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## Drawing the Blue Line: Categorizing Law Enforcement as a Protected Class Within Hate Crime Legislation

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# Drawing the Blue Line: Categorizing Law Enforcement as a Protected Class Within Hate Crime Legislation

## ABSTRACT

*Several states have passed legislation to include law enforcement officers as a protected class within Hate Crime laws. Additionally, there is pending legislation in the United States Senate to add law enforcement officers as a protected class under the federal Hate Crimes Act. This is a step in the wrong direction for both state and federal legislatures for three main reasons. First, law enforcement officers are distinguishable from the currently protected classes. These classes have not only been marginalized in our society but have been targeted for reasons they have no control over. In contrast, including law enforcement officers as a protected class would offer protection to a group based on its choice of employment rather than an immutable characteristic. Second, many states have already implemented increased punishment for crimes committed against law enforcement. The federal government is no exception, as it has also already provided for law enforcement safety within its code. Finally, this trend could potentially have serious consequences across the board.*

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## INTRODUCTION

Consider the following hypothetical: In Louisiana, a man is caught stealing from a convenience store and is arrested for theft. Upon arrest, a law enforcement officer, carrying out his duties responsibly, tries to handcuff the man before putting him in the squad car. The man is upset with this specific law enforcement officer. This officer has authority over him, and in the man's mind, the officer is the reason he is going to jail. At this point, the man proceeds to strike the officer in the face.

This one act will likely result in far greater consequences than the man would imagine. By striking the officer, the man has undoubtedly committed a battery.<sup>1</sup> However, Louisiana's hate crime statute includes law enforcement as a protected class; therefore, the man has not only committed a battery, but may also be charged for committing a hate crime.<sup>2</sup> Additionally, if this incident took place on a public highway,<sup>3</sup> the man may

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1. LA. STAT. ANN. § 14:33 (2016) (“Battery is the intentional use of force or violence upon the person of another . . .”).

2. LA. STAT. ANN. § 14:107.2.

3. Protect and Serve Act of 2018, S. 2794, 115th Cong. § 2 (2018); Protect and Serve Act of 2018, H.R. 5698, 115th Cong. § 2 (as passed by House, May 16, 2018). For the statute to apply, the crime must fall within the circumstances described in section 2(b) of the statute. One of the circumstances states “the conduct described in subsection (a) occurs during the

be charged under the federal Protect and Serve Act of 2018<sup>4</sup> and would face up to ten years in prison.<sup>5</sup> Finally, the government need not choose under which law to charge the individual, for the dual sovereignty doctrine<sup>6</sup> allows the individual to be charged under both Louisiana and federal law without violating the Double Jeopardy Clause.<sup>7</sup> While the man attacked this specific officer, the battery was not committed because of the man's hatred for all of law enforcement; yet he could be guilty of a hate crime.

There is a recent trend among states to include law enforcement officers as a protected class under hate crime legislation. While including law enforcement as a protected class is inappropriate for several reasons, there are three main reasons that show why this trend should not continue. First, statistical data shows there is a vast difference between the number of attacks on law enforcement officers and the number of attacks on groups that have been traditionally protected. Further, the traditionally protected classes share certain traits; namely, these classes have experienced a history of invidious discrimination and possess immutable characteristics. In comparison, law enforcement officers have not suffered from a history of discrimination, nor should an occupational choice be viewed as an immutable characteristic, especially for hate crime purposes. Second, both state and federal laws currently protect law enforcement officers, rendering their inclusion within hate crime legislation redundant and unnecessary. Finally, some states include verbal harassment as an offense that could be prosecuted as a hate crime. For these states, extending hate crime legislation to include law enforcement officers could impede on the freedom of speech under the First Amendment.

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course of, or as the result of, the travel of the defendant or the victim . . . using a channel, facility, or instrumentality of interstate . . . commerce." S. 2794; H.R. 5698. Because public highways are instrumentalities of interstate commerce, criminal conduct which falls within the statute that takes place on these highways may be subject to the punishment enhancement of the statute.

4. S. 2794; H.R. 5698. The Protect and Serve Act of 2018 is currently pending in the Senate. For purposes of this hypothetical, this Comment assumes its enactment.

5. S. 2794; H.R. 5698.

6. 26 DANIEL R. COQUILLETTE ET AL., MOORE'S FEDERAL PRACTICE § 629.24 (3d ed. 2018) ("The existence of concurrent criminal jurisdiction between state and federal governments gives rise to the possibility that a single criminal act may be simultaneously a violation of federal and state law. A defendant charged with committing such a criminal act may, therefore, face trial in both state and federal courts.")

7. *Id.*

## I. THE HATE CRIMES PREVENTION ACT

In October of 2009, Congress passed the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act.<sup>8</sup> This Act remains the federal Hate Crime legislation in place today. The first subsection of the Act criminalizes “willfully caus[ing] bodily injury to any person”<sup>9</sup> “because of the actual or perceived race, color, religion, or national origin of [that] person.”<sup>10</sup> By criminalizing violent acts of this nature, the Act broadened the scope of existing federal hate crime statutes<sup>11</sup> by no longer requiring the victim to be involved in a federally protected activity when the offense occurred.<sup>12</sup>

The Act also broadened the classes protected by including crimes based on a victim’s sexual orientation, gender, gender identity, or disability.<sup>13</sup> Offenses based on race, color, religion, or national origin may be criminalized regardless of the jurisdiction in which they occur; however, offenses based on actual or perceived sexual orientation, gender, gender identity, or disability have a more limited application.<sup>14</sup> For the hate crime statute to apply to the latter, the offense must occur as a result of, or during the course of, the victim or defendant traveling across state lines or interfering with some sort of economic activity.<sup>15</sup>

8. 18 U.S.C. § 249 (2012).

9. 18 U.S.C. § 249(a)(1), (a)(2)(A). Bodily injury is defined as “a cut, abrasion, bruise, burn, or disfigurement; [] physical pain; [] illness; [] impairment of the function of a bodily member, organ, or mental faculty; or [] any other injury to the body, no matter how temporary.” 18 U.S.C. § 1365(h)(4) (2012). However, bodily injury “does not include solely emotional or psychological harm to the victim.” 18 U.S.C. § 249(c)(1).

10. 18 U.S.C. § 249(a)(1).

11. *See* 18 U.S.C. § 245(b)(2)(A)–(F) (2012).

12. *See* 18 U.S.C. § 245. Before the Hate Crimes Prevention Act was passed, crimes committed because of a person’s race, color, religion or national origin could only be prosecuted if the victim was participating in one of the enumerated activities within the statute. 18 U.S.C. § 245(b)(2)(A)–(F). As an example, it would only be a crime if a person willfully injured the victim because of their race if the victim was “enrolling in or attending any public school or public college.” 18 U.S.C. § 245(b)(2)(A).

13. 18 U.S.C. § 249(a)(2).

14. *See* 18 U.S.C. § 249(a)(2)(B).

15. *Id.* These requirements stem from Congress’s Commerce Clause authority under which this subsection of the Act was passed. *See generally* Sarah L. Harrington, Annotation, *Validity, Construction, and Application of Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act*, *Pub. L. No. 111-84, Div. E., 123 Stat. 2835*, 77 A.L.R. Fed. 2d 103 (2013). The Commerce Clause gives Congress the power to regulate “[c]ommerce . . . among the several states.” U.S. CONST. art. I, § 8, cl. 3. Pursuant to this power, “the government must prove that the crime was in or affected interstate or foreign

Punishment<sup>16</sup> under the Act varies depending on whether or not the offense results in death.<sup>17</sup> For offenses that do *not* result in the victim's death, the defendant may only be imprisoned for up to 10 years.<sup>18</sup> Offenses that *do* result in the death may cause the offender to be imprisoned for life.<sup>19</sup> The statute of limitations for offenses not resulting in death is set at seven years.<sup>20</sup> Alternatively, if a death occurs, there is no statute of limitation.<sup>21</sup> Since the Act's passage in 2009 to 2016, seventy-two defendants were charged.<sup>22</sup> Of those seventy-two, forty-five of the defendants were convicted.<sup>23</sup>

## II. CRIMINALIZING HATE CRIMES

It is important to examine why the Hate Crimes Prevention Act and others like it have been enacted in the first place. After analyzing the legislative intent behind the Act, it is undeniable that law enforcement officers should not be included as a protected class. Originally appearing as a note following the text of the bill, Congress made several findings in support of the Act.<sup>24</sup> Within these findings, Congress explained that violence constituting hate crimes “poses a serious national problem.”<sup>25</sup> Congress noted that “[e]xisting Federal law [was] inadequate to address this problem”<sup>26</sup> and when “[l]eft unchecked, [hate crimes] threaten to ruin the very fabric of America.”<sup>27</sup> Hate crime statutes are created with the goal of protecting large groups of people, not just one person. The House Report for the Act explained that prosecuting criminal activity amounting to a hate crime is equally as important as having a hate crime law.<sup>28</sup>

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commerce.” *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, DEP’T JUST.: C.R. DIV., <https://perma.cc/8JZE-5CYY>.

16. The punishments proscribed under the Act will be compared to punishments in already existing laws. See *infra* Part III.

17. 18 U.S.C. § 249(a)(1)(A)–(B)(ii), (2)(A)–(A)(ii).

18. 18 U.S.C. § 249(a)(1)(A), (a)(2)(A)(i).

19. 18 U.S.C. § 249(a)(1)(B), (a)(2)(A)(ii).

20. 18 U.S.C. § 249(d)(1).

21. 18 U.S.C. § 249(d)(2).

22. *About Hate Crime Laws*, DEP’T JUST.: C.R. DIV., <https://perma.cc/AU58-ZX2H>.

23. *Id.*

24. 34 U.S.C. § 30501 (2009).

25. 34 U.S.C. § 30501(1).

26. 34 U.S.C. § 30501(4).

27. Carl Hulse, *House Votes to Expand Hate Crimes Definition*, N.Y. TIMES (Oct. 8, 2009), <https://perma.cc/92JN-4DDV>.

28. H.R. REP. NO. 111-86, pt. 1, at 8–9 (2009).

### A. Hate Crimes or Crimes of Opportunity?

Hate crime statutes are generally meant to deter criminal conduct that puts minority populations at risk. A theory has been proposed that the classes protected under hate crime legislation are often seen as easy targets for crime because of their perception as outsiders.<sup>29</sup> This proposition can be explained with the following example:

If criminals who reside in a racially homogeneous area are looking for someone to rob, they are more likely to choose a victim who has few connections to them and to the area. Race may be thought of as one easy way to identify such a victim. Criminals will therefore tend to target racial outsiders as victims unless the penalties for doing so are higher.<sup>30</sup>

Another example of this “easy target” theory can be shown through the tragic death of Michael J. Sandy. In 2007, three men were arrested and accused of murder for the death of Sandy.<sup>31</sup> While looking for money and drugs, the defendants initially targeted the victim because he was a gay male.<sup>32</sup> They believed “a gay man would be an easy target, unlikely to put up much resistance or to report the crime.”<sup>33</sup> Defense counsel took issue with the hate crime murder charge, arguing that it was inappropriate since the crime was one of opportunity, not a crime of hate.<sup>34</sup> However, the Brooklyn prosecutors pointed to the New York state law, which does not require “blatant hatred”; instead, the law requires only choosing a target based on “a belief or perception regarding” the victim’s characteristic(s) that make them part of a protected class.<sup>35</sup> While the New York Penal Code does not require “blatant hatred,” it does require the victim to be sought out because of the characteristic that makes the victim part of a protected class, or that the criminal act itself was committed because of the perpetrators belief or perception that the victim belonged to one of the protected classes.<sup>36</sup> Although some violent acts can be seen as crimes of opportunity, when that opportunity arises due to a victim’s characteristic that make them part of a protected class, the violent act is still—regardless of the chosen phraseology—a hate crime.

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29. Keith N. Hylton, *Hate Crime Statutes Don’t Impede Free Thought, They Deter Crime*, NAT’L L.J. (Jan. 23, 2017).

30. *Id.*

31. Clyde Haberman, *An Easy Target, but Does That Mean Hatred?*, N.Y. TIMES (June 26, 2007), <https://perma.cc/6ZG3-6Q7D>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*; N.Y. PENAL LAW § 485.05(1) (McKinney 2018).

36. N.Y. PENAL LAW § 485.05(1).

*B. The Requirements of Prosecuting a Hate Crime*

The examples above prompt the inquiry of what is required to prosecute a hate crime: if a person commits a violent act, what turns that violent act into a hate crime? At the state level, requirements of proving a hate crime vary, but one commonality of most statutes is the requirement that the perpetrator intentionally select the victim because of the trait that makes the victim part of a protected class. An example of this is *In re Joshua H.*<sup>37</sup> In 1993, the California Court of Appeals affirmed a punishment enhancement due to the application of the state's hate crime statute.<sup>38</sup> In 1991, a seventeen-year-old boy battered his neighbor, William Kiley.<sup>39</sup> While tensions between the two neighbors had been growing for a number of reasons, the inevitable dispute ended with the seventeen-year-old defendant assaulting Mr. Kiley while yelling obscenities about Mr. Kiley's sexual orientation.<sup>40</sup> While discussing whether criminal motive could be used to determine guilt, the court stated that "[i]t is the *selection* of a victim because of his or her race or other status, not the *reason* for that selection (intolerance, xenophobia, vengeance, fear, to impress others, and so forth) that triggers the additional punishment imposed by the hate crime statutes."<sup>41</sup>

Before the enactment of the Hate Crimes Act, federal law required proof beyond a reasonable doubt that the defendant harbored two separate intents when committing the crime.<sup>42</sup> The two separate intents were, "first, that the crime of violence was motivated by racial, ethnic, or religious hatred; and second, that it was committed with the intent to interfere with the victim's participation in one or more of the federally protected activities."<sup>43</sup> The Hate Crimes Act eliminated this dual-intent requirement: now, prosecutors no longer have to prove the victim was participating in a federally protected activity for the defendant to be convicted.<sup>44</sup> To successfully prosecute a hate crime based on "race, color, religion, or national origin"<sup>45</sup> under the Hate Crimes Act, the government must prove, beyond a reasonable doubt, that the violent act was motivated by "animus

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37. *In re Joshua H.*, 17 Cal. Rptr. 2d 291 (Cal. Ct. App. 1993).

38. *Id.* at 303.

39. *Id.* at 293–94.

40. *Id.* at 294.

41. *Id.* at 302.

42. H.R. REP. NO. 111-86, pt. 1, at 6 (2009).

43. *Id.*; see also 18 U.S.C. § 245(b)(2)(A)–(F) (2012).

44. See 18 U.S.C. § 249 (2012).

45. 18 U.S.C. § 249(a)(1).



based on actual or perceived” membership in one of the protected classes.<sup>46</sup> Additionally, for the crimes based on actual or perceived sexual orientation, gender, gender identity, or disability, the Government must prove the interstate commerce link beyond a reasonable doubt.<sup>47</sup>

As shown above in the hypothetical,<sup>48</sup> classifying as a hate crime the selection of a victim because of their occupation as a law enforcement officer could create hate crime prosecutions in situations where no actual *hate crime* took place.<sup>49</sup> Thus, including law enforcement as a protected class takes away from the original intention of hate crime legislation.

### *C. Judicial Support of Hate Crime Legislation: Wisconsin v. Mitchell*

The Supreme Court reiterated the constitutionality and importance of hate crime legislation in *Wisconsin v. Mitchell*.<sup>50</sup> In October of 1989, Todd Mitchell and others severely beat a young white male to the point of unconsciousness, rendering him comatose for the following four days.<sup>51</sup> Mitchell was convicted of aggravated battery, which carries a maximum sentence of two years imprisonment.<sup>52</sup> However, Mitchell’s sentence was increased to seven years imprisonment under Wisconsin’s hate crime statute because “the jury found that Mitchell had intentionally selected his victim because of the boy’s race.”<sup>53</sup> Mitchell contended that the statute under which his punishment was increased violated the First Amendment because it punished discriminatory motive.<sup>54</sup> The Supreme Court distinguished Mitchell’s case from *R.A.V. v. St. Paul*<sup>55</sup> by stating that while “the ordinance struck down in *R.A.V.* was explicitly directed at expression (*i.e.*, ‘speech’ or ‘messages’) the statute in this case is aimed at conduct unprotected by the First Amendment.”<sup>56</sup> Holding that the Wisconsin statute did not violate Mitchell’s First Amendment rights, the Supreme Court explained the statute

46. H.R. REP. NO. 111-86, pt. 1, at 14.

47. *Id.*

48. *See supra* Part I.

49. When a crime against an officer is motivated by a discontent for the officer’s authority and control, and not by a particular characteristic the officer possesses, this is not a hate crime.

50. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

51. *Id.* at 479–80.

52. *Id.* at 480.

53. *Id.*

54. *Id.* at 485, 487.

55. *See generally* *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (holding the ordinance at issue violated the rule against content-based discrimination).

56. *Mitchell*, 508 U.S. at 487 (citation omitted).

“singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm.”<sup>57</sup> Further, “bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”<sup>58</sup> In its reasoning for affirming the constitutionality of the statute, the Supreme Court quoted Blackstone’s Commentaries: “it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.”<sup>59</sup>

### III. INCLUSION OF LAW ENFORCEMENT OFFICERS IN HATE CRIME LAWS

The Hate Crimes Prevention Act (“HCPA”) was enacted to ensure federal protection for minority groups who were victimized across the country. In 2016, seven years after the enactment of the HCPA, Louisiana became the first state to include law enforcement as a protected class within its hate crime statute.<sup>60</sup> Kentucky followed suit and a year later added law enforcement to its statutorily protected classes.<sup>61</sup> New Jersey, Massachusetts, Mississippi and Texas have also considered making the addition.<sup>62</sup> Additionally, there is current pending legislation in Congress that would make law enforcement officers a federally protected class.

#### A. Louisiana

In 2016, Louisiana became the first state to amend its hate crime statute to include law enforcement officers.<sup>63</sup> The statute originally included the typically protected classes seen in most hate crime statutes.<sup>64</sup> In addition to the commonly protected classes, Louisiana’s hate crime statute went so far as to include actual or perceived “membership or service in, or employment with, an organization.”<sup>65</sup> When Louisiana’s proposed hate crime statute

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57. *Id.* at 487–88.

58. *Id.* at 488.

59. *Id.*

60. *See* LA. STAT. ANN. § 14:107.2 (2018).

61. *See* KY. REV. STAT. ANN. § 532.031(1) (LexisNexis 2014).

62. Rebecca Beitsch, *Is Killing a Police Officer a Hate Crime?*, PBS: NEWS HOUR (Aug. 3, 2016), <https://perma.cc/BA56-Y7KX>.

63. LA. STAT. ANN. § 14:107.2.

64. LA. STAT. ANN. § 14:107.2(A) (including classes based on “race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry”).

65. *Id.* The definition of “organization” within the statute includes “[a]ny entity or unit of federal, state, or local government.” LA. STAT. ANN. § 14:107.2(D)(3).

was announced, it was criticized by several advocacy groups. For example, the Anti-Defamation League's ("ADL") regional director for the Metairie office<sup>66</sup> explained that, while the ADL supports law enforcement officers, the organization disagreed with including law enforcement officers in the hate crime statute.<sup>67</sup> The regional director reasoned that "people move in and out" of groups like law enforcement while hate crime statutes are "really focused on immutable characteristics."<sup>68</sup>

In contrast, the executive director of the Louisiana Sheriff's Association spoke after the bill was signed into law, saying that "[t]his is an indication of where our priorities are in Louisiana as far as protecting our law enforcement officials."<sup>69</sup> The bill passed in the House ninety-two to zero, the Senate thirty-three to three, and was signed by the Governor on May 26, 2016.<sup>70</sup>

The amended hate crime statute states that "[i]t shall be unlawful for any person to select the victim of the following offenses . . . because of actual or perceived employment as a law enforcement officer, firefighter, or emergency medical services personnel."<sup>71</sup> There are over twenty offenses listed in the statute.<sup>72</sup> If the offense committed against the law enforcement officer is a misdemeanor, the defendant may be imprisoned for up to six months, fined up to five-hundred dollars, or both.<sup>73</sup> However, if the offense is a felony, the defendant may be imprisoned, with or without hard labor, for up to five years, fined up to five thousand dollars, or both.<sup>74</sup> The additional sentence for the hate crime will run consecutively to the sentence for the underlying offense regardless of whether it is a misdemeanor or a felony.<sup>75</sup> In other words, a person who commits a battery against a police officer will not only receive punishment for the crime of battery, but also for the hate crime against the officer. The sentences received for both crimes will begin simultaneously.

66. ADVOCATE, <https://perma.cc/X5EB-3RNL> (Louisiana's largest daily newspaper).

67. Elizabeth Crisp, 'Blue Lives Matter': Louisiana Legislature Considers Hate Crime Protections for Police, Firefighters, ADVOCATE (Apr. 26, 2016), <https://perma.cc/FT5S-LJ8H>.

68. *Id.* (internal quotation marks omitted); see *infra* Section IV.A.2.b for a more thorough discussion on immutable characteristics.

69. *Gov. Edwards Signs HB 953, Five Veterans' Bills*, OFF. GOVERNOR (May 26, 2016), <https://perma.cc/5MQ4-AGKH> (internal quotation marks omitted).

70. *Louisiana House Bill 953*, LEGISCAN, <https://perma.cc/EWF3-M7GG>.

71. LA. STAT. ANN. § 14:107.2(A) (2018).

72. See *id.*

73. LA. STAT. ANN. § 14:107.2(B).

74. LA. STAT. ANN. § 14:107.2(C).

75. LA. STAT. ANN. § 14:107.2(B)-(C).

The Louisiana statute defines “law enforcement officer” to include the following personnel:

[C]ity, parish, or state law enforcement officer, peace officer, sheriff, deputy sheriff, probation or parole officer, marshal, deputy, wildlife enforcement agent, state correctional officer, or commissioned agent of the Department of Public Safety and Corrections, as well as any federal law enforcement officer or employee, whose permanent duties include making arrests, performing search and seizures, execution of criminal arrest warrants, execution of civil seizure warrants, any civil functions performed by sheriffs or deputy sheriffs, enforcement of penal or traffic laws, or the care, custody, control, or supervision of inmates.<sup>76</sup>

The individuals who hold these titles are not only protected when they are currently employed, but also after they retire.<sup>77</sup>

According to the FBI website, between 2007 and 2016 there were a total of twenty-four felonious law enforcement killings in Louisiana.<sup>78</sup> While a majority of the years between 2007 and 2016 reported between zero and three deaths, 2015 showed six law enforcement deaths.<sup>79</sup> Out of these six deaths, only one was caused by an unprovoked attack.<sup>80</sup>

### *B. Kentucky*

In 2017, Kentucky became the second state to include law enforcement officials within its hate crime statute.<sup>81</sup> With its inclusion of law enforcement, the hate crime statute now states that a defendant may be found to have committed one of the listed offenses as a result of a hate crime based on “a person’s actual or perceived employment as a state, city, county, or federal peace officer, member of an organized fire department, or

76. LA. STAT. ANN. § 14:107.2(E)(3).

77. *Id.*

78. *2016 Law Enforcement Officers Killed & Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/74UE-AFHC>.

79. *Id.*

80. *Id.*; see *2015 Law Enforcement Officers Killed & Assaulted: Summaries of Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/F72V-VV64>. An unprovoked attack is defined as “[a]n attack on an officer not prompted by official contact at the time of the incident between the officer and the offender.” *2017 Law Enforcement Officers Killed & Assaulted: Definitions*, FED. BUREAU INVESTIGATION, <https://perma.cc/7AXK-9V5F>. See *infra* Section IV.A.1.a for statistics of attacks on law enforcement. Using data for only unprovoked felonious killings and ambush attacks allows the data to be compared to deaths due to other crimes classified as hate crimes. These deaths are more likely to be bias-motivated than an officer being attacked in the line of duty.

81. KY. REV. STAT. ANN. § 532.031(1) (LexisNexis 2014).

emergency medical services personnel.”<sup>82</sup> An example of some of the offenses listed are first-degree assault,<sup>83</sup> wanton endangerment in the first degree,<sup>84</sup> and riot in the first degree.<sup>85</sup> If the sentencing judge determines that the primary factor in the criminal conduct was a hate crime, the judge makes a written finding of fact and uses it in the judgement against the defendant.<sup>86</sup> The American Civil Liberties Union (“ACLU”) criticized the law, stating that it “misunderstands the very purpose of hate crimes—to protect communities that have been marginalized within our society and who are at a higher risk of facing violence simply because of an immutable characteristic they share.”<sup>87</sup>

### C. Congress

The Protect and Serve Act of 2018 will include law enforcement officers as a protected class within the federal Hate Crimes Prevention Act.<sup>88</sup> As of publication,<sup>89</sup> the bill has passed the House with a vote of 382 to 35.<sup>90</sup> Its language states that a defendant who “knowingly assaults a law enforcement officer causing serious bodily injury, or attempts to do so,”<sup>91</sup> in a situation that falls within the criteria of the bill,<sup>92</sup> “shall be imprisoned not more than 10 years, fined in accordance with this [Act], or both.”<sup>93</sup> However, if a death results from the offense—or a kidnapping, attempt to

82. *Id.*

83. KY. REV. STAT. ANN. § 508.010 (LexisNexis 2014).

84. KY. REV. STAT. ANN. § 508.060.

85. KY. REV. STAT. ANN. § 525.020 (LexisNexis 2014) (which only requires a person to “knowingly participate[] in a riot . . . and as a result of such riot a person other than one of the participants suffers physical injury or substantial property damage occurs.”).

86. KY. REV. STAT. ANN. § 532.031(2).

87. Michelle D. Anderson, *Kentucky Governor Signs Redundant ‘Blue Lives Matter’ Law*, REWIRE NEWS (Mar. 24, 2017), <https://perma.cc/9S4N-WNRV> (internal quotation marks omitted).

88. *See Summary: H.R. 5698: Protect and Serve Act of 2018*, CONGRESS.GOV, <https://perma.cc/X53X-T73S>.

89. This Comment was published in the spring of 2020.

90. *Actions Overview: H.R. 5698 – Protect and Serve Act of 2018*, CONGRESS.GOV, <https://perma.cc/6WMN-B56Q>.

91. Protect and Serve Act of 2018, H.R. 5698, 115th Cong. § 2 (as passed by House, May 16, 2018).

92. The assault must fall within one of the bill’s stated criteria due to the Commerce Clause. *See supra* notes 3, 15 and accompanying text. The criteria listed in the bill are similar to the circumstances required under the current hate crime statute for an offense based on the victim’s actual or perceived gender, sexual orientation, gender identity, or disability. *See* 18 U.S.C. § 249(a)(2)(2012).

93. H.R. 5698.

kidnap, or an attempt to kill is included within the offense—the bill states the offender “shall be imprisoned for any term of years or for life, fined in accordance with this [Act], or both.”<sup>94</sup>

The Senate version of the bill has some slight differences in the wording. Instead of having to knowingly assault, attempt to or actually cause the bodily injury of a law enforcement officer, the Senate version of the bill uses the following language: “knowingly causes bodily injury to any person, or attempts to do so, because of the actual or perceived status of the person as a law enforcement officer.”<sup>95</sup> The difference between these two versions lies in the phrase “actual or perceived status.”<sup>96</sup> In the House’s version of the bill, a person must *know* that the individual is a law enforcement officer. The Senate’s version of the bill differs slightly: a person may *believe* that an individual is a law enforcement officer and attack them because of that belief and be found guilty of a hate crime regardless of whether that belief was correct.<sup>97</sup> The Senate’s version also eliminates the requirement of the victim being a federal law enforcement officer.<sup>98</sup> Additionally, the Senate version includes a statute of limitations, mandating a seven-year limit for offenses not resulting in death.<sup>99</sup>

The Fraternal Order of Police, National Association of Police Organizations, and the National Sheriff’s Association all showed support for the bill.<sup>100</sup> The executive director of the National Association of Police Organizations was quoted in a CNN article, stating, ““This bill is critical, as there is a serious and growing trend of armed attacks on law enforcement officers . . . .”<sup>101</sup> On the other hand, organizations, including the ACLU, have openly opposed the bill.<sup>102</sup> They have said that “the bill wrongly extends hate crimes protections to a group that does not need them because they are not vulnerable to bias or discrimination in the same manner as people of color and other historically marginalized communities.”<sup>103</sup> In May of 2018, four organizations joined together and published a letter in

94. *Id.*

95. Protect and Serve Act of 2018, S. 2794, 115th Cong. § 2 (2018).

96. H.R. 5698; *see also* S. 2794.

97. *See* S. 2794.

98. *Id.*

99. *Id.* (noting that offenses resulting in death do not have a statute of limitations and may be brought at any time). There are other small differences between the two versions of the bill; however, they are minimal and do not affect the substance of the bill itself.

100. Emanuella Grinberg, *New Bill Offers Police Officers Protections Similar to Those for Hate Crime Victims*, CNN (May 8, 2018), <https://perma.cc/XE4Y-RMBG>.

101. *Id.*

102. *Id.*

103. *Id.*

opposition of the Protect and Serve Act.<sup>104</sup> The letter lists four main reasons for the groups' collective opposition.<sup>105</sup> One reason speaks to the redundancy of the laws, specifically addressing the laws currently in place that provide protection for law enforcement, "rendering [the] bill superfluous."<sup>106</sup> A second reason explains that the "bill signals that there is a 'war on police,' which is not only untrue, but an unhelpful dangerous narrative to uplift."<sup>107</sup>

#### IV. LAW ENFORCEMENT OFFICIALS DO NOT BELONG IN HATE CRIME LEGISLATION

As mentioned, there are three main reasons why law enforcement should not be protected under hate crime legislation: First, law enforcement as a whole does not fit the description of a traditionally protected class. Statistical data reflecting the number of attacks on the respective groups shows a much lesser frequency of attacks on law enforcement. Additionally, law enforcement as an occupational choice is not an immutable characteristic. Second, these new laws including law enforcement as a protected class are redundant as there are already laws that provide specifically for their protection. Finally, the inclusion of law enforcement as a protected class could result in a restriction of free speech. This type of legislation should be halted before other states continue down the slippery slope of inevitable First Amendment restrictions.

##### *A. Law Enforcement Officers Do Not Fit the Description of Traditional Protected Classes*

There are two central areas in which law enforcement officers differ from traditionally protected classes. First, traditionally protected classes are attacked because of their protected characteristics more frequently than law enforcement are attacked for being law enforcement. Second, the traits possessed by traditionally protected classes, such as immutable characteristics, are not present in law enforcement.

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104. Letter from the Am. Civil Liberties Union, Human Rights Watch, Leadership Conference on Civil and Human Rights, and NAACP Legal Def. and Educ. Fund, Inc. to the U.S. Senate (May 8, 2018).

105. *Id.* at 1.

106. *Id.*

107. *Id.*

### 1. *Statistical Differences Between the Protected Classes and Law Enforcement*

Statistical data collected over the years shows that the number of attacks on law enforcement, while high, does not compare to the number of attacks on traditionally protected classes.<sup>108</sup> This Section provides data for both law enforcement officer attacks and hate crime attacks that have occurred over a twelve-year period, from 2006–2017.

#### *i. Data on Law Enforcement*

Between 2006 and 2017 there were a total of 131 state law enforcement deaths and 2,762 assaults.<sup>109</sup> There are several criteria for law enforcement

108. See *infra* Section IV.A.1.c. The Federal Bureau of Investigation's ("FBI") Criminal Justice Information Services Division ("CJIS") provides statistical data each year on the deaths and assaults for both state and federal law enforcement officers through the Uniform Crime Reporting ("UCR") program. *Uniform Crime Reporting (UCR) Program*, FED. BUREAU INVESTIGATION, <https://perma.cc/UKS7-8RRN>. The UCR program also provides similar data for hate crimes. *Id.*

109. These figures are based on the Author's calculations after consulting the sources. *See 2006 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/BHW8-2LEU>; *2006 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/FH3T-ACZU>; *2007 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/4P4D-R59K>; *2007 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/4AJF-AZRH>; *2008 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/FGU9-HN7U>; *2008 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/FHT9-ZYD9>; *2009 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/WD6J-YR6Q>; *2009 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/68VQ-J82N>; *2010 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/6XL3-9W7R>; *2010 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/X7UY-RQRZ>; *2011 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/7PNP-4S93>; *2011 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/3T7Y-382F>; *2012 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/RJR9-LZXC>; *2012 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/F2G3-5DL5>; *2013 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/JN6L-CUSL>; *2013 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/V2PJ-R4Y9>; *2014 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/SD9S-AA6C>; *2014 Law Enforcement Officers*



officers that are included within these reports, such as being a member of a law enforcement agency, carrying a badge, and acting within official capacity whether on or off duty.<sup>110</sup> There are also several exceptions to what is included in these reports, such as death by natural causes, or deaths due to personal situations or suicide.<sup>111</sup> The data reflecting the totals above consists of the felonious deaths of state law enforcement officers that were either unprovoked or caused by ambush,<sup>112</sup> as well as assaults caused by ambush that did not result in death.<sup>113</sup>

*ii. Data on Hate Crimes*

During the same twelve-year time span used above, 96,455 individuals were victims of hate crime offenses.<sup>114</sup> Of those individuals, 99 were

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*Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/GWT4-HZPG>; *2015 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/6DBQ-DF3D>; *2015 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/FN7A-479Y>; *2016 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/KLH3-8YYN>; *2016 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/Y6XP-TUJ6>; *2017 Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://perma.cc/4RYN-EAWM>; *2017 Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://perma.cc/VY8P-B2N7>.

110. *2017 Law Enforcement Officers Killed & Assaulted: Criteria*, FED. BUREAU INVESTIGATION, <https://perma.cc/ZV8B-6ZQS> (“The data in this publication pertain to felonious deaths, accidental deaths, and assaults of duly sworn law enforcement officers who, at the time of the incident, met the following criteria.”).

111. *Id.*

112. Ambush is defined as a “[s]ituation where an officer is unexpectedly assaulted as the result of premeditated design by the perpetrator.” *2017 Law Enforcement Officers Killed & Assaulted: Definitions*, *supra* note 80.

113. Using data for only unprovoked felonious killings and ambush attacks allows the data to be compared to deaths due to hate crimes. *See supra* note 80.

114. This figure is based on the Author’s calculations after consulting the sources. *See 2006 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/7R54-W6QM>; *2007 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/6V2J-ATT7>; *2008 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/SX8U-K3RM>; *2009 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/S9BB-TZ64>; *2010 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/56EV-KDHJ>; *2011 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/8ATV-FRD6>; *2012 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/AS3J-G5VT>; *2013 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/M5BZ-XGU7>; *2014 Hate Crime Statistics:*

victims of murder and non-negligent manslaughter, and 57,272 were victims of aggravated assault, simple assault, and intimidation.<sup>115</sup> The remaining 39,084 were victims of crimes against property.<sup>116</sup>

This data, like the data on law enforcement, is divided into many different categories. The data used here consists of the number of victims of crimes against persons, and crimes against property. The crimes against persons category includes the number of people who were victims of murder and non-negligent manslaughter, rape,<sup>117</sup> aggravated assault, simple assault, and intimidation.<sup>118</sup> The crimes against property category includes the number of people who were victims of robbery, burglary, larceny-theft, motor vehicle theft, arson, and destruction/damage/vandalism.<sup>119</sup>

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*Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/WS9F-YTYA>; *2015 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/3UDM-MRF3>; *2016 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/24E5-TUTK>; *2017 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <https://perma.cc/2P6M-CSL7>.

115. These figures are based on the Author's calculations after consulting the sources. See *2006 Hate Crime Statistics: Incidents and Offenses*, *supra* note 109; *2007 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2008 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2009 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2010 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2011 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2012 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2013 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2014 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2015 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2016 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2017 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114.

116. This figure is based on the Author's calculations after consulting the sources. See *2006 Hate Crime Statistics: Incidents and Offenses*, *supra* note 109; *2007 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2008 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2009 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2010 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2011 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2012 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2013 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2014 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2015 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2016 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; *2017 Hate Crime Statistics: Incidents and Offenses*, *supra* note 114.

117. From 2006 to 2013 a rape was only recorded within this data if it fell within the definition of "forcible rape." Beginning in 2013 the UCR removed the term "forcible" from the definition. *2017 Hate Crime Statistics: Methodology*, FED. BUREAU INVESTIGATION, <https://perma.cc/Q7RU-TJNP>.

118. *Id.*

119. *Id.*

### iii. Comparing the Data

The total number of incidents, including deaths, assaults, and the like for state law enforcement officers reaches 2,893.<sup>120</sup> The number of hate crime incidents, excluding all occurrences of crimes against property, amounts to 57,371.<sup>121</sup> While the population size differs for each group, it is possible to see the differences in the number of attacks on law enforcement as a whole, and the groups of people already protected within hate crime statutes. When looking at the same twelve-year time span, the number of attacks on members of classes already protected within hate crime laws is almost nine times the number of attacks on law enforcement officers.<sup>122</sup>

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120. 2006 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2006 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2007 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2007 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2008 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2008 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2009 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2009 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2010 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2010 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2011 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2011 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2012 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2012 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2013 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2013 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2014 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2014 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2015 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2015 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2016 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2016 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109; 2017 *Law Enforcement Officers Killed & Assaulted: Officers Feloniously Killed*, *supra* note 109; 2017 *Law Enforcement Officers Killed & Assaulted: Officers Assaulted*, *supra* note 109.

121. 2006 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 109; 2007 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2008 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2009 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2010 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2011 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2012 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2013 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2014 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2015 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2016 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114; 2017 *Hate Crime Statistics: Incidents and Offenses*, *supra* note 114.

122. See *supra* notes 109 and 115 and accompanying text.

This is despite the fact that the Hate Crimes Prevention Act was passed three years into this twelve-year span.

## 2. *Traditional Traits of a Hate Crime Class*

The classes<sup>123</sup> protected under hate crime legislation are protected for different reasons. Each class has a trait or characteristic that has made the inclusion of the class appropriate under hate crime laws. These characteristics, although different, share commonalities regarding the reasoning for their inclusion within hate crime statutes. The commonalities are not so different from the factors that are used by the courts to determine heightened scrutiny in equal protection cases. These factors have received some criticism for the lack of judicial clarity regarding how they are applied. While they have been stated in different ways throughout the years,<sup>124</sup> two prominent factors are “(1) whether there is a *history of invidious discrimination* against the affected class; [and] (2) whether the affected class share[s] an *immutable characteristic*.”<sup>125</sup>

### *i. History of Invidious Discrimination*

Law enforcement as a class has not endured the history of discrimination that is common in other protected classes. The fact that there has been discrimination based on race or national origin is not a novel statement; one only has to open a history book or a newspaper to see the extent of discrimination the traditionally protected classes have endured. To illustrate, the findings of Congress regarding the Hate Crimes Prevention Act included the following:

For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry.<sup>126</sup>

One article discussing the suspect classifications in an equal protection context described that while classes based on sexual orientation have not

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123. The traditional classes protected under hate crime statutes are race, color, religion, ethnicity, gender, gender identity, and sexual orientation. See *ADL Hate Crime Map*, ANTI-DEFAMATION LEAGUE, <https://perma.cc/5YRV-Z3K6>.

124. See Marcy Strauss, *Reevaluating Suspect Classification*, 35 SEATTLE U. L. REV. 135 (2011).

125. MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 1473 (Robert C. Clark et al. eds., 3d ed. 2017).

126. 34 U.S.C. § 30501(7) (2009).

had the same level of history of discrimination as racial minority groups, they have still suffered from a history of violent attacks, discrimination within the military and until recently, the right to marry.<sup>127</sup>

America's past is filled with discrimination towards certain minority groups for one reason or another. However, it is clear that what is missing from the documentation of American history is discrimination suffered by law enforcement. Not only has law enforcement not suffered discrimination, the law tends to be on their side, shown through the several statutes already in place protecting law enforcement at both the state and federal level.<sup>128</sup>

*ii. What is an Immutable Characteristic?*

In the legal context, “[a] human trait that defines a group is ‘immutable’ when the trait exists ‘solely by the accident of birth,’ or when the person with the trait has no ability to change it.”<sup>129</sup> Immutable characteristics have been used in equal protection cases to determine whether a certain group of individuals should receive a higher level of scrutiny.<sup>130</sup> If a higher level of scrutiny is appropriate, the government must prove that the discriminatory law being challenged is “narrowly tailored to serve a compelling state interest.”<sup>131</sup> In *Bowen v. Gilliard*, the plaintiffs challenged an amendment to the Families with Dependent Children Act which required families to account for the income of relatives living in the same home when determining their benefit eligibility.<sup>132</sup> The Court held that close relatives were not a “suspect” class because, among other things, “they do not exhibit obvious, *immutable*, or distinguishing characteristics.”<sup>133</sup>

Typical examples of immutable characteristics are race and national origin. These characteristics are unlike occupations in that a person's race will remain the same while the person's occupation may change frequently throughout his or her life. However, Louisiana's addition of law enforcement officers within their hate crime statute has turned the

127. Strauss, *supra* note 124, at 152–53.

128. See *infra* Section IV.B.

129. Varnum v. Brien, 763 N.W.2d 862, 892 (Iowa 2009) (citations omitted) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

130. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

131. Susannah W. Pollvogt, *Beyond Suspect Classifications*, U. PA. J. CONST. L. 739, 744 (2013).

132. *Bowen*, 483 U.S. at 589.

133. *Id.* at 602 (emphasis added) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (emphasizing also that the group was “not a minority or powerless”).

occupational choice of becoming a law enforcement officer into an immutable characteristic.<sup>134</sup> Louisiana's statute defines the term "law enforcement officer" to mean "any active or retired" official.<sup>135</sup> By protecting both active and retired law enforcement officers, once an individual is a law enforcement officer, he or she will always be protected as a law enforcement officer under the statute. When an occupation is turned into an immutable characteristic it creates a false commonality between the occupation and other groups whose immutable characteristics remain marginalized in society. This creates a false pretense for making law enforcement officers a protected class within hate crime legislation.

*B. The Inclusion of Law Enforcement Within Hate Crime Laws is Redundant and Unnecessary*

Current hate crime legislation in states that add law enforcement officers as a protected class, including the pending Protect and Serve Act of 2018, are redundant and unnecessary because there are already many statutes in place which prohibit the same behavior. Several states already have laws that protect the safety of police officers. Louisiana and Kentucky are examples of two states with such preexisting laws.<sup>136</sup>

*1. State Law Previously Enacted to Protect Police Officers*

In Louisiana, battery of a police officer is already a crime.<sup>137</sup> Under this statute, a person who batters a police officer "shall be fined not more than five hundred dollars and imprisoned not less than fifteen days nor more than six months without benefit of suspension of sentence."<sup>138</sup> However, if the battery results in injury that requires medical attention, "the offender shall be fined not more than one thousand dollars or imprisoned with or without hard labor for not less than one year nor more than five years, or both."<sup>139</sup> Aggravated assault upon a police officer with a firearm is also already codified in Louisiana's statutes.<sup>140</sup> A person convicted under this statute "shall be fined not more than five thousand dollars, or imprisoned for not less than one year nor more than ten years, with or without hard

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134. LA. STAT. ANN. § 14:107.2(E)(3) (2018).

135. *Id.*

136. *See supra* Sections III.A and III.B.

137. LA. STAT. ANN. § 14:34.2 (2016).

138. LA. STAT. ANN. § 14:34.2(B)(1).

139. LA. STAT. ANN. § 14:34.2(B)(3).

140. LA. STAT. ANN. § 14:37.2.

labor, or both.”<sup>141</sup> In addition to these examples are several more statutes, all located within Louisiana’s Criminal Code, under the section effectively entitled “Offenses affecting law enforcement.”<sup>142</sup>

The battery of a police officer—not resulting in injury requiring medical attention—carries with it the same punishment as a hate crime against a law enforcement officer with the underlying offense which constitutes a misdemeanor.<sup>143</sup> Further, the battery of a police officer which *does* result in injury requiring medical attention imposes the same punishment guidelines as a hate crime against a law enforcement officer with an underlying felony offense.<sup>144</sup> Having the same punishment for the same criminal conduct, renders the inclusion of law enforcement within Louisiana’s hate crime statute redundant.

In Kentucky, the crime of assault in the third degree is defined as a person who “[r]ecklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to” a law enforcement officer.<sup>145</sup> This is listed as a Class D felony.<sup>146</sup> A Class D felony is punishable by imprisonment from one to five years,<sup>147</sup> and fines not less than one thousand dollars and not more than ten thousand dollars.<sup>148</sup> Kentucky has also already codified resisting arrest, which is defined as when a person “intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another,” and does so using physical force or violence, threatening physical force or violence, or by “[u]sing any other means creating a substantial risk of causing physical injury to the peace officer or another.”<sup>149</sup> Resisting arrest under the Kentucky code is a Class

141. LA. STAT. ANN. § 14:37.2(C).

142. LA. STAT. ANN. §§ 14:108–112.4 (2018) (additional examples of these laws include: § 14:108 – Resisting an officer (a person may be fined not more than five hundred dollars or be imprisoned for not more than six months, or both); § 14:108.1 – Aggravated flight from an officer (a person may be imprisoned not more than five years and fined up to two thousand dollars, or both, if there is no resulting bodily injury); § 14:108.2 – Resisting a police officer with force or violence (a person may be imprisoned not less than one year and up to three years and fined up to two thousand dollars or both)).

143. See Section III.A.

144. See Section III.A.

145. KY. REV. STAT. ANN. § 508.025(1)(a) (LexisNexis 2014) (The term law enforcement officer is used here as a summation of an entire list of possible victims listed within the statute. The statute lists an entire range of victims from a state or federal peace officer to a volunteer firefighter).

146. KY. REV. STAT. ANN. § 508.025(2).

147. KY. REV. STAT. ANN. § 532.060(2)(d) (LexisNexis 2014).

148. KY. REV. STAT. ANN. § 534.030(1) (LexisNexis 2014).

149. KY. REV. STAT. ANN. § 520.090(1)(a)–(b) (LexisNexis 2014).

A misdemeanor.<sup>150</sup> Punishment for a Class A misdemeanor includes imprisonment not exceeding twelve months,<sup>151</sup> and fines up to five hundred dollars.<sup>152</sup>

### *2. Federal Law Previously Enacted to Protect Police Officers*

In addition to state laws which provide protection for federal law enforcement officers, there are provisions in the United States Code that already provide for the safety of federal law enforcement officers.<sup>153</sup> Under the Code, assaulting, resisting, or impeding certain officers or employees while they are engaged in the performance of their official duties may be punishable by up to eight years in prison.<sup>154</sup> If a person uses a deadly weapon within the commission of this assault or inflicts bodily injury, they may serve up to twenty years in prison.<sup>155</sup> Murder and attempted murder against an officer is also already a crime.<sup>156</sup> The punishment for this crime is identical to that of murder against a citizen.<sup>157</sup> Not only are federal law enforcement officers protected under federal law, but they are also protected under state law. Kentucky's assault in the third-degree statute includes the protection of federal law enforcement,<sup>158</sup> as does Louisiana's battery of a police officer.<sup>159</sup>

### *3. Comparison*

As illustrated above, there are already laws that serve to protect law enforcement officers at both the state and federal level. These laws enhance the punishment of criminal conduct already codified solely because it is committed against an officer. In comparison, when the Federal Hate Crimes Act of 2009 was enacted,<sup>160</sup> there were no provisions in the federal code to enhance punishment for crimes committed against victims due to sexual orientation, gender, gender identity or disability. Nor were there sentencing

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150. KY. REV. STAT. ANN. § 520.090(2).

151. KY. REV. STAT. ANN. § 532.090(1).

152. KY. REV. STAT. ANN. § 534.040(2)(a).

153. *See* 18 U.S.C. § 111 (2012).

154. 18 U.S.C. § 111(a)(1)–(2) (If there is no physical contact or intent to commit another felony, then punishment is limited to not more than one year in prison).

155. 18 U.S.C. § 111(b).

156. 18 U.S.C. § 1114 (2012).

157. 18 U.S.C. § 1114(1) (referencing 18 U.S.C. § 1111).

158. KY. REV. STAT. ANN. § 508.025(1)(a)(1) (LexisNexis 2014).

159. LA. STAT. ANN. § 14:34.2(A)(2) (2016).

160. 18 U.S.C. § 249 (2012) (broadening the scope of federal hate crimes to include sexual orientation, gender, disability, and gender-identity).



enhancements for the already protected classes if the offense occurred outside one of the enumerated federal activities. There were also several states at this time with hate crime statutes that did not include sexual orientation,<sup>161</sup> and some states that did not—and some that continue to not—have a hate crime statute at all.<sup>162</sup>

### *C. Slippery Slope to Free Speech Restrictions*

An additional consequence of adding law enforcement officers to state and federal hate crime statutes is that it could possibly infringe on the First Amendment's right to free speech. At this point in time, most statutes in place center around crimes which include an act of criminal conduct.<sup>163</sup> It is possible, however, that this type of legislation will grow to impede upon the First Amendment in the future.

The inclusion of law enforcement in hate crime laws may implicate the right to free speech, specifically in the context of content regulation. A content-based regulation occurs when the government restricts certain speech because of the message being conveyed.<sup>164</sup> The Supreme Court discussed the issue of content-based regulation in *R.A.V. v. St. Paul*.<sup>165</sup> In this case, several teenagers constructed a cross out of broken chairs before burning it inside the fenced-in yard of a black family's home across the street from where one of the teenagers lived.<sup>166</sup> The teenagers were charged under the St. Paul Bias-Motivated Crime Ordinance.<sup>167</sup> The trial court granted the petitioners' motion to dismiss on the ground that the statute was overbroad, as well as facially invalid because the regulation the ordinance

161. See *State Maps of Laws & Policies: Hate Crimes*, HUM. RTS. CAMPAIGN, <https://perma.cc/T92M-XM95>.

162. See *id.* (States that do not have hate crime laws at all include Arkansas, Georgia, South Carolina, and Wyoming).

163. See LA. STAT. ANN. § 14:107.2 (2018); KY. REV. STAT. ANN. § 532.031(1) (LexisNexis 2014); Protect and Serve Act of 2018, S. 2794, 115th Cong. § 2 (2018); Protect and Serve Act of 2018, H.R. 5698, 115th Cong. § 2 (as passed by House, May 16, 2018). The crimes included within these statutes require the defendant to commit battery, assault, or some crime that requires a physical act of the defendant.

164. See generally 1 WILLIAM H. ERICKSON, ET AL., UNITED STATES SUPREME COURT CASES AND COMMENTS: CRIMINAL LAW AND PROCEDURE § 5A.03 (2018).

165. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

166. *Id.* at 379.

167. *Id.* at 380; see St. Paul, Minn. Legis. Code § 292.02 (1990) (“Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”).

imposed was content-based.<sup>168</sup> The Supreme Court of Minnesota reversed the trial court's decision and held the ordinance to be constitutional because "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order."<sup>169</sup>

The Supreme Court of the United States reversed and held the ordinance to be facially unconstitutional, violating the First Amendment.<sup>170</sup> In its analysis, the Court made several points about how the Minnesota ordinance crosses the line drawn by the First Amendment. When discussing why the expression of ideas may be punished in one situation, but not in another, the Court explained:

We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.<sup>171</sup>

Comparing this to the situation at hand regarding hate crime statutes, while it may be permissible for the state and federal legislatures to punish the battery or assault of a law enforcement officer—because it violates statutes already in place for crimes such as battery or assault—it is not permissible for legislatures to prohibit other types of expressive conduct when it is the result of discontent with the government.

There have been several comments made in support of these types of bills. One comment was the statement by the executive director of Louisiana's Sheriffs Association stating that the new law is "an indication of where our priorities are in Louisiana as far as protecting our law enforcement officials."<sup>172</sup> While the community may support law enforcement in many different ways, limiting the expression of opinions against the police is not one of them. As the Court in *R.A.V.* stated, "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."<sup>173</sup>

Kentucky's hate crime statute serves as an example of the limitation on expression of opinion. The hate crime statute includes various underling

168. *R.A.V.*, 505 U.S. at 380.

169. *Id.* at 381 (internal quotation marks omitted).

170. *Id.* at 391.

171. *Id.* at 385.

172. *Gov. Edwards Signs HB 953, Five Veterans' Bills*, *supra* note 69 (internal quotation marks omitted).

173. *R.A.V.*, 505 U.S. at 392.

offenses, one of which is harassment.<sup>174</sup> The statute states that “(1) [a] person is guilty of harassment when, with intent to intimidate, harass, annoy, or alarm another person, he or she . . . (c) [i]n a public place, makes an offensively coarse utterance, gesture, or display, or addresses abusive language to any person present.”<sup>175</sup> As discussed above, Kentucky has amended its hate crime statute to include the protection of law enforcement officers. Kentucky’s hate crime statute includes other underlying offenses such as assault<sup>176</sup> and criminal abuse<sup>177</sup> which are focused more towards criminal conduct and do not suppress free speech. The crime of harassment, on the other hand, is a direct example of how the inclusion of law enforcement officers in hate crime statutes could lead to a violation of the First Amendment because any individual who “makes an offensively course utterance” towards a law enforcement officer in Kentucky is now in violation of the state’s hate crime statute.<sup>178</sup> If an individual chooses to express their discontent with law enforcement through speech, the First Amendment affords them this right. Offensive speech and its protection under the First Amendment have been thoroughly discussed in this country’s case law. To quote Justice Douglas,

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.<sup>179</sup>

By statutorily prohibiting a person from expressing their discontent for law enforcement through speech, Kentucky has impeded upon the First Amendment rights of its citizens. If this trend in legislation continues, it is likely that it will not be the last state to slide down the slippery slope.

It could be argued that the government is not suppressing the ideas of its people but is more so concerned about the secondary effects. Chuck Canterbury, the national president for the Fraternal Order of the Police, was

174. KY. REV. STAT. ANN. § 525.070(1)(c) (LexisNexis 2014 & Supp. 2016).

175. *Id.*

176. KY. REV. STAT. ANN. § 508.010 (LexisNexis 2014).

177. KY. REV. STAT. ANN. § 508.100.

178. KY. REV. STAT. ANN. § 525.070(1)(c).

179. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (citation omitted).

quoted in support of the Louisiana amendment, stating, “Our members are being increasingly under fire by individuals motivated by nothing more than a desire to kill or injure a cop . . . . There is a very real and very deliberate campaign to terrorize our nation’s law enforcement officers.”<sup>180</sup> In the same article, Canterbury notes that the “extension is needed because of what he sees as a growing anti-police sentiment in the wake of controversial deaths by law enforcement” officers.<sup>181</sup> What seems to be suggested is the growing “campaign to terrorize” law enforcement officers will act as a secondary effect on society and lead to even more attacks on law enforcement.

The issue of secondary effects was discussed in *Renton v. Playtime Theaters, Inc.*<sup>182</sup> Playtime Theaters purchased two theaters in Renton for the purpose of showing adult motion pictures.<sup>183</sup> The ordinance at issue “prohibited any ‘adult motion picture theater’ from locating within 1,000 feet of any residential zone, single[] or multiple-family dwelling, church, or park, and within one mile of any school.”<sup>184</sup> Playtime filed suit seeking a declaratory judgement on the ground that the ordinance violated the First and Fourteenth Amendments.<sup>185</sup> The Court decided that the ordinance was a “content-neutral” time, place, and manner regulation.<sup>186</sup> These regulations, the Court stated, were only acceptable “so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.”<sup>187</sup>

The Court held the ordinance was constitutional because the Government had a valid substantial interest to protect against serious issues the placement of the adult theaters could have on the community.<sup>188</sup> The secondary effects the theater could have on the communities were increased crime and a decline in property value.<sup>189</sup> The ordinance’s general purpose was to “protec[t] and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life.”<sup>190</sup> Suggesting that attacks on law enforcement will cause a secondary effect resulting in widespread hatred for the police—to a level that makes inclusion within hate crime statutes appropriate—seems to be a reach. The secondary effects of

180. Crisp, *supra* note 67 (internal quotation marks omitted).

181. *Id.*

182. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

183. *Id.* at 45.

184. *Id.* at 44.

185. *Id.* at 43.

186. *Id.* at 48.

187. *Id.* at 47.

188. *Id.* at 52.

189. *Id.* at 48.

190. *Id.* (alterations in original) (internal quotation marks omitted).

adult theaters in *Renton* were considered by the Court to be “more than adequate to establish that the city’s pursuit of its zoning interests here was unrelated to the suppression of free expression.”<sup>191</sup> In contrast, the suggested secondary effects of attacks on law enforcement are directly related to Louisiana’s interest in suppressing free expression of discontent with law enforcement. While the town in *Renton* was advocating to protect its citizens, Louisiana and other states are advocating to protect their employees.

Retaliation against the perpetrator has been considered as another possible secondary effect of hate crimes. The Supreme Court stated in *Wisconsin v. Mitchell* that bias-motivated crimes were enhanced because of their effects.<sup>192</sup> Specifically, they are more likely to provoke retaliatory crimes.<sup>193</sup> A brief in support of the Petitioner in *Mitchell* explained the concept of the retaliatory effect these crimes could have: “[a]nother common [effect of a hate crime on the individual victim] is anger. Several persons seemed almost surprised by the depth and power of the anger which the incident evoked in themselves. Some made reference to plans or fantasies of retaliation should the incidents be repeated.”<sup>194</sup> In the case of law enforcement officers, the argument that secondary effects provoking retaliatory crimes is without merit. Law enforcement officers go through training for several different aspects of their employment.<sup>195</sup> Law enforcement recruits are also trained in law, ethics, procedures, and protocol.<sup>196</sup> Regarding ethics training, LawEnforcementEdu.net has stated that “[e]thics training prevents officers from exceeding their authority.”<sup>197</sup> In fact, all police organizations “provide strict guidelines on how to respond to sensitive situations.”<sup>198</sup>

There may be a circumstance in which a victim of a hate crime is employed within a profession that has been trained to deal with retaliation—a psychologist for example. If a psychologist is attacked because the perpetrator selected him as a target solely because he is a psychologist, then

191. *Id.*

192. *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993).

193. *Id.* at 488.

194. Brief for Lawyers’ Committee for Civil Rights of the San Francisco Bay Area as Amicus Curiae Supporting Petitioner, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (No. 92-515).

195. *Police Officer Academy Training*, LAWENFORCEMENTEDU.NET, <https://perma.cc/W2K8-EGLT> (Law enforcement officers are trained in areas of firearms, apprehension and arrest, driving, close combat, etc.).

196. *Id.*

197. *Id.*

198. *Id.*

a hate crime conviction would not be upheld because psychologists are not protected under hate crime statutes. On the other hand, if the psychologist was targeted because of his race, a hate crime conviction would be highly appropriate; however, the individual's employment as a psychologist has nothing to do with why he is protected under the hate crime statute. Psychologists, much like law enforcement officers, would not make an appropriate hate crime class.

For the average person who is not trained in handling these situations, the concern of retaliation makes sense. However, law enforcement officers anticipate and require training for these exact situations. If law enforcement officers are assaulted, the concern of retaliation as a secondary effect resulting from crimes against the police begs the question: Do law enforcement officers need to be added to hate crime statutes as a protected class, or does the quality and frequency of their ethics training need to be reanalyzed?

#### CONCLUSION

A line must be drawn between those who have been historically oppressed and victimized and those who are momentarily dealing with societal backlash. Even if laws that currently criminalize attacks on law enforcement officers may be ineffective, the answer is not to group this occupational choice with others who have been marginalized for centuries. If the current laws protecting law enforcement are not an effective deterrent, then maybe the answer would be to focus on a stronger enforcement of these laws. Perhaps increasing the punishment handed out to those who violate these laws. This could increase deterrence and lessen the desire for people to commit harm to law enforcement.

Looking to the reasoning behind the current discontent towards law enforcement might also be helpful in finding an appropriate solution. With an up rise in community unrest and the trust between communities and law enforcement crumbling, community outreach programs or additional training for law enforcement may be the answer. This Comment addressed ethics training for law enforcement officers. Perhaps if police departments nationally were to require officers to go through additional training, the community backlash from recent events would lessen. Providing more training for law enforcement officers in addition to community outreach programs might better mend this particular issue rather than including law enforcement officers as a protected class.

To include law enforcement officers within the groups protected by hate crime statutes is a step in the wrong direction for both state and federal legislation alike. Law enforcement officers differ greatly from those groups

who have been protected in the past. Importantly, choice of occupation is not an immutable characteristic and certainly should not be treated as such. Adding law enforcement to these statutes not only dilutes the initial purpose of hate crime statutes, but also implicates constitutional concerns. While law enforcement officers deserve protection and respect for their choice to protect our communities, including them in hate crime legislation is not the answer.

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