ARE THE PERCEIVED GREATER HARMS CAUSED BY HATE CRIMES A PLAUSIBLE JUSTIFICATION FOR THE EXISTENCE OF HATE-CRIME LAWS?

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1 Introduction

Crimes that are motivated by the perpetrator's prejudice or bias are commonly referred to as "hate crimes".[111] The perpetrator's prejudice or bias could be directed towards the victim's race, ethnicity, gender, sexual orientation, religion, disability or several other victim characteristics.[112] The victims of hate crimes are therefore specifically targeted because of personal characteristics. Hate crime laws are laws that specifically address such criminal conduct. Such laws could create substantive crimes, in terms of which unlawful conduct motivated by prejudice or bias towards certain personal characteristics of the victim, is recognised as an independent crime[113] and allow for the imposition of enhanced or harsher penalties on perpetrators who have been convicted of hate crimes.[114] An enhanced penalty is more severe than a penalty which is imposed on the same crime when it is not motivated by bias or prejudice towards a specific victim characteristic. Since the United States of America ("USA") was one of the first countries to recognise hate crimes as a specific form of criminal conduct and to enact laws which allow

[111] A hate crime therefore consists of a crime, which is sometimes referred to as the "underlying" or "base" crime, accompanied by the perpetrator's bias motivation. See further PB Gerstenfeld *Hate crimes: causes, controls and controversies* 3 ed (2013) 25 and FM Lawrence *Punishing hate: bias crimes under American law* (1999) 9.

[112] It is submitted that a convenient distinction may be drawn between hate crimes and "non-hate crimes". "Non-hate crimes" are crimes that are not motivated by prejudice or bias towards personal characteristics of the victim, but are crimes that could have been motivated by the perpetrator's lust, passion, greed, economic need, jealousy or compassion, in the case of mercy killing. Since hate crimes refer to criminal conduct motivated by bias or prejudice, there is a tendency in some American literature to refer to hate crimes as "bias crimes". See for example: B Levin "Bias crimes: a theoretical and practical overview" (1992-1993) 4 *Stan L & Pol'y Rev* 165 165. The term "hate crime" will however, be used in this article.

[113] In this regard refer to s 7(a)(1) of the American federal statute, the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act of 2009 which creates a specific crime of causing wilful bodily injury to a victim because of the victim's race, colour, religion or national origin. Also refer to s 28 of the British Crime and Disorder Act of 1998 ("British Crime and Disorder Act") 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.

[114] In this regard, refer to the American federal statute, the Hate Crimes Sentencing Enhancement Act of 1994 which allows a sentencing officer to impose a harsher sentence on a perpetrator who has committed a crime because of the actual or perceived race, colour, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of the victim. Also refer to s 28 of the British Crime and Disorder Act which allows for enhanced sentences to be imposed on perpetrators who have been convicted of certain "racially-aggravated" crimes.

for the imposition of enhanced penalties on convicted hate crime perpetrators, most of the existing research relating to hate crimes is of American origin.[115]

At present South-African criminal law neither recognises substantive hate crimes nor do specific laws exist to sentence the perpetrators of hate crimes.[116] However, hate-speech provisions exist in South-African law.[117] Hate-crime laws are often justified on the basis that crimes motivated by prejudice or bias towards certain personal characteristics of the victim, cause greater harms than crimes which are not motivated by prejudice or bias.[118] This article will explore whether the greater harms caused by hate crimes are a plausible justification for the existence of hate crime laws.[119]

2 The greater harms caused by hate crimes

Hate crimes are said to be different from their non-hate crime counterparts because they cause greater harm to the victim, to the victim's group, to the extended community and beyond and generally to society.[120] Hate-crime laws which allow for the imposition of harsher penalties are justifiable because the greater harms caused by the hate-crime perpetrator are worthy of harsher punishment. This justification for hate-crime laws serves a retributive purpose in society.[121] The rationale of the retributive theory of punishment is that the wrongdoer is morally deserving of punishment and has to receive his just

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[115] See further: N Hall *Hate Crime* 2 ed (2013) 19-27.

[116] Despite the non-recognition of hate crimes in South-African criminal law, criminal conduct motivated by bias or prejudice 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. See N Mollema & C Van der Bijl "Hate crimes: the ultimate anathematic crimes" (2014) 35 *Obiter* 672 677. Following two large-scale outbreaks of xenophobic violence in 2008 and 2015 and the rape and murder of a number of African lesbian women, there have been several calls from the non-governmental and academic sectors for the enactment of hate-crime legislation in South Africa. See: D Breen & JA Nel "South Africa-a home for all? The need for hate-crime legislation" (2011) 38 *SA Crime Quarterly* 33 33; K Naidoo & M Karels "Hate crimes against black lesbian South Africans: where race, sexual orientation and gender collide Part 2" (2012) 33 *Obiter* 600 624 and Mollema & Van der Bijl (2014) *Obiter* 679. Also refer to the website of the Hate Crimes Working Group at <http://www.hcwg.org.za/HCWG> (accessed 01-03-2016). The Hate Crimes Working Group is a multi-sectoral civil-society organisation which focuses on *inter alia* hate crimes against the lesbian, gay, bisexual, transgender and intersex community and xenophobic hate crimes.

[117] Hate speech is prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA"). S 10(1) of PEPUDA provides:

> "No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred."

S 21 of PEPUDA provides a civil remedy for hate speech in the form of damages. It is the writer's contention that some confusion presently exists in South Africa between the terms "hate speech" and "hate crime". While the hate-speech provisions in PEPUDA could refer to the use or the dissemination of racist, homophobic and gender-biased words, they would not apply to a racially-motivated murder or to a rape that was motivated by the sexual orientation of the victim (or, in other words, to hate crimes).

[118] See Gerstenfeld *Hate Crimes* 18 and Hall *Hate Crime* 124. Hall refers to the "disproportionate harm" caused by hate crimes.

[119] Since hate crimes consist of an underlying or base crime, the conduct, which comprises a hate crime, is already criminalised and subject to a penalty. Hate-crime laws thus re-criminalise such conduct when a bias motivation is present and allow for the imposition of enhanced penalties.

[120] J McDevitt & J Levin *Hate Crime: The rising tide of bigotry and bloodshed* (1993) ix-x; J McDevitt, J Balboni, L Garcia & J Gu "Consequences for victims: a comparison of bias and non-bias motivated assaults" in B Perry (ed) *Hate and bias crime: a reader* (2003) 139-151 and Gerstenfeld *Hate Crimes* 19-24.

[121] See further Gerstenfeld *Hate Crimes* 18.

desert.[122] Implicit in the retributive idea of just desert is that the wrongdoer must be punished in proportion to his crime.[123]

According to Snyman: "[t]he less the harm, the less the punishment ought to be because the debt which the offender owes the legal order is smaller."[124]

The greater harms caused by hate crimes thus serve as a retributive justification for the imposition of an enhanced, harsher penalty on the convicted hate-crime offender. The greater harms that are caused by hate crimes will be considered in more detail below.

2 1 Harms to the victim

According to McDevitt and Levin, hate crimes involve extreme brutality and unnecessary force to the victims who often require hospitalisation or medical treatment.[125] The submissions of McDevitt and Levin are, however, based on a geographically-limited study which relied on a small sample of hate-crime victims.[126] Gerstenfeld criticises the findings of this study since there is no indication if comparisons were made between hate crimes and non-hate crimes in the sample to justify the conclusion that hate crimes are actually more brutal than their non-hate crime equivalents.[127]

In a subsequent study comparing violent hate and non-hate aggravated-assault victims, McDevitt et al conducted a survey among victims in the city of Boston for the period 1992-1997.[128] Despite a poor return rate of the questionnaires used in the survey, the study found that hate-crime victims sought medical treatment less frequently than non-hate crime victims: 29% of hate-crime victims as opposed to 43% of non-hate crime victims.[129] There was also very little difference between the hate crime and non-hate crime victims who required overnight hospital treatment: 15% of hate-crime victims compared to 16% of non-hate crime victims.[130] McDevitt et al concede that the findings of this study seem to suggest that non-hate aggravated-assault victims are more likely to be severely injured or that hate-crime aggravated-assault victims are less likely to go to hospital for overnight treatment.[131] Definitive conclusions cannot be drawn from this study as to the severity of the injuries sustained by hate-crime assault victims. Gerstenfeld concedes that while some hate crimes can be brutal and vicious, most of the evidence relating to the excessive physical violence of hate crimes is merely anecdotal.[132]

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[122] RJ Rychlak "Society's moral right to punish: a further exploration of the denunciation theory of punishment (1990-1991) 65 *Tul L Rev* 299 300.
[123] RS Frase "Punishment purposes" (2005) 58 *Stan L Rev* 67 73.
[124] CR Snyman *Criminal Law* 6 ed (2014) 13.
[125] McDevitt & Levin *The rising tide of bigotry and bloodshed* 11-16.
[126] The submissions of McDevitt and Levin are based on an empirical study of 452 hate crimes reported to the Boston Police Department between 1983 and 1987. See McDevitt & Levin *The rising tide of bigotry and bloodshed* 11.
[127] Gerstenfeld *Hate Crimes* 21-22.
[128] McDevitt et al "Consequences for victims" in *Hate and bias crime* 142-151.
[129] 146.
[130] 146.
[131] 146.
[132] Gerstenfeld *Hate Crimes* 21-22.

In order to justify the criminalisation of hate crimes and the imposition of harsher penalties on convicted hate-crime perpetrators, a number of authors have argued that hate-crime victims suffer additional psychological, emotional and traumatic effects.[133] In an early contribution, Delgado, reflecting on the psychological effects of verbal racial abuse that he refers to as "racial insult" writes:

> "Such language injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status and personhood … the listener learns and internalises the messages contained in racial insults."[134]

Delgado[135] also writes that the psychological harm caused by verbal racial abuse is more severe than other forms of abuse because race is an unalterable characteristic and leads to humiliation, isolation and self-loathing. The victim may resort to the use of alcohol, narcotic drugs and other anti-social behaviours.[136] In a similar vein, Matsuda[137] opines that the negative effects of verbal racial abuse and hate propaganda include the victim resigning from work to avoid racist messages, forgoing education, avoiding certain public places and modifying their overall behaviour. Matsuda also writes that racist speech "has a devastating effect on one's self esteem … [and] … hits right at the emotional place where we feel the most pain."[138]

It is not clear however, whether Delgado and Matsuda's views are also applicable to violent personal hate crimes that are motivated by personal victim characteristics other than race, such a sexual orientation or ethnicity.

According to Gertsenfeld however, "[i]f verbal affronts alone can cause such dire consequences, one can only imagine that the effects of attacks upon one's body would be even greater."[139]

Levin submits that since hate crimes are motivated, at least in part, by bias towards a personal characteristic of the victim, the hate-crime victim's very existence is targeted so that he or she constantly feels exposed with no possibility of remedying the situation.[140] In expanding on the reason for a hate-crime victim's vulnerability, Lawrence[141] also opines that the hate-crime victim is not randomly attacked, but is attacked for a personal reason and can therefore not lessen the risk of being attacked in the future since he or she cannot change the characteristic that made him or her a victim. Hate

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[133] See S Gellman "Sticks and stones can put you in jail but can words increase your sentence? Constitutional and policy dilemmas of ethnic-intimidation laws" (1991-1992) 39 *UCal LA L Rev* 33 40; B Levin (1992-1993) *Stan L & Pol'y Rev* 167-168; FM Lawrence "The case for a federal bias crime law" (1998-2000) 16 *Nat'l Black LJ* 144 150; B Levin "Hate crimes: worse by definition" (1999) 15 *J Contemp Crim Justice* 6 17; TA Scotting "Hate crimes and the need for stronger federal legislation" (2000-2002) 34 *Akron Law Review* 853 862-863 and P Iganski "Hate crimes hurt more" (2001) 45 *American Behavioural Scientist* 626 628.

[134] R Delgado "Words that wound: a tort action for racial insults, epithets and name-calling" (1982) 1 *Harv Civ Rights-Civ Liberties L Rev* 133 135-136.

[135] 136.

[136] 136-138.

[137] MM Matsuda "Public response to racist speech: considering the victim's story" (1988-1989) 87 *Mich L Rev* 2320 2337.

[138] 2338.

[139] Gerstenfeld *Hate Crimes* 20.

[140] Levin (1992-1993) *Stan L & Pol'y Rev* 168.

[141] Lawrence (1998-2000) *Nat'l Black LJ* 150.

crimes, according to Lawrence "strike at the very core of … [the victim's] … identity".[142]

Lawrence concedes however that the psychological trauma of being specifically chosen as a victim because of one's race exists equally for white and black victims of hate crime.[143] However, according to Craig-Henderson and Ren-Sloan[144], when an African American or a person of colour is a victim of a hate crime, the experience is different since it brings back all the underlying feelings of anger, fear and pain to the collective psychological forefront of the victim. The opinions of Craig-Henderson and Ren-Sloan should be considered in light of the history of hate crimes against people of colour generally and against African Americans specifically, within the context of the USA.[145] Craig Henderson and Ren-Sloan[146] write that individuals who are targeted because of their race or ethnicity experience unique reactions because the assault is directed at an integral part of their identity and is representative of fundamental, salient identities that are very visible. The assault based on the victim's race or ethnicity therefore affects the victim profoundly since they have no control over such an assault and also because the victim's racial or ethnic group is often negatively stereotyped or stigmatised. These stereotypes have remained unchanged and are pervasive in the USA.[147]

Furthermore, according to a respondent in a study by Iganski, "[t]here is no way that someone can no longer be black and therefore protect themselves from the vulnerability that led to their prior attack."[148]

Since hate crimes are motivated by one or more of the victim's unchangeable characteristics, they are psychologically and emotionally more damaging. The psychological and emotional symptoms amongst hate-crime victims include depression, withdrawal, anxiety, feelings of helplessness and a sense of isolation.[149] Levin refers to these symptoms as the grievous psychological trauma of the victim.[150]

In a 1989 American survey of victimisation and ethnoviolence[151] conducted by the Prejudice Institute and the Centre for the Applied Study of Ethnoviolence, 2 078 respondents were interviewed, which included 918

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142 150.

143 151.

144 K Craig-Henderson & L Ren-Sloan "After the hate: helping psychologists help victims of racist hate crime" (2003) 10 *Clin Psychol Sci Pract* 481 485.

145 See further C Petrosino "Connecting the past to the future: hate crime in America" in B Perry (ed) *Hate and bias crime: a reader* (2003) 9-26, for a brief historical overview of hate crimes against African Americans and Native Americans.

146 Craig-Henderson & Ren-Sloan (2003) *Clin Psychol Sci Pract* 484.

147 484.

148 Iganski (2001) *American Behavioural Scientist* 626 628.

149 Lawrence (1998-2000) *Nat'l Black LJ* 151.

150 Levin (1999) *J Contemp Crim Justice* 17.

151 The sociologist Howard Ehrlich coined the term "ethnoviolence" in the 1980's to refer to a wide range of criminal acts and anti-social conduct based on the race and the ethnicity of the victim. Ethnoviolence therefore, does not necessarily involve purely criminal conduct but could also include discriminatory conduct such as objectifying and excluding a victim based on their race or ethnicity. The term "ethnoviolence" was subsequently replaced by the wider term "hate crime" which is not confined to conduct motivated by the race or ethnicity of the victim. See: HJ Ehrlich *Hate crime and ethnoviolence: The history, current affairs and future of discrimination in America* (2009) 34.

white and 1013 black respondents.[152] 15% of the sample population had experienced incidents of violence and abuse, which was conclusively based on prejudice. Most of these cases were racially motivated and almost equally divided between black and white respondents. The findings revealed that the victims of ethnoviolence reported more psychological symptoms than other victims of victimisation.[153] These symptoms included depression, sadness, anger, staying at home at night, feelings of helplessness, loss of confidence in oneself, and an increased use of alcohol and prescription drugs.[154] The study concluded that ethnoviolence victims suffer greater trauma than victims of violent, criminal acts committed for other reasons.[155] However, the study did not compare the symptoms of the victims of ethnoviolence and the symptoms of those victims who suffered other forms of victimisation.

In a 1994 study, Barnes and Ephross interviewed 59 white, black and Asian hate-crime victims from several American cities.[156] Most of the respondents were victims of physical assault, verbal harassment and threats.[157] The most common reaction of the victims was anger towards the perpetrator (68% of the sample), and a fear of further injury (51% of the sample).[158] The study also found that 33.9% of the victims reported behavioural changes in order to cope with the attack, which included leaving the neighbourhood, minimising socialisation, purchasing a gun and increasing home-security.[159] The study was however based on a small sample and it is therefore not possible to generalise the findings and apply them to all victims of hate crimes. The study also did not compare the reactions of non-hate crime victims; it is consequently doubtful whether these findings actually prove that hate-crime victims suffer more severe emotional and psychological effects than victims of other forms of victimisation.

In a study that was conducted from 1993 to 1996 and included 2 259 homosexual men and lesbian women who were the victims of a personal or property-related hate crime in the Sacramento area,[160] it was found that most of the victims exhibited psychological distress, which included depression, stress, and anger.[161] Moreover, the stress and depression lasted for up to five years after the incident. However, the researchers caution that this study focused exclusively on the victims of hate crimes who were targeted because of their sexual orientation.[162] It is therefore not clear whether the findings of

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[152] HJ Ehrlich, BE Larcom & RD Purvis "The traumatic effects of ethnoviolence" in B Perry (ed) *Hate and bias crime: a reader* (2003) 153 153-167.

[153] 155.

[154] 157.

[155] 167.

[156] A Barnes & PH Ephross "The impact of hate violence on victims: emotional and behavioural responses" (1994) 39 *Social Work* 247 248.

[157] 248.

[158] 250.

[159] 250. The authors concede however, that many of these behavioural changes are similar to the behavioural changes reported by victims of personal non-hate crimes.

[160] GM Herek, JR Gillis & JC Cogan "Psychological sequelae of hate-crime victimization among lesbian, gay and bisexual adults" (1999) 67 *Journal of Consulting and Clinical Psychology* 945 946.

[161] Herek et al (1999) *J Consult Clin Psychol* 949-950.

[162] 951.

this study could be applied to the victims of hate crimes who are targeted because of other personal characteristics such as race or religion.[163]

Consensus does not exist amongst all scholars, however, that hate-crime victims suffer more psychological and emotional trauma. Jacobs and Potter[164] for example, adopt a more sceptical view. By referring to earlier literature on the effects of victimisation and research conducted by the American Psychological Association Task Force on the victims of Crime and Violence, they submit that victims of non-hate crimes such as assault, robbery, burglary and rape, exhibit similar psychological and emotional reactions as the victims of hate crimes. These reactions include anger, shock, disbelief, fear, anxiety, and helplessness, which could also be accompanied by sleep disturbances and nightmares.[165] This could lead to long-lasting psychological and emotional responses such as depression, loss of self-esteem and the deterioration of personal relationships.[166] Jacobs and Potter[167] also question the validity of the findings of a number of the above studies where no comparison was made between hate-crime victims and non-hate crime victims.

Blee questions whether hate-crime victims actually receive a message that they are more vulnerable to further violence and abuse.[168] In Blee's study, which dealt with the victims of racial violence, she contends that the victim's personal characteristics and the victim's levels of "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.[169]

It is conceded that all victims of crime are, to some extent, negatively affected by their experience. In most physical assaults, the victim's physical well-being is affected. The victim could have sustained injuries that required medical intervention.[170] The victims of crime may also suffer psychological effects. Some victims are so traumatised that they develop "clinical symptoms" in which case a diagnosis of posttraumatic stress disorder is warranted.[171] It cannot be concluded with certainty therefore that hate-crime victims actually suffer more emotional and psychological effects than non-hate-crime victims. Most of the studies supporting this view are based on small samples in limited locales. Gerstenfeld's hedged opinion regarding the psychological and emotional effects of hate crimes on the victim aptly sums up the position:

> "It seems under some circumstances, hate crimes might be more traumatic than other crimes."[172]

Due to the non-recognition of hate crime as a specific category of criminal conduct in South-African law, there is a paucity of literature on the subject

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163 951.
164 JB Jacobs & KA Potter "Hate crimes: a critical perspective" (1997) 22 *Crime and Justice* 11.
165 31.
166 31.
167 30.
168 KM Blee "Racial violence in the United States" (2005) 28 *Ethnic and Racial Studies* 599 608.
169 608.
170 Craig-Henderson & Ren-Sloan (2003) *Clin Psychol Sci Pract* 482.
171 482.
172 Gerstenfeld *Hate Crimes* 21.

in relation to the South-African context. The term "hate crime" nevertheless enjoys some academic and intellectual currency in South Africa. Some research exists on the perpetration of xenophobic violence, particularly against African foreigners in South Africa.[173] The victims of xenophobic violence in South Africa have almost always been African foreigners who have been subjected to acts of violence and coercion by African South Africans. It is the writer's submission that the victims of xenophobic violence in South Africa are specifically targeted based on their ethnicity since they speak foreign languages and adhere to different cultural practices. Following the first countrywide outbreak of xenophobic violence in 2008, more than 1 400 perpetrators were arrested.[174] However, a media report in 2015 has revealed that the arrests have yielded a mere 79 convictions for the crimes of malicious damage to property, murder, rape, assault, robbery and public violence.[175]

The non-recognition of hate crime in South-African law also makes it difficult to find accurate accounts of hate crimes. The media has a tendency to report only the most violent and sensational crimes in which the bias motive of the perpetrator is often speculative and based on anecdotal evidence.[176] In January 2008, for example, Johan Nel, a white male, killed four African people and wounded eight more victims with a hunting rifle in the town of Skierlik in the North West province.[177] Nel's crime was described as a hate crime since he shouted several racial insults at the victims.[178] Nel was convicted on several counts of murder and received several life sentences.[179]

There is very limited South African literature available on the effects of hate crime on the victim. Naidoo and Karels[180] have referred to the traumatic effects of "corrective rape"[181] on African lesbian women who are specifically targeted because of their sexuality.[182]

Ostensibly then, hate-crime laws which recognise hate crimes as specific crimes and which allow for the imposition of enhanced penalties on convicted

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[173] See for example, S Robin "Humanitarian aid beyond bare survival: social movement responses to xenophobic violence in South Africa" (2009) 36 *American Ethnologist* 637-650; LB Landau & JP Misago "Who's to blame and what's to gain? Reflections on space, state and violence in Kenya and South Africa" (2009) 44 *Africa Spectrum* 99-110 and Breen & Nel (2011) *SA Crime Quarterly* 33-43.

[174] See further: Landau & Misago (2009) *Africa Spectrum* 99-110.

[175] See: F Rabkin "Xenophobia: Convictions for 2008 lacking" (30-04-2015) *Business Day* <http://www.bdlive.co.za/national/law/2015/04/30/xenophobia-convictions-for-2008-lacking> (accessed 10-03-2016).

[176] See K Naidoo *A comparative and historical legal study of hate crimes motivated by race and ethnicity* LLD thesis University of South Africa (2015) 486-487, for some of the media accounts of racially-motivated murders and assaults that have been committed in the post-apartheid period.

[177] See M De Waal "Analysis: measuring racial hatred, one murder at a time" (16-01-2013) *Daily Maverick* <http://www.dailymaverick.co.za/article/2013-01-16-analysis-measuring-racial-hatred-one-murder…> (accessed 07-02-2016).

[178] See L Holborn *The long shadow of apartheid: race in South Africa since 1994* (2010) 31.

[179] See Anonymous "Life behind bars for Skierlik shooter" (21-11-2008) *Mail & Guardian* <http://mg.co.za/article/2008-11-21-life-behind-bars-for-skierlik-shooter> (accessed 10-02-2016).

[180] K Naidoo & M Karels "Hate crimes against black lesbian South Africans: where race, sexual orientation and gender collide Part 1" (2012) 33 *Obiter* 236 260.

[181] "Corrective rape" refers to acts of rape in which heterosexual male perpetrators specifically target lesbian women in order to correct or change the sexual orientation of the victims. See Naidoo & Karels (2012) *Obiter* 243-245.

[182] 247-248. It should be noted that this study was not based on empirical evidence but on anecdotal reports and a few academic articles. The authors therefore concede that there is no proof that the "corrective rape" of a lesbian woman is more psychologically damaging than the rape of a heterosexual woman.

hate-crime offenders cannot simply be justified on the basis of the physical, the psychological and the emotional effects on the victim.

It is the writer's submission that despite some academic scepticism surrounding the physical and psychological effects of hate crimes on the victims,[183] the psychological effects of racially motivated hate crimes on the victim present a plausible reason for the imposition of enhanced penalties on hate-crime offenders. It has been argued that a racially motivated hate crime profoundly affects the victim since he or she is targeted because of a personal, unalterable characteristic. A similar argument could be made with regard to the perpetration of hate crimes that are motivated by the ethnicity, the disability, or the sexual orientation of a victim. It could be argued that ethnicity, disability and sexual orientation are personal, unalterable characteristics of the victim. The specific targeting of these characteristics in a criminal act would undoubtedly have a profound psychological and emotional effect on the victim, particularly in a community where racism, disability prejudice, ethnic prejudice and homophobia are endemic.

2 2 The effects of hate crimes on the victim's group, extended community and beyond

Several authors have submitted that the effects of hate crimes extend beyond the actual victim to the victim's group.[184] According to Lawrence,[185] the effects of hate crimes extend to the targeted community or the community that shares the same characteristics as the victim. He is of the view that the members of such community experience a hate crime in a way that has no equivalent in the public response to a similar crime.[186] The victim's group considers a hate crime as a personal attack. The hate crime could evoke feelings in the victim's group or community which are similar to the actual victim's sense of victimisation.[187] Lawrence refers to the example of a *swastika* that is spray-painted on the home of a Jewish family and submits that the reactions of the victim's group or target community will extend beyond mere sympathy, since all Jews in the victim's group and community will feel a similar sense of victimisation.[188] According to Greenawalt,[189] hate crimes can frighten and humiliate other members of the victim's community. Freeman[190] opines that hate crimes intimidate others in the victim's group and community causing them to feel isolated, vulnerable and unprotected by the law. The effects of hate crimes on the victim's group and community are regarded as a message

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[183] See for example: Jacobs & Potter (1997) *Crime and Justice* 1 and Blee (2005) *Ethnic and Racial Studies* 608.

[184] Gellman (1991-1992) *UCLA L Rev* 342; K Greenawalt "Reflections on justifications for defining crime by the category of victim" (1992) *Ann Surv Am L* 617 627; Freeman (1992) *Ann Surv Am L* 581-2; Scotting (2000-2001) *Akron Law Review* 864; Lawrence (1998-2000) *Nat'l Black LJ* 152-3.

[185] Lawrence (1998-2000) *Nat'l Black LJ* 152.

[186] 152.

[187] Lawrence *Punishing Hate* 42.

[188] 42.

[189] Greenawalt (1992) *Ann Surv Am L* 627.

[190] Freeman (1992) *Ann Surv Am L* 581.

of further violence to all members of the victim's group and community[191] and is termed the *in terrorem* effect of hate crimes.[192] One respondent in a study conducted by Iganski stated:

> "I think there is a special consequence to the victim's group … I think that they respond as if they have been victimised, because they share the same characteristics as that person, they take it personally."[193]

Besides the terroristic effect on the victims' group and community, the effects of hate crimes extend further, to other minority groups. According to Gellman,[194] attacks on one minority group may lead to other disempowered minority groups also feeling apprehensive. For example, attacks on African Americans may create fears amongst Hispanics, Jews and Asians in the same neighbourhood.[195] Levin considers a hate crime as sufficiently volatile to disrupt an entire community and refers to the example of the Los Angeles riots in 1992, following the assault on Rodney King, an African-American motorist.[196] The Oldham, Bradford and Burnley race riots in the United Kingdom are often referred to in order to demonstrate how hate crimes can affect an entire community, especially where underlying feelings of discontent exist.[197]

Moreover, it is possible for a single hate crime to 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 spark long-standing tensions and feuds in the community.[198] Hate crimes thus have a retaliatory effect on the victims' group and community and could extend to the neighbourhood and the entire community.

In an experimental study, Craig[199] endeavoured to investigate whether hate crimes actually lead to retaliatory violence. She selected 24 African-American and 49 white male students between the ages of eighteen and 24 from a Midwestern American university. The participants were shown videotaped scenarios depicting *inter alia*, racial-assaultive hate crimes and non-hate crimes. After viewing the videotapes, the participants were asked to complete a questionnaire about the scenarios. They were asked, among other questions, whether they would have desired revenge if they were in the same situations as the victims in the videos.[200] The study found that while African-American participants were more likely to express a desire for revenge if they were in the same situation as the victims in the videotaped racist hate-crime scenarios, white participants were more likely to suggest that a victim of a

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[191] 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) 135 144.

[192] Hall *Hate Crime* 166.

[193] Iganski (2001) *American Behavioural Scientist* 631.

[194] Gellman (1991-1992) *UCLA L Rev* 342.

[195] 342.

[196] Levin (1992-1993) *Stan L & Pol'y Rev* 168.

[197] See further A Amin "Unruly strangers: the 2001 urban riots in Britain" (2003) 27 *Int J Urban Reg Res* 460-463 and A Kundnani "From Oldham to Bradford: the violence of the violated" (2001) 43 2 *Race and Class* 105-131.

[198] Lawrence *Punishing hate* 43.

[199] KM Craig "Retaliation, fear, or rage: an investigation of African-American and white reactions to racist hate crimes" in PB Gerstenfeld & D Grant (eds) *Crimes of hate: selected readings* (2004) 58 66.

[200] 66.

racist hate crime respond passively by fleeing the scene or pretending to be hurt and not retaliating.[201]

Gerstenfeld[202] cautions that the results of Craig's limited study do not prove that hate crimes lead to additional retaliatory violence. As was the case with the effects of hate crimes on the immediate victim, consensus does not exist amongst all scholars that the effects of hate crimes extend to the victim's community and beyond.

Jacobs and Potter[203] also express some scepticism about the effects of hate crimes on the victim's group and submit that only a concerted campaign of hate crimes against a particular group could have traumatic effects on the group. They also refer to the example of the 1992 Los Angeles riots in the African-American community following Rodney King's assault by white police officers. However, they question the validity of the claims that hate crimes have an effect on the victim's group and community since these claims have not been systematically documented and because of the lack of supporting empirical evidence.[204] They submit that ordinary street crime, drug-related crimes and violence amongst African Americans in the cities of the USA have had a more devastating and destabilising effect on inner-city communities.[205] Harel and Parchomovsky echo most of these sceptical views regarding the effects of hate crimes on the victim's group and community.[206]

In a later submission, Jacobs and Potter,[207] while conceding to the reality of the retaliatory effects of hate crime on the victim's group and beyond, opine that these effects are more likely to occur in racial and ethnic hate crimes and conflicts. However, they caution that this does not apply to ethnic groups such as Jews and Asians. One would assume that they arrive at this conclusion because the authors apparently believe that Jewish and Asian communities are less likely to retaliate in response to hate crimes. Blee[208] also doubts whether the victim's entire group (more specifically the victim's racial group) will receive the message of hate similarly.

As has been discussed above with regard to the effects of hate crimes on the victim, not all victims, victim groups and communities perceive hate crime similarly. Several other factors, including the victim's personal characteristics, support within the community and economic status impact on how the message of a hate crime is received.[209] A convincing case has therefore not been presented for the justification of hate-crime laws based on the greater harms to the victim's group or community.

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[201] 64. The author doubts, however, whether the findings of this experiment which was conducted in a controlled laboratory could be applied to real-life events.
[202] Gerstenfeld *Hate Crimes* 23-24.
[203] Jacobs & Potter (1997) *Crime and Justice* 32.
[204] 32.
[205] 32. Jacobs and Potter also refer to examples of other non-hate crimes such as arson, carjacking, serial murders and drive-by shootings which have destroyed inner-city communities.
[206] A Harel & G Parchomovsky "On hate and equality" (1999-2000) 109 *Yale LJ* 507 516-518.
[207] JB Jacobs & KA Potter *Hate crimes, criminal law and identity politics* (1998) 88.
[208] Blee (2005) *Ethnic and Racial Studies* 608.
[209] 608.

Furthermore, and as mentioned above, there is very limited South-African literature available on hate crime and the effects of hate crime on the victim. Despite this paucity of literature, some research exists on the effects of hate crime on the victim's group. In a 1998 study undertaken by Morris amongst twenty Nigerian and Congolese migrants in central Johannesburg, it was found that they were frequently the victims of crime, prejudice and racism, particularly by African South-African men.[210] Naidoo and Karels have also referred to a number of African lesbian victims of "corrective rape" who contracted the human immunodeficiency virus ("HIV") and who eventually succumbed to Acquired Immune Deficiency Syndrome ("Aids").[211] However, the authors found that no reliable empirical evidence was available to compare the HIV-infection rate of victims of "corrective rape" with heterosexual female victims of rape in South Africa. One cannot conclude therefore, that "corrective rapes" in South Africa impact more severely on the victim's group and community.[212]

2 3 The effects of hate crime on society

While it is often asserted that hate crimes impact more severely on the immediate victim, the victim's group and extended community, a less frequent assertion is that hate crimes impact more negatively on society as a whole.[213] According to Lawrence,[214] hate crimes do not only impact on society's general concern for safety, but also on "the shared value of equality among its citizens and on racial and religious harmony in a heterogenous society". Hate crimes thus impact negatively on the right to equality and the principle of non-discrimination which Lawrence regards as integral to the American legal system and to American society.[215]

Delgado also regards racist crimes as harmful to society because they conflict with the ideal of egalitarianism.[216] According to Delgado, if the law does not take cognisance of racist acts and racist violence, a message is conveyed to minority groups that equality is not a fundamental principle and it demoralises those citizens who prefer to live in an equal society making them unwitting participants in the perpetuation of racism and racial inequality".[217] Perry[218] writes that minority groups would be unable to achieve their full potential and to participate meaningfully in society. If minority groups do not fully participate in society because of fear, anger, or resentment towards a system that does not completely value them, society loses out.[219]

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[210] A Morris "Our fellow South Africans make our lives hell: the lives of Congolese and Nigerians living in Johannesburg" (1998) 21 *Ethnic and Racial Studies* 1116 1136. It should be noted that the findings of this study were based on a small sample of African foreigners in only one South-African city.
[211] Naidoo & Karels (2012) *Obiter* 247-248.
[212] 248.
[213] Lawrence *Punishing Hate* 43; Delgado (1982) *Harv Civ Rights-Civ Liberties L Rev* 140-141.
[214] Lawrence *Punishing hate* 43.
[215] 43.
[216] Delgado (1982) *Harv Civ Rights-Civ Liberties L Rev* 140.
[217] 141.
[218] B Perry *In the name of hate: understanding hate crime* (2001) 2.
[219] Delgado (1982) *Harv Civ Rights-Civ Liberties L Rev* 142.

According to Iganski,[220] hate crimes strike at the heart of societal values and offend society's collective moral code. According to one American respondent in a qualitative study conducted by Iganski, which considered, *inter alia*, the effects of hate crimes on society:

> "It is our diversity that makes us so great. For somebody to threaten somebody or act and hurt somebody based on their difference, I think it is really outrageous. It really rips at what this country was founded on. It polarizes communities, it pulls us apart."[221]

The writings of Lawrence, Delgado, Perry and Iganski are all based on the American context. In the USA, the right to equality is enshrined in the Constitution of the United States and the principle of anti-discrimination is regarded as an important guiding principle which resulted from a protracted struggle for equality culminating in the Civil-Rights Movement. In reflecting on the absence of racial harmony and the existence of racial tensions in American society, Lawrence submits that hate crimes involve a social history of prejudice, discrimination and oppression and consequently cause greater harm to the general society than their non-hate crime counterparts".[222]

It is submitted that the views of these above-mentioned authors are equally applicable to the South-African context. In light of the history of racial discrimination and the protracted, bitter struggle for equality in South Africa, the right to equality and the principle of non-discrimination are both enshrined in the Constitution of the Republic of South Africa, 1996 ("Constitution") and are the cornerstones of our democracy.[223] In South Africa's diverse, multicultural society, social fissures between racial and ethnic groups have always existed and biases and bitter memories are widely shared within these groups.[224] The perpetration of a racially or ethnically motivated hate crime in South Africa is therefore extremely likely to exacerbate simmering tensions that exist in the fragile relations between racial and ethnic groups. It has to be conceded, however, that in a perfect, egalitarian society, where racial divisions have never existed and where the right to equality has never been a contested right, a racially or ethnically motivated hate crime might not tear apart the fabric of society.

Hate-crime laws are thus justifiable on the basis that hate crimes negatively affect society as a whole and because hate crimes violate the sacrosanct right to equality. Hate-crime laws are consequently regarded as "highly symbolic laws"[225] which are a reflection of modern society's repugnance to criminal conduct motivated by prejudice or bias towards certain personal characteristics of the victim. A more plausible justification for hate-crime laws therefore is the retributive principle of denunciation which regards punishment as an expression of society's condemnation of the offender's criminal conduct.[226]

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[220] Iganski (2001) *American Behavioural Scientist* 631.
[221] 632.
[222] Lawrence *Punishing Hate* 44.
[223] Refer to s 9 of the Constitution.
[224] RJ Kelly & J Maghan *Hate crime: the global politics of polarization* (1998) 2.
[225] Gerstenfeld *Hate Crimes* 26-27.
[226] SS Terblanche *Guide to sentencing in South Africa* 2 ed (2007) 167.

3 Conclusion

While hate-crime laws are frequently justified based on the greater harms that hate crimes cause to the individual victim and to the victim's group and extended community, a more plausible justification for the existence of hate-crime laws is that hate crimes negatively affect society. Hate crimes that are motivated by personal characteristics such as the race, ethnicity or sexual orientation of victims violate the right to equality which is an almost sacrosanct right in most Western democracies where the general public is increasingly tolerant of diversity in all its forms and increasingly intolerant of personal prejudices.[227]

Despite some academic scepticism regarding the especially harmful effects of hate crimes, such effects have been accorded judicial recognition in the USA. In the case of *Wisconsin v Mitchell*[228] a number of *amici curiae*[229] submitted briefs which supported the assertion that hate crimes inflict great individual and societal harms. Based on these briefs, Rehnquist CJ, in delivering the majority opinion of the court stated:

> "Hate crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims and incite community unrest."[230]

Since hate crimes are regarded as a violation of the right to equality and in light of South Africa's post-apartheid constitutional commitment to equality,[231] it is lamentable that the enactment of hate-crime laws is not accorded serious consideration by the South-African government.[232]

The enactment of a special hate-crime law is therefore recommended which would allow for specific violent and coercive crimes, such as murder, rape, public violence, robbery, assault and damage to property to be regarded as

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[227] This is a view that has been expressed by Hall *Hate Crime* 123.

[228] 508 US 476 (1993).

[229] The *amici curiae* included the Lawyers Committee for Civil Rights under Law, the National Association for the Advancement of Coloured People, the American Civil Liberties Union and the Anti-Defamation League.

[230] *Wisconsin v Mitchell* 488.

[231] Refer to the Constitution, where the right to equality is enshrined in s 9. Equality is also recognised in s 1(a) of the Constitution as one of the values upon which the Republic of South Africa is founded.

[232] Despite several calls for the enactment of a hate-crime law in South Africa and the formulation of a draft hate crime law by the non-governmental sector and a task team, the South-African government still procrastinates. Moreover, the consideration of a hate-crime law has been subjected to several delays since 2016 because of a public debate on hate speech. The public debate on hate speech commenced in January 2016 when Penny Sparrow, a White South African woman, referred to Black South Africans as "monkeys" on her Facebook page. See Anonymous "Law to criminalise hate speech nearly ready" (01-04-2016) *Times Live* <http://www.timeslive.co.za/local/2016/04/01/Law-to-criminalise-hate-speech-nearly-ready> (accessed 29-08-2016). Since 2016, the South African government has publicly announced its intention to include hate-speech provisions in a Draft Hate-Crime Law and to criminalise "racism". See C Peterson "Racism will be a criminal offence" *The Star* (01-12-2016) 4. As has been stated in the introduction (see the text to n 7 above), some confusion exists in South Africa between the terms "hate crime" and "hate speech". Moreover, according to international practice hate-speech provisions are never included in a hate-crime law.

hate crimes[233] when motivated by specific victim characteristics.[234] Once a bias motivation has been proved, such crimes must be subjected to enhanced penalties.[235] The penalty-enhancement provision of the recommended hate-crime law should specifically provide that when a perpetrator has been convicted of the crimes of either murder or rape with a bias motive, a sentence of life imprisonment must be imposed. As regards convictions of assault, robbery, public violence and damage to property that have been committed with a bias motive, minimum sentences, which are akin to the minimum-sentence provisions in the present Criminal Law Amendment Act 105 of 1997 must be imposed.[236]

While a hate-crime law will not eradicate hate crimes in South-African society,[237] it could be considered as an expression of the serious light with which hate crimes are viewed by society and could convey this message to potential hate-crime perpetrators.[238] Hall considers hate-crime laws as the "ultimate symbolic message"[239] that a government has at its disposal to attempt

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[233] In the accounts of xenophobic violence in South Africa that were referred to above under paragraph 2 1, these were the common-law and statutory crimes with which a few of the perpetrators were charged and convicted. Apart from damage to property, all these crimes are presently subject to the minimum-sentence provisions of the Criminal Law Amendment Act 105 of 1997, as amended (Criminal Law Amendment Act). However, this statute does not contain any provision which would enable a sentencing officer to consider the bias motivation of a hate-crime perpetrator (for example, a bias motivation based on the race or the sexual orientation of the victim) as an aggravating factor at sentencing. On a charge of murder, for example, s 51(1) of the Criminal Law Amendment Act provides that a life sentence must be imposed if the murder was planned or premeditated, the victim was a law-enforcement officer, or the victim has given or was likely to give evidence in respect of certain offences or the murder was committed during the course of a rape or a robbery with aggravating circumstances, or was committed by a person or group of persons acting in furtherance of a common purpose or conspiracy. As has been mentioned above (see the text to n 6 above), sentencing officers have the discretion to consider the bias motivation of a perpetrator as an aggravating factor at sentencing. A hate-crime law however, would compel a sentencing officer to consider the bias motivation of a hate-crime perpetrator as an aggravating factor.

[234] As regards the inclusion of victim characteristics in a future South-African hate-crime law, most of the existing South African research and anecdotal evidence suggests that hate crimes in South Africa have been perpetrated on the basis of ethnicity, race and sexual orientation. No research has hitherto been conducted on, for example, the perpetration of hate crimes motivated by the disability of the victim. The inclusion of only race, ethnicity and sexual orientation in a hate-crime law would not reflect all the grounds of non-discrimination which are to be found in the Constitution. It is recommended therefore that all the grounds of non-discrimination which are presently enshrined in s 9(3) of the Constitution should be included in a future hate-crime law. These grounds include: race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, colour, age, disability, religion, belief, culture, language and birth. These victim characteristics have been included in a draft hate-crime law that has been formulated by the Hate Crimes Working Group. See further the website of the Hate Crimes Working Group at <http://www.hcwg.org.za/HCWG> (accessed 01-03-2016).

[235] A similar approach is evident in s 28 of the British Crime and Disorder Act of 1998 where the most common hate crimes are subject to aggravated or enhanced penalties when a bias motivation has been proved. These crimes include assault, damage to property, harassment and public order offences

[236] See for example, Part IV, Schedule 2 of the Criminal Law Amendment Act which provides that the crimes of public violence and assault involving the infliction of a dangerous wound can be subjected to minimum sentences. If the accused was in possession of a firearm at the time of committing the offence which he intended to use in the commission of the offence, he could be subject to a period of imprisonment of not less than five years if he was a first offender, a period of not less than seven years' imprisonment if he was a second offender and a period of not less than 10 years' imprisonment if he was a third offender.

[237] No empirical studies have hitherto been conducted which proves that hate-crime laws have a deterrent effect. In this regard see Gerstenfeld *Hate Crimes* 25-26.

[238] It is submitted that the imposition of aggravated or enhanced penalties on convicted hate-crime perpetrators is a reflection of the seriousness with which hate crimes are viewed by society. It is therefore an expression of society's denunciation of such conduct.

[239] Hall *Hate Crime* (2013) 124.

to change prejudiced attitudes and behaviour. Hate-crime laws could therefore serve as a symbolic condemnation of criminal conduct that is motivated by personal victim characteristics.

SUMMARY

Crimes that are motivated by prejudice or bias towards certain personal characteristics of the victim are commonly referred to as "hate crimes". Such criminal conduct is said to cause greater harms than criminal conduct that is not motivated by bias or prejudice. Hate-crime laws are laws that specifically criminalise 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 perpetrators. This article attempts to find a plausible justification for the existence of hate-crime laws. The principal justification for the existence of hate-crime laws that will be considered in this submission are the greater harms that hate crimes cause to the victim, to the victim's group and extended community and to society as a whole. Since hate-crimes are presently not recognised as a specific category of criminal conduct in South-African criminal law and specific laws do not exist to sentence the convicted perpetrators of hate crimes, consideration is given to whether a hate-crime law should be enacted in South Africa.