

# The *raison d'être* of hate-crime laws

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## ABSTRACT

Hate-crime laws include laws that specifically criminalise unlawful conduct motivated by bias or prejudice towards personal characteristics of the victim and laws that allow for the imposition of harsher penalties on convicted hate-crime offenders. Such laws are often justified on the retributive basis that hate crimes cause greater harms than crimes that are not motivated by bias or prejudice. The imposition of a harsher punishment on the convicted hate-crime offender is therefore justifiable since it is proportional to the harms caused and because it is the offender's just desert. However this retributive justification for hate-crime laws has been the subject of academic criticism. This article therefore attempts to find an alternative rationale for hate-crime laws by exploring denunciation as another justification for retribution and by considering the utilitarian theory of punishment. The South African context is considered since hate-crime laws do not presently exist in South African law. This article posits that the enactment of a hate-crime law in South Africa could be regarded as a symbolic commitment to equality since hate crimes are said to violate the right to equality.

## 1 Introduction

Hate crimes are criminal acts that are motivated by prejudice or bias<sup>1</sup> towards a specific personal characteristic of the victim.<sup>2</sup> These characteristics could include the victim's actual or perceived race, ethnicity, religion, sexual orientation, gender, disability or nationality.<sup>3</sup>

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<sup>1</sup> The perpetrator's motivation in a hate crime is referred to as a 'bias motivation'. The actual criminal conduct is referred to as the 'base' or 'underlying' crime. See further: FM Lawrence *Punishing Hate: Bias Crimes Under American Law* (1999) 9.

<sup>2</sup> Since hate crimes are motivated by bias or prejudice, there is a tendency in some American literature to refer to hate crimes as 'bias crimes'. See further: B Levin 'Bias crimes: A theoretical and practical overview' (1992-1993) 4 *Stanford Law and Policy Review* 165 at 165.

<sup>3</sup> The victim characteristics that are included in a hate-crime law depend on the jurisdiction concerned. One of the most extensive lists of victim characteristics can be found in the hate-crime law of the District of Columbia in the United States of America (USA). According to the District of Columbia's Code on Bias-Related Crime, the following victim characteristics or protected groups may be the subject of a hate crime: 'Actual or perceived race, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibility, physical handicap, matriculation, or political affiliation of a victim of the subject designated act.'

Because of their bias motivation, hate crimes may be distinguished from what could conveniently be termed 'non-hate crimes'.<sup>4</sup>

Hate-crimes laws specifically address this form of criminal conduct. Such laws could take the form of laws that specifically criminalise unlawful conduct motivated by bias or prejudice towards personal characteristics of the victim<sup>5</sup> and laws that provide for the imposition of enhanced or aggravated penalties on convicted hate-crime offenders.<sup>6</sup> An enhanced or aggravated penalty is more severe than the penalty which is imposed on the same crime when it is not motivated by prejudice or bias (or the equivalent 'non-hate crime'). Penalty-enhancement laws could also increase the 'level' of a crime from a simple misdemeanor to a felony.<sup>7</sup> Since the USA was the first country to recognise hate crimes as a specific category of criminal conduct and to enact hate-crime laws, the existing academic literature and the legal and historical sources are predominantly of North American origin.<sup>8</sup>

While hate-crime laws do not presently exist in South African law there have been calls from the civil society and academic sectors for

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<sup>4</sup> 'Non-hate crimes' refer to crimes that are not motivated by bias or prejudice towards a personal characteristic of the victim. They could, however, have been motivated by greed, lust, passion or a desire for revenge.

<sup>5</sup> Refer to s 28 of the British Crime and Disorder Act of 1998 which creates a number of 'racially aggravated' crimes if the offender demonstrated hostility towards the victim based on the victim's membership or presumed membership of a racial group.

<sup>6</sup> Refer to the French law, *Loi no. 2003-88 du 3 février 2003*, which is commonly referred to as the 'Lellouche law'. According to art 1 of the 'Lellouche law', the normal penalties incurred for certain crimes are aggravated when the offence is committed because of the victim's actual or perceived membership or non-membership in a given ethnic group, nation, race or religion.

<sup>7</sup> Lawrence op cit (n1) 93. It should be noted that the distinction between misdemeanors and felonies exists in Anglo-American criminal law. However, this distinction does not exist in South African criminal law.

<sup>8</sup> Some consensus exists that the idea underpinning hate crimes as the concept is presently understood may be traced back to the enactment of federal criminal-civil-rights laws in the post-civil war period in the USA. See further: N Hall *Hate Crime* 2ed (2013) 20 and B Levin 'From slavery to hate crime laws: The emergence of race and status-based protection in American criminal law' (2002) 58(2) *Journal of Social Issues* 227 at 227. Criminal-civil-rights laws were intended to protect newly freed slaves, particularly in the Southern states of the USA, who were subject to abuse and murder. An example of such a federal-criminal civil-rights law is the Civil Rights Act of 1871 which enabled the American federal government to prosecute offenders who conspired to deprive others of their civil rights. However the earliest example of a contemporary federal hate-crime law in the USA is the Hate Crime Statistics Act of 1990.

the enactment of hate-crime legislation.<sup>9</sup> These calls from various sectors in South Africa for the enactment of hate-crime laws should be considered in light of the rape and murder of black lesbian women and several countrywide outbreaks of xenophobic violence against black African foreigners in 2008 and 2015. Despite the non-recognition of hate crimes in South African criminal law, criminal conduct motivated by bias or prejudice towards specific victim characteristics could still be prosecuted in terms of the existing common-law or statutory crimes. The bias motivation of the perpetrator may be considered as an aggravating factor at sentencing.<sup>10</sup>

Hate-crime laws are often justified on the retributive basis that hate crimes cause greater harms than 'non-hate crimes'. The imposition of a harsher punishment on the convicted hate-crime offender is therefore justifiable since it is proportional to the harms caused and because it is the offender's just desert. However, several academics have criticised this justification for hate-crime laws. This article therefore attempts to find an alternative rationale for hate-crime laws by exploring denunciation as one of the justifications of the retributive theory and by considering the utilitarian theory of punishment. Hate crimes are presently not recognised in South-African criminal law. This submission therefore considers the South-African context. Since hate crimes are said to violate the right to equality and in light of South Africa's constitutional commitment to equality, this article posits that the enactment of a hate-crime law in South Africa could be considered as symbolic proof of the post-apartheid state's commitment to equality.

## 2 The theoretical justifications for punishment

The imposition of punishment on a wrongdoer is generally justified on the basis of two broad theories of punishment: the retributive theory on the one hand and the utilitarian (or consequentialist) theory on

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<sup>9</sup> In this regard see: B Harris 'Arranging prejudice: Exploring hate crime in post-apartheid South Africa' available at <http://www.csvr.org.za/docs/racism/arrangingprejudice.pdf>, accessed 30 July 2015. Also see: D Breen and JA Nel 'South Africa - a home for all? The need for hate-crime legislation' (2011) 38 *SA Crime Quarterly* 33 at 33; K Naidoo and M Karels 'Hate crimes against black lesbian South Africans: Where race, sexual orientation and gender collide' Part 2 (2012) 33(3) *Obiter* 600 at 624 and N Mollema and C van der Bijl 'Hate crimes: The ultimate anathematic crimes' (2014) 35 3 *Obiter* 672 at 679.

<sup>10</sup> See Mollema and Van der Bijl op cit (n9) 677. Also refer to the cases of *S v Van Wyk* 1992 (1) SACR 147 (NmS) and *S v Matela* 1994 (1) SACR 236 (A). In both these cases the racist motivations of the accused were held to be aggravating factors at sentencing.

the other.<sup>11</sup> According to the retributive theory, since human beings are endowed with freedom of choice, when they voluntarily choose to engage in criminal conduct, they must be punished for their actions.<sup>12</sup> The utilitarian or consequentialist theory is based on the rationale that punishment can be justified on the grounds that it achieves a goal<sup>13</sup> or a benefit<sup>14</sup> or a positive result<sup>15</sup> for society. The rationale or justification of the utilitarian theory is therefore founded on the positive consequences of punishment.<sup>16</sup> Such positive consequences include setting an example to members of society (also known as 'deterrence') by restraining the wrongdoer so that he or she can cause no further harm to society ('incapacitation') and by reforming the wrongdoer (which is also referred to as 'rehabilitation').<sup>17</sup> Hate-crime laws are often justified on the retributive basis that criminal conduct motivated by prejudice or bias towards personal characteristics of the victim causes greater harms than similar criminal conduct that is not motivated by prejudice or bias.<sup>18</sup>

### 3 The retributive theory of punishment: A broad overview

The rationale of the retributive theory of punishment is that a wrongdoer is morally deserving of punishment and has to receive his just desert.<sup>19</sup> Once a crime has been committed, an offender has shown that he refuses to conform to society's rules and he creates an imbalance in society.<sup>20</sup> A similar view is expressed by Snyman who writes that when X commits a voluntary criminal act, the scales of

<sup>11</sup> K Bilz and JM Darley 'What's wrong with harmless theories of punishment' (2004) 79 *Chicago-Kent Law Review* 1215 at 1215; K Huizens 'Street crime, corporate crime and theories of punishment: A response to Brown' (2002) 37 (1) *Wake Forest Law Review* 1 at 10; RJ Rychlak 'Society's moral right to punish: A further exploration of the denunciation theory of punishment' (1990-1991) 65 *Tulane Law Review* 299 at 300 and SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 171-174.

<sup>12</sup> SB Byrd 'Kant's theory of punishment: Deterrence in its threat, retribution in its execution' (1989) 8 *Law and Philosophy* 151 at 154-157 and CR Snyman *Criminal Law* 6ed (2014) 14.

<sup>13</sup> Bilz and Darley op cit (n11) 215.

<sup>14</sup> RS Frase 'Punishment purposes' (2005) 58(1) *Stanford Law Review* 67 at 69.

<sup>15</sup> Terblanche op cit (n11) 174.

<sup>16</sup> G Fletcher *Rethinking Criminal Law* (1978) 414.

<sup>17</sup> Bilz and Darley op cit (n11) 1215-1217.

<sup>18</sup> See: PB Gerstenfeld *Hate Crimes: Causes, Controls and Controversies* 3ed (2013) 18 and Hall op cit (n8) 124. Hall refers to the 'disproportionate harm' caused by hate crimes.

<sup>19</sup> Rychlak op cit (n11) 300 and D Husak 'Preventive detention as punishment: Some possible obstacles' in A Ashworth, L Zedner and P Tomlin (eds) *Prevention and the Limits of the Criminal Law* (2013) 178 at 188. According to Husak, the idea of 'just desert' is central to the retributive theory of punishment.

<sup>20</sup> Fletcher op cit (n16) 417.

justice are 'no longer in balance'.<sup>21</sup> The offender thus owes a debt to society which can only be repaid by the infliction of punishment.<sup>22</sup> Punishment is thus the answer to the offender's wrongdoing since it gives expression to society's norms and morals.<sup>23</sup> According to Fletcher, punishment is just because it is 'a fitting social response to the commission of crime.'<sup>24</sup> Huizens opines that 'society is duty-bound to impose punishment on an offender'.<sup>25</sup> The duty of society to impose punishment on a wrongdoer is usually associated with the 18th century German philosopher Immanuel Kant who is regarded as the father of the retributive theory of punishment.<sup>26</sup> An oft-cited passage from Kant's work, 'Metaphysics of Morals',<sup>27</sup> which is regarded as espousing a retributive justification for punishment refers to an island society which is about to be dissolved by the unanimous vote of all its members. Even if the members of such a society were to be dispersed over the rest of the earth, the last murderer confined within the prison of this society must first be executed so that he/she can experience the full weight of his/her deeds and so that the blood guilt of the murderer does not taint the members of the society who fail to inflict punishment.

The wrongdoer's moral guilt implies that his/her blameworthiness or culpability, whether in the form of intention or negligence, is central to determining the nature and extent of the harm he/she has caused.<sup>28</sup> The retributive theory thus distinguishes between intentional and negligent conduct.<sup>29</sup> Negligent conduct is consequently punished less severely than intentional conduct.<sup>30</sup> Also implicit in the retributive idea of just desert is that the wrongdoer must be punished in proportion to his crime.<sup>31</sup> According to Snyman, 'the less the harm ... the less the punishment ought to be because the debt which the offender owes the

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<sup>21</sup> Snyman op cit (n12) 11.

<sup>22</sup> Fletcher op cit (n16) 417.

<sup>23</sup> Bilz and Darley op cit (n11) 1215.

<sup>24</sup> Fletcher op cit (n16) 415.

<sup>25</sup> Huizens op cit (n11) 10.

<sup>26</sup> RA Posner 'Retribution and related concepts of punishment' (1980) 9 *Journal of Legal Studies* 71 at 71 and Bilz and Darley op cit (n11) 1217.

<sup>27</sup> Referred to in Byrd op cit (n12) 151 and BJ Sendor 'Restorative retributivism' (1994) 5 *Journal of Contemporary Legal Issues* 323 at 355.

<sup>28</sup> Frase op cit (n14) 73.

<sup>29</sup> G Fletcher 'What is punishment imposed for?' (1994) 5 *Journal of Contemporary Legal Issues* 101 at 106 and Byrd op cit (n12) 191.

<sup>30</sup> Byrd op cit (n12) 191.

<sup>31</sup> Frase op cit (n14) 73; Byrd op cit (n12) 153; CS Steiker 'Proportionality as a Limit on preventive justice: Promises and pitfalls' in A Ashworth, L Zedner and P Tomlin (eds) *Prevention and the Limits of the Criminal Law* (2013) 194 at 195 and Sendor op cit (n27) 342.

legal order is smaller.<sup>32</sup> A person who is convicted of drunk driving that causes the death of another person is consequently punished more severely than a person who has been convicted of mere drunk driving.<sup>33</sup> Steiker writes that retribution justifies punishment that is proportional to the offender's just desert, his degree of culpability for the crime and the seriousness of the crime.<sup>34</sup>

Retribution is based on the idea that the wrongdoer has to pay a price to society in order to vindicate the system of law or to avenge the victim and allow the criminal to expiate his sins through pain and suffering.<sup>35</sup> If the wrongdoer were not punished, this would be contrary to the laws of the state and to the laws of a higher moral order.<sup>36</sup> Punishment restores this balance when the perpetrator is punished.<sup>37</sup> Punishment under the retributive theory is an end in itself. No further justification for punishment is necessary.

### 3.1 The common retributive justification for hate-crime laws: The greater harms caused by hate crimes

Hate crimes are said to profoundly affect their victims since they are targeted because of personal, unalterable characteristics.<sup>38</sup> Hate crimes are also said to have a negative impact on the group or community who shares the same characteristic of the victim because they perceive the hate crime as a personal attack.<sup>39</sup> The effect of hate crimes on the victim's group and community is regarded as a message of further violence to all members of the victim's group and community<sup>40</sup> and is

<sup>32</sup> Snyman op cit (n12) 13.

<sup>33</sup> Fletcher op cit (n29) 106. A similar view is expressed by Snyman op cit (n12) 13.

<sup>34</sup> Steiker (op cit n31) 195.

<sup>35</sup> MG Duncan 'Cradled on the sea: Positive images of prison and theories of punishment' (1988) 76(6) *California Law Review* 1201 at 1242.

<sup>36</sup> R Dennis-Jones 'Theories of punishment' (1945) 4 *Probation Journal* 155 at 155.

<sup>37</sup> KM Carlsmith 'Why do we punish? Deterrence and just deserts as motives for punishment' (2002) 83(2) *Journal of Personality and Social Psychology* 284 at 284.

<sup>38</sup> See for example: FM Lawrence 'The case for a federal bias-crime law' (1998-2000) 16 *National Black Law Journal* 144 at 151 and K Craig-Henderson and L Ren-Sloan 'After the hate: Helping psychologists help victims of racist hate crime' (2003) 10(4) *Clinical Psychology: Science and Practice* 481 at 484, who argue that the victims of racially and ethnically motivated hate crimes are psychologically more traumatised than the victims of similar non-hate crimes because the crime is directed at an integral part of their identity. It is submitted that a similar argument could be made in relation to the victims of hate crimes that are motivated by the sexual orientation or the disability of the victim. Also see: J McDevitt and J Levin *Hate Crime: The Rising Tide of Bigotry and Bloodshed* (1993) 11-16.

<sup>39</sup> See Lawrence op cit (n38) 152.

<sup>40</sup> P Iganski 'Hate crimes hurt more, but should they be punished more severely?' in P Iganski (ed) *The Hate Debate: Should Hate be Punished as a Crime?* (2002) 132 at 135.

referred to as the ‘*in terrorem*’ effect of hate crime on all members of the victim’s group and extended community.<sup>41</sup> It has been posited that a single hate crime can cause the victim’s group to direct their anger, fear and apprehension at all members of the perpetrator’s group. This has the potential to exacerbate long-standing tensions and feuds in a community.<sup>42</sup> Hate crimes thus have a retaliatory effect on the victims’ group and community.

Laws which specifically criminalise hate crimes and allow for the imposition of harsher penalties are therefore justified because of the greater harms that are caused by hate crimes.<sup>43</sup> Such a justification for hate-crime laws resonates with the retributive theory of punishment which maintains that a wrongdoer is morally deserving of punishment and has to receive his just desert. Since hate crimes cause greater harms than their non-hate-crime counterparts, the imposition of harsher or aggravated penalties on convicted hate-crime offenders can therefore be considered as proportional to their crimes.

An alternative retributive justification for punishment that is less frequently encountered in literature is the harms principle. The harms principle was first espoused by the English philosopher John Stuart Mill in his 19th-century work, *On Liberty*.<sup>44</sup> While the harms principle was originally concerned with restricting the scope of governmental power in encroaching upon individual liberty, by the 20th century it had become a justification for government intervention in the areas of tort law and criminal law.<sup>45</sup>

According to Sendor,<sup>46</sup> crime causes two types of harm: harm to a legally-protected interest<sup>47</sup> and harm to the interests of the community.<sup>48</sup> According to Bilz and Darley,<sup>49</sup> the economic losses,

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<sup>41</sup> Hall op cit (n8) 166.

<sup>42</sup> Lawrence op cit (n1) 43.

<sup>43</sup> Gerstenfeld op cit (n18) 19-23.

<sup>44</sup> Bilz and Darley op cit (n11) 1225-1226; A Ashworth and J Horder *Principles of Criminal Law* 7ed (2013) 27-28; GL Heriot ‘The practical role of harm in the criminal law and the law of tort’ (1994) 5 *Journal of Contemporary Legal Issues* 145 at 145 and RA Epstein ‘The harms principle and how it grew’ (1995) 45(4) *The University of Toronto Law Journal* 369 at 370.

<sup>45</sup> Epstein op cit (n44) 371. Epstein writes that the harms principle had become an ‘engine of social control’ that operated against individual liberty.

<sup>46</sup> Sendor op cit (n27) 324.

<sup>47</sup> According to Sendor op cit (n27) 324, interests that are worthy of protection in terms of criminal law attain the status of a right and include the rights to life, physical integrity, sexual autonomy and the possession of property.

<sup>48</sup> According to Sendor op cit (n27) 334-335, a murderer does not simply violate the right to life of the victim. Since the right to life is also a right that is held by every member of the community, the murderer makes the implicit claim that he can also violate the right to life of every member of the community.

<sup>49</sup> Bilz and Darley op cit (n11) 1227.

physical injuries and psychological traumas that are experienced by a victim of crime, constitute losses to a victim and could be considered as the harms of the crime. As has been discussed above, hate crimes have far-reaching negative effects on the victim and the victim's group and community. It is submitted that these negative effects of hate crimes could be considered as losses to the victim, to the victim's group and community and consequently as harms.

However the effects of hate crime on the victim and on the victim's group or community have been subjected to some degree of academic scepticism since both the victims of hate crimes and non-hate crimes are negatively affected by their experience.<sup>50</sup> The validity of the claims that hate crimes have an effect on the victim's group and on the community have also been subjected to negative criticism since these claims have neither been systematically documented nor supported by reliable empirical evidence.<sup>51</sup> The studies which did endeavour to support the view that hate crimes cause greater harms to the victim and to the victim's group were based on small, geographically limited samples which did not indicate if comparisons were made between hate-crime and non-hate-crime victims.<sup>52</sup>

Blee<sup>53</sup> questions whether hate-crime victims actually receive a message that they are more vulnerable to further violence and abuse. In her study, which deals with the victims of racial violence, she contends that a victim's personal characteristics and 'social support, community organisation, political ties, experience with the police, citizenship status, economic vulnerability ... and visibility', all affect how the victim will receive a message of violence.<sup>54</sup>

Hate-crime laws can therefore not simply be justified on the basis of the retributive effects of just desert and the harms principle.<sup>55</sup>

<sup>50</sup> See: JB Jacobs and KA Potter 'Hate crimes: A critical perspective' (1997) 22 17 *Crime and Justice* 1 at 32.

<sup>51</sup> Jacobs and Potter op cit (n50) 32.

<sup>52</sup> Gerstenfeld op cit (n18) 21-22.

<sup>53</sup> KM Blee 'Racial violence in the United States' (2005) 28(4) *Ethnic and Racial Studies* 599 at 608.

<sup>54</sup> Blee op cit (n53) 608.

<sup>55</sup> Despite some academic scepticism regarding the harmful effects of hate crimes, in the USA some judicial recognition has been accorded to these effects. In the case of *Wisconsin v Mitchell* 508 U.S. 476 (1993), a number of *amici curiae* submitted briefs which supported the assertion that hate crimes inflict greater individual and societal harms. Based on these briefs, Rehnquist CJ, in delivering the majority opinion of the court, stated that hate crimes are: '... more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims and incite community unrest' (*Wisconsin v. Mitchell* at 488).

#### 4 The utilitarian or consequentialist theory of punishment

As has been highlighted earlier, the utilitarian or consequentialist theory is based on the rationale that punishment can be justified on the basis of a number of positive outcomes for society. Deterrence has been described as the 'best known' justification or effect under the utilitarian theory of punishment.<sup>56</sup> Deterrence is based on the idea that the fear of a threatened punishment may dissuade a person from committing crime.<sup>57</sup> Deterrence is usually divided into individual (or specific) deterrence, which is the effect of punishment on the actual offender and general deterrence, which refers to the effect of punishment on the members of society as a whole.<sup>58</sup>

In the absence of any studies or empirical data relating to the deterrent effect of hate-crime laws, it cannot be concluded with certainty that hate-crime laws have a deterrent effect. According to Gerstenfeld,<sup>59</sup> in order to believe in the deterrent effect of hate-crime laws, one would have to assume firstly that a potential offender is not deterred by being punished for the base crime but is deterred by the potential of enhanced punishment for the hate-crime offence. Gerstenfeld<sup>60</sup> also doubts whether racist hate-crime offenders actually rationalise the costs of committing hate crimes since racial hatred is an intense emotion that sometimes finds resonance in certain sectors of society and influences the commission of hate crimes.

Prevention by incapacitation is the second utilitarian or consequentialist effect of punishment that is most often referred to in academic writings.<sup>61</sup> The effect of incapacitation is that the criminal sanction, whether in the form of imprisonment or the death penalty, prevents the criminal from doing further harm to society since he or

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<sup>56</sup> Carlsmith op cit (n37) 285.

<sup>57</sup> Duncan op cit (n35) 1240.

<sup>58</sup> Duncan op cit (n 35) 1240 and J Andenaes 'The general preventive effects of punishment' (1966) 114(7) *University of Pennsylvania Law Review* 949 at 949.

<sup>59</sup> Gerstenfeld op cit (n18) 25.

<sup>60</sup> Gerstenfeld op cit (n18) 26.

<sup>61</sup> Frase op cit (n14) 68; AW Alschuler 'The changing purposes of criminal punishment: A retrospective on the past century and some thoughts about the next' (2003) 701 *The University of Chicago Law Review* 1 at 1 and Rychlak op cit (n11) 312. However the term 'incapacitation' is not used by all writers on the subject of punishment. Terblanche op cit (n11) 163, employs the term 'prevention' when courts refer to the physical incapacitation of the offender committing crimes in society. Duncan op cit (n35) 1239, prefers the use of the term 'restraint'.

she has been removed from society.<sup>62</sup> Incapacitation is underpinned by the logic that an incarcerated offender cannot do any further harm to the community.<sup>63</sup>

However, in the absence of any empirical studies to determine the effects of hate-crime laws on the rates of hate crime, one can only surmise that the enhanced penalties imposed on convicted hate-crime offenders which results in their extended conviction could contribute to a decrease in the rate of hate crimes.

The final utilitarian or consequentialist effect of punishment that is most frequently encountered in academic literature is rehabilitation.<sup>64</sup> Rehabilitation regards punishment as a means to a beneficial end: that of transforming the offender before his or her return to society.<sup>65</sup> The offender should return to society with a new set of values and morals so that he or she is able to contribute meaningfully to society as opposed to returning with a sense of bitterness and revenge.<sup>66</sup>

Gerstenfeld<sup>67</sup> writes that a convicted racist hate-crime offender could become more resentful of minority groups while in prison, since prisons, particularly in the USA, are racially-divided and riddled with prejudice. One could thus postulate that if an offender who has been convicted of a racially or ethnically motivated hate-crime were to be subjected to a longer period of imprisonment, this could be counter-productive to the idea of rehabilitation since he or she would become more racist.

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<sup>62</sup> S Shavell 'A model of optimal incapacitation' (1987) 77 *American Economic Review* 107 at 107. While incapacitation usually refers to the incarceration of a convicted offender, F Schauer 'The ubiquity of prevention' in A Ashworth, L Zedner and P Tomlin (eds) *Prevention and the Limits of the Criminal Law* (2013) 10 at 12, views incapacitation more widely as all restrictions which are placed upon an offender. He therefore regards restrictions on travel, disqualifications from driving and disqualifications from holding public office as forms of incapacitation since they are meant to prevent an offender from committing further crimes.

<sup>63</sup> J Cohen 'Incapacitation as a strategy for crime control: Possibilities and pitfalls' (1983) 5 *Crime and Justice* 1 at 2.

<sup>64</sup> Duncan op cit (n35) 1243; Bilz and Darley op cit (n11) 1215; J Meyer 'Reflections on some theories of punishment' (1968) 59 *Journal of Criminal Law, Criminology and Police Science* 595 at 597 and Frase op cit (n14) 68. The older term 'reformation' was also used to explain this effect of punishment. See Dennis-Jones op cit (n36) 156.

<sup>65</sup> Duncan op cit (n35) 1243.

<sup>66</sup> Meyer op cit (n64) 597 and Bilz and Darley op cit (n11) 1215.

<sup>67</sup> Gerstenfeld op cit (n18) 80-81.

## 5 An alternative justification for hate-crime laws: The retributive principle of denunciation

Denunciation is regarded as one of the effects of or justifications for retribution.<sup>68</sup> According to Rychlak,<sup>69</sup> denunciation considers the effects of punishment on society and maintains that punishment is justified because the offender has violated the rules of society. Consequently, imposing punishment on the offender reinforces the social values that bind the members of society together. Terblanche<sup>70</sup> similarly considers denunciation as society's expression of condemnation of the offender's criminal conduct. Bennet<sup>71</sup> regards denunciation as the state claiming the sole authority to determine not only what is legally permissible, but also the collective, official view of what is morally permissible. In punishing an offender, the state provides a collective voice that all its citizens can lay some claim to. Bennet<sup>72</sup> however is sceptical about the assumption that moral consensus exists amongst citizens in the modern, liberal state. He opines that this assumption does not take cognisance of pluralism within a state, of freedom of conscience and moral independence.<sup>73</sup>

One is able to find some support for the idea of denunciation in the writings of Césaire Beccaria. According to Beccaria,<sup>74</sup> when people live together in society, punishment is necessary to prevent encroachment on another person's legally defined freedoms and to prevent disruption of the social order. James Wilson, the first professor of law at the University of Pennsylvania, wrote that in civil society, the social contract implies that if one intentionally injures another, he or she transfers to society the right to judge and impose punishment.<sup>75</sup>

Denunciation is thus society's ultimate condemnation of a convicted offender for having flouted the accepted rules of society. The state's imposition of punishment on a convicted offender is consequently society's way of expressing its condemnation of the conduct. Some

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<sup>68</sup> Terblanche op cit (n11) 167 and Rychlak op cit (n11) 299-338. Also see: J Cottingham 'Varieties of retribution' (1979) 29(116) *The Philosophical Quarterly* 238 at 245, who regards denunciation as an 'account' of retribution.

<sup>69</sup> Rychlak op cit (n11) 301.

<sup>70</sup> Terblanche op cit (n11) 167.

<sup>71</sup> C Bennet 'State denunciation of crime' (2006) 33 *Journal of Moral Philosophy* 288 at 293.

<sup>72</sup> Bennet op cit (n71) 294.

<sup>73</sup> Ibid. Bennet writes that the idea that a state is allowed to express an authoritative opinion in or name on matters of morals and conscience is not compatible with a free society.

<sup>74</sup> E Monachesi 'Pioneers in criminology IX: Césaire Beccaria' (1955-1956) 46(2) *Journal of Criminal Law, Criminology and Police Science* 439 at 443.

<sup>75</sup> HT Rosenberger 'James Wilson's theories of punishment' (1949) 73(1) *The Pennsylvania Magazine of History and Biography* 45 at 53.

authority exists for the view that the imposition of an enhanced sentence on certain hate-crime offenders may be justified by the principle of denunciation. According to Iganski,<sup>76</sup> the imposition of an enhanced penalty on a hate-crime offender reflects society's denouncement of such 'bad values'. Since hate crimes that are motivated *inter alia* by the race, ethnicity, sexual orientation and gender of the victim are in conflict with society's established, acceptable values, they may be punished more severely by society. As has been stated above, implicit in this argument is the assumption that there is consensus in the modern liberal state. The modern democratic state is home to a multitude of beliefs, faiths, ideologies and groupings.<sup>77</sup>

Walters<sup>78</sup> regards the punishment of hate crime as a separate category of crimes as an important means of 'denunciation' since the punishment shapes positive social values by creating a society that rejects displays of personal prejudice and over time helps to reduce hate crimes by decreasing society's tolerance of certain prejudices that previously permitted offenders to justify their public displays of bigotry.

Lawrence<sup>79</sup> also finds partial justification for the imposition of enhanced penalties on convicted hate-crime offenders in the principle of denunciation since it has some 'expressive value'.<sup>80</sup> An enhanced penalty, according to Lawrence, is indicative of society expressing the stigma associated with hate crimes and its condemnation of hate crimes.<sup>81</sup> However, Lawrence,<sup>82</sup> like Bennet, concedes that it is questionable whether one could refer to unanimity in society, or indeed, even if a single community with uniform values and consensus regarding the criminal law can be said to exist in the modern state.

According to Lawrence<sup>83</sup> since racial equality and harmony are amongst the highest values held in society, crimes that violate these values should be punished more severely than when the same base

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<sup>76</sup> Iganski op cit (n40) 138.

<sup>77</sup> Bennet op cit (n71) 294.

<sup>78</sup> MA Walters 'Conceptualising hostility for hate-crime laws: Minding the minutiae when interpreting section 28(1)(a) of CAD 1998' (2013) *Oxford Journal of Legal Studies* 1 at 1.

<sup>79</sup> Lawrence op cit (n38) 163.

<sup>80</sup> Lawrence writes that denunciation cannot stand on its own as the basis for the imposition of punishment. The offender usually deserves punishment (or his or her just desert) before society can express its condemnation of the conduct through the imposition of punishment. Denunciation on its own is thus vague and meaningless. See: Lawrence op cit (n38) 163-165.

<sup>81</sup> Lawrence op cit (n38) 163-164.

<sup>82</sup> Lawrence op cit (n38) 165-166. Lawrence does however feel that there are commonly held values regarding murder and the intentional infliction of harm. It is possible therefore that the divergence of values and the lack of consensus are exaggerated.

<sup>83</sup> Lawrence op cit (n38) 168.

crime is not racially motivated. Lawrence writes that racial inequality was the reason for the American Civil War and several constitutional amendments.<sup>84</sup> Within the American context, racial inequality was indeed the catalyst for the Civil Rights Movement of the 1960s. To Lawrence therefore, hate crimes, and particularly hate crimes that are motivated by race, 'violate the national social contract' of equality and this is the main prudential reason for the enactment of hate-crime legislation.<sup>85</sup> By implication, if society failed to criminalise racially motivated hate crimes and did not impose harsher penalties on convicted hate-crime offenders, it would indicate that society does not regard racial equality and harmony as one of its most cherished values.

Walters<sup>86</sup> also regards hate crimes as undermining the rights to human dignity and equality, both of which are important rights in most liberal Western democracies. Moreover he regards hate crimes as undermining social cohesion and the values of tolerance and acceptance so that they are consequently not only immoral, but also more serious and worthy of additional punishment.

Both the specific criminalisation of conduct motivated by bias or prejudice and the subjection of an offender convicted of such conduct to an enhanced penalty can be justified on the basis of the retributive principle of denunciation. Society may in other words justify the imposition of enhanced penalties since the offender has violated the right to equality which is one of the most sacrosanct rights in a modern, democratic society. Hate-crime laws are therefore highly 'symbolic laws'<sup>87</sup> which are a reflection of modern society's denunciation of criminal conduct that is motivated by prejudice or bias towards certain personal characteristics of the victim which include, *inter alia*, race, ethnicity, sexual orientation, disability and gender.

Within the context of South Africa, equality is enshrined as a justiciable right in the Constitution.<sup>88</sup> Equality is also one of the values upon which the Republic of South Africa is founded.<sup>89</sup> According to Albertyn and Goldblatt<sup>90</sup> equality as a right is a 'mechanism' by which equality can be achieved, whereas equality as a democratic value

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<sup>84</sup> Lawrence op cit (n38) 164.

<sup>85</sup> Lawrence op cit (n38) 164.

<sup>86</sup> Walters op cit (n78) 7.

<sup>87</sup> Gerstenfeld op cit (n18) 26-27.

<sup>88</sup> See section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>89</sup> See section 1(a) of the Constitution.

<sup>90</sup> See: C Albertyn and B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' 1998(14) *South African Journal on Human Rights* 248 at 250.

and foundational principle is used to interpret the right to equality. It would be trite to add that in light of South Africa's oppressive past which was premised on inequality, the right to equality protects the most important ideal in the present constitutional dispensation.<sup>91</sup> The perpetration of hate crimes in South Africa could be considered as a violation of the right to equality since victims are targeted specifically because of their sexual orientation, ethnicity and race which are personal, unalterable characteristics. They therefore cannot minimise the risk of further victimisation and cannot fully enjoy their right to equality.

## 6 Conclusion

It is submitted that the retributive effect of denunciation may be considered as the *raison d'être*<sup>92</sup> of hate-crime laws since hate-crime offenders violate the right to equality which is one of the most revered rights in a democratic society. At present in South African law, the bias motivation of a hate-crime perpetrator is left to the discretion of a sentencing officer who may consider such motivation as an aggravating factor at sentencing.<sup>93</sup> This could be regarded as 'insufficient denunciation'<sup>94</sup> of criminal conduct that is motivated by prejudice or bias, and particularly criminal conduct that is motivated by racial bias. In light of the present South African constitutional commitment to equality, the enactment of hate-crime laws should be seriously considered in South Africa and could be considered as further proof,

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<sup>91</sup> According to Kriegler in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para [74]: 'In light of our own particular history and our vision for the future, a Constitution was written with equality at its centre.' Equality could therefore be considered as a *grundnorm*, or the most fundamental norm in South Africa's present constitutional dispensation.

<sup>92</sup> Since the term *raison d'être* may be translated into English as the reason or the justification for existence, the retributive effect of denunciation is therefore the reason that hate-crime laws exist or the most important justification for their existence.

<sup>93</sup> This point has already been made in the introduction. Since the consideration of a hate-crime perpetrator's bias motivation is left to the discretion of a sentencing officer, it is possible that a South African sentencing officer could choose to ignore a bias motivation at sentencing or, alternatively, could regard such motivation as sufficiently serious to impose a harsher sentence.

<sup>94</sup> See: M Malik 'Racist Crime: Racially-Aggravated Offences in the Crime and Disorder Act' Part II (1999) 62 3 *The Modern Law Review* 409 at 416. According to Malik therefore, a bias motivation should not simply be regarded as an aggravating that is left to the discretion of a judge. Malik's comments were made after the passing of the British hate-crime law, the Crime and Disorder Act of 1998 (referred to in n5). After this law came into effect, a racist bias motivation in cases of racially-motivated crimes must be considered by a judge for the purposes of enhancing the sentence of the perpetrator.

albeit highly symbolic proof, of the government's commitment to equality. It would also resonate with the approach adopted in relation to hate crimes in a number of democratic countries.<sup>95</sup>

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<sup>95</sup> As mentioned in the introduction, the USA, the United Kingdom and France have passed hate-crime laws to address criminal conduct motivated by bias or prejudice and which provide for the imposition of enhanced penalties on convicted hate-crime offenders.