

## THE ASYMMETRY OF CRIMES *BY* AND *AGAINST* POLICE OFFICERS

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### INTRODUCTION

The shootings by and against police officers over the last few years have raised numerous issues—political, social, and legal—on the relationship and interactions between officers and citizens.<sup>1</sup> This Essay focuses on the criminal laws that govern these encounters. At first blush, their application seems noncontroversial. If a crime is committed, the individual—regardless of her status as police officer or citizen—should be held accountable. But it turns out that the actual crimes are different depending on the victim.

If a police officer unlawfully harms a citizen, the officer is subject to assault or homicide charges—no different than if the officer

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1. See, e.g., Julie Bloom, Richard Fausset & Mike McPhate, *Baton Rouge Shooting Jolts a Nation on Edge*, N.Y. TIMES (July 17, 2016), [http://www.nytimes.com/2016/07/18/us/baton-rouge-shooting.html?\\_r=0](http://www.nytimes.com/2016/07/18/us/baton-rouge-shooting.html?_r=0) [<https://perma.cc/95LQ-LT7Q>]; Richard Fausset, Richard Pérez-Peña & Campbell Robertson, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html> [<https://perma.cc/8YBB-ADET>]; Manny Fernandez, Richard Pérez-Peña & Johnah 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/6RSC-DCLW>]; Matt Furber & Richard Pérez-Peña, *After Philando Castile's Killing, Obama Calls Police Shootings 'an American Issue'*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html> [<https://perma.cc/YAF5-SX3G>]; Liam Stack, *Video Released in Terence Crutcher's Killing by Tulsa Police*, N.Y. TIMES (Sept. 19, 2016), [http://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html?\\_r=0](http://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html?_r=0) [<https://perma.cc/W5YF-ZGDE>].

committed these crimes off duty.<sup>2</sup> However, if a citizen unlawfully harms a police officer, the citizen is automatically subject to aggravated assault or aggravated homicide charges, which carry more severe punishment.<sup>3</sup> In fact, some states make the intentional killing of an on-duty officer a capital offense.<sup>4</sup> Enhanced charges in police encounters are thus asymmetrical. They only apply if a citizen harms an officer but not if an officer harms a citizen.

States have similar one-sided aggravated charges when it comes to crimes against other employees performing public services such as paramedics, public-school teachers, and firefighters.<sup>5</sup> The key in all these situations is that the victim was acting in her official capacity at the time of the crime.<sup>6</sup> The rationale for these statutes is straightforward. It is imperative for states to deter individuals sufficiently from interfering with their ability to carry out state-authorized functions.<sup>7</sup>

But police officers serve a unique role compared to these other public-service professions. Only their job authorizes the detention of citizens and the use of force—including deadly force.<sup>8</sup> The inherent pressure of police action and the threat of physical harm—qualities not present in other public-service-oriented professions—suggest more tailored scrutiny of this activity that not only protects it but also prevents its abuse.

Some states already have in place certain statutes targeting the misconduct of state actors. Dubbed “official oppression statutes,” these misdemeanor crimes are primarily designed to prevent abuse by public officials that may not otherwise fall under general criminal statutes.<sup>9</sup> These statutes seem well suited to deter abuse or mistreatment by public-school teachers or firefighters who are not uniquely authorized to use physical force. But the greater authority of

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2. See *infra* Part I.A.

3. See *infra* Part I.B.

4. See *id.*

5. See, e.g., N.Y. PENAL LAW § 120.05 (McKinney 2010); 18 PA. CONS. STAT. § 2702(a) (2016); *infra* note 55 (collecting statutes).

6. See *supra* note 5.

7. See *infra* note 36 and accompanying text.

8. Soldiers also carry this authority, but, unlike police officers, these individuals are already subject to a separate set of criminal laws that are narrowly tailored to their unique duties and responsibilities. See Monu Bedi, *Toward a Uniform Code of Police Justice*, 2016 U. CHI. LEGAL F. 13 (analogizing police officers to soldiers and arguing that police officers too should be subject to unique criminal laws based on their authority and responsibilities).

9. See *infra* notes 17–24 and accompanying text.

police officers over citizens suggests something stronger is necessary to prevent abuse by these individuals, especially when something stronger is used to prevent harm against them.

States should care *equally* about harms by and against police officers and their impact on state activity. Indeed, the recent (and seemingly consistent) news of police abuses—particularly against minority communities—only underscores the importance of effectively regulating police behavior in both directions.<sup>10</sup> This kind of change will ultimately go a long way in helping to legitimate police activity in this context.

Part I of the Essay discusses the asymmetry of criminal statutes when it comes to police encounters. Part II argues for aggravated criminal liability for crimes both by and against officers. It focuses on the expressive nature of uniform criminal laws and the concurrent need to regulate police behavior effectively. After addressing some potential (though unpersuasive) explanations for the asymmetry, the Essay concludes by suggesting remedial measures that may ultimately help restore confidence in police accountability.

## I. ASYMMETRICAL CRIMINAL STATUTES IN PERFORMANCE OF POLICE DUTIES

This Part describes the asymmetrical nature of criminal statutes that govern police and citizen encounters. Part I.A discusses how states handle harm caused by police officers and Part I.B focuses on the heightened punishment that applies when citizens harm police officers.

### A. *Crimes by Police Officers*

Criminal law generally treats police officers the same way, whether they commit crimes on or off duty. The elements of relevant crimes such as assault and manslaughter make no distinction between these two contexts. These crimes typically require a specific *mens rea* together with some physical act resulting in injury. A simple assault, for example, requires a person to intentionally or recklessly cause

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10. See *supra* note 1; see also Richard Pérez-Peña, *Fatal Police Shootings: Accounts Since Ferguson*, N.Y. TIMES (Apr. 8, 2015), [http://www.nytimes.com/interactive/2015/04/08/us/fatal-police-shooting-accounts.html?\\_r=0](http://www.nytimes.com/interactive/2015/04/08/us/fatal-police-shooting-accounts.html?_r=0) [<https://perma.cc/29F7-3TW4>]; Stack, *supra* note 1 (providing accounts of fatal police shootings since 2014 and noting a disproportionate number of African-American victims).

bodily injury to another.<sup>11</sup> The charge can be increased in severity if the act results in severe bodily injury.<sup>12</sup> Manslaughter generally requires a person to recklessly cause the death of another.<sup>13</sup> Depending on the level of intent, the police officer may be on the hook for murder.<sup>14</sup>

Recent indictments of police officers allegedly using excessive force bear this out. For example, in the Freddie Gray case in Maryland, the local prosecutor—in connection with the death of an arrestee in police custody—brought a number of general charges against a group of officers including manslaughter, murder, and aggravated assault.<sup>15</sup>

Police officers can invoke special defenses on the use of reasonable force when their duties implicate potential criminal liability.<sup>16</sup> This shouldn't be surprising or problematic. Part of a police officer's job is to make arrests and keep the peace. These duties necessarily implicate the potential of assaulting citizens, and, if necessary, killing them. None of this changes the fact that officers are still only potentially liable for the same crime as they would be if committed outside their duties.

Some states also impose additional affirmative liability on police officers in the form of official oppression statutes.<sup>17</sup> These are broadly worded laws that make it a crime for a police officer or other official to knowingly abuse her power.<sup>18</sup> Deriving from the common law, these misdemeanors statutes historically have been applied to a wide range of police conduct, from the unlawful detention or mistreatment of

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11. See N.Y. PENAL LAW § 120.00 (McKinney 2010); 18 PA. CONS. STAT. § 2701 (2016); MODEL PENAL CODE § 211.1(1)(a) (AM. LAW INST. 1985).

12. See N.Y. PENAL LAW § 120.10; 18 PA. CONS. STAT. § 2702; MODEL PENAL CODE § 211.1(2).

13. N.Y. PENAL LAW § 125.15; 18 PA. CONS. STAT. § 2504; MODEL PENAL CODE § 210.3.

14. N.Y. PENAL LAW § 125.25; 18 PA. CONS. STAT. § 2502; MODEL PENAL CODE § 210.2.

15. See *List of Charges Against Officers in Freddie Gray Case*, CNN (May 21, 2015, 7:12 PM), <http://www.cnn.com/2015/05/01/us/freddie-gray-police-charges/index.html> [https://perma.cc/SY3Z-ZG29]. The charges were eventually dismissed. See Sheryl Gay Stolberg & Jess Bidgood, *All Charges Dropped Against Baltimore Officers in Freddie Gray Case*, N.Y. TIMES (July 27, 2016), [http://www.nytimes.com/2016/07/28/us/charges-dropped-against-3-remaining-officers-in-freddie-gray-case.html?\\_r=0](http://www.nytimes.com/2016/07/28/us/charges-dropped-against-3-remaining-officers-in-freddie-gray-case.html?_r=0) [https://perma.cc/QQF6-K65F].

16. N.Y. PENAL LAW § 35.30; 18 PA. CONS. STAT. § 508(a); MODEL PENAL CODE § 3.07.

17. Roughly half of states have such statutes. See Matthew V. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 183 n.213 (collecting official oppression statutes).

18. See, e.g., N.Y. PENAL LAW § 195.00; 18 PA. CONS. STAT. § 5301; MODEL PENAL CODE § 243.1.

citizens to extortion or other fraudulent acts.<sup>19</sup> A typical statute reads in relevant part: “A person acting . . . in an official capacity . . . commits a misdemeanor . . . if, knowing that his conduct is illegal, he: (1) subjects another to arrest, detention, search seizure, mistreatment. . . .”<sup>20</sup> The primary purpose of these statutes, however, seems to be cases of nonviolent abuse or verbal harassment—crimes that may not otherwise be covered by traditional criminal statutes.<sup>21</sup> Nevertheless, these broadly worded statutes would sweep in any unlawful physical harm caused by police officers.<sup>22</sup> For example, the prosecutor in the Freddie Gray case also charged the officers with official oppression in addition to the more serious assault and homicide charges.<sup>23</sup>

The placement of these oppression statutes within typical criminal codes is revealing. These statutes are not part of the codes relating to crimes against persons—such as assault or homicide charges—but rather part of sections on offenses relating to public administration.<sup>24</sup> This placement may suggest that their primary function is to regulate state actors during the performance of their duties rather than to protect citizens from unlawful harm.

### *B. Crimes Against Police Officers*

Physical harm against police officers is treated differently than physical harm caused by police officers. When the victim is a police officer, aggravated charges apply, which carry more severe penalties

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19. *State v. Lackey*, 155 S.E.2d 465, 467 (N.C. 1967) (discussing common law origin of oppression statutes as misdemeanor crimes that apply when officer “while exercising, or under colour of exercising, his office he inflicts upon any person from an improper motive any illegal bodily harm, imprisonment, or any injury other than extortion”).

20. *See* 18 PA. CONS. STAT. § 5301. Federal law similarly has a broad general criminal provision that subjects police officers to liability if they deprive a person of a constitutional right, which can include physical harm. *See* 18 U.S.C. § 242 (2012).

21. *See* Hess, *supra* note 17, at 183.

22. *See* Lackey, 155 S.E.2d at 467 (applying oppression statutes to assaults by officer).

23. *See* *supra* note 15.

24. *Cf.* *Yates v. United States*, 135 S. Ct. 1074, 1084 (2015) (noting that a specific statute’s location within the overall federal statutory framework is relevant to a determination of its meaning). *Compare* N.Y. PENAL LAW § 195.00 (McKinney 2010) (under “Title L—Offenses Against Public Administration”), *with* N.Y. PENAL LAW §§ 120, 125 (under “Title H—Offenses Against the Person Involving Physical Injury . . .”); *compare* 18 PA. CONS. STAT. § 5301 (2016) (placed under “Article E. Offenses Against Public Administration”), *with* 18 PA. CONS. STAT. §§ 2701, 2502 (placed under “Article B. Offenses Involving Danger to the Person”); *compare* MODEL PENAL CODE § 243 (AM. LAW INST. 1985) (placed under “Offenses Against Public Administration”), *with* MODEL PENAL CODE §§ 210–11 (placed under “Offenses Involving Danger to the Person”).

than general homicide or assault charges.<sup>25</sup> These statutes are classified in a variety of different ways, including for example, “aggravated manslaughter,”<sup>26</sup> “criminal homicide of law enforcement officer”<sup>27</sup> or “assault on a police officer.”<sup>28</sup> In some states, the intentional killing of on-duty police officers enhances a homicide charge to a capital offense.<sup>29</sup>

It is important to recognize that these aggravated crimes contemplate the commission of the underlying assault or homicide. In this way, these crimes share the same elements as traditional homicide or assault charges, requiring a *mens rea* together with some physical act resulting in injury.<sup>30</sup> The only difference is that these aggravated crimes include an additional element that the officer was acting in her official capacity at the time of the criminal act.<sup>31</sup> Courts typically paint with a broad brush when determining whether a police officer was acting within her scope of authority.<sup>32</sup> Some jurisdictions also require that the defendant know that the victim was a police officer.<sup>33</sup> No additional harm, however, is necessary for the enhanced charge.

The need for deterrence helps explain a key rationale for these aggravated statutes. Criminal laws generally seek to regulate citizen behavior by deterring or preventing individuals from harming one another.<sup>34</sup> But harm to a police officer during an official encounter is more problematic than when similar harm occurs between private

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25. See, e.g., N.Y. PENAL LAW §§ 120.11, 125.22; 18 PA. CONS. STAT. §§ 2507, 2702.1.

26. N.Y. PENAL LAW § 125.22 (“Aggravated manslaughter in the first degree”).

27. 18 PA. CONS. STAT. § 2507 (“Criminal homicide of law enforcement officer”).

28. 18 PA. CONS. STAT. § 2702.1 (“Assault of law enforcement officer”).

29. See, e.g., TEX. PENAL CODE ANN. § 19.03(a)(1) (West 2016); VA. CODE ANN § 18.2-31(6) (2014); Anthony Gosserand, “*Protecting the Foot Soldiers of an Ordered Society*”: *An Analysis of State Statutory Aggravating Circumstances of Murdering a Police Officer in the Performance of His or Her Duty*, 58 UMKC L. REV. 675, 681–94 (1990) (collecting state statutes that enhance murder of an officer in the line of duty to a capital offense).

30. See *supra* note 26.

31. See *id.*; see also *infra* note 62 (collecting statutes).

32. See, e.g., *Commonwealth v. Schwenk*, 777 A.2d 1149, 1153 (Pa. Super. Ct. 2001) (finding that “a police officer may act in the performance of his duties even if he is not in uniform, and is not officially ‘on-duty’ at the time of an arrest”).

33. See 18 PA. CONS. STAT. §§ 2502, 2507 (2016). *But see* N.Y. PENAL LAW §§ 120.11, 125.22 (McKinney 2010) (stating that the defendant only needs to reasonably have known that the victim was a police officer); see, e.g., *United States v. Feola*, 420 U.S. 671, 676–77, 676 n.9 (1975) (noting that knowledge of the identity of the police officer is not required under federal law for a defendant to be charged with assault against a police officer during performance of duty).

34. See generally Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765 (2010) (discussing the history and contours of deterrence theory, which regulates citizen behavior through fear of sanctions or punishment).

citizens. Only in the former situation is a citizen interfering with a vital state-sanctioned activity—one that requires an officer to put herself in harm’s way. Accordingly, states have a special interest in meting out more severe punishment to protect police officers when they are carrying out these duties.<sup>35</sup>

There may also be a retributive rationale for these aggravated charges, though its application depends on the specific circumstances. Retributivism focuses on the defendant’s culpability or degree of moral wrongfulness to justify criminal liability and the resultant sentence rather than the good consequences stemming from punishment.<sup>36</sup> Under this theory, a citizen who targets a police officer and assaults or kills her during the course of her official duties may be more blameworthy than if the individual targeted a private citizen. One may find that it is morally worse to assault a state employee sworn to protect others than a private citizen, thus justifying the enhancement. Intuitions may differ, however, if the individual is being questioned or detained by the officer at the time of the crime. The citizen may feel stressed or otherwise agitated given the circumstances. While this certainly would not excuse the behavior and the resulting criminal charge, it may reduce the relative blameworthiness compared with the first scenario.

Police encounters may also give rise to the crime of resisting arrest or a related charge of preventing an officer from discharging her duty.<sup>37</sup> This kind of crime is separate from an aggravated assault or homicide charge. “A person is guilty of resisting arrest when he intentionally

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35. See, e.g., *Feola*, 420 U.S. at 679–82 (discussing that the justification for the crime of assault against a federal employee includes protection of federal activities); Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 958 (2001) (discussing the rationale for and the history of aggravated crimes in this context, and noting that “an act of disobedience against the state is an act of disobedience against a particular state official” and “the modern American state takes great pains to protect the authority, dignity, safety, and well-being in the broadest sense, of ‘its’ officials”).

36. See Monu Bedi, *Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis*, 28 GA. ST. U. L. REV. 559, 592–97 (2012) (discussing moral-based criminal theories by Jerome Hall, Paul Robinson, and John Coffee); John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1068 (2009); Russell L. Christopher, *Detering Retributivism: The Injustice of ‘Just’ Punishment*, 96 NW. U. L. REV. 843, 859 (2002) (“Essentially, retributivism justifies punishment based not on its consequences but solely because an offender deserves it.”); Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 119–23 (2010) (analyzing the historical reasons for punishment including, among other things, deterrence, retribution, and rehabilitation).

37. See, e.g., N.Y. PENAL LAW § 205.30 (McKinney 2010); 18 PA. CONS. STAT. § 5104 (2016); MODEL PENAL CODE § 242.2 (AM. LAW INST. 1985).

prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person.”<sup>38</sup> Some statutes explicitly require actual force here, whereas others do not make it an element of the crime.<sup>39</sup>

In one way, these crimes stand as the natural analog to the oppression statutes described above because they too are classified under crimes against public administration rather than under crimes against the person.<sup>40</sup> Only this time the aim is protecting the lawful use of state activity rather than curtailing its abuse.

Aggravated criminal charges and resisting arrest may be brought together depending on the circumstances. If a person assaults an officer with the intent to prevent her from performing her duties, the individual could be on the hook for both crimes.<sup>41</sup> However, a person may physically harm an officer while in the performance of her duties—an instance of aggravated assault—but may not have a specific intent to interfere with her official duties to justify a resisting arrest charge.<sup>42</sup> In states where actual force is required for a resisting arrest charge, the two crimes may merge depending on the circumstances.<sup>43</sup>

Aggravated charges against citizens who harm police officers thus seem to be a hybrid. On the one hand, these statutes seek to deter physical harm to police officers *qua* citizens (much like regular assault or homicide) and, on the other, they seek to deter interference with the state’s ability to exercise its lawful police authority (much like resisting arrest charges).

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38. N.Y. PENAL LAW § 205.30.

39. Compare *People v. Stevenson*, 286 N.E.2d 445, 448 (N.Y. 1972) (not requiring force), with 18 PA. CONS. STAT. § 5104 (requiring force).

40. See *supra* note 37.

41. See *People v. Chesebro*, 463 N.Y.S.2d 711, 713 (App. Div. 1983) (finding that a defendant can be convicted of both assault and resisting arrest because “the former involves intentional prevention of the performance of a police officer’s ‘lawful duty’ while the latter is directed only at proscribing intentional or attempted prevention of ‘an authorized arrest’”).

42. See *Taylor v. Connelly*, 18 F. Supp. 3d 242, 263 (E.D.N.Y. 2014) (“[T]he Court notes that resisting arrest is not a lesser included offense of assault in the second degree . . . .”); *Chesebro*, 463 N.Y.S.2d at 713 (“It is theoretically possible to commit assault in the second degree as defined by section 120.05 (subd. 3) of the Penal Law without committing the crime of resisting arrest.”).

43. See, e.g., *Commonwealth v. Nelson*, 305 A.2d 369, 370 (Pa. 1973) (stating that “[u]nder the instant facts, the assault and battery necessarily involved the act of resisting arrest, and the act of resisting an officer in making the arrest; hence, the offenses merged” and thus the defendant could only be sentenced for the assault and battery).



## II. INCONSISTENT CRIMINAL LAWS AND A PATH TO REFORM

This Part expounds on the divergent messaging the asymmetrical statutes send about harm to an officer compared with harm by an officer and argues for the creation of uniform aggravated statutes. Part II.A distinguishes the role of police officers from other public employees when it comes to asymmetrical criminal laws. Part II.B suggests possible explanations for the current one-sided aggravated statutes but ultimately rejects them as unpersuasive. Part II.C argues that amending laws along the lines I suggest will have an overall salutary effect that will help deter instances of police abuse and, in the process, foster greater legitimacy of police activity.

### A. *Divergent Messaging and Regulating Police Behavior*

Criminal law performs an expressive function.<sup>44</sup> It signals to the community what is acceptable and unacceptable behavior and, in turn, serves an important socializing function.<sup>45</sup> Symmetrical laws naturally send a uniform message. For example, the crimes of resisting arrest and official oppression, together, tell the community that interference against police action and abuse of it are equally harmful to society.

However, if there is asymmetry in certain criminal laws—such as the aggravated criminal statutes discussed above—this sends two different messages to the community as to the gravity of the relative harms. One signal sent by aggravated statutes is that physical harm against a public official is more damaging to society than harm by a public official. This kind of asymmetrical messaging is not always a bad thing. It may serve a legitimate state end. Take the case of a citizen harming a firefighter, teacher, or other public employee who is not a police officer. A one-sided aggravated statute makes sense here. On the one hand, it is important for states to take additional measures to protect these employees from physical harm while they perform their public-service-oriented duties. On the other, because their state-sanctioned authority does not implicate unique powers to detain or use

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44. See, e.g., Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1504 (2016) (“The ‘expressive theory of punishment’ is well known [and] turns on noticing that punishment has expressive characteristics—that it is a kind of symbolic communication.”); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 476 (1997) (“Criminal law rules can contribute to normative forces; they can shape, alter, and guide those forces, but only if the community accepts the law as a legitimate source of moral authority.”).

45. See *supra* note 44.

force, regular assault or homicide charges together with oppression statutes (where available) seem adequate to address any reciprocal problem of abuse by these officials.

But the double standard and resulting divergent messaging is less compelling in the context of police encounters. Police are uniquely authorized to question and detain citizens and use force and even deadly force. The dynamic between police officer and citizen thus necessitates coercion and the invasion of privacy—qualities that are not present in the consumer-like relationships with other public-service professionals.<sup>46</sup> This suggests greater scrutiny of police conduct during these encounters over and above general assault or homicide charges. As it stands, police officers are able to use their powers without this increased attention to the risk posed to citizens.

And the use of oppression statutes (assuming a state even has one) to make up the difference does not seem adequate. As misdemeanor crimes, they do not share the same deterrent effect or expressive function as aggravated assault or homicide charges.<sup>47</sup> Moreover, it is harder to prove these charges because they typically require a knowing violation on the part of the officer.<sup>48</sup> It is no surprise then that prosecutors rarely bring these charges.<sup>49</sup>

The disparate criminal laws governing police encounters are particularly worrisome given the recent (and seemingly consistent) news of police misconduct. One needs only to read about the cases of Terence Crutcher, Philando Castile, and Alton Sterling, to see the severity of the problem and the need for reform.<sup>50</sup> In a recent civil suit relating to police use of deadly force, Justice Sotomayor lamented the culture of police brutality and violence.<sup>51</sup> Subjecting police officers to

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46. See Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2186–87 (2014) (discussing police exceptionalism amongst other public services).

47. See Hess, *supra* note 17, at 187. For similar reasons, police manuals or department policies would also not adequately make up the difference. See, e.g., Bedi, *supra* note 8, at 29 n.115 (“It is worth pointing out that these police manuals or department policies are outside the criminal justice system and thus necessarily do not have the same deterrent effect as criminal charges.”).

48. See *supra* notes 18–20 and accompanying text. Federal prosecutions under 18 U.S.C. § 242 are also hard to prosecute since the officer must commit the violation with specific intent to violate a constitutional right. See 18 U.S.C. § 242 (2012); *Screws v. United States*, 325 U.S. 91, 107 (1945) (finding that the prosecution must show that police officers acted with the purpose to deprive the victim of a constitutional right).

49. See Hess, *supra* note 17, at 186–88 (discussing the difficulty in prosecuting police officers under state oppression statutes and analogous federal law).

50. See *supra* notes 1 and 10.

51. See *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (“But the [officer’s glib] comment [after the shooting] seems to me revealing of the culture this Court’s

aggravated crimes may foster greater trust in police authority by not only showing citizens—and particularly minority communities—that states care equally about harm caused by police officers but also simultaneously deterring these instances of abuse through more severe punishment.<sup>52</sup> If states care about these two issues (as they should) there does not seem to be a good reason why they should treat police abuse and protection differently. The ability of states to use resisting-arrest or related charges—as an additional mechanism to protect lawful police activity—further underscores this point.

It is worth noting that the argument for symmetry does not undercut or adversely impact a state's legitimate interest in using the current aggravated statutes to protect officers from harm by citizens.<sup>53</sup> In other words, inserting a reciprocal aggravated statute targeting police misbehavior does not make it less likely that citizens will be deterred from causing harm during police encounters. The two statutes and their respective deterrent effects would work in parallel with each other, not at cross-purposes.

#### *B. Possible Explanations for the Asymmetry*

The above analysis assumes that these aggravated crimes seek to protect the official duties of an officer. Perhaps the asymmetry is better explained by shifting the focus away from the state activity at play toward the police officer herself. This interpretation is also consistent with the fact that these statutes are located in the section on crimes against persons. Under this reconceptualization, symmetry becomes less compelling because states certainly have (relatively speaking) a greater interest in protecting police officers than private citizens.<sup>54</sup> These individuals are performing a much-needed function and putting themselves at risk. As such, society must take additional precautions to protect them.

This line of reasoning may have some persuasive appeal if identity alone were sufficient for an aggravated charge. It is not. Nearly all states require that the criminal act occur during the performance of an

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decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor's express order to 'stand by.'").

52. *See infra* Part II.C.

53. *See infra* Part I.B.

54. *Cf.* Monu Bedi, *Entrapped: A Reconceptualization of the Obedience to Orders Defense*, 98 MINN. L. REV. 2103, 2141 (2014) (arguing that the government has a greater interest in protecting against harms connected to it).

officer's duty before triggering this enhanced charge.<sup>55</sup> In other words, simply targeting a police officer who is off-duty or not otherwise in the performance of her duty would not trigger this enhancement. To be sure, a similar connection to official duties is necessary for aggravated charges in cases relating to firefighters, teachers, and other public-service employees.<sup>56</sup> This requirement in the end makes sense. A state has the most interest in the interaction at the point when the victim is *actually* working in her official capacity. Other instances of assault or homicide falling outside this narrow sphere are better regulated through general criminal statutes applicable to all citizens.

This limitation may explain why some legislatures have now proposed hate-crime laws against defendants who target police officers.<sup>57</sup> These kinds of statutes enhance an underlying criminal charge if the defendant targets a specific class of people because of some bias or animus toward the group.<sup>58</sup> Traditionally hate-crime legislation has been used for crimes where the victim was targeted because of her race, religion, or gender.<sup>59</sup> Today, many states have expanded these statutes to include sexual orientation and physical or

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55. See ARK. CODE ANN. § 5-13-202 (2015); CAL. PENAL CODE § 243 (West 2015); DEL. CODE ANN. tit. 11, § 612 (2015); FLA. STAT. § 784.07 (2016); IND. CODE § 35-42-2-1 (2016); KAN. STAT. ANN. § 21-5413 (2015); LA. STAT. ANN. § 14:34.2-3 (2014); MISS. CODE ANN. § 97-3-7 (2014); MONT. CODE ANN. § 45-5-210 (2015); NEV. REV. STAT. ANN. § 200.481 (LexisNexis 2013); N.J. STAT. ANN. § 2C:12-1 (West 2015); N.Y. PENAL LAW § 125.22 (McKinney 2010); TENN. CODE ANN. § 39-13-102 (2016); *see also* 18 U.S.C. §§ 1111, 1114 (2012) (showing that the federal government requires the assault or homicide of a federal employee to occur during the performance of duty). Some statutes are more broadly worded to include acts occurring outside an officer's official duties, but even here, the defendant must commit the harm to prevent, or otherwise in retaliation for, or on account of an officer's performance of her duties. *See, e.g.*, 720 ILL. COMP. STAT. 5/12-3.05(3)(ii)–(iii) (2016); TEX. PENAL CODE ANN. § 22.01(b)(1) (West 2016). It seems that these jurisdictions would also have equal interest in protecting citizens from unlawful harm by police officers acting in their official capacity as they do protecting officers from lawful harm by citizens on account of those duties.

56. *See supra* note 33.

57. *See* Rebecca Beitsch, *Should Killing a Police Officer be a Hate Crime?*, PEW CHARITABLE TRUST (Aug. 3, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/03/should-killing-a-police-officer-be-a-hate-crime> [https://perma.cc/A2G4-6HB6] (noting that half a dozen states are considering amending hate-crime laws to include police officers). Louisiana became the first state to add police to the list of hate crimes when it passed “Blue Lives Matter” earlier this year. *See id.*

58. *See, e.g.*, Susan B. Gellman & Frederick M. Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach Common Ground*, 41 HARV. J. LEGIS. 421, 422–23 (2004) (discussing the nature of hate-crime statutes as targeting biased-based crimes).

59. *See id.* at 423.

mental disability, and some states have even expanded the scope to include age and political affiliation.<sup>60</sup>

In the context of proposed police hate-crime statutes, these laws would trigger aggravated charges if a citizen intentionally targeted a police officer because of the officer's status as law enforcement.<sup>61</sup> Whether the officer was actually in the performance of her duties at the time of the crime would be irrelevant.<sup>62</sup> This kind of statute, as a result, may potentially apply more broadly than the current aggravated statutes protecting police activity. Proponents of this kind of hate-crime legislation argue that it sends a strong message that the community stands behind police officers and cares about their protection.<sup>63</sup> Some groups, however, argue that these statutes are unnecessary given the current enhanced charges already available if the offense occurs in the line of duty and also worry that including police officers would dilute the meaning of hate-crime legislation, which is designed to deter acts that intimidate whole communities.<sup>64</sup>

This Essay does not take a position on these proposed hate-crime statutes. My focus is on current enhancement statutes that do not rely on identity and thus do not require specific animus against police officers. The relevant trigger focuses exclusively on whether the harm was caused during the performance of an officer's duty. It is this kind of performance-based aggravated charge that I argue should apply in both directions.

Retributive principles and the respective culpability of a defendant—either citizen or officer—do not readily provide their own justification for the asymmetrical enhancement during police encounters. Under this model, individuals would be punished more severely if they are more culpable.<sup>65</sup> But much of this analysis depends on the underlying crime and relevant circumstances. Our intuitions can turn out to be the same in certain situations suggesting equal

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60. See, e.g., Ben Gillis, Note, *Understanding Hate Crime Statutes and Building Towards a Better System in Texas*, 40 AM. J. CRIM. L. 197, 210 (2013) (cataloging protected groups by state).

61. See Beitsch, *supra* note 57.

62. See *id.*; see also LA. STAT. ANN. § 14:107.2 (West, Supp. 2016) (establishing under Louisiana hate-crime law, selecting victim based on his status as police officer sufficient for an enhanced charge).

63. See Beitsch, *supra* note 57.

64. See *id.*

65. See, e.g., Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1757 (2012) (discussing a theory that links relative culpability of a defendant to the severity of punishment).

culpability. Take, for example, a citizen who shoots and kills a police officer while she is on patrol simply because the individual dislikes the profession. No one would disagree that this person is morally culpable and should be held accountable for aggravated homicide charges. Now assume a police officer while on patrol decides to kill a peaceful protestor because she dislikes the cause. Currently, only the first situation would receive a “performance of duty” enhancement.<sup>66</sup> But it seems hard to distinguish these two cases on culpability grounds. Both individuals seem equally deserving of aggravated charges. One defendant harms a public official who is working to guard the community, and the other harms a citizen while duty bound to protect this individual.

Things get murkier when the assault or homicide occurs in the context of questioning or detaining a citizen. Did the officer (albeit unreasonably) think the citizen was armed? Did the citizen (albeit unreasonably) believe the officer was unlawfully detaining or questioning her? These mitigating considerations—while not discharging criminal liability—would certainly impact any relative culpability analysis. My point is simply that a blanket aggravated charge in one scenario but not the other does not necessarily comport with our intuitive response as to which actor is more blameworthy and thus deserving of more punishment. Any compelling retribution-based analysis of the respective culpability of the individual will thus necessarily be case specific.

### C. Remedial Measures and Fostering Legitimacy

Admittedly, there remains the question of remedial measures. Laws will have to be changed and I recognize this enterprise takes political capital and will naturally confront challenges. But despite the long odds of such a change being implemented, now may be the opportune time to introduce this reform given the groundswell of support and discussion regarding police reform.<sup>67</sup> A symmetrical

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66. This act could also subject the citizen to a potential hate crime. *See supra* notes 57–64 and accompanying text.

67. *See supra* note 10; Joseph Goldstein & J. David Goodman, *Criminal Justice Reforms Stall in a Liberal Capital: New York*, N.Y. TIMES (Aug. 21, 2016), <http://www.nytimes.com/2016/08/22/nyregion/criminal-justice-reforms-new-york.html> [<https://perma.cc/DQ3X-W4RP>]; Daniel Payne, *Why We Need Police Reform*, FEDERALIST (Aug. 20, 2015), <http://thefederalist.com/2015/08/20/why-we-need-police-reform> [<https://perma.cc/Z22D-KZPE>]; Maya Rhodan, *Why President Obama’s Police Reform Is a Work in Progress*, TIME (July 8, 2016),

system of regulating police activity will ultimately go a long way to legitimating police behavior in this context with the understanding that the laws apply equally to both parties.<sup>68</sup>

I see two potential avenues for reform. A compelling argument can be made that after a general conviction for assault or homicide, sentencing—not the liability phase—is the better venue to decide the relevance of whether the harm was caused by or against a police officer. Sentencing allows a judge to weigh a host of aggravating and mitigating circumstances that may not be relevant during the guilt-or-innocence phase.<sup>69</sup> What was the exact nature of the police interaction before the crime occurred? How severe was the assault? Did the defendant commit a similar crime in the past? These are all questions that go beyond the elements of conviction but can be included in a sentencing hearing.<sup>70</sup>

When it comes to physical harm by police officers, judges can consider the position of trust held by an officer as an aggravating factor during the sentencing phase of trial.<sup>71</sup> This means judges can increase defendants' sentences if they feel individual police officers abused their

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<http://time.com/4398392/obama-police-reform-report-task-force-on-21st-century-policing> [<https://perma.cc/MVM6-KPXX>].

68. See *infra* notes 72–83 and accompanying text.

69. See *Payne v. Tennessee*, 501 U.S. 808, 820–21 (1991) (“[T]he sentencing authority has always been free to consider a wide range of relevant material.”); *Williams v. New York*, 337 U.S. 241 (1949) (discussing how sentencing judges mete out individualized punishment that takes into account all the circumstances surrounding crime and defendant’s history); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 52 (2011) (“Judges modified sentences based on the particular facts [of] the crime, such as harm . . . or the defendant’s motive[.] . . . facts about the offender himself, such as any previous convictions, employment history, family ties, educational level, military service or charitable activities, and the defendant’s age.”). The extent of judicial discretion obviously varies from jurisdiction to jurisdiction. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196–1206 (2005) (discussing the various ways states have drafted sentencing guidelines).

70. See *supra* note 69.

71. See, e.g., WASH. REV. CODE ANN. § 9.94A.535(2)(n) (2015) (noting as aggravating sentencing factor the fact that “[t]he defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense”); CAL. R. CT. 4.421(a)(11) (noting as an aggravating sentencing factor the fact that “[t]he defendant took advantage of a position of trust or confidence to commit the offense”); *Bisard v. Indiana*, 26 N.E.3d 1060, 1067 (2015) (finding as aggravating sentencing factor that defendant abused his position of trust as police officer); U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (U.S. SENTENCING COMM’N 2016) (“Abuse of Position of Trust or Use of Special Skill”); Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 681 (1996) (discussing police abuse of trust as aggravating sentencing factor under federal guidelines).

trust in committing the assault or homicide. This is similar to other aggravating circumstances such as the vulnerability of the victim or age of the victim.<sup>72</sup>

Ostensibly, the presence of this abuse-of-trust sentencing factor may suggest that there is no need to amend the current statutory framework along the lines I propose. Police officers can indeed receive an enhancement, only it occurs at sentencing and not during the guilt-or-innocence phase. There are two problems with this line of reasoning. For one thing, it seems that judges in their discretion do not currently do enough with this potential aggravating factor to mete out strong sentences that would make up for the asymmetry during the guilt-or-innocence phase.<sup>73</sup> Second, and more importantly, even if they did, for the reasons discussed in this Essay it is nonetheless imperative that the statutory liability framework—not the resultant sanction for a crime—reflect a consistent message to the community.<sup>74</sup> Put differently, “making specific behavior a crime is what communicates social reprobation, not the sentencing of that crime.”<sup>75</sup>

In order to achieve statutory parity through this avenue of reform, states would have to repeal the current aggravated assault statutes that currently only apply to harm against police officers.<sup>76</sup> Sentencing then would be the only place where the status of the victim—as citizen or police officer—would be relevant.

It may be easier, and more politically palatable, to amend the current aggravated statutes to add those crimes committed by police officers during the performance of their duties rather than repeal the current laws. For instance, states could pass a statute called “assault by a police officer” that would be a mirror image of the aggravated assault charge that currently only applies to citizens harming officers. This

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72. 730 ILL. COMP. STAT. 5/5-5-3.2(a)(8) (2015) (“[T]he defendant committed the offense against a person 60 years of age or older or such person’s property[.]”); WASH. REV. CODE ANN. § 9.94A.535(3)(b) (“The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.”); CAL. R. CT. 4.421(a)(3) (“The victim was particularly vulnerable[.]”); U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (U.S. SENTENCING COMM’N 2016) (increasing sentencing level if the victim was vulnerable).

73. See, e.g., Freeman, *supra* note 71, at 727–28 (citing cases and discussing the problem of weak sentences for officers convicted of police abuses).

74. See *id.* at 715 (citing H.L.A. Hart’s argument that distinguishes “between the primary objective of the law in encouraging or discouraging certain kinds of behavior, and its merely ancillary sanction or remedial steps”).

75. See *id.* (citing H.L.A. Hart’s theory).

76. This change may also adversely impact a state’s ability to sufficiently deter harm against police officers in the performance their public duties. See *infra* Part I.B.



time, police officers too would automatically receive an enhanced charge if they unlawfully harm a citizen during an official encounter. This type of addition to the statutory framework also sends a uniform message that crimes involving police officers are unique and more damaging to society than crimes between private citizens.

As it stands, the current asymmetry only contributes to what appears to be a low point in American confidence in police authority.<sup>77</sup> Minority populations appear even less trustworthy of the police and their ability to enforce laws uniformly.<sup>78</sup> While my proposal does not directly address the issue of disproportionate police treatment of certain sectors of the population, it can still help foster greater confidence in police accountability.

The push to amend relevant statutes will signal to the community that states take police abuse seriously—just as seriously as harm to officers. It is important that laws reflect our culture and vice versa. More specifically, this kind of messaging may encourage more individuals to be part of community-policing-based initiatives. These initiatives, broadly speaking, seek to increase involvement of local community members with law enforcement personnel to formulate relevant polices and partnerships in order to foster greater trust between both groups.<sup>79</sup> Individuals may feel more invested in participating in these initiatives if they feel that harm by and against officers is treated equally.

This messaging also can directly impact how police officers carry out their functions. Aggravated statutes may help in reducing police abuses. It is true that officers are already subject to assault or homicide charges for acts of excessive force. However, the threat of enhanced criminal liability may push police officers to be more careful or judicious when exercising force and deadly force. A recent study

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77. See, e.g., Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), <http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx> [<https://perma.cc/D5ZE-RLGB>] (noting that police trust is at a low point).

78. See, e.g., Julie Hirschfield Davis, *Obama Warns of Growing Mistrust Between Minorities and Police*, N.Y. TIMES (July 14, 2016), [http://www.nytimes.com/2016/07/15/us/politics/tensions-flare-at-obamas-town-hall-on-race-and-police.html?\\_r=0](http://www.nytimes.com/2016/07/15/us/politics/tensions-flare-at-obamas-town-hall-on-race-and-police.html?_r=0) [<https://perma.cc/2D67-WRHN>]; Jones, *supra* note 77; see also Sendhill Mullainathan, *Police Killings of Blacks: Here Is What the Data Say*, N.Y. TIMES (Oct. 16, 2015), <http://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html> [<https://perma.cc/E6VE-KCYR>] (discussing how African Americans are disproportionately killed by police officers).

79. See generally Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997) (discussing theoretical underpinnings, history, and practical benefits of community-based police initiatives).

confirms that greater scrutiny of police conduct promotes better behavior and reduces the likelihood of police abuses, which in turn can save lives.<sup>80</sup> This kind of change can ultimately help instill more faith in police authority and greater support for police officers generally.

Changing laws is only half the battle; prosecutors must still bring these aggravated charges. Because these individuals work closely with officers, they may not have the motivation to prosecute them.<sup>81</sup> Given the nature of their relationship, prosecutors will always deal with institutional or other pressures not to bring charges against officers.<sup>82</sup> My proposal does not fundamentally change this institutional structure. That said, this kind of reform could promote more prosecutions. The insertion of reciprocal aggravated statutes could help prosecutors internalize the importance of curtailing abuses, which may, in turn, prompt them to submit more charges. Or public pressure in light of this kind of reform will make it harder for prosecutors to justify not bringing charges.

These reforms are still worthwhile even if they do not materially alter the rates at which prosecutors charge officers. Beyond the benefits of uniform messaging described above, aggravated statutes can still change police behavior because they carry more severe punishment and thus will have a greater deterrent effect than the current set of laws, even if officers are not prosecuted in higher numbers as a result of these statutes.<sup>83</sup>

My proposal not only can improve how police officers interact with citizens but also may positively impact how they judge their fellow police officers. Specifically, my proposal may reduce the likelihood of police officers failing to disclose unlawful conduct committed by fellow

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80. Cf. Michael D. White, Henry F. Fradella, Weston J. Morrow & Doug Mellom, *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-And-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9, 62–64 (2016) (finding positive effects of greater police scrutiny in the form of federal civil litigation).

81. See, e.g., Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 443 (“Prosecutors, for example, have authority to prosecute law enforcement officers for criminal misconduct, but their motivation to do so may be compromised by their desire to maintain positive relationships . . .”); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 499 (1992) (“[P]rosecutors do not like prosecuting fellow law enforcement officers (with whom they work on a day-to-day basis) . . .”).

82. See *supra* note 81.

83. See, e.g., Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1544 (1974) (noting that under deterrence theory model, “more severe sanctions yield greater deterrence, other things being equal”).

officers. The “police ‘code of silence’” phenomenon refers to “the refusal of a police officer to ‘rat’ on fellow officers, even if the officer has knowledge of wrongdoing or misconduct.”<sup>84</sup> An aggravated statute sends the message to officers that crimes by their fellow officers are equally problematic as abuses against their fellow colleagues. Internalizing this kind of messaging may motivate more officers to speak out against colleagues when they cross the line.

#### CONCLUSION

The focus here has been on how aggravated charges can send a uniform message to the community and ultimately promote better police practices. As a society, we need to foster an atmosphere of equal accountability for citizens *and* officers—a message that can help restore confidence in police authority. This kind of reform is particularly important in light of the current concerns over police misconduct.

My proposal, though, also will help police officers directly. The current asymmetrical messaging, together with instances of excessive force, do nothing to cultivate an appreciation for the risks officers take in protecting the community. A symmetrical system may ultimately put the focus where it squarely belongs: the sacrifices that officers make in the line of duty and the debt we as a society owe them.

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84. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 63–64 (2000). “The police ‘code of silence’ is a well-documented phenomenon” in the scholarly literature. *See id.* at 63 & n.202.