

Hate Crimes, Crimes of Atrocity, and Affirmative Action in India and the United States

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Introduction

Hate Crimes are crimes that result from a “manifest prejudice based on race, religion, sexual orientation, or ethnicity...committed not out of animosity toward the victim as an individual, but out of hostility toward the group to which the victim belongs.” Hate crimes in the United States have not always been recorded officially. These crimes include infamous lynchings in southern states of black men who dared to speak to white women.

Crimes of Atrocity have come to be understood under international law as referencing: genocide, crimes against humanity and war crimes. The legal meaning is found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and subsequent treaties and encompass the crime of ethnic cleansing. In particular, genocide is that component of atrocity crimes that targets individuals simply because of their group membership. The United Nations states:

Genocide, according to international law, is a crime committed against members of a national, ethnical, racial or religious group. Even though the victims of the crimes are individuals, they are targeted because of their membership, real or perceived, in one of these groups. (United Nations, 2014)

However, as used in the context of this paper, “crimes of atrocity” means hate crimes committed by non-scheduled castes/tribes against scheduled castes/tribes in India. The actions referenced are considered to be shockingly cruel and inhumane and include rape, murder, and infliction of pain and suffering. The Scheduled Castes and Tribes (Prevention of Atrocities) Act of 1989 and its revisions in 1995 detail the specific acts perpetrated by non-scheduled castes/tribes against scheduled castes/tribes that would merit prosecution and include such indignities as forceful drinking or eating of inedible or obnoxious substances, sexual exploitation, injury or common annoyances.

The origins of caste-based atrocities are rooted in the notion of “untouchability” in India. Relatively recent events that highlight the concept of caste-based atrocities include the Chundur massacre (1991), the Badanavalu killings (1993), the Kambalapalli carnage (2000) and the Khairlanji incident (2006). These events highlight “historic” hate crimes in India (e.g., those envisioned by Dr. B.R. Ambedkar) and compare to lynchings detailed by W.E. B. Dubois. The result is that contemporary instances of hate crimes in both India and the United States can be understood within the context of historic crimes against racial groups or castes.

The common defining feature about hate crimes in the United States and crimes of atrocity in India is the role of racial/caste discrimination or prejudice as the motivation for the criminal act. Whether the hate crimes or crimes of atrocity take the form of rape, physical assaults, murders or violent attacks, the underlying motive is the prejudice against an individual because of the individual’s group membership.

Policy-induced Hate Crimes

Public policies designed to improve the social and economic well-being of marginalized groups may have the unintended consequence of provoking animosities among non-protected group members. The non-protected group members may perceive that the policies that target specific racial, ethnic, or tribal groups or members of lower castes inherently harm those who do not receive targeted protections. This perception might cause them to lash out at the protected group members and extract revenge.

A particular example of a policy that putatively may provoke unintended effects on the very groups it is intended to help is affirmative action. Majority-group opposition to affirmative action policies arguably is related to the real or perceived economic status of groups not covered by the race-based or caste-based policies. Quite a bit has been written claiming that such policies provoke non-protected group members to engage in hate crimes. However, it is particularly difficult to test this hypothesis directly because conventional national crime data sets do not include measures of perceptions or beliefs of alleged perpetrators of violence against protected group members.

Through field experiments and laboratory tests, Shteynberg et al. (2011) demonstrate that hostility towards race-conscious affirmative action programs is rooted, in part, in racialized attitudes and beliefs among whites. More racialized beliefs among whites is associated with higher opposition to race-conscious programs. The same research contends, however, that white beliefs about their relative disadvantage tend to be stronger in organizations with race-conscious affirmative action programs than those without such programs.

Not all groups, however, are likely to translate their opinions about affirmative action into hostility towards the beneficiaries of affirmative action. Own-group discrimination is a common factor cited for why some groups excluded from affirmative action nevertheless support affirmative action programs. For example Tamer (2010) reports that Arab-Americans, who face increasing discrimination in employment, tend to support race-conscious admissions policies.

A good approximation, however, comes from own-group unemployment. Using non-protected group unemployment as a proxy for perceptions about the adverse impacts of affirmative action, one can empirically examine the putative relationship a) between white male unemployment and incidents of hate crimes against blacks and the relationship, and b) between unemployment among non-scheduled castes and tribes and crimes of atrocities against scheduled castes and schedule tribes in India.

The paper begins with a historical rendering of legislation designed to punish hate crimes against African Americans in the United States and Dalits in India. The legislation in both countries came about long after the hate crime problem had become widely publicized. In the United States, at least, the hate crime legislation is very broad and includes gender identity, sexual orientation, disability, religion as well as race. But, the fact that the legislation mandates collection of data motivates our empirical analysis.

We demonstrate that although the number and rates of reported crimes of atrocities against Dalits have been on the rise in India, in the United States hate crimes directed towards African Americans conspicuously dropped after the election Barack Obama, a period when unemployment rates were rising. We argue that the ambiguous relationship between reported hate crimes and economic indicators of potential opposition to affirmative action policies arises in part from the imprecise nature of the hate crime data.

HATE CRIMES IN THE UNITED STATES

The FBI has collected information on hate crimes—a classic indicator of human rights abuse—since 1992. Some argue that federal officials do not view police killings of unarmed civilians as hate crimes. Still, the official record seems to show no evidence of an escalation in the types of hate crimes that *are* reported to authorities.

Initially, the FBI recorded hate crimes that appeared to have been caused by prejudice based on race, religion, sexual orientation or ethnicity in the following offense types: crimes against persons, murder and non-negligent manslaughter, rape (revised definition and legacy definition), aggravated assault, simple assault, intimidation, crimes against property, robbery, burglary, larceny-theft, motor vehicle theft, arson, destruction/damage/vandalism, crimes against society, and more. Absent from this list are police killings of unarmed offenders. Still, it is instructive to review what we know about these officially reported crimes.

With recent changes in legislation, hate crimes are now defined as any "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity." Some hate crimes, like those based on sexual orientation, increased from 1,016 to 1,393 incidents from 1996 and 2001 and then declined to 1,017 incidents in 2014. Race-based hate crimes declined steadily from 1996 until the present. Race-based hate crimes against blacks declined from 3,674 in 1996 to 2,486 in 2002. There was a slight up-tick in anti-black hate crimes in 2008, the year of Barack Obama's election to his first term, rising to 2,876. But, by 2014, the numbers had fallen again to 1,621.

The incredible litany of publicly exposed incidents of police use of force against African American males in the past two years is both a testament to the power of social media and an exposé of the deficits of state, local and federal government accountability. The brutalization of African American males by law enforcement agents is not a new phenomenon. It was chronicled after the riots of the 1960s in the Kerner Commission Report and remains a historical legacy of the power of law enforcement agencies over the lives and bodies of black men. Whereas W.E.B. DuBois used his brilliant essays published in the NAACP's *The Crisis* magazine to expose the horrors of lynching in early 20th Century America, contemporary movements such as *Black Lives Matter* and their allies have used Twitter, Facebook, Snapchat, FaceTime and related social networking platforms—along with the ever-present video phone—to expose police excesses. The first issue of *The Crisis*

in 1910-11 mentioned lynching several times; the second issue 1910-12 on page 26 included a list of colored men lynched without trial from 1885 to 1910, 2,425 in total.

Although the United States belatedly ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1994, it still has failed to fully implement key elements of the treaty, according to the American Civil Liberties Union (ACLU). This failure is particularly evident in the area of criminal justice, where African Americans, Hispanics, and American Indians are disproportionately stopped and frisked, arrested, incarcerated and sentenced to the death penalty. They are more likely to be denied bail, more likely to be tried as adults when they are juveniles, and less likely to be employed once they are released from prison.

And, apparently—though not officially, as there is no uniform database for this—they are also more likely to be the victims of excessive police force. Just as there were no official lynching statistics in DuBois' day, there are no reliable statistical indicators today on police use of deadly force. Only recently has the US Department of Justice proposed a largely untested methodology for attempting to piece together what is known at the local level of police shootings.

Under Edgar Hoover's leadership, the FBI began to produce an annual report on major crimes and offenses committed in nearly every city and state. This official report, dating back to 1932, highlights information on homicides, rapes, robberies, larcenies and auto thefts and is used by policy makers to gauge trends requiring corrective action.

Not surprisingly, official statistics are silent on the police's use of force against innocent African Americans. This has not prevented pundits and others from contesting whether, in fact, there are in fact racial disparities in the police's use of deadly force. For example, in a widely criticized and unpublished report by a team of students led by Harvard economist Roland Fryer, evidence collected from several police departments did not show racially disparate uses of deadly force. While others have pointed to various methodological flaws in the statistical analysis arising from the one-sided police data, a more compelling objection is that there is no uniform federal data base on police killings of unarmed citizens, despite the fact that for nearly a quarter of a century, there has been a federal mandate to collect such data. That we know so little about police killings of black males is attributable to the lack of accountability on the part of local, state and federal law enforcement agencies.

Few observers, however, believe that anti-black hatred in America has declined simply because *reported* hate crimes declined. It is well known that crimes of all types are seriously underreported. Child maltreatment offenses frequently go unreported by public officials legally mandated to report these offences. (Ards, et al., 1998). What are known as index crimes – robbery, burglary, larceny, auto theft, murder, rape, assault and arson – also go unreported by victims or police (Myers, 1978). Detecting, reporting and prosecuting hate crimes particularly requires the involvement of law enforcement personnel. In a revealing analysis of the association between past lynchings (1882 to 1930) and contemporary law enforcement responses to hate crimes in the United States, King et al. (2009) report that

“past lynching combined with a sizeable black population largely suppresses (1) police compliance with federal hate crime law, (2) police reports of hate crimes that target blacks, and in some analyses (3) the likelihood of prosecuting a hate crime case.” In short, one cannot always believe officially reported hate crime statistics in part because the primary reporters are a part of a long legacy of hateful activities.

This is just another illustration of why it is difficult to get a handle on the magnitude of racist acts in society. The extent to which the looming crisis of continuing and unresolved racial divides in the U.S. remains a matter of perceptions, rather than careful empirical analysis.

CASE STUDY: Dylann S. Roof

One of the most horrific hate crimes in modern US history occurred on June 17, 2015 took place at Emanuel African Methodist Episcopal Church in Charleston, South Carolina, when Dylann S. Roof systematically murdered nine African American bible-study class members. Unemployed and a high-school dropout Dylann confessed to shootings and justified his acts as part of an effort to ignite a national race war. All indicators were that this unemployed young white male was living on the margins of society, frequently using and abusing drugs, and angry at the advantages that African Americans and other non-whites appeared to have gained at his expense and the expense of other whites like him. The narrative of the angry white male would resonate but for the fact that Dylann Roof was mentally ill.

The New York Times reported on “how an awkward adolescent had progressed from reclusive consumer of internet hate to ruthless and remorseless jihadist” stating that unsealed psychiatric reports revealed a young man tormented by mental illness:

The documents provide, for the first time, a multidimensional portrait of a withdrawn but strikingly intelligent misfit whose tastes ran to Dostoyevsky, classical music and NPR but who said his “dream job” would be working at an airport convenience store. He exhibited disturbingly introverted behavior from an early age — playing alone, never starting conversations — but received little treatment for what defense experts later concluded was autism and severe social anxiety, with precursor symptoms of psychosis. (Sack, 2017)

Roof had repeatedly been arrested in prior months for other crimes and normally would have been prohibited from purchasing a lethal weapon. However, apparently, clerical errors resulted in his prior arrests not being registered at the time of his application for a firearm. The Charleston, SC massacre resulted in national outrage about gun availability, mental illness, and auxiliary factors that seemed to explain away or diminish the explanation of heightened white male unemployment that might contribute to violent acts of racism.

CASTE AND CRIMES OF ATROCITIES IN INDIA

In India, according to Dr. Ambedkar, “Untouchables” are the descendants of “Broken Men” (Dalit, in Marathi) who were the original inhabitant tribes that were conquered and forced to live as peripheral groups, relegated to guard the villages of the conquered. There was a

clear non-acceptance of the original inhabitants by the conquered.¹ Article 17 of the Constitution abolished “untouchability” in 1950. It is no longer defined under the Constitution.

Scheduled Castes (SC) and Scheduled Tribes (ST) are the **only two** groups covered under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, **1989**. Passed in furtherance of Article 17 of the Constitution, this Act seeks to

- 1) Prevent the commission of offenses of atrocities against SC/ST
- 2) Provide for Special Courts for the trial of offenses and
- 3) Provide for relief and rehabilitation of victims.

An amendment to the Act in 2015 broadened its scope. Punishment for offenses under the Act varied with the severity of the offense- from monetary fines, to life imprisonment and even death.²

The prevalence of “untouchability” and caste-based atrocities in the present day strike a nerve at the very core of India’s social identity and consciousness. Caste discrimination is a prevailing and entrenched bias that permeates Indian institutions even though it violates the Constitutional mandate.³ Caste discrimination is based on the concepts of inferior and superior birth status. Atrocities in the form of violence against Dalits are manifestations of deep-rooted hatred and intolerance that are often directed towards the annihilation of entire Dalit families. Post POA, harrowing stories of suppression and extreme forms of human rights violations, and stark insensitivity on the part of civil society to such happenings, are among the striking paradoxes of modern India’s social reality. For example, atrocities in the Chundur massacre (1991),⁴ Badanavalu killings (1993)⁵, Kambalapalli carnage (2000)⁶

1 Jaffrelot Christophe, “Dr. Ambedkar's strategies against Untouchability and the caste system,” IIDS, Working Paper Series Vol III, No 04, 2009.

² <http://66.223.50.234/asrec/archive/papers/Sharma%20-%20Hate%20crimes%20in%20india.pdf>.

³ Article 17

⁴ Chundur is a village in Tenali district of Andhra Pradesh, where, following an altercation between a post-graduate Dalit youth and a Reddy boy in a cinema theater, the Reddys organized themselves in large numbers and killed 8 Dalits. In order to get rid of evidence, they packed the bodies in gunny bags and dumped them in Tungabhadra drain and irrigation canal.

For a detailed discussion see, Kaplan Cannabin, “Chundur: On the Road to Justice” EPW, Vol42, No.39(Sep. 29-Oct. 5,2007), pp 3915-3916.

⁵ Badanavalu is a village in Nanjangud Taluk, 25 kilometers from Mysore city, where, due to assertive temple entry by Dalits, the Head Master of a school, his son, an Engineering graduate and a clerk of the school were attacked and killed by a mob of twenty-five “upper caste” Lingayats. For a detailed discussion, see Amrose Pinto, “Badanvalu: Emerging Dalit Paradigm” EPW, Vol 30, No 15 (April 15, 1995) pp. 797-799, and Janaki Nair, “Badanavalu Killings: Signs for the Dalit Movement of Karnataka”, EPW, Vol 28, No 19 (May 8, 1993), pp. 912-913.

⁶ Kambalapalli is a village 40 kilometers north of Chintamani, in Kolar district of Karnataka, where, based on a history of hatred and distrust, the Reddys doused inflammable materials on two houses belonging to the

and Khairlanji incident (2006)⁷. The Nagalapalli carnage, detailed below, is particularly relevant because it speaks not just about the plight of Dalits in Indian villages, but also about the dual discrimination based on gender and caste.⁸

The call for the annihilation of caste by Dr. B.R Ambedkar is countered by the resurgence of caste and discrimination in new communities. In 1932, Dr. Ambedkar, signed the Poona Pact to assuage his fears that the Hindu caste might massacre his people and to avert a genocide of sorts⁹ if M.K Gandhi's health were jeopardized. Forced to withdraw his demands for separate electorates for the “untouchables,” Dr. Ambedkar, fought for establishing equality and equal status, including the need for a strong federal structure, till the end of his life. His assertion that villages were “cesspools”¹⁰ of caste discrimination based on bitter personal experiences stand as a testimony against practices of “untouchability” in Indian villages- a reality then as well as now.

Modern day Indian villages are hubs of caste discrimination. A uniqueness of the Dalits’ situation is their submergence in poverty. They are subject to large scale atrocities¹¹ and sexual exploitation. Dr. Ambedkar's fears of violence are being acted out on a daily basis. Dr. Ambedkar resigned as the Law Minister in 1951, after his Hindu Code bill was rejected by the Nehru government. His Hindu Code bill speaks of his rock-solid conviction that recognition of women's right to equality was a priority in independent India. In this article, we have chosen to comment on atrocities on Dalits by closely examining the case¹² of an

Holeyas (SCs), bolted the door from outside and set fire on fire, charring to death, seven persons between the ages of 25 to 70. For a detailed discussion, see M. Azadi and S. Rajendran “Changing nature of caste conflict,” EPW, Vol. 35, No. 19 (May 6-12, 2000), pp. 1610-1612.

7 Khairlanji is a village in Bandara district of Maharashtra, where, a Mahar (SC) family, headed by an educated woman, whose three children-two sons and a daughter when to school and colleges bought a plot of land in Khairlanji next to “upper castes” lands. They were attacked by 70 “upper caste” men and women, “the boys were ordered to rape their mother and sister; when they refused, their genitals were mutilated and they were lynched. Surekha and Priyanka were gang-raped and beaten to death”. For a detailed discussion, see Arundhati Roy in Annihilation of Caste, B.R. Ambedkar ‘The Doctor and the Saint- an introduction’ Navayana Publishing Pvt. Ltd., New Delhi, 2014, pp 18-20.

8 The plight of Dalit women has been recognized at the United Nations. CEDAW, in its concluding comments, rebuked India and called for special attention at “the ongoing atrocities committed against Dalit women and the culture of impunity for perpetrators of such atrocities.” CEDAW 37th session 2. Feb 2007(CEDAW/C/IND/CO/3)
<http://daccessddsny.un.org/doc/UNDOC/GEN/N07/243/98/PDF/N0724398.pdf?OpenElement> (accessed on 23/04/2014)

9 Omvedt Gail, “A Part that Parted” Outlook, August 20, 2012,

<http://www.outlookindia.com/magazine/story/a-part-that-parted/281929>, last viewed on Oct/ 11/2016.

10 Ibid.

11 Debashis Chakraborty, Babu Shayam, Chakravorthy Manashi, “Atrocities on Dalits- What the district level data can say on Society- State complicity,” EPW, Vol 4, Nov 24, 2006, pp2478-81.

12 Based on the research conducted by Mr. Chandrashekar Aijoor, Vanishree Radhakrishna and Mrs. Manoranjani for CSSEIP, NLSIU, Bangalore and acknowledging the guidance of Prof Japhet Shantappa, Mr. B.T Venkatesh, Advocate and former additional Public Prosecutor, High Court of Karnataka and Sri Venkatesh, civil rights activist, Kolar district.

assertive Dalit woman and her two sons, in Nagalapalli, a village in Kolar district of Karnataka, which serves as a useful illustration.

The acknowledgement by Parliament in 1989, of the prevalence of atrocities and violence based on “untouchability” comes as a significant step towards addressing fundamental issues of abuse and violence against scores of citizens, who are living in unequal circumstances socially, economically and politically.

A Case Study: Crimes of Atrocities in Nagalapalli

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 (POA),¹³ for the first time in Indian legislative history created a new class of offenses,¹⁴ by recognizing various forms of “untouchability” and created a presumption that every offense against a member of Scheduled Caste (SC) or Scheduled Tribe (ST), committed by a person who is not a member of SC and ST, is inevitably and invariably based on caste prejudice.¹⁵ It penalizes willful neglect of duties by public servants,¹⁶ creates a presumption as to group intention to commit offenses¹⁷ and provides for the establishment of Special Courts to try cases under the POA¹⁸.

Demographics and Caste Composition:

Nagalapalli is a village near Kyasamballi, 5 kilometers away from the Bethamangala police station limits of Bangarapet Taluk in Kolar district of Karnataka. The total population of Kolar district is 15, 36,401.¹⁹ Scheduled Castes (SC) constitute 4, 65,867 of the population, out of which 3, 27,424 reside in the rural areas.²⁰ The majority of the population of the village at the time of the incident consisted of the dominant Reddy caste, owning between twenty-five to thirty houses and SCs owned only five houses in the village. SCs and Reddys live as neighbors as there are no separate settlements or SC colonies in Nagalapalli.

13 Objectives of POA as laid down in its preamble ‘A11,602n Act to prevent the commission of offenses of atrocities against the members of Scheduled Castes and the Scheduled Tribes, to provide for Special Courts for the trial of such offenses and for the relief and rehabilitation of the victims of such offenses and for matters connected there with or incidental thereto.

14 See Section 3

15 Section 3 (1)

16 See Section 4

17 See Section 8

18 See Section 14

19 Census 2011, available at <http://censusindia.gov.in/2011-prov-results/indiaatglance.html> (last accessed on 19/04/2014)

20 *ibid*

History and 'origin of discord'²¹

Yashodamma belonged to Adi Karnataka (Scheduled Caste) and owned 3 acres and 17 guntas of land next to Vasanthareddy's property. Vasanthareddy belonged to the dominant Reddy community. There was a dispute for over 15 years between Yashodamma and Vasanthareddy regarding the passage in the land. Yashodamma had the land surveyed and found that Vasanthareddy had encroached on her land. Yashodamma also owned about 3 acres of Inamti land granted by the government. The accused Vasanthareddy and his community members tried to coerce the victim to sell them all her lands. On the victim's persistent refusal to sell, she and her sons were threatened with death. The victims' family lodged several complaints at the police station of abuse and attacks in connection with this dispute.

Six months before the incident, Yashodamma's eldest son D. Kumar was abused and assaulted by Brahmanandareddy, Vasanthareddy and Gangireddy. Two days before the incident, on April 24, 2002, Brahmanandareddy and Puttappa, had abused and assaulted Dinesh. Due to fear of an imminent attack from the Reddys of the village, the victims moved from Nagalapalli - Yashodamma and Dinesh moved to Bethamangala and started to live with D. Kumar. Chandrashekar moved to his wife's village in Lakkur. On the day of the incident, however, Vasanthareddy approached the victims and invited them to Nagalapalli to reconcile and compromise. Jayaramareddy went to Lakkur to invite Chandrashekar to join his mother and brother in reconciling. Yashodamma, Chandrashekar and Dinesh were taken in to confidence, brought to Nagalapalli and led in to a premeditated death trap.

Trial Court Proceedings

Table of Relevant dates

Date of Commission of offense	04/26/2002
Date of report of offense	04/26/2002
FIR	04/26/2002
Date when FIR was handed to the Court	04/27/2002
POA sections added to FIR	05/02/2002
Date of Inquest	04/27/2002
Post Mortem Reports of the deceased.	04/27/2002
Date of submission of Charge sheet	08/26/2002
Charges framed by the Court	06/23/2003
Date of commencement of recording evidence	11/13/2006
Date of closing of recording evidence	01/09/01/2007
Date of Judgment	10/19/2007
Duration of the Case	Years Months Days 05 01 23

²¹ Based on information provided by family members of victims and Court records in State v Seethappa and others, S.C No 260/2002

Charges framed by the Court

Charges framed on 06/23/2003 by Mr. Milind Dange, II Additional Sessions Judge, Kolar district, in S.C 260/2002

- i. Charges framed against the accused under section 143²² read with section 149²³ of the Indian Penal Code (IPC), for forming an *unlawful assembly* with the *common object* of *assault* and commit *murder* of Yashodamma and her sons Chandrashekar and Dinesh, based on their previous grudge for refusing to sell their lands to the Reddys
- ii. Charges framed for the offense of rioting under section 147²⁴ read with 149 of the IPC for the use of *criminal force* against the victims by participating in a *criminal assembly* in pursuance of their *common object*.
- iii. Charges framed under section 148²⁵ read with 149 of IPC for committing the offense of *rioting by holding deadly weapons* as part of an *unlawful assembly* with a *common object*.
- iv. Charges under section 427²⁶ read with 149 of IPC for “committing mischief by pelting stones, brick pieces and clubs on the roof, door and windows of the house” of the victims as part of the *unlawful assembly* and in pursuance of a *common object*.
- v. Seethappa, accused of assaulting Yashodamma with a Machu (hatchet) on her left eye brow and lower lip was charged with murder under section 302²⁷ read with section 149 of the IPC. Gangadharareddy, accused of assaulting Yashodamma on “her right chest” with a Machu (hatchet) was charged under section 302 of the

22 Section 143- **Punishment**- Whoever is an member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine or with both.

23 Section 149. **Every member of unlawful assembly guilty of offense committed in prosecution of common object**- If an offense is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offense, is a member of the same assembly, is guilty of that offense.

24 Section 147-**Punishment for rioting** – Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

25 Section 148- **Rioting, armed with deadly weapon**- Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offense, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

26 Section 427. **Mischief causing damage to the amount of fifty rupees** – Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

27 Section 302. **Punishment for murder**- Whoever commits murder shall be punished with death, or [imprisonment for life], and shall also be liable to fine.

- IPC for murder, and Kodandappa, accused of assaulting Yashodamma with a Machu on her head was charged with murder under section 302.
- vi. Gangireddy, accused of assaulting Chandrashekar with a Machu (hatchet) on his left head was charged with murder under section 302 read with 149 of the IPC; Narayanappa, accused of assaulting Chandrashekar with a machu on his left hand, was charged under section 302 read with section 149 of the IPC; Srinivasareddy, accused of assaulting Chandrashekar with a machu on his right leg was charged with murder under section 302 read with 149 of the IPC; Venkataramareddy, accused of assaulting Chandrashekar with a club on his right shoulder was charged with murder under section 302 read with 149 of the IPC.
 - vii. Chandrareddy was charged under section 302 read with 149 of the IPC for assaulting Dinesh with a matchu on the head; Venkatakrishna was charged under section 302 read with 149 of the IPC for assaulting Dinesh with a sword on the right eye brow; Krishnareddy was charged under section 302 read with 149 of the IPC for assaulting Dinesh with a sword on his neck; Babureddy charged under section 302 read with 149 of the IPC for assaulting Dinesh with a repiece on the right hand and left leg. Vasanthareddy charged under section 302 read with 149 of the IPC for cutting off Dinesh's right hand with a sword.
 - viii. The accused persons were charged under Section 457²⁸ read with 149 of the IPC for the offense of gaining entry into the victims' dwelling house after the hour of sunset and before the hour of sun rise with an intention to cause loss.
 - ix. The following accused persons, were charged under section 3(2)(v) ²⁹of POA read with section 149 of the IPC, Brahmanadareddy, Gangadharareddy, Jayaramareddy, Srinivasareddy, Venkataramareddy, Krishnareddy, Babureddy, Vasanthareddy, Gangireddy, Narayanareddy, Kodandareddy, Narayanamma, Ramakka, Nagamma, Obamma (wife(W/o) of Narayanareddy, Obamma, W/oVenkataramareddy, Venkatamma, Viyayamma, Malleshreddy, Ramachandrareddy Venkatalakshmi, and Chandrakala.
 - x. The following accused persons were charged under section 3(1) (x) of POA read with section 149 of IPC for abusing the victims with threats and vulgar epithets touching the caste-Brahmanadareddy, Gangadharareddy, Jayaramareddy, Srinivasareddy, Venkataramareddy, Krishnareddy, Babureddy, Vasanthareddy, Gangireddy, Narayanareddy, Kodandareddy, Narayanamma, Ramakka, Nagamma, Obamma (wife(W/o) of Narayanareddy, Obamma,

28 Section 457-**Lurking house trespassing or house-breaking by night in order to commit offense punishable with imprisonment-** Whoever commits lurking, house trespassing by night, or house breaking by night, in order to the committing of any offense punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extent to five years, and shall also be liable to fine, and if the offense intended to be committed is theft, the term of the imprisonment may extent to fourteen years.

29 Section 3 (2) (v) commits any offense under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine.

W/o Venkataramareddy, Venkatamma, Viyayamma, Malleshreddy,
Ramachandrareddy Venkatalakshmi, and Chandrakala.

Judgment delivered in S.C No 260/2002 by Mr. K.Shivaram, II Additional District & Sessions Judge, Kolar on 19th October 2007.

Although ruling that the deaths of Yashodamma, Chandrashekar and Dinesh were *homicidal*, based on the inquest mahazars, photographs and postmortem reports of the victims, the judge *acquitted* all the accused persons, on all counts, on the following grounds:

1. The prosecution failed to prove that Ramakka, Nagamma, Obamma and Vekatamma pelted stones, brick pieces and clubs on the house of the victims, causing damage to the roof, door and windows of the house.
2. The prosecution failed to prove that the accused persons abused Yashodamma, Chandrashekar and Dinesh using filthy language, *touching their caste* with an *intention to humiliate* them in *public view*, as there was no eyewitness account substantiating the accusation.
3. The prosecution failed to prove that Narayanareddy, Kodandareddy, Malleshreddy and Ramappa trespassed into the house of the victims with an intention to commit murder. The eye witness account was considered inconsistent. The Court noted an absence of other corroborative evidence in this regard.
4. The prosecution failed to prove that all the accused persons, with a common intention, murdered Yashodamma, Chandrashekar and Dinesh who belonged to Scheduled Caste.

The prosecution failed to prove the circumstances as under:

First, a lack of motive: In the absence of documentary evidence to prove that cases were registered in the police station by the victims against Brahmanandareddy, Puttappa, Kodandappa, Narayanappa, Malur Narayanaswamy, Srinivasareddy, Gangireddy and Krishnareddy and Vasanthareddys, previous enmity regarding the land dispute could not be established. The evidence produced in this regard, of the eyewitness Muniyappa (the elder brother of the victim Yashodamma) was discarded because he was "vague." The evidence of the eyewitness Bharatamma (widow of deceased Chandrashekar) was found contradicting the Prosecution's case and hence rejected. Further, because the Prosecution did not produce correct records from the Tahsildar's office to prove Yashodamma's land ownership further weakened the case.

Second, the prosecution failed to prove that extra-judicial confessions made by Seethappa, Brahmanandareddy, Kodandappa, Jayaramareddy, Venkatakrishna, Gangireddy, Kodandareddy and Ramachandrareddy to their relatives about the murder of Yashodamma, Chandrashekar and Dinesh, on the grounds that all the prosecution witnesses called in to

substantiate this fact, denied knowledge of the murders and were, therefore, declared as hostile.

Finally, the recovery of the following weapons, clothes, vehicles and accessories used in/during the murders were not recognized by all the Panch³⁰ witnesses, who have supposedly signed the Mahazar³¹. Consequently, all the witnesses were declared hostile.

List of objects, whose knowledge was denied by Panch witnesses:

Weapons	Clothes	Vehicles	Accessories
Choppers	Blood stained shirts	Hero Motorcycle	Honda Ladder
Clubs	Shirts	Yamaha Motorcycle	
Swords	Lungis (wrap arounds used by men)	Suzuki Motorcycle	Samurai
	Banians (men's underwear, under shirts)	Tractor	
	Towel		

Other pivotal facts on which the case turned:

Dhanalakshni and her husband's (daughter and son-in-law of victim Yashodamma) witness were discarded as hearsay since they were not present at the site and time of the incident and had only heard of the incident from Yellamma (Yashodamma's elder sister), who was dead at the time of the trial.

D.Kumar's complaint based on what he had heard from his aunt Yellamma about the murder of his mother and brothers was not only considered as hearsay, but as a move to register a case against 54 persons who were "inimical towards him."

Muniyappa and Bharatamma, the only eyewitnesses, were declared hostile since both are close relatives of the victims and their evidence was found contradicting the Prosecution's case. d) Although the incident took place on April 26, 2002 at 9:30 pm, the FIR was presented to the Court only at 4 pm on April 27, 2002. The Court considered this an "unreasonable delay" and a "concoction" on the part of the Police.

Police Inquest of Chandrashekar's body was considered doubtful and unreliable on the grounds that the Panch witness' statement substantiating the report was inconsistent.

The Postmortem report given by Dr. S. Loganayaaki's in Yashodamma's case mentions the fact that she could not remember exactly how many blunt weapons; how many sharp

30 An independent witness to the Mahazar.

31 A written record maintained by the Police in furtherance of criminal investigations, either in search of goods or documents and witnessed by independent and respectable members of the community.

weapons were produced before her for examination; that she did not notice any blood stains on the weapons at the time of her examination, weakened the Prosecution's case.

The Court also relied on the statements made by Dr. D.K.Hallikere who conducted Post mortem on Dinesh's body. He mentioned that the weapons were produced for examination before him on April 1, 2003 and that there were no blood stains on them.

Analysis of the judgment and deductions

Failure on the part of the Prosecution:

1. Failure to identify and gather evidence against the main accused persons in the case.
2. Failed to produce documentary evidence of cases registered against some of the accused persons and thereby losing an opportunity to establish previous enmity between them and the victims (*motive*).
3. Production of erroneous documents from the Tahsildar's office in the name of Yashodamma, wife of Gangulareddy (not the victim).
4. Failure to produce the hair of victims collected from Mallesh Reddy and Gangadharareddy which were sent for forensic examination as per the evidence of Dr. C. Dhanashekar (p. 482)
5. Failure to show to the Court that despite being hearsay evidence, D.Kumar's statement and police report about the murders can be accepted as valid evidence, under the principle of Res Gestae in Evidence Law, as laid down in Bishwadeb Mahanto & others v. State of W. Bengal AIR SC 302 at P 309 para. 27.

Failure of judicial process

- a) Non- application of POA: Although charges were framed under section 3(2) (v) of POA by Judge Milind Dange in the first instance, Judge K.Shivaram, completely ignored this important legal provision in his deliberations.
- b) The Court declared eyewitness Muniyappa's evidence to be "vague" without giving any reasons for the same; similarly, eyewitness Bharatamma's evidence was turned down as "not inspiring confidence" without giving any further clarification.
- c) The Court did not comment on the evidentiary value of "voluntary statements" made by some of the accused persons, on the basis of which, weapons, clothes, vehicles and accessories were recovered.
- d) Placing reliance on the statement that there were no blood stains found on the weapons, when the gap between the commission of the offense and the examination of the weapons by the doctors is eleven months and nine days? (April 26, 2002 to April 1, 2003)
- e) When rejecting the evidence of D.Kumar, the judge draws a conclusion that 54 persons against whom the complaint was made, were inimical to D.Kumar. No

reasons are given to substantiate this claim. Further, what is the Court acknowledging in saying “even though there was an involvement of only about 6 to 8 accused, cases were registered against 54 persons?”

Frederick Douglas, had this to say on the eve of America's Independence Day:

*“this Fourth of July is yours, not mine. You may rejoice, I must mourn. To drag a man in fetters to the ground illuminated temple of liberty, and call upon him to joining you in joyous anthems, were inhuman mockery and sacrilegious irony.... I say it with a sad sense of disparity between us. I am not included within the pale of this glorious anniversary.... the blessing in which you, this day rejoice, are not enjoyed in common. The rich inheritance of justice, liberty and prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought light and healing to you, has brought stripes and death to me.”*³²

The caste carnage that took place in Nagalapalli, perpetrated by the dominant Reddy community that succeeded in taking the lives of all three members of a family, predominantly because it was headed by an assertive Dalit woman, who owned lands and who sought to reclaim what was rightfully hers. The patriarchal hegemony and the inferior status of “untouchables” in the Reddy dominated village of Nagalapalli, sought to disentitle her and force her into compliance. The price she paid for standing up for her rights was her life and the life of her two sons.’

These heinous anecdotes of recent history in Indian villages raise questions about the continued perpetration of violent crimes against Dalit population despite the legislative attention and the existence of provisions for strict legal enforcement. Specifically, it is worth examining the political and socio-economic structures in rural settings that give rise to incidences of conflict and violence, such as property rights in Nagalapalli. Another lesson from Nagalapalli is the need to estimate the impact of gender on economic discrimination and violent crime.

Affirmative Action in the United States vs India

In comparing the effects of race or caste-conscious policies in India vs the United States, it is helpful to identify three significant distinctions. The first is that in the USA, race-conscious programs in the form of affirmative action, set-asides, preferential treatment, or targeted college and university admissions are considered to be constitutionally suspect. By way of contrast, in India caste-preferences or reservations for scheduled castes and scheduled tribes are embedded in the Indian Constitution.

A second significant distinction is that in the United States many race-conscious programs operate in environments where the targeted groups are in a numerical minority. One of the first constitutional challenges to a race-conscious program of preferential university

32 Quoted by Justice Ramaswamy in State of Karnataka vs Appa Balu Ingale and Others, AIR 1993 SC 1126.

admissions occurred in California where at the time African Americans accounted for less than five percent of the population. By way of contrast, scheduled castes and scheduled tribes and other backward castes in India often account for the majority of those in a given state where the reservations are put into place.

A third significant distinction, is that affirmative action in India is largely limited to the public sector. By way of contrast, in the United States, affirmative action has made its way into both public and private institutions. Indeed, much of the support for affirmative action in the United States comes from private corporations that embrace a “business case for diversity” in providing a rationale for race-conscious programs.

Affirmative Action in the United States

Affirmative Action was first introduced by President John F. Kennedy in 1961 through Executive Order 10925³³ to ensure equal opportunity in government employment for all citizens irrespective of “race, creed, color or national origin.” It was Title VII of the Civil Rights Act, 1964 (the Act) that was more directly concerned with ending segregation in public employment by providing equal opportunity in employment along with Executive Order 11246 of 1965.³⁴ Although affirmative action policy has been found to be every effective in the overall representation of blacks and minorities in employment markets,³⁵ the underlying concepts justifying the policy have come under severe legal scrutiny and, as a result, it has lost the initial thrust³⁶ with which the Civil Rights Act was enacted. For an analysis of the effectiveness of affirmative action policies, it becomes imperative to understand the overarching concepts of equality and anti-discrimination.

The Constitution of United States abolished slavery (Amendment 13) and provides for equal protection of laws to all its citizens (amendment 14) and provides for Congress to make legislations in furtherance of the objective of the 14th amendment. Thus, not only is affirmative action justified under the Constitution, it is envisioned as a means to achieve equality. The judiciary has been responsible for interpreting principles and setting guidelines to achieve this objective. The concept of anti-discrimination has been dealt with in intriguing ways by the Supreme Court. Title VII of the Civil Rights Act of 1964 seeks to

³³ (<http://www.eeoc.gov/eeoc/history/35th/thelaw/eo-10925.html>)

WHEREAS it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and

WHEREAS it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government; and

³⁴ Requires that affirmative action plans in written form be submitted to the government by employers with more than 50 employees, having obtained federal contracts worth more than \$50,000
<http://fpc.state.gov/documents/organization/53577.pdf>

³⁵ Leonard, *The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON.439 (1984).

³⁶ President John F. Kennedy’s speech introducing the Civil Rights Act
<http://www.youtube.com/watch?v=sOGDSgyeHPM> (last viewed on 05/12/2014).

address intentional discrimination in employment practices;³⁷ it was the Supreme Court in *Griggs v. Duke Power*³⁸ historically, laying down that Title VII remedies can be availed of even where there was no intentional discrimination, but where there was “disparate impact” on entire groups of blacks and minorities—a move, that is said to have created a “more egalitarian workplace” compared to what it was in the pre-*Griggs* era.³⁹ However, the judicial U-turn and the shifting burden of proof in Title VII cases have been a crucial determinant of outcomes affecting the cause of civil rights. This part examines some of the landmark judgments of the Supreme Court which have ultimately diluted and “dismantled” *Griggs*.

The Narrow Tailoring Principle; “remediating past discrimination” and balancing the fundamental rights of non-beneficiaries:

The impetus that equality/non-discrimination jurisprudence has had on Affirmative Action litigation is a significant factor in understanding the effectiveness of implementation of affirmative action policies. Affirmative action beneficiaries are viewed as ‘suspect classes’ that directly or indirectly infringe on the right to equality of non-members of the class. Courts have applied various levels of scrutiny justified under the equality clause. ***Narrow tailoring*** and ***compelling government interest*** are the conceptual bases on which ***strict scrutiny*** analysis is done in a court of law.⁴⁰ This part focuses on the principle of *narrow tailoring* and examines how the courts determine necessary criteria in assessing whether a policy fulfills the goals it set out to achieve and what the courts perceive as minimum damage to non-beneficiaries. Although there is ambiguity and no exact definition of the principle, Courts have engaged in “identifying certain features.” A landmark decision where the Supreme Court considered affirmative action was *Regents of California v. Bakke*⁴¹ where, University of California’s Davis Medical School’s policy was in question for reserving 16 out of 100 seats for minority students. Justice Powell, being the controlling member and speaking for the majority, found that the policy was unconstitutional, as it did not meet the requirements of strict scrutiny. He found neither “***past injustice being remedied***” nor ***the cause of diversity*** being served. By enjoining the usage of ***rigid quotas*** that made race the single determinant factor for some candidates to get admitted, he approved the policy of Harvard College which, while not following a numerical quota system, allowed race as a mere “plus” among the other relevant points used as determinants to help achieve diversity. An analysis of the constitutionality of three other significant cases with respect to affirmative action decided while justice Powell was the controlling member⁴² are instructive in understanding the shifting judicial reasoning. *Fullilove v.*

³⁷ Section 703.

³⁸ 401 U.S. 424 (1971).

³⁹ Robert Belton, *The Dismantling of the Griggs disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 Yale Law & Policy Review, No 2, 223-256, 225 (1990).

⁴⁰ *Narrow Tailoring and Diversity Policy*, Military Leadership Diversity Commission (MLDC), Issue Paper # 37, Legal Implications, Version 2, May 2010. file:///C:/Users/Owner/Downloads/nps56-071212-20%20(1).pdf (last viewed on 6/11/2014).

⁴¹ 438 U.S. 265.

⁴² Luiz Antonio Salazar Arroyo, *Tailoring the Narrow Tailoring Requirement in the Supreme Court’s Affirmative Action Cases*, <http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1085&context=clevstlrev/> (last accessed on 6/11/2014).

*Klutznick*⁴³ was a case where the constitutionality of Public Works Employment Act of 1977, a Congressional legislation stipulating state and local governments to guarantee a set-aside of 10% of the granted amount to be spent on contracts with minority business enterprises (MBEs) was upheld. Under this scheme, higher bids from MBE were permitted as long as they could be established that higher bids *were due to past discrimination*. The Economic Development Authority was vested with the powers to waive the requirement for MBE participation where higher bids were found not to be due to past discrimination.⁴⁴ Thus in *Fullilove*, affirmative action by means of fulfilling the objectives of a federal legislation which reflected “*broad remedial powers*” of the Congress along with a *waiver provision* was seen as easily passing the constitutionality test. In *Wygant v. Jackson Board of Education*,⁴⁵ as a result of a “collective-bargaining agreement” between the school board and teachers union, Jackson Board of Education agreed that when it came to layoffs, “those with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.” As a result, less senior minority teachers were retained and non-minority teachers were laid off for certain years. The Supreme Court struck down the preference. Justice Powell, differentiating between providing a preference in hiring and layoffs, stated: “denial of a future employment opportunity is not as intrusive as loss of an existing job” and that because affirmative action in hiring creates a “diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives.”⁴⁶ In *Paradise*⁴⁷ the Supreme Court upheld a state affirmative action policy by finding that the Alabama Department of Public Safety had a well-known history of discrimination against blacks and therefore hiring “one black trooper for each white trooper” was constitutionally valid. In Justice Powell’s words, “in determining whether an affirmative action remedy is narrowly drawn to achieve its goal, I have thought that five factors may be relevant: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (4) the availability of waiver provisions if the hiring plan could not be met; and (5) the effect of the remedy upon innocent third parties.”⁴⁸ Thus Justice Powell advocated a “contextualizing” framework and not a rigid formalist approach. This approach to affirmative action however, was to change when Justice O’Conner became the controlling judge.⁴⁹ The first significant affirmative action case decided after Justice O’Conner became the controlling judge was *City of Richmond v. J. A. Croson & Co.*,⁵⁰ where the city of Richmond sought to adopt a Minority business Utilization plan (MBE) requiring prime contractors awarded with city construction to subcontract at least 30% of the dollar amount of each contract to MBEs.

⁴³ 448 U.S. 448 (1980).

⁴⁴ *Fullilove v. Klutznick : Do Affirmative Action plans require Congressional Authorization*, 38 Wash. & Lee L. Rev. 1315 (1981) <http://scholarlycommons.law.wlu.edu/wlulr/vol38/iss4/14>

⁴⁵ 476 U.S. 267 (1986).

⁴⁶ *Id.* 283.

⁴⁷ 480, U.S. 149 (1987).

⁴⁸ *Id.* 187.

⁴⁹ Luiz Antonio Salazar Arroyo, *supra* note 18, 659.

⁵⁰ 488 U.S. 469 (1989).

MBEs were characterized as 51% of businesses controlled by African American, Hispanic, American Indian, Eskimo, and Aleut citizens. The evidence produced to substantiate the plan included statistics showing that 50% of the city's population was black but only 0.67% of the prime construction contracts were awarded to minority businesses. A waiver was available on proof that either sufficient qualified MBEs were unavailable or unwilling to participate. J. A. Croson & Co., the sole bidder on the city contract was denied a waiver. The company challenged the constitutionality of the plan. Holding the plan as unconstitutional, the Supreme Court held that strict scrutiny in affirmative action cases required a narrow tailoring approach. Although what constituted narrow tailoring was not agreed upon by the Judges. Justice O'Connor found the program overly inclusive as it included minorities other than blacks, against whom past discrimination could not be established; hence, there was no *compelling government interest*. Justice O'Connor further commented that *race-neutral* means were not adopted in city contracting and spoke against the "*rigid numerical quota*," also, that using quotas due to mere administrative convenience was proscribed, when "bids and waivers were already determined on a case by case basis, allowing the affirmative action decisions to be made on an individual basis." Although on the face of it, Justice O'Connor seemed to be in line with Justice Powell's opinions in *Paradise*, she was in fact setting stricter and narrower interpretations through her observations.⁵¹ Justice O'Connor's observations have had a lasting effect on the Supreme Court's affirmative action jurisprudence. In *Metro Broadcasting Inc v. FCC*⁵², Justice Brennan opined that in reviewing federal affirmative action programs, courts ought to apply the "intermediate scrutiny standard." However, the dissenting judges, Justices O'Connor, Scalia, Kennedy, and Rehnquist pushed for a "strict scrutiny rather than an intermediate scrutiny." In *Adarand Constructions, Inc. v. Pena*,⁵³ it was held that "all racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny." "federal racial classifications [including all forms of affirmative action], like those of a State, must serve a compelling government interest, and must be narrowly tailored to further that interest."⁵⁴ Subsequently, Justice O'Connor sought to "dispel the notion that strict scrutiny is strict in theory and fatal in fact." By making such an observation, Justice O'Connor attempted to assuage the strict requirements in *Croson*.⁵⁵ It was fourteen years after *Croson* was decided, that the *Narrow Tailoring Principle* was given a conclusiveness in the twin cases of *Grutter v. Bollinger*⁵⁶ and *Gratz v. Bollinger*.⁵⁷ *Grutter* was a case where the University of Michigan Law School sought to increase its diversity by admitting African- American, Hispanic, and Native American students in order to create a "critical mass," using race as a "predominant" factor. Petitioner *Grutter*, a white student with a GPA of 3.8 and an LSAT score of 161, was denied admission. She alleged violation of the 14th Amendment on the ground that the university had no compelling interest in using race as a predominant factor in admissions. The district court found for the petitioner and ruled that the university's actions were illegal. On appeal,

⁵¹ Arroyo, supra note 18, 661.

⁵² 497 U.S. 547 (1990).

⁵³ *Adarand Constructions, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

⁵⁴ *Id.* 235.

⁵⁵ Arroyo, supra note 18, 662-63.

⁵⁶ 539 U.S. 506 (2003).

⁵⁷ 539 U.S. 244 (2003).

the 6th Circuit Court reversed the decision following the precedent in *Bakke*,⁵⁸ where Justice Powell had held that “establishing diversity was a compelling state interest and that the Law school had narrowly tailored race as merely a “potential plus factor.” Further, “the Law School’s goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota” (335-336). The program, according to the court, should be *flexible* in assessing individual candidates and not base its decision on race and diversity alone (337). Thus, an “*individualized and holistic view*” was propagated. In *Gratz v. Bollinger*, the University of Michigan’s undergraduate admissions allowed for a 20 points addition to minority applicants, which automatically ensured that all minority applicants were admitted. The Supreme Court applied its logic in *Grutter* and held that the University’s admission policy “[did] not provide for a meaningful individualized review of applicants but instead relied on racial classifications in a non-individualized mechanized way.” The court viewed the automatic point system as a quota, which could not be constitutionally validated, although it was argued that individual applications were assessed on their own merit.

Judicial interpretations of establishing narrow tailoring in affirmative action cases have become narrower over time with the *contextualizing* ability of the courts becoming diluted. *Racially-neutral* policies that are *racially motivated* seek to achieve *diversity* in an unequal society where racial discrimination in the work place is not such an uncommon occurrence. In the absence of guidelines as to how racially motivated principles would translate into racially-neutral policies from the Supreme Court’s ruling in *Grutter* and *Gratz*, where, numerical specification for affirmative action is defined in one (held unconstitutional) and left undefined in another (constitutionally valid) opens up a dimension which Ian Ayres and Sydney Foster⁵⁹ call “Don’t tell, don’t ask” where the Supreme Court openly embraces vague motivation-based affirmative action and the government does not volunteer any numerical goals. The problem seems to be with a specificity of numerical goals.⁶⁰ How can compelling government interest be met with by vague racially motivated goals? Can a balance between the fundamental rights of non-beneficiaries and beneficiaries of affirmative action be achieved in the absence of quantifiables?

Reservations in Public Employment in India

To appreciate the philosophical basis of reservations in India, one needs to traverse into the historic and social institution of the caste system that has left an immutable scar on the Indian psyche. The caste system in India is thousands of years old and is based on hierarchical social compartments claiming their origins from Hindu religion. Ancient Hindu society was characterized on *Varna and Jati*,⁶¹ a caste system initially based on four exclusive *varnas*—*Brahmin* (the priestly and learned class); *Kshatriyas* (the warriors and royalty); *Vaisyas* (the merchants and business class); and *Sudras* (those engaged in menial

⁵⁸ 438 U.S. 65.

⁵⁹ Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring after Grutter and Gratz*.

⁶⁰ It has been demonstrated that the outcome from quantification of affirmative action is in fact less intrusive on non-beneficiaries than non-quantification and is in keeping with the *compelling government interest*. See Ian Ayres, *Narrow Tailoring*, 43 UCLA Law Review, 1781 (1996).

⁶¹ For a more detailed discussion of *Jati*, see Ashwini Deshpande, *Recasting Economic Inequality*, Review of Social Economy, Vol. LVIII, No. 3, Sep 2000, 383-384.

jobs). A later social degeneration resulted in the emergence of a fifth class, the Ati-sudras or the “untouchables.” This stratification was “hereditary, endogamous and occupation specific.”⁶² The Ati-sudras were further placed in a hierarchy of “untouchables,” “unseeables,” and “unapproachables,” where, touching, seeing and even the falling of their shadows on the upper castes was considered polluting. As a fallout of such severe social diktat, the Ati-sudras had to live in separate hamlets and settlements, away from the mainstream society, and were denied access to public amenities such as roads, public water tanks and to worship in Hindu temples. Access to education was unthinkable. Women had no control over their bodies—the “upper castes men had undisputed rights over the bodies of “untouchable” women.”⁶³ They were condemned to wear certain types of clothing and jewelry. Such practices had their regional deviations; the Mahars, for example—a community from which Dr. Ambedkar⁶⁴ hails, had to tie brooms around their waists to erase their foot prints as they walked the streets because their foot prints were considered polluting.⁶⁵ This scheme of entrenched institutionalized discrimination has continued for generations, and presently persists with modern variations. The Constitution has abolished⁶⁶ “untouchability” and the Parliament and State legislatures have passed several legislations designing and seeking to implement affirmative action for “untouchables” officially known as Scheduled Castes (SCs)⁶⁷ and Adivasis or Scheduled Tribes (STs).⁶⁸ Addressing the evil effects of the caste system by recognizing its debilitating effects of stigma, its social, economic, and political backwardness, and by providing access to opportunities in education, employment, and the legislature has been a part of modern India’s vision of social justice. Affirmative action in India is a strongly contested topic, especially after the implementation of the Mandal Commission report,⁶⁹ with divergent views sustaining the debate as to whether it is a “self-effacing or self-perpetuating” policy. Affirmative action in

⁶² Ibid., 383.

⁶³ *The doctor and the Saint—an introduction* by Arundhati Roy in *Annihilation of Caste*, B.R. Ambedkar, Navayana Publishing Pvt. Ltd., New Delhi.

⁶⁴ The chief architect of the Indian Constitution and the first Law Minister of India.

⁶⁵ Ibid., 24.

⁶⁶ Article 17.

⁶⁷ Article 341 Scheduled Castes—(1) The President may with respect to any state or Union territory, and where it is a State, after consultation with the Governor thereof by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State, or Union territory as the case may be. (2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race, or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

⁶⁸ Article 342—Scheduled Tribes—(1) The President may with respect to any State or Union territory and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

⁶⁹ The report identified Other Backward Communities (OBCs), but the brunt of vehement opposition was borne by SC and STs, in such strong terms that there were student protests all over the country and self immolations.

See http://en.wikipedia.org/wiki/Mandal_Commission_protests_of_1990, http://www.telegraphindia.com/1040225/asp/frontpage/story_2934985.asp for protests and media coverage (web pages viewed on 4/13/2014).

public employment, unlike in the United States, is expressly enshrined in the Constitution⁷⁰ and takes the specific form of reservations. Constitutional provisions for the SCs and STs and other, weaker sections of society was strongly advocated and incorporated, at the behest of Dr. B. R. Ambedkar, the chief architect of the Indian Constitution.⁷¹ His perception of justice under the Constitution, especially for the SCs, is reflected in Part III—the fundamental rights chapter of the Constitution.⁷² The clarion call for a just social order runs through the entire length of the Constitution, and has often been clouded with ambiguous interpretations by the Supreme Court. As a result, Parliament has resorted to amendments to the Constitution to undo extra-Constitutional deviations and reestablish the significance of the objectives of India’s “foremost social document.” Some of the strongest justifications for reservations are made on the following grounds⁷³—first, *that there is evidence of stigma attached to belonging to the “untouchable” caste*; second, *to help certain historically discriminated castes to tide over disadvantageous conditions and provide a ‘level playing field*; and third, *discrimination in labor markets goes beyond factors such as past discrimination, low levels of educational and technical skills*; and finally, *the need to compensate for “historic wrongs” that have institutionalized discriminatory practices*.

Criteria for identifying subjects of reservations:

Identifying Scheduled Castes for reservations is based on the fact that, traditionally, Hinduism kept them in the lowest social order, whereas Scheduled Tribes were identified because of their inaccessibility to the modern world.⁷⁴ Caste has been significantly used to determine reservations for SCs and Other Backward Classes (OBCs) as well. Scheduled Castes have been identified based on *“the test of extreme social, educational and economic backwardness of castes arising out of traditional practices of “untouchability.”*⁷⁵ The criteria⁷⁶ for identifying Scheduled Tribes is based on *(a) existence of primitive traits; (b) distinctive culture; (c) geographical isolation; (d) shyness of contact with the community at large; and (e) backwardness*. The subsequent addition of OBCs has considerably broadened the beneficiary circle. The Mandal Commission⁷⁷ was constituted under Article 340 of the Constitution to identify OBCs. The Commission culled out 11 criteria based on

⁷⁰ Ashwini Deshpande. *The Grammar of caste: Economic discrimination in contemporary India*, Oxford University Press, 2011.

⁷¹ D. L. Seth, *Reservations Policy Revisited*, EPW, No. 22, Vol. 46 (Nov 14, 1987), 1957-1962, &1959.

⁷² “I came into the Constituent Assembly with no greater aspiration than to safeguard the interests of the Scheduled Castes” quoted by Raj Kumar in *Ambedkar and the Constitution*, Common Wealth, New Delhi, 2011, 25, & 447-452.

⁷³ Ashwini Deshpande. *The Grammar of caste: Economic discrimination in contemporary India*, Oxford University Press, 2011, 216-217.

⁷⁴ E.W Osborne, E “Culture, Development and Government” *Economic Development and Cultural Change*, vol. 49, No. 3, 659- 85.

⁷⁵ Lokur Committee 1965 cited in *The Constitutional (Scheduled Castes) Orders (Amendment) Bill 2012*, 28th Report.

⁷⁶ The Ministry of Tribal Affairs, 2005-2006, Annual Report.

⁷⁷ Report submitted on December 31, 1980 and implemented between 1990 and 2006.

social, educational, and economic backwardness for identifying the groups.⁷⁸ The new beneficiaries included 1,257 groups. The percentage of **reservations for SCs and STs in all services under the Central government is 22.5%**, which is proportionate to their population. The OBCs on the other hand, constituted 52% of the population. The Commission reduced **OBC reservations to 27%** in order not to exceed the maximum limit prescribed by the Supreme Court⁷⁹ with a rider that a “creamy layer”⁸⁰ among the OBCs should be kept out of the scheme of reservations.

Constitutional Framework for reservations in Public Employment:

(a) Preamble and Fundamental Rights:

The Constitution of India, in its preamble,⁸¹ sets the tone for social, economic, and political justice through equality of status and opportunity. Substantive provisions of reservations for SCs and STs and OBCs are made part of the fundamental rights chapter and are thus enforceable in a court of law. Article 14 provides for equality before the law and the equal protection of the laws—the principle of **like cases to be treated alike and different cases differently** being the guiding principle for making special provisions for affirmative action. “Compensatory preference” becomes a channel through which “**real equality**” is sought to be actualized by providing a **level playing field**. While Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth and allows for special provisions for the advancement of any socially and educationally backward classes of citizens or SCs

⁷⁸ **Social:** (1) castes/classes considered as socially backward by others; (2) caste/classes which mainly depended on manual labour for their livelihood; (3) caste/classes where at least 25% of females and 10% of males above the State average get married at an age below 17 years in rural areas and at least 10% of females and 5% of males do so in urban areas; (4) caste/classes where participation of females in work is at least 25% above the state average. **Educational:** (5) castes/classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the state average; (6) caste/classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the state average; (7) caste/classes amongst whom the proportion of matriculates is at least 25% below the state average. **Economic:** (8) caste/classes where the average value of family assets is at least 25% below the state average; (9) caste/classes where the number of families living in kuccha houses is at least 25% above the state average; (10) caste/classes where the source of drinking water is beyond half a kilometer away for more than 50% of the households; (11) castes/classes where the number of households saving taken consumption loans is at least 25% above the state average.

⁷⁹ As laid down in *Balaji v. State of Mysore*, AIR 1963 SC 649 followed in *Devadasan v Union of India*, AIR 1964 SC 179 and *Indra Sawhney v. Union of India* 1992 Supp. (3) SCC 217. The State of Tamil Nadu is an exception with provision for 69% reservation, protected under the 9th Schedule of the Constitution.

⁸⁰ For a detailed discussion on the ‘creamy layer’ and OBC, see Paramanad Singh, “The ideal of Equality and Reservation Policy: A Critical Review in Swati Deva (ed.) Law and (in) equalities—contemporary perspectives, EBC, 1edn, Lucknow, 2010.

⁸¹ We, the people of India, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief , faith and worship; EQUALITY of status and of opportunity; and to promote among all FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation];

and STs⁸² and Article 16⁸³ most directly provides for equality of opportunity in public employment.

(b) *Directive Principles of State Policy:*

Article 37 emphatically states that despite being non-enforceable, ***Directive Principles are nevertheless fundamental in the governance of the country.*** Article 38⁸⁴ mandates *the State to secure a social order for the promotion of welfare of the people.* Article 46 provides for the promotion of educational and economic interests of the weaker sections, particularly of the Scheduled Castes and Scheduled Tribes and seeks to protect them from social injustice and all forms of exploitation.

Overcoming judicial hurdles, the Parliamentary way:

(i) *Equality: Construction of Article 15 (4)⁸⁵ and 16 (4)⁸⁶*

Are Articles 15 (4) and 16 (4) inconsistent with equality guaranteed to all citizens of the country? Can the provision mandating affirmative action be considered as exceptions to the

⁸² Article 15 (4)—Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

⁸³ Art 16—Equality of opportunity in matters of public employment—(1) there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employments or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that States or Union territory] prior to such employment or appointment. (4) Nothing in this article shall prevent the State from making any provisions for the reservations of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. [(4A) Nothing in this article shall prevent the State from making any provision for reservation [in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State are not adequately represented in the services under the State] [(4B) nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or under (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation of total number of vacancies of that year] (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

⁸⁴ Article 38—State to secure a social order for the promotion of welfare of the people: (1) the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, the social, the economic and the political, shall inform all the institutions of the national life. (2) The State shall, in particular strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only among individuals but also among groups of people residing in different areas or engaging in different vocations.

⁸⁵ Id note 22.

⁸⁶ Id note 23.

rule of equality—or does the Constitutional philosophy permit the establishment of real equality through equal concern⁸⁷ for distributive justice by providing a level playing field? In *M. R. Balaji v. the State of Mysore*,⁸⁸ the Supreme Court, speaking through Justice Gajendragadkar, held that Article 15 (4) and 16 (4) were enabling provisions that do not impose obligations on the State and were hence discretionary in nature (para. 37). Following the precedent in *Balaji*, in *Devadasan v. Union of India*,⁸⁹ a government policy applicable to all services under the control of the Government of India, prescribed minimum qualifications for reservations for candidates from reserved communities and since a sufficient number of candidates from SC and STs were not available, it sought to introduce the rule of carry forward of vacancies for that particular year. Despite the carrying forward of vacancies for a year, the number of SC and ST candidates were not “adequately represented in the services.” Hence the government modified its instructions to include 17.5% of reservations in total vacancies for SC/ST candidates and allowed the unfilled vacancies to be carried forward to two consecutive years. As a result, the total percentage of reserved vacancies went up to 64%. The issue before the court was whether the carry forward rule was unconstitutional on the ground that it violated Articles 14 and 16(1) of the Constitution. The court held that under Article 14, reasonable classification was permissible (para. 11), and the State was justified to the extent of “providing the members of the backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments to public service;” however, the “excessive” reservation sought amounted to a “perpetual carry forward” and was violative of the **upper limit of 50%** set by *Balaji* (para. 18). The Court’s contention that the State’s responsibility ended with a blind provision of “equal opportunity” on par with the upper castes without allowing for appropriate measures was shortsighted, as there can be no parity among unequals. Suffering predominantly from social and economic disabilities and stigma, SCs and STs are severely handicapped and require special attention as a class. Justice Subba Roa, in his dissent, on the other hand, decided on the constitutionality of the rule without commenting on the policy underlying the rule. Stating that “centuries of calculated oppression and habitual submission [had] reduced a considerable section of our community to a life of serfdom” (para. 23). The expression “nothing in this article” in 16 (4) is “most emphatic expression of legislative intention and that it has not “carved out an exception, but has preserved a power untrammelled by the other provisions of the Article.” Thus, relying on three “bold expressions” (1), “any provision for the reservation of appointment” (2) “in favour of any backward classes of citizens” (3) “in the opinion of the State is not adequately represented in the services under the State” (para. 24), he held that the carry forward rule for the reservation of appointments for SC/STs was constitutionally valid. Unfilled reserved vacancies speak volumes on the sociological and educational limitations of their beneficiaries. Reserved vacancies carried forward and filled in subsequent years is a reflection of gradual scaling through social and educational thrust—a reflection of what ought to have been achieved in the past, fructifying in the present. In the poignant words of Justice Krishna Iyer, in *Akhil Bharatiya Soshit Karamchhari Sangh*⁹⁰ (para. 21):

⁸⁷ Mahendra P. Singh, “Are Articles 15 (4) and 16 (4) Fundamental rights? (1993) 3SCC (J) 32-41 at 35.

⁸⁸ AIR 1963 SC 649.

⁸⁹ AIR 1964 SC 179.

⁹⁰ AIR 1981 SC 298.

Art 16 (4) is not a jarring note but auxiliary to fair fulfillment of Article 16 (1). The prescription of Art. 16 (1) needs, in the living conditions of India, the concrete sanction of Art 16 (4) so that those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history has not so harshly hamstrung. To bury this truth is to sloganise Art 16 (1) and sacrifice the facts of life.

(ii) *Rulings of the Supreme Court and consequential amendments to Article 16 and 335 of the Constitution to undo anomalies in the areas of **promotions**, the **carry forward rule**, and the **relaxing of qualifying marks and standards of evaluation**.*

In *Union of India v. Virpal Singh Chauhan*⁹¹ & *Ajit Singh Januja v. State of Punjab*,⁹² the Supreme Court set aside consequential seniority that was hitherto availed by government employees belonging to the SC and ST categories, which affected their promotion to the next higher grade. The Parliament found that this state of affairs had an adverse effect on SC and ST employees, and sought to rectify it by means of adding clause (4A) to Article 16.⁹³ The article, after the addition, reads:

Nothing in this article shall prevent the State from making any provision for reservations [in matters of promotion with consequential seniority, to any class]⁹⁴ or classes of posts in the services under the State in favor of the Scheduled Castes and Scheduled Tribes, which in the opinion of the State, are not adequately represented in the Services under the State.

A second hurdle in the area of affirmative action in public service was created by *Indra Sawhney v. Union of India*,⁹⁵ where it was held that vacancies reserved for SCs and STs to be filled on the basis of reservations should in no case exceed the limit of 50%. Prior to 8/29/1997, such vacancies which could not be filled by direct recruitment due to non-availability of SC and ST candidates were considered as “backlog vacancies” and as a distinct group that was excluded from the ceiling of 50% reservations. The Supreme Court’s blanket upper limit of 50% created difficulties in filling the “backlog vacancies” and in holding special recruitment drives. This anomaly was sought to be rectified by amending Article 16 with the insertion of clause (4B).⁹⁶ The clause reads,

Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provisions for reservation made under clause (4) or

⁹¹ (1995) 6SCC 648.

⁹² (1996) 2 SCC 715.

⁹³ The Constitution (Eighty-Fifth Amendment) Act, 2001.

⁹⁴ Subs by the constitution (Eighty-fifth Amendment) Act, 2001.

⁹⁵ 1992 Supp. (3) SCC 217.

⁹⁶ The Constitution (Eighty-First Amendment) Act, 2000.

clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

A stricture to this effect is necessary for the State to ensure that all steps are taken to advertise and disseminate information about the vacancies. Mandating that unfilled vacancies be treated as a separate class to which the 50% ceiling is not applied is a progressive move on the part of Parliament to ensure that “sufficient representation” in public service is available for SC/STs. A third hurdle came in the form of interpretation of Article 335 of the Constitution. In *Vinod Kumar v. Union of India*,⁹⁷ the Supreme Court held that relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion was not permissible under Article 16 (4) in view of the mandate in Article 335, which reads: *the claims of the members of the Scheduled Castes and Scheduled tribes shall be taken in to consideration consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State*. The Court’s ruling was found to adversely affect the interests of the SC and ST employees whose unique social background and disabilities demanded considerations and standards that were dissimilar to those applicable to the general classes who did not suffer such disabilities. Keeping this in consideration, the Parliament amended Article 335 by means of adding a proviso,⁹⁸ which reads:

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

This provision reaffirms the idea that general standards of *efficiency* and *merit* cannot be adopted to whittle down the overall objectives of reservations and social justice. Justice Chinnappa Reddy’s⁹⁹ advocacy for an overall assessment of SC and ST candidates in the light of the social, economic and cultural milieu in which they find themselves and the impediments they overcome, is instructive in an understanding of the true meaning of *merit*.

It is established law that reservations are not an *exception* to the equality provision in the Constitution, and that they are in fact a means to achieve equality by creating a “level playing field.”¹⁰⁰ The Courts are also bound by the 50% rule—where 22.5 % of central government employment is reserved for SC/STs and 27 % for OBCs. Anything in excess is bound to be struck down as unconstitutional. With the implementation of the Mandal Commission recommendation in the 90s, 1257 new groups of beneficiaries were included within the ambit of affirmative action. This has opened up a Pandora’s Box of competing

⁹⁷ (1996) 6 SCC 580.

⁹⁸ The Constitution (Eighty-Second Amendment) Act, 2000.

⁹⁹ K.C. Vasantha Kumar v. State of Karnataka, AIR 1985 SC 1495.

¹⁰⁰ Akhil Bharatiya Soshit Karamchari Sangh, AIR 1981 SC 298.

identities that have pervaded the political, social and intellectual lives of modern India. Reservations are a highly contested topic and social perceptions have ranged from indifference, stigma, hatred, and even violence against the beneficiaries. The Parliament and State legislatures are represented by SC and ST legislators who are predominantly responsible for pushing for laws and policies that are aimed at ameliorating the rigors of caste system and poverty. The doctrine of checks and balances ensures that there is a vibrant, yet organic balance maintained by the three pillars of democracy. The judiciary is perceived as a leveler by all competing entities. By adjudicating on the legality and constitutional validity of impugned legislations, government orders, and executive measures relating to affirmative action, judicial intervention is the remedy of last resort for citizens. Responsible judicial pronouncements by stalwart judges such as Justice Subba Roa, Justice Chinnappa Reddy, and Justice Krishna Iyer have been trail blazers in enriching social justice jurisprudence. As we have noted earlier, Justice Subba Roa's reading of the Constitution, which, despite adhering strictly to the words in Article 16, is wide in its ambit, and is instructive in underscoring the constitutional philosophy behind provisions for reservations in public employment. Justice Subba Rao drew a fine balance between understanding the nature of the subjects of reservations and adjudicating on the constitutionality of the provisions to resolve the issue at hand, without, however, commenting on the policy. On the other hand, short-sighted judicial pronouncements create huge imbalances that can only be resolved through constitutional amendments. Discrimination in public employment, especially at the stage of promotions, has been writ large, displaying intolerance towards the social and economic betterment of SC/STs; therefore, Parliamentary intervention to guarantee consequential seniority was an empowering move. The provision for back log carry forward, for any year where the number of reserved jobs were not filled, is a measure to ensure that sufficient number of members from the SC/ST communities are represented in public services at any given point. Finally, relaxing of qualifying marks and standards of evaluation has come under severe criticism for diluting merit and affecting the efficiency of administration. In response, as Radhakrishna has argued¹⁰¹ elsewhere, "in a society wherein market forces have increasingly become the determinants of educational and welfare policies with cut-off percentages that do not necessarily reflect real merit, the destinies of aspiring students hailing from the excluded and marginalized communities are often sacrificed at the altar of merit." Applying a common standard to evaluate the gestation period for performance, especially academic performance, across communities is bound to produce unjust results. In the eloquent words of Justice Reddy, the question, therefore, is "if spring flower he cannot be, autumn flower he may be. Why then should he be stopped at the threshold of an alleged meritarian principle?" How then would a court of law consider real merit? Real merit cannot be deciphered from the mere qualifying marks obtained in a disciplined class room set up but should go beyond the performance in classrooms into the social realities that candidates face, such as domestic responsibilities; hailing from low income rural/semi-rural areas with no access to educational resources, such as libraries,

¹⁰¹ Vanishree Radhakrishna, *Affirmative Action & Social Justice- Reflections on the judgments of the Supreme Court*, in Jindal Journal of Public Policy, Special Issue on Diversity, Discrimination and Social Exclusion in India and the USA, Vol. 1, Issue 2, Aug. 2013.

available at <http://www.jsgp.edu.in/Journal/CurrentIssues.html>

research and documentation centers or internet; lack of parental guidance or mentoring; and working part-time to fund their studies. The fact that a student could overcome such severe debilitating circumstances to reach a certain academic/ public post is reflective of meritorious character. The significance of reserved jobs in the Indian context cannot be undermined, as India is still grappling with old forms of social hierarchy on the one hand, and modernity on the other. Where caste-based discrimination and atrocities, especially in rural areas, is common place and continues to persist,¹⁰² reserved jobs are a means to shed traditional occupations in rural settings that are “cesspools” of social and economic backwardness. They instill a sense of pride and security¹⁰³—moving away from rural settings, where life and limb are better protected. They open up avenues of opportunity. Although affirmative action in the form of reservations in public employment has made a substantial material difference in the lives of beneficiaries, whether their adequacy can be taken as a given is a moot point. It is instructive to recall the Supreme Court’s¹⁰⁴ acknowledgement that there is a “yawing gap between legitimate expectations of the socially depressed SC & STs and their utter under representation in the Public Services, except in such menial jobs as of *scavengers* and *sweepers* where no other caste was forthcoming.” This acknowledgement is telling of the prevalent social realities and is a justification for the continuation of affirmative action in the form of reservations, until a social state is reached where “untouchability” is completely eradicated and there are no communities of scavengers and sweepers left.

Affirmative Action in the United States vs India: Perceptions of Discrimination

Despite the many historical differences in the evolution of affirmative action in the United States and India, a common feature is that the policy is a preference policy and affords benefits to one group at the possible expense of another group. The long history of opposition to affirmative action in both the United States and India underscores this point: that the preferences provided to protected group members easily can be viewed as discrimination against the non-protected group members. Now, the original purpose of affirmative action in both the US and India was to remedy the vestiges of discrimination against racial and ethnic minority groups (in the United States) and Scheduled Castes and Scheduled Tribes (in India). The remedy of affirmative action, then, can be viewed as positive discrimination in favor of protected groups. While there is nothing that requires that the resulting positive discrimination in favor of protected groups produces negative discrimination against non-protected groups, the perception nevertheless exists that affirmative action results in negative discrimination.

¹⁰² Understanding Untouchability: A comprehensive study of practices and conditions in 1589 villages. Navsarjan Trust (2010).

¹⁰³ Marc Galanter, *Competing Equalities: Law and the Backward Classes in India*, Oxford University Press, New Delhi, 1984, 548-49.

¹⁰⁴ Akhil Bharatiya Soshit Karamchari Sangh, *supra* note 76.

It is worth repeating what is different between affirmative action in the United States and India before proceeding to our analysis of the impacts on hate crimes and crimes of atrocity. As mentioned earlier, there are three significant distinctions between affirmative action in the USA and India. First of all, race-based affirmative action in the USA is constitutionally suspect. It is not illegal, but the implementation of affirmative action plans and programs by public bodies must meet the strict scrutiny test. The remedy must satisfy a compelling governmental interest and the remedy when applied must be narrowly tailored. By way of contrast, in India caste-preferences or reservations for scheduled castes and scheduled tribes are embedded in the Indian Constitution.

Secondly, in the United States many race-conscious affirmative programs target racial *minority* groups. Scheduled castes and scheduled tribes and other backward castes in India, by way of contrast, often account for the majority of those in a given state where the reservations are put into place.

Thirdly, affirmative action in India is largely limited to the public sector and its codification in the Indian constitution reflects the mandate to provide remedies to Scheduled Castes and Scheduled Tribes in the public sector. In the United States, the problem that affirmative action was originally intended to remedy included discrimination in both public and private institutions.

With these distinctions in mind, we can now examine what is known empirically about the effects of affirmative action on hate crimes in India and the United States.

Descriptive Statistics on Hate Crimes in the United States and Crimes of Atrocities in India

Figures 1 and 2 provide the initial core findings of the changes in hate crimes in the United States from 1995-2015. Figure 1 reports the measures regarding victims. Figure 2 reports the measures regarding incidents. Whether the measure is victims or incidents, it is clear that over the period during which the FBI reported total, race-based, anti-black or anti-white hate crimes the numbers have faced a steady decline over the past 20 years. There is a sharp uptick in anti-race hate crimes between 2014 and 2015, but this is not attributable to increases in anti-black hate crimes. Thus, overall, the numbers of anti-black hate crimes appeared to decline throughout the period of 1995-2015.

Figure 1

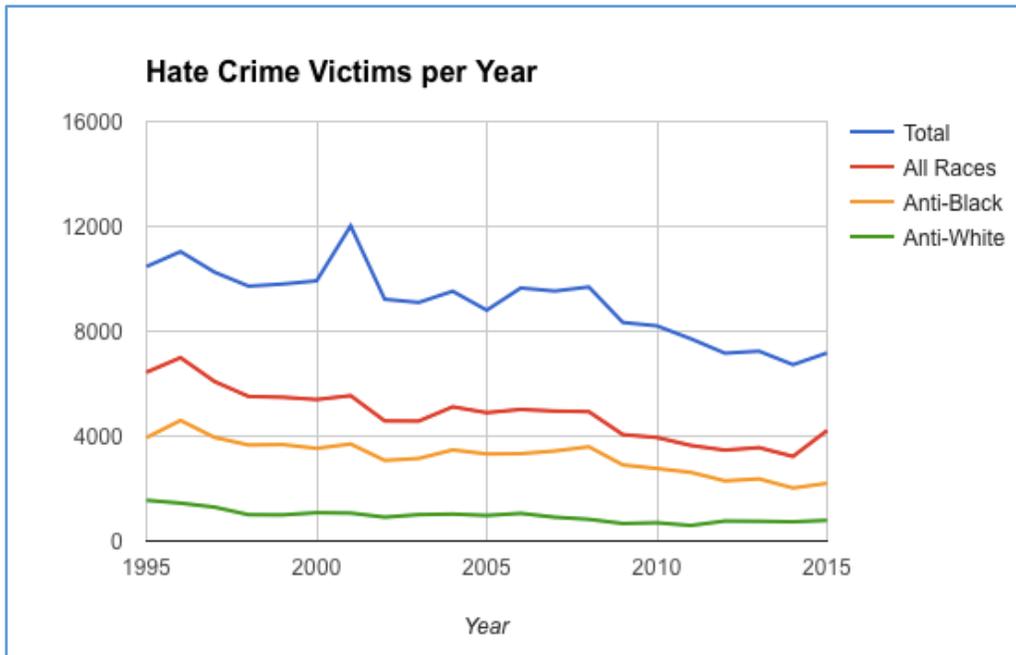
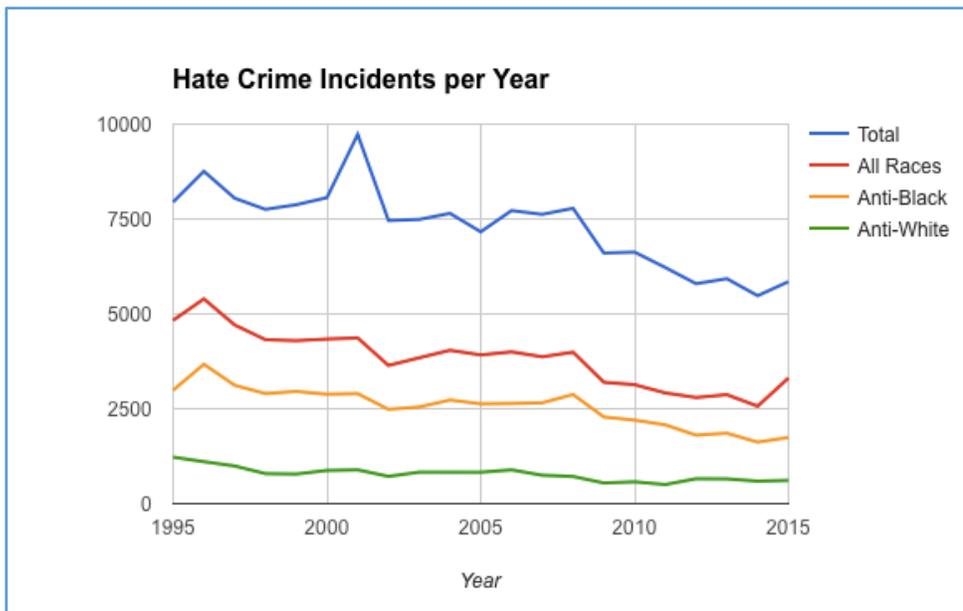


Figure 2



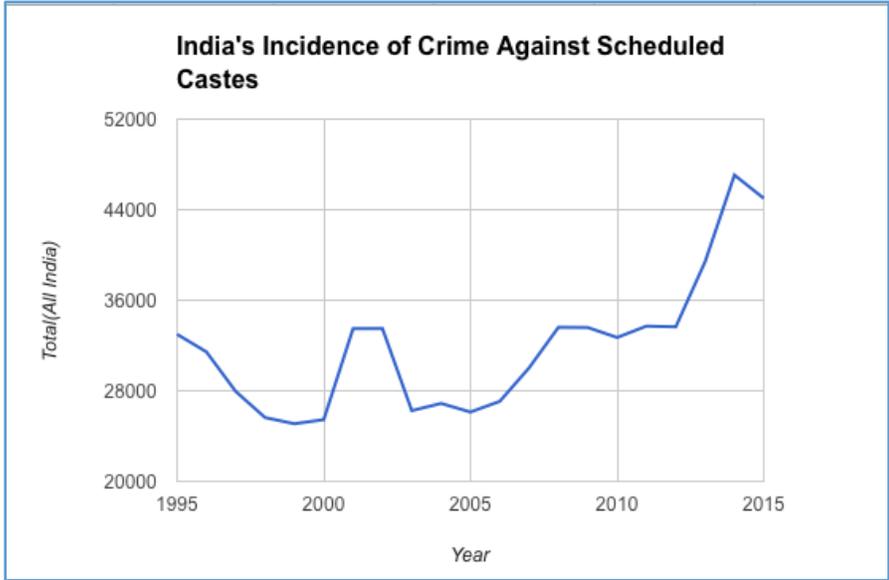
Figures 3 and 4, by way of contrast, report the numbers of crimes of atrocity in India over the same period of 1995-2015 against Scheduled Castes and Scheduled Tribes, respectively. Both figures show an initial spiking of reported crimes of atrocity from 2000-2002. For Scheduled Castes, the number of reported crimes of atrocity has increased steadily since 2005 with a sharp upturn after 2012. For Scheduled Tribes, the number of reported crimes of atrocity leveled off after the peaks of 2002 and then sharply increased after 2012.

Both Figures 3 and 4 show that there have been long-term increases in reported crimes of atrocity with several peaking periods. Moreover, both figures show that in India recent years have demonstrated upward spikes in crimes of atrocity resulting in levels far higher than at any time during the entire period of 1995-2014. There is, however, a noticeable drop in the number of crimes of atrocity reported between 2014 and 2015 but the level in 2015 is still higher than any year before 2014.

In short, the USA data show long-term declines in hate crimes reported whereas the Indian data show long-term increases.

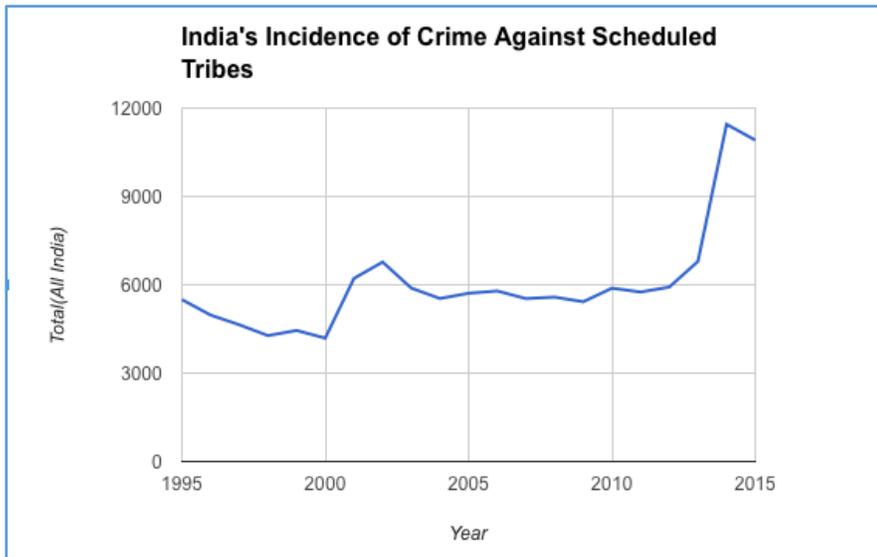
The unemployment rates for the black and white males, ages 16-24 and all white males are displayed in Figure 5. The black male unemployment rates are consistently higher than the white male rates. But, the movements of these rates are the same: when one increases the other increases. When one falls, the other falls. For example, from 2010 to 2015, black male unemployment rates for persons 16 to 24 years of age declined from nearly 35 percent to 20 percent. White male unemployment rates for persons 16 to 24 years of age dropped from almost 20 percent to nearly 10 percent. During the same period, the unemployment rate for all white males dropped from 10 percent to about 5 percent.

Figure 3¹⁰⁵



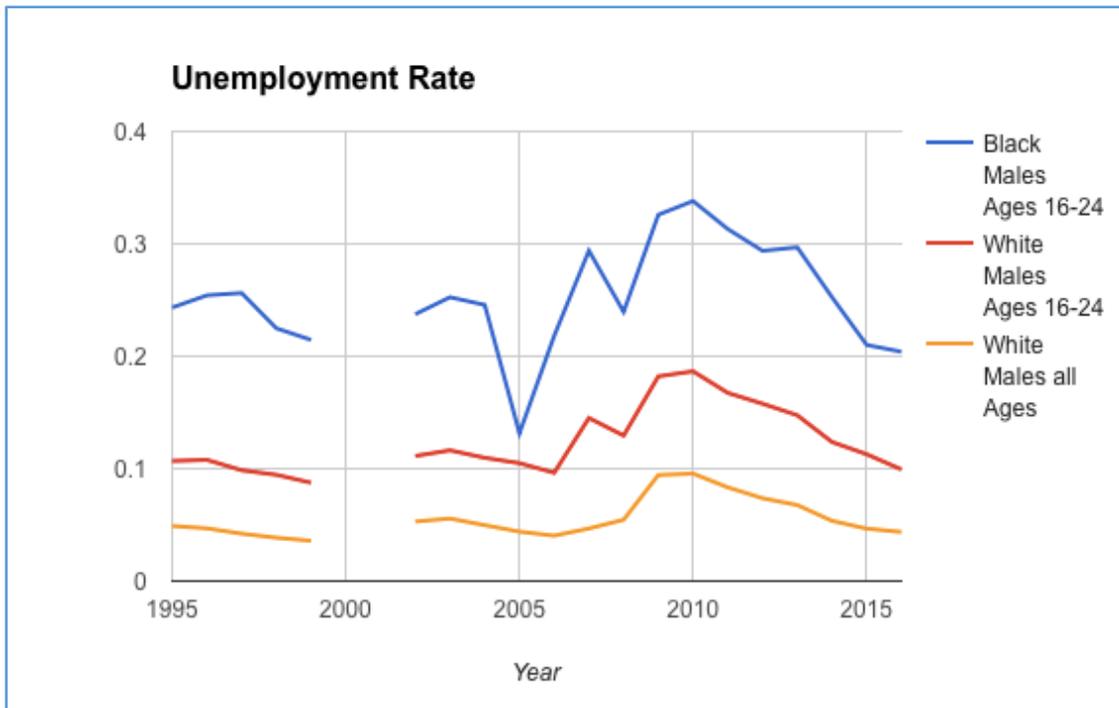
¹⁰⁵ Data for India: <http://ncrb.nic.in/StatPublications/CII/PrevPublications.htm>
<http://66.223.50.234/asrec/archive/papers/Sharma%20%20Hate%20crimes%20in%20india.pdf>
 “Crime in India’ by National Crime Records Bureau (NCRB), Government of India. This data is based on complaints or ‘first information reports’ filed with the police and not the cases convicted. A First Information Report (FIR) is a written document prepared by the police when they receive information about the commission of a ‘cognizable’ offense from either the victim or by someone on his on her behalf.” Debashis Chakraborty, Babu Shayam, Chakravorthy Manashi, “Atrocities on Dalits- What the district level data can say on Society - State complicity,” EPW, Vol. 4, Nov. 24, 2006, pp. 2478-81.

Figure 4



Unemployment rates in India, reported in Table 1, are derived from various rounds of the National Social Survey (NSS) and are not reported here for every year. However, it is clear from Table 1 that urban unemployment rates are considerably higher than rural

Figure 5¹⁰⁶



¹⁰⁶ Unemployment US: https://www.bls.gov/cps/cps_aa2004.htm

“Tables are not available for 2000–2001. The tables that were published for 2000–2001 contained data using 1990 Census-based population controls. The data for 2000–2001 were

unemployment rates and are not always higher for Scheduled Castes or Scheduled Tribes than they are for all others. For example, in the 68th Round of the NSS (2011-2012), the unemployment rate for rural males was 17 percent. For urban males the unemployment rate was 30 percent. For scheduled castes the unemployment rate for rural males was 20 percent, while for other rural males it was 18 percent. For scheduled castes the unemployment rate for urban males was 32 percent, while for other urban males it was 34 percent.

Table 1 also reveals significant gender disparities in unemployment rates. For the 68th Round of the NSS (2011-2012), rural female unemployment rates for scheduled castes was much lower than the unemployment rate for other rural females at 14 percent vs. 24 percent. Although the overall unemployment rates for rural females were about the same as that for rural males, the unemployment rates for rural females from scheduled castes were lower than that for rural males from scheduled castes. The unemployment rates for rural females from other groups were higher than those for males from other groups.

later revised to incorporate Census 2000-based population controls, but the tables were not re-issued with revised data.”

Table 1¹⁰⁷

Statement 3.20: Number of persons unemployed per 1000 persons (PU) and unemployment rate (UR) (number of persons unemployed per 1000 persons in the labour force) according to usual status (ps+ss) for different social groups during 1983 to 2011-12					
					all- India
NSS rounds (year)	household social group				all (incl. n.r.)
	ST	SC	OBC	Others	
(1)	(2)	(3)	(4)	(5)	(6)
rural male					
68th (2011-12)	7(13)	11(20)	9(17)	10(18)	10(17)
66 th (2009-10)	10(17)	10(17)	7(14)	11(20)	9(16)
61 st (2004-05)	6 (11)	9 (17)	8 (15)	11 (20)	9 (16)
55 th (1999-00)	6 (11)	10 (18)	8 (15)	12 (23)	10 (18)
50 th (1993-94)	5 (8)	6 (12)	-	9 (16)	8 (14)
43 rd (1987-88)	4 (7)	9 (16)	-	11 (21)	10 (18)
38 th (1983)	3 (5)	7 (12)	-	9 (16)	8 (14)
rural female					
68th (2011-12)	4(11)	4(14)	4(17)	5(24)	4(17)
66 th (2009-10)	3(9)	4(15)	4(14)	5(25)	4(16)
61 st (2004-05)	2 (4)	5 (14)	6 (19)	8 (29)	6 (18)
55 th (1999-00)	2 (5)	2 (6)	3 (10)	5 (22)	3 (10)
50 th (1993-94)	2 (3)	1 (4)	-	3 (10)	3 (8)
43 rd (1987-88)	6 (14)	11 (31)	-	7 (22)	8 (24)
38 th (1983)	1 (1)	2 (5)	-	3 (8)	2 (7)
urban male					
68th (2011-12)	18(34)	18(32)	14(25)	19(34)	17(30)
66 th (2009-10)	24(44)	17(31)	15(28)	15(27)	16(28)
61 st (2004-05)	16 (29)	31 (55)	19 (33)	21 (37)	22 (38)
55 th (1999-00)	22 (44)	27 (51)	22 (40)	26 (48)	25 (46)
50 th (1993-94)	26 (47)	24 (46)	-	21 (39)	22 (40)
43 rd (1987-88)	22 (43)	29 (56)	-	28 (51)	28 (52)
38 th (1983)	24 (43)	26 (51)	-	28 (51)	28 (51)
urban female					
68th (2011-12)	10(48)	8(45)	7(47)	9(63)	8(52)
66 th (2009-10)	9(43)	8(42)	10(62)	7(62)	8(57)
61 st (2004-05)	9 (34)	10 (46)	13 (67)	13 (85)	12 (69)
55 th (1999-00)	6 (28)	6 (31)	9 (54)	9 (77)	8 (54)
50 th (1993-94)	4 (17)	9 (44)	-	11 (69)	10 (62)
43 rd (1987-88)	5 (20)	8 (36)	-	10 (67)	10 (62)
38 th (1983)	4 (15)	6 (29)	-	8 (55)	8 (49)

Note: 1. For 38th, 43rd and 50th rounds, no separate category of social group 'OBC' was there and the category 'others' included 'OBC' category also.

2. Figures in parentheses are the corresponding unemployment rates (UR).

¹⁰⁷ Unemployment Data India:

<http://mospi.nic.in/search/node/unemployment%20situation%20among%20social%20groups%20in%20India>

THE RELATIONSHIP BETWEEN HATE CRIMES AND UNEMPLOYMENT

We now turn our attention to the core question of this paper: How does the insecurity due to affirmative action faced by the non-preferred group – as measured by their unemployment rates – affect the level of hate crimes against the protected group? The rational model of economic behavior posits that increases in the white male unemployment rates (or the relative white male unemployment rates) induces the perception that the protected group members – such as blacks -- are the culprits and thereby results in increases in the number of anti-black hate crimes. The model posits that when members of non-scheduled castes or tribes face higher unemployment rates, they too perceive that the culprit is affirmative action and preferences afforded to protected group members, resulting in an increase in crimes of atrocities directed towards members of scheduled tribes and scheduled castes.

Figure 6

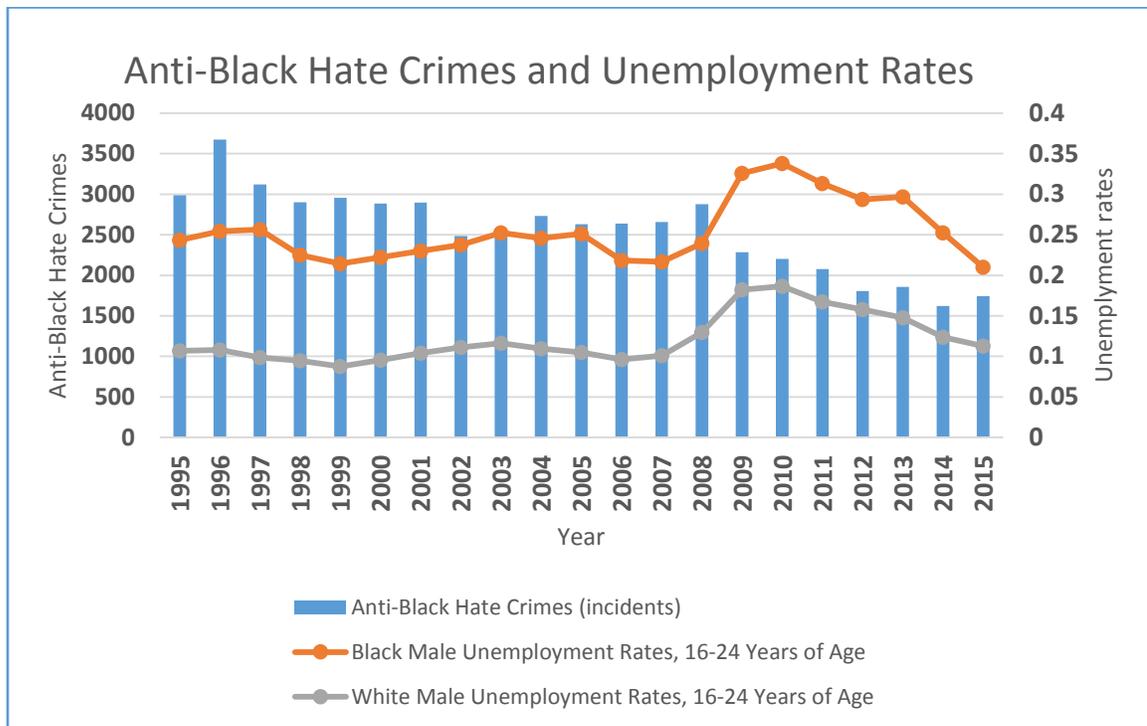


Figure 6 maps the time series of anti-black hate crimes against black male unemployment rates and white male unemployment rates for persons 16-24. Before 2005, it is difficult to discern any particular pattern in the data. After 2007 to 2009 – the great recession in the

http://mospi.nic.in/sites/default/files/publication_reports/516_final.pdf?download=1
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 Most Updated:
http://mospi.nic.in/sites/default/files/publication_reports/nss_rep_563_13mar15.pdf?download=1

United States – there is a sharp rise in white male unemployment as well as a sizeable increase in the number of anti-black hate crimes. From 2010 to 2015, there is a continuous drop in young white male unemployment rates but not always a consistent drop in anti-black hate crimes. This figure provides the initial clue that the effects of white unemployment on anti-black hate crimes are anything but obvious.

Another way to look at the relationship between economic insecurity and anti-black hate crimes is to plot the overall unemployment rates against the level of anti-black hate crimes. Figure 7 reveals that at low levels of unemployment, increases in the overall unemployment rates *reduce* anti-black hate crimes. Only after unemployment is above 8 percent or so does there appear to be a positive slope in the relationship between unemployment and anti-black hate crimes.

Figure 7

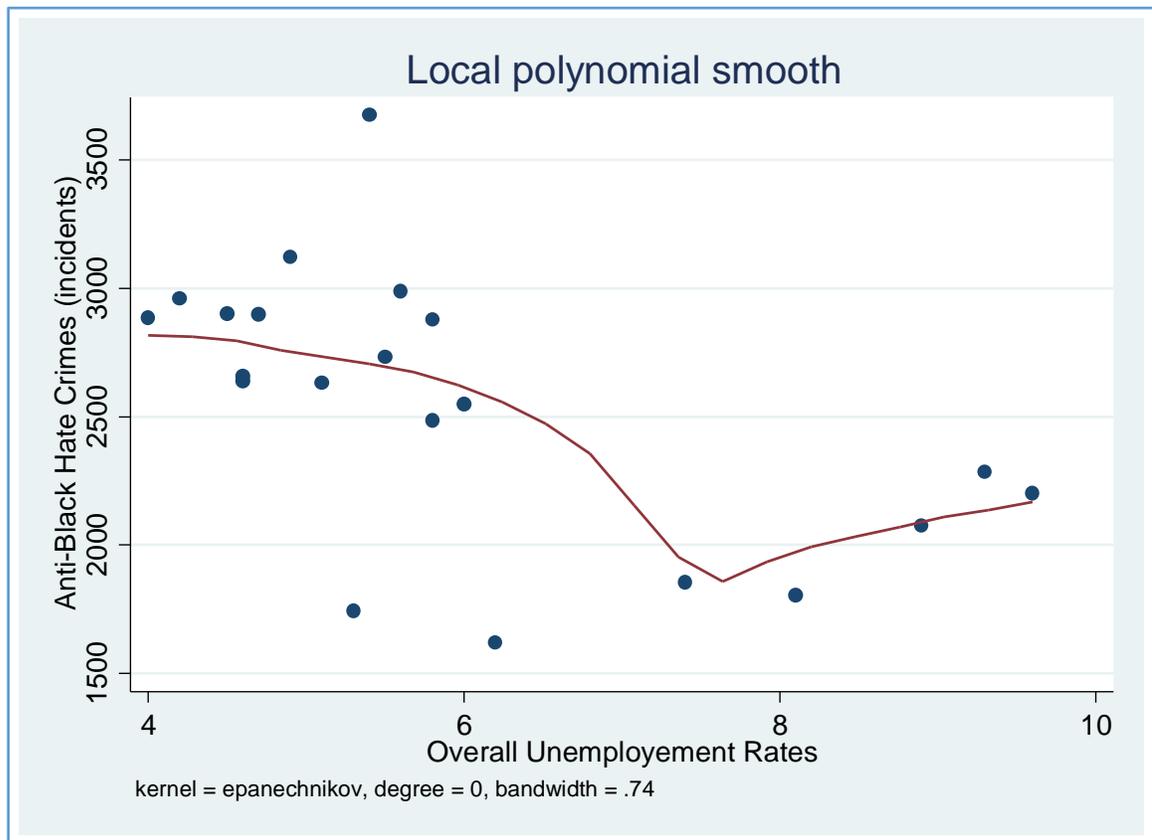
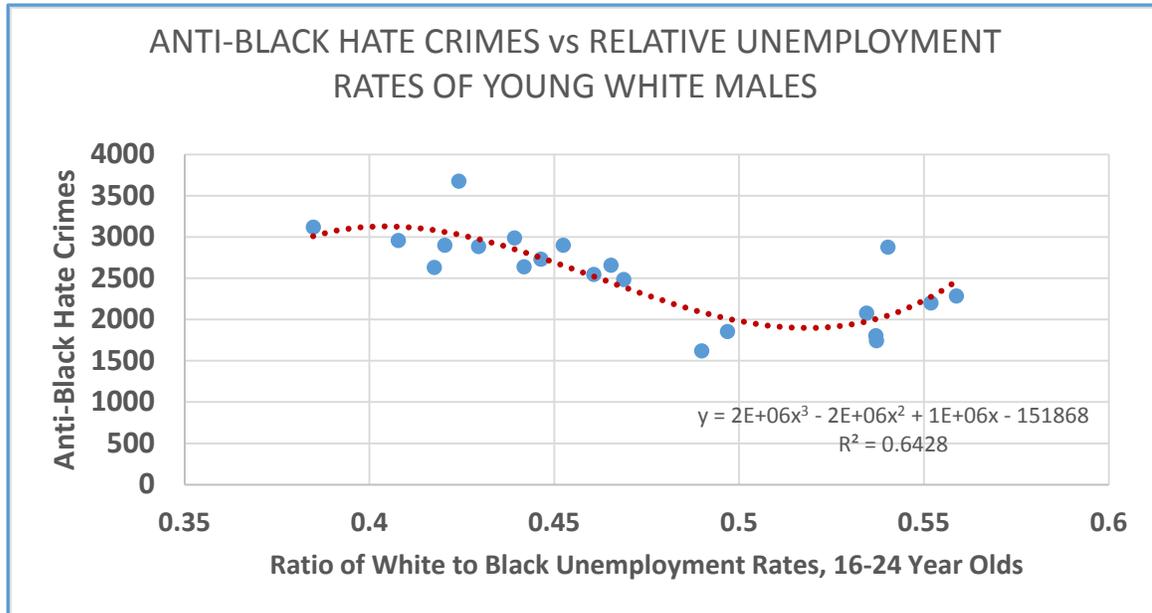


Figure 8 further underscores the non-linear relationship between economic insecurity of whites and the level of anti-black hate crimes. Here, the plot is between the ratio of white to black male unemployment rates for persons 16-24 years of age and the level of anti-black hate crimes. We have fitted the curve to a third degree polynomial function (R-square = .6428) and demonstrate that only when white male unemployment rises to higher than half of black male unemployment does there appear to be an upward relationship between relative unemployment and anti-black hate crimes. Elsewhere along the curve, where young black males' unemployment rates are more than twice the unemployment rates for young

white males, the relationship between economic insecurity of whites and anti-black hate crimes is inverse: higher relative insecurity reduces hate crimes.

Figure 8



In summary, the relationship between a) the economic insecurity faced by young white males triggered by increases in their unemployment rates or their unemployment rates relative to that of young black males and b) incidents of anti-black hate crimes is not uniform. At best, the relationship is an inverse one when unemployment rates are low. When unemployment rates are high or when the gap between black and white unemployment rates narrows, then we do observe increases in anti-black hate crimes when white insecurity increases.

Turning now to evidence on India, Figures 9 and 10 report the time series of crimes of atrocity (hate crimes) and unemployment rates for persons other than those from households from Scheduled Tribes, Scheduled Castes or Other Backward Castes. Between 1994 and 2000, unemployment rates for other males rose but the numbers of crimes against scheduled tribes and scheduled castes fell. Between 2000 and 2005, unemployment rates fell but the crimes of atrocity were slightly higher. Similar non-confirmatory results appear for other pairing of years. These two figures provide little or no support for the claim that increases in economic insecurity among non-protected group members produce crimes of atrocity.

Figures 11 and 12 provide clearer evidence that increases in the unemployment rates for other males (rural or urban) do not produce higher levels of hate crimes against scheduled castes or scheduled tribes. Second order polynomial equations are fitted producing R-squares of .587 and .688 with downward slopes.

Figure 9

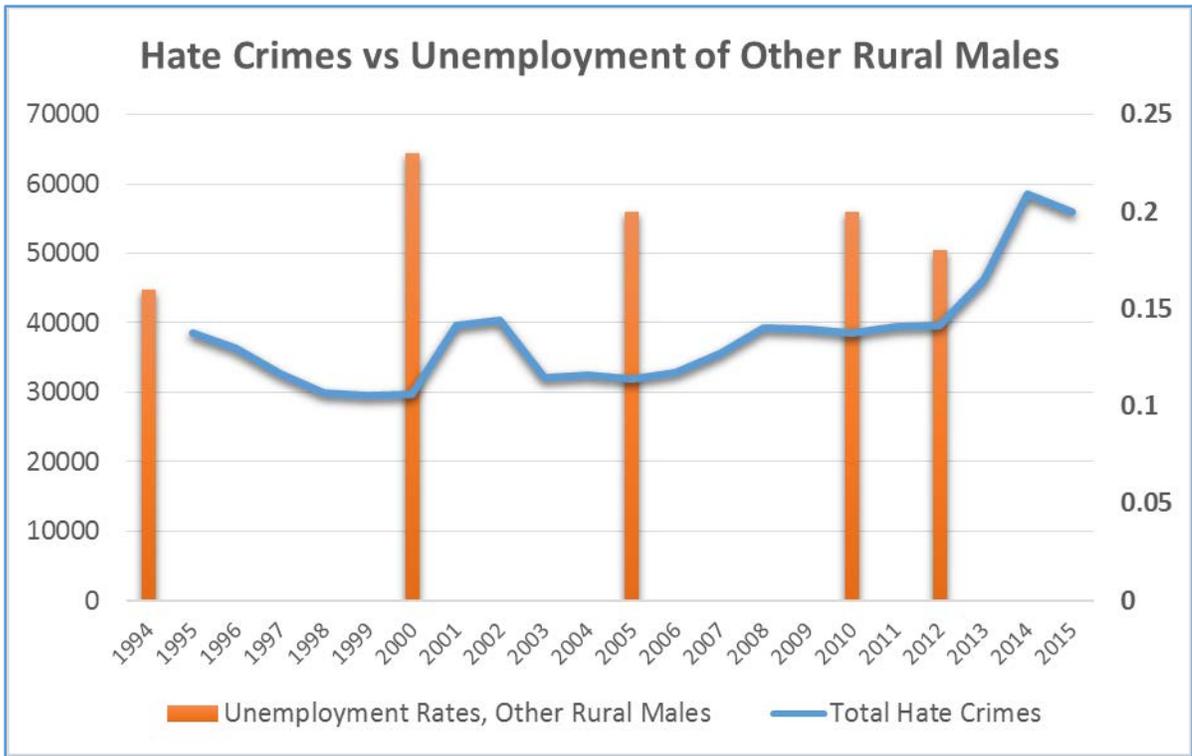


Figure 10

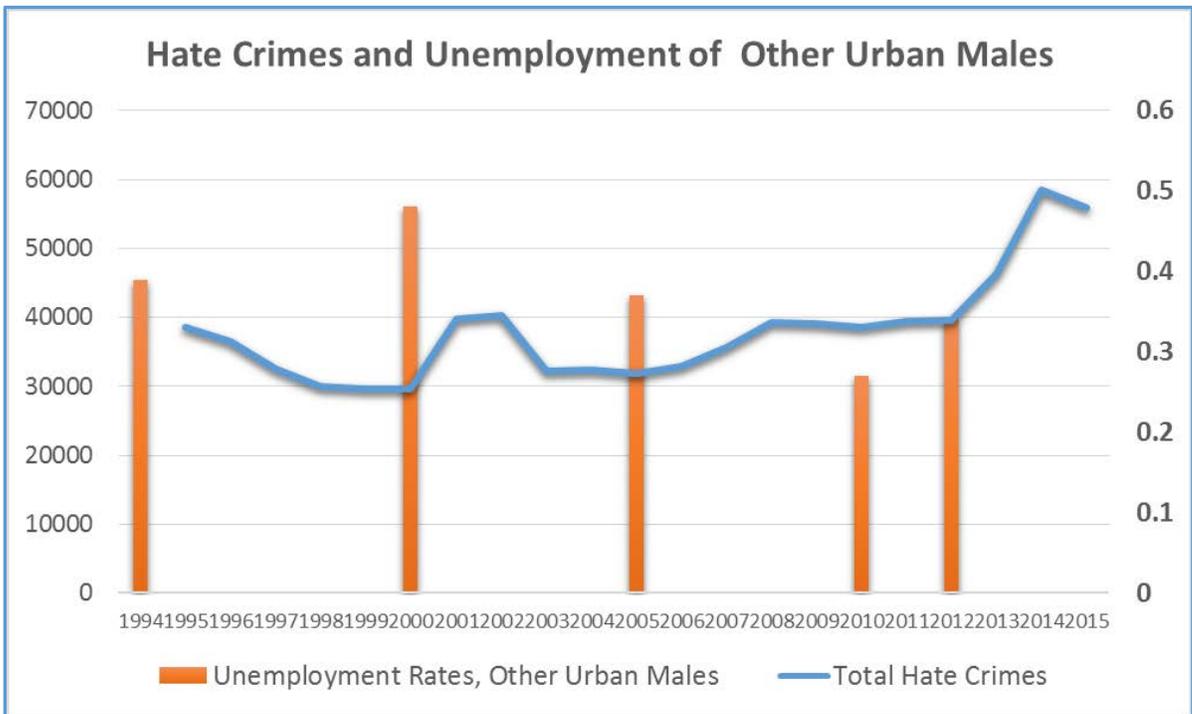


Figure 11

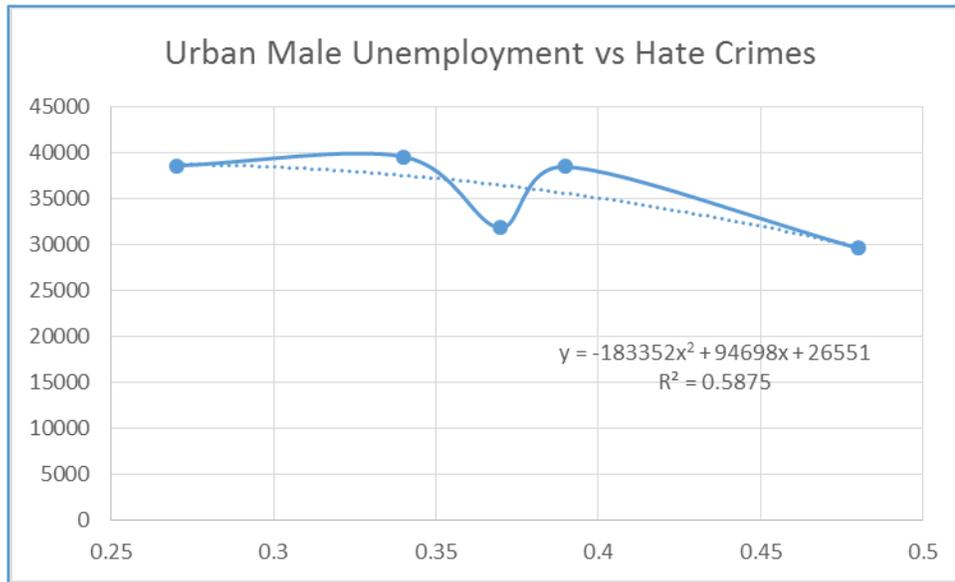
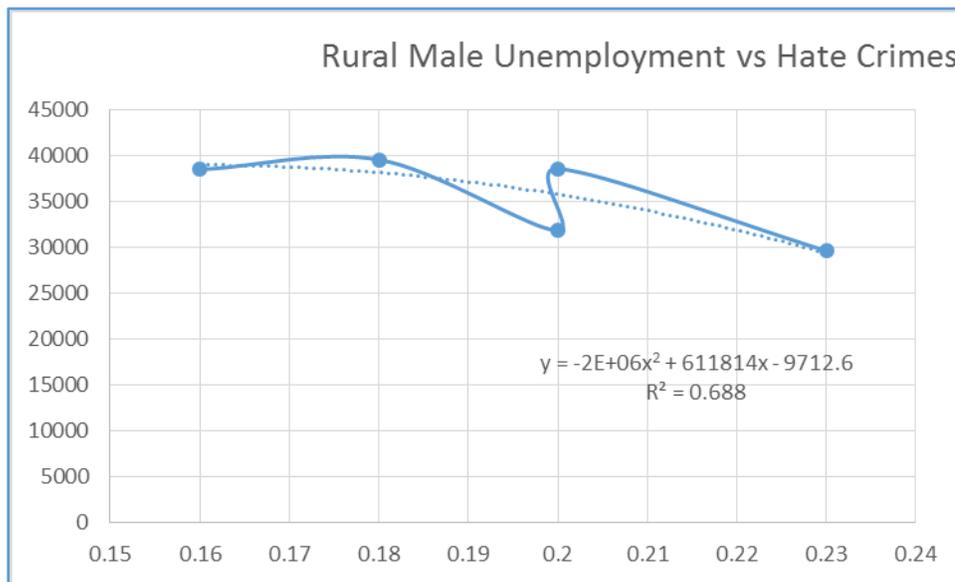


Figure 12



By way of contrast, Figures 13 and 14 report the results of estimating the relationship between the relative unemployment rates and hate crimes. For low rates of relative unemployment there is an inverse relationship between relative unemployment of other groups and crimes of atrocity against scheduled castes and scheduled tribes. For high rates of relative unemployment, increases in relative unemployment of other groups produce higher levels of crimes against scheduled castes and scheduled tribes. This finding is consistent with the view that it is not the absolute level of unemployment or economic security that affects crimes against scheduled castes or scheduled tribes. It is the relative economic insecurity that matters. Anti-SC/ST sentiments may not translate into hate crimes

until and unless the relative economic insecurity reaches a threshold. As seen in the USA results, that threshold is quite high, suggesting that the standard rational economic model may not be particularly helpful in understanding the behavior of those who perpetuate crimes against protected group members.

Figure 13

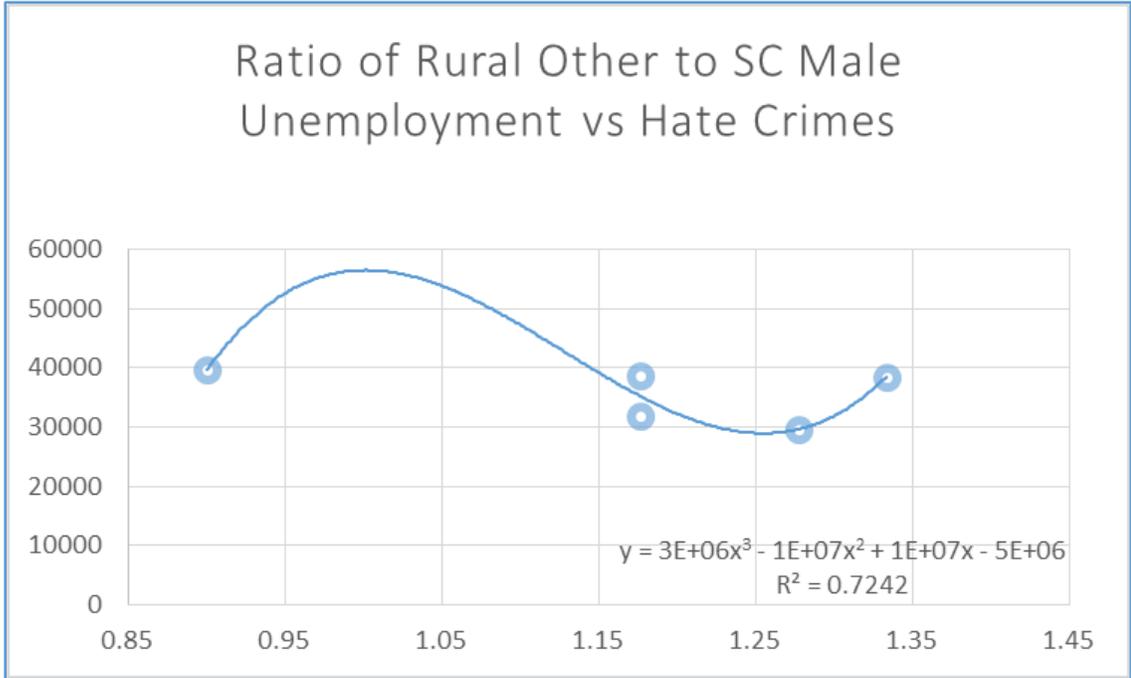
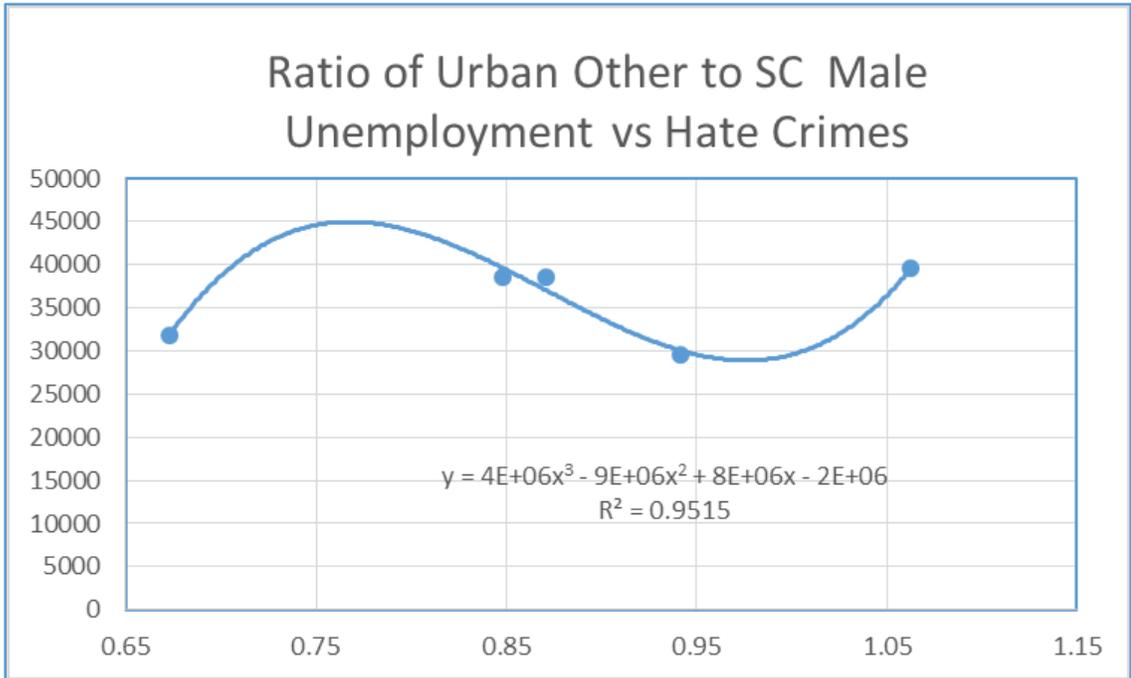


Figure 14



Summary and Conclusions

Hate crimes against African Americans in the United States are manifestations of deep prejudice based on racism. A comparison between atrocities against Dalits and hate crimes is especially germane since there has been increased media attention to violence based on hatred and intolerance against both the communities. Both communities face disabilities based on discrimination in all walks of life. Professor Derrick Bell deems racial discrimination a permanent institution, designed to keep the American economy in 'balance.' A comparison is useful of discrimination based on race in America and caste in India == two countries where legal protections are in place yet where cases of violence and discrimination continue to escalate.

The paper has detailed a rationale for the empirical analysis that examines the relationship between hate crimes and unemployment. We demonstrate that the putative empirical relationship between hate crimes and affirmative action is tenuous at best. But, we also point out some of the major flaws and measurement concerns related to the underlying data in the United States and India.

The first major flaw and measurement issue is that one important form of hate crime is not included in the USA data: police use of deadly force against young African American males. Strikingly, during the very years that outward manifestations of racial hatred in American have escalated, the FBI official reports of anti-black hate crimes have declined. One can only speculate about why the official data do not coincide with popular beliefs and perceptions about the rise of anti-black hatred in recent years.

A second methodological concern is that the theory sketched concerns hostility towards protected group members arising from the perceptions that affirmative action harm non-protected group members. However, we have not directly measured these perceptions in the United States or India. Instead, we have used the empirical strategy of adopting a plausible proxy for economic insecurity: unemployment rates of non-protected group males. An interesting extension of this research might include the examination of other measures of economic insecurity – e.g. loss of property or declines in homeownership – or of gendered aspects of economic insecurity – e.g. female unemployment rates.

Nonetheless, our main finding, apparent in the data for both India and the United States, is that racial hatred is not easily explained simply by economic insecurity – a pretext often used to justify opposition to race-conscious or caste-conscious remedies to discrimination. While a conventional and widely held view is that affirmative action *causes* racial hatred, hostility and therefore hate crimes, the evidence in this paper does not support that view. At best, our results suggest that only in the most extreme cases of economic insecurity where non-protected group members' unemployment relative to protected group members' unemployment is above some threshold does there appear to be an aggravating impact of economic insecurity on hate crimes. Over most of the range of unemployment rates, there does not appear to be an adverse impact of economic insecurity on hate crimes.

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