records on such incidents. Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1880-1950*, <http://teachersinstitute.yale.edu/curriculum/units/1979/2/79.02.04.x.html> [https://perma.cc/X8LP-572F] (last visited Sept. 25, 2017).

victims being black (72.7%).¹⁷¹ Such mob violence was so common it occurred once a week for decades.¹⁷² A black man during the Jim Crow era was “more likely to be lynched than to receive a fair trial in the South.”¹⁷³

Most lynchings involved the custodial transfer of an arrested person into the custody of the lynch mob that eventually killed the individual.¹⁷⁴ Many were facilitated by jailers who simply handed over the inmates.¹⁷⁵ Few of these abductions were documented to have been over the protests or resistance of law enforcement personnel. However, even when officers claimed to have been overpowered, they were generally not asked for any evidence to support their claims.¹⁷⁶ Lynchings received encouragement through the “ever-present” political climate and were often condoned by those in authority who failed to make arrests or even speak out in condemnation of the violence.¹⁷⁷

Lynching is the epitome of failure by the state to protect its most marginalized citizens from violence,¹⁷⁸ exacerbated by the lack of resistance and even active participation by law enforcement officers charged with the care of arrested individuals who instead fed their charges to the wolves.¹⁷⁹ Lynching was meant to send a message of

171. KENNEDY, *supra* note 163, at 42; *Lynching Statistics*, *supra* note 170.

172. Bailey & Snedker, *supra* note 168, at 847; see STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930, at 17 (1995) (discussing mob violence).

173. ALEXANDER, *supra* note 161, at 226.

174. *Police and State Involvement with Lynching*, STATE SANCTIONED, <https://statesanctioned.com/police-and-state-involvement-with-lynching> [<https://perma.cc/D77K-57XT>] [hereinafter *Police Involvement*] (last visited Aug. 25, 2017).

175. See, e.g., Kimberley Mangun & Larry R. Gerlach, *Making Utah History: Press Coverage of the Robert Marshall Lynching, June 1925*, in LYNCHING BEYOND DIXIE: AMERICAN MOB VIOLENCE OUTSIDE THE SOUTH 132, 133 (Michael J. Pfeifer ed., 2013) (discussing the lynching of Sam Joe Harvey, who was handed “over to a vengeful mob who hung him and then dragged his corpse down a Salt Lake City street for several blocks”).

176. *Police Involvement*, *supra* note 174.

177. Yohuru R. Williams, *Permission to Hate: Delaware, Lynching, and the Culture of Violence in America*, 32 J. BLACK STUD. 3, 6 (2001); see also Ryan D. King et al., *Contemporary Hate Crimes, Law Enforcement, and the Legacy of Racial Violence*, 74 AM. SOC. REV. 291, 294 (2009) (“Many lynching incidents were perpetrated with impunity, as law enforcement either tolerated such behavior or acquiesced to it.”).

178. King et al., *supra* note 177, at 294.

179. See *id.* at 294 (offering different explanations for the prevalence of lynching, including the state’s failure to protect racial minorities and the law enforcement’s acquiescence to such lynching).

intimidation and terror to black citizens, while allowing white participants to revel in their collective identity and celebrate their self-proclaimed moral superiority.¹⁸⁰ Lynchings were a means of continuing black oppression.¹⁸¹

Though lynchings are no longer practiced—at least to the extent and with the societal approval that they once were—new forms of racial conflict exist through the resistance of policies aimed at equality.¹⁸² Some perceive affirmative action programs and hate-crime legislation to be special protections given to racial minority groups.¹⁸³ The brutal treatment of minority citizens by law enforcement officers can be viewed as a continuation of white supremacy, espousing the view that whiteness is normal.¹⁸⁴ Law enforcement agencies operating in areas with a history of lynching black victims are less likely to comply with and enforce hate crime legislation.¹⁸⁵ This negative correlation between hate crime compliance and historical practice of lynching suggests a shift in law enforcement attitudes in these locales, from overt discrimination to a more subtle kind of discrimination.¹⁸⁶

B. *Modern Policing and Race*

Comparisons can be drawn between slave patrols and modern police practices that allow and even encourage higher levels of force to be used against African-American subjects.¹⁸⁷ For example, Stop and Frisk, Racial Profiling, and “Speak When I Tell You” are police policies based

180. See Mattias Smångs, *Doing Violence, Making Race: Southern Lynching and White Racial Group Formation*, 121 AM. J. SOC. 1329, 1336–38 (2016) (discussing the private-public dichotomy of lynch mobs and their respective relationships to White social and collective identity-building).

181. See TOLNAY & BECK, *supra* note 172, at 294 (emphasizing the numbers of people lynched and the extralegal method of execution contributed to the systematic subjugation of Black people); see also King et al., *supra* note 177, at 294 (explaining lynching was a form of extreme racial antagonism intended to control Black people).

182. King et al., *supra* note 177, at 292.

183. *Id.*

184. See Chaney & Robertson, *supra* note 155, at 50–51 (analogizing between modern-day law enforcement and citizen slave patrols brutalizing Black persons in order to maintain control).

185. King et al., *supra* note 177, at 307.

186. *Id.* at 308–09.

187. Spruill, *supra* note 158, at 51; see Chaney & Robertson, *supra* note 155, at 50–51 (arguing police brutality is an extension of white supremacy).

on the subordination of nonwhites.¹⁸⁸ Hispanic and black citizens are twice as likely to be stopped by police as white citizens, but are less likely to be arrested, which suggests law enforcement officers stop minorities without actual reason.¹⁸⁹ A study of traffic stops conducted in the St. Louis, Missouri area found black drivers stopped by white officers had the highest likelihood of having their vehicle searched.¹⁹⁰ Similar results were found in a study of forty black male adolescents from St. Louis.¹⁹¹ Only one respondent denied either being harassed by the police or knowing someone who had.¹⁹² The interactions described by many of the respondents amount to harassment: officers repeatedly searching the juveniles several times in the same day; engaging in inappropriate language; forcing respondents to the ground for no reason; throwing around their belongings; forcing them to remove articles of clothing; and placing fingers in the youths' mouths, all conducted without the requisite level of suspicion.¹⁹³

The Ferguson, Missouri, police department was subject to a Department of Justice Civil Rights Division (DOJ) investigation following allegations of racial bias and misconduct after the shooting death of Michael Brown, an unarmed teenager, by a Ferguson police officer.¹⁹⁴ The report cites systematic abuses, constitutional violations, and vastly disproportionate policing of black citizens.¹⁹⁵ Without any reasonable suspicion, police routinely detained citizens and compelled

188. Marlese Durr, *What Is the Difference Between Slave Patrols and Modern Day Policing? Institutional Violence in a Community of Color*, 41 CRITICAL SOC. 873, 875 (2015).

189. Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop and Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 821 (2007).

190. Jeff Rojek et al., *Policing Race: The Racial Stratification of Searches in Police Traffic Stops*, 50 CRIMINOLOGY 993, 1006-07 (2012); *see also* Gelman et al., *supra* note 189, at 814 (noting the disproportionate numbers of stops, searches, and arrests of Black and Hispanic motorists by police).

191. Rod K. Brunson & Jody Miller, *Young Black Men and Urban Policing in the U.S.*, 46 BRIT. J. CRIM. 613, 622 (2005).

192. *Id.*

193. *Id.* at 623-27.

194. CIVIL RIGHTS DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERUGSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/RT6C-D4JL>] [hereinafter FERUGSON]; Spruill, *supra* note 158, at 44.

195. FERUGSON, *supra* note 194, at 1-2.

them to produce identification, often culminating in arrest on unjustified charges for activities like waiting at a bus stop or sitting in a car.¹⁹⁶

Many of the officers within the department viewed African-Americans, particularly those residing in predominantly minority neighborhoods, as “potential offenders and sources of revenue” rather than “constituents to be protected.”¹⁹⁷ African-American citizens were more likely than white citizens to be subjected to official uses of force, a vehicle stop, receiving a citation, being arrested, or receiving multiple citations in a single incident.¹⁹⁸ Additionally, where racial information was available, DOJ investigators found every instance of canine use of force (dog bite) between 2011 and 2013 involved an African-American subject.¹⁹⁹ This use of canine force to control black bodies is reminiscent of the “packs of negro dogs” deployed as a tool of the slave patrols of yesteryear.²⁰⁰

A similar investigation conducted by the DOJ’s Civil Rights Division into the Baltimore Police Department (BPD) yielded similar results to those found in Ferguson.²⁰¹ BPD officers were found to engage in a disproportionate number of pedestrian and vehicle stops and searches of African-American citizens.²⁰² Officers directed derogatory slurs towards African Americans in over one hundred separate incidents.²⁰³ Particularly heinous examples of these derogatory comments include referring to an elderly woman as a “black bitch”; encouraging a teenager to “put a hoodie on and come to my neighborhood” after the teenager

196. *Id.* at 17–19. The report also details a “department policy” referred to as “pedestrian checks,” or “ped checks,” which entails officers stopping pedestrians with no objective and no reasonably articulable suspicion. *Id.* at 18.

197. *Id.* at 2.

198. *Id.* at 4.

199. *Id.* at 31. The DOJ report described African-Americans involved in police canine dog-biting incidents as nonviolent offenders who suffered serious puncture wounds. Some victims who suffered police dog bites were children. *Id.*

200. Spruill, *supra* note 158, at 51–52.

201. See CIV. RIGHTS DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016), <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/N3GG-3W3N>] (finding the Baltimore Police Department engages in “a pattern or practice of (1) making unconstitutional stops, searches, and arrests; (2) using enforcement strategies that produce severe and unjustified disparities in the rates of stops, searches and arrest of African Americans; (3) using excessive force; and (4) retaliating against people engaging in constitutionally-protected expression”).

202. *Id.* at 48.

203. *Id.* at 66–67.

referred to officers as “Zimmermans”; making references to subjects “do[ing] voodoo” in response to their African accents; suggesting firefighters turn their hoses on protesters; and multiple instances where officers referred to subjects as n***ers.²⁰⁴

Not only have officers engaged in disparate enforcement of the laws, verbal abuse, and assaultive behavior toward black citizens at grossly disproportionate rates, they have also used lethal force in unprecedented numbers and in unprecedented ways.²⁰⁵ A comparison of fatal shootings of citizens by police officers reveals such incidents are far more common in the United States compared to other developed nations.²⁰⁶

There is no uniform method by which law enforcement agencies report fatal shootings, and those methods in existence are voluntary in nature.²⁰⁷ Two media organizations, the *Washington Post* and the *Guardian*, have begun to track fatal police shootings.²⁰⁸ The *Washington Post*'s police shooting database includes 995 incidents of fatal shootings of citizens by police officers in 2015 and 963 incidents in 2016.²⁰⁹ The *Guardian*'s database includes even higher body counts: 1,146 and 1,092 respectively.²¹⁰ The discrepancy in these figures likely

204. *Id.*

205. See Ryan Gabrielson et al., *Deadly Force, in Black and White: A ProPublica Analysis of Killings by Police Shows Outsize Risk for Young Black Males*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <https://www.propublica.org/article/deadly-force-in-black-and-white> [<https://perma.cc/YCJ2-ZPYF>] (finding young black males were killed at a rate 21 times larger than their white male counterparts).

206. *Armed Police Trigger Happy: Civilians Innocent or Guilty Are Far More Likely to Be Shot by Police in America Than in Any Other Rich Country*, ECONOMIST: DEMOCRACY IN AMERICA (Aug. 15, 2014), <https://www.economist.com/blogs/democracyinamerica/2014/08/armed-police> [<https://perma.cc/6FS8-FDWB>].

207. Aaron C. Davis & Wesley Lowery, *FBI Director Calls Lack of Data on Police Shootings ‘Ridiculous,’ ‘Embarrassing’*, WASH. POST (Oct. 7, 2015), https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html?utm_term=.a2eb36847635 [<https://perma.cc/LS37-EXZF>].

208. *The Counted: People Killed by Police in the U.S.*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [<https://perma.cc/P9QZ-R79Q>] [hereinafter *The Counted*] (last visited Nov. 5, 2017); *Fatal Force*, WASHINGTON POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017> [<https://perma.cc/9D7Y-2NXR>] [hereinafter *Fatal Force*] (last visited Nov. 5, 2017).

209. *Fatal Force*, *supra* note 208 (click on “2016” and “2015” to access data for the corresponding year).

210. *The Counted*, *supra* note 208.

results from the voluntary nature of UCR reporting, thereby substantively contributing to the difficulty of tracking fatal violence by police officers.²¹¹

African-American men are disproportionately killed in shootings by the police.²¹² When a police officer fatally shoots an unarmed African-American individual, typically, no charges are filed.²¹³ When charges are filed, officers are generally charged with manslaughter rather than murder and often are acquitted at trial. When officers are convicted, their sentences tend to be quite varied with most serving for relatively short periods of time.²¹⁴

There are a number of victims of police brutality whose names are burned into our collective conscious due to the shocking and unjust nature in which their lives were lost: Freddie Gray, Eric Garner, Michael Brown, Philando Castile, Alton Sterling, Sandra Bland, Rekia Boyd, Amadou Diallo, Laquan McDonald, John Crawford, Terence Crutcher—the list goes on. Unfortunately, these names are only a small sampling of the actual damage done by police policies that reflect the normalization of murdering Black and Brown persons in our society.²¹⁵

Videos of unjustified police-perpetrated assaults and killings are widely available through various video hosting platforms. A search on YouTube of “police shooting unarmed black man video” returns over

211. See *FBI to Report on Officer-Involved Shootings as Overall Crime Rate Drops*, RT QUESTION MORE (Sept. 29, 2015), <https://www.rt.com/usa/316964-fbi-officer-shooting-data> [<https://perma.cc/42T2-2KF8>] (reporting the FBI will begin to track information on annual shootings, but data will continue to be voluntary in nature); Davis & Lowery, *supra* note 207 (quoting then-FBI Director James B. Comey: “The lack of accurate information about police-involved shootings is roiling the nation’s law enforcement community, leaving officials unable to say whether high-profile killings are isolated events or part of an alarming trend”).

212. Jazelle Hunt, *Counting the Victims of Police Violence*, LA. WKLY. (Mar. 23, 2015), <http://www.louisianaweekly.com/counting-the-victims-of-police-violence> [<https://perma.cc/2S9B-JFRR>].

213. See Chaney & Robertson, *supra* note 155, at 56 (finding charges against officers were filed in only 15% of cases over the course of sixteen years from 1999-2015).

214. See *id.* at 56–57 (finding only seven of twelve cases of the respective officers were charged with manslaughter followed by a range of different sentences and procedural outcomes). See *U.S. v. McRae*, 702 F.3d 806 (5th Cir. 2012); *U.S. v. Bowen*, 799 F.3d 336 (5th Cir. 2012); *People v. Mehserle*, 206 Cal. App. 4th 1125 (Jul 02, 2012) for contrasting outcomes and instructive examples of the difficulty in prosecuting a police officer for killing a citizen.

215. See David G. Embrick, *Two Nations, Revisited: The Lynching of Black and Brown Bodies, Police Brutality, and Racial Control in “Post-Racial” Amerikkka*, 41 CRITICAL SOC. 835, 837 (2015) (arguing brown and black persons have been systematically murdered).

500,000 hits. These search results document incident after incident of police abuse. One side effect of a technology-savvy public is that these moments are more likely to be captured on camera, a device, which most of us carry in our pockets on a daily basis and preserved indefinitely.²¹⁶ The reaction by the law enforcement community has not been an increase in transparency, policy changes, or racial sensitivity training. Instead law enforcement continues to provide the same justifications and defenses: “exaggerating the dangers of police work, blaming victims for the force used against them, expanding the legal and professional justifications for deadly force to include resisting arrest situations, and use extreme legalistic rationales and technicalities (which they condemn when criminals and their lawyers employ them) to deny responsibility and guilt.”²¹⁷ The technological age has brought forth a new type of accountability of law enforcement agencies, which they don’t seem to like.²¹⁸

C. *Policing and LGBTQ Citizens*

Although not technically accurate, the 1969 riot at Stonewall Inn in Greenwich Village is often viewed as the birth of the gay rights movement.²¹⁹ In reality, the uprising against police abuses by the transgender community started three years prior at Compton’s Cafeteria in San Francisco’s Tenderloin District²²⁰ in what was the first documented incident of members of the trans community using violence

216. See Laura Ly, *Can Cell Phones Stop Police Brutality?*, CNN, <http://www.cnn.com/2014/11/18/us/police-cell-phone-videos/index.html> [<https://perma.cc/E9WK-CYRH>] (last updated Nov. 19, 2014) (“Cell phone videos of alleged police misconduct have proliferated online, flooding social media websites and provoking questions about law enforcement behavior.”).

217. See generally Otwin Marenin, *Cheapening Death: Danger, Police Street Culture, and the Use of Deadly Force*, 19 POLICE Q. 461, 466–76 (2016) (describing the various methods and explanations law enforcement have long deployed to justify excessive use of force and abuse of authority).

218. *Id.* at 463.

219. JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 46 (2011).

220. Nicole Pasulka, *Ladies in the Streets: Before Stonewall, Transgender Uprising Changed Lives*, NPR (May 5, 2015, 4:52 PM), <http://www.npr.org/sections/codeswitch/2015/05/05/404459634/ladies-in-the-streets-before-stonewall-transgender-uprising-changed-lives> [permalink unavailable].

to resist police harassment.²²¹ This incident, which began with a patron throwing a cup of coffee in a police officer's face after he grabbed her,²²² was a response to the regular targeting of members of the gay and transgender community by the police for "being out."²²³ The diner patrons erupted in violence directed at the officers, throwing objects, flipping over furniture, and smashing windows.²²⁴ The melee poured out into the streets where a police car was destroyed, and a nearby newsstand was set on fire.²²⁵

According to a trans-woman who frequented Compton's Cafeteria at the time, the response represented the sentiments of the trans-community as

[t]ired of being arrested for nothing. Arrested for being who we wanted to be. Thrown in jail for obstructing the sidewalk. Thrown in jail for dressing like a woman, because in those days it was illegal. Anything they could think of to make their quota or just to make our lives a living hell, they would do.²²⁶

For decades, law enforcement officers across the country have habitually targeted the LGBTQ community, regularly effecting arrests for "disorderly conduct, vagrancy, public lewdness, assault, and solicitation," secure in the knowledge that those being targeted were powerless to resist.²²⁷ After the Compton's Cafeteria riot, victims targeted by the police in crackdowns on gay establishments put up increasing resistance to the harassment, culminating in the Stonewall riots in 1969.²²⁸

221. Susan Stryker, *Transgender History, Homonormativity, and Disciplinarity*, 100 *RADICAL HIST. REV.* 145, 151 (2008).

222. *See id.* (discussing account of incident).

223. MOGUL ET AL., *supra* note 219, at 45.

224. Pasulka, *supra* note 220.

225. *Id.*

226. Neal Broverman, *We Can Still Hear the "Screaming Queens" of the Compton's Cafeteria Riot*, *ADVOCATE* (Aug. 8, 2016, 6:09 AM), <http://www.advocate.com/transgender/2016/8/08/we-can-still-hear-screaming-queens-comptons-cafeteria-riot> [<https://perma.cc/6ADU-2L8Q>].

227. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 14 (2d ed. 1998).

228. *See* Pasulka, *supra* note 220 (explaining the Compton Cafeteria Riot was the first known instance of collective LGBT resistance to police harassment in the U.S. followed by the Stonewall riots three years later).

From a police perspective, the raid on Stonewall Inn was a routine operation; it was a popular police target as patrons were primarily young, minority, and non-heterosexual.²²⁹ During the raid, police officers assaulted patrons and used homophobic slurs.²³⁰ These abuses were met with resistance, including attacks against officers, culminating in assertions of gay pride that lasted for days.²³¹ At the height of the riots, 400 police officers attempted to control a crowd that had grown to over 2,000 individuals.²³²

Following Stonewall, the LGBTQ community mobilized. Hundreds of new organizations were established and thousands of gay men and lesbians joined the gay rights movement.²³³ There has been a great deal of progress in terms of confronting police abuses and holding officers and departments accountable when these abuses occur.²³⁴ However, the mistreatment of LGBTQ community members at the hands of the police continues.²³⁵ More recently, law enforcement agencies have been interested in building a positive relationship with gay and lesbian community members.²³⁶ Despite these efforts, police officers continue to engage in inappropriate behaviors such as harassment and even perpetrating criminal actions against LGBTQ citizens.²³⁷

229. D'EMILIO, *supra* note 227, at 231.

230. MOGUL ET AL., *supra* note 219, at 45.

231. *Id.* at 45–46.

232. D'EMILIO, *supra* note 227, at 232.

233. Simon Hall, *The American Gay Rights Movement and Patriotic Protest*, 19 J. HIST. SEXUALITY 536, 546 (2010).

234. *United States of America Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, AMNESTY INT'L 2 (Sept. 21, 2005), <https://www.amnesty.org/en/documents/AMR51/122/2005/en/> (follow "Download PDF" hyperlink) [<https://perma.cc/7DZB-Z3BK>] [hereinafter *Stonewalled*].

235. *See id.* ("[S]erious patterns of police misconduct and brutality aimed at LGBT people, including abuses that amount to torture and ill treatment [persist].").

236. *See* Wayne Gillespie, *Thirty-Five Years After Stonewall: An Exploratory Study of Satisfaction with Police Among Gay, Lesbian, and Bisexual Persons at the 34th Annual Atlanta Pride Festival*, 55 J. HOMOSEXUALITY 619, 621 (2008) ("[P]olice organizations . . . have embarked on a much more tolerant and accepting position regarding GLBT persons than in the past.").

237. *Stonewalled*, *supra* note 234; *see* NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDERED, QUEER, AND HIV-AFFECTED COMMUNITIES IN THE UNITED STATES IN 2011, at 37–38 (2012), https://avp.org/wp-content/uploads/2017/04/2008_NCAVP_HV_Report.pdf [<https://perma.cc/36QL-J26D>] [hereinafter ANTI-VIOLENCE] (presenting its findings on how the police respond to LGBT incidents, including police misconduct, entrapment, and verbal and physical abuse).

In a 2002 study, 25% of the officers surveyed admitted to engaging in antigay behaviors such as using insulting language, making negative comments, asking inappropriate questions, and avoiding contact with gay or lesbian citizens.²³⁸ In its 2005 report, Amnesty International, “documented serious patterns of police misconduct and brutality aimed at LGBTQ people, including abuses that amount to torture and ill treatment.”²³⁹ When LGBTQ individuals reported criminal victimization, nearly 10% of the offenders were police officers with many incidents occurring while in police custody.²⁴⁰ Reported mistreatment of crime victims occurred in other ways, such as refusing to classify an offense as a bias or hate crime or refusing to allow the victim to report a crime.²⁴¹ Those at a higher risk of police abuse were persons of color, youths, immigrants, homeless citizens, and particularly transgender persons.²⁴²

Transgender women reported some of the most egregious abuses at the hands of police officers including: roadside strip searches; the facilitation of sexual assault by inappropriate placement in detention; invasive and inappropriate pat-down searches; body cavity searches; refusal to allow medical treatment following injury; and even rape by a police officer.²⁴³ A recent study on LGBTQ youth experiences with the New Orleans Police Department revealed (1) 87% of the eighty-six gender non-conforming respondents had been approached by a police officer; (2) 50% had been called a homophobic or transphobic name by a police officer; (3) 84% felt targeted by the police because of their gender; (4) 59% had been asked for a sexual favor by a police officer; and (5) 64% were assumed to be sex workers by officers.²⁴⁴ The study’s findings suggest police officers are impermissibly and purposefully targeting

238. Mary Bernstein & Constance Kostelac, *Lavender and Blue: Attitudes About Homosexuality and Behavior Toward Lesbians and Gay Men Among Police Officers*, 18 J. CONTEMP. CRIM. JUST. 302, 317 (2002).

239. *Stonewalled*, *supra* note 234.

240. ANTI-VIOLENCE, *supra* note 237, at 43; *see Stonewalled*, *supra* note 234 (providing examples of LGBT individuals being victimized by police officers while in custody).

241. ANTI-VIOLENCE, *supra* note 237, at 13, 28–29.

242. *Stonewalled*, *supra* note 234

243. *Id.*

244. BREAKOUT!, WE DESERVE BETTER: A REPORT ON POLICING IN NEW ORLEANS BY AND FOR QUEER TRANS YOUTH OF COLOR 10 (Lhundyn Fernandez & Kaya Williams eds., 2014), <https://www.scribd.com/document/334018552/We-Deserve-Better-Report> [<https://perma.cc/724Y-XGBD>] [hereinafter BREAKOUT!].

citizens based upon their gender identity and are using the encounters to engage in further abuse and mistreatment.²⁴⁵

D. *Hate Crimes, Hate Crime Reporting, and Law Enforcement*

The NCVS estimates roughly 300,000 hate crimes are committed annually in the United States.²⁴⁶ According to the 2015 UCR, the largest number of hate crimes were motivated by anti-Black or anti-African-American bias followed by anti-gay (male) bias.²⁴⁷ Compared to other offenses, hate crimes tend to be violent in nature.²⁴⁸ The NCVS estimates only about one-third of hate crimes are reported to the police and when they are reported, these crimes are usually not documented as hate crimes despite indications of bias, such as hate language or symbols.²⁴⁹ Although 98,460 hate crimes were reported to the police in 2012, the UCR indicates only 7,440 incidents.²⁵⁰ NCVS estimates place the average number of incidents documented by police as hate crimes at about 14,000 per year.²⁵¹ Police officers document offenses as hate crimes in only about 14% of cases where the victim believed they were the target of a hate crime.²⁵²

Failing to investigate a citizen's hate crime victimization significantly undercuts a law enforcement agency's ability to have a positive relationship with the marginalized community. Such incidents demonstrate to the community their reports of victimization will not be taken seriously.²⁵³ Police inaction has damaged the minority community's trust in the law enforcement community which impairs law

245. *Id.* at 2.

246. MEAGAN M. WILSON, U.S. DEP'T OF JUST., HATE CRIME VICTIMIZATION, 2004-2012 STATISTIC TABLES 1 (Morgan Young & Jill Thomas, eds., 2014), <https://www.bjs.gov/content/pub/pdf/hev0412st.pdf> [<https://perma.cc/XT32-D9EU>].

247. *Table 1: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation, 2015*, UCR.FBI.GOV, <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/1tabledatadecpdf> [<https://perma.cc/E8T8-KGVR>] (last visited Sept. 26, 2017).

248. *See* WILSON, *supra* note 246, at 4 (reporting 90% of hate crimes were violent while only 25% of non-hate crimes were violent in 2012).

249. *Id.* at 1, 7.

250. *Id.* at 7 tbl. 3.

251. *Id.* at 8.

252. *Id.* at 8 fig. 2.

253. *See* BREAKOUT!, *supra* note 244, at 16 (explaining a study surveying young LGBTQ individuals and their experience with the New Orleans Police Department, where over half the respondents of color called law enforcement and were not taken seriously).

enforcement's ability and willingness to help when help is needed.²⁵⁴ Trust is further damaged when officers' conduct is perceived as mocking, disrespectful of victims, or suggesting the victims deserved criminal mistreatment.²⁵⁵

Studies of minority citizens demonstrate ambivalence of these citizens toward the police.²⁵⁶ Minority citizens and communities often distrust law enforcement agencies and their officers due to an extensive history of abuse at the hands of the same institution.²⁵⁷ When officers engage in harassment, physical and sexual assaults, and refuse to provide assistance to members of certain communities,²⁵⁸ it is easy to understand why these communities do not trust the police.

When police officers abuse and harass minority citizens, regardless of whether they are racial minorities, religious minorities, ethnic minorities or sexual minorities, the police are engaging in hate crimes.²⁵⁹ If a police officer judges a black citizen differently due to the citizen's race and that judgment causes the officer to use deadly force against that citizen, the officer commits a hate crime.²⁶⁰ When a police officer physically tortures a gay man due to his sexual orientation, that officer commits a

254. See Ned Parker & Mimi Dwyer, *Attacks Against LGBT Community Rarely Prosecuted as Hate Crimes*, REUTERS INVESTIGATES (June 28, 2016, 4:21 PM), <http://www.reuters.com/investigates/special-report/florida-shooting-hate-crimes> [https://perma.cc/4LSY-XYZL] (discussing the murder of Dionte Greene and how not classifying his murder as a hate crime caused distrust of law enforcement). Greene's family and friends believe Green was killed because he was gay. Greene's murderer, however, was convicted of involuntary manslaughter and faces up to twenty-nine years in prison. *Id.* "But in the view of the LGBT community, law enforcement should have prosecuted the killing as a hate crime." *Id.*

255. See *id.* ("Police are not in many cases receptive. They blame the victim for being transgender and somehow deserving of being attacked.") (statement of Professor Jack McDevitt).

256. Louis Hoffman et al., *An Existential-Humanistic Perspective on Black Lives Matter and Contemporary Protest Movements*, 56 J. HUMANISTIC PSYCHOL. 595, 601 (2016).

257. See *id.* (suggesting the lack of trust from marginalized communities stems from "systematic issues in the legal system"); see also BREAKOUT!, *supra* note 244, at 16 (reporting 89% of respondents expressed they did not trust the police in their city, even if they had never been victims of police harassment).

258. See BREAKOUT!, *supra* note 244, at 16 (reporting 42% of respondents of color called the police seeking help and were subsequently arrested, compared to the zero percent of white respondents).

259. See 18 U.S.C. § 249 (2012) (adding federal protections against crimes based on "religion, national origin, gender, sexual orientation, gender identity, or disability").

260. See *id.* § 249(a)(1) (2012) ("[W]illfully causes bodily injury to any person . . . because of actual or perceived race . . .").

hate crime.²⁶¹ If a police officer sexually assaults a transgender woman because of her gender identity, the officer commits a hate crime.²⁶² Certainly, every police officer is not engaging in such abuses, but many officers do admit to engaging in negative behavior toward members of marginalized communities.²⁶³ Research focusing on the members of minority communities suggests such police abuses are commonplace, and may even be expected.²⁶⁴

Policing is an institution founded in the midst of a racist society for the purpose of controlling minorities; it is an institution that has evolved in various ways to continue its original mission.²⁶⁵ From the early days of slave patrols to the facilitation of lynchings to the disparate treatment of minorities, modern policing cannot be said to be an institution that is by and for all of the people.²⁶⁶ Modern policing is a white hetero-patriarchal institution that allows, condones, looks the other way, and actively protects and defends its members who commit hate crimes. There is no place in hate crime laws to afford protection to abusers who have offended against the most vulnerable members of society.

261. See *id.* § 249(a)(2) (2012) (“[W]illfully causes bodily injury to any person . . . because of actual or perceived . . . sexual orientation . . .”).

262. See *id.* § 249(a)(2) (2012) (“[W]illfully causes bodily injury to any person . . . because of actual or perceived . . . sexual identity . . .”).

263. See, e.g., Conor Friedersdorf, *The NYPD Officers Who See Racial Bias in the NYPD*, ATLANTIC (Jan. 7, 2015), <https://www.theatlantic.com/national/archive/2015/01/the-nypd-officers-who-see-racial-bias-in-the-nypd/384106> [<https://perma.cc/URX2-5V3J>] (“The testimony also included an anonymous retired detective who alleged that a superior officer said of minority suspects, ‘They are fucking animals. You make sure if you have to shoot, you shoot them in the head. That way there’s one story,’ and that on raids in black neighborhoods, his superiors ‘didn’t care if it was kids in there, they didn’t care if it was women in there, naked women They treated them as if they had no rights whatsoever. It was disgusting.’”).

264. BREAKOUT!, *supra* note 244, at 9.

265. See WALKER, *supra* note 151, at 52 (“Southern states had developed slave patrol systems to control the slave population.”).

266. See Jonathan Capehart, *No, ‘Black Lives Matter’ is Not ‘Inherently Racist’*, WASH. POST (July 13, 2016), https://www.washingtonpost.com/blogs/post-partisan/wp/2016/07/13/no-black-lives-matter-is-not-inherently-racist/?utm_term=.9157459419b4 [<https://perma.cc/7CBL-RVXE>] (“[W]hites and people of color experience the criminal justice system differently, so that if you’re black you’re more likely to get pulled over or searched or arrested, more likely to longer sentences, more likely to get the death penalty for the same crime . . .”).

V. THE EMERGENCE OF THE BLUE LIVES MATTER MOVEMENT
AS A MEANS OF SILENCING BLACK VOICES

The Black Lives Matter (BLM) movement was founded in the aftermath of the killing of Trayvon Martin, in response to the denigration of the seventeen-year-old victim and subsequent acquittal of his killer, George Zimmerman.²⁶⁷ The movement gained traction following the deaths of Michael Brown and Eric Garner at the hands of law enforcement officers.²⁶⁸ BLM was a direct response to the killing of unarmed black men and women and the unequal treatment of persons of color by police officers.²⁶⁹ The purpose of BLM is to raise awareness of the powerlessness of black people by affirming that all black lives, particularly those who have been marginalized by other movements.²⁷⁰

Although BLM is a relatively new movement, it is built on decades of work by prior movements that challenged racial oppression and improved the lives of members of the African-American community.²⁷¹ To be clear, the BLM movement does not claim that only black lives matter or that black lives matter more than other lives, but that black lives matter just as much as other lives and should not be subject to disparate treatment and violence at the hands of the government.²⁷² The phrase “Black Lives Matter” is meant to “assert the value of the lives of certain people, and advocate for change that will increase the safety of everyone, including police officers.”²⁷³

267. Hoffman et al., *supra* note 256, at 596–97.

268. Reena N. Goldthree & Aimee Bahng, *#BlackLivesMatter and Feminist Pedagogy: Teaching a Movement Unfolding*, 106 *RADICAL TCHR.* 20, 21 (2016).

269. Juliana Menasce Horowitz & Gretchen Livingston, *How Americans View the Black Lives Matter Movement*, PEW RESEARCH CTR. (July 8, 2016), <http://www.pewresearch.org/fact-tank/2016/07/08/how-americans-view-the-black-lives-matter-movement> [<https://perma.cc/MPW7-FAGK>] (stating the “Black Lives Matter” movement was a direct response of the police shooting of an unarmed black teen).

270. *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about> [<https://perma.cc/LV47-F8YE>] (last visited Aug. 28, 2017).

271. Alondra Nelson, *The Longue Durée of Black Lives Matter*, 106 *AM. J. PUB. HEALTH* 1734, 1734 (2016); see Hoffman et al., *supra* note 256, at 598 (tracing the concept behind Black Lives Movement of equality to 400 years of history).

272. Hoffman et al., *supra* note 256, at 597.

273. *Id.* at 604.

While BLM is not an anti-law enforcement group and does not promote violence,²⁷⁴ its goals are misinterpreted and misrepresented by members of the law enforcement community who have endorsed the claim that BLM promotes violence against officers and adopted the view that BLM protesters are the enemy.²⁷⁵ Backlash to BLM generated its own countermovement; pro-law enforcement groups co-opted the name of the BLM movement through its own name, “Blue Lives Matter.”²⁷⁶ Blue Lives Matter was founded in response to BLM protests following the Michael Brown killing.²⁷⁷ Blue Lives Matter claimed that such a movement was necessary to protect officers and falsely asserted the purpose of BLM was the “vilification of law enforcement.”²⁷⁸ Blue Lives Matter claimed the media presented false information regarding the protests and protesters and that politicians “pandered to these criminals [protesters] and helped spread [the] false narrative” of police officers shooting individuals based upon the color of their skin.²⁷⁹ Blue Lives Matter dedicates itself to “relentlessly defending law enforcement from baseless attacks” and working “to promote the good work of police officers” by providing a voice for the police.²⁸⁰

The very use of the name “Blue Lives Matter” demonstrates the social oppression that BLM is resisting.²⁸¹ BLM treats the misuse of their

274. See Greg Carey, *Black Lives Matter Doesn't Kill Cops*, HUFFINGTON POST (July 19, 2016, 3:50 PM), http://www.huffingtonpost.com/entry/black-lives-matter-doesnt-kill-cops_us_578e843ae4b0f529aa07427a [<https://perma.cc/H13N4-KMJX>] (stating the Black Lives Matter movement does not promote violence and does not cause people to hate police).

275. See Russell Rickford, *Black Lives Matter: Toward a Modern Practice of Mass Struggle*, 25(1) NEW LAB. F. 34, 40 (2016) (“Police spokespeople and apologists have encouraged the demonization of the struggle, and have propagated the absurd claim that Black Lives Matter actually provokes assault on cops.”).

276. *About Us*, BLUE LIVES MATTER, <https://bluelivesmatter.blue/organization/#mission-statement> [<https://perma.cc/NEM3-BDMM>] [hereinafter *About Blue Lives Matter*] (last visited Aug. 28, 2017).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. Tai Harden-Moore, *Black Lives vs. All Lives and Blue Lives: Why Are Non-Blacks Threatened by the Black Lives Matter Movement*, SKANNER (July 21, 2016), <http://www.theskanner.com/opinion/commentary/24165-black-lives-vs-all-lives-and-blue-lives-why-are-non-blacks-threatened-by-the-black-lives-matter-movement> [<https://perma.cc/7Q6Y-HMBY>].

name as a theft.²⁸² A visit to the Blue Lives Matter webpage makes clear the group was established in an attempt to silence those speaking out against the structural racism espoused and protected by law enforcement.²⁸³ Blue Lives Matter is an attempt to circumvent the legitimate and growing concerns that a significant portion of the American population have regarding the mistreatment of citizens by police.²⁸⁴ The Blue Lives Matter movement attempts to undermine these concerns when claiming there is a “war on police”;²⁸⁵ referring to Michael Brown’s killer as “heroic” and “doing his job” when he was “forced to defend his life by shooting Brown”; and asserting the 2014 murder of two police officers was committed by “a fanatic who believed the lies of Black Lives Matter, the media, and politicians.”²⁸⁶

There have been attacks on police officers by individuals claimed to be a part of the BLM including the 2016 attacks in Dallas and Baton Rouge that resulted in the deaths of eight police officers and injuries to twelve additional officers.²⁸⁷ BLM does not condone violence,²⁸⁸ specifically denounced the shootings, and noted the Dallas protest where the officers were shot was a peaceful protest that did not encourage violence.²⁸⁹ The Baton Rouge shooter posted a video to social media shortly before the shootings in which he denied any affiliation with a number of

282. See Alicia Garza, *A HerStory of the #BlackLivesMatter Movement*, BLACK LIVES MATTER, <http://blacklivesmatter.com/herstory> [no permalink available] (last visited Aug. 28, 2017) (discussing the taking of their slogan—Black Lives Matter—without crediting where it came from and without justification).

283. *About Blue Lives Matter*, *supra* note 276.

284. Harden-Moore, *supra* note 281.

285. See, e.g., Compl. for Damages, *Smith v. McKesson et al.*, No. 3:17-cv-00429-JWD-EWD, 2017 WL 2884405 (M.D. La. July 7, 2017) (alleging “BLM has declared a virtual war on police”).

286. Harden-Moore, *supra* note 281.

287. Ronald Schouten & Douglas Brennan, *Targeted Violence Against Law Enforcement Officers*, 34 BEHAV. SCI. & LAW 608, 609–10 (2016).

288. See, e.g., Joshua Berlinger, *Gavin Long: Who is Baton Rouge Cop Killer?*, CNN, <http://www.cnn.com/2016/07/18/us/who-is-gavin-long/index.html> [https://perma.cc/MN2H-EMDT] (last updated Aug. 4, 2016) (stating the founder of St. Paul’s Black Lives Matter chapter denounced a violent outbreak of protesters who attacked police officers).

289. Aamer Madhani, *Black Lives Matter: Don’t Blame Movement for Dallas Police Ambush*, USA TODAY (July 8, 2016, 3:47 PM), <https://www.usatoday.com/story/news/2016/07/08/black-lives-matter-dont-blame-movement-dallas-police-ambush/86866014> [https://perma.cc/T3CA-7XZ2].

organizations and took sole responsibility for his actions.²⁹⁰ The actions of a single person or group of individuals committing violent acts cannot be imputed to BLM; violence as a whole is counterintuitive to the BLM movement and its goals.²⁹¹ Regardless of the shooter's own words denying a relationship between his actions and the BLM movement, Blue Lives Matter and its supporters persist with a campaign of misinformation insisting on his connection to BLM.²⁹²

On July 7, 2017, one of the officers injured in the Baton Rouge shooting filed suit against Black Lives Matter, its founders, and representatives claiming they were the cause of the officer's injuries.²⁹³ The Complaint refers to BLM as "a militant anti-police national organization"²⁹⁴ and suggests the murders of at least eleven officers and injuries to nine others were the result of incitement to violence by BLM and its leaders.²⁹⁵ The Complaint acknowledges the defendants denounced the shooting in Baton Rouge, but claims the denouncement was too late.²⁹⁶

The unfortunate result of Blue Lives Matter and its surrounding rhetoric is the misconception that BLM is a movement of violence that condones assaulting, injuring, and even killing police officers for nothing more than the uniform they wear.²⁹⁷ Such thinking has been embraced by those who feel vulnerable to the perceived threat of BLM.²⁹⁸

290. Berlinger, *supra* note 288.

291. See Hoffman et al., *supra* note 256, at 598 ("While some individuals who may use the phrase 'Black Lives Matter' have been violent, this should not be confused with the intentions of the movement.").

292. See Kamala Kelkar, *Baton Rouge Officer Wounded by Lone Shooter Sues Black Lives Matter*, PBS (Jul. 8, 2017, 2:59 PM), <http://www.pbs.org/newshour/rundown/baton-rouge-officer-wounded-lone-shooter-sues-black-lives-matter> [<https://perma.cc/KFP7-E9VT>] (referencing the unsettled connection between the Baton Rouge police officer shooting and "BLM" protestors).

293. Compl. for Damages, *Smith v. McKesson et al.*, No. 3:17-cv-oo429-JWD-EWD, 2017 WL 2884405 (M.D. La. July 7, 2017).

294. *Id.* at 3.

295. *Id.* at 6.

296. *Id.* at 20.

297. See *About Blue Lives Matter*, *supra* note 276 (asserting the goal of Black Lives Matter is to villainize law enforcement and that Black Lives Matter consists of criminals who assault and murder innocent people).

298. See Hoffman et al., *supra* note 256, at 602-03 ("The Black Lives Matter movement represents a . . . threat to the ideologies of power that many have held for centuries . . . [t]he loss of [which] is not just a threat to the present power structure; it is a threat to the very ways in which many have protected themselves against feelings of powerlessness.").

Statistics documenting assaults and homicides of police officers over the past several years fail to support the assertion that there is a “war on police.”²⁹⁹ It is unfortunate the law enforcement community is offended by a social justice movement whose principal aim is equality for a historically marginalized segment of society that has legitimate concerns about its treatment. There are numerous measures police departments could take to mend the damage caused by their misconduct. However, as noted by BLM “[w]e completely expect those who benefit directly and improperly from White supremacy to try and erase our existence.”³⁰⁰ A more appropriate response by the law enforcement community to the concerns raised by BLM would include: greater transparency, particularly in matters involving the alleged abuse of citizens at the hands of officers; more effective training focusing on community relations; improved communication skills, emphasized de-escalation, and racial sensitivity training; and increased efforts at building positive relationships between agencies and surrounding communities. The answer to the existing racial tensions between minority communities and law enforcement is not simple, will not be quickly articulated, or easy to implement, but this answer will not continue to drive larger wedges deeper between the citizenry and law enforcement.

The current climate of negativity toward BLM and the subsequent declaration that there is a “war on police” has created ideal conditions for amending laws, particularly those aimed at protecting marginalized communities such as the Black community. Misinformation and misunderstanding coupled with the unwillingness of citizens to educate themselves on social justice issues³⁰¹ has resulted in a great deal of support for legislative changes that will roll back protections for the historically mistreated while at the same time increasing protections for law enforcement who are not in need of increased protections.³⁰² One

299. See *FBI Releases 2015 Statistics on Law Enforcement Officers Killed and Assaulted*, FBI.GOV (Oct. 18, 2016), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2015-statistics-on-law-enforcement-officers-killed-and-assaulted> [<https://perma.cc/3UKF-BUXZ>] (finding a decrease in felonious deaths of law enforcement officers between 2014 and 2015).

300. Garza, *supra* note 282.

301. See Hoffman et al., *supra* note 256, at 595–96 (relating controversy over Black Lives Matter movement to distorted portrayals and misunderstanding and emphasizing the importance of understanding social justice issues).

302. See Blue Lives Matter Act, H.R. 4760, 114th Cong. (2016) (mandating an attack on a police officer be qualified as a hate crime); Wilson & Zhao, *supra* note 139, at 462.

must wonder if the purpose of amending hate crime laws is twofold. On the one hand, amending the legislation is meant to reiterate support for the law enforcement community,³⁰³ while on the other hand, these amendments send a message to the communities protected under the laws that their protections may be reduced or removed if deemed appropriate.

VI. CONCLUSION

Police officers already enjoy numerous protections under the law.³⁰⁴ In fact, law enforcement officers enjoy some of the strongest possible protections resulting in the harshest punishments for those who attack police.³⁰⁵ There is no need to provide additional protection for law enforcement via alteration of hate crime legislation. If a state feels that increasing protections for law enforcement officers is necessary, such protections can be implemented in ways such as those enacted in Arizona and Oklahoma.³⁰⁶ Both states passed statutes that do not usurp previous legislation designed to provide protection and assurance for marginalized communities that the majority community will stand against the prejudicially motivated abuses addressed in hate crime laws.³⁰⁷ The law

303. *See, e.g.*, KY. REV. STAT. ANN. § 532.031 (West 2016) (including “offenses committed against an individual because of the individual’s actual or perceived employment as a city, county, state, or federal peace officer, member of an organized fire department, emergency medical services personnel” within the definition of a hate crime).

304. *See, e.g.*, CONN. GEN. STAT. §§ 53a-54b (2012) (mandating life imprisonment without the possibility of release for the murder of a police officer); HAW. REV. STAT. §§ 707-701(b), 706-656 (2016) (mandating first degree murder shall be sentenced to life in prison without the possibility of parole); IOWA CODE §§ 707.2(1)(d), 902.1(1) (2017) (mandating that only upon the governor’s commuting the sentence, a person convicted of intentionally killing a police officer is not to be released on parole); MICH. COMP. LAWS § 750.316(1)(c) (2015) (knowingly murdering a peace officer while the officer is engaged in official duties mandates life without parole); MINN. STAT. § 609.185(a)(4) (2016) (mandating life without parole for the killing of a peace officer engaged in official duties); N.J. REV. STAT. § 2C:11-3(b)(2)(2015) (causing the death of a peace officer while the officer is engaged in official duties mandates life without parole); 11 R.I. GEN. LAWS §§ 11-23-1, -2 (2016) (mandating life without parole for the murder of a peace officer).

305. *See, e.g.*, N.M. STAT. ANN. §§ 30-2-1, 31-18-14 (2015) (mandating life sentences for first-degree murder generally).

306. OKLA. STAT. tit. 21, § 701.9 (2017); ARIZ. REV. STAT. ANN. § 13-751(F)(10) (2010).

307. OKLA. STAT. tit. 21, § 701.9 (2017); ARIZ. REV. STAT. ANN. § 13-751(F)(10) (2010).

enforcement community has never been a marginalized community.³⁰⁸ Including protections for law enforcement officers in hate crime laws is improper and hurtful to communities that have suffered from historical mistreatment³⁰⁹ at the hands of law enforcement officers. The misappropriation of these statutes is a direct result of the backlash to the BLM movement and an attempt to give additional status and protections to law enforcement officers who are not in need of such status and protections while also silencing marginalized voices daring to speak out against injustice. Our government is sending a strong message to its minority citizens through “Blue Lives Matter” laws. Government will continue to support structural racism, promote subjugation, and treat its most vulnerable communities with disrespect.

308. See TRUMAN & MORGAN, *supra* note 113 at 7 (reporting 50,212 incidents of assault on a law enforcement officer in 2015, which is lower than the NCVS-estimated assault rate for the general population aged twelve or older of 14.8 assaults per 1000 persons).

309. Simmons, *supra* note 51, at 1869.