A Time to Kill Hate: A Case for a Hate Crime Law in South Carolina

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A TIME TO KILL HATE: A CASE FOR A HATE CRIME LAW IN SOUTH CAROLINA

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I. INTRODUCTION

It was a warm summer evening just like any other in Charleston, South Carolina. Many people surely hurried home from work to fix dinner, as children went inside to cool off after a hot day of fun in the Carolina sunshine. Others made their way to midweek Bible study, seeking a couple of hours of spiritual reflection among a community of friends and neighbors. One of those parishioners was Reverend Clementa Pinckney. Earlier that day, Reverend Pinckney made the trip from Ridgeland to the State House in Columbia to attend a committee meeting as a state senator representing his Lowcountry constituency.¹ After a long day of traveling, meetings, and

events, he made his way home to his congregation at Emanuel AME Church to lead them in prayer. A young, new face sought to join Reverend Pinckney and others, and they welcomed him with open arms. Little did they know he intended to take their lives in hopes of starting a “race war.” Nine precious souls were lost that night because the color of their skin was black, and the fellow pulling the trigger had a heart full of hatred for those kinds of people.

Dylann Roof was convicted and sentenced to death for these crimes under federal hate crime laws. The federal government and a majority of states have enacted laws that identify bias-motivated crimes as hate crimes, and these laws have largely been held constitutional. A “hate crime” can be defined as “a criminal offense against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.” Hate crimes are not perpetrated solely against African-Americans, nor are they geographically confined to a particular region of the United States. Hate crimes affect people of every race, color, gender, religion, ethnicity, and

2. See id.
5. See David Lohr, Charleston Church Shooting Victims Identified, HUFFINGTON POST (June 18, 2015, 12:44 PM), https://www.huffingtonpost.com/2015/06/18/charleston-church-shooting-victims-identified_n_7611838.html.
sexual orientation. The impact extends beyond the person victimized to their families, communities, and society as a whole.

Roof was prosecuted under federal hate crime laws because South Carolina is one of only five states without some type of hate crime statute. In these five states, crimes are prosecuted as hate crimes only when the federal government brings charges under federal law. Accordingly, hate crime victims in these states must rely on federal intervention to address the particular heinousness inherent only in hate-motivated crimes. Federal prosecution of hate crimes, however, is limited because the federal government can act only through its powers enumerated in the Constitution. Moreover, states are better equipped to address and prosecute these crimes locally because their law enforcement officers are on the front lines in their communities, and states collectively have more resources than the federal government.

This Note advocates that South Carolina should adopt a hate crime statute that enhances the penalty of the crime when the perpetrator intentionally selects the victim because of his or her race, color, religion, national origin, disability, sexual orientation, ethnicity, gender, or gender identity. This state must adopt this type of law not only to further protect its citizens from bias-motivated crime, but also to make clear that South Carolina does not tolerate hate-producing violence of any kind. Part II of this Note analyzes the historical evolution of hate crime legislation in the United States and the emergence of federal hate crime regulation through modern statutes. Because state hate crime legislation is derived from early federal statutes, a historical discussion of federal laws is necessary. Similarly, Part III explores state hate crime laws through a discussion of the need for state

14. See id.
17. Trout, supra note 15, at 150.
legislation in addition to federal legislation and also addresses constitutional concerns regarding hate crime statutes. Hate crime legislation, in general, has been challenged as violating the First and Fourteenth Amendments. However, several cases challenging state statutes have been constitutionally upheld. Part IV of this Note explains why South Carolina must adopt a hate crime statute and analyzes the current political climate surrounding this issue by discussing legislative concerns from previous hate crime bills. Finally, Part V discusses two statutory models—the discriminatory selection and racial animus models—that often help shape hate crime legislation. This Part also provides guidance and suggestions for the adoption of a hate crime statute by the South Carolina General Assembly.

II. BACKGROUND

State hate crime law, as we understand it today, is derived from early federal legislation that criminalized the acts of preventing or denying another from exercising his or her rights. The purpose of early federal laws was to broadly protect citizens from interference with their rights, while modern state hate crime laws more narrowly address criminal acts against a particular group because of a characteristic they possess. To understand modern state hate crime law, a historical discussion of federal hate crime legislation is necessary. Section A of this Part will begin with a discussion of early federal hate crime legislation, specifically the Ku Klux Klan Act of 1871. Next, two additional federal statutes will be introduced, which Congress enacted to further protect American citizens from deprivation of their guaranteed federal rights based on certain characteristics. Section B will introduce a precursor to modern hate crime laws, the Civil Rights Act of 1968. Finally, Section C will discuss modern federal statutes relating specifically to hate crime and will conclude by discussing the most recent federal statute, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.

A. Early Federal Hate Crime Legislation

The first federal hate crime statute was the Ku Klux Klan Act of 1871. Following the end of the Civil War, many local law enforcement agencies

18. See discussion infra Section III.B.
19. See discussion infra Section III.B.
20. See discussion infra Section II.A.
within former Confederate states failed to prosecute crimes committed by whites against blacks and to protect African-Americans’ recently established

1. Preventing officer from performing duties
If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

2. Obstructing justice; intimidating party, witness, or juror
If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

3. Depriving persons of rights or privileges
If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Fourteenth Amendment guarantee of equal protection under the law.\textsuperscript{22} In response, the Ku Klux Klan Act “authorize[d] federal prosecution of the Ku Klux Klan and others, including law enforcement and government officials, who denied the newly freed slaves their civil rights.”\textsuperscript{23} The Act made it illegal for persons to conspire to deprive “any person, or class of persons, of the equal protection of the laws, or of equal privileges and immunities under the laws.”\textsuperscript{24} Specifically, the Act provided a cause of action for recovery of damages if a person conspired to or caused another to be “injured in his person or property, or deprived of having or exercising any right or privilege.”\textsuperscript{25}

Unlike modern hate crime statutes, the purpose of federal statutes was not to provide enhanced penalties for established crimes.\textsuperscript{26} Rather, statutes like the Ku Klux Klan Act provided the only option of protecting victimized former slaves against those who attempted to deny them their rights and privileges.\textsuperscript{27} In fact, these federal laws would not have been necessary had local law enforcement properly addressed the issue and prosecuted the offenders themselves.\textsuperscript{28} In South Carolina, several Ku Klux Klan members were arrested and tried under the Act in an attempt by the federal government to show the measures it was willing to take in order to preserve the Fourteenth and Fifteenth Amendments to the Constitution.\textsuperscript{29}

Congress enacted two additional post-Civil War statutes that not only punished conspiracy to violate another’s rights but also sought to protect private citizens from deprivation of their federally guaranteed rights by federal, state, or local government based on certain characteristics.\textsuperscript{30}

The first statute, 18 U.S.C. § 241 provides:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . or;

\textsuperscript{22} JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 36 (1998).
\textsuperscript{23} Id.
\textsuperscript{26} See JACOBS & POTTER, supra note 22.
\textsuperscript{27} See id.
\textsuperscript{28} See id.
\textsuperscript{29} See also Kermit L. Hall, Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872, 33 EMORY L.J. 921, 928 (1984).
\textsuperscript{30} See JACOBS & POTTER, supra note 22, at 37.
If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder free exercise or enjoyment of any right or privilege so secured... They shall be fined not more than $10,000, or imprisoned not more than 10 years or both... 31

The second post-Civil War statute, 18 U.S.C. § 242 provides:

Whoever, under color of any law, ... willfully subjects any person ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined ... or imprisoned ... 32

Similar to the Ku Klux Klan Act, neither of the two post-Civil War statutes was enacted to provide harsher punishment of criminals because of their prejudices against their victims. 33 Instead, their purpose was to broadly protect all victims and ensure equal enforcement against all offenders. 34

These post-Civil War statutes apply more broadly than modern state hate crime statutes in that they apply to everyone rather than only those victims who belong to groups listed in the hate crime statute. 35 In other words, although these laws concern conduct that seems very similar to hate crime, they do not fully address the problem as modern statutes attempt to do because they were not intended for that purpose. 36 Instead, the purpose of these statutes was to punish a category of crimes known as “rights interference crimes” 37 and to broadly protect an individual’s civil rights as opposed to punishing bias crimes as a separate category. 38

33. JACOBS & POTTER, supra note 22, at 37.
34. Id.
35. See id.
37. Frederick M. Lawrence, Civil Rights and Criminal Wrongs: The Mens REA of Federal Civil Rights Crimes, 67 TUL. L. REV. 2113, 2116 n.5, 2117, 2208 (1992–1993) (explaining that when there was no pure federal bias crime statute, §§ 242 and 245(b)(2) of Title 18 of the U.S. Code provided federal proscriptions against “rights interference crimes” that were racially motivated); see 18 U.S.C. § 242 (2012) (proscribing punishment of persons who interfere with another’s rights because of his or her color or race); 18 U.S.C. § 245(b)(2)
B. The Civil Rights Act of 1968

As part of the Civil Rights Act of 1968, which addresses racial violence against civil rights workers and individuals pursuing federally protected activities, Congress enacted a statute entitled “Federally Protected Activities,” which is considered today to be a “precursor to the modern state hate crime laws.” 18 U.S.C. § 245(b)(2) provides:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to interfere with . . . any person because of his race, color, religion, or national origin and because he is or has been . . . enrolling in or attending a public school or university; participating in any benefit, program, service or facility provided by a state or local government; applying or working for any state or local government or private employer; serving as a juror; traveling in or using any facility of interstate commerce, or using an vehicle, terminal or facility of any common carrier; or using any public facility, such as a bar, restaurant, store, hotel, movie theater, or stadium shall be punished . . . .

This statute was designed to provide a remedy for victims of violence resulting from interference with their right to march, vote, serve as a member of a jury, and enroll in public schools among other protected activities. Specifically, subsection (b)(2) protects several categories of state and local activities from interference motivated by prejudices against another’s race, color, religion, or national origin. Under this statute, the prosecution must prove that the defendant attacked a victim, who was participating in a state or local activity, with the purpose to interfere because of prejudice against the victim’s race, color, religion, or national origin.

38. See Lawrence, supra note 37, at 2116 n.5; see also JACOBS & POTTER, supra note 22, at 36.
39. Woodson, supra note 24, at 545.
40. JACOBS & POTTER, supra note 22, at 38.
41. Id. (citing 18 U.S.C. § 245(b)(2) (2012)).
42. See id.
43. See id.
44. See id.; Lawrence, supra note 37, at 2213.
is not required, however, that the offender’s prejudice be the only motivation behind the interference.\footnote{45}{\textit{Jacobs} \& \textit{Potter}, \textit{supra} note 22, at 38.}

C. Modern Federal Statutes

Hate crime legislation can typically be categorized into four groups: specific acts, sentence enhancement, statistics collection, and civil remedies.\footnote{46}{\textit{Woodson}, \textit{supra} note 24, at 545.} A specific acts statute makes the offender’s selection of the victim because of bias a separate offense that the prosecution may charge the defendant with in addition to the underlying criminal offense.\footnote{47}{\textit{Id.}} An example of a specific acts statute is section 245 of the Civil Rights Act of 1968.\footnote{48}{\textit{Id.}}

A sentence enhancement statute is an alternative hate crime statute that, rather than creating a separate offense, enhances the defendant’s sentence for a crime if the offender’s bias or hate motivation can be shown.\footnote{49}{\textit{Id.} at 546.} In 1994, as part of the Violent Crime Control and Law Enforcement Act, Congress passed the Hate Crimes Sentencing Enhancement Act, which requires the United States Sentencing Commission to “promulgate guidelines or amend existing guidelines to provide sentencing enhancement of not less than three offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes.”\footnote{50}{\textit{Id.; see} 28 U.S.C. § 994 (2012); \textit{U.S. SENTENCING GUIDELINES MANUAL} § 3A1.1 (U.S. SENTENCING COMM’N 2016).} The Sentencing Commission amended its guidelines as a result of this statute to include enhanced punishment for crimes motivated by bias.\footnote{51}{\textit{Id.}; see \textit{Woodson}, \textit{supra} note 24, at 546–47.}

A statistics collection statute mandates that the government, through its agencies, collect data regarding bias-motivated crime activity.\footnote{52}{\textit{Id.} at 548.} In 1990, Congress enacted the Hate Crime Statistics Act (HCSA),\footnote{53}{28 U.S.C. § 534 (2012).} which mandated that the federal government develop procedures for “implementing, collecting and managing hate crime data.”\footnote{54}{\textit{Hate Crime Statistics 2010}, \textit{FED. BUREAU OF INVESTIGATION}, \url{https://ucr.fbi.gov/hate-crime/2010/resources/hate-crime-2010-about-hate-crime} (last visited Jan. 7, 2018).} The HCSA was the first federal statute to use the term “hate crime” and to bring national attention to the
issue. Specifically, the Act directs the Attorney General to collect data “about crimes that manifest evidence of prejudice based on race, gender and gender identity, religion, disability, sexual orientation, or ethnicity.” The Attorney General has since delegated this task to the Director of the Federal Bureau of Investigation (FBI), who assigned the operation to the Uniform Crime Reporting (UCR) Program.

A civil remedy statute allows hate crime victims to vindicate their individual rights and recover damages. As an example, in 1994, Congress passed the Violence Against Women Act (VAWA), which provides a civil action for recovery against “a person who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes of violence].”

Finally, the most recent federal hate crime statute incorporates elements common to both specific acts as well as sentence enhancement statutes. In 2009, Congress passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA), which extended federal hate crime law to include “violence motivated by the . . . gender, sexual orientation, gender identity, or disability of the victim.” Most notably, the statute “expand[ed]
federal jurisdiction over hate crimes by eliminating the requirement that victims engage in ‘federally protected activities’ and increase[d] federal funding for the investigation and prosecution of these crimes.”61 Specifically, the statute punishes anyone who “willfully causes bodily injury to any person or . . . attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person,”62 or “the actual or perceived . . . gender, sexual orientation, gender identity, or disability of any person.”63 Despite the Act’s expansion of hate crime law beyond federally protected activities, state hate crime law remains necessary because of the constitutional and practical problems that limit the Act’s effectiveness.64

III. STATE HATE CRIME LAW

Because the federal government will not investigate and prosecute all hate crimes, state hate crime laws must also be enacted and enforced. Despite challenges to both federal and state hate crime laws on the grounds that they unconstitutionally violate a defendant’s First and Fourteenth Amendment rights, several court cases challenging state statutes have proved that hate crime legislation is constitutional if drafted carefully. Section A of this Part will explain the necessity for state hate crime laws separate from the federal hate crime laws discussed in Part II. Section B will address constitutional concerns relating to hate crime laws, focusing on state statutes that have been challenged in court.

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national origin, gender, sexual orientation, gender identity, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(I) death results from the offense; or

(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

63. Id. § 249(a)(2).
A. The Need for State Hate Crime Legislation

Even though federal hate crime laws establish authority for prosecution of violent crimes motivated by bias towards a particular characteristic of the victim, state hate crime laws are vital nonetheless to ensuring that these crimes are fully prosecuted because the federal government will not address all hate crimes. Specifically, the Department of Justice maintains a “backstop policy” for all criminal, civil rights investigations in which the Department defers prosecution to state and local law enforcement officials.65 Only in cases where the federal interest outweighs the usual justifications of the backstop policy will the federal government prosecute the crimes.66

In fact, the Shepard-Byrd hate crime prevention bill was designed only to assist state and local law enforcement in their investigations and prosecutions by providing funding and other resources to effectively address local hate crime.67 The bill was not intended to replace state and local law enforcement with the federal government as the primary investigative, prosecutorial, and enforcement authority for hate crime.68 Furthermore, unlike states, which are authorized to enact criminal laws under their police power, the federal government is limited to the powers granted to it under the Constitution, such as its Commerce Clause and Thirteenth Amendment powers.69 Rather than rely solely on the Shepard-Byrd Act, “state and federal hate crime law should be complementary, each supporting the other to produce an effective regime of criminal justice.”70

B. Constitutional Challenges

Opponents to hate crime legislation have challenged both federal and state statutes on the grounds that they violate the offender’s First Amendment right to free speech and the Fourteenth Amendment Due Process and Equal Protection Clauses. However, various cases challenging the constitutionality of state hate crime statutes have proved otherwise. Although the United States Supreme Court struck down a local ordinance as unconstitutional in R.A.V. v. City of St. Paul71 because it sought to prohibit protected speech, state hate crime statutes which seek to penalize criminal

65. Holder Testimony, supra note 16.
66. Id.
67. Id. at 170.
68. See id.
70. Id. at 153.
conduct carried out against another on the basis of race or other protected category have been upheld.\textsuperscript{72} Specifically, the Court found the ordinance unconstitutional because it only criminalized “biased fighting words differently than other fighting words,”\textsuperscript{73} which violated the First Amendment. The ordinance provided that

[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.\textsuperscript{74}

The Court determined that the ordinance was unconstitutional, finding that “St. Paul impermissibly engaged in content-based discrimination by selectively proscribing certain threats...while leaving other threats untouched.”\textsuperscript{75} The Court suggested, however, in dicta that “[a]n ordinance not limited to the favored topics...would have precisely the same beneficial effect” without “displaying the city council’s special hostility toward the particular biases thus singled out.”\textsuperscript{76}

The following year, the United States Supreme Court held in Wisconsin v. Mitchell\textsuperscript{77} that a statute providing for enhancement of a defendant’s sentence whenever he intentionally selects his victim based on the victim’s race did not violate the defendant’s free speech rights by purporting to punish his biased beliefs, and the statute was not overbroad.\textsuperscript{78} The statute provided an increased sentence for a person who “[i]ntentionally selects the person against whom the crime...is committed or selects the property which is damaged or otherwise affected...because of race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.”\textsuperscript{79} Unlike in R.A.V., the Court

\textsuperscript{74} R.A.V., 505 U.S. at 380, 393.
\textsuperscript{75} Id. at 392–94; Trout, supra note 15, at 144.
\textsuperscript{76} R.A.V., 505 U.S. at 395.
\textsuperscript{78} See id. at 484–85, 488–89.
\textsuperscript{79} WIS. STAT. § 939.645 (2017) provides:

(1) If a person does all of the following, the penalties for the underlying crimes are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.
determined that the Wisconsin statute was “aimed at conduct unprotected by the First Amendment” and not at expression. Since the Court’s decision in Mitchell, state hate crime sentence enhancement statutes similar to Wisconsin’s have been constitutionally upheld.

Although states remain free to decide that sentence enhancement statutes violate their own state constitution, several state supreme courts have held that they do not. For example, the Oregon Supreme Court rejected the claim that their constitution prohibits penalty enhancement, and “the Supreme Court of Washington upheld the constitutionality of the Washington statute.”

Bias-motivated crime statutes have also been challenged as violating the Due Process Clause of the U.S. Constitution by being unconstitutionally vague. Specifically, “[t]he due process clause requires that a criminal statute give clear notice of what activity is proscribed and provide adequate

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor’s belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of the property, whether or not the actor’s belief or perception was correct.

(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is ordinarily a felony, the maximum fine prescribed by law may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

83. ANTI-DEFAMATION LEAGUE, supra note 81; see State v. Talley, 858 P.2d 217 (Or. 1993).
84. ANTI-DEFAMATION LEAGUE, supra note 81, at 10.
guidelines to prevent arbitrary law enforcement actions.”85 Defendants in state cases challenging statutes on this ground focused on the “by reason of” or “because of” language, arguing that, “these clauses do not make clear when bigoted behavior will be punished.”86 However, “because the statutes require the commission of an underlying crime, . . . the state courts largely have rejected these claims.”87

One exception is Botts v. State88 in which the Supreme Court of Georgia concluded that the “because of bias or prejudice”89 language of its state hate crime penalty statute was unconstitutionally vague “because of the broad signification of these words and the absence of any specific context in which a person’s bias or prejudice may apply.”90 Specifically, the court found that the use of “because of bias or prejudice” in the statute failed to give clear notice of the prohibited conduct.91 Therefore, hate crime statutes should be crafted carefully, and those statutes that closely resemble the language of Wisconsin’s statute will likely be successfully enacted and enforced.92

In addition, the intentional selection component of sentence enhancement hate crime laws must be established beyond a reasonable doubt at trial so as not to violate the Due Process Clause. In Apprendi v. New Jersey,93 after the defendant was convicted of the underlying criminal offense, the trial judge, in his discretion, found by a preponderance of the evidence that the defendant committed the crime “with a purpose to intimidate” a person or group because of race.94 The United States Supreme Court held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”95 Therefore, intentional selection of the victim motivated by bias must be
proven during trial and determined by a jury for the penalty enhancement to apply without violating due process.

Lastly, bias-motivated crime statutes have been constitutionally challenged as violating the Equal Protection Clause of the U.S. Constitution.96 Specifically, the parties to these cases “have suggested either that the statutes unconstitutionally benefit minorities, because minorities are more likely to be victims of bias crimes, or that the statutes unconstitutionally burden majority members because majority members are more likely to be prosecuted.”97 In each case challenging the statute on equal protection grounds, “the state court rejected the argument, noting that the statute is neutral on its face and that the state has a legitimate interest in punishing hate crimes more severely.”98 Therefore, although hate crime legislation has often been challenged as violating the First and Fourteenth Amendments, the cases discussed in this Section prove that hate crime statutes may withstand constitutional scrutiny if drafted carefully.

IV. THE NEED FOR A HATE CRIME STATUTE IN SOUTH CAROLINA

A. Justification

South Carolina needs a hate crime law to deter bias-motivated violence with the threat of enhanced punishment because of the intentional selection of the victim based on race, gender, religion, or other perceived characteristic. In order to fully comprehend the need for a hate crime statute in South Carolina, it is necessary to understand the justifications for hate crime legislation generally. American lawyer and civil rights scholar Frederick Lawrence explains the necessity of enhanced punishment for hate crimes in his book Punishing Hate:

The enshrinement of racial harmony and equality among our highest values not only calls for independent punishment of racially motivated violence as a bias crime and not merely as a parallel crime; it also calls for enhanced punishment of bias crimes over

96. ANTI-DEFAMATION LEAGUE, supra note 81, at 10.
97. Id.
parallel crimes. If bias crimes are not punished more harshly than parallel crimes, the implicit message expressed by the criminal justice system is that racial harmony and equality are not among the highest values in our society. If a racially motivated assault is punished identically to a parallel assault . . . [n]ot only has the crime itself occurred, but the underlying hatred of the crime is invisible to the eye of the legal system. The punishment of bias crimes . . . is necessary for the full expression of commitment to American values of equality of treatment and opportunity.99

In addition to the need for enhanced punishment for bias crimes to condemn the evil character of offenders, hate crime legislation also addresses the tensions between individualized and group justice.100 Specifically, “the psychological and moral need for individual justice is undermined when victims are harmed because they are treated as members of a category rather than as unique beings.”101 Unlike parallel crimes, bias crimes contribute to the cultural marginalization of groups and increase the risk of future assault.102 Bias-motivated violence “rel[ies] on a despised theory of human worth that has been rejected by our modern constitutional culture,”103 and for this reason, offenders of bias-motivated crimes are more culpable and more harmful to society than those who commit crimes without a bias motivation.104 Hate crime legislation remains necessary, therefore, because “it condemns the particular way in which the victims have been humiliated—the damage to their sense that they are judged for who they uniquely are.”105


100. Andrew E. Taslitz, Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong, 40 B.C. L. REV. 739, 742 (1999).

101. Id.

102. Id.

103. Id.

104. Id. at 744.

105. Id. at 745. Taslitz notes that “all humans have equal worth” and that “punishment is deserved according to the wrongdoer’s choice to disregard another’s value.” Id. at 756. He further explains that when harm is inflicted against persons “because they are viewed as representatives of a category and not as unique individuals, their special value is disregarded.” Id. (citing Samuel H. Pillsbury, Judging Evil: Rethinking the Law of Murder and Manslaughter 73, 114 (1998)). In this way, “a hate criminal is culpable because he is the kind of person whose rationally chosen actions contribute to robbing the meaning of both the victim’s life and our collective lives as American citizens.” Id. (citing Pillsbury, supra note 105, at 73). Therefore, “[h]ate crimes legislation thus helps to dismantle group-based status hierarchies that are inconsistent with the egalitarian spirit of our modern constitutional
Despite the extended ability to prosecute hate crimes at the federal level through the Hate Crimes Prevention Act of 2009, the limits on its effectiveness, together with the fact that too many hate crimes occur for the federal government to prosecute, support the conclusion that prosecution through state hate crime law remains a necessity. The FBI’s UCR Program released hate crime statistics for 2016 indicating that law enforcement agencies reported 6,121 criminal incidents that were motivated by bias toward race, ethnicity, ancestry, religion, sexual orientation, disability, gender, or gender identity. The number of hate crimes reported increased almost five percent from 5,850 criminal incidents reported in 2015. Victims of hate crime are more likely to report the crime if they are aware of a special reporting system for collecting hate crime data. This increase in reporting may not only indicate a potential rise in the number of incidents committed, but also an increase in society’s willingness to engage with this issue.

Despite the fact that Roof’s crimes were treated as hate crimes under federal law, they would not be treated as such in state courts. In an article by the Post and Courier, then-U.S. Attorney General Loretta Lynch explained that “South Carolina does not have a hate crimes statute, and as a result, the state charges do not reflect the alleged hate crimes offense reflected in the federal indictment returned today.” More specifically, “[i]n South Carolina, there is no legal distinction between shooting someone in a drug deal gone wrong and gunning down an innocent man because of

culture.” Id. at 761 (citing J.M. Balkin, The Constitution of Status, 106 YALE L.J. 2313, 2343–44 (1997)).

Professor Balkin makes a similar point:
The Constitution has an egalitarian demand, a demand which is more than a demand for equality of civil rights, and more than a demand for equality of political rights. It is a demand for equality of social status . . . . This egalitarian demand is what connects the Constitution to our founding document, the Declaration of Independence. It is the deep meaning of the American political experience. It is the soul of our Constitution.

Id. at 761 n.120 (citing Balkin, supra note 105, at 2343–44).

106. See Trout, supra note 15, at 150.


109. ANTI-DEFAMATION LEAGUE, supra note 81, at 13.

110. See Buckley, supra note 13.

111. Id.
the color of his skin.”112 Although a state hate crime statute would have likely had little effect on the charges brought against Roof because the harshest penalty would be sought under federal law, a state hate crime law would help to address lesser crimes committed out of hate.113 These lesser crimes “still send shockwaves throughout entire communities,” creating a “destabilizing, demoralizing, fear-inducing impact [that] warrants a serious punishment.”114 As previously discussed, the federal government’s authority to prosecute South Carolinians for hate crimes is limited, and less visible crimes would not likely command a federal prosecution.115 These crimes still cause “a tremendous negative impact,” so “it makes sense to allow the state to prosecute them with that in mind.”116

As one of only five states without a hate crime statute, South Carolina implicitly condones bias-motivated violence despite its laws convicting offenders of the underlying crime. The failure of the South Carolina legislature to enact a hate crime law sends the message to all South Carolinians that bias-motivated crime does not warrant enhanced punishment for the additional pain and community suffering that it inflicts. Therefore, the enactment of a hate crime statute would make clear that bias-motivated crime will not be tolerated in the State of South Carolina.

B. Current Status of South Carolina Hate Crime Legislation

In order to determine potential reasons why the South Carolina legislature has yet to enact a hate crime statute and to propose certain language and other provisions for consideration by the legislature, a historical review of previous bills should be discussed. The South Carolina General Assembly first introduced a hate crime bill in the senate in 1997 as Senate Bill 37 to enact a penalty enhancement statute for hate crimes. The bill read in part:

To amend Chapter 1, Title 16 of the Code of Laws of South Carolina, 1976, relating to felonies and misdemeanors, by adding Section 16-1-130 so as to provide for an increase in the penalty for an underlying offense if the offender intentionally selects the person against whom the crime is committed or selects the property that is damaged or otherwise affected by the crime in whole or in part

112. Id.
113. See id.
114. Id.
115. See id.
116. Id.
because of the offender’s belief or perception regarding the race, color, ethnicity, national origin, ancestry, religion, gender, sexual orientation, or disability of that person or the owner or occupant of that property, whether or not the actor’s belief or perception was correct . . . .”

In 1999, the senate bill was reintroduced with essentially the same language as the 1997 bill, and the South Carolina House of Representatives introduced a bill parallel to that in the senate.118 The house bill introduced in 2011 defined a hate crime as follows:

A person who commits an offense contained in this chapter with the intent to assault, intimidate, or threaten a person because of his race, religion, color, sex, age, national origin, or sexual orientation is guilty of a felony and, upon conviction, must be fined not less than two thousand dollars nor more than ten thousand dollars, or imprisoned not less than two years nor more than fifteen years, or both . . . .119

House Bill 3589, introduced in 2013, contained identical language to the 2011 bill, which was also referred to the House Judiciary Committee and failed to be voted out to the house floor.120 In 2015 and 2016, house members continued to propose hate crime legislation with the following language:

To amend the Code of Laws of South Carolina, 1976, by adding Article 18 to Chapter 3, Title 16 so as to provide penalties for a person convicted of a crime contained in this chapter with the intent to assault, intimidate, or threaten a person because of his race,
religion, color, sex, age, national origin, or sexual orientation . . . . \textsuperscript{121}

These bills were also introduced and referred to the House Judiciary Committee but failed to return to the house floor for consideration.\textsuperscript{122}

None of the previously proposed hate crime bills have made it out of the South Carolina State House “due to concerns about restricting thought and speech,” as “current language criminalizes the intent to ‘intimidate or threaten.’”\textsuperscript{123} First, as discussed in Part III, the United States Supreme Court along with several state supreme courts have determined that state hate crime statutes which provide an increased penalty for bias-motivated crimes are constitutional and do not violate the First Amendment because they penalize conduct, not expression.\textsuperscript{124} Specifically, during the creation of its penalty-enhancement statute, the Wisconsin legislature determined that “bias-motivated conduct caused particular harms above the crime itself, such as retaliatory criminal activity, increased emotional harms on the victims of such crime, and increased community unrest, which combined to result in crimes of different natures from those that are not bias-driven.”\textsuperscript{125} In addition, the Court held that “the legislature’s intent to prevent such additional harms was a compelling state interest,” deciding that the statute was constitutional.\textsuperscript{126} Therefore, because the intentional selection of a victim based on an actual or perceived characteristic is conduct, not expression, the South Carolina legislature’s concern that hate crime legislation would unconstitutionally restrict speech is unwarranted.

Similarly, the argument that hate crime legislation would restrict or otherwise unlawfully punish thought is also without merit. Although the First Amendment prohibits restriction of thought,\textsuperscript{127} hate crime legislation does not unconstitutionally restrict or punish thought if drafted carefully. For example, Wisconsin’s statute, upheld as constitutional in Mitchell, contains language that focuses on the act, not on expression protected by the First Amendment: “intentionally selects the person against whom the crime is


\textsuperscript{122} Id.

\textsuperscript{123} Buckley, supra note 13.


\textsuperscript{126} Id. at 670 (citing Mitchell, 508 U.S. at 487–88).

\textsuperscript{127} See U.S. CONST. amend. I.
committed . . . because of the actor’s belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”128 It is “the intentional selection of a victim based on specified characteristics [that] is itself an act.”129

In our society, we understand “that acts undertaken by individuals are motivated by thought and some sort of mental process that preceded the act.”130 However, “the act of intentionally selecting a victim and then engaging in criminal conduct against that person [results in] . . . two acts, not one act plus an underlying thought process.”131 People are free to think biased thoughts, but when those thoughts lead to criminal conduct resulting in harm against another intentionally selected because of an identifiable characteristic, hate crime laws allow for enhanced punishment because of that intentional selection. Drafting the statute in this way prevents mischaracterization of the law “as seeking to punish criminals solely for their bigoted thoughts” and instead focuses the attention where it should be—on the act of intentional selection of the victim.132 Therefore, lawmakers’ concern as to punishment of thought is unwarranted because hate crime statutes criminalize the act of intentional selection, not the thoughts that precede it.

V. PROPOSED SOUTH CAROLINA HATE CRIME STATUTE

A. Two Statutory Models

While most hate crime statutes can be categorized into one of two models, South Carolina should adopt the discriminatory selection model based on Wisconsin’s statute to avoid potential constitutional challenges by focusing on the offender’s act of selection rather than his or her mental processes. The discriminatory selection model requires only that the defendant select the victim because he or she shares a characteristic with a particular group.133 Under this model, the reason for the offender’s selection is irrelevant—just the fact that the offender selected the victim based on a protected characteristic is sufficient.134 The racial animus model, on the

128. WIS. STAT. § 939.645(b) (2017) (emphasis added).
130. Id.
131. Id.
132. Id. at 879.
133. LAWRENCE, supra note 99, at 29.
134. See id.
other hand, requires that the defendant act out of hatred for the group with which the victim is associated.\textsuperscript{135} The racial animus model "defines crimes on the basis of the perpetrator’s animus for the racial or ethnic group of the victim and the centrality of this animus in the perpetrator’s motivation for committing the crime."\textsuperscript{136}

The statute upheld by the United States Supreme Court in Wisconsin v. Mitchell was a discriminatory selection statute.\textsuperscript{137} In contrast, New Jersey’s statute follows the racial animus model, which "enhances the criminal penalty for a crime that is motivated, at least in part, by ‘ill will, hatred, or bias due to race, color, religion, sexual orientation, or ethnicity.’"\textsuperscript{138} Under this model, the offender must have committed the crime with hostility toward the victim because he belongs to a particular group.\textsuperscript{139}

Although these two models of hate crime statutes are distinct, most state statutes do not fit squarely in one category or the other.\textsuperscript{140} Instead, most states and the federal civil rights crime statutes have adopted a because of formulation, which "require only that the defendant has committed the parallel crime and that the crime be committed because of the victim’s

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 30.
\item Id. Wisconsin’s hate crime statute was based on model legislation originally drafted by the Anti-Defamation League (ADL) in 1981. ANTI-DEFAMATION LEAGUE, supra note 81, at 1. The ADL was originally established following a "brutal, anti-semitic crime—the lynching of a Jew named Leo Frank in Atlanta, Georgia—which provided dramatic evidence of the need to combat criminal conduct motivated by bigotry.” Steven M. Freeman, Hate Crime Laws: Punishment Which Fits the Crime, 1992 ANN. SURV. AM. L. 581, 581 (1992). Since 1981, forty-three of the fifty states plus the District of Columbia have adopted a state hate crime statute. See ANTI-DEFAMATION LEAGUE, supra note 81, at 2. The section of the ADL’s model legislation concerning bias-motivated crimes reads as follows:
\begin{quote}
A person commits a Bias-Motivated Crime if, by reason of the actual or perceived race, color, religion, national origin, sexual orientation or gender of another individual or group of individuals, he violates Section _____ of the Penal Code (insert code provisions for criminal trespass, criminal mischief, harassment, menacing, intimidation, assault, battery and or other appropriate statutorily proscribed criminal conduct).
\end{quote}
A Bias-Motivated Crime under this code provision is a _____ misdemeanor/felony (the degree of criminal liability should be at least one degree more serious than that imposed for commission of the underlying offense).
\end{enumerate}
\end{footnotesize}
race.” Lawrence argues, however, that the racial animus model is preferable because it encompasses the characteristics of a discriminatory selection statute while also supporting the conclusion that “bias crimes ought to single out criminal conduct that is motivated by racial animus.” However, the use of language such as “motivated by” under the racial animus model potentially turns the attention towards the perpetrator’s mental processes rather than focusing on the act itself. For this reason and those mentioned in the previous section, South Carolina should adopt the discriminatory selection model based on Wisconsin’s statute in order to avoid a mischaracterization of the statute’s purpose.

B. Policy Considerations

In drafting a hate crime statute, the South Carolina legislature must consider the type of statute to enact, the crimes to which the statute will apply, and the categories of characteristics to be protected under the statute. First, because bill sponsors’ objective for hate crime laws is typically to deter and punish hate crimes, legislators often decide to create a penalty enhancement law that imposes a more severe punishment for crimes in which the offender intentionally selects the victim on the basis of certain characteristics rather than creating a separate offense statute. There are three possible reasons why most states have opted for this choice. The first reason is that, generally, when a perpetrator of crime targets victims because of some identifiable characteristic, it is more likely that he or she will commit another targeted crime in the future. Another reason why legislators choose to create a sentence enhancement statute is because the harm caused by hate crimes tends to be greater than that caused by the underlying offense, as the act is considered to be an assault on the victim’s community rather than an isolated incident. Finally, due to the nature of bias-motivated crimes, the harm that is created is typically more extensive and severe than in crimes without bias motivation.

Next, once a state has determined that it would like to adopt a penalty enhancement statute, the next consideration is the crimes that should be

141. Id. at 36.
142. Id. at 79, 175.
143. See Cordray, supra note 129, at 879.
144. Id. at 874.
145. Id.
146. Id.
147. Id.
148. Id. at 875.
subject to the enhancement.\textsuperscript{149} The Wisconsin statute provides an example of penalty enhancement applied to all crimes in the state’s criminal code.\textsuperscript{150} Ohio’s statute, on the other hand, “only applies to... a small subset of... offenses identified in the State’s criminal laws.”\textsuperscript{151} Narrowing the crimes to which the enhancement may be applied, however, may cause unintended difficulty in its interpretation by courts.\textsuperscript{152} A broader scope of crimes to which the hate crime statute would apply would likely be the better choice, as it would apply to all crimes equally.\textsuperscript{153}

Lastly, a final consideration is the “categories of identifiable characteristics... to be protected under such laws.”\textsuperscript{154} Typically, drafters track “the established provisions of antidiscrimination laws.”\textsuperscript{155} The language used in South Carolina’s anti-discrimination laws to identify the protected characteristics closely follows federal law, stating that an employer is prohibited from discriminating against an individual “because of the individual’s race, religion, color, sex, age, national origin, or disability.”\textsuperscript{156} Proposed legislation in South Carolina should likely follow the provisions set out in its anti-discrimination laws but may also include additional categories usually protected in state hate crime statutes.

\section*{C. Proposal: The Senator Clementa Pinckney and Emanuel Nine Hate Crime Act}

The South Carolina legislature should consider changing the language of recent unsuccessful hate crime bills from “intent to intimidate or threaten” to focus on the “intentional selection” of the victim. If the legislature adopts the following suggestions and considers additional provisions, South Carolina can successfully enact a hate crime statute. First, to alleviate legislative concerns discussed in Section IV.B regarding the “intent to intimidate or threaten...” language of South Carolina’s most recent bill, this proposal suggests using the language of “intentional selection” similar to Wisconsin’s statute. Use of this language will make clear that a person convicted of an underlying criminal offense who “intentionally selected” the victim based on certain protected characteristics may be subject to an enhanced sentence

\begin{thebibliography}{9}
\bibitem{149} See id. at 875–76.
\bibitem{150} Id. at 876 (citing Wis. Stat. § 939.645 (1992)).
\bibitem{151} Id.
\bibitem{152} See id.
\bibitem{153} Id. at 877.
\bibitem{154} Id.
\bibitem{155} Id.
\end{thebibliography}
because of the accompanying act of intentional selection, not the defendant’s intentions or thoughts.

Second, for the reasons discussed in Section V.A, this proposal suggests “because of” language rather than “motivated by.” Specifically, the statute will enhance sentence penalties for persons convicted of an underlying criminal offense when he or she intentionally selected the victim because of the victim’s race, color, religion, national origin, gender, sexual orientation, ancestry, or disability. Using “because of” rather than “motivated by” language keeps the focus on the intentional act of selection rather than the biased or bigoted thoughts of the offender at the time of the crime. The proposed statute will use because of in order to protect it from potential First Amendment violation claims and will also specify the protected categories so as not to be found unconstitutional for vagueness like Georgia’s previous statute.

Third, South Carolina should adopt a statute that enhances the sentence for a person convicted of an underlying criminal offense if the trier of fact determines beyond a reasonable doubt that the offender intentionally selected the victim because of an actual or perceived protected characteristic. The accompanying act of intentional selection of the victim because of bias or prejudice creates psychological harm in addition to the harm caused by the underlying offense that affects the victim, the community associated with the perceived group, and society as a whole.157 For these reasons, by adopting a sentence enhancement hate crime statute, South Carolina would rightfully condemn bias-motivated criminal conduct once and for all.

In addition to sentence enhancement, the South Carolina legislature could consider additional provisions such as a system of guidelines and procedures for identifying and reporting hate crime and training for law enforcement officers and other related agencies. Recently, the State of Georgia pre-filed a hate crime bill158 that establishes sentence enhancement and also instructs law enforcement to “incorporate training materials on identifying, responding to and reporting activity that might involve a hate crime.”159 Like South Carolina, Georgia is also one of five states in the U.S. without a hate crime statute.160 Georgia previously enacted a hate crime

159. Id.
160. See ANTI-DEFAMATION LEAGUE, supra note 12.
statute in 2000\textsuperscript{161} that was determined to be unconstitutional due to vagueness by the Supreme Court of Georgia in 2004.\textsuperscript{162} Remediing prior issues, the Georgia bill seeks to “provide sentencing of defendants who commit certain crimes which target a victim or his or her property because of the defendant’s belief regarding the victim’s race, color, religion, national origin, sexual orientation, gender, gender identity, mental disability, or physical disability.”\textsuperscript{163} Specifically, the operative language of the proposed statute reads in part:

[I]f the trier of fact determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property of the victim as the object of the offense because of the individual’s belief or perception regarding the race, color, national origin, sexual orientation, gender, gender identity, mental disability, or physical disability of such person or group of persons, whether or not such individual’s belief or perception was correct . . . \textsuperscript{164}

Additional provisions for identification and reporting of hate crime in South Carolina, as well as training and information for law enforcement officers and agencies, and civil liability for hate crimes would bolster the enforcement of the hate crime statute.

Finally, the sentence enhancement statute should apply broadly to criminal offenses, and the protected characteristics should cover a wide range of groups so as not to favor any one class over another. Based on the 1997 Senate Bill 37, the sentence enhancement should apply to crimes classified or exempted under section 16-1-10 of the South Carolina Code of Laws. This broad scope of crimes would allow the sentence enhancement to apply to all crimes equally and would prevent unintended difficulty in interpretation by courts. The categories protected under the hate crime

\footnotesize{\textsuperscript{161} GA. CODE ANN. § 17-10-17 (repealed 2004).}
\footnotesize{\textsuperscript{162} Botts v. State, 604 S.E.2d 512, 514 (Ga. 2004).}
\footnotesize{\textsuperscript{163} H.R. 660, 154th Gen. Assemb., Reg. Sess. (Ga. 2018). Section 1-1 of the bill would enact a new code section imposing a sentence enhancement for defendants guilty of crimes involving bias or prejudice. Section 1-2 establishes a notification requirement to which the state must adhere in order to seek the penalty enhancement. Section 1-3 specifies that the reasonable doubt standard of proof is necessary for a determination of guilt as to enhancement of the sentence. Section 2-1 mandates the establishment of guidelines and procedures for training, identification, and reporting of hate crimes. Section 2-2 outlines the powers and duties of the Georgia Crime Information Center, such as to provide a uniform crime reporting system. Section 3-1 would enact a new code section establishing civil liability for hate crimes. Id.}
\footnotesize{\textsuperscript{164} Id.}
statute “should include qualities we all possess—race, color, national origin, ethnicity, gender, religion, and sexual orientation.”\textsuperscript{165} It could also cover those characteristics protected by anti-discrimination laws, such as disability.\textsuperscript{166} Because “any person in this state could become a victim of a hate crime . . . [South Carolina’s] hate crime law should be neutral or generic in its definition and application . . . [and] must protect all citizens equally and . . . punish without discrimination.”\textsuperscript{167}

VI. CONCLUSION

The historical and cultural forces of society help shape much of the law that governs it. When an issue arises, society attempts to remedy the problem by establishing certain principles and rules to guide its citizens on how to handle it. Hate exists throughout our society and is “an unfortunate side of human nature.”\textsuperscript{168} It is something that we are often forced to tolerate in everyday life.\textsuperscript{169} But when “these hateful and intolerant attitudes serve as the basis of criminal conduct, tolerance must end, and criminal sanctions must takeover.”\textsuperscript{170} Although hate, prejudice, and bias-motivated violence “cannot be legislated out of existence,”\textsuperscript{171} the adoption of hate crime legislation in South Carolina will make clear that hate-motivated violence will not be tolerated in this state.

While we may not have been able to change the biased thoughts of Dylann Roof or others like him on that fateful night, our hope is that one day future bias-motivated conduct can be prevented through the deterrence of a hate crime law. Following the deaths of the Emanuel Nine, “almost every public figure . . . has rightfully condemned the hatred that drove the gunman to kill. State law should more closely reflect that condemnation.”\textsuperscript{172} The South Carolina General Assembly has failed to enact a hate crime statute due to concerns that the language in previous bills unconstitutionally restricts thought and speech. These concerns, however, are unwarranted because hate crime statutes that increase the penalty for bias-motivated

\textsuperscript{165} Mark Pryor, \textit{Why We Need Hate Crime Legislation in Arkansas: Stopping Bias-Motivated Violence}, 36 ARK. LAW. 28, 30 (2001).
\textsuperscript{167} Pryor, \textit{supra} note 165, at 30.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Pryor, \textit{supra} note 165, at 28.
\textsuperscript{172} Buckley, \textit{supra} note 13.
crimes penalize conduct, not expression, and therefore do not violate the First Amendment.

South Carolina must enact a sentence enhancement hate crime statute because bias-motivated crimes are more reprehensible than the underlying parallel offense, as it harms not only the victim, but it extends devastating psychological harm to their families, communities, and society as a whole. If South Carolina fails to enact a hate crime statute, victims of bias-motivated crime will remain unprotected, and perpetrators will not be punished—if even convicted at all—for the despicable targeting of another human being because of race, gender, religion, or other perceived characteristic. The State of South Carolina must join the forty-five other states in passing hate crime legislation to deter bias-motivated conduct and declare to the nation once and for all that hate will not be tolerated.

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