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## Policing Hate: The Problematic Expansion of Louisiana's Hate Crime Statute to Include Police Officers

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**Policing Hate: The Problematic Expansion of Louisiana’s Hate Crime Statute to Include Police Officers**

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INTRODUCTION

On December 20, 2014, Officers Rafael Ramos and Wenjian Liu of the New York City Police Department were sitting in a parked patrol car in Brooklyn, New York when a man armed with a handgun approached from the passenger side and fired multiple rounds into the vehicle, instantly killing both officers.<sup>1</sup> At a press conference that evening, the New

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1. Melanie Eversley, Katharine Lackey & Trevor Hughes, *Two NYPD Officers Killed in Ambush Style Shooting*, USA TODAY (Dec. 21, 2014, 9:21 AM), <http://www.usatoday.com/story/news/nation/2014/12/20/new-york-city-police-officers-shot/20698679/> [https://perma.cc/NN3C-QGF7].

York City Police Commissioner announced that the shooter deliberately targeted the police officers “for their uniform and the responsibility they embraced.”<sup>2</sup> The Commissioner pointed to posts on the shooter’s social media accounts foreshadowing a plan to “put wings on pigs” in retaliation for the highly protested police killings of Eric Garner and Michael Brown<sup>3</sup> as evidence of the killer’s bias against police officers.<sup>4</sup>

The outrage surrounding the assassination of Officers Ramos and Liu was widespread.<sup>5</sup> Politicians and protesters alike condemned the violence.<sup>6</sup> Many people, however, believed the shooting was not a senseless, isolated act but evidence of something bigger: law enforcement was under systematic attack, a phenomenon politicians hastily dubbed a “war on cops.”<sup>7</sup>

In the spring of 2016, Louisiana State Representative Lance Harris drafted House Bill 953,<sup>8</sup> a solution to what he perceived as an intentional crusade to terrorize police officers evidenced by the murders of Ramos

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2. *Id.*

3. Ismaiiyl Brinsley (@dontrunup), INSTAGRAM (Dec. 20, 2014), *archived at* <http://gawker.com/cop-killers-instagram-im-putting-wings-on-pigs-today-1673793374> (last visited Sept. 6, 2016) [<https://perma.cc/ZP2C-M8HE>]; *Ferguson Unrest: from Shooting to Nationwide Protests*, BBC NEWS (Aug. 10, 2015), <http://www.bbc.com/news/world-us-canada-30193354> [<https://perma.cc/4FE5-YA3G>]; Al Baker, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/2DXZ-9YR8>].

4. Eversley et al., *supra* note 1.

5. *Id.*

6. *Id.*

7. *See, e.g.*, Steve Benen, *Ted Cruz Shows How Not to Respond to Police Killings*, MSNBC (Sept. 2, 2015, 8:00 AM), <http://www.msnbc.com/rachel-maddow-show/ted-cruz-shows-how-not-respond-police-killings> (quoting Senator Ted Cruz, who remarked that cops are “feeling the assault” nationwide) [<https://perma.cc/PW2T-JKW7>]; Radley Balko, *Scott Walker Couldn’t Be More Wrong About the Threat to Police Officers*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/news/the-watch/wp/2015/09/03/scott-walker-couldnt-be-more-wrong-about-the-threat-to-police-officers/?tid=a\\_inl&utm\\_term=.584f49b74c56](https://www.washingtonpost.com/news/the-watch/wp/2015/09/03/scott-walker-couldnt-be-more-wrong-about-the-threat-to-police-officers/?tid=a_inl&utm_term=.584f49b74c56) (criticizing Wisconsin governor Scott Walker’s comments on what he perceives as “a disturbing trend of police officers being murdered on the job”) [<https://perma.cc/77HD-YFQN>].

8. H.B. 953, Reg. Sess. (La. 2016).

and Liu<sup>9</sup> and a similar murder of a deputy in Cypress, Texas.<sup>10</sup> The bill was termed the “Blue Lives Matter” bill, its name being a response to Black Lives Matter, a civil rights group<sup>11</sup> that has been accused of inciting anti-police violence through its protests of police activity.<sup>12</sup> The bill sought to modify Louisiana’s hate crime statute, which provides increased penalties for offenders who select their victims based on the individual victim’s race, age, gender, religion, color, creed, disability, sexual orientation, national origin, ancestry, or organizational affiliation.<sup>13</sup> The modification added “actual or perceived employment as a law enforcement officer, firefighter, or emergency medical services personnel” to the list of protected characteristics.<sup>14</sup>

The bill passed the House unanimously and passed the Senate by a margin of 33-3.<sup>15</sup> Governor John Bel Edwards signed it into law on May 26, 2016, officially making Louisiana the first state to offer additional protection to law enforcement officers through hate crime legislation.<sup>16</sup>

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9. Elizabeth Crisp, ‘Blue Lives Matter’: Louisiana Legislature Considers Hate Crime Protections for Police, Firefighters, *ADVOCATE* (Apr. 26, 2016, 3:26 PM), [http://www.theadvocate.com/baton\\_rouge/news/politics/Legislature/article\\_f82c5a03-f31a-5574-bc5b-f1311aa1348f.html](http://www.theadvocate.com/baton_rouge/news/politics/Legislature/article_f82c5a03-f31a-5574-bc5b-f1311aa1348f.html) (explaining that Representative Harris cited the murders of Ramos and Liu in his proposal) [<https://perma.cc/MK86-DPLR>].

10. See Elizabeth Chuck & James Novogrod, *Texas Deputy Darren Goforth, Slain at Cypress Gas Station, Remembered at Funeral*, *NBC NEWS* (Sept. 4, 2015, 3:19 PM), <http://www.nbcnews.com/news/crime-courts/thousands-attend-funeral-texas-deputy-darren-goforth-n421831> [<https://perma.cc/4JKG-TC9B>].

11. “Black Lives Matter” began as a protest cry after the 2012 fatal shooting of unarmed African-American teenager Trayvon Martin but now refers to a national political group that includes 30 official chapters. See Alex Altman, *Person of the Year, the Short List: No. 4, Black Lives Matter*, *TIME* (Dec. 2015), <http://time.com/time-person-of-the-year-2015-runner-up-black-lives-matter/> [<https://perma.cc/WBX9-USV6>]. The group protests various forms of perceived racial oppression and injustice, but its largest and most visible protests have been those aimed at police brutality following the high-profile deaths of several African-American men at the hands of law enforcement. See *id.*

12. Richard Perez-Pena, *Louisiana Enacts Hate Crime Laws to Protect a New Group: Police*, *N.Y. TIMES* (May 26, 2016), [http://www.nytimes.com/2016/05/27/us/louisiana-enacts-hate-crimes-law-to-protect-a-new-group-police.html?\\_r=0](http://www.nytimes.com/2016/05/27/us/louisiana-enacts-hate-crimes-law-to-protect-a-new-group-police.html?_r=0) [<https://perma.cc/3T44-MYL6>].

13. LA. REV. STAT. § 14:107.2 (2018).

14. Act No. 953, 2016 La. Acts 2038.

15. Perez-Pena, *supra* note 12.

16. *Id.*

Legislators across the country subsequently have proposed similar bills at both state<sup>17</sup> and federal<sup>18</sup> levels.

Upon signing the bill, Governor Edwards declared that law enforcement officers deserve every available protection,<sup>19</sup> but he chose the wrong avenue for effectuating this protection. The hate crime statute is an improper safeguard against anti-police crimes for two main reasons. First, status as a police officer is not the kind of identity characteristic that belongs in a hate crime statute.<sup>20</sup> Second, the Blue Lives Matter amendment will not effectively protect police officers from the kinds of violent attacks that inspired its existence because the law's structure makes it an impractical tool to prosecute such offenses.<sup>21</sup> Instead, the modification will weaken Louisiana's hate crime statute by opening it up to massive over-expansion and may ultimately exacerbate the ongoing social conflict between citizens and police officers.<sup>22</sup> To avoid these consequences and serve the legitimate purpose of police protection, the Blue Lives Matter law should be repealed or, at the very least, rewritten.

Part I of this Comment discusses the purpose of hate crime laws through historical context, explaining the various forms the laws take at the state level. Part II introduces Louisiana's hate crime statute, analyzes the inconsistencies in the Blue Lives Matter amendment, and predicts the consequences the amendment will have on hate crime law, citizens, and social unity. Part III proposes the repeal of the amendment and considers heavy modification of the statute as an alternative solution. Finally, this Comment implores the Louisiana Legislature ("Legislature") to use either of these solutions, both of which will protect police officers while avoiding the array of problems created by the Blue Lives Matter amendment.

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17. See, e.g., Jonathan Silver, *Abbott: Targeted Killing of Police Should Be a Hate Crime*, TEX. TRIBUNE (July 18, 2016), <https://www.texastribune.org/2016/07/18/abbott-wants-killing-police-officer-become-hate-cr/> (explaining Texas's Police Protection Act, which would extend hate crime protections to law enforcement officers) [<https://perma.cc/DL9H-LRVZ>].

18. *Attacks on Police Are Hateful, but Are They Hate Crimes?*, L.A. TIMES (Aug. 16, 2016, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-police-hate-20160816-snap-story.html> (explaining Representative Ken Buck's "Blue Lives Matter Act," a bill similar to Louisiana's that expands the federal hate crime statute to cover police officers) [<https://perma.cc/9QXY-27NV>].

19. *Gov. Edwards Signs HB 953, Five Veterans' Bills*, OFFICE OF THE GOVERNOR (May 26, 2016), <http://gov.louisiana.gov/news/gov-edwards-signs-hb-953-five-veterans-bills> [<https://perma.cc/JXP4-FN5B>].

20. See discussion *infra* Part II.B.1.

21. See discussion *infra* Part II.B.2.

22. See discussion *infra* Part II.B.2.

## I. HATE CRIME LAWS: A BROAD OVERVIEW

Criminal acts inspired by prejudice are harmful to a multiethnic, multiracial, and multireligious society.<sup>23</sup> Since the late 1960s,<sup>24</sup> legislators have addressed this narrow class of offenses through hate crime laws, which serve a unique and crucial purpose in the legal system.<sup>25</sup> By specifically targeting bias-inspired offenses, the laws seek to condemn prejudice and protect citizens from the crimes that violate the principles of equality and anti-discrimination that are central to American culture.<sup>26</sup>

## A. Defining “Hate Crime”

The term “hate crime” became a topic of national conversation in the 1980s following the introduction of the Hate Crime Statistics Act (“HCSA”),<sup>27</sup> which required the Department of Justice to collect and publish statistics on crimes motivated by racial, religious, or ethnic prejudice.<sup>28</sup> Since that time, the federal government and 48 states have adopted different variations of hate crime statutes.<sup>29</sup> The Federal Bureau of Investigation (“FBI”) defines hate crimes as “traditional offense[s], like murder, arson, or vandalism with an added element of bias.”<sup>30</sup> A hate crime has two components: (1) the offender must commit a crime; and (2) the offender must be motivated to commit the crime because of his hatred

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23. See discussion *infra* Part I.B.

24. The most direct precursor to modern hate crime statutes is United States Code § 245, enacted as part of the Civil Rights Act of 1968. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 865 (2014). The law allows federal prosecution of anyone who interferes with victims’ participation in certain federally protected activities—such as attending school and voting—because of the victim’s race, color, religion, or national origin. See 18 U.S.C. § 245(b)(2) (2018).

25. FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 1 (2002).

26. *Id.* at 42.

27. JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* 4 (2000). The HCSA became law in 1990. See 28 U.S.C. § 534.

28. JACOBS & POTTER, *supra* note 27, at 4.

29. Eisenberg, *supra* note 24, at 867.

30. FED. BUREAU OF INVESTIGATION, *WHAT WE INVESTIGATE: CIVIL RIGHTS*, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last visited Apr. 5, 2018) [<https://perma.cc/F98Z-2HY2>]. Because of the bias requirement, hate crimes are commonly called “bias crimes.” See, e.g., LAWRENCE, *supra* note 25, at 9 (explaining that he uses the term “bias crime” rather than “hate crime” to emphasize that the key factor in a bias crime is not the perpetrator’s hatred of the victim but his prejudice or bias toward that victim).

of the victim.<sup>31</sup> To meet the second requirement, the hatred motivating the offender must be connected to the offender's general antipathy for a protected group or for the victim specifically because of membership in that group.<sup>32</sup> In short, the perpetrator must commit the crime not because of who the victim is as an individual but because the victim represents the group that the perpetrator hates.<sup>33</sup>

### *B. Why We Legislate Hate*

Although hate crime laws vary in the characteristics they protect and the penalties they impose, the core practical purpose of hate crime legislation is to combat and condemn violence against people based on fundamental features of their identity.<sup>34</sup> The deterrence efficacy of the laws is unclear.<sup>35</sup> There is little evidence to prove definitively that enacting hate crime statutes reduces the occurrence of hate crimes.<sup>36</sup> The laws' debatable deterrent effects, however, do not detract from their expressive value.<sup>37</sup> Hate crime laws send messages.<sup>38</sup> To victims, the laws convey messages of support and solidarity,<sup>39</sup> and to society, they serve as an official condemnation of bigotry.<sup>40</sup> The laws are symbolic political acts that evoke strong emotions in the public and shape their expectations by

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31. LAWRENCE, *supra* note 25, at 9.

32. *Id.*

33. *Id.*

34. See Eisenberg, *supra* note 24, at 867 (quoting then-President Obama's description of a federal hate crime law as an important step that would "help protect our citizens from violence based on what they look like, who they love, [or] how they pray").

35. Susan B. Gellman & Frederick M. Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach For Common Ground*, 41 HARV. J. ON LEGIS. 421, 428 (2004); see also Alex Ginsburg, *Hate is Enough: How New York's Bias Crimes Statute Has Exceeded Its Intended Scope*, 76 BROOK. L. REV. 1599, 1607 (2011) (explaining that detractors argue that hate crime statutes do nothing to actually deter hate crimes).

36. Gellman & Lawrence, *supra* note 35, at 429 (describing studies that failed to find that enacting hate crime statutes had any effect on hate crime rates).

37. Eisenberg, *supra* note 24, at 858.

38. Laura Meli, *Hate Crime and Punishment: Why Typical Punishment Does Not Fit The Crime*, U. ILL. L. REV. ONLINE 921, 948 (2014).

39. JACOBS & POTTER, *supra* note 27, at 67.

40. *Id.* at 68.

establishing a societal norm against crimes rooted in identity-based prejudice.<sup>41</sup>

Generally, state legislatures seek to accomplish the practical and expressive purposes of hate crime laws by punishing more severely those offenders motivated by prejudice.<sup>42</sup> Hate crimes are especially detrimental to victims because they often cause greater physical<sup>43</sup> and psychological<sup>44</sup> harm than parallel crimes with motives other than bias.<sup>45</sup> Hate crimes also damage society because they are likely to provoke retaliatory crimes and create turmoil in the community.<sup>46</sup> By imposing harsher penalties on those persons who commit hate crimes, legislators acknowledge the unique harms that the crimes cause and reaffirm the seriousness of the offenses.<sup>47</sup>

### *C. Structure of State Hate Crime Statutes*

State hate crime statutes can be divided into two separate but overlapping analytical models: the discriminatory selection model<sup>48</sup> and the animus model.<sup>49</sup> Under a discriminatory selection statute, any offense in which the offender chooses the victim for a discriminatory reason

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41. Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement*, 80 B.U. L. REV. 1227, 1259 (2000).

42. Ginsburg, *supra* note 35, at 1608 (explaining that the majority of state hate crime statutes are sentence enhancement statutes that increase the penalty for certain crimes when the offender's motive involves a certain prejudice); *see also* JACOBS & POTTER, *supra* note 27, at 29.

43. Meli, *supra* note 38, at 951 (explaining that in comparison to assault with other motives, hate crime assaults are twice as likely to cause serious injury to the victim and four times as likely to necessitate hospitalization).

44. *Id.*; *see also* LAWRENCE, *supra* note 25, at 40 (explaining that hate crime victims often feel helpless because they cannot reasonably minimize the risk of future attacks without changing the central identity characteristic that made them victims).

45. LAWRENCE, *supra* note 25, at 41–42.

46. *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993).

47. Meli, *supra* note 38, at 948.

48. LAWRENCE, *supra* note 25, at 30.

49. Lawrence refers specifically to “racial” animus and “racial or ethnic group” of the victim, but the classification of “racial animus” statutes is understood by some scholars to refer to animus on the basis of any characteristic covered by a hate crime statute, not only race. For that purpose, it sometimes is referred to as the “animus” model. *See, e.g.*, Raegan Jorn, *Mean Streets: Violence Against the Homeless and the Makings of a Hate Crime*, 6 HASTINGS RACE & POVERTY L.J. 305, 314 (2009); *see also* Ginsburg, *supra* note 35, at 1608 (referring to Lawrence’s racial animus model as the “group animus” model).



constitutes a hate crime.<sup>50</sup> Animus statutes have a motive component, requiring that the offender be motivated by animus toward the victim's identity group.<sup>51</sup> The distinction is best illustrated through an example. Offender A exclusively robs Asian people because he believes that they generally carry more valuables than people of other ethnicities.<sup>52</sup> Offender B exclusively robs Asian people because he dislikes them as a group and hopes to intimidate them into leaving his neighborhood.<sup>53</sup> Offender A has committed a hate crime under a discriminatory selection statute because he selected the victim on the basis of race—but not under a racial animus statute because he lacks bias motivation.<sup>54</sup> Offender B meets the specific subset of bias crimes covered by animus statutes.<sup>55</sup> Discriminatory selection statutes are broad enough to cover opportunistic crimes with bias elements while animus statutes focus on crimes of pure hate.<sup>56</sup>

Legislative history suggests that regardless of the statutory model chosen, legislators enact hate crime laws to combat attacks motivated by prejudice.<sup>57</sup> Animus statutes, which explicitly require proof of such motives, more precisely target the crimes the statutes seek to address.<sup>58</sup> Still, the majority of states, including Louisiana,<sup>59</sup> continue to use the

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50. Ginsburg, *supra* note 35, at 1608. Under a typical discriminatory selection statute, an offender commits a hate crime if he or she “intentionally selects the person against whom [the crime] is committed because of his race, religious conviction, color or national origin.” *See, e.g.*, VA. CODE ANN. § 18.2-57 (2018).

51. Ginsburg, *supra* note 35, at 1608. A typical animus statute requires proof of “prejudice,” “bigotry and bias,” or “hostility” based on the victim’s identity. *See* Eisenberg, *supra* note 24, at 870; *see also, e.g.*, FLA. STAT. § 775.085 (2018) (enhancing penalties when the crime “evidences prejudice based on” designated characteristics); N.H. REV. STAT. ANN. § 651:6(I)(f) (2018) (extending sentence of an offender who “[w]as substantially motivated to commit the crime because of hostility towards the victim’s religion, race, creed, sexual orientation”).

52. *See* LAWRENCE, *supra* note 25, at 30.

53. *Id.*

54. *Id.*

55. *Id.*

56. Ginsburg, *supra* note 35, at 1608.

57. Eisenberg, *supra* note 24, at 870.

58. LAWRENCE, *supra* note 25, at 79 (arguing that an animus model statute more appropriately defines a bias crime); *see also* JACOBS & POTTER, *supra* note 27, at 146 (arguing that hate crime statutes should use the narrowest possible definition by requiring group based animus to prevent mere “fights involving epithets” from being classified as hate crimes).

59. *See* LA. REV. STAT. § 14:107.2 (2018) (making it unlawful for any person to select the victim of certain enumerated offenses “because of actual or perceived” protected characteristics); *see also* LAWRENCE, *supra* note 25, at 35–

discriminatory selection model,<sup>60</sup> generating concern that the broadly applicable laws may grant prosecutors the power to punish a much wider array of offenses than intended.<sup>61</sup> Concerns of overreach have been exacerbated by the trend of hate crime law expansion<sup>62</sup> that has recently reached Louisiana's statute through the Blue Lives Matter amendment.

## II. DISSECTING THE FLAWS OF THE BLUE LIVES MATTER LAW

Since its enactment in 1997, Louisiana's statute has included a vast list of protected characteristics, including "actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry" and "actual or perceived membership or service in, or employment with, an organization."<sup>63</sup> In 2016, the Blue Lives Matter amendment further expanded the law by adding "actual or perceived employment as a law enforcement officer, firefighter, or emergency medical services personnel" to the list of protected characteristics.<sup>64</sup>

Representative Harris proposed the bill as an additional means of protecting police officers.<sup>65</sup> Governor Edwards concurred, describing the bill as a well-deserved protection for police officers that sent a clear message of Louisiana's refusal to tolerate hate crimes.<sup>66</sup> Representative Harris and Governor Edwards's comments suggest that the purpose of the law is twofold: to send a message about the seriousness of crimes against police and provide extra legislative protection for police officers.

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36 (explaining that most states use statutes with "because of" language consistent with a discriminatory selection model).

60. Jorn, *supra* note 49, at 312 (explaining that many states adopted discriminatory selection statutes modeled after Wisconsin's statute upheld by the Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)).

61. Ginsburg, *supra* note 35, at 1602.

62. See discussion *infra* Part II.B.1.

63. § 14:107.2. When the underlying offense is a misdemeanor, the offender may be required to pay a fine of up to \$500, be imprisoned for up to six months, or both. § 14:107.2(B). When the underlying offense is a felony, the offender may be fined up to \$5,000, be imprisoned for up to five years, or both. § 14:107.2(C). These sentences run consecutively with the sentences for the underlying offenses. § 14:107.2(C).

64. H.B. 953, Reg. Sess. (La. 2016).

65. Perez-Pena, *supra* note 12 (quoting Representative Harris, who explained that "[he] just wanted to give an extra level of protection to the people who protect us").

66. See OFFICE OF THE GOVERNOR, *supra* note 19 (quoting Governor Edwards, who stated that "[police officers] deserve every protection that we can give them").

Unfortunately, the law is ill-equipped to serve either purpose effectively.<sup>67</sup> Its language makes it difficult to use as a means of protection, and the practical enforcement of the law is likely to contradict any message that it sends.<sup>68</sup> Furthermore, the law could actually jeopardize the effectiveness of the hate crime statute as a whole.<sup>69</sup>

*A. The Unnecessary Expressive Purpose*

Generally, hate crime laws do not fill any practical void in the criminal law because they recriminalize already criminal behavior.<sup>70</sup> The purpose of the laws is instead largely expressive.<sup>71</sup> The laws warn potential offenders that crimes rooted in bias are particularly reprehensible and will be punished severely.<sup>72</sup> For traditional hate crime statutes, this message signified a shift in policy, demonstrating the government's commitment to treating crimes that had long been downplayed or ignored as serious offenses.<sup>73</sup> In contrast, the Blue Lives Matter law sends a message about crimes against police that is wholly unnecessary.<sup>74</sup>

There is no evidence suggesting that crimes against police are, like other hate crimes, underreported or insufficiently investigated.<sup>75</sup> On the contrary, the crimes are documented meticulously<sup>76</sup> and prosecuted

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67. See Collier Meyerson, *The Case Against 'Blue Lives Matter' Bills*, THE NATION (May 23, 2017), <https://www.thenation.com/article/case-blue-lives-matter-bills/> (explaining the difficulty of prosecuting crimes against police under a hate crime statute) [<https://perma.cc/HG4S-VFJU>].

68. See Eisenberg, *supra* note 24, at 858.

69. See discussion *infra* Part II.B.1.

70. JACOBS & POTTER, *supra* note 27, at 5 (arguing that hate crime statutes did not come about because of a lacuna in criminal law; rather, crime statutes came about because of the rising significance of identity politics).

71. Beale, *supra* note 41, at 1255.

72. JACOBS & POTTER, *supra* note 27, at 68.

73. See, e.g., Eisenberg, *supra* note 24, at 865 (explaining how United States Code § 245, a precursor to modern hate crime statutes, sought to address the racially motivated violence that state governments had largely ignored).

74. See *Attacks Against Police Are Not Hate Crimes*, ANTI-DEFAMATION LEAGUE (June 7, 2016), <https://www.adl.org/blog/attacks-against-police-are-not-hate-crimes> [<https://perma.cc/U6QF-MFZM>].

75. *Id.*

76. The Federal Bureau of Investigation specifically tracks crimes against police and prepares an annual report on the findings. See, e.g., *FBI Releases 2015 Preliminary Statistics for Law Enforcement Officers Killed in the Line of Duty*, FED. BUREAU OF INVESTIGATION (May 16, 2016), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2015-preliminary-statistics-for-law-enforce>

vigorously<sup>77</sup> through criminal statutes that carry significant penalties. For example, an offender who commits simple battery on a civilian faces a maximum sentence of six months,<sup>78</sup> but an offender who commits the same offense on a police officer will serve a minimum sentence of one year.<sup>79</sup> Though an offender who commits aggravated assault on a civilian faces a maximum sentence of only six months,<sup>80</sup> the same offense committed on a police officer carries a maximum sentence of ten years.<sup>81</sup> Hate crime laws use heightened penalties to demonstrate the gravity of the offense, but Louisiana legislators sufficiently conveyed the seriousness of crimes against police officers well before the existence of the Blue Lives Matter law.<sup>82</sup> The law does not send a new message but simply restates a message that has long been apparent.<sup>83</sup>

Admittedly, however, pre-existing criminal statutes that adequately address offenses against a particular group do not always justify withholding hate crime coverage from that group. Before gender was widely included as a protected characteristic in hate crime statutes, opponents of the inclusion argued that the addition was unnecessary because violence against women was already well covered by existing criminal law provisions.<sup>84</sup> Proponents argued in response that by excluding gender, legislators were implying to victims of gender violence that they did not deserve the same level of protection as victims of ethnic, racial, or religious prejudice crimes.<sup>85</sup> Essentially, the proponents implored legislators to consider not only the communicative impact of adding a characteristic to the statute but also the impact of its exclusion.<sup>86</sup>

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ment-officers-killed-in-the-line-of-duty [<https://perma.cc/EWX7-G9QP>].

77. *Making Attacks Against Police Hate Crimes Goes Too Far*, DENV. POST (July 20, 2016, 5:18 PM), <http://www.denverpost.com/2016/07/20/making-attacks-against-police-hate-crimes-goes-too-far/> (noting that the justice system “comes down extra hard” when a police officer is harmed) [<https://perma.cc/K9Z4-PM3D>].

78. LA. REV. STAT. § 14:35(B) (2018).

79. *Id.* § 14:34.2(B).

80. *Id.* § 14:37.

81. *Id.* § 14:37.2.

82. Perez-Pena, *supra* note 12.

83. *Id.*

84. LAWRENCE, *supra* note 25, at 15 (explaining the argument that the legislature had already addressed violence against women through its laws on domestic violence and sexual assault).

85. *Id.* at 17.

86. JACOBS & POTTER, *supra* note 27, at 133 (explaining that during the debate over adding sexual orientation to bias crime statutes, the director of the National Gay and Lesbian Task Force argued that if sexual orientation was not

The eventual success of those advocating expansion suggests that a redundant law is preferable to exclusion when exclusion would devalue victims. Excluding police officers, however, will not have a significant negative effect.<sup>87</sup> Louisiana legislators clearly demonstrated that police officers are worthy of protection by imposing significantly harsher penalties upon those who harm them.<sup>88</sup> Further, states heavily arm police and give them full authority to protect themselves.<sup>89</sup> Leaving “employment as a police officer” out of the hate crime statute does not negate the message conveyed by existing protections, and including it does not send any new message that would necessitate the addition.<sup>90</sup>

### *B. The Practical Shortcomings*

Even expressive laws should do more than symbolize political recognition of an issue to constitute a proper exercise of the legislative function.<sup>91</sup> Legislators should also consider the law’s practical and measurable goals.<sup>92</sup> If the goal of the Blue Lives Matter law is to protect police officers from attacks, the hate crime statute is not the proper means.<sup>93</sup> “Employment as a police officer” is not the kind of identity trait contemplated by hate crime legislation, and including it threatens the legitimacy of the law by inviting constitutional challenges and overexpansion.<sup>94</sup> Furthermore, the statute is unlikely to be an effective

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included, the law would be sending “a dangerous signal that this kind of crime is less reprehensible”).

87. See DENV. POST, *supra* note 77; see also Arjun Singh Sethi, *Louisiana Draws Blue Line in Wrong Places*, CNN (July 6, 2016, 5:31 PM), <http://www.cnn.com/2016/07/06/opinions/baton-rouge-blue-lives-matter-law-arjun-sethi/> [https://perma.cc/B6CF-E2LF].

88. DENV. POST, *supra* note 77.

89. See Sethi, *supra* note 87 (arguing that unlike minority communities, police officers have always been supported by the law, which grants them immense power); see also Meyerson, *supra* note 67 (quoting civil rights attorney Jonathan Moore’s argument that police officers already “get so much benefit of the doubt from juries and legal immunity”).

90. See Perez-Pena, *supra* note 12.

91. Gellman & Lawrence, *supra* note 35, at 429.

92. *Id.*

93. See discussion *infra* Part III.B.

94. See generally Scott Steiner, *Habitations of Cruelty: The Pitfalls of Expanding Hate Crime Legislation to Include the Homeless*, 45 No. 5 CRIM. L. BULL. 836 (2009) (making a similar argument regarding efforts to expand state hate crime laws to protect homeless people).

source of protection.<sup>95</sup> Its language creates burdens that make it an inefficient choice for prosecuting serious crimes against police but leaves open the possibility of use far beyond its contemplated purpose.<sup>96</sup>

*1. Police Officer Status Does Not Fit into a Hate Crime Statute*

Opponents of hate crime laws often criticize the laws' perceived unfairness.<sup>97</sup> The laws are plagued by the notion that they favor certain groups of people by granting them special protections.<sup>98</sup> The idea of special protection generally is used to oppose the existence of the laws.<sup>99</sup> Representative Harris, however, actually relied on that idea in proposing the Blue Lives Matter law. He explained that because Louisiana's hate crime statute already covered many other groups, it was appropriate to add police and first responders.<sup>100</sup> His words suggest that the expansion was intended to equitably grant police officers the special protections that the hate crime law offered to other groups.<sup>101</sup>

Representative Harris's proposal demonstrates a fundamental misconception about the purpose of hate crime laws. The laws do not seek to single out certain groups of people for protection—instead they aim to protect all people from attacks motivated by prejudice toward enumerated characteristics.<sup>102</sup> The laws achieve equal applicability by including only neutral characteristics inherent in all people: for example, a hate crime law does not explicitly provide harsher penalties for an offender who assaults a homosexual but rather for any offender who assaults any victim on the basis of sexual orientation.<sup>103</sup> To say that such a law protects homosexuals may be a description of the law's effect, but it is not an accurate description of how the law is written.<sup>104</sup> Until the Blue Lives Matter law, Louisiana's hate crime statute did not offer greater protection to any one group.

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

96. See Eisenberg, *supra* note 24, at 898.

97. Steiner, *supra* note 94, at 836.

98. *Id.* at 837.

99. *Id.* at 829 (explaining that California's efforts to expand its hate crime law was met with the argument that "the legislature should not hand-pick a few victims").

100. Greg Hilburn, 'Blue Lives Matter' Bill Expected to Become Law in Louisiana, USA TODAY (May 24, 2016, 7:11 AM), <http://www.usatoday.com/story/news/nation-now/2016/05/23/blue-lives-matter-bill/84821440/> [https://perma.cc/48R2-2FCE].

101. *Id.*

102. Steiner, *supra* note 94, at 837.

103. *Id.*

104. *Id.* at 812.

Police officer status, however, is not universally applicable but singles out a specific subset of the population. By adding this trait to the hate crime statute, legislators have elevated one specific class of victims above the others.<sup>105</sup> They have inadvertently validated the previously inaccurate criticism that hate crime laws fundamentally are unfair.<sup>106</sup>

Opponents of hate crime laws often expand upon the notion of the laws' unfairness to question their constitutionality, alleging that the statutes grant special legal protections to certain groups and deny them to others in violation of the Fourteenth Amendment's guarantee of equal protection of the laws.<sup>107</sup> Several state supreme courts have relied on the neutrality of the laws to reject this argument and uphold their constitutionality.<sup>108</sup> For example, in *State v. Ladue*, the Vermont Supreme Court dismissed the argument that Vermont's hate crime statute favors classes of persons based on race, sex, orientation, and other characteristics.<sup>109</sup> The court explained that the statute does not treat similarly situated victims differently but protects all victims from crimes motivated by hate, "whether this hate is directed at minority or majority members of a class."<sup>110</sup> Similarly, in *State v. Talley*, the Washington Supreme Court upheld the constitutionality of Washington's hate crime statute because its facial neutrality made it applicable to any defendant who targeted any victim on the basis of any of the listed characteristics.<sup>111</sup>

These decisions suggest that hate crime laws draw their legitimacy from their neutrality.<sup>112</sup> Laws that are universally applicable avoid running afoul of the Equal Protection Clause by providing the benefit of protection from prejudice to all citizens rather than favoring a single class of persons.<sup>113</sup> By including police officer status, the Legislature has created a law that grants special protection to one group while excluding other

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105. See *id.* (explaining that until the proposed addition of homelessness as a protected characteristic, not a single special group was created by hate crime laws in the United States).

106. See *id.* (arguing that expansion of a hate crime law to cover homelessness gives traction to criticism).

107. *Id.* at 836; see also U.S. CONST. amend. XIV.

108. See Steiner, *supra* note 94, at 812.

109. *State v. Ladue*, 631 A.2d 236 (Vt. 1993).

110. *Id.* at 237.

111. *State v. Talley*, 858 P.2d 217, 229–30 (Wash. 1993).

112. Steiner, *supra* note 94, at 820 (arguing that the neutrality of hate crime laws "is the root of their legitimacy").

113. *Id.*

groups that may be similarly victimized because of their occupations.<sup>114</sup> A challenge to the law under the Fourteenth Amendment is no longer without merit. The Blue Lives Matter law thus threatens the legitimacy of Louisiana's hate crime statute by exposing it to constitutional attacks that most likely would have failed before the amendment.<sup>115</sup>

Furthermore, adding a non-neutral characteristic may lead to over-expansion of the statute. Hate crime laws are undergoing a trend of expansion.<sup>116</sup> Although all existing state statutes include race, ethnicity, and religion, increasing advocacy efforts by special interest groups have led some states to include additional characteristics like age, political affiliation, and personal appearance.<sup>117</sup> By lobbying for inclusion of certain traits, the special interest groups have created contentious politics about which characteristics should be covered, leading other advocacy groups to compete for comparative symbolic status for their own group.<sup>118</sup>

Adding a non-neutral characteristic that specifically references a single group of people invites other advocacy groups to demand the same treatment.<sup>119</sup> Legislators will be left with the choice of denying some of these requests while granting others, creating a "slippery slope of legal favoritism,"<sup>120</sup> or avoiding the conflict by unilaterally accepting all requests. The first option unnecessarily brings contentious politics into the criminal law.<sup>121</sup> The second threatens the utility of the laws. Expansion creates the misconception that violent acts are treated seriously only when they are designated as hate crimes and suggests that inclusion in the list of categories is a symbol of respect.<sup>122</sup> This flawed understanding of the purpose of hate crime laws perpetuates the cycle of over-expansion.<sup>123</sup>

The existence of hate crime laws is justified by the principle that perpetrators who commit crimes motivated by certain kinds of bias are

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114. See Sethi, *supra* note 87 (explaining that if police officers are added, there is no reason not to add lawyers, doctors, or public servants).

115. Steiner, *supra* note 94, at 837. ("Only if the law protected only homosexuals, blacks and other minorities, or Jews and Wiccans for example, would the equal protection argument have any merit.").

116. Meli, *supra* note 38, at 927.

117. Eisenberg, *supra* note 24, at 867.

118. JACOBS & POTTER, *supra* note 27, at 21.

119. Steiner, *supra* note 94, at 845.

120. *Id.* at 846.

121. Beale, *supra* note 41, at 1269 (noting that symbolic or expressive criminal legislation presents the special danger of undermining the efficiency of the criminal law).

122. See L.A. TIMES, *supra* note 18.

123. *Id.* (explaining that recent expansion of hate crime laws "creates the temptation to expand the coverage further to encompass 'our' group").



more culpable than perpetrators who commit the same crimes for non-biased reasons.<sup>124</sup> If the list of covered “biases” continues to expand, virtually any crime in which the offender specifically chooses his victim on any basis could be punishable as a bias crime. Laws aimed at targeting a specific kind of crime rooted in prejudice would become general penalty enhancers, eliminating their meaning entirely.<sup>125</sup>

## *2. The Blue Lives Matter Law Will Not Be Used Effectively*

Even if the hate crime statute was the proper vehicle to bolster police protection, it would not be effective. The Blue Lives Matter law carries burdens and risks that make it an inefficient tool for prosecuting the majority of crimes against police. Prosecutors likely will avoid the complications of the Blue Lives Matter law and rely instead on previously existing criminal statutes.<sup>126</sup> In some cases, the Blue Lives Matter law may be used disproportionately against protesters, thereby discouraging citizens from speaking out against perceived injustices.<sup>127</sup> Because an expressive law’s communicative impact is dependent upon how the law is enforced, either result will have negative consequences on the public and on hate crime law as a whole.<sup>128</sup>

### *a. Potential Underuse*

Prosecutorial charging decisions generally are motivated by the desire to process cases efficiently and promote fairness and justice.<sup>129</sup> A prosecutor’s desire to seek justice for a hate crime victim often conflicts with the desire to prosecute efficiently and effectively.<sup>130</sup> When the difficulty of meeting the burden imposed by hate crime charges outweighs the possible benefit of doing so, prosecutors have little incentive to use hate crime laws.<sup>131</sup>

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124. JACOBS & POTTER, *supra* note 27, at 133; *see also* Ginsburg, *supra* note 35, at 1631 (arguing that a crime committed for a practical reason does not “generate the same level of revulsion as a crime committed out of” hateful bias).

125. JACOBS & POTTER, *supra* note 27, at 133 (arguing that exclusion of certain traits gives the laws meaning).

126. *See* discussion *infra* Part II.B.2.a.

127. *See* discussion *infra* Part II.B.2.b.

128. Eisenberg, *supra* note 24, at 858.

129. *Id.* at 886.

130. *Id.* at 887.

131. *Id.*

The burden is proving that the offender selected the victim because of the victim's employment as a law enforcement officer.<sup>132</sup> In the majority of crimes against police, motives are not obvious or singular.<sup>133</sup> Prosecutors who pursue hate crime charges are left to separate the discriminatory motive from other, often comingling motives<sup>134</sup> and prove the discriminatory motive exists, an extremely difficult task absent a rare self-incriminating statement from the offender.<sup>135</sup> Additionally, hate crime charges carry the risk of complicating jury selection<sup>136</sup> by relying on laws affiliated with divisive political and social issues.<sup>137</sup> Prosecutors often fear that hate crime charges will make certain jurors more hesitant to convict or, conversely, more hostile toward defendants accused of certain biases.<sup>138</sup> Charges under the controversial<sup>139</sup> Blue Lives Matter law implicate a debate that has become increasingly partisan, often sharply

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132. LA. REV. STAT. § 14:107.2 (2018).

133. Max Kutner, *Who Kills Police Officers?*, NEWSWEEK (Mar. 21, 2015, 11:50 AM), <http://www.newsweek.com/who-kills-police-officers-315701> (explaining that most often, police killings occur impulsively when officers attempt to arrest a suspect for a separate offense) [<https://perma.cc/AGZ2-9943>].

134. Catherine Pugh, *What Do You Get When You Add Megan Williams to Matthew Shepard and Victim Offender Mediation? A Hate Crime Law That Prosecutors Will Actually Want to Use*, 45 CAL. W. L. REV. 179, 194 (2008) (explaining that crimes generally have multiple motives, which contributes to complexity); Eisenberg, *supra* note 24, at 892 (arguing that hate crime cases are difficult if there is any other motive).

135. Pugh, *supra* note 134, at 191 (“[S]elf-incrimination is such a critical source of motive evidence that prosecutors generally avoid a hate crime charge in its absence.”). *But see* Eversley et al., *supra* note 1 (exemplifying the rare case in which the offender supplies his own motive with a self-incriminating statement).

136. Eisenberg, *supra* note 24, at 893–94.

137. *Id.*

138. *Id.* at 893–94, 908 (“[I]t may not matter whether juries are actually capable of maintaining objectivity in practice; so long as prosecutors continue to believe that hate crime charges will have adverse effects on the jury pool, this belief alone may be enough to make it unlikely that prosecutors will include the charges . . .”).

139. *See, e.g.*, Hilburn, *supra* note 100 (quoting Ejike Obineme of the New Orleans chapter of the Black Youth Project 100, “Including ‘police’ as a protected class in hate crime legislation would serve to provide more protection to an institution that is statistically proven to be racist in action, policy and impact.”). *But see, e.g.*, Kevin Conlon, *Louisiana Governor Signs ‘Blue Lives Matter’ Bill*, CNN (May 27, 2016, 11:22 AM), <http://www.cnn.com/2016/05/26/us/louisiana-blue-lives-matter-law/> (quoting Louisiana police superintendent expressing support for the bill) [<https://perma.cc/Q36Z-CSEE>].

divided along racial and political lines.<sup>140</sup> A prosecutor that brings charges under the law risks dividing his jury and jeopardizing his chance of a conviction.<sup>141</sup>

In relation to the significant burden imposed by hate crime charges, the benefit is minimal. Most crimes against police already carry harsh penalties that would be only incrementally increased by hate crime charges.<sup>142</sup> It is unlikely that many prosecutors would willingly take on the burden of proving motive and the risk of dividing their juries to pursue hate crime charges that ultimately would have little impact on the offender's sentence.<sup>143</sup> Instead, the law is likely to be underused by prosecutors who will choose to rely on previously existing criminal statutes.<sup>144</sup> It may seem that underuse of the Blue Lives Matter law renders it ineffective but causes no real harm, but underuse will actually have grave effects on the expressive message of the law.<sup>145</sup>

The more prominent the expressive element of a law is, the more significant it is to the public when the law is not used, despite seemingly

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140. Dan Balz & Scott Clement, *On Racial Issues, America is Divided Both Black and White and Red and Blue*, WASH. POST (Dec. 27, 2014), [https://www.washingtonpost.com/politics/on-racial-issues-america-is-divided-both-black-and-white-and-red-and-blue/2014/12/26/3d2964c8-8d12-11e4-a085-34e9b9f09a58\\_story.html](https://www.washingtonpost.com/politics/on-racial-issues-america-is-divided-both-black-and-white-and-red-and-blue/2014/12/26/3d2964c8-8d12-11e4-a085-34e9b9f09a58_story.html) (noting that African-American and Causasian Americans have vastly different perceptions of the police's role in society, and within the Causasian community, the division is shaped by partisan identification and ideology) [<https://perma.cc/6NSW-CEHL>].

141. Pugh, *supra* note 134, at 194 (suggesting that prosecutors are mindful of dividing their juries with hate crime charges).

142. For example, an offender who fatally shot a police officer could be charged with first-degree murder. To succeed on this charge, the prosecutor would have to prove that the offender killed the police officer with specific intent to kill or inflict great bodily harm on a police officer engaged in the performance of his lawful duties. *See* LA. REV. STAT. § 14:30(2) (2018). A hate crime charge could increase the penalty by a maximum of only five years. *Id.* § 14:107.2. This increase essentially would be meaningless when added to a sentence of death or life imprisonment. *See* § 14:30(2) (providing that first-degree murder carries a sentence of life imprisonment or death).

143. Eisenberg, *supra* note 24, at 887–89 (explaining that when an added hate crime charge increases the penalty only incrementally, or when prosecutors feel that an offender's sentence is sufficient without a hate crime enhancement, they may not consider it worthwhile to expend additional resources pursuing hate crime convictions).

144. *Id.* at 890.

145. *Id.* at 904.

fitting the facts of a case.<sup>146</sup> The expressive Blue Lives Matter law<sup>147</sup> responded to several highly publicized violent attacks characterized by clear anti-police motives.<sup>148</sup> By enacting the law, the Legislature sought to demonstrate that anti-police crimes are similar to crimes motivated by racial or religious prejudice in that they are particularly abhorrent and warrant the most severe punishment.<sup>149</sup> Enactment alone, however, is not enough to serve an expressive law's purpose.<sup>150</sup> For a law to convey its intended message fully, it must be enforced.<sup>151</sup>

Failure to enforce the law not only dilutes its intended message but may directly contradict it.<sup>152</sup> A prosecutor's decision to avoid hate crime charges in a case with seemingly prejudicial elements often results in public outrage.<sup>153</sup> The public, particularly members of the group who share the protected characteristic with the victim, question the purpose of the

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146. *Id.*; see also Pugh, *supra* note 134, at 196 ("In many cases, the victim and his or her class feel underserved when a prosecutor bypasses a hate charge in lieu of a more traditional offense.").

147. See, e.g., John Newsome & Carma Hassan, 'Blue Lives Matter' Bill Set for Louisiana Governor's Signature, CNN (May 20, 2016), <http://www.cnn.com/2016/05/20/us/louisiana-blue-lives-matter-legislation/> (quoting a Blue Lives Matter spokesman's suggestion that the law "is important because symbolically it advises that there is value to the lives of police officers") [<https://perma.cc/3V9G-U2TF>].

148. Crisp, *supra* note 9.

149. See Newsome & Hassan, *supra* note 147 (quoting Representative Harris's explanation that because crimes targeting police are "like a hate crime," the crimes need to be covered by Louisiana's "extensive hate crime statute").

150. Eisenberg, *supra* note 24, at 864 ("[W]hen enacting expressive legislation, legislators should consider carefully what messages they may be sending both ex ante to potential victims and defendants upon passage of laws and ex post based on predictions of how prosecutors will use these laws in practice.").

151. *Id.* at 899.

152. *Id.*; see also Beale, *supra* note 41, at 1267 (questioning how those persons to whom the message is addressed would react if they knew the statute would be enforced seldomly).

153. See, e.g., Ned Parker & Mimi Dwyer, *Attacks Against LGBT Community Rarely Prosecuted as Hate Crimes*, REUTERS (June 28, 2016, 4:21 PM), <http://www.reuters.com/investigates/special-report/florida-shooting-hate-crimes/> (criticizing decision not to charge killer of Dionte Greene, a gay man, with a hate crime) [<https://perma.cc/KQG2-P8SC>]; Scott Bronstein & Drew Griffin, *Victim's Son: 'They Ran Him Over Because He Was Black'*, CNN (Jan. 17, 2013, 3:25 PM), <http://www.cnn.com/2013/01/17/us/mississippi-hit-and-run/index.html> (questioning the lack of hate crime charges in hit and run of a black man in Mississippi) [<https://perma.cc/U3WH-788M>].

law and the sincerity of those who enacted it.<sup>154</sup> Each time a prosecutor fails to bring charges under the Blue Lives Matter law when it seems to apply, proponents of the law are left wondering whether the government ever truly intended to protect police from bias-motivated attacks.<sup>155</sup> Ultimately, an unenforced law may send the message to both law enforcement and the public that anti-police crimes are not as serious or prevalent as legislators suggested upon enactment.<sup>156</sup> The value of an expressive hate crime law comes from its message, and a message that is undercut or contradicted by the law's application renders the law ineffective and potentially harmful.<sup>157</sup>

*b. Potential Misuse*

Opponents of the Blue Lives Matter law are concerned that the law will be used to punish citizens who protest police activity.<sup>158</sup> The Blue Lives Matter law is an impractical tool to prosecute most crimes against police,<sup>159</sup> but it has the potential to be used in situations in which the prosecutorial burden of proving motive is easier to meet and the relative impact on the offender's sentence is more significant.<sup>160</sup> Criminal offenses stemming from protests fall into this category of offenses. For example, a protester who demonstrates at a police station<sup>161</sup> can be charged with

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154. JACOBS & POTTER, *supra* note 27, at 138 (noting that when hate crime charges are not applied, “[S]ome journalists, advocacy organizations, politicians, and individuals charge the police and rival commentators, with hypocrisy, bias, double standards, and pandering to one group or another.”).

155. See Eisenberg, *supra* note 24, at 904.

156. *Id.* at 899–900.

157. *Id.*

158. See, e.g., Sethi, *supra* note 87 (“Black Lives Matter activists may find themselves on the receiving end of a particularly perverse application of the new Louisiana law. A protester who raises his elbows when confronted by a cop could be charged with a hate crime and assault.”); Marshaun D. Simon, ‘Blue Lives Matter’: Louisiana Hate Crimes Bill to Protect First Responders, NBC NEWS (May 23, 2016, 10:03 AM), <http://www.nbcnews.com/news/nbcblk/blue-lives-matter-louisiana-hate-crimes-bill-protect-first-responders-n576246> (quoting a Louisiana public defender predicting that the law could have negative repercussions for protesters) [<https://perma.cc/B46Q-JRTC>].

159. See discussion *supra* Part II.B.2.a (explaining that the burden of proving anti-police motive often outweighs the minimal effect that successful hate crime charges have on penalties that are already severe).

160. Eisenberg, *supra* note 24, at 887.

161. See, e.g., Elizabeth Rosner & Daniel Prendergast, *10 Protesters Arrested Outside Police Station*, N.Y. POST (July 21, 2016, 2:54 PM), <http://nypost.com>

criminal trespass,<sup>162</sup> an offense that carries relatively light penalties: a fine between \$100 and \$500, imprisonment for a maximum of 30 days, or both.<sup>163</sup> A hate crime charge could increase the penalties significantly, adding fines of up to \$500 and jail time of up to six months.<sup>164</sup> The potential impact on penalties makes pursuing hate crime charges more beneficial to the prosecutor, and his burden of proving motive is much less challenging in these instances. The protesters' chants<sup>165</sup> could support an allegation of anti-police motive—in many cases, the defendant's use of racial epithets or slogans before, during, or after the crime has served as circumstantial evidence of bias motive.<sup>166</sup>

Like underuse, misuse of the statute against protesters would have a detrimental impact on the message of the law. Critics of the Blue Lives Matter law have alleged that the true motive of the law is not to protect police from violence but to unilaterally reject calls for police reform and accountability.<sup>167</sup> Use of the statute to punish protesters would validate

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/2016/07/21/10-protesters-arrested-outside-police-station/ [https://perma.cc/GZ59-XMKZ].

162. LA. REV. STAT. § 14:63 (2018) (defining “criminal trespass” as entering a structure or movable owned by another without express, legal, or implied authorization).

163. *Id.*

164. *See id.* § 14:107.2 (naming criminal trespass as an underlying offense triggering hate crime charges); *see also* Simon, *supra* note 158 (“Any protest in a police station could be criminal trespass, but now it could also be a hate crime.”).

165. ‘Pigs in a Blanket’ Chant at Minnesota Fair Riles Police, CBS (Aug. 31, 2015, 6:03 PM), <http://www.cbsnews.com/news/pigs-in-a-blanket-chant-at-minnesota-fair-riles-police/> (describing protesters chanting “pigs in a blanket, fry ‘em like bacon”) [https://perma.cc/6AVV-P6LA]; Paighen Harkins, *Tulsa Black Lives Matter Marchers Call for Justice, Peace, ‘No Racist Police’*, TULSA WORLD (July 13, 2016), [http://www.tulsaworld.com/news/local/tulsa-black-lives-matter-marchers-call-for-justice-peace-no/article\\_1e3ae192-e3a9-5cd8-aa90-1d56c4ca8ced.html](http://www.tulsaworld.com/news/local/tulsa-black-lives-matter-marchers-call-for-justice-peace-no/article_1e3ae192-e3a9-5cd8-aa90-1d56c4ca8ced.html) (describing protest chants of “[n]o justice, no peace, no racist police” and “they say get back, we say fight back”) [https://perma.cc/595P-E62W].

166. ZACHARY WOLFE, HATE CRIMES LAW § 11:14 (June 2016). *See, e.g.*, *State v. Hendrix*, 838 P.2d 566 (Or. 1992) (defendant’s accomplice’s use of racial slurs and racist slogans supported the conviction of ethnic intimidation); *Grimm v. Churchill*, 932 F.2d 674 (7th Cir. 1991) (plaintiff’s use of racial slurs supported defendant police officer’s arresting him for violating Illinois’s ethnic intimidation statute).

167. *See, e.g.*, Sethi, *supra* note 87 (“Making police officers a protected class is just the latest effort to avoid police accountability.”); *see also* Kami N. Chavis, *Hate Crime Laws to Protect Police Are Misguided*, JURIST (July 13, 2016, 9:19 AM), <http://www.jurist.org/forum/2016/07/kami-chavis-hate-crime.php> (“[T]he Louisiana law . . . do[es] not appear to be based on legitimate goals to protect police, but many critics see them as thinly veiled backlashes to recent calls for police reform.”) [https://perma.cc/56BR-MY3M].

these allegations and further deteriorate the relationship between police officers and communities.<sup>168</sup> Such use would also be a direct contradiction to the understood purpose of hate crime laws. The laws promote justice and equality by serving as “societal condemnation[s] of racism, religious intolerance, and other forms of bigotry.”<sup>169</sup> That Louisiana’s hate crime statute can now be used to penalize a person protesting perceived bigotry and inequality in the criminal justice system is counterintuitive. It sends a message to the public that by alleging the kind of prejudice that the statute intends to prevent, a person commits a punishable act of prejudice.<sup>170</sup> It also works to dissuade citizens from exercising their constitutionally protected right to protest, thus discouraging active participation in the political realm.<sup>171</sup>

A New Jersey legislator proposing a Blue Lives Matter bill in his own state suggested that his bill would be the proper measure to “address the polarization in this country.”<sup>172</sup> Louisiana has demonstrated that enacting a Blue Lives Matter law does little to address polarization,<sup>173</sup> and practical application of the law is likely to intensify it. Underuse suggests that legislators had no sincere intentions to protect law enforcement officers from bias-motivated attacks and frustrates proponents and advocacy groups who believe that law enforcement is entitled to the full benefit of

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168. Chavis, *supra* note 167.

169. LAWRENCE, *supra* note 25, at 167.

170. See Eisenberg, *supra* note 24, at 899 (arguing that application of hate crime charges to non-archetypal hate crimes dilutes the message of combating intergroup hatred); see also Yanan Wang, *Should Attacking Police Officers Become a Hate Crime? A Minnesota City Says Yes*, WASH. POST (Oct. 8, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/10/08/should-attacking-police-officers-become-a-hate-crime-a-minnesota-city-says-yes/> (“Making [police] the first profession to receive a penalty enhancement under hate crimes legislation would ‘paradoxically, give legal protection to a group that is notorious for perpetrating violence against the very people that hate crime laws were originally intended to protect.’”) [<https://perma.cc/B5Y2-9M4S>].

171. Elahe Izadi, *Louisiana Is the First State to Offer Hate Crime Protections to Police Officers*, WASH. POST (May 26, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/05/26/louisianas-blue-lives-matter-bill-just-became-law/?utm\\_term=.3c66a379ae67](https://www.washingtonpost.com/news/post-nation/wp/2016/05/26/louisianas-blue-lives-matter-bill-just-became-law/?utm_term=.3c66a379ae67) [<https://perma.cc/HB79-7P2G>].

172. Rebecca Beitsch, *Is Killing a Police Officer a Hate Crime?*, PBS NEWS (Aug. 3, 2016), <http://www.pbs.org/newshour/rundown/killing-police-officer-hate-crime/> (quoting New Jersey assemblyman Ronald Dancer) [<https://perma.cc/YE7M-XZQZ>].

173. See *supra* note 139 and accompanying text (demonstrating the controversy of the law).

the legislation.<sup>174</sup> Misuse propagates the incorrect idea that the law's stated purpose of police protection actually refers to protecting police from criticism and accountability.<sup>175</sup> Either application breeds resentment and increases conflict between social groups.<sup>176</sup> The Legislature can avoid these consequences either by repealing the law or extensively modifying it.

### III. RECOMMENDED SOLUTIONS

Police officers serve a vital purpose in democratic society by enforcing and upholding the law. The state has a special interest in protecting "[those] public servants who regularly must risk their lives in order to guard the safety of other persons and property."<sup>177</sup> It is wrong, however, to distort Louisiana's hate crime statute to serve a purpose that is better accomplished through other means.<sup>178</sup> The Blue Lives Matter law should be repealed or, at the very least, revised.

#### *A. Revising the Law: An Imperfect Solution*

Proponents of the law may seek to address its problems through revision. An adequate revision requires several changes—each of which presents new problems for the statute. First, legislators must replace "status as a law enforcement officer" with a generalized characteristic, such as occupation. Because occupation is a neutral human characteristic, the addition would properly protect all people from crimes motivated by occupation-based bias rather than creating a special group.<sup>179</sup> Although this modification is necessary to a valid revision, it is flawed in its redundancy. Louisiana's hate crime statute has always included "actual or perceived membership or service in, or employment with, an

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174. Eisenberg, *supra* note 24, at 899.

175. Kelly Riddell, *Black Lives Matter and Blue Lives Matter at Odds*, WASH. TIMES (July 29, 2016), <http://www.washingtontimes.com/news/2016/jul/29/black-lives-matter-and-blue-lives-matter-at-odds/> (discussing difficulty of supporting both Black Lives Matter protests and Blue Lives Matter legislation in modern debate over policing) [<https://perma.cc/HC9K-RFU2>].

176. Chavis, *supra* note 167.

177. *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977).

178. Steiner, *supra* note 94, at 843 ("It is wrong, however, to hijack an effective and intellectually honest legal tool and appropriate it to one's own interest group.").

179. *See id.* at 812.



organization.”<sup>180</sup> “Organization” is defined broadly,<sup>181</sup> covering nearly any conceivable occupation, including police officers.<sup>182</sup> A generalized occupation characteristic that simply restates the pre-existing law adds no protection and serves no purpose that could not be equally served by repealing the Blue Lives Matter law entirely.<sup>183</sup>

Furthermore, even a neutral characteristic like occupation does not necessarily belong in a hate crime statute. To properly combat crimes committed against people because of fundamental features of their identity,<sup>184</sup> the laws should include only identity traits, which are those traits that yield identifiable groups with some shared self-consciousness or collective identity.<sup>185</sup> Not all identity traits have a place in hate crime laws, however.<sup>186</sup> Scholars suggest adding only those identity traits that implicate societal fissure lines, or “divisions that run deep in the social history of a culture.”<sup>187</sup> The societal fissure line analysis is based on the principle that hate crime statutes are not meant to target personal prejudice; rather, they should target prejudice with a social context that is recognizable in society.<sup>188</sup>

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180. LA. REV. STAT. § 14:107.2 (2018).

181. § 14:107.2(D) (defining organization as “[a]ny lawful corporation, trust, company, partnership, association, foundation, or fund”; “[a]ny lawful group of persons, whether or not incorporated, banded together for joint action on any subject or subjects”; or “[a]ny entity or unit of federal, state, or local government”).

182. See § 14:107.2; see also Perez-Pena, *supra* note 12 (quoting Representative Harris, who explained that the Blue Lives Matter bill simply made explicit what was already implied by the statute).

183. See Perez-Pena, *supra* note 12.

184. See discussion *supra* Part I.B.

185. LAWRENCE, *supra* note 25, at 12; see also Jorn, *supra* note 49, at 324 (explaining that an assortment of people constitutes a group when some portion of a society views it as “an identifiable group of persons who, to some degree, maintain a collective identity,” or “common interests, experiences, and solidarity”).

186. See LAWRENCE, *supra* note 25, at 12 (explaining that the list of traits that could qualify as identity characteristics is over-inclusive and should be narrowed down through further analysis).

187. *Id.* at 11–12; see also L.A. TIMES, *supra* note 18 (arguing that a hate crime, as distinguished from an ordinary crime, “is rooted in a pervasive and especially pernicious prejudice that infects society at large.”).

188. *Id.* Lawrence distinguishes between these two types of prejudice with two hypothetical examples. In the first scenario, Person A decides before meeting Person B that he dislikes B because B is Jewish, and A believes that Jewish people are inherently dishonest. In the second scenario, Person C decides before meeting Person D that he dislikes D because D has blue eyes, and C believes that people with blue eyes are untrustworthy. C’s prejudice is not group antipathy with a social context. There may be other individuals that share C’s perception of blue-eyed

Occupation may constitute an identity trait,<sup>189</sup> but it does not implicate a societal fissure line comparable to race or religion.<sup>190</sup> Additionally, a relatively recent series of high-profile murders of police officers does not create a societal fissure.<sup>191</sup> The idea that society is embroiled in a “war on cops” originated in 2014 because of “low-frequency, high impact events” like the ambush style murders of Officers Ramos and Liu.<sup>192</sup> It remains unsupported by convincing evidence. A study conducted by the FBI found that 51 officers were killed in the line of duty in 2014,<sup>193</sup> a significant increase from the 27 officers killed in 2013.<sup>194</sup> The increase is less alarming, however, when considered in context. The 2013 number was a

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people, but there is no cultural history of eye color discrimination and no underlying ideology or worldview connecting those who discriminate on that basis. *Id.*; see also JACOBS & POTTER, *supra* note 27, at 146 (suggesting that hate crime laws target antipathy with a social context by requiring a showing that the offender’s conduct was linked to furthering the ideals and goals of a recognized hate group).

189. Much of the dispute over the Blue Lives Matter law has centered around whether a characteristic like profession actually is an identity trait appropriate for inclusion in a hate crime law. See, e.g., DENV. POST, *supra* note 77 (“[B]eing a police officer is not an innate part of a person’s identity. You’re not born a police officer.”); see also, e.g., Conlon, *supra* note 139 (quoting Allison Padilla-Goodman, regional director of the Anti-Defamation League, arguing that “working in a profession” is not the kind of “personal characteristic” to be included in hate crime laws) [<https://perma.cc/U996-DNXN>].

190. See LAWRENCE, *supra* note 25, at 13 (suggesting that determining where societal fissure lines fall requires beginning with classic examples like race or religion and looking for commonalities between the experiences of those groups and the experiences of the proposed group); see also Gellman & Lawrence, *supra* note 35, at 429 (suggesting that determining which characteristics should be covered by hate crime laws is contextual and requires social evaluation of societal fissure lines).

191. See Steiner, *supra* note 94, at 15 (arguing that several highly publicized murders of homeless people do not justify including homelessness in the hate crime statute).

192. See *supra* Introduction; see also Perez-Pena, *supra* note 12 (arguing that low-frequency, high-impact events drive perception).

193. FED. BUREAU OF INVESTIGATION, *supra* note 76 (showing that 41 officers were killed in 2015 in comparison to 51 in 2014).

194. See *FBI Releases 2012 Statistics on Law Enforcement Officers Killed and Assaulted*, FED. BUREAU OF INVESTIGATION (Oct. 28, 2013), <https://archives.fbi.gov/archives/news/pressrel/press-releases/fbi-releases-2012-statistics-on-law-enforcement-officers-killed-and-assaulted> (showing that 27 officers were killed in the line of duty in 2013, a decrease from 48 in 2012) [<https://perma.cc/YEB7-LJKV>].

historic low.<sup>195</sup> The 2014 figure was only slightly higher than 2012,<sup>196</sup> and it was followed by a 20% decrease in 2015.<sup>197</sup> 2016 numbers reveal another increase.<sup>198</sup> Sixty-six officers were killed in the line of duty,<sup>199</sup> a number bolstered<sup>200</sup> by police officer shootings with multiple fatalities in Dallas<sup>201</sup> and Baton Rouge.<sup>202</sup> These numbers, however, do not presently signify a developing trend but instead an unfortunate anomaly.<sup>203</sup> The

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195. *Id.*; see also Radley Balko, *Once Again, There Is No War on Cops*, WASH. POST (Sept. 10, 2015), [https://www.washingtonpost.com/news/the-watch/wp/2015/09/10/once-again-there-is-no-war-on-cops-and-those-who-claim-otherwise-are-playing-a-dangerous-game/?utm\\_term=.5ae162841516](https://www.washingtonpost.com/news/the-watch/wp/2015/09/10/once-again-there-is-no-war-on-cops-and-those-who-claim-otherwise-are-playing-a-dangerous-game/?utm_term=.5ae162841516) [<https://perma.cc/S79R-K5RH>].

196. See *supra* notes 76, 194.

197. See FED. BUREAU OF INVESTIGATION, *supra* note 76 (“Preliminary statistics released today by the FBI show that 41 law enforcement officers were feloniously killed in the line of duty in 2015. This is a decrease of almost 20 percent when compared with the 51 officers killed in 2014.”).

198. FED. BUREAU OF INVESTIGATION, *FBI Releases 2016 Statistics for Law Enforcement Officers Killed and Assaulted in the Line of Duty* (Oct. 16, 2017), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-statistics-for-law-enforcement-officers-killed-and-assaulted-in-the-line-of-duty> [<https://perma.cc/K7Y4-SCUQ>].

199. *Id.*

200. Jason Hanna & Steve Visser, *Fallen Officers: 38 Shot Dead in the Line of Duty in 2016*, CNN (Aug. 26, 2016, 3:14 PM) (citing *Preliminary 2016 Law Enforcement Officer Fatalities*, NAT’L LAW ENFORCEMENT OFFICERS MEMORIAL FUND, <http://www.nleomf.org/facts/officer-fatalities-data/> (last visited Oct. 10, 2016)) [<https://perma.cc/6JKM-KMV4>], <http://www.cnn.com/2016/08/14/us/police-officers-fatal-shooting-line-duty-nationwide/> (explaining that 41 officers were murdered between January 1 and September 19, 2016 in comparison to 28 during the same period of 2015) [<https://perma.cc/X8RC-E7FS>].

201. In July 2016, a sniper opened fire on Dallas police officers during a police brutality protest, killing five officers and wounding seven more. See Manny Fernandez, Richard Perez-Pena & Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), <http://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html> [<https://perma.cc/5CY7-FRDD>].

202. In July 2016, a gunman in Baton Rouge fired at officers responding to an emergency call, leaving three dead and three others wounded. See Amy Ellis Nutt, Matt Zapposky & Mark Berman, *3 Police Officers Killed, 3 Wounded in Baton Rouge; Gunman Dead*, WASH. POST (July 18, 2016), [https://www.washingtonpost.com/politics/3-police-officers-killed-3-wounded-in-baton-rouge/2016/07/17/3734a3a6-4c2f-11e6-aa14-e0c1087f7583\\_story.html](https://www.washingtonpost.com/politics/3-police-officers-killed-3-wounded-in-baton-rouge/2016/07/17/3734a3a6-4c2f-11e6-aa14-e0c1087f7583_story.html) [<https://perma.cc/T9AZ-44XE>].

203. Max Lewontin, *Are Police Deaths Really on the Rise? It Depends on How You Look at It*, CHRISTIAN SCI. MONITOR (July 28, 2016), <http://www.csmonitor.com/USA/Justice/2016/0728/Are-police-deaths-really-on-the-rise-It-depends-on-how-you-look-at-it> [<https://perma.cc/W9TS-BFQM>].

number of officer fatalities in 2016 still fell below the average of the previous ten years.<sup>204</sup> To classify the relatively recent wave of conflict as a societal fissure line worthy of legislative intervention is premature.<sup>205</sup> Although it may seem that early intervention is preferable to inaction, premature legislation is not without consequence; it signifies acceptance of the “war on cops” narrative and ultimately strengthens the media’s portrayal of an ever-widening divide between citizens and police.<sup>206</sup> Enactment of the law therefore inadvertently intensifies social divisions and may contribute to a self-fulfilling prophecy.<sup>207</sup> Legislators can avoid these social consequences by exercising restraint and extending hate crime coverage only to those identity traits that clearly implicate societal fissure lines.<sup>208</sup>

The societal fissure line limitation will also help legislators avoid furthering the current trend of over-expansion that threatens the utility of hate crime laws.<sup>209</sup> Other states have chosen not to use such limitations and

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204. Camila Domonoske, *Number of Police Officers Killed by Firearms Rose in 2016, Study Finds*, NPR (Dec. 30, 2016), <https://www.npr.org/sections/thetwo-way/2016/12/30/507536360/number-of-police-officers-killed-by-firearms-rose-in-2016-study-finds> [<https://perma.cc/WHK2-BDNF>].

205. See Wang, *supra* note 170 (comparing the short-term history of crimes against police to the history of hate crimes against minorities and suggesting that the ambush murders of police officers are too recent to be considered anything other than a short-term trend); see also Kate Wheeling, *Are Attacks on Police Hate Crimes?*, PAC. STANDARD (May 25, 2016), <https://psmag.com/are-attacks-on-police-hate-crimes-7b9db6fabdee#.2pogcit2r> (“[D]espite the ire toward police in America today, the persecution of police is hardly on par with the persecution that other protected groups have faced.”) [<https://perma.cc/VV5V-Q4ZN>]; Derrick Clifton, *Killing a Cop Is a Horrible Crime—But It’s Not a Hate Crime*, CHI. READER (July 8, 2016, 5:46 PM), <http://www.chicagoreader.com/Bleader/archives/2016/07/08/killing-a-cop-is-a-horrible-crimebut-its-not-a-hate-crime> (“There’s no comparison between generations of race-based dehumanization and the many ebbs and flows of public scrutiny or animosity towards police. There’s no parallel between the occupational hazards faced by police and the lived realities of protected groups experiencing targeted discrimination and violent crime based on their immutable identities.”) [<https://perma.cc/5SSM-V7TG>].

206. See JACOBS & POTTER, *supra* note 27, at 64 (arguing that the uncritical acceptance of a hate crime epidemic may have negative sociopolitical ramifications).

207. *Id.*

208. See Eisenberg, *supra* note 24, at 908 (arguing that legislators should limit the addition of new protected categories).

209. *Id.*; see also discussion *supra* Part II.B.1 (discussing over-expansion of hate crime laws).

have added traits like homelessness<sup>210</sup> or political affiliation<sup>211</sup> to their respective hate crime statutes. If Louisiana chooses to follow this approach, however, there may be unfortunate consequences on the statute as a whole. The societal fissure line justification acts as a bar to over-expansion of hate crime statutes by giving legislators a logical method to determine which traits should be included.<sup>212</sup> Without the societal fissure line analysis or a similarly restrictive method in place, it becomes especially difficult for them to deny any interest group's demands to include their defining trait.<sup>213</sup>

The resulting over-expansion would be particularly problematic for Louisiana's statute. Its structure is broad enough to include ordinary crimes of opportunity.<sup>214</sup> When a vast number of characteristics are included in a statute that also covers opportunistic crimes, the potential for "creative use"<sup>215</sup> of the statute is significant.<sup>216</sup> As Louisiana's hate crime law expands to include even more crime victims, so does the potential to apply the law in ways that are permissible under the language of the statute but not aligned with the purpose of hate crime legislation.<sup>217</sup> Therefore, if legislators choose to include traits like "occupation" that do not implicate societal fissure lines, further modification of the statute is necessary to limit the application of the statute.

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210. See, e.g., FLA. STAT. § 775.085 (2018) (providing "homeless status" as a protected characteristic).

211. See, e.g., W. VA. CODE § 61-6-21 (2018) (providing "political affiliation" as a protected characteristic).

212. See LAWRENCE, *supra* note 25, at 12–15; see also Eisenberg, *supra* note 24, at 908 (suggesting limiting expansion of protected categories to those categories for which group-based animus is a particular concern).

213. Steiner, *supra* note 94, at 15.

214. See *In re M.S.*, 896 P.2d 1365, 1377 (Cal. 1995) (ruling that a California statute, due to its "because of" discriminatory selection structure, contained nothing in its text that suggested the California Legislature intended to limit punishment to offenses committed exclusively or even mainly because of the prohibited bias).

215. Eisenberg, *supra* note 24, at 898 (explaining how New York prosecutors recently have begun to use the hate crime statute, which includes age as a protected category and has no animus requirement, to prosecute cases involving swindling of elderly victims, though those crimes do not involve the "invidious hatred toward[s] particular groups" that the statute sought to address).

216. Ginsburg, *supra* note 35, at 1602; see also Eisenberg, *supra* note 24, at 908.

217. See discussion *supra* Part I.B; see also Ginsburg, *supra* note 35, at 1631–32 (arguing that it is troubling that legislators might enact a statute to prohibit a species of conduct but use the broad language of the statute to harshly penalize a distinct species of conduct).

By redrafting the law to include an animus requirement,<sup>218</sup> legislators can ensure that the law is used only in cases of invidious hatred.<sup>219</sup> An animus requirement significantly raises the burden of proof by requiring prosecutors to prove specifically that the perpetrator was motivated by prejudice, bigotry, or bias based on the victim's identity.<sup>220</sup> By narrowing the definition of a hate crime, the addition of an animus requirement alleviates the risk of overcharging ordinary crimes of opportunity as hate crimes.<sup>221</sup>

Unfortunately, this change, though necessary to counterbalance expansion, will have significant ramifications.<sup>222</sup> Prosecutors often forego hate crime charges to avoid the challenges imposed by their steep burdens of proof.<sup>223</sup> An amendment that demands even greater proof of subjective bias motivation likely will make use of the statute extremely rare.<sup>224</sup> Infrequent use will hinder the expressive value of the hate crime statute,<sup>225</sup> which is already significantly weakened by expansion.<sup>226</sup> When the statute is used, convictions will be difficult to obtain, impairing the practical purpose of the law by keeping some victims of hate crimes from finding justice.<sup>227</sup>

Revision of the Blue Lives Matter law is possible, but the complex revision process ultimately produces a statute that is less effective than the pre-Blue Lives Matter version in combatting hate crimes.<sup>228</sup> A modified statute is certainly preferable to the current heavily flawed version, but the impact that a revision will have on the utility of the statute is a high price to pay for police protection—an objective that can be readily obtained

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218. See discussion *supra* Part I.C.

219. Eisenberg, *supra* note 24, at 908 (“[L]egislators might choose to amend hate crime statutes by adding an animus requirement, thus eliminating the possibility that ordinary crimes of opportunity would be charged as hate crimes.”).

220. See *supra* note 51 and accompanying text.

221. Eisenberg, *supra* note 24, at 870; see also JACOBS & POTTER, *supra* note 27, at 146.

222. See *infra* note 226 and accompanying text; see also *infra* note 230.

223. Eisenberg, *supra* note 24, at 892; Pugh, *supra* note 134, at 191.

224. See JACOBS & POTTER, *supra* note 27, at 23 (arguing that narrowly drawn hate crime statutes, like those requiring animus, can only be used to prosecute the most obvious of hate crimes, which are rare).

225. See discussion *supra* Part II.B.2 (explaining how the expressive impact of hate crime law is dependent on enforcement of the law).

226. Eisenberg, *supra* note 24, at 909 (“The addition of too many categories . . . may dilute the communicative impact of hate crime legislation.”).

227. See discussion *supra* Part I.B (explaining the practical purpose of hate crime laws).

228. See JACOBS & POTTER, *supra* note 27, at 23; see also *supra* note 224 and accompanying text.

through other sources.<sup>229</sup> Revision is a significantly less efficient and less practical solution than repeal.<sup>230</sup>

*B. Repealing the Law: Nothing Lost, Plenty Gained*

The issue of police protection is primarily one of safety, not hate.<sup>231</sup> If the Blue Lives Matter law were to be repealed, police officers would remain well protected by previously existing criminal laws, which already offer heightened protection by severely penalizing many serious offenses against police, including murder,<sup>232</sup> battery,<sup>233</sup> and aggravated assault.<sup>234</sup> If legislators find that police safety is threatened by other offenses not yet covered, they can draft new provisions to specifically cover those offenses. This tactic was used by the Legislature in 1997, when disarming a peace officer was made a criminal offense punishable by up to five years' imprisonment.<sup>235</sup> The addition directly responded to the narrow category of offenses that would have previously been forced under broader assault and battery statutes.<sup>236</sup> Initially, "disarming" referred only to taking possession of an officer's firearm, but the law was later expanded to include taking possession of any law enforcement equipment.<sup>237</sup> The statute demonstrates how new threats can be addressed effectively through new provisions, and those provisions can be modified as needed to cover broader ranges of conduct.

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229. See discussion *infra* Part III.B.

230. See generally JACOBS & POTTER, *supra* note 27, at 23 (explaining the practical consequences of the animus requirement); see also discussion *infra* Part III.B (describing how other criminal law provisions can be used to address crimes against police officers without requiring changes to the hate crime statute).

231. See L.A. TIMES, *supra* note 18.

232. LA. REV. STAT. § 14:30(2) (2018).

233. *Id.* § 14:34.2(B).

234. *Id.* § 14:37.2.

235. See *id.* § 14:34.6 (defining "disarming a peace officer" as "when an offender, through use of force or threat of force, and without the consent of the peace officer, takes possession of any law enforcement equipment from the person of a peace officer or from an area within the peace officer's immediate control, when the offender has reasonable grounds to believe that the victim is a peace officer acting in the performance of his duty").

236. Act No. 558, 1997 La. Acts 901.

237. See Act No. 820, 2010 La. Acts 2790; § 14:34.6 (defining "equipment" as including "any firearms, weapons, restraints, ballistics shields, forced entry tools, defense technology equipment, self-defense batons, self-defense sprays, chemical weapons, or electro shock weapons issued to a peace officer and used in the course and scope of his law enforcement duties").

The Blue Lives Matter law may remain necessary to protect police officers from the specific class of crimes in which the offender is motivated by invidious hatred against police as a group. Studies suggest that when a prosecutor charges an offender with an ordinary offense instead of a hate crime, the victim and his group feel underserved because the ordinary charge emphasizes the conduct rather than the hateful motivation, which is the true source of the additional harm.<sup>238</sup> In the case of police officers, however, the unique harm caused by anti-police motivation can be addressed through ordinary criminal law.

For example, Louisiana law provides that an offender is guilty of first-degree murder when he kills with the specific intent to kill or inflict great bodily harm upon a police officer performing his duties or “when the [offender’s] specific intent to kill or inflict great bodily harm is directly related to the victim’s status as a [police officer].”<sup>239</sup> The first clause emphasizes the offender’s conduct and addresses the practical need to protect police officers performing a public service.<sup>240</sup> The second clause specifically addresses situations when an offender is motivated to kill a police officer because of his status as such.<sup>241</sup> By making anti-police motive an aggravating factor, the provision acknowledges the unique harm inherent in a crime motivated by animosity toward an entire group and penalizes accordingly.<sup>242</sup> If the Blue Lives Matter law is repealed, legislators can draft similar provisions to apply to other underlying violent crimes.

Legislators can also use ordinary criminal provisions to address conduct with elements typically characteristic of hate crimes. Hate crimes often are intended to intimidate the victim and cause terror within a community.<sup>243</sup> The Legislature demonstrated its ability to respond directly

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238. Pugh, *supra* note 134, at 196.

239. LA. REV. STAT. § 14:30(2).

240. *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977) (“[T]he fact that the murder victim was a peace officer performing his regular duties may be regarded as aggravating circumstance [because] [t]here is a special interest in affording protection to [those] public servants who regularly must risk their lives in order to guard the safety of other persons and property.”).

241. Act No. 1056, 2001 La. Acts 2222 (classifying an offense as first degree murder when the offender had specific intent to kill or inflict great bodily harm on a peace officer because of his status).

242. See Pugh, *supra* note 134, at 196.

243. Sethi, *supra* note 87; see also Gellman & Lawrence, *supra* note 35, at 441 (proposing a model statute defining hate crimes as those crimes committed with a purpose to create terror in a definable community or with the knowledge that the crime would create a perception of threat against the definable community).



to crimes with these elements in 1999 by criminalizing the use of a laser<sup>244</sup> on a peace officer when the offender has “reasonable grounds to believe that the officer will . . . be injured, intimidated, or placed in fear of bodily harm.”<sup>245</sup> The statute protects police officers from offenders seeking to threaten or intimidate them without the complication of requiring a showing of anti-police motive imposed by the hate crime statute.

In addition to greater functionality, ordinary criminal provisions also have expressive value.<sup>246</sup> Legislators can demonstrate support of law enforcement officers and condemnation of their attackers through the harsh penalties that accompany these provisions.<sup>247</sup> Because the laws are easier to apply than the Blue Lives Matter law, their intended message will not be contradicted by underuse after enactment but will be strengthened through enforcement.<sup>248</sup>

Ultimately, repealing the Blue Lives Matter law and relying on new and existing criminal provisions to prosecute crimes against police officers will not deprive police officers of either practical protection or expressive support. Society’s most cherished values are reflected in the criminal law by applying the harshest penalties to those crimes that violate these values.<sup>249</sup> Louisiana’s criminal law simultaneously can reflect the values of protecting public servants and protecting citizens from crimes rooted in bigotry. By addressing these two purposes separately, legislators can avoid invoking the intergroup controversy that commonly accompanies hate crime expansion<sup>250</sup> or undermining the efficacy of the existing hate crime law.<sup>251</sup>

### CONCLUSION

In a lawful society, police officers represent order. The public execution of a police officer who is performing his duties signifies an attack on that

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244. See LA. REV. STAT. § 14:37.3 (defining “laser” as “any device that projects a beam or point of light by means of light amplification by stimulated emission of radiation or any device that emits light which simulates the appearance of a laser”).

245. *Id.*

246. Eisenberg, *supra* note 24, at 858.

247. See Perez-Pena, *supra* note 12.

248. See discussion *supra* Part II.B.2.a.

249. LAWRENCE, *supra* note 25, at 169.

250. JACOBS & POTTER, *supra* note 27, at 133 (arguing that hate crime expansions inspire inter-group fighting over what should be covered, an exercise that “hardly contributes to a more tolerant and harmonious society”).

251. Beale, *supra* note 41, at 1269.

order.<sup>252</sup> Although it may be tempting to legislators to respond to the chaos with reactionary legislation that symbolically demonstrates support for lawful order, such action is shortsighted. Legislators must think beyond enactment and consider the practical application of the law and the purpose it will serve. The Blue Lives Matter law rarely will be applied to the types of crimes that inspired its existence and, instead, may be applied in ways that are both unjust to citizens and contradictory to the purpose of hate crime laws.

The law does not solve an existing problem but creates new ones by weakening Louisiana's hate crime statute and contributing to the widening divide between citizens and police.<sup>253</sup> Protecting police from violence is critically important, but the protection need not come at such an enormous societal cost. By repealing or heavily revising the Blue Lives Matter law, legislators simultaneously can protect police officers and preserve the validity of Louisiana's hate crime statute.

*Savannah Walker\**

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252. Eversley et al., *supra* note 1 (calling New York police shootings an attack on lawful society).

253. See discussion *supra* Part II.B.2.b.

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