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Responding to hate crimes: Identity politics in the context of race and class divisions among South African LGBTI

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Research report submitted to the Faculty of Humanities, University of the Witwatersrand, Johannesburg, in partial fulfillment of the requirements for the degree of Master of Arts in Political Studies.

March 2015

I, Matthew Clayton, declare that this research report is my own work. It is being submitted in partial fulfillment for a degree of Master of the Arts in Political Studies at the University of the Witwatersrand, Johannesburg. I further declare that neither this report, nor any part of it, has been submitted for any degree or examination at any other university.

Abstract

This paper examines race and class schisms among South African LGBTI persons using the lens of hate crimes legislation. While much praise is given to South Africa's constitutional framework which provides for non-discrimination on the grounds of sexual orientation, LGBTI persons still face unacceptably high levels of violence and victimisation. An ongoing trend of violent murders of black lesbian women in particular has mobilised advocacy by LGBTI organisations and other civil society actors to call for hate crimes legislation. This paper takes a critical look at hate crimes legislation and the potential problems of its application in a society with gross inequality and power discrepancies. This critique has as its foundation an acknowledgement that action needs to be taken to address the scourge of violence, while at the same time understanding the intersectionality of oppression and the uneven results achieved by liberal legal reform.

Keywords: LGBTI; South Africa; discrimination; hate crimes; hate crimes legislation

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Chapter One

Introduction, aim and scope of study

1.1.Introduction

Two facts exist that are simultaneously true and contradictory. The first is that LGBTI South Africans live in a country which provides them with what could be regarded as the most elaborate arrangement of legal protections in the world. South Africa was the first country in the world to have a Constitution prohibiting discrimination on the grounds of sexual orientation, while rights to marry a same sex partner, adopt a child together, and automatically inherit the partner's estate, are all available. The second is that LGBTI South Africans continue to live in a country where most people are openly homophobic; where they face high risk of sexual and physical assault, including murder, because of their sexual orientation; and where the rights won are enforceable only by the few with resources. South African LGBTI persons straddle two worlds, one of elaborate legal protections and another of ongoing and violent persecution with no abatement in sight.

This contradiction is the starting point of this thesis and raises the question: if these rights exist, and have existed for nearly twenty years, then why are so many LGBTI people not yet free? Why is it that those with resources and privilege – both of these markers overlapping significantly with the markers of being white and male – enjoyed a life so different to others, not just materially, but in terms of victimisation owing their sexual orientation. The final question that needs to be asked is: if within this group, based on the attribute of sexual orientation, so much of the oppression could not be linked solely to that attribute, then what repercussions does that have for organised identity politics that the LGBTI groupings in South Africa have driven for much of the last three decades? The original question that led to this thesis was whether an LGBTI community existed in contemporary South Africa and, if not, what value existed in attempting to form and – just as importantly – present a vision of a cohesive community. The focal point guiding such a discussion thus became hate crimes against LGBTI persons. These heinous crimes are not only one of the key concerns of organised LGBTI groupings in South Africa, but highlight more clearly than anything else, the different lives and vulnerabilities that exist within the grouping of LGBTI persons.

This thesis sets out to examine the limitations of identity politics in a South African LGBTI context by using hate crimes and lobbying for hate crimes legislation as a focal point.

1.2. Literature review

This paper begins with a brief historical overview of LGBTI movements in South Africa. This is intended as a focused process not on LGBTI history as it were, but rather an overview of identity formation and conflicts within LGBTI movements in South Africa. Cameron (1995), Craven (2011), Gevisser and Cameron (1995) provide rich resources of historical information about a key time of identity formation among LGBTI South Africans in the late 1980s and early 1990s. De Waal and Manion (2006) provide a history of the various pride parades in South Africa since the 1990s, using these as a way to talk about identity, representation and difference within LGBTI movements. Hirshman (2013) also looks at identity politics among American LGBTI, a discussion that is useful in understanding the dialogue all over the world about identity within counter-normative groups like LGBTI.

Government sources were a necessary resource for this thesis, focusing as it does on hate crimes and government's responses. Documents from the Department of Justice and Constitutional Development (DOJ&CD) provide access to previous discussions around hate crimes, and can also be used to show government's possible intention with new legislation. Further, work by parliamentary researchers such as Thorpe, provides a useful overview of the legislative and policy framework South Africa finds itself in today. Publications by non-governmental organisations (NGOs) or groupings of such organisations – including Triangle Project, OUT LGBTI Well-being, the Hate Crimes Working Group (HCWG) and others – are also valuable resources, especially when it comes to hate crimes, which no government entity is at present accurately capturing or frankly, discussing. These documents once again serve a dual purpose of providing an overview of the situation in South Africa and giving insight into the preferred path of civil society, allowing this thesis to engage with hate crimes legislation before it is actually enacted.

While the HCWG will eventually produce the largest study of such crimes in South Africa at the end of the project's life, other in-depth studies of hate crimes are limited by their small scale and geographic concentration, and are now somewhat out of date. Nevertheless, the work of Nel and Judge (2008), Wells and Polders (2006), Graham and Kiguwa (2006), and Smith (2004) provide an important insight into hate crimes in South Africa. While this literature cannot be used to draw conclusions about incidence and current trends relating to hate crimes, they are useful in a discussion about intergroup vulnerability and patterns of relating to reporting these crimes. This focus is of particular interest to this thesis, as it looks to explore hate crimes through the angle of identity politics and group identity. In addition, Wells' and Polders' (2004), focus, while not about hate crimes specifically, on experiences of LBTI women in accessing health facilities is useful in discussing issues of secondary victimisation among this group when needing to access healthcare following a hate crime.

Meyer's 2008 and 2010 pieces examine the race and class differences of victims of homophobic violence and how this shapes their experiences, both relating to vulnerability and later interaction with the legal system. These also examine the intersectionality of violence and, crucially for South Africa, examine hate crimes not merely as manifestations of bigotry and ignorance, but as attacks on the bodies of those who subvert social hierarchies, and as a form of conformity policing. Meyer identifies race, class, sex and gender and other aspects of social positioning as key to understanding hate crimes committed against people for their sexual orientation or gender identity.

The second chapter of this thesis broadly focuses on how counter-normative groups can form into interest groups or communities, and about the identity formation of individuals within these groups. This means that not only does this literature extend outside of discussions around South Africa but it also extends to discussions outside of LGBTI. There is a wide array of literature available relating to this question in various ways, which are used in this thesis.

Antje Schuhmann's 2008 work on hate crimes, and the specific vulnerabilities within the LGBTI community, notes that this disjointed and unequal community suffers in such different ways, not only in relation to the general population, but in relation to one another, thereby rendering the

term ‘community’ problematic. This thread runs through much of this thesis. In addition, Schuhmann’s piece looks at hate crimes legislation as another piece of liberal legal reform, attacking this modernist and uncritical reliance on such reforms and their unequal rewards.

Mohanty’s 1988 article, and its 2002 follow up, illustrates that the effects of race and class differences on social movements are not unique to LGBTI. These pieces are a solid starting point to many discussions experienced by both feminism and LGBTI activism. Van Marle’s and Bonthuys’s 2004 work also provides a valuable overview of feminist critiques of both perceived and constructed homogeneity within communities and social groupings like women and LGBTI.

Bernstein (1997) provides an overarching analysis of identity formation within counter-normative groups, examining this formation as a form of strategy and further discussing how this often useful strategy can have damaging long term effects on group identity and cohesion. Gamson (1995) also discusses identity formation and the long term strategy and usefulness of a cohesive queer identity, asking: “Must identity movements self-destruct?”

This thesis also integrates the work of authors like Reidy (2002), Hurd (2001), Sloan, King and Sheppard (2008), and Dixon and Gadd (2011) who advocate that hate crimes legislation need not be introduced. While the conclusions reached about hate crimes legislation by these authors differ from the central argument of this thesis, they nonetheless provide valuable critiques of hate crimes legislation and their shortcomings that must be taken into account.

Craven (2011) authored a thesis that follows race and class schisms in South Africa’s LGBTI community using the Johannesburg pride parade as a focal point. It provides not just a useful historical overview for this thesis, but also a rich discussion on identity, community, cohesiveness and usefulness of such identity that is drawn upon.

Polletta and Jasper (2011) provide a foundation of the concept of collective identity formation and further discuss the strains such artificial groupings are expected to undertake. They consider why such limitations often lead to the fissures seen in movements like the LGBTI one.

Van Marle (2001), Van Marle and Bonthuys (2004), Modiri (2014), and Schwartzman (1999) drive the discussion of liberal legal reform touched on by Schuhmann, Craven and others. The theoretical lens of Critical Legal Studies (CLS) is used to achieve this.

1.3. Methodology

This paper provides a theoretical answer to its title and relies on research and writing by a range of authors from different – but often overlapping – schools of thought, as indicated in the literature review above.

Schuhmann's 2008 piece forms a foundation this thesis builds upon. Her approach is centred around discussing hate crimes against LGBTI South Africans, critically examining heteronormativity and white privilege, and taking an uncritical reliance on state institutions like the judiciary and legislature. This thesis takes a similar approach, investigating hate crimes against LGBTI South Africans by first placing this in its full historical context, before discussing identity formation through a post-colonial, post-modernist, radical feminist, and CLS lens.

These approaches, while different, share a rejection of the universal subject championed by liberal conceptions. There is acknowledgement of the limitations this places on interventions driven by institutions like the law, and an understanding that oppression does not exist along one dimension, but is intersecting and multidirectional. A quotation featured in Modiri, though referring to CLS, neatly captures a core theme of this thesis: "As long as we continue to believe that 'justice is blind' we sustain the illusion that the law protects citizens through a mandate that is somehow above the petty practices of (our) commerce, politics and socio-political interactions." (Thom, cited in Modiri, 2011: 180). Existing alongside this intellectual strand is queer theory, in which Milani (2014: 261) emphasises that an understanding of the social construction of normality versus deviance must not be limited to an interrogation of heteronormativity alone. Queer theory should not only be focused on trying to upend practices like heteronormativity. Instead, it is more productive to think of it as a more antagonistic form of dissent, which Warner (cited in Milani, 2014: 262) regards as "reject[ing] minoritising logic of toleration or simple political interest representation in favour of a more thorough resistance of the normal".

This critical questioning of that which appears to be the norm, the neutral, the natural, the rational, and the permanent, runs throughout this theoretical investigation of the LGBTI community in South Africa.

1.4. Structure

The second chapter provides an overview of key concepts for the discussion of this thesis and situates it within the specific historical, cultural and legal context of contemporary South Africa. The section begins by explaining hate crimes before discussing their particular manifestation within a South African context. It then situates hate crimes within the racist, sexist, heteronormative and patriarchal framework of South Africa today. This discussion of South African history is essential for two reasons. First because it places hate crimes in a context of broader discrimination and oppression rather than purely looking through the more Western lens of homophobia; and second, because it views the current move for hate crimes legislation as part of a longer project of liberal legal reform driven by certain groups within the LGBTI grouping. The latter point in particular allows us to 'assess' hate crimes legislation in South Africa pre-emptively by viewing the faults of previous legislative and judicial advances that were based on narrow, modernist and liberal understandings of the law.

The third chapter discusses the limitations and usefulness of collective identity as it applies to LGBTI persons and how it interacts with hate crimes legislation. It examines how identity formation is often a far from organic process, and is driven by different motives and based on different biases. In this way, this chapter looks at the so-called LGBTI community in South Africa, but in a much more abstract manner, also at the community in general, alongside the drivers and shapers of identity. Using a feminist lens, this chapter is also able to draw knowledge from post-modernist and post-colonial discourses that seek to unpack the myth of the neutral and universal subject on which so much of identity and group identity quietly relies.

While the first chapter mentioned liberal legal reform as a strategy adopted by LGBTI activists in South Africa, the third seeks to examine this strategy and look at the structural limitations it presents. It does this by linking to the second chapter's discussion of identity formation and the

strategy of a cohesive external identity, while giving an overview of South African LGBTI activism in the early years of democracy. It does this through the lens of CLS as well as, once again, post-modernist discourse, to examine the perceived neutrality and certainty provided by the law.

The fourth chapter discusses hate crimes legislation and its limitations, not from an ideological perspective, but rather through critiques of the efficacy of such measures and whether they can justify the diversion of resources they often require. This chapter pays attention to the specific context of a South African state suffering severe capacity constraints, including within its criminal justice system, and asks what practical ends such legislation can meet.

The fifth chapter is a conclusion with a summary of key findings.

Chapter Two

Hate crimes against LGBTI South Africans: An overview of the historical context, patterns, incidence, and knowledge gaps

2.1. Introduction

While this thesis will explore some of the critiques levelled against hate crimes legislation, it is not from the angle that such legislation should not be enacted. South Africa shows a clear and compelling need for some sort of intervention to halt the violence and victimisation experienced by LGBTI persons in general – and in particular, black lesbian women. Rather, this thesis aims to communicate that hate crimes legislation, which places duties on the state and service providers, delivers valuable information for combatting violence and discrimination, and ensures implementation occurs, is one of the many valuable avenues that should be undertaken to combat violence against LGBTI persons. Hate crimes legislation must also be drafted and applied so that it takes into account the various ways different LGBTI persons are positioned within South African society *outside* of the fact that they are LGBTI. It must take real cognisance of the multifaceted nature of violence and vulnerability faced in order to make a lasting difference to the lives of LGBTI persons who suffer constant and violent forms of victimisation.

2.2. History

The hate crimes legislation discussed and mooted for passage thus far in 2015 signifies another marker in the more than twenty-year-long engagement with the South African state. Liberal legal reform was embarked upon from the early 1990s to attain the elaborate set of rights that LGBTI persons in South Africa enjoy in theory: from removing sodomy laws reforming tax and succession laws to include same-sex couples, and altering adoption laws, to finally that hallmark of queer accomplishment, the passage of same-sex marriage legislation. All of this was the work of concerted lobbying and advocacy by activists and NGOs, with the South African state as a partner – even if this partnership was the result of an initial struggle. This section will give a brief overview of historical liberal legal reform championed by LGBTI organisations and activists in South Africa and driven by the government under the African National Congress (ANC). In this way, this thesis seeks to position hate crimes legislation within the scheme of a long term drive from LGBTI organisations for continuous legal reform, even as it becomes strikingly clear that such moves often find unequal application to the lives of LGBTI persons. This thesis views any future hate crimes legislation as an additional measure of legal reform and, to that end, states it is necessary to briefly discuss South Africa's history of LGBTI-driven legal reform.

Legal reform in South Africa takes mostly two different but interlinked forms: legislation and litigation. South Africa's Constitution vests the supreme judicial and legal authority within the Constitutional Court, which is empowered to invalidate legislative provisions it deems to be unconstitutional, but can also demand the legislative branch develop legislation that meets constitutional scrutiny. This is a relatively new power of the South African judiciary which operated under a Westminster-style system of parliamentary supremacy, prior to the new Constitution's adoption in the democratic era. These new powers afforded to South Africa's judiciary and its often progressive Constitutional Court are used vigorously by activists on rights to housing, access to healthcare and education, the rights of incarcerated persons, abolitionists of the death penalty and, in the interests of this paper, LGBTI activists (Reddy, 2006).

While South Africa's Constitution is lauded in books, academic papers and various other media almost to the point of cliché, there is in fact much to be proud of, especially given the historical context in which South Africa's supreme law was forged and continues to operate.

2.2.1. Pre-democratic South Africa

The apartheid state was one based not only on white supremacy, but followed an ideology rooted in a ultra-conservative notion of Calvinist Christianity and the related ideas around patriarchy, and so-called traditional gender and sex roles. This meant that while the apartheid state was one which obviously had no interest in South Africa's non-white citizens, it was also never one in which LGBTI persons were treated kindly (Cameron, 1995: 91).

In 1995, Cameron wrote:

> It is now widely acknowledged in South Africa – at least officially – that racism and sexism are unacceptable. But opprobrium towards gays is still everywhere. It is countenanced in the media, in employment and in social attitudes. This often reflects obviously biased and selective reliance on Judeo-Christian Biblical doctrine and history. The traditional attitude of intolerance towards gay sexual conduct seems to be deeply ingrained in our legal history. All sexual acts not directed towards procreation, even those between women and men were prohibited under our common law, but our legal system has pronounced these non-homosexual crimes obsolete. But by a historical anomaly – one which cannot be rationally justified – the common law crimes targeting gay men have been preserved. (Cameron, 1995: 93).

Same-sex sexual activity was illegal under the apartheid government, and, in keeping with its masculine, patriarchal and white supremacist roots, far more attention and public concern was placed on sex between white gay men than on white lesbian women and other race groups in South Africa. Many of the legal prohibitions against same-sex sexual activity remained in law but largely dormant in the final years of apartheid. The wide formulation of these laws meant there was little certainty about what conduct could potentially be criminalised under the state. As the law stood in the last years of apartheid rule – which overlapped, naturally, with the opening years of democratic rule – same-sex sexual activity between men remained criminal. While no prohibition existed against women, which itself speaks to patriarchal and heteronormative ideas around 'real sex', the Tricameral Parliament mooted such a prohibition in 1988 and ignited fears of predatory lesbians (Cameron, 1995: 92). While many of these laws, as mentioned, lay dormant at the end of apartheid – and were often seldom used during apartheid – their existence had powerful effects. One was these laws acted as a powerful tool of intimidation hanging constantly

over the heads of LGBTI persons. Another was that this legislation had a message it sent out to society at large: that the very existence of certain people, with their sexuality and their counter normativity, was criminal. Laws have a powerful effect in shaping what is and is not acceptable and normal, and these thereby created a persisting pervasive stigma. Even as apartheid drew to a close and racism (or legally sanctioned racism) was no longer acceptable, other forms of intolerance including homophobia appeared to be more entrenched than ever.

2.2.2. Constitutional protections against discrimination

South Africa's section 9 constitutional protections prohibit discrimination by the state or other actors (including other citizens) on several listed grounds, including sexual orientation. The inclusion of this provision in the ANC's draft Bill of Rights in 1993 followed many years of lobbying and negotiations between the LGBTI activists and the party. Though previous drafts could be regarded as affording LGBTI persons protection from discrimination, it was only in 1993 that three of the four major negotiating parties included express protections on the grounds of sexual orientation – the National Party opting for a formulation focusing on "natural characteristics" (Cameron, 1995: 96).

These draft Bills of Rights, draft Constitutions, and the interim Constitution of 1993 all set the stage for South Africa's current Constitution adopted by the Parliamentary Assembly in 1996. The section 9 equality clause reads as follows:

> (1) Everyone is equal before the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in (3) is unfair unless it is established that the discrimination is fair.

The significance of the above section and its formulation allowed it to become the backbone of several successful moves towards legal reform for LGBTI persons through the judiciary, including inter alia same-sex marriage, adoption, the removal of sodomy laws, and intestate succession. While the provision enables crucial engagement with the state, it also makes clear that discrimination does not only occur on the vertical axis between state and citizen, but that many abuses occur between citizen and citizen and private sector and citizen. Any future hate crimes legislation put forward in South Africa will no doubt rely on section 9 in general, but will in particular find the provision in Section 9(2) useful – especially when concerns are raised about hate crimes legislation and its effect on the right to freedom of expression similarly guaranteed in the Bill of Rights.

Reddy (2006) gives an overview of the case law history of LGBTI persons in post-apartheid South Africa. He argues that such legal reform not only brings the benefits sought in the particular litigation – such as rights to intestate succession – but also play a role in the "development and refinement of citizenship claims … for the queer subject in post-apartheid South Africa" (Reddy, 2006: 150). Reddy details ten key pieces of litigation between 1993 and 2006 that brought LGBTI civil rights in line with those guarding heterosexual people in terms of legal status and rights. What Reddy's list makes evident is the nature of the subjects being litigated, which includes four relating to matters such as medical aid and pension benefits. This obvious specificity is problematic for two main reasons. First, it should be clear that for most LGBTI persons in South Africa, these are not really key issues, important as they undoubtedly are. Insofar as the process of litigating for rights goes, often only very specific issues are discussed, driven by people with the resources and privilege – thereby making the process far from representative. Second, the specificity of the litigating of rights is piecemeal, and does not necessarily deal with larger issues that may have made the litigation necessary in the first place.

Other constitutional rights significant for the protection of LGBTI persons include the rights to privacy, dignity, access to information, and life.

2.3. The status of hate crimes legislation

In one form or another, hate crimes legislation has been the subject of discussion by the South African government for several years. As of early 2015, however, clarity is still lacking regarding exactly when hate crimes legislation will be tabled in Parliament; what form the legislation will take (explicit duties, statistical gathering, mandatory minimums are all a possibility); and crucially, how the vulnerable groups who seek increased protections will be determined and included. A brief overview of government statements on hate crimes legislation is provided.

The government department chiefly responsible for drafting hate crimes legislation and steering it through the legislative process is the DOJ&CD. It has spoken out on the issue of hate crimes, specifically those against LGBTI persons, since at least 2011. During 2010, the then minister, Jeff Radebe responded to a parliamentary question and announced a draft bill was prepared. Crucially, this bill was focused on racism, racial discrimination, xenophobia, and related intolerance (Thorpe, 2013: 9). This stance began to change in 2011 when South Africa committed itself to ending violence and human rights violations occurring against people based on their gender identity or sexual orientation. In May of 2011, following public outcry at the violence being committed against lesbian women in particular, the DOJ&CD established the LGBTI National Task Team (NTT). The NTT is comprised of representatives from relevant national government departments, chapter nine institutions, and several LGBTI NGOs, and has a draft hate crimes bill as one of its planned outputs. The NTT was launched following concerns raised by the public and NGOs to address violence occurring against LGBTI persons, but rather tellingly, the announcement of the formation of the NTT made it appear that government was still not fully satisfied about the need for hate crimes legislation:

> We would like to dispel a myth that government is not concerned about the plight of the victims of corrective rape. A proper perspective on this matter would be to appreciate government efforts in the context of the fight against crime. Crime fighting remains one of the five main priorities of this government

> and for that reason government remains resolute that no effort will be spared in fighting crime, regardless of how it manifests itself, including in the form of corrective rape (DOJ&CD, 2011).

By 2013, the DOJ&CD announced it was finalising a policy framework covering both hate speech and hate crimes, to pave the way for hate crimes legislation. No explicit mention was made regarding LGBTI persons. Again in 2013, press releases to mark International Day Against Homophobia and to discuss a new programme of action for the NTT, made no mention of hate crimes legislation covering LGBTI persons. Instead it emphasised existing and under-utilised avenues such as the Equality Courts and the Prevention and Elimination of Unfair Discrimination Act as a method of redress for LGBTI survivors (Thorpe, 2013: 11).

By the end of 2014, DOJ&CD officials were confirming privately that the legislation was at an advanced stage and had the support of cabinet. Reservations were disclosed by various government representatives around the rigorous consultation process planned around the legislation, while the fear from the side of government that a law that is not well crafted and balanced with other constitutional rights could be overturned in the courts at a high cost and great embarrassment was also reiterated. At the LGBTI national task team meeting on 16 October 2014, co-chair of the task team, Advocate Ooshara Sewpaul shared that the Hate Crimes Policy Framework was finalised and had been presented during a Justice, Crime Prevention, Safety and Security cluster cabinet committee meeting. The suggestion from the committee was to have a national debate on the issue, potentially in partnership with chapter nine institutions and the South African Law Reform Commission (SALRC). The idea to have this partnership host the public participation process was motivated by the fact that hate crimes cut across several areas of victimisation, and are not limited to sexual orientation and gender identity. The chapter nine institutions and SALRC are in the process of being contacted by DOJ&CD to establish this partnership. Sewpaul indicated the aim is for public consultation to be concluded by the end March 2015, and for legislation to be tabled 2015/2016 (I Lynch, pers.comms, 3 Nov 2014).

2.4. Homophobia and hate crimes in South Africa

One of the arguments in favour of enacting hate crimes legislation is it would enable policy makers, NGOs and other stakeholders to understand more clearly the violence being committed

and where it is occurring. Currently there exists no way to categorise a hate crime and to distinguish between, for example, an assault and a group specifically targeting a lesbian couple. This lack of information means that policy makers and others are 'flying blind' when it comes to combatting violence against LGBTI persons. For a host of reasons - not just those related to the lack of a category - the data available at present is incomplete. The only estimates available to understand the scale of the violence being perpetrated against LGBTI persons, and in particular, black lesbian women, is through the work of NGOs. Triangle Project, Luleki Sizwe, and many other organisations record hate crimes being committed against persons within their own networks. Sizwe estimates that ten lesbian women are raped every week in townships, targeted because of their sexual orientation (Thorpe, 2013: 2).

In a 2013 report released by Triangle Project, a selection of incidents of hate crimes are presented, detailing twelve murders that occurred between 2001 and 2013 (the list is but a sample and limited not only by concerns around confidentiality but also restricted by the geographic limitations of the organisation). What is clear from the crimes that are discussed, is that these are not ordinary rapes or ordinary murders. The deaths of these LGBTI persons include: being stoned to death; suffering prolonged torture; being stabbed over twenty times; having genitals and other parts of the body mutilated; or being found with a toilet brush having been pushed into a vagina. In these crimes, it appears that not only is murder, pain and humiliation standard, but a desecration of the body is also commonplace (Lee, Lynch and Clayton, 2013).

A difficulty arises when discussing hate crimes legislation in South Africa insofar as while the horrendous violence of these specific crimes makes them worthy of attention and action, it is impossible to remove them from the larger context of an incredibly violent South African society – and nor would such a move be helpful. Between 2007 and 2008 and 2011 and 2012, nearly one million contact crimes committed against women were reported to the South African Police Services, including over 12 000 incidents of murder and nearly 165 000 sexual offences. It is evident, then, that violence against lesbian women occurs in a context in which violence against women in general (and especially sexual violence) is at extremely high levels (Thorpe, 2013: 2). An understanding that lesbian women have a specific vulnerability but also exist in a general

environment where violent patriarchal social control drives violence against all women will be instructive in any intervention that is planned. Bristow (cited in Wells and Polders 2006: 21) argues that all homophobia actually has its roots in a cultural understanding of gender and masculinity. Homophobia is the response to these acts of non-conformity and the threat they pose to norms.

It is not only the contemporary context which must not be ignored, but the important role played by history in shaping South Africa today. The nation's historical background of apartheid and colonialism is one of prejudice, characterisation and discrimination, and it is therefore little wonder this system of oppression so easily filters into other forms of oppression, intolerance and supremacy, such as homophobia. Of course sexual orientation is by no means the way that hate and intolerance materialises (Nel and Judge, 2006: 19). South Africa has many examples of often-violent attacks based on race and class (take for example the spate of reported racist incidents occurring in Cape Town's southern suburbs towards the end of 2014), as well as xenophobia, including the almost weeklong violence that occurred in 2008 and displaced thousands (News24, 2015). Hate crimes are extreme expressions of homophobia and occur worldwide. There is information indicating that as incidents of hate crime rise, the more visible a LGBTI community becomes – although it is worth noting that such an increase could also be caused by an increased level of reporting by a more organised and less marginalised LGBTI community in a location.

Several studies were conducted to try gauge the incidence of LGBTI hate crimes in South Africa including ones by Nel and Judge (2008) and Wells and Polders (2006). Nel's and Judge's study covered a twenty-four month period between 2002 and 2003, and revealed that 9.7 percent of black female respondents reported having experienced sexual victimisation during the period (slightly higher than black males at 9.4 percent, and nearly double that of white males and females at 5.2 percent and four percent respectively). What is particularly interesting about this research is that it shows those LGBTI persons who do not fit into a society's expected gender roles suffer a far higher rate of victimisation (Judge and Nel, 2008: 26). This finding is perhaps further evidence that what are regarded as homophobic hate crimes are as rooted in patriarchal gender norms as they are in pure homophobia.

2.4.1. The role of socio-economic positioning

Mention has been made only of LGBTI persons, with reference to "black lesbians in particular". Yet this qualifier does not capture effectively the fundamentally different experiences of hate crimes and discrimination that occurs across race and class lines of LGBTI persons in South Africa. In fact, this distinction is a key component of this thesis, which examines hate crimes legislation and its application in a context of a very divided and divergent LGBTI community.

Central in understanding hate crimes against LGBTI persons in South Africa is the principle of intersectionality: the idea that oppression can be – and often is – multifaceted. This provides an understanding that a black lesbian women living in a township is not merely victimised and oppressed owing to her sexual orientation, but must face oppression on several axes, including that she is a woman, she is classified black in a society built on the principles of white supremacy, and she is also (in relation to the two previous conditions) economically marginalised. In this way it becomes clearer that the lives of black and working class LGBTI persons are affected as much by other signifiers as they are by their LGBTI status.

It is of course important to view issues holistically and to understand that oppression and violence comes from many sources. Still, an understanding should be maintained that being an LGBTI person in an extremely homophobic society continues to mean a life of increased risk and victimisation. According to one study, lesbians face violence twice as often as heterosexual women (Graham and Kiguwa, 2004). Hate crimes like corrective rape and the murder of black lesbian women cannot only be understood as extreme homophobia, but rather as a manifestation of violent heteronormative patriarchy. These are not random incidents ('a man sees two women holding hands and begins to attack them'). Most of the survivors surveyed in Smith (2004) knew their perpetrators, and many of these perpetrators were in fact family members. Another example can be found with the murder and rape of Duduzile Zozo in 2013. Zozo was friends with her attacker, Lekgoa Lesley Motleleng, who murdered her in a rage when she repeatedly rebuffed his drunken sexual advances on her one evening. Motleleng, who was handed a lengthy sentence at the end of 2014 after pleading guilty, appeared not to have been overcome with rage at the fact Zozo was lesbian, as they were friends and spent time together (Germaner, 2014) The point at

which he murders her is when he realises that her sexual orientation denies him what he feels is his right: a woman's body. The pattern of hate crimes in South Africa reject what Schumann (2008: 6) cites as a specifically American understanding of such crimes as encompassing "stranger danger" and driven by specifically homophobic (or racial as the case may be) animosity. As will be argued below, for hate crimes legislation to have any effect, it must be grounded firmly in a South African context.

Polders and Wells (2006) examine these links between what manifests as homophobic violence but is driven, at least in part, by South Africa's highly patriarchal environment and linked with poverty and disempowerment. Further, violence against black lesbian women is linked to generally high levels of violence and generally high levels of gender-based violence. Attacks like those against Duduzile Zozo and Zoliswa Nkonyana – who was raped before being stoned and stabbed to death and whose murderers were the first to be convicted taking into account the homophobic nature of their crime – can be seen in the context of a society where men are angered and feel disempowered and threatened by the emerging empowerment of women in their communities (Lynch, Lee and Clayton, 2013: 10). One of the ways they reclaim that power and their own masculinity is through violence and sexual violence. Women who have sexual relations with women are understood here because they challenge – through their existence – gender norms that have traditionally served to empower men and their right to women's bodies (Polders and Wells, 2006: 20).

Polders and Wells (2006: 21) assert that while homophobia and heterosexism exist among all races and classes of South African society, homosexuality is considered by many black South Africans to be 'unAfrican' and a Western import. This leads to greater sanction and censorship – in the form of violent attacks – of those people who violate the heterosexual norm. The narrative of homosexuality being 'unAfrican' is a useful one for driving conservative projects around the sanctity of the family and hark back to idealised and convenient caricatures of values in Africa prior to colonization. Wrapped together with this already compelling narrative is the apocryphal notion of homosexuality – or same-sex sexual intercourse – as being a toxic Western influence foreign to African values (Naidoo and Karels, 2012: 256). While Epprecht (2013) and others tracked same-sex sexual activity predating European colonisation by centuries, the very emotive

concepts of traditional values, history and masculinity make the issue of 'unAfrican' behaviour a dangerous prospect for those deemed in violation. Despite constitutional and other guarantees, key figures in the ANC have invoked notions of 'African-ness' and nationalism in order to show their disapproval of LGBTI persons. This was seen when the then Minister of Arts and Culture, Lulu Xingwana, left a photographic exhibition which featured lesbian women in embraces, stating it was "immoral, offensive and going against nation building" (Sosibo, 2014). Jon Qwelane, who infamously compared homosexuality to bestiality in his 2008 article, 'Call me names, but gay is not okay', was appointed as South Africa's High Commissioner to Uganda two years later (Naidoo and Karels, 2012: 255). These incidents, coupled with what is easily the most socially conservative administration in a democratic South Africa under President Jacob Zuma, mean that dangerous ideas around culture, values and normative sexuality can become toxic and breed deadly violence against those who do not and often cannot meet this norm.

2.4.2. Secondary victimisation

LGBTI persons are not only more likely to experience violence and discrimination, but are also more likely than other victims to experience so-called secondary victimisation. Secondary victimisation occurs when LGBTI persons are mistreated, humiliated or ignored by service providers and official systems when seeking help. The levels of secondary victimisation experienced are significant because they undermine confidence in official systems to provide help, and generally make LGBTI persons more vulnerable (Lee, Lynch and Clayton, 2013: 22). It is also significant because any intervention made against hate crimes will necessarily fail to be implemented by service providers at lower levels. If LGBTI persons do not feel safe and protected in these spaces, then the interventions are doomed to fail. Again, these levels of secondary victimisation do not apply equally to all LGBTI persons – the roles of class, race, and other socio-economic positions, play a part in any secondary victimisation that may occur.

Secondary victimisation does not just cover the poor and humiliating treatment that many LGBTI persons endure at the hands of police or medical staff, but also includes the traumatic experience of a complicated and often drawn out court process that may not result in a conviction. Polders and Wells (2004) found that forty-four percent of respondents experienced heterosexism when attempting to access healthcare, and that seventy-six percent of respondents

did not think the criminal justice system would be able to uphold LGBTI persons' rights. The study further revealed that while thirty-three percent of respondents had a negative experience in terms of the police simply not being interested in the matter, another forty-two percent of respondents actually feared abuse by the police if they reported the crime committed against them. Notable in statistics relating to the non-reporting of hate crimes, is the reasons given and the difference caused by the race of the victim. Black respondents were almost twice as likely to fear disclosure of the sexual orientation to the police (forty-one percent of black respondents to twenty-two percent of white respondents) and were more likely to believe their complaint would not be taken seriously than white respondents (seventy-nine percent versus sixty-seven percent). Perhaps the most interesting statistic to come from the report was that black respondents did not report these crimes because they "happen so often that I am used to them", more than twice the percentage of white respondents (thirty-four percent versus sixteen percent) (Wells and Polders, 2006: 26).

These statistics are important to grasp the different experiences of LGBTI South Africans. They also help in understanding how current legal measures to prevent violence and discrimination are being used to varying degrees by different sub-sections of the community, and mirror the existing disadvantage and privilege within the community and South Africa in general.

2.5. Understanding hate crimes

A hate crime is any incident that constitutes a criminal offence, perceived as being motivated, in whole or in part, by prejudice and hate. Distinguishing between these and other crimes comes down to the motive of the perpetrator, insofar as it is deemed that such a perpetrator seeks to demean and dehumanise their victims whom they consider different from them. This can be based on their actual or perceived race, ethnicity, gender, age, sexual orientation, disability, health status, nationality, social origin, religious convictions, culture language, or other attributes. Hate crimes receive special attention for several reasons, one of which is the fact that they operate as so-called 'message crimes'. Here the intention is not merely to bring negative consequences to the victim but also to destabilise and threaten the larger group in which that person belongs (Nel and Judge, 2008: 20). Essentially, the message being sent to the victim is the

same as the one being conveyed to the larger group: that divergence and difference is wrong and will not be tolerated.

Hate crimes are a relatively new subject of interest in South Africa compared to, for example, the United States, where legislation has existed in certain states since the early 1990s. Violence in the United States against LGBTI persons in particular, is experiencing increased scholarly attention and viewed as a serious societal issue (Meyer, 2008: 263).

2.5.1 Intersectionality and the drivers of hate crimes

In the United States, work has been done from within many different quarters to understand more fully what drives and exacerbates hate crimes (Meyer, 2008: 263). Once again, what feminist work and the perspectives of feminist women of colour bring to this understanding, proves invaluable to a discussion around the intersectional nature of the causes of hate crimes. The critique given by feminist women of colour, such as Davis, Bell-Scott and Smith, of feminist activism in 1980s America, was that it essentialised the experiences of women and imposed the world view and lived experiences of white, middle class women as the views of all women. They argued that oppression ought to be viewed as multiple and simultaneous rather than additive or aggregate. In light of this, the different aspects that make up an individual's identity cannot be compartmentalised in order to gain an understanding of oppression, but rather need to be viewed as intersecting one another, so that black lesbian women are understood to be oppressed not just by patriarchal social structures or by homophobia, but also by white supremacy in the places they live (Meyers, 2008: 265). This critique is important in an understanding of hate crimes and the efforts made to combat them – through legislation or otherwise – because it demonstrates that oppression, and perhaps also hate and animosity, emerges from multiple sources and must be tackled and rebuffed on multiple fronts. Intersectionality allows for the acknowledgement that while white gay men and black lesbian women may suffer verbal abuse related to their sexual orientation, other aspects of their individuality feed into their experiences and vulnerabilities.

According to Meyer (2008: 265), American criminological theory holds that hate crimes occur because relatively powerless individuals do not have the means to "achieve society's goals through acceptable means". This argument holds that poor social conditions and the

powerlessness of individuals within such causes those individuals to assert their power in other, less healthy ways. However, in the United States, perpetrators of hate crimes have tended not to be marginalised and vulnerable, but actually from relatively privileged socio-economic backgrounds. A more sound explanation for hate crimes is put forward by Perry (cited in Meyer, 2008: 265), who asserts that hate crimes should be understood as a social control mechanism rooted in institutional power structures, and a way for perpetrators to maintain social hierarchies. For example, racially motivated crimes reaffirms white privilege while violence against lesbian women "reinforces the subordination of women and the cultural devaluation of homosexuality". While Perry's examples are separate, it would also apply to perpetrators asserting more than one form of social hierarchy at once, and victims being attacked for more than one reason.

Chapter Three
Hate Crimes and Groups: Collective identity's usefulness and limitations

3.1. Introduction

Hate crime legislation exists because a vulnerable group is identified and it is deemed necessary to offer this group specific protections. In the 1980s in the United States, the first group that was considered for such protections were African Americans and Jews, in an acknowledgment of the specific vulnerabilities faced by these two groups (Westbrook, 2008: 3). Hate crime legislation necessarily realises that certain people are more vulnerable owing to their membership of a group, but it has difficulty taking fully into account the fact that individuals can be (and often are) members of not only one group, but several groups, and that these memberships affect them all differently. All social groups are the subject of formation and debate and are in a sense artificial, and this artificial nature of social groups becomes very clear when discussing LGBTI persons.

Bernstein (1997) discusses group identity formation under three headings: 1) identity as empowerment, 2) identity as goal, and 3) identity as strategy. Identity as empowerment is explained by Bernstein as the creation of collective identity and the feeling that political action is feasible. This process is necessary to translate individual interests into group interests and use those group interests as the basis for collective action – in essence, generating a political

consciousness. The formation of identity can also have an external component relating to mobilisation and to achieve "political standing" or legitimacy. How these identities form can be crucial for legitimacy for future activism (Bernstein, 1997: 536). The next understanding of identity formation is when the process occurs as a goal, whereby activists forge a collective identity that eschews negative and stigmatised identities and deconstructs negative social structures. This is a process embarked upon by feminists in the United States and other countries, who began challenging the dominant culture of use of sexist terms relating to women. LGBTI politics has also undertaken this task with battles for the understanding of what it means to be gay or queer, with more radical activists seeking a new collective identity that reconstructs problematic notions of gender, sex and masculinity. Bernstein (1997: 537) also discusses identity deployment, wherein the scene of conflict becomes the individual, while values, categories and practices of individuals become subject to debate.

This chapter will examine group identity, borrowing from the vigorous debates occurring between radical and post-colonial feminists, and other writers within feminism. This thesis finds these debates highly relevant to the current discourse and difficulties facing LGBTI groups within South Africa and across the world, as these groups struggle to deal with intersectionality, inclusivity, and old agendas. Further, these debates will highlight the many issues that are found when a piece of legal reform – in this case, hate crimes legislation – requires the existence of a group in order to be effective.

3.2. Group formation: Dominance, hierarchy and compromise

These debates around identity politics do not only hinge on inclusion and exclusion – in other words, whose lived experience as "queer" is the more valid, the more real one – but also extends to the viability and usefulness of these constructs. Is there still usefulness in assigning ourselves to these groups that include more and more people on less clear criteria (Gamson, 1995: 390)? In other words, is it worth going forward pretending that there is a community when there is not one and, if we do continue, how do we ensure that we extract the most benefit from this collaboration without losing the essential element of diversity? This is a tricky balancing act of trying to reject heteronormativity while at the same time using the oppression of heteronormativity as the only factor that binds LGBTI persons together.

Hate crimes legislation relies on group identity in order to avoid a slippery slope into redundancy. Currently, those included in hate crimes legislation are there because they belong to a group of people that has historically suffered discrimination. Without such a distinction, hate crime legislation could end up being applied to crimes where the victim has tattoos or enjoys opera (Reidy, 2002: 282). Without a clear list of criteria – such as nationality and sexual orientation, for example – any attribute of any victim could be considered as a motive for a hate crime.

LGBTI persons suffer different kinds of victimisation compared to other South Africans, but also have a very large variation in how they experience victimisation even within their own group. LGBTI persons are not necessarily grouped together on the basis of a shared characteristic, and the grouping as it stands currently (and it has been very flexible even in the recent past) is not even one based around sexual orientation. This is because it also consists of transgender and intersex individuals, who are vulnerable not necessarily for their sexual orientation, but because of their gender identity. It would be remiss not to mention that this paper has for the sake of convenience also taken part in the 'invisibilisation' of several other groups who may classify themselves under the queer umbrella – for instance asexuals, pansexuals – who are 'united' in that they, along with many others, do not conform to heteronormative standards. Of course, not only does claiming that LGBTI persons form anything like a homogenous group become impossible, the same is true within the letters of the initials themselves. Gay men in South Africa lead very different lives depending on where they were born and what socio-economic resources they have, and the same extends to every other section within the group.

The imprecise language can be liberating and allow for the full range of diverse sexual and gender expressions to find a 'home', but simultaneously, its vagueness can also lead to silencing the targeted, because of their membership of other groups within the larger group, and the increased vulnerability this brings with it. While black lesbian women may be attacked because of their sexuality, a universal term such as homophobic violence might further camouflage the fact that men and women across different race and class divides are not being targeted equally (Schuhmann, 2008: 7).

Given South Africa's recent past, politics around inclusion, groups, hierarchies and self-identification remain contentious. Here lies another issue with hate crimes legislation and its reliance on groups for its application. It allows the state to declare who is a valid victim in terms of this legislation, with the specific problems of inclusion and exclusion discussed elsewhere. While that is problematic in and of itself, it may also force some people to fit their identity into a neatly defined category in order to gain protection from the state, even when such an identity may be fluid, or that person may be resistant to such labels. This forces individuals to buy in to a system of state-labelling of sexualities and the creation by the state of hierarchies of victims, all in order to aid in guaranteeing what should be a fundamental right to efficient policing and prosecution (Schuhmann, 2008: 10).

3.3. The feminist lens

Mohanty's widely acclaimed 1988 piece 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' discusses the issues that were debated (and continue to be) by feminists, around the problematic and assumed homogeneity of women's struggles, both within a state and internationally. Mohanty's piece discusses issues around the prevalent white saviour complex of Western feminists and their engagements with women in the developing world. Though by now almost thirty years old, it nevertheless still holds relevance to contemporary South African LGBTI debates.

Mohanty (1988: 334) argues that while Western feminism itself does not pretend that all women have the same issues or that all the same goals should be worked towards, it does however situate itself within a certain ideological setting. This ideology is one in which the West is the primary reference of thought and practice, and has an often implicit expression of universality of issues where, in fact, few exist. Mohanty's argument begins by critiquing the situational positing of the term "women" and the fact that this analysis assumes an already constituted, coherent group, with the same interests and desires, and does not take into account positioning stemming from race, class, ethnicity and other factors. The term "women" (and correspondingly terms like "women's issues" or "women's rights") is problematic, not only in its assumed universality, but because that universality has as its basis a very specific type of woman, one who is often white,

middle class and Western (Mohanty, 1988: 336). Mohanty also argues some of this assumed homogeneity plays a role in perpetuating negative images of women, both to themselves and to men. Assuming all women are the same accepts all women as victims and all men as perpetrators, freezing them into these positions. Similar arguments – laid out below – criticise hate crimes legislation in a similar way for accentuating negative aspects of LGBTI life and cementing a feeling of victimhood and outsider status. Unity cannot be assumed on the basis of a shared characteristic, be it gender, sexual orientation or race, but must be "forged in concrete, historical and political practice and analysis" (Mohanty, 1988:339).

The waves that have existed in feminist activism are instructive here to draw comparisons with LGBTI activism over several decades.

First wave feminism aimed to achieve standards of neutrality of treatment between men and women. This first wave involved agitating for basic rights that precluded women owing to perceived biological, mental and physical limitations that made them inferior to men. These movements included issues of women's suffrage, the right to hold jobs – access to the "public sphere" – and a "sameness" of treatment. This was advocated for on the premise of equality: women were equal to men and that objective legal norms should codify this sameness and equality. This broadly falls into the category of classically liberal feminism (Van Marle and Bonthuys, 2004: 127)

Following this wave, which secured access for women to the public sphere, the second one was related not to the sameness of women to men, but to the specific and different needs men had to women. Here, sameness is pushed aside because blindly giving the same treatment to men and women – positioned as they are so differently within societies – was deemed to not be progressive for women, but potentially regressive. Second wave feminism began to tackle the myth of the neutral subject that runs through first wave liberal feminism, ultimately attacking this construct and its neutrality, exposing it not as neutral, but as men (and a particular type of white man with access to resources) still being established as a norm (Van Marle and Bonthuys 2004: 127).

> Third wave feminism argued that both first and second wave feminism explain subordination as it relates to a perceived universal subject and essentialist notions of women:
>
> > This means that both positions proclaiming sameness and those proclaiming difference are problematic because they assert only one version of the truth, either that all women are essentially the same as, or essentially different from men. (Van Marle and Bonthuys, 2004: 127)

Third wave feminism is aligned with post-modernism, critical race, and postcolonial streams of thought, and criticises the lack of intersectionality in both previous waves of feminism. It regards them as failing to adequately account for the difference within groups that are already marginalised, and rejects essentialist – and often Western – conceptions of women and "women's issues".

While obviously not following exactly the same path, it is interesting to note the commonalities between feminist activism and thought and LGBTI activism in South Africa. Of course, what is not taken into account in these waves is extreme racial discrepancies that existed in South Africa. South Africa underwent what could be called its LGBTI "first wave" in the late 1980s and early 1990s, when gays, lesbians and bisexual men and women organised themselves to advocate for equal rights denied to them under apartheid because of their sexual orientation. In this wave, the goal was simple – legal equality and non-discrimination. The legal reforms that were achieved are briefly discussed above, including "sexual orientation" being listed as a prohibited ground of discrimination under South Africa's interim as well as final 1996 Constitution. This, as well as other reforms, gave South Africa's LGBTI population formal equality for the first time in the country's history, and for those that had other resources, it meant that their lives were secure, prosperous and free. For the vast majority of the LGBTI population, however, the legal reforms brought little tangible difference to their everyday lives. It can be argued that these reforms failed to bring difference because rights and legal reform have a fundamental limitation relating to intersectionality of oppression. It can also be argued that hate crimes legislation can fall into the same trap as previous legal reforms.

These modes of activism are also significant for the role they play in identity formation and public perception of group identity. In 1994 the National Coalition for Gay and Lesbian Equality (NCGLE) was formed, comprising a broad range of LGBTI organisations and existing for the

sole purpose of including sexual orientation as a listed ground for prohibited discrimination in what would become the 1996 Constitution. As outlined in Chapter Two above, the national coalition was successful in its task and shortly after began a hugely successful wave of litigation with the inclusion of sexual orientation in Section 9 as its basis (Craven, 2011: 32).

This process of concerted advocacy followed by litigation provided a common goal for those people and organizations working on LGBTI issues and, for a few years, created the impression of unity and a common purpose – even if this impression did not truly reflect reality. Cock (cited in Craven 2011: 32) states: "The unity of the gay rights movement should not be overemphasized…the movement was fragmented, splintered politically and divided along race, gender, class and ideological lines." While some point to these issues to dismiss the notion of unity across race, class and other lines, what is perhaps most interesting to consider is the success of the coalition in spite of these challenges. The NCGLE did not pretend to be wholly intersectional and integrated, but rather its narrow focus on removing legislation that discriminated broadly against LGBTI persons meant that it was afforded broad support (Craven, 2011: 33).

Over the next decade, South African LGBTI activism began to shift away from a mostly white-dominated space concerned with liberal legal reform, towards a more representative and more intersectional grouping, concerned with the substantive equality lacking in the lives of LGBTI persons. This move is relevant not because of the interest in how lobbying and advocacy has changed – and how it has remained static in some respects – but because it exposes the growing pains and internal schisms within the LGBTI population, more than before (I Lynch, pers.comms., 3 Nov 2014).

It can be argued that South Africa has never had anything like an LGBTI "community". The deep divisions wrought by apartheid and patriarchy mean that if anything, there are several different communities which exist, which have the common thread of non-normative sexual orientation. These tensions are not new, but certainly in the most recent past, they have become clearer. Craven (2011), in her MA thesis, gives a detailed account of the struggles to balance new

demands for intersectionality and inclusivity with old activist goals, and the much narrower focus of LGBTI campaigns and activists of the past. Her work, along with the book by De Waal and Manion (2006), uses Gay Pride events to discuss the race and class schisms within South African LGBTI communities to great effect.

3.3. The strategy and politics of identity formation

Gamson (1995: 391) discusses that many of the successes experienced by LGBTI persons in the United States were partly a result of their ability to organise themselves into a socially recognizable group. LGBTI people built themselves a "quasi-ethnicity" through which they were able to more clearly articulate their demands for civil rights. This formation of a group makes it clear that oppression is not individualised in this regard but is systemic. People were not being discriminated owing to their behaviour and choices, but rather because of their membership of a group – a type of discrimination that seems inherently less palatable.

Another concern that exists with forming a group identity is that not only is difference often subsumed, but the way a group identity forms will be disproportionately influenced by those individuals within a group that already have the most power and resources (whether this is an explicit or implicit process). Gamson (1995: 397) provides letters written to LGBTI publications in the early 1990s in the United States around the use of the word "queer". "Queer" is discussed not only as a reclaimed term for individuals to use, but as a name that cuts across difference and emphasizes what the clumsy initialisms try to achieve; that is, what is held in common with one another. The reclaiming and detoxification of terms falls outside of the focus of this thesis, but what is relevant here is that individuals were concerned that the term would be used to continue a long trend of erasure of bisexuals, trans persons, and other less visible members of the LGBTI grouping. Part of the concern here relates to who within a group gets "left behind" during this formation and whose image is the grouping really cast in. This has serious implications for the development of and implementation of hate crimes legislation.

3.4. Ditching difference for strategy

In South Africa, and many other countries, a strategy of denying difference and finding common ground was embarked upon by LGBTI activists. This strategy allowed these activists to focus on

progressive legal reform and not deal with substantive issues of inequality. While this programme of legal reform will be expanded on below, for this section what is relevant is how the choices of activism and strategy had an effect on the formation of group identity – both within the group as well as on the identity that existed outside of it.

LGBTI movements presented themselves to the wider public as a normal group of people who were being oppressed. They demanded recognition for their lives and acceptance of their difference, and the rights that attach to this identity. This was a drive without reference to class, and compounded with the cultural presentation of lesbian women and gay men as affluent or middle class, provided the reference point (McDermmott, 2011: 67). It is through this decidedly liberal framework that much of LGBTI activism occurs, including the focus on marriage equality and legislative changes. If this is the framework all LGBTI persons must work with, then it is essential to acknowledge the different positioning given to people by their class, race and gender in society, and to understand how this will fundamentally affect their experience of the gains that have been made in many Western countries and in South Africa (McDermott, 2011: 64). While differences were underplayed and a friendly identity was forged for the outside world, it should be remembered that this was not done on a blank canvas. Advancing unity and finding common ground is one issue, but when the identity revolving around this activism is not neutral, but based around the lives of a small and unrepresentative minority, then issues are bound to arise at a later stage.

This gap in lived experiences within the LGBTI community is complicated – perhaps even exacerbated – by the reliance of LGBTI advocacy on liberal legal reform and judicial activism. The limitations of such a path will be discussed below.

3.5. Activism as a driver of identity rather than activism driven by identities

Polletta and Jasper (2001: 285) define collective identity as:

> …an individual's cognitive, moral and emotional connection with a broader community, category, practice and institution. It is a perception of a shared status or relation, which may be imagined rather than experienced directly and is distinct from personal identities although it may form part of personal identity.

Polletta and Jasper (2001: 284) discuss social identities and group identities within social movements, including that of the LGBTI movement. They stress that the concept of collective identity has in the past been required to do too much in terms of analysis. They ask several questions about collective identity within social and protest movements, including whether identities exist and predate the social movement, rather than preceding it. Is the projected public identity of the group the same one as that experienced by those within the group? Are these identities created by the groups themselves or are they imposed on them by others? Do individuals choose to belong to collective identities as a way of strategy and their own self-interest or rather, do their own interests flow from their very membership of a grouping?

By the 1970s, the "new social movement" was emerging and in the West, for the first time, through protests around peace, nuclear disarmament, LGBTI issues and feminist issues, broad movements displaced the class-based political mobilisations that were the norm in the West until then. This movement is game changing, not only because class location is not (necessarily) a determiner of location within a struggle, but also because these protests and movements are not narrowly asking for concessions from powerful institutions – they are more broadly asking for recognition and acceptance of their group (Polletta and Jasper (2001: 285).

Another key difference with these groups compared to social movements that predate them, is that of the politics of inclusion. Whereby other mass movements have often been about inclusion in the processes and rights of being a citizen (suffragettes, civil rights in the United States, and anti-apartheid activism in South Africa) what these movements often have is many or all of the associated rights that come with being a citizen. They can mobilise legally and agitate for political change in a way that black South Africans pre-1994 and women in the early twentieth century could not (Polletta and Jasper, 2001: 287).

Social movements are defined not only by themselves and the individuals within them. Often the role of the wider community and the legal and government apparatus can play a vital role in how identity is shaped – and as a result, how activism and social movements around that identity emerge and progress. For instance, homosexuality remains a taboo and punishable, but it was not until the nineteenth century in Europe – and in African colonies occupied by Europeans at the

time – that same-sex sexual activity was not just a deviant and immoral act but had become a deviant and immoral identity too. The network of legal prohibitions, punishment and discrimination made it clear that deviation from the heterosexual norm was not acceptable, and that those persons engaged in same-sex activity were criminal and 'other' to normal society. For example, strict legal definitions of race and enforcement white supremacy in the United States and in South Africa played a role in cementing a social movement of black people within those countries in a way that black people in Brazil – where there was an absence of legal racial categories but not of racism – were not able to be mobilised as effectively (Polletta and Jasper, 2001: 287).

It is through these methods, through the law and enforcement of otherness, that social movements can often find their identity forged for them through their opposition to the norm rather than any shared trait (in the way that blue collar workers might for example). This lack of a real backbone of existing identity means that groups can often have a great deal of scope and creativity when it comes to defining themselves – again, in a way that perhaps other more formed and homogenous groups may not. It is exactly this fluidity and scope that can give rise to tension within groupings later on, and lead to discussions about their identity, their strategy and activism, and precisely who within the group is represented and who is not. It is this fluidity and a group that forms as a result of activism rather than activism stemming from an already formed group that makes treating LGBTI persons as a constituted group – and thus makes legislation aimed at that group, such as hate crimes legislation a complicated process.

3.6. The "natural group"

There are many social movements and collective identities that are taken for granted in their formation and cohesion, including women and homosexuals. This ahistorical and acontextual understanding of these groupings leads to problematic and unsophisticated engagement, not only in terms of the wider community and policy makers, but from within these movements themselves and to the outside world. Polletta and Japer (2001: 289) argue inter alia that in order to properly engage with group identity and activism, it is essential to first acknowledge the historical and other contextual drivers that forged these groups, and do away with the assumption

of “natural groups”. Following this, a keener understanding of the social, economic and political backgrounds of individuals can generate mobilising identities.

In taking the points raised by Polletta and Jasper and Schuhmann, what implications does this have for an understanding of and engagement with the South African LGBTI grouping? One which consists of people who have no shared political and economic background, and in the case of South Africa can mean that members on opposite spectrums of the same group can have almost no shared experiences and few common interests? In light of this, how do we engage with legislation that seeks a cohesive group to protect? How do we acknowledge that sexual orientation is an obvious driver of the violence experienced by so many LGBTI persons but that that shared attribute does not lead to the same violence and victimisation of some of the members of the group?

3.7. Race and class within identity groups

The above section speaks broadly on the issues and limitations of identity formation and the politics around using a group as a social movement. This subsection discusses LGBTI persons as a group, as well as the issues that race and class have on a grouping that is not organized along those principles. Simon Nkoli was a prominent LGBTI activist, and after being dissatisfied with activist groups existing at the time such as the Gay Association of South Africa (GASA) he formed Gays and Lesbians of the Witwatersrand. GASA was famously “politically neutral” and tried to articulate gay and lesbian issues without criticising the apartheid government too strongly. Nkoli’s quote below criticises this kind of single-issue activism and highlights the need for an intersectional approach:

> I am black and I am gay. I cannot separate the two parts of me into secondary and primary struggles. In South Africa I am oppressed because I am a black man, and I am oppressed because I am gay. So when I fight for my freedom I must fight against both oppressions. (Nkoli, cited in De Waal and Manion, 2006: 19)

The race, class and gender issues within the LGBTI community and its effect on LGBTI as a social movement is not a new nor uniquely South African phenomenon. Internationally, the internal struggle within the LGBTI movement is over thirty years old, with Linda Hirshman naming a chapter of her book on the “triumphant gay revolution” in the United States, ‘With

liberal friends, who needs enemies?' What is key to note here is that LGBTI groups, as much as they have forged a common identity, have had to tackle the reality that their different racial, social and economic realities bias their perspectives and play a role in how they experience the wave of social change that swept much of the Western world in the last twenty-five years. Milani (2014: 261) states that the main issue from a queer theory standpoint is that the so-called gay liberation in the United States was an exclusionary political movement, characterised by several different biases of race, gender and class (in this case these equated to white, male and middle class, respectively). This had the effect of invisibilising other forms of non-heterosexual identification.

This is also true – perhaps far more starkly – in South Africa where race is closely aligned to class, and class determines much about a person's quality of life. Activists like Simon Nkoli and other black LGBTI activists were faced with a new struggle after democracy, and had to carve out their own path once their activism around sexual orientation was no longer subsumed by the broader anti-apartheid movement. On the other hand, white LGBTI persons had to reconcile themselves with the ending of a system that denied them their sexual freedom and full citizenship, but also provided them tremendous economic and social advantages (Craven, 2011: 22).

Chapter Four
The shortfalls of liberal legal reform

4.1. LGBTI activists and the law

LGBTI persons have in recent years gone from 'deviants' and 'criminals' to being some of the most vocal and ambitious users of law and legal reform to drive their agendas. In the second chapter there was a discussion on South Africa's reliance on liberal legal reform, a result of the country's constitutional framework. This section will discuss this choice of advocacy and its limitations in a country where gross class, race and gender inequality persists.

Throughout apartheid and into the early years of democracy, South African LGBTI persons lived as criminals and were denied many civil and human rights that heterosexual persons enjoyed.

From criminals under the law to fighters within it, the South African LGBTI community sought legal redress on myriad issues since the new Constitution prohibited discrimination on the grounds of sexual orientation. Not only was this a valuable strategy because of the legal framework – it would for instance be less valuable in the United States or in a state where homosexuality remained illegal – but because of the renewed interest in human rights in a country that had denied rights to the majority of its citizens for so long.

LGBTI groups have used human rights litigation and the language of human rights law to advance their strategy for many years, not only because it is likely to succeed, but because it frames their grievances as more legitimate. It also frames these issues as the oppressive denial of civil rights that they are (Mertus, 2007: 1037).

American activists have made use of the law and judicial reform for many years, and in terms of LGBTI concerns, this is a contentious method of engagement within the movement. Critics of this form of activism argue that there are two scenarios: first, massive resources are diverted to a court challenge which ends in a defeat; or, second, resources are diverted to a successful court challenge which is quickly made redundant by a legislative or executive conservative backlash. In both scenarios, they argue, massive resources are diverted towards a strategy that often means little to LGBTI persons and which could have been put to better use (Keck, 2009: 154).

The South African law reform movement following apartheid is also criticized for this failing. The NCGLE, referred to earlier in this thesis, in its lobbying and litigation that so quickly changed the legal landscape for LGBTI persons, was able to achieve this rapid change, because while it provided the appearance of a united coalition, it was actually a centrally controlled body that was able to marginalise the views of dissenting individuals and groups (Oswin, cited in Craven, 2011: 34).

While the NCGLE appeared to be an umbrella of independent organisations which fed into it, it was really more the opposite. Therefore, instead of bringing together a community, the idea of a community was made through the NCGLE. It appeared as a "community fighting for its collective interests, when in fact there was a relatively small number of people undertaking what

was a fairly conservative project of legislative reform within which the mobilization of a mass movement was deliberately not undertaken" (Craven, 2011: 35). The limited focus of the work meant that some of the more complex issues, such as power relations and race and class issues, were not dealt with. In fact, the way the NCGLE pursued progress and avoided issues of contention actually deepened divisions along these lines (Craven, 2011: 35).

In this way, liberal legal reform pursued an agenda which ignored the broad and structural concerns of other LGBTI persons, and instead focused on a conservative agenda which delivered benefits to a few. This failure of liberal legal reform in the recent past should be cause for concern and introspection. Will the implementation of hate crimes legislation without any interrogation of power relations and intersectionality bring more of the same? The subsection below explores Critical Legal Studies, and applies its theoretical approach – that questions universality, neutrality and certainty of the law – to hate crimes legislation.

4.2. The Lens of CLS

CLS approaches the law from a post-modern perspective and eschews the ideas of legal neutrality and certainty. The neutrality and objectivity of the law derives from Cartesian logic, which assumes that legal knowledge is acquired by individual people through the exercise of their faculties of reason. When knowledge is obtained through the correct process of reasoning, it will tend to be true, irrespective of the "knowers" (subjects of knowledge) or the people about whom knowledge is obtained (objects of knowledge). Therefore, legal rules can and should be objective and based on universally accepted philosophical methods. For rules to be applied neutrally, the law should categorize events and people so as to apply rules to cases which are similar. Essential and universal similarities among humans must be abstracted and form the basis for fixed assumptions about human nature. This means that legally relevant differences should be clearly outlined, which would justify differences in legal treatment. Such an approach subscribes to only one theory of the truth and rests on the need to identify objective facts and reject all "subjective" facts as irrelevant (Van Marle and Bonthuys, 2004: 44) Among others, feminists critiqued this so-called legal objectivity as nothing more than the cementing of the experience of the heterosexual white man as a norm against which others would then be measured. In other words, what is presented as neutral is actually a manifestation of the privilege of white male

heterosexuals who do not see their own race, gender and sexuality as anything but the norm. The critique of legal objectivity and the universal subject is one that raises considerable problems for hate crimes legislation for LGBTI South Africans. In engaging with the law in this way, certain norms and experiences will have to be used to define a group that is granted protection under the law. In past legal reform, this universal subject was not a representative one for the LGBTI community and through an approach like CLS, activists would be wise to guard against such mistakes again.

The experiences of all who do not fit this mould of white male heterosexuality are excluded from legal discourse in several ways. One of these ways is the assumption that existing laws already accommodate them and thus no changes are needed (laws which ensure formal equality with others and fail to achieve any substantive equality). Other mechanisms see those not represented by the norm represented as an anomaly or special case (pseudo-inclusion). Finally, others may be included as subjects, but their experiences are articulated and interpreted by lawyers, judges and other figures of authority who themselves meet the norm described above, in what Van Marle and Bonthuys (2004: 45) call alienation. The alienation discussed by Van Marle and Bonthuys can also be seen in to play a role in secondary victimisation, where service providers like the police and healthcare workers alienate and exclude those victims and survivors who do not meet the criteria of other "more deserving" victims.

Modiri's 2011 piece discusses critical race theory and black consciousness within legal education in South Africa. This quotation captures the essence of CLS that this thesis uses:

> As long as we continue to believe that 'justice is blind' we sustain the illusion that the law protects citizens through a mandate that is somehow above the petty practices of (our) commerce, politics and socio-political interactions. (Thom, cited in Modiri, 2011: 180)

Van Marle's 2001 article relating to the teaching of critical race theory within legal education also provides a useful resource to explain some of the key themes of CLS. Van Marle summarises these into four points: indeterminacy, fundamental contradiction, false consciousness, and reification. Indeterminacy attacks a fundamental premise of the law – legal certainty – and exposes the law not as the certain and just tool it is presented as, but fraught with

inconsistencies and uncertainty. The law is not certain and in some cases purposely vague in its approach, which requires interpretation. This is where the problem arises - while the law in theory is blind, it is being interpreted by men and women (though mostly men) who are anything but (Van Marle: 2001: 86-90). This means that the law as a tool for justice and equality is often subject to the limitations of those who are interpreting and applying it. It is also subject to the personal privileges and world views of those people, which will almost inevitably be of a position of privilege and security.

The next point of fundamental contradiction places the law within the structural limitations by the convergence of the state, economy and culture. This places the law not above the economy, the state and culture, but within and subject to it. (Van Marle, 2001: 90) This limitation on the law is important when considering that reform movements – like LGBTI activists – have in the past attempted to change laws related to heavily reified social institutions, like marriage and gender norms.

Van Marle's third point – false consciousness – strikes at the centre of the myth of legal neutrality. The false consciousness being referred to relates to the idea that legal norms and ideals that appear "static and objective" are actually "contingent and relative". Exposing how dominant power inequalities and ideologies influence, ever so subtly, public and legal discourse, should be ongoing, as well as how hidden belief, heavily loaded acts and expressions are seen as objective and neutral. (Van Marle, 2001: 90)

Van Marle's (2001: 90) final point, which is perhaps the most relevant to a discussion around LGBTI persons, is reification. This feeds into the other points raised by CLS scholars such as Van Marle, as it encompasses the assumption that rights are static. This reification of rights means that their interpretation and their application is often based on an incomplete and acontextual understanding of how rights function in the world outside of academia. This problem is related to another issue of overreliance on rights – and litigation in relation to those rights.

The issue of reification is even more problematic in the context of South Africa, because staggering inequality means that rights are not static. Indeed, their application depends heavily

on the resources and social context of the user of those rights. In a context where an extensive and valuable set of rights have done little to curb the violence against particularly black LGBTI persons, this elevation and overreliance on the law is especially troubling. Too often, rights attainment has been viewed as an end rather than a means. The rights that LGBTI South Africans have are undoubtedly a good thing, but rights – as well as hate crimes legislation – must be critically engaged with and viewed as a foundation on which substantive equality can be built upon.

MacKinnon (cited in Schwartzman, 1999: 33) argues that the liberal formulation of rights and equality are structurally incapable of dealing with issues around gender inequality. She states that similar arguments can be made around race and class issues in a society, especially when one subject has more than one of those attributes. The law stands to protect people from action and rarely demands action or sanctions inaction, and it is in this way that the liberal standard of the law may guarantee rights and non-interference, but does nothing to address existing privilege and power discrepancies that exist. It is this blind application of the law to a collection of subjects with assumed homogeneity that generates the critique of the liberal subject. The law can guarantee rights, but it can also serve to freeze and entrench hierarchies because there is a notion of rights and not one of advancement – or in the South African context, redress.

In this way, the law assumes a uniform legal subject as the beneficiary of rights, and does not account for the different ways every individual is positioned within a society along multiple and intersecting axis of oppression. Once again, this template of the uniform citizen is not neutral or arbitrary but highly politicised and biased in favour of the "ideal" citizen – the white, heterosexual man – with all other citizens being implicitly viewed not as their own agents, but as incomplete versions of the ideal (Schwartman, 1999: 33). Above in this thesis, intersectionality of oppression was discussed as key to understanding hate crimes against LGBTI persons, but also as crucial to shaping any interventions to it. What Schwartman and others highlight is that the law – and liberal legal reform in particular – fails on issues of intersectionality and cannot be applied uncritically.

South African law takes into account the difference between formal and substantive equality. Where the former is concerned with access to equal opportunity, the latter is interested in the realization of equality for subjects. Liberal human rights frameworks are not substantive in practice, and act only as a legal guarantee against unjust interference – from state and private actors. What laws and rights do not do is bring justice to people who are not being actively discriminated against, but are rather suffering oppression from restriction placed on them from economic, racial and sexual power structures (Schwartzman, 1999: 34).

4.3. Legislating against hate

Perhaps one of the most contentious aspects of hate crimes legislation is that it criminalises motivation and bias in a way that is foreign to most legal systems – including South Africa's. Hurd (2001: 226) argues that there is a fundamental defect with hate crimes legislation in that, in the first case, it chooses certain motivations as being worthy of more severe punishments. This is problematic because it necessarily creates a somewhat artificial hierarchy of hate and suffering. For example, a racist or homophobic motive is deemed to be worse than a misogynistic or patriarchal one, if most hate crime legislation is to be taken at face value. Secondly, this can reinforce existing prejudices that exist in a society by reaffirming – through inclusion or exclusion – which members of society are worthy of our consideration and protection. This became an intensely political problem in the United States in the 1990s when homosexuals were not included in hate crime legislation. Later on, gay men and lesbian women were included in certain jurisdictions, with transgender and intersex individuals remaining excluded.

The second flaw raised by Hurd (2001: 226) is efficacy, wherein she argues that legislating against a motive of hate is likely to be as ineffective as one aimed at jealousy or greed. Hurd's point may seem trite at first glance, but it is fundamental insofar as in the same way other crimes are not driven only by greed or jealousy, for instance, violent crimes against LGBTI people do not exist in a social and cultural vacuum, triggered by one hateful individual. This argument exposes a deficiency in hate crimes legislation, which sees another law trying to tackle the manifestation of hate and intolerance in lieu of dealing with the hate, intolerance and other issues that feed into it. Hurd argues that those who advocate for hate crimes legislation have burden to

show why this specific motivation – hate or bias – will be more readily curbed by the law than other social ills and intolerance that has been so stubborn.

The above argument by Hurd, however, does not deal with the motivations for hate crimes legislation fully. After all, measurable deterrence can never be truly engaged with before a law is passed, and there is no reason that hate crimes legislation should have to jump this extra hurdle. Secondly, Hurd assumes that it is the motivation – the hate or the bias – that is intended to be curbed by hate crimes legislation, whereas, as Miller (2003) argues, it is not the motive or the intolerance itself that the legislation would address, but how that hate manifests itself in actions. Hate crimes legislation is not a silver bullet that will erase homophobia and patriarchy, although such legislation can send a message about the place of these undesirable views within a democratic society. In the same way that laws against fraud do not have to show they will curb the human emotion of greed, but just that particular manifestation of greed which we have deemed sufficiently damaging to other individuals to attach a sanction.

While it might appear superficial to criminalise certain motivations and not deal with larger issues, it is worth noting that such legislation does not preclude such an engagement in addition to the current measures. Measures must absolutely be taken to address intolerance and bigotry in society, but measures must simultaneously be taken to protect those who are the victims of this intolerance now.

Violence against LGBTI persons and black lesbian women in particular should not be removed from the wider context wherein these incidents are driven by patriarchal and misogynistic attitudes. It can therefore be instructive to briefly look at legislative interventions made by the government in the field of sexual violence against women. Hate crimes statutes in other jurisdictions have had the effect of limiting judicial discretion by making bias-motivated crime either a mandatory aggravating circumstance or including special mandatory minimum sentences. In South Africa, the government in 1998 passed legislation making inter alia gang rape and premeditated murder require a mandatory minimum sentence. Nel and Breen (2011: 38) argue, however, that these tougher new sanctions have had no measurable effect on the crimes they have targeted and have contributed directly to the problem of prison overcrowding.

Chapter Five
Issues with hate crimes

5.1. Inclusion: who's in and who's out

As mentioned above, hate crimes legislation requires a limit on the kinds of motivations included for harsher sanction and closer monitoring – without these limits, the law would be so wide ranging and vague it would become quickly useless. This necessitates that there will be a rather arbitrary line drawn relating to who is a victim needing 'special' protection and who is not. The inclusion and exclusion of certain parties from hate crimes legislation is again one that, far from being a neutral and logic process, is fraught with politics, power relations and norms.

For instance, when various states in the United States began considering hate crimes legislation, the inclusion of sexual orientation as a motivation for hate crimes was a contentious issue that lead to several state legislatures excluding sexual orientation to appease socially conservative elements within their states. It should be mentioned that inclusion on the grounds of sexual orientation is a different issue than inclusion based on gender expression or identity. Here, even where sexual orientation was included in the legislation, protection was not extended to gender non-conforming individuals (Sloan, King and Sheppard, 2008: 29). Breen and Nel (2011: 37) argue that in the South African context, this would be less of a burden owing to the existence of an agreed-upon list of attributes where discrimination is prima facie unfair. These are the grounds listed in Section 9(3), which prohibit discrimination on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, disability, religion, conscience, belief, culture, language, and birth. Breen and Nel raise issues even with this list, which does not on its face include nationality – although this characteristic was included through later jurisprudence. They also cite the fact that the current formulation, while including gender, does not necessarily supply relief when a hate crime has been committed because of the victim's gender expression and gender identity – or rather their perceived defiance of the norm. Further, they state that this list would also need to be examined to more accurately respond to the types of crimes being committed in South Africa, and would most likely have to include a provision that

protects those persons being victimised because of their health status – including persons living with HIV.

Added to the problem of inclusion is the ever present issue of multiple and intersecting oppression that is discussed above. When white gay men are victimised, they are far more certain about labelling such a crime as a homophobic hate crime, but when the victim is either black, female, foreign or any combination as well as LGBTI, then a problem arises not just for identifying when a hate crime has been committed, but a problem occurs for a police and prosecution service that is already shown itself to be ill-equipped to handle such complaints.

It is well known that conservative and traditional elements in a society can influence the process of hate crimes legislation and in effect, create the "in" and "out" groups that are worthy of protection. What else is key in this discussion, however, is the power that certain groups have – even groups that are marginalized by the wider society – to lobby and agitate for legislative change such as hate crimes legislation. The more organised, more resourced, and more traditionally powerful a particular group is, the more likely that they will be able to lobby for their group's inclusion than other less organised groups. The capacity issues that exist within South African NGOs and more so among activists mean that the ability to substantively engage with policy, the law and government, is lacking and is concentrated in a small core of individuals and organisations.

5.2. The right kind of relief?

Violence in general in South Africa is unacceptably high and violence against LGBTI persons is even higher. These are not the issues in dispute, but what should be carefully considered is whether one of the remedies being offered – hate crimes legislation – will offer the right kind of relief to those who are victims of this violence and abuse. In this case, what needs to be established is not whether hate crimes legislation will have a marked impact on the incidence of such crimes and the suffering caused to victims, but whether, out of other available interventions, it is the most efficient use of finite resources both on the side of the state as a service provider, and on the side of civil society in terms of capacity.

Reidy (2002) places traditional arguments in favour of hate crimes into three groups. The first is the "greater harm" argument which holds that hate crimes should be more severely punished and tackled because of the greater harm they cause to victims and to the wider community that the victim(s) belong(s) to. The principle here is that the harm caused by being targeted by virtue of sexuality or race, for example, causes more harm than other similar types of crime. The second Reidy calls the "more capable mental state" argument. Criminal liability relies on intention or negligence, and proponents argue that in the case of hate crimes, that intention is more clearly set out, making the perpetrator more culpable than, for instance, a random act of criminality. These first two points are also made by Hurd (2001: 215), though from a perspective of the law of criminal procedure; the issues relating to hate crimes and criminal procedure will be examined briefly below. The third argument is called the "fundamental values argument", which holds that crimes of this nature are repugnant to the very nature of an open, free and democratic society. In other words, such crimes are an attack on the very structure of that society and warrant special attention. There are several deficiencies in these arguments, which led to scholarship and activism advocating for hate crimes legislation from distributive justice and equal protection angles (Harel and Parchemovsky, cited in Reidy, 2002: 271). These arguments state that the protection of the law can be applied in a way that offers extra protections to those most vulnerable and offers substantive equality, as opposed to formal equality. This is arguably the most promising avenue for South African activism, where the law already recognizes the need for specific measures to be taken to ensure the fulfilment of constitutional guarantees to equality.

While hate crimes legislation is discussed under the ambit of liberal legal reform, in a context where so few offenders are actually arrested (and an even smaller minority successfully prosecuted), is this concentration on legislative reforms the best possible way forward? Dixon and Gadd (2012: 26) state that many survivors of sexual assault will argue that their trauma and wellbeing would be more suitably addressed by providing better security and aftercare to victims than by focusing more on harsher punishments for the minority of offenders who are prosecuted. Is it possible that civil society is again "backing the wrong horse", as was done during the legal reform movement of the 1990s and 2000s? It is possible the pursuit of a laudable goal could once again engage in a kind of reform that will deliver benefits to relatively few, though those resources could be directed in the pursuit of more systemic and longer-lasting interventions.

Is more legislation being piled onto a broken system which cannot meet even the most basic requirements under its current workload a feasible plan? In a submission prepared for the University of Cape Town's Gender Health and Justice Unit's summit on the implementation of the Sexual Offences Act, Triangle Project outlines several key failures (2015). It is almost ten years since the Sexual Offences Act came into operation in South Africa. The landmark piece of legislation not only finally expanded the definition of sexual assault to include more than vaginal-penile penetration, it also included a new ethos of service, respect and commitment to the survivors of sexual assault – all of these developments that should have been huge leaps forwards for LGBTI persons who are the survivors of sexual assault. Yet, what the Triangle Project submission outlines is a police service and health service that fails to meet the most elementary tasks of their jobs, and a space where particularly LGBTI survivors would not feel protected and cared for (Triangle Project, 2015).

5.3. Most vulnerable or merely most vocal?

Meyer (2008: 271) provides many examples of attacks on LGBTI persons in order to study how LGBTI persons determined whether an attack was being made on them because of their sexual orientation, i.e., that a hate crime was being committed. The intersecting oppression that existed in many of the attacks sometimes made it difficult to determine whether the attack was based on sexual orientation (as opposed to race or gender, for example). While some of the women of colour expressed reservations about labelling their attack exclusively as a homophobic hate crime, this was not an issue that white respondents (and particularly white male respondents) had. This group was far more certain about the homophobic nature of their attack, even when the attackers were of a different race to them, as was the case with other respondents. This is in part to white privilege, which inter alia constructs the white race and culture as an invisible social norm (as opposed to one race and culture among many). White privilege allowed white respondents to view their sexuality as the most salient detail of their personality and to overlook the possible role their race may have played in their attack. Meyer (2010: 989) finds that not only are privileged people more likely to identify an attack on them as homophobic, they are more likely to view it as more severe, compared to the women of colour surveyed in the same study. White respondents in this study were more likely to view their experience as worse than others

(comparing their experience to peers who have not had similar negative experiences), whereas the other respondents were more likely to downplay their own experiences in light of more serious incidents that had happened to their own peers. For example, while a white respondent felt his verbal attack was a severe one, a black respondent felt her physical assault was not as severe as it could have been.

Two points emerge here. First, the hate in hate crimes is multidirectional and needs to be addressed as such. It should be tackled not as not emerging plainly from homophobia, but from a whole host of problematic social hierarchies that also need to be tackled - so that class, race, sex and gender are viewed as primary determiners of vulnerability and experience, even within a group (LGBTI). Second, this blurry line of motivation for perpetrators, coupled with the privileged position of whiteness means that white victims (and white males in particular) are more likely to identify a homophobic element in their attack. The implications of this second point must be considered when tailoring a response to hate crimes and considering which groups are most vulnerable and which groups are most likely to make use of the legislation. If we take all of the above into consideration, what impact does it have on a hate crimes legislation that identifies vulnerability as emanating from membership of an identified vulnerable group, rather than from the perspective of intersectionality?

5.4. Flawed assumptions

Schumann (2008:6) argues that hate crimes legislation operates within several implicit and explicit assumptions about the victims, the perpetrators, and the motivations of these crimes. Moreover, this legislation is necessarily situated within a larger legal and social framework, which has real implications for how it has been shaped, but also interacts with other issues including power discrepancies and entrenched privilege.

Key to these assumptions is that such crimes are so-called “stranger danger” crimes: random acts of violence and criminality committed by hateful individuals who are not representative of wider society. The DOJ&CD’s own television commercial (which can be viewed on YouTube) which sought to educate South Africans about corrective rape of lesbian women, took this exact angle. As stated above, this is in contrast to the admittedly sparse information available on hate crimes

and the corrective rape of lesbian women, most of which are perpetrated by someone familiar with the victim (Lee, Lynch and Clayton, 2013: 9).

The assumptions hate crimes legislation rest on betray its particular American heritage and original design as a response to racially motivated crimes, such as being committed principally in the southern United States. This formulation of laws seeks to take what is actually a structural problem with a society and instead "hide" the problem by pretending that such issues are actually located in the hate of individual actors for others (Schumann, 2008: 6). In South Africa in particular, where such structural inequality persists and the toxic influence of apartheid is still interwoven with people's daily lives, it is essential not to abrogate our responsibility to tackle these issues at their root, while simultaneously tackling their manifestation.

5.5. Lack of information

Facts faced, it must be acknowledged that hate crimes in South Africa are poorly understood. As far as the incidence, location, types, drivers, reports, prosecutions go, the information available is anecdotal, from a small sample, dated, or not representative. Even the HCWG, which at its completion of its own study, will have conducted by far the most in-depth study of hate crimes in South Africa, has methodological shortcomings. These shortcomings – which are acknowledged by its members– include the fact that incidents are captured through member organisations, meaning that the current issues with organisations and their often small geographic footprint, will be replicated in this study. Being aware of this shortcoming, the purpose of the study is not to give an overview of the incidence of hate crimes but to understand the nature of the incidents and their impact (Hate Crimes Working Group, n.d.).

Chapter Six
Conclusion

Before the democratic transition in 1994, the majority of people in South Africa did not have a legal system that acknowledged their full personhood or offered protection from the state or private actors. For LGBTI individuals, this lack of legal recognition also included legal prohibitions on consensual sexual acts, and led to high levels of police harassment and

discrimination in housing, employment and other economic spheres – all without any mechanism to seek a remedy. It is this stark reality that should be kept in mind when examining the route of legal reform that was carried out in South Africa in the 1990s and 2000s – a country where a person could be dismissed from a job because of sexual orientation, and where the idea of same-sex couples being able to adopt a child was a ludicrous one. Looking back from the comfort of 2015, all the rights enjoyed by LGBTI people in theory look normal – an obvious extension of this country's commitment to the values of human dignity, the achievement of equality, and the advancements of human rights and freedoms. All these are so proudly outlined in the Constitution, and for any other state of affairs to exist is unthinkable. The attainment of full legal equality for LGBTI people was, however, never an inevitable result of a democratic transition. Most of the world's democracies still have some or other legal restraint on LGBTI people. For the majority of countries in Africa, homosexuality remains illegal and a punishable crime. In the United States, while over two decades of struggle finally moved the needle on issues like spousal benefits, marriage and non-discrimination for millions of LGBTI people in some states, others openly discuss laws allowing discrimination on the grounds of religious freedom. Democracy and universal suffrage do not traditionally come attached to progressive attitudes towards women, as well as sexual, racial and religious minorities. The fact that South Africa's did was a fortunate combination of timing as well as highly organised lobbying and advocacy work by a small group of committed individuals. Without the concerted efforts of LGBTI activists to shape the Constitution and then to reform the law around it, it is unclear what the legal situation for LGBTI persons would be in South Africa in 2015.

Since the Constitution's Section 9 includes a prohibition on discrimination on the grounds of sexual orientation, and lays out a very broad interpretation of the rights of people and the responsibility not to infringe on those rights, the rights in the Bill of Rights have a broad application outside of the narrow parameters critics use to define legal reform. This legal framework should in theory act as a guarantee for LGBTI persons' access to healthcare, education, and other services that may be denied to them because of their sexual orientation or gender identity. While this framework exists and is doubtless a positive inclusion, what can be seen from an overview of the litigation launched using these laws, is that the interests of a

narrow minority positioned with resources and influence will make the most use of any legal reform.

The shape these reforms took and the interests that drove them have, of course, been subject to their own problematic influences. Despite the rather negative view this thesis takes of such single-issue moves, legal reform should be viewed for being able to achieve what is reasonably possible for it to achieve. No legislation – and for that matter, no overturn of legislation – is going to be able to properly address the structural issues that cause oppression among all South Africans, including LGBTI people. This expectation is to set legal reform for LGBTI persons the task that has not been set – and rightly so – for legal reforms that were aimed at racially discriminatory and sexist laws. Without an understanding of how power relations and access to resources shapes every interaction in our lives – not just economic, but with the apparatus of justice, for example – it is clear that legal reform will continue to drive benefits only to some, leaving those that suffer oppression on more than one ground behind, though they require support the most. Liberal legal reform must be sternly rebuked when it raises the law as the key impediment to freedom of any group, including LGBTI people, but legal reform as one tool among many can be an incredibly powerful weapon with which to make a difference in the lives of people. It is worth noting that whatever hate crimes legislation the South African government puts in place, the inclusion of LGBTI persons is also not a foregone conclusion, but the result of years of lobbying the government and raising awareness about the victimisation of black lesbian women in particular. Without such an effort, LGBTI people would have likely been excluded from such a process, as they were in earlier drafts of such legislation.

In order for a full understanding of the current situation South Africans find themselves in, it is necessary to examine apartheid in South Africa in its wider context. The apartheid state was a racist white supremacist state which disadvantaged the black majority to the advantage of the white minority. At the same time as this project of white supremacy was being advanced during apartheid (and colonialism), a simultaneous project based on ultra-conservative Calvinist interpretations of Judeo-Christian religious texts cemented a certain kind of masculinity as an ideal in South Africa. First, this ideal was one of a white heterosexual man: a man who is in charge and has almost unquestioned power over his wife and their children, because, included in

this narrative is the explicit message of procreation. These outmoded ideas around masculinity – and by extension, femininity – had several different effects still seen in South African society today. First was the establishment of heterosexuality and the nuclear family as not merely one of the manifestations of sexuality and the family, but as the primary manifestation, by which others are seen not for their own value, but by what extent they detract from this norm. Second, it clearly positioned women as extensions of their children and husbands rather than their own agents, wherein women are made complete by their coupling with men and by their role in reproduction. Third, this artificial standard of masculinity is one that required power and agency, which white heterosexual men possessed. The inability for other men to meet this ideal is detailed by various authors as causing a feeling of powerlessness and emasculation that is often recovered by exerting what power they do have – physical and sexual – over those who do not have power.

In this way, apartheid provided an artificial norm of masculinity; a weak and subservient role for women; a glorification of heterosexuality; and the economic and social conditions responsible for driving crime and anti-social behaviour in all its guises. South Africa twenty years into democracy has not truly extracted itself from the legacy of apartheid, failing to address not merely the rights that bring formal equality, but the substantive changes that address people's ability to shape their own destiny. As a result, apartheid and its legacy are perhaps the key drivers for much of the homophobic and transphobic violence that persists in South Africa.

South Africa's need for a response to this targeted and widespread violence and victimisation is not in question. What is less certain, however, is what path the South African government will take and when it will begin the public phase of this process. All legislative drafting is time consuming, but even for this glacial and considered process, hate crimes legislation has sat in the pipeline for quite some time. This is perhaps an indication of the seriousness of the legislation being contemplated and an acknowledgement of the potential that exists for 'push back' from many quarters.

While this thesis focuses on LGBTI issues, whatever legislation that is eventually passed will of course not deal exclusively with LGBTI crimes, but will (if previous known drafts are an

indication) include crimes committed on the basis of, inter alia, race, sexual orientation, disability, national origin and religion. Also, in keeping with the American model that appears to be exerting a heavy influence on the South African process, the law may be a combination of monitoring and reporting, sentencing enhancement, or specific crime category – and additionally would cover not just criminal acts motivated by hate, but hate speech as well. It is this inclusion of hate speech that will no doubt prove the most problematic and lead to a careful balancing act between rights in the Bill of Rights, including freedom of expression and freedom of religion, belief and opinion. Correspondence cited in this paper discusses the wariness of government figures to engage in this 'fight' before a clear consultation process is conducted. It remains to be seen precisely what will be done, but there at least appears to be a commitment from the South African government and various civil society actors.

The lack of available information about hate crimes perpetrated against LGBTI persons is another issue that must be addressed, because a meaningful intervention must be based on a full understanding of the issues at hand. Paradoxically, this is both a caution against creating hate crimes legislation too quickly, as well as the reason that legislation that includes monitoring and reporting tools is passed as quickly as possible. Well-crafted legislation which includes tools for reporting and monitoring hate crime patterns, and makes provisions for training of service providers, will not only help accurately capture the crimes that are already being reported to the authorities, but will also encourage more survivors to approach them when they have a crime to report. What is most troublesome about this lack of information is not about how sparse it is, but rather that it does not represent the reality for survivors. The existing data may be unrepresentative if power imbalances that exist in South African society (as evidenced in previous studies) are to be extended, whereby more resourced individuals are first, more likely to report any crime committed against them, and second, more likely to identify a crime as a hate crime. It is hoped that such a trend can be accounted and corrected for, and that legislation will not be informed by the lived experiences of a minority of survivors.

While it remains unclear exactly what form hate crimes legislation will take in South Africa, it will have to rely on group identity in order for it to be effective. It seems like common sense to make a law applicable to groups when people are being victimised because of their membership

– perceived or otherwise – of that group, be it sexual orientation, nationality or race. It becomes far more complicated, however, when difference within these groups is taken into account and ideas of homogeneity and equality are dispensed. This is a struggle in all jurisdictions that codify hate crimes legislation, but in a country marked by such inequality as South Africa, the intersecting identities of the members of these groups that include attributes like race, class and location become just as important as their membership of a group generally considered to be vulnerable. Group identity not only tries to erase difference within a group, but also makes inclusion within that group a necessary part of validating the victimisation that may be experienced. For people positioned along a wide spectrum of gender and sexual variance, this may mean surrendering part of one identity in order to fit into one already included in this protection. This again raises a very troubling issue of power dynamics in that the state determines which kinds of sexuality and gender identity is worth of protection – and by extension, valid.

The use of post-colonial and radical feminist thought is an important part of this thesis. This is partly because of the excellent critiques it provides on power discrepancies within movements that are themselves counter-hegemonic. It is also relevant because, it can be argued, the current level of engagement among many activists, NGOs and to an extent, government, is informed partly by the intersectionality and the eschewing of universality that characterises post-colonial feminist thought. Just as feminists have been raising issues around the lack of universality among women and decried the so-called objective norm of the white women in engagement, so too do South African LGBTI activists caution against activism and advocacy that does not critically engage with these issues.

While hate crimes legislation depends on groups and group identity, this thesis also explored how groups can use different advocacy strategies to shape impressions of themselves among the wider community, as well as how activism can in fact forge a community by itself. The LGBTI community in South Africa and internationally engages in both these kinds of identity politics. In the closing years of apartheid, difference was pushed aside as gays, lesbians and bisexual men and women worked together under a common cause of legal recognition by the new Constitution. While this strategy was incredibly successful in achieving the goals set by the

organisations in question, the failure to deal with the substantive issues facing LGBTI people continues to loom large over the community and over activism. This is especially clear at pride parades across South Africa, that see separate prides particularly for black South Africans who do not feel represented by the event being held even in their own city. Even more tellingly is the emergence of counter- and protest-prides. This is a clear indication that all is not well among LGBTI people and that race and class issues are not being addressed. Again, it is wise to avoid placing burdens on the LGBTI community that may not be placed on other sections of society. The racial and class divisions existing in South Africa continue to persist and the fact that they also continue within the LGBTI community is no surprise. LGBTI South Africans are no more removed from the economic and social realities left in this country by apartheid than any other group. Perhaps the surprise is that what once appeared to be a united group is now clearly not one – though it was that appearance in the first place that was misleading, rather than the current state of affairs.

The limits of identity politics are set out in this thesis as a key issue, especially among the LGBTI grouping, which has struggled to find an identity useful for advancing activism, while at the same time accommodating the large amount of difference and variance that such an umbrella group will necessarily possess. The limitations of identity politics are also exacerbated by the tactic of liberal legal reform undertaken in South Africa and many Western countries. This thesis views the shortcomings of liberal legal reform as falling into two broad problems: first, that the system of law is itself structurally flawed and biased; and second, that the application of any rights that are gained in this way is an unequal process often dependent on access to resources.

This thesis used CLS as the theoretical framework to discuss flawed legal reform movements. While CLS speaks to the shortcomings of rights – where access to these rights is reliant on resources – it also offers post-modern critiques on the flawed assumptions of the law that ground so much of liberal legal activism's engagement with the law.

It is of course not legal reform that is problematic, but rather the overreliance on rights-based approaches to issues like hate crimes and homophobic/transphobic violence. It has been seen over many years and in many different settings that legal reform cannot deliver changes that are

necessary to address issues that drive hate crimes. Equality must exist in all spheres of life, and making sure that laws recognise this fact can provide not only a useful framework to articulate for more substantive equality, but make an impactful message about commitments to equality and justice that do more than promise on paper. In order to drive activism that is inclusive and generates more than formal equality, the critiques of CLS – among others – must steer engagement and correct the notion that the law is a neutral tool awaiting shape and direction by altruistic actors. This will not only help interventions be more substantive, but will also clearly set out expectations of such reform before, during and after the process of development.

Inasmuch as liberal legal reform has its limitations in general – for example other rights in South Africa's Constitution like education and housing have made little difference to those lacking resources – it can be argued that this kind of reform is particularly ill-suited to addressing hate crimes. This is because hate crimes are not driven by the hate of LGBTI persons only, but exist in a complex network of gender roles, masculinity, sexual violence, emasculation, poverty and crime. No law that merely addresses the actions while little action is being directed at the other drivers, is likely to find good results.

This thesis discussed the limits of hate crimes legislation to deal with the high levels of violence and victimisation directed at LGBTI persons. It did this by first discussing how legislation that applied to groups was flawed when there was intense debate about the composition of those groups and the power relations within them. The second point was to examine hate crimes legislation as another in a long line of liberal legal reform and attack this method of activism from the perspective of post-modernism and CLS. Finally, this paper examined issues with hate crimes legislation that where not related to their ideological or theoretical backing, but rather relating to the way that such laws can be misapplied owing to practical limitations - especially how this could happen in a South African state with constrained capacity.

Whatever form hate crimes legislation takes, it must be acknowledged that it is a means, rather than an end. The real work of bringing substantive equality to South Africa's lesbian, gay, bisexual, transgender and intersex people, and all other people who suffer because of their

gender and sexual identity, will likely not happen in the Constitutional Court or the National Assembly, but rather in the streets, in people's homes, and in hearts and minds.

Chapter 7

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