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Defining Characteristics and Politicising Victims: A Legal Perspective

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ABSTRACT

Legislatures worldwide experience the same problem in drafting or amending hate crimes statutes: How is it possible to discriminate between victim groups, and which groups are worthy of legislative protection? This article explores some of the experiences of legislatures, highlighting the political inconsistencies which go on to shape the legal system. It focusses on the experience of a number of common law jurisdictions,¹ and seeks to establish a normative platform from which hate crimes statutes can be based, drawing on the legislative experiences of the United States. This platform draws on two other areas of law, particularly the criminal defence of provocation and equality legislation, and shows that the determination of victim groups for hate crimes legislation need not be the politically charged, discriminatory, and exclusionary process that it is today.

Keywords: victims, legislation, legal approaches, equality, comparative

I. INTRODUCTION

Legislatures worldwide experience the same problem in drafting or amending hate crimes statutes: How is it possible to discriminate between victim groups, and which groups are worthy of legislative protection? This article seeks to explore some of the experiences of legislatures, highlighting the political inconsistencies which go on to shape the legal system. It focusses on the experience of a number of common law jurisdictions,² and seeks to establish a normative platform on which hate crimes statutes can be based, drawing on the legislative experiences of the United States. This platform will draw on two other areas of law, particularly the criminal defence of provocation and equality legislation, and show that the determination of victim groups for hate crimes legislation need not be the politically charged, discriminatory, and exclusionary process that it is today.

II. VICTIMS, THE CRIMINAL JUSTICE SYSTEM, AND HATE CRIMES LEGISLATION

Traditionally, the only role for the victim in the criminal justice system was as a witness for the prosecution. However, the discipline of victimology has developed prominence in recent years, and as a result of calls for change in the role of the victim, many accommodations have been made for victims in the system.³ When considering the role of victims in the context of hate crimes, the perspective is a little different. Rather than considering the role of victims in the criminal justice system as a whole, we are instead considering a more contentious issue: the ranking of victims. As Chakraborti and Garland note:

The increased standing for victims clearly has implications for the development of hate crime, for it is within this context that we have begun to appreciate the differential impact of certain forms of crime upon particular groups of victim. Indeed, this would appear to be one of the key underlying premises of hate crime: that crimes motivated by hatred or prejudice against certain groups of people deserve particular attention.⁴

In terms of the victims' movement, hate crimes could be considered the ultimate victim-led offence. While generally speaking, crimes are ranked in severity by assessing the objective severity of the offence (for example, assault, assault causing harm, assault causing serious harm⁵), hate crimes are punished more harshly due to the motivation of the offender, the subjective experience of the victim, and the impact the crime has on the community with which the victim identifies.

III. TWO DEFINITIONS

Barbara Perry defines hate crimes from a criminological perspective in this way:

Hate crime . . . involves acts of violence and intimidation, usually directed toward already stigmatized and marginalized groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterize a given social order. It attempts to recreate simultaneously the threatened (real or imagined) hegemony of the perpetrator's group and the 'appropriate' subordinate identity of the victim's group. It is a means of marking both the Self and the Other in such a way as to reestablish their 'proper' relative positions, as given and reproduced by broader ideologies and patterns of social and political inequality.⁶

More concisely, she encapsulates her definition later as ‘violence motivated by negative interpretations of difference and the demonization of the Other.’⁷ What is very useful about this definition, as Chakraborti and Garland observe, is the recognition that hate crime is not a static problem, but is ‘historically and culturally contingent, the experience of which needs to be seen as a dynamic social process involving context, structure and agency.’⁸ For the purposes of enacting legislation, however, the concept of ‘othering’ is rather too vague to withstand judicial scrutiny. Nonetheless, the definition is useful for legal purposes, including as it does the key elements of any hate crime: violence, or some form of criminal conduct; against a victim; who was targeted due to his affiliation with a stigmatised and marginalised group.

In the United States, Frederick Lawrence sought to determine which status characteristics should be included in hate crimes statutes and which should not. He proposed a two-stage process: first, to determine the characteristics which are appropriate for consideration; and second, how the legislature should, or could, distinguish between these groups for the purposes of enacting hate crimes legislation.⁹ The first question asks whether the members of the group self-identify as such members. Lawrence admits that this first stage will identify a great many number of groups, some of which have no place in a bias crimes statute. He argues, however, that in this stage, ‘where we seek characteristics that yield self-regarding groups, we should be expansive.’¹⁰

The second stage, then, requires the legislature to determine which of these self-identifying groups should be included in the bias crimes statute. These, he states, ‘are the characteristics that implicate social fissure lines, divisions that run deep in the social history of a culture.’¹¹ In the context of the United States, for example, he highlights race and racial discrimination: ‘the greatest American dilemma has its roots in slavery, the greatest American tragedy.’¹² He further observes that ‘race, color, ethnicity, religion and national origin’ are all examples of such national social fissure lines.¹³ Having established those national fissure lines, he goes on to note that particular states may include characteristics particular to the social and historical context of that state. While this approach has merits, it lacks a normative basis, and allows politicians to discriminate, for valid or less meritorious reasons, between victim groups. It also potentially requires politicians to be purely reactive in their approach to hate crimes legislation, without the capacity to proactively protect new vulnerable groups.

Thus, while there are clear theories as to how the legislature *should* determine victim groups, in practice, the process is not as well thought-out as Lawrence would require, nor as objective as it could be. Many hate crimes statutes are created, not out of an evidence-based objective

approach, but rather as the result of sustained lobbying on the part of particular interest groups.¹⁴ While there is little cause to question their entitlement to be afforded the protection of a bias crimes statute, one must immediately ask: Are there other groups who simply do not have the resources required to sustain a lengthy battle to be afforded such protection?

IV. THE 'BREADTH OF THE PROTECTED CLASSES'

Hate crimes differ from 'ordinary crimes' in a number of ways, but perhaps one of the most compelling differences, from the perspective of victims, is that they were chosen as a victim, not because of who they are, but rather because of their membership of, or perceived membership of, a particular group. As Perry notes, for the perpetrator of such violence, the specific victim is immaterial, and the victims interchangeable.¹⁵ Blake observes that central to bias crimes is the 'fungible' or interchangeable nature of the victim.¹⁶ This deindividuation of the victim plays a central role in bias crimes. That said, the group that the individual is from, or is perceived to be from, is deliberately chosen because of the 'hatred' of that group. Bowling and Phillips remark that this targeting, rather than being picked at random from the population as a whole, creates feelings of hostility and tension, which make both the victim and the community feel vulnerable to future attacks.¹⁷

Determining which victim groups should be protected by legislation, however, is a highly problematic process. Grattet and Jenness observe that including a group within the legislation serves to demarcate the 'enhanced vulnerabilities' of some people, and inscribe victim statuses to some minority groups and not others.¹⁸ Further, as Perry notes, the definition is relative, and historically and culturally contingent—what, she says, is a hate crime today could be 'standard operating procedure' in another time or place.¹⁹

Chakraborti further notes that limiting the application of hate crimes legislation to certain groups and not others 'is a process fraught with danger, as this requires difficult judgements to be made regarding who should be deserving of 'special protection.'²⁰ Jacobs and Potter note that while offenders probably have conscious or unconscious prejudices against people who are, for example, rich, poor, successful, or drug addicts, these prejudices would not turn an ordinary crime into a hate crime.²¹ 'By contrast,' they note, 'racial, religious, and gender prejudices are widely and vigorously condemned.'²² By choosing those crimes which are more widely condemned, we as a society are making a judgment on which victims deserve more protection, or which ground of discrimination is more

heinous. It is this process, preferring one ground of discrimination over another, which is the problem faced by legislatures.

If we examine hate crimes legislation across a broader category of jurisdictions, it is clear that the range of victims of hate crimes is much greater than those included in any one statute. Those common to most jurisdictions include race, ethnicity, sexual orientation, and disability. Perry describes the ‘breadth of the protected classes,’ which are culturally and socially dependent.²³ A list of protected classes across a wide range of hate crimes legislation in the United States includes:

- Age
- Citizenship
- Class
- Colour
- Disability
- Economic status
- Ethnicity
- Family responsibility
- Gender
- Matriculation
- Membership of Labour organisation
- Marital status
- National origin
- Personal appearance
- Political orientation or affiliation
- Race
- Religion
- Sex
- Sexual orientation
- Social status

Grattet and Jenness observe that there have been two ‘tiers’ of categories of hate crimes in the United States. The first (or core) tier, they note, in 1988 ‘represented a legal response to the most visible, recognizable, and stereotypical kinds of discriminatory behavior,’ including crimes against individuals on the basis of their race, religion, colour and national origin. The so-called ‘second tier’ of hate categories, emerging in the late 1990s, included sexual orientation, gender, and disabilities. The authors explain the movements:

The respective unfolding of these clusters of statuses—the core and the second tier—reflects the history of various post-1960s civil rights movements in the United States. Race, religion, color, and national origin

reflect the early legal contestation of minorities' status and rights . . . Because the gay and lesbian movement, the women's movement, and the disability movement reflect a 'second wave' of civil rights activism and 'identity politics,' sexual orientation, gender and disability, respectively, have only recently been recognised by policy-makers responsible for the formulation of hate crime law as legitimate axes around which hate crime occurs.²⁴

The range of potential protected classes is thus potentially very broad, ranging from the traditionally protected groups (race, colour, national origin), developing into Grattet and Jenness' second wave, with the capability of a third wave of potential protected groups emerging today. The remainder of this paper will assess how, if at all, we can distinguish normatively between potential victim groups to determine which are deserving of legislative protection through hate crimes legislation.

V. THE POLITICS OF VICTIMHOOD

Determining victim classes in hate crimes legislation is an essentially political process—controversially, Jacobs and Potter go so far as to say that the primary purpose of hate crime laws is to 'bolster the morale and strategic position of certain identity groups.'²⁵ Thus, the problem is not simply one of categorisation of victims, but is exacerbated by the politics of this categorisation. However, there is much more to this issue than simply politics. By singling out specific groups, the legislature is sending a clear message that these groups are deserving of more protection than others. This means that the legislature is classifying distinct victim types as more worthy of legal protection—legal protection which has an enormous impact on the offender during the sentencing stage. When the legislature chooses to discriminate between offenders, placing certain offenders into a category, any offence against which automatically requires an enhanced sentence, it must do so carefully, and with the principle of equality for offenders and victims in mind.

Critics of hate crimes legislation argue that once a single group is protected under the statute, there is no end to the number of groups who will seek protection in this way. As Dickey notes, referring to the growth in hate crimes legislation in the United States:

As the laws raced through the legislatures around the country, there were few voices of dissent. In the lexicon of magic political words, being against hate is abracadabra. Can you imagine a candidate trying to defend against a 30-second commercial accusing him or her of being 'soft on hate'?'²⁶

Hall observes that the mere process of creating categories of protected groups is problematic. The exclusion, he states, of any one group gives the message that their victimisation is of less importance than any single group included; while including every single possible group renders the legislation meaningless.²⁷ Jacobs and Potter observe that hate crime laws are enormously appealing to politicians:

Except for the inclusion of sexual orientation, politicians faced a no lose proposition. By supporting hate crime legislation, they could please the advocacy group without antagonizing any lobbyists on the other side (there were none) and without making hard budgetary choices. The hate crime laws provided an opportunity to denounce two evils—crime and bigotry—without offending any constituencies or spending any money.²⁸

There are two ancillary problems here: first, as identified by Garland, groups which are socially marginalised and stigmatised often lack recourse to political power.²⁹ Without this access, they will be further marginalised in any legislative measure introduced to combat hate crimes. Secondly, whilst oftentimes legislators will be happy to expand the ambit of hate crimes legislation for political purposes, they can also limit its extent for the same purposes. This occurred a number of times in the United States, where politicians argued against the inclusion of sexual orientation in hate crimes legislation.³⁰ Excluding groups for political purposes can have the effect of further marginalising the individuals and reinforcing public prejudices against the group.

This is not all to say that popular mobilisation for legislative change is necessarily a bad thing. It is not suggested that any of the groups protected by hate crimes legislation are not deserving of such protection, nor that politicians act only in a self-serving and politically expedient way. It is argued here, however, that in considering the expansion or creation of hate crimes legislation, the determination of protected victim groups must be done in a manner which is objective and considered, ensuring that all groups are protected in accordance with human rights standards.

VI. MUTABILITY AND MARGINALISATION

Oftentimes, in seeking to differentiate between victim groups, legislatures will seek to establish which characteristics are so fundamental as to be ‘immutable.’ In seeking to determine the ‘moral fault lines’ in hate crimes—that is, where we draw the lines between protected and unprotected identities—Blake first refers to the United States Federal Violent Crime Control and Law Enforcement Act.³¹ The Act identifies the following as deserving protection: race, colour, religion, national origin, ethnicity, gen-

der and sexual orientation. These, he argues, are significant because they 'represent aspects of the person which are either immutable or, at the very least, exceptionally difficult or costly to change.'³² These, he argues, reflect to some degree, those classifications in 'constitutional law.'³³ However, O'Keefe argues that 'immutability' is not the sole factor in determining protected groups in hate crime legislation—religious belief, marital status and political affiliation, which are all protected to some degree in legislation are, she argues, arguably mutable

In the United States, Lawrence examines both gender and sexual orientation as characteristics which are often considered by State legislatures in the context of hate crimes. His discussion on the latter is interesting: He notes that the argument for excluding sexual orientation 'has been couched in terms of whether homosexuality is an immutable characteristic the way race, color, ethnicity, or national origin are.'³⁴ He finds this argument to be flawed in a number of ways, not least because:

The problem is that this same argument could be made with respect to religion, one of the classic bias crimes characteristics . . . The reason that religion . . . is protected by virtually all bias crimes statutes is that we deem it unreasonable to suggest that a Jew or Catholic might just choose to avoid discrimination by giving up her religion.³⁵

Thus, while immutability of characteristic seems to be one way of determining the characteristics which ought to be included in bias crimes statutes, as it would be quite impolitic for a legislature to suggest that religion is mutable, it will not be used as a solution for determining victim characteristics for bias crimes statutes.

Blake takes a broader perspective. Rather than being persons who are merely linked by 'some personal attribute,' social groups rather 'offer their members means by which they might understand their place in the social world.'³⁶ These groups are then in this way differentiated from 'mere aggregates.'³⁷ However, when he explores this 'self-identification' aspect in more detail by reference to two social groups—'geeks' and homeless people—he observes that this definition is no longer feasible. Because these individuals are identified as members of the group from the outside, they will be targeted as such, regardless of whether they in fact identify with the group, or even want to be associated with it. He argues:

Reducing someone to a single aspect, making them a fungible victim in virtue of one characteristic, would seem as morally problematic when the victim does not identify with that characteristic as when the victim uses that characteristic as the foundation of how they see their place in the world.³⁸

These remarks are particularly applicable in the context of the ‘disabled community’: while individuals may be labelled as ‘disabled’ for the purposes of the legislation, they may not in fact view themselves in this way, seeing themselves rather as ‘differently-abled.’ Blake rejects the narrow conception, preferring instead to favour a wider categorisation of hate crimes. This approach, he argues, would include attacks based on the perception of social difference and vulnerability more generally³⁹ and acts of violence based on stereotyping and hierarchy whether from within or outside a group.⁴⁰ This, he argues, would not require the victim to identify with the group in order for the crime to be considered as one which reflects and perpetuates bias.⁴¹

Chakraborti notes that another solution is to restrict the ambit of the protection to minority groups.⁴² While he accepts that this solution as a whole has some merit, he argues that if we accept this position, it would mean that members of majority groups could not be protected under the legislation, no matter how persuasive the evidence that an attack was based on prejudice or hate.⁴³

Others prefer to determine the ambit of hate crime laws to include only those who, historically, have been the victims of oppression—again, in the United States, it is argued that ‘violence against gays and the disabled, for example, is not a badge or incident of slavery.’⁴⁴ Whether the history of racism should be determinative, however, is questionable. As Jacobs and Potter argue, first, on this basis, anti-white prejudice would not be treated as a hate crime; and secondly, they ask why history of a condemnable motivation should be the basis for more punishment, and other criminal motivations, such as greed, lust, or politics not be regarded as being politically based.⁴⁵

Further, if we limit the protection afforded by the legislation to only those classes of traditionally marginalised groups, it could be argued, as Jacobs and Potter do, that it would be possible

to exclude from the definition of hate crime those crimes motivated by minority group members’ prejudice against whites on the ground that such prejudices are more justified or understandable, and the crimes less culpable, or less destructive to the body politic than crimes by whites against minorities.⁴⁶

However, to do so, they argue, would be difficult to construct, and would arguably violate the constitutional guarantee of equal protection.⁴⁷ Wolfe and Copeland refer to ‘groups of people who generally are not valued by the majority society, who suffer discrimination in other arenas, and who do not have full access to remedy social, political and economic injustice.’⁴⁸

This definition, however, fails to account for crimes motivated by hate against the majority population—and again, requires a politically subjective assessment as to the relative merits of individual social groupings.

It is argued here that the case of Sophie Lancaster, a Goth, represents the cornerstone of any analysis of protected groups. Garland refers to the murder of Lancaster, who the trial judge believed was targeted ‘solely because their appearance was different’ and whose murder was labelled a hate crime by the judge.⁴⁹ Sophie and her boyfriend, Robert Maltby (who survived the attack) had been targets of abuse before the fatal attack and it was quite clear that the perpetrators of the offence were motivated by prejudice against the Goth community when attacking their victims.⁵⁰ Garland notes that the trial judge stated, ‘This was a hate crime against these completely harmless people targeted because their appearance was different to yours.’⁵¹

As to the social identity, or defining characteristics of Goths, Garland notes that Goths have both created and sustained a distinctive and tight-knit subculture which ‘permeates almost every aspect of their daily lives and that stays with them for decades.’⁵² He states:

Contemporary Goth activity therefore operates mostly autonomously from mainstream and other stylistic subcultures, reinforcing the significant sense of collective affiliation between Goths *and their distance from ‘conventional others’*.⁵³

Further, he notes that due to their appearance, which makes them easily identifiable as ‘other,’ they are an ‘outgroup’ prone to victimisation.⁵⁴ In summary, Garland notes:

- Goths are members of a distinct social outgroup
- Goths are repeatedly targeted as victims of abuse⁵⁵
- The attack in question here was a stranger-crime
- The crime had an impact on the social confidence of the victim’s community.⁵⁶

These four elements satisfy most tests of victimhood in the context of hate crimes. While Garland accepts that there may be difficulties in how these issues are defined at law, he concludes:

To be targeted due to one’s difference, in whatever form this may take, and the fear this may cause, could well be the most important facet of these discussions. If this is the case, then some academic definitions of hate crime may need to be rethought.⁵⁷

This argument is very compelling. Agreeing with Garland, I propose a re-thinking of hate crimes which de-politicises the process, allowing juries (or

triers of fact) to determine whether, on the basis of the evidence before them, a hate crime was committed, rather than curtailing the operation of the legislation to a limited number of (albeit fully deserving) victim groups.

VII. WHO ARE THE VICTIMS?

Prior to detailing the proposed new definition, a quick examination of the ambit of hate crimes legislation in some key jurisdictions is required. Jurisdictionally, the definition of hate crime victims differs enormously in three ways: first, the inclusion of different victim groups in the various pieces of legislation (ranging from hate speech to the more usual ‘hate crimes’); second, the manner in which hate crimes are defined and the manner in which hate crime statistics are gathered; and finally, whether hate crimes are punished at all through statute or the common law.

In England and Wales, sections 29 to 32 of the Crime and Disorder Act 1998 define a number of offences as racially aggravated offences. All of them are offences already known to the law in their non-racially aggravated condition. For the purpose of the sections, ‘racial group’ is defined as ‘a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.’

The Criminal Justice Act 2003⁵⁸ provides that where a court is considering the seriousness of an offence other than one provided for in sections 29 to 32 of the Crime and Disorder Act 1998, and the offence is racially aggravated, or where it involves hostility towards the victim on the basis of their sexual orientation, disability, or religion,⁵⁹ the court must treat that as an aggravating factor, and state in open court that the offence was so aggravated. In Scotland, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 builds on the Crime and Disorder Act 1998 and the Criminal Justice (Scotland) Act 2003 by including disability, sexual orientation, and transgendered identity within the protected classes of hate crimes legislation.

Article 2 of the Criminal Justice (No 2) (Northern Ireland) Order 2004 provides that where an offence was aggravated by hostility, the court must treat that as an aggravating factor in sentencing which increases the seriousness of the offence, and must state in open court that that is the case. The offence is aggravated by hostility if the hostility is based on membership in a racial group,⁶⁰ a religious group,⁶¹ or a sexual orientation group,⁶² or on a disability of the victim.⁶³

Ireland is quite different, prohibiting only hate speech, albeit encompassing a wider category of victims in this limited context. Section 2 of the Prohibition of Incitement to Hatred Act makes it an offence for a person to publish or distribute material if that material is ‘threatening, abusive or insulting’ and is either intended to, or is likely to, stir up hatred. Section 1

of the Act defines hatred as being against a group of persons in the State or elsewhere on account of their 'race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.'⁶⁴

The sentencing system in Ireland is a discretionary one, with few limitations and even less guidance given to the Courts on sentencing issues. The Courts have yet to find that where an attack appears to have been motivated or aggravated by hate, that fact should be treated as an aggravating factor. Indeed, they have explicitly stated that such a motivation is *not* one which should be treated as an aggravating factor in sentencing. In *DPP v. Jones and Derwin*,⁶⁵ the Director of Public Prosecutions appealed the sentencing court's decision on the basis that it was unduly lenient, under section 2 of the *Criminal Justice Act 1993*. The first defendant was charged with the manslaughter of a 30-year-old Chinese national. Prior to the incident which resulted in the victim receiving his injuries, a number of racial insults were exchanged between Derwin and two Chinese men, one of whom, Zhao Liu Tao, was the victim. The Court was asked to consider that the sentences were unduly lenient on the basis of the need to condemn racially motivated attacks or attacks in which race plays any part. While the Court admitted that it did condemn such attacks, it went on to state that as the Director criticised only the 'context' in which the crime occurred (that is, the fact that it was racially aggravated), that context did not require a custodial sentence as a matter of principle, and further, that the sentence was 'fully in accordance with the principles of sentencing.'⁶⁶

VIII. RETHINKING HATE CRIMES: BORROWING FROM THE SUBSTANTIVE CRIMINAL LAW

In the OSCE report *Challenges and Responses to Hate-Motivated Incidents in the OSCE Region*,⁶⁷ the problems around defining the protected class in hate crimes legislation are skipped over, by including 'other similar factor' after the traditional list of victims. This approach, while arguably simplistic, has merit. If creating categories of protected groups is so fraught with difficulties, the logical solution is to simply frame the legislation to provide that any individual who commits a crime based on hate against a member of an identifiable group should be prosecuted under the legislation. This approach has a number of problems associated with it. First, as Jacobs and Potter quite rightly point out, prejudice is pervasive, and plays a role of some kind in a large percentage of crimes.⁶⁸ Further, if the sole basis of a hate crime is the prejudice itself, then it could be argued that anyone could claim that he or she was a victim of a hate crime, and thus, the application of the term is limitless. As Hall observes, there is a danger that the very

concept of such an offence would lose its meaning.⁶⁹ This approach, prioritising the ‘hate’ or prejudicial element of hate crimes offences, could lead to a situation where prejudice on the basis of any identifying characteristic or personality trait could justify the prosecution of a hate crime. If we consider the traditional targets of playground bullies—rich, poor, clever, stupid, fat, thin, ugly, and pretty—where would the line be drawn between a crime and a crime motivated by hate? It is argued here, however, that by re-prioritising hostility, as opposed to victim characteristics, as the core foundation of hate crimes statutes, we will have hate crimes which are inclusive and protective, rather than exclusive and discriminatory.

It has been said that, by discriminating between victims and treating crimes motivated by prejudice more harshly, we are seeking to promote social equality through the criminal justice system.⁷⁰ While legislation which penalises discriminatory behaviour from the perspective of the civil law is useful, hate crimes ‘reflect the increasing acceptance of the idea that criminal conduct is “different” when it involves an act of discrimination.’⁷¹ It is argued here, however, that it is possible to criminalise such behaviour and retain the message that is central to hate crimes, whilst simultaneously avoiding the creation of hierarchies of victims on the statute book.

The criminal law has proven itself capable of identifying core personal characteristics through the operation of the defence of provocation.⁷² Traditionally, when the defence of provocation was argued, law in England and Wales required the ‘reasonable man’ (against whose temper the provoking remark will be tested) to be endowed with the characteristics of the accused that the jury thought

would affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.⁷³

Characteristics which were found to be relevant in this context include:

- Age
- Gender
- Race
- Ethnic origin
- Sexual orientation
- Religious affiliation
- Physical infirmity
- Drug addiction
- Criminal record

- Paedophile tendencies
- Mental infirmity.⁷⁴

Thus, no matter how distasteful or socially unacceptable the ‘personal characteristic,’ the jury would consider the provoking event from the perspective of an individual endowed with such characteristics. Juries were entirely capable of determining which characteristics should be considered, and it was accepted that we have faith in them as triers of fact to do so. As was stated in *R v. Smith (Morgan)*:⁷⁵

The jury is entitled to act upon its own opinion of whether the objective element of provocation has been satisfied and the judge is not entitled to tell them that for this purpose the law requires them to exclude from consideration any of the circumstances or characteristics of the accused.⁷⁶

Using this approach, the law is then capable of adapting to social and cultural changes. The question as to which characteristics should be taken into account or not is unclear: it is arguable that morally questionable characteristics should be taken into account, such as paedophilic tendencies. Ashworth states:

Does this mean that there are not boundaries at all to what personal attributes may be taken into account in assessing the gravity of the provocation? What about the case of a racist who believes that it is gravely insulting for a non-white person to speak to a white man unless spoken to first? . . . [T]he judgement of such matters must be left to the jury without much guidance . . . [T]hat is unsatisfactory: there ought to be a normative element that excludes attributes and reactions *inconsistent with the law or inconsistent with the notion of a tolerant, pluralist society* that upholds the right to respect for private life without discrimination.⁷⁷

This normative element was not introduced in the Coroners and Justice Act 2009, section 54 of which replaced the defence of provocation with the partial defence of loss of control. Section 54(1) provides that where there was a loss of control resulting from an act or omission of the defendant, which loss of control had a qualifying trigger, and a person of the defendant's sex and age, ‘and in the circumstances’ of the defendant would have reacted in the same way (i.e., lost control), the defendant can rely on the defence. The circumstances of the defendant are defined in section 54(3) as ‘all of [the defendant’s] circumstances other than those whose only relevance to [the defendant’s conduct] is that they bear on [the defendant’s] general capacity for tolerance or self-restraint.’

It is argued here that this manner of assessing defining or personal characteristics from the perspective of the defence of provocation can be

easily applied in a context where the jury (or judge) determine whether a bias crime was committed against the accused on the basis of a ‘defining characteristic’ or ‘personal characteristic.’ The legislation could be framed as depending on

whether the jury believe that the motivation behind the criminal offence was based on hostility towards the victim, hostility which was directed at the victim because of their personal characteristics (or presumed characteristics), characteristics of which he or she shares with an identifiable social group.

This approach, I believe, would allow courts broad discretion in determining whether a bias crime occurred in a particular instance, thus allowing crimes against the homeless, Goths, and the elderly to be considered hate crimes, while simultaneously avoiding the problem whereby a ‘hate crime’ is said to occur where prejudicial language is used in the course of an attack, where that attack was not in any way *motivated* by bias. It could be argued that this definition is too wide, or that it will protect victims who are not morally or socially entitled to such protection. However, if the true purpose of a bias crime statute is to seek to deter crimes which are motivated by bias against a group, then this approach seems logical. It is an approach which is known to the law, and which juries are capable of applying.

In order to provide Ashworth’s normative element, it is argued that the legislation should include the nine protected characteristics included in equality legislation as indicative characteristics, or presumptive characteristics, but allow the jury or trier of fact to include other characteristics where it deems it appropriate—or, to use the language of the OSC—include the ‘other similar factor’ element. Thus, the legislation would define ‘personal characteristics’ as those protected in the equality legislation ‘or any other similar factor.’ This approach is commendable as it includes an element of consistency in the law, while simultaneously avoiding the politics of assessing which characteristics should be considered protected or not by bias crime statutes. It will also provide Ashworth’s ‘normative element’ to the legislation, allowing the trier of facts to determine whether, after considering all aspects of the case, a hate crime was in fact committed, without being hamstrung by politicised and narrow categories of victims.

In Ireland, equality legislation deals with discrimination on nine grounds:

- Gender
- Civil status (i.e., marital status or civil partnership status)
- Family status
- Age

- Race
- Religion
- Disability
- Sexual orientation
- Membership of the travelling community.⁷⁸

The Equality Act 2010 in Great Britain similarly recognises the following as protected characteristics:⁷⁹

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation.⁸⁰

In this sense, the law already recognises and protects categories of individuals; it seems logical to extend the breadth of these categories to hate crimes victims. Other classes could be included where the trier of fact deems it necessary: Goths, geeks and the homeless could all be victims of hate crime using this broad definition. This approach also deals with inter-group and mixed-group hate crimes.

Admittedly, the solution proposed is not perfect. It does not, however, deal with attacks on the basis of an absence of a characteristic, such as religion. Similarly, it does not deal with individuals who are attacked due to their association with a group; an offender may well target such an individual, not because the attacker mistakes the person as a member of the group (for example, a straight woman with a gay man; a white woman with a black man), but because they are associating with that group. Further, people can belong to many difference communities, and thus have multiple identities and, as Chakraborti notes, 'be prone to multiple forms of victimization.'⁸¹

IX. DEVELOPING THE 'SIMILAR FACTOR' ELEMENT

While this approach does have merits, the Canadian experience highlights a potential problem for such a legislative development. Section 718.2(a)(i) of the Criminal Code provides that where there is evidence that an offence was motivated by bias, prejudice, or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical

disability, sexual orientation, *or any other similar factor*, that this should be considered an aggravating factor in sentencing.

Roberts and Hastings speculated on how the ‘any other similar factor’ element should be interpreted, referring to the media example of a criminal attack on a physician who was engaged in performing abortions.⁸² They first determined the ‘common element’ in the enumerated characteristics in section 718.2(a)(i), and noted that as both ascribed and choice-based factors are included, ‘the only common element is that they relate to groups or communities rather than individuals.’⁸³ Thus, they argued that the provisions in question apply where the attack is aimed at ‘an entire community’ rather than at an individual: ‘It matters little whether the community is defined by occupation belief or lifestyle.’⁸⁴ This approach seems sensible, being sufficiently broad to incorporate a Sophie Lancaster-type attack, while simultaneously limiting the application of the section to only those crimes which would truly be considered ‘hate crimes.’

In the context of the application of section 718.2(a)(i) in the Courts, there have been very few cases concerning the meaning of ‘other similar factor.’ Indeed, Lawrence and Verdun-Jones note that, with one exception, no ‘other similar factor’ has been recognised.⁸⁵ The exception they mention is in one of two related cases, *R v. JS*⁸⁶ and *R v. Cran*⁸⁷ where the Court considered whether section 718.2(a)(i) applied.⁸⁸ In the first case, the Crown had stated that there was no way of establishing that the case constituted a ‘hate crime’ for the purposes of the section. Romilly J disagreed. He stated:

It strikes me that this section contemplates hatred against ‘peeping toms’ and/or ‘voyeurs’ as being within its purview, since in my opinion such activity represents a sexual lifestyle which some may consider deviant, but it is a sexual lifestyle all the same.⁸⁹

On this reasoning, then, Romilly J believed that (deviant) sexual lifestyles were of a ‘similar’ nature to one’s (immutable) sexual orientation.⁹⁰ However, he went on to state that, as a gay man was attacked in an area frequented by gay men (a fact which was known to the defendant), ‘I fail to see why it cannot be regarded as a “gay bashing.”’ This reasoning does not sit easily with the earlier statement: On this basis, the defendant knew (or ought to have known) that the victim was gay, and that the motivation for attacking him was his homosexual orientation, rather than the fact that he was a peeping tom.

In *Cran*, the Court was faced with exactly the same facts, and the question again was whether the defendant should be subject to the enhanced penalty provisions. Humphries J first observed that the Crown did not rely

on or refer to section 718.2(a)(i) in either the instant case or either of the cases before the youth court. She observed that there was no evidence before the Court that the motive for the attack was the sexual orientation of the victim. In fact, she stated that the motive for the attack seems to have been the defendant's desire to attack 'peeping toms.' Humphries J stated, 'There is . . . no basis on the evidence before the court to equate 'peeping toms and voyeurs' to gay people in the mind of Ryan Cran in the absence of evidence and in the face of evidence to the contrary.'⁹¹

Lawrence and Verdun-Jones note that, whilst Romilly J articulated 'an analogous ground' for the application of the legislation, Humphries J applied a 'strict construction' of the language used in the section, as she was unwilling to extend the protection in the legislation to a group 'in the absence of evidence linking the group targeted by the accused to one of the groups listed in the section itself.'⁹² Neither of these approaches is particularly useful. To say that 'peeping toms' are an 'analogous group' to the gay community is both offensive and harmful to that latter community. However, to restrict the ambit of the legislation as narrowly as Humphries J did means that the section will have rather limited application.

Perhaps a more appropriate way for Humphries J to assess the question was to, first, ask if Cran attacked the victim because of his perceived membership of a group, regardless of whether that group has protected status. Second, then, the court should ask whether that group is deserving of inclusion in section 718.2(a)(i)—or to use Roberts and Hastings' approach, to determine if peeping toms constitute a community. However, determining if a group should be protected by asking if they are the same as, or even analogous to, a protected group (the 'equation' of peeping toms and gay people) is not, it is argued, an appropriate approach. Rather, once it is established that the individual was attacked due to some characteristic he or she shares with an identifiable social group, the presumption should be that the case falls within the ambit of section 718.2(a)(i).

In what could be called the 'sister' provisions to hate crimes legislation, section 15 of the Canadian Charter of Rights and Freedoms provides for the guarantee of equality and 'in particular' prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability, and the development of the 'analogous grounds' provision is useful in this context. In *Andrews v. Law Society of British Columbia*⁹³ the Court noted that the enumerated grounds applied to 'the most common and probably the most socially destructive and historically practised bases of discrimination.'⁹⁴ While of some utility, this test could be considered quite narrow: arguably, the Sophie Lancaster case might not be considered to fall within the parameters of the test. Unsurprisingly, the Supreme Court of Canada took a different approach to the test in

Miron v. Trudel.⁹⁵ Here, the Court rejected the ‘historical disadvantage’ test, and while recognising the utility of what the Court in *Andrews* said, McLachlin J stated:

[A]nalogous grounds cannot be confined to historically disadvantaged groups; if the *Charter* is to remain relevant to future generations, it must retain a capacity to recognize new grounds of discrimination. Nor is it essential that the analogous ground target a discrete and insular minority; this is belied by the inclusion of sex as a ground enumerated in s. 15(1). And while discriminatory group markers often involve immutable characteristics, they do not necessarily do so . . . All these and more may be indicators of analogous grounds, but the unifying principle is larger: the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual.⁹⁶

Thus, rather than restricting the application of section 15 to only those groups which are determined to have been the subject of historical discrimination, the development of ‘analogous grounds’ is quite open, and instead has at its heart the human rights and civil liberties of individuals.⁹⁷

While Roberts and Hastings’ early analysis is persuasive, the jurisprudence from the courts on this issue in relation to section 718.2(a)(i) is underdeveloped, and an application of the early jurisprudence in relation to section 15 would lead to a narrow interpretation of the ‘similar factor’ provision. If the approach suggested in this article is adopted, some guidance on the interpretation of ‘any other similar factor’ should be given in an interpretation section. The term could well be defined as ‘any community, social, or organised group with identifiable and shared characteristics.’ Again, this would provide for a test which places the concerns of the discipline of hate studies at its core, that is, the desire to combat the dehumanisation of the other, while simultaneously being inclusive and non-discriminatory.

X. CONCLUSION

By creating hierarchies of victims in hate crimes statutes, the criminal justice system discriminates arbitrarily between social groups. It is argued here that there is no logic in including sexual orientation as a defining characteristic, but excluding transgendered or transsexuals. The law is slow to change, and the criminal law even slower: It is a blunt instrument which should be applied with care and due regard to principles of equality and

respect for the private life of citizens. By allowing juries or triers of fact to establish if a hate crime actually occurred on a case-by-case basis, we will ensure that all victim classes are equally protected by the law, and that no hate crime will go unpunished.

AUTHOR'S NOTES

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NOTES

1. England and Wales, Scotland, Northern Ireland, Ireland, and Canada are all considered.

2. England and Wales, Scotland, Northern Ireland, Ireland, and Canada are all considered.

3. Vicky Conway, Yvonne Daly, and Jennifer Schweppe, *Irish Criminal Justice: Theory, Process and Procedure* (Clarus Press, 2010) 221. See also, Valerie Jenness, 'Hate Crimes' in Michael Tonry, *Handbook on Crime and Public Policy* (Oxford University Press, 2009).

4. Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (Sage Publications, 2009) 14.

5. Sections 2-4 of the Irish Non Fatal Offences Against the Person Act 1997.

6. Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge, 2001) 10.

7. *Ibid.*, 11.

8. Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (Sage, 2009) 6.

9. Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 12.

10. *Ibid.*

11. *Ibid.*

12. *Ibid.*

13. Ibid.

14. This is not to say that *no* hate crimes statutes emerge from an evidence-based approach to the issue: rather, that many are, and an objective approach is required in order to ensure equality of protection.

15. Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge, 2001) 10.

16. Michael Blake, 'Geeks and Monsters: Bias Crimes and Social Identity' (2001) 20(2) *Law and Philosophy* 121. He notes, 'A hate crime committed against a gay man . . . is a crime committed not in virtue of any particular aspect of the victim in question, but simply in virtue of his sexuality; for the purposes of the biased criminal, one gay man is as suitable as another . . . [He] is attacked not because of *who* [he] is, but because of *what* [he] is.' At 123-124.

17. Benjamin Bowling and Coretta Phillips *Race, Crime and Justice* (Pearson Education, 2002) 121.

18. Ryken Grattet and Valerie Jenness, 'Examining the Boundaries of Hate Crime Law: Disabilities and the "Dilemma of Difference"' in Barbara Perry (ed.), *Hate and Bias Crime: A Reader* (Routledge, 2003) 284.

19. Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge, 2001). An example of such a protected class might include people living with HIV or the AIDS virus who, in the 1980s and early 1990s may well have been seen as deserving of protection under the legislation, but are relatively less "othered" today.

20. Neil Chakraborti, 'Crimes Against the "Other": Conceptual, Operational, and Empirical Challenges for Hate Studies' (2010) 8 *Journal of Hate Studies* 9.

21. James Jacobs and Kimberly Potter, *Hate Crimes* (Oxford University Press, 1998).

22. Ibid.

23. Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge, 2001) 7-8.

24. Ryken Grattet and Valerie Jenness, 'Examining the Boundaries of Hate Crime Law: Disabilities and the "Dilemma of Difference"' in Phyllis B. Gerstenfeld and Diana R. Grant (eds.), *Crimes of Hate: Selected Readings* (Sage, 2004) 277-278.

25. James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford, 1998) 73. It would also appear that, certainly in those jurisdictions with limited victim categories, those included are not necessarily done so on the basis of any policy reasons, but rather on the basis of political judgment and lobbying. In Northern Ireland, for example, MENCAP lobbied for the inclusion of the disabled community in the 2004 Order. Most ironically from a policy perspective, in Ireland 1989 when it

was illegal to engage in consensual homosexual acts, sexual orientation was included in the categories of victims in the Prohibition of Incitement to Hatred Act 1989. Similarly, the travelling community was so included despite the refusal of the Irish government to recognise the community as a separate ethnic group.

26. Fred Dickey, 'The Definition of Hate Crimes Should Not Be Expanded' in Roman Espejo, *What is a Hate Crime* (Greenhaven, 2002) 44.

27. Nathan Hall, *Hate Crime* (Willan, 2005) 10-11.

28. James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press, 1998) 67.

29. Jon Garland, 'Difficulties in Defining Hate Crime Victimization' (2011) 18(1) *International Review of Victimology* 25.

30. See, Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 19.

31. Michael Blake, 'Geeks and Monsters: Bias Crimes and Social Identity' (2001) 20(2) *Law and Philosophy* 121, 124. Violent Crime Control and Law Enforcement Act of 1994, 42 USC §13701.

32. Michael Blake, 'Geeks and Monsters: Bias Crimes and Social Identity' (2001) 20(2) *Law and Philosophy* 121, 125.

33. *Ibid.*

34. Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 18.

35. *Ibid.*, 19.

36. Michael Blake, 'Geeks and Monsters: Bias Crimes and Social Identity' (2001) 20(2) *Law and Philosophy* 121, 125.

37. *Ibid.*

38. *Ibid.*, 134.

39. This would include groups to which the victim does not identify, such as the homeless, and groups whose only identifier is social oppression.

40. This would include, for example, African-American students who seek scholastic achievement and are subject to attack on the basis that they are 'acting white.'

41. Michael Blake, 'Geeks and Monsters: Bias Crimes and Social Identity' (2001) 20(2) *Law and Philosophy* 121, 137.

42. Neil Chakraborti, 'Crimes Against the "Other": Conceptual, Operational, and Empirical Challenges for Hate Studies' (2010) 8 *Journal of Hate Studies* 9.

43. *Ibid.*, 18.

44. *Ibid.*

45. James Jacobs and Kimberly Potter, *Hate Crimes* (Oxford University Press, 1998) 80.

46. *Ibid.*, 17.

47. Ibid.

48. Leslie R. Wolfe and Lois Copeland, 'Violence Against Women as Bias-Motivated Hate Crime: Defining the Issues in the USA' in M. Davies (ed.), *Women and Violence* (Zed Books, 1994) as quoted in Nathan Hall *Hate Crime* (Willan, 2005) 2.

49. Jon Garland, 'The Victimisation of Goths and the Boundaries of Hate Crime' in Neil Chakraborti (ed.), *Hate Crime: Concepts, Policy, Future Directions* (Willan, 2010) 41.

50. Ibid., 47.

51. Ibid., 46.

52. Ibid., 43-44.

53. Ibid., 44. (Emphasis added.)

54. Ibid., 45.

55. Garland goes on to observe that the murder of Sophie Lancaster was part of a 'distinctive nationwide pattern of victimisation of Goths.' Jon Garland, 'The Victimisation of Goths and the Boundaries of Hate Crime' in Neil Chakraborti (ed.), *Hate Crime: Concepts, Policy, Future Directions* (Willan, 2010) 47.

56. Ibid., 47.

57. Ibid., 54.

58. Originally provided for in section 82 of the Crime and Disorder 1998 Act.

59. This is provided for under section 146 where the offence was motivated by hostility on the grounds of sexual orientation or disability.

60. 'Racial group' means means a group of persons defined by reference to colour, race, nationality, or ethnic or national origins, and references to a person's racial group refer to any racial group into which he or she falls. See Art 2(5) and Art 5, Race Relations (Northern Ireland) Order 1997 (SI 1997/869, NI 6).

61. 'Religious group' means a group of persons defined by reference to a religious belief or lack of religious belief.

62. 'Sexual orientation group' means a group of persons defined by reference to sexual orientation. While transgendered persons would not usually fall within this category, the Northern Ireland Criminal Justice Inspectorate considers hate crimes against transgendered persons to fall within the ambit of the legislation. See, Criminal Justice Inspection Northern Ireland, *Hate Crime: A Follow-up Inspection of Hate Crime by the Criminal Justice System in Northern Ireland* (July 2010).

63. Disability for the purposes of the legislation means any physical or mental impairment, Art 2(5).

64. The Act was quite progressive for its time, but contains some alarming internal inconsistencies in light of the political and legal situation

at the time and even now. For example, when the Act was passed, it was still a criminal offence for gay men (though not lesbians) to engage in consensual sexual behaviour. It was not until 1994 that this situation was rectified in the Criminal Law (Sexual Offences) Act 1993, following an unsuccessful challenge to the legislation in the Irish Supreme Court in *Norris v. Attorney General* [1983] IESC 3 and a successful application to the European Court of Human Rights in *Norris v. Ireland* 10581/83 (1988). Members of the travelling community, a traditionally marginalised group in Ireland, are protected by the legislation, but despite constant calls from the international community, they are still not recognised by the State as a distinct ethnic group. See for example, Committee of the Elimination of All Forms of Racial Discrimination *Concluding Observations: Ireland* (CERD/C/IRL/CO/3-4, 2011).

65. Unreported Court of Criminal Appeal 1 November 2004 Hardiman J (ex tempore). For further details, see Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia with the Criminal Law* (NCCRI, 2008) 108-110.

66. In *DPP v. O'Driscoll and Moore*, the defendants were charged with assault causing harm, but also charged under section 2 of the Prohibition of Incitement to Hatred Act 1989. Here, the defendants made racist remarks towards the victim during the course of the assault and after the assault in the presence of An Garda Síochána (the police force). Here, the court sentenced the defendants on the more serious count of assault, with the 1989 prosecution being 'taken into account.' Thus, while hate *speech* is criminalised in Ireland, the Courts did not take the opportunity to declare a hate *motivation* an aggravating factor in sentencing, despite the clear evidence presented in the case that the offence was motivated by hate. For further details, as well as an examination of the merits of introducing 'hate crimes' legislation in Ireland, see Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia with the Criminal Law* (NCCRI, 2008); Séamus Taylor, *Responding to Racist Incidents and Racist Crimes in Ireland* (Equality Authority, 2011).

67. http://www.osce.org/documents/odihhr/2006/10/21496_en.pdf.

68. James Jacobs and Kimberly Potter, *Hate Crimes* (Oxford University Press, 1998) 18.

69. Nathan Hall, *Hate Crime* (Willan, 2005) 11.

70. See, Ryken Grattet and Valerie Jenness, 'Examining the Boundaries of Hate Crime Law: Disabilities and the "Dilemma of Difference"' in Phyllis B. Gerstenfeld and Diana R. Grant (eds.), *Crimes of Hate: Selected Readings* (Sage, 2004).

71. *Ibid.*, 273.

72. The defence of provocation was abolished by section 56 of the

Coroners and Justice Act 2009 and replaced with the partial defence to murder of ‘Loss of Control’ in section 54 of the Act. However, the discussion on the development of the defence, and some of its criticisms are relevant in this context.

73. *DPP v. Camplin* [1978] AC 705, 718. The Irish test for provocation is a purely subjective one: see, *DPP v. MacEoin* [1978] IR 27; *DPP v. Curran* [2011] IECCA 95.

74. See, Law Reform Commission, *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP27, 2003); Law Reform Commission, *Report on the Defences in Criminal Law* (LRC 95, 2009).

75. *R v. Smith* [2001] 1AC 146. The ratio of the case has since been rejected, but the statement remains compelling in this context.

76. *Ibid.*, 166.

77. Andrew Ashworth, *Principles of Criminal Law* (6th ed., Oxford University Press, 2009) 256.

78. The Employment Equality Acts 1998-2011 and Equal Status Acts 2000-2011.

79. The Act does not extend to Northern Ireland.

80. Interestingly, the strategy states that it ‘sets out a new approach to delivering equality, moving away from the identity politics of the past and to an approach that recognises people’s individuality.’ See, <http://www.homeoffice.gov.uk/publications/equalities/equality-strategy-publications/equality-strategy/equality-strategy?view=binary>.

81. Neil Chakraborti, ‘Crimes Against the “Other”: Conceptual, Operational, and Empirical Challenges for Hate Studies’ (2010) 8 *Journal of Hate Studies* 9, 24.

82. Julian V. Roberts and Andrew J.A. Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ [2001-2002] 27 *Queen’s Law Journal* 93.

83. *Ibid.*, 123.

84. *Ibid.* They ultimately argue that section 718.2(a)(1) should apply in the context of the attack against the doctor, as the attack was ‘directed at the group of physicians’ and thus carries ‘a threat to other individuals.’ *Ibid.*, 124.

85. Michelle S. Lawrence and Simon N. Verdun-Jones, ‘Sentencing Hate: An Examination of the Application of s. 718.2(a)(i) of the *Criminal Code* on the Sentencing of Hate Motivated Offences’ (2011) 57 *Criminal Law Quarterly* 28. I am indebted to Professor Simon Verdun-Jones at South Fraser University for sending me the article.

86. [2003] BCPC 442.

87. [2005] BCSC 171. See also, Sean Robertson, ‘Spaces of Exception in

Canadian Hate Crimes Legislation: Accounting for the Effects of Sexuality-Based Aggravation in *R. v. Cran*' (2005) 50 *Criminal Law Quarterly* 482.

88. In one further case, *R v. Cornakovic* [2004] OF No 4081; 67 WCB (2d) 340, the Court stated that an 'abiding bias or prejudice against Judges' was 'closely allied to the aggravating factor identified in section 718.2(a)(i) of the Criminal Code.' However, the Court did not elaborate on why it believed this to be the case, nor does it appear to have taken this prejudice into account in the actual sentencing of the defendant.

89. [2003] BCPC 442, para 50.

90. Arguably, on this basis, paedophiles would similarly be protected by the legislation.

91. *Ibid.*, para 10.

92. Michelle S Lawrence and Simon N Verdun-Jones, 'Sentencing Hate: An Examination of the Application of s. 718.2(a)(i) of the *Criminal Code* on the Sentencing of Hate Motivated Offences' (2011) 57 *Criminal Law Quarterly* 28, 37.

93. [1989] 1 SCR 143.

94. *Ibid.*, 175. In determining which 'analogous' grounds should be protected, the Court referred to the judgment of Huggessan JA in *Smith, Kline and French Laboratories v. Canada (Attorney General)* [1987] 2 FC 359. Here, the Court stated that, in determining whether discrimination is based on analogous grounds, the question was whether the group was stereotyped, or the subject of historical disadvantage.

95. [1995] 2 SCR 418.

96. *Ibid.*, para 149.

97. Analogous or non-enumerated grounds of discrimination have been found to exist in the context of citizenship, employment status, place of prosecution, litigants against the Crown, residency, membership in military, parental status, sexual orientation, marital status, and immigrant status. See, Mary C. Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions* (BP-402E, Library of Parliament, 2007) 17-31.