



**WHEN LAW AND HATE COLLIDE**

**LITERATURE REVIEW:**

**PARTS ONE AND TWO**

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*The Daphne III programme aims to contribute to the protection of children, young people and women against all forms of violence and attain a high level of health protection, well-being and social cohesion.*

*Its specific objective is to contribute to the prevention of, and the fight against all forms of violence occurring in the public or the private domain, including sexual exploitation and trafficking of human beings.*

*It aims to take preventive measures and provide support and protection for victims and groups at risk.*

## LITERATURE REVIEW

### Part One: the Emergence of hate crime as a topic for State intervention

The concept of hate crime and subsequent legislation has not entered the social and legal psyche without debate and criticism. A sample of critiques is given below, arranged thematically. Clearly, hate crime legislation singles out some but not all groups for special protections not afforded to others, although literature has tended to focus upon the concept of hate crime, rather than explaining or critiquing the categories.

Hurd critiques hate crime legislation on the grounds that ‘if hatred and bias are construed as *mens rea* elements, then they are alien to traditional criminal law principles.’<sup>1</sup> The often highly subjective nature of interpreting motivation is a particular focus for many critics, and a cause of concern for legislators. Gadd compares the complications caused by this subjectivity to those experienced in many US jurisdictions, which have a longer history of ‘hate crime’ legislation, where ‘The defendant’s ‘bias’ against an outgroup is often taken as sufficient evidence of the ‘animus’ required to secure a conviction for ‘hate crime’- an outcome that some socio-legal scholars have deemed socially divisive and unconstitutional.’<sup>2</sup> Cornides considers whether it is possible that the ‘awareness-raising’ aspects of anti-discrimination policies ‘rather than providing a cure bring a new illness to society: generalized hypochondria...’<sup>3</sup>

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<sup>1</sup> H.Hurd, ‘Why liberals should hate " hate crime legislation", *Law and Philosophy* 2001, 20 (2) 215-232, p215.

<sup>2</sup> D. Gadd, ‘Aggravating Racism and Elusive Motivation’, 2009, *Brit.j.Criminol*, 49, pp755-771, p.757

<sup>3</sup> J.Cornides, ‘Three case studies on anti-discrimination’ *European Journal of International Studies* 2012, pp.1-19,p.1.

## Reasons for introduction of legislation

In much of Europe, historical work claims that although the term ‘hate crime’ has become politically and legally evident only in the last decade, acts now identified as such have long existed and have either been seen as legitimate, or covered by developing legislation, including human rights. In the UK, evidence of historic discrimination abounds, and, as cited by Lawrence<sup>4</sup>, the most commonly quoted in UK literature being the massacre of the Jews in London and York in 1189, and their expulsion from England in 1290 (16,000 left England). As Lawrence, states, however, these events did not dominate the political or legal language. Historic and more recent work cites a rise in ethnic tensions following an increase in immigration as ‘... placing incitement to racial hatred in a class of its own’.

Regarding legal change, many focus upon reports. Lawrence argues that the Joint Committee Against Racism 1981 which reported on racial violence to the Home Secretary, may have marked the starting point of British Bias Crime Law. Similarly, Gadd argues that the Home Office publication *Racial Attacks* is ‘a noteworthy starting point ... (in) the history of criminological research on racially motivated crime...’<sup>5</sup> Iganski argues that ‘the consistent rise in the number of racist incidents reported to the police in England and Wales across the 1990s’ was the impetus for legislation. Iganski uncritically takes such reports as indicative of rising occurrence, stating that the report revealed ‘a far greater number of racist incidents.’<sup>6</sup>

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<sup>4</sup> F.M.Lawrence, ‘The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes’ [1994] Vol.93, *Michigan Law Review*, 320-381.

<sup>5</sup> Gadd, loc cit., p.755

<sup>6</sup> P.Iganski, ‘Legislating against hate: outlawing racism and anti-Semitism in Britain’, *Critical Social Policy* 58, 1999. P130. See also N .Aye Maung and C. Mirrlees-Black, *Racially Motivated Crime: a British Crime Survey Analysis*, 1994, London, Home Office, A.Perry, ‘Ethnicity and Victimization: Findings from the 1996 British Crime Survey’, *Home Office Statistical Bulletin* 6/98 London Home Office 1998, S.Virdee, ‘Racial harassment’ in T.Modood, R.Berthoud, J.Lakey, J.Nazroo, P.Smith.S.Virdee and S.Beishon (eds) *Ethnic Minorities in Britain: Diversity and Disadvantage*. London Policy Studies Institute. 1997.

Equally, the 1993 Commission of the European Communities reported an escalation of racist attacks throughout European countries in the 1980s and 1990s<sup>7</sup> and for many this is seen to be the policy impetus for the European community, as evidenced in the Kahn commission, (European parliament 1995), which advocated ‘a clear prohibition on incitement to racial hatred should be explicitly and unequivocally included in the criminal law...the law should provide for the prohibition of demonstrations, publications and other expressions of opinion which incite racial hatred.’<sup>8</sup>. The Kahn commission did not advocate a special offence of racially motivated violence, but recommended penalty enhancement (as introduced in the UK through part 1 Criminal Justice Act 1991 sections 3(3) and 7(1)1).

Much academic work, for example Chakraborti, link specific incidents to reports as the impetus for the introduction of hate crime legislation, citing in the UK the murder of Stephen Lawrence in 1993 and the subsequent publication of the Macpherson report in 1999, stating that since these ‘the prioritization of hate crime in the UK has gained pace...’<sup>9</sup>. The Macpherson Report stated that ‘institutionalised racism’ existed in the British Law Enforcement system. Iganski also cites the reaction to the murder of Stephen Lawrence, but sees this as evidence of ‘abhorrence against violence and other incidents motivated by racism and anti-Semitism... (with) a broad consensual support for legislation...’<sup>10</sup>. Iganski sees three main objectives for including racially aggravated crime legislation in the 1998 Crime and Disorder Act: the ‘deterrent effect’; the promotion of social cohesion; to provide the impetus for a more effective response to incidents.<sup>11</sup>

However, other work has critiqued the collection and interpretation of statistics. Work by Cornides raises the possibility that a rise in the report of incidents may reflect changing

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<sup>7</sup> Commission of the European Communities 1993.

<sup>8</sup> European Parliament 1995:49 as quoted in Iganski ‘legislating against hate p.133.

<sup>9</sup> N.Chakraborti, ‘Crimes against the ‘Other’: Conceptual, Operational, and Empirical Challenges for Hate Studies’, *Journal of Hate Studies* 2010 vol. 8-9, pp9-28. The Macpherson report – report of a public enquiry into the flawed police investigation into the racist murder of Stephen Lawrence. The Report made 70+ recommendations to improve the policing of race and diversity and improve public relations with minority ethnic communities..

<sup>10</sup> Iganski loc cit., p130

<sup>11</sup> Iganski ibid.

definitions of ‘incidents’ or greater awareness and self-perception, particularly if a government promotes ‘awareness raising’ initiatives. Cornides refers to the *Special Eurobarometer 317 discrimination in the EU in 2009*, which appeared to show that Sweden experienced the highest levels of discrimination, with 48% of respondents stating they had witnessed discrimination, with Turkey at the lower end, with 18%. Such figures, as Cornides state ‘seem to defy common wisdom’.<sup>12</sup>

Other work has suggested that international concerns influence the creation of legislation. Hare, for example, relates the introduction of racially aggravated offences to the Crime and Disorder Act 1998 (c37 in the UK), via the Anti –terrorism, Crime and Security Act 2001(c24) to the aftermath of the September 11 2001 attack in the US.<sup>13</sup> Hare cites the fact that the Human Rights Committee made recommendations to the UK in November 2001, ‘in the light of the increase in hostility towards Muslims since September 11 2001’<sup>14</sup> However, as the literature argues, there will clearly be significant differences between and within groups identified as requiring legislation, dependent upon historic and geographical location.

Regarding the Lesbian, gay, transgender communities, McGhee notes, ‘there are certain key elements of the LGBT groups that make it a unique community, for example, stigma, prejudice, legal inequality, a history of oppression...’<sup>15</sup> Any attempt to chart historical developments in anti-discrimination and hate crime legislation regarding LGBT must be aware of the above. In the rhetoric of campaigners, and particularly those of gay rights, (but not necessarily of academic critique), unlike racial or religious developments, there does not appear to be the impetus of social disintegration or fear of terrorism or radicalisation leading to changes in the law.

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<sup>12</sup> J.Cornides, ‘Three case studies on anti-discrimination’ [2012] *European Journal of International Studies*, 1-19.

<sup>13</sup> I.Hare, ‘Crosses, crescents and sacred cows: criminalising incitement to religious hatred.’ [2006] *Public Law Aut*, 521-538.

<sup>14</sup> Concluding Observation of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (November 5,2001) CCPR/CO/73/UK, CCPR/CO/73/UKPT,para.14

<sup>15</sup> D.McGhee, ‘Joined-Up Government, ‘Community Safety’ and Lesbian, Gay, Bisexual and Transgender ‘Active Citizens’, 2003 *Critical Social Policy* 23:345. p. 368

For gay rights campaigners, developments, including the introduction of bias crime legislation, are promoted as the result of emphases upon equal rights, human rights, and in particular through lobbying or supporting cases or challenges to the European Court of Human Rights. Stonewall, for example, highlights specific restrictive legislation, dating from the criminalisation of homosexuality in the common law in 1290,<sup>16</sup> through various further acts such as the Buggery Act 1533 punishable by hanging, the 1885 Labouchere amendment ( s11 Criminal La Amendment Act) creating the offence of ‘gross indecency’ and therefore defined by Stonewall as the first specifically anti-homosexual Act’. Stonewall also cite the decriminalisation of homosexuality in 1982, (1992 in the Isle of Man), and the 1993 challenge to the European Court of Human Rights on the Age of consent via the case of *Ralph Wilde, Hugo Greenhalgh and William Parry v UK.*,<sup>17</sup> and the case of *Euan Sutherland v UK* <sup>18</sup> in 1994. The latter ultimately led to the Sexual Offences (Amendment) Act of 2000 (in force January 2001), which equalised the age of consent for consenting homosexual males to that of heterosexual couples.

The European Court of Human Rights Report of 1997 agreed that a UK court action against Sutherland would have breached Article 8 of the European Convention on Human Rights (right to respect for family life), and Article 14 ‘freedom from discrimination’. Stonewall cite the UK government 2004 White paper ‘Fairness for All: a new commission for equality and human rights’, which covered all areas of inequality in terms of race, gender, disability, sexual orientation, age and religion.

The impact of European involvement is promoted in Gay rights actions and literature, especially since the late 1990s, but particularly into the 21st century. In 1997 the International Lesbian Gay, Bisexual, Trans and Intersex Association obtained participative status at the

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<sup>16</sup> See also, survey of English law produced in the Court of Edward I in 1290: *Fleta, Seu Commentarius Juris Anglicani* (ed. and tr. H.G. Richardson and G.O. Sayles, London, Quaritch 1955). See also Human Rights Watch op cit 13.

<sup>17</sup> *Ralph Wilde, Hugo Greenhalgh and William Parry v UK* 22382/93 [1995] ECHR 109

<sup>18</sup> *Sutherland v UK* (25186/94)

Council of Europe, and currently receives its largest funding from the European Commission. In 2001 Stonewall and the International Lesbian Gay, Bisexual, Transgender and Intersex Association produced the first survey of lesbian and gay rights for the European commission. In 2006 ILGA –Europe obtained consultative status at the Economic and Social Council of the United Nations (ECOSOC) and was therefore able to advocate for equality and human rights of LGBTI people at the UN level.

In academic discussion for example that of Kirby,<sup>19</sup> restrictions and lack of recognition of gay rights (and bias crimes) was a reflection of patriarchal society, where sexuality was seen as a threat to the social order.<sup>20</sup> In the UK, the commission to the Wolfenden Report mentioned social order, since it recommended modification of homosexual offences, removing adult consensual conduct from the ambit of the criminal law: ‘Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.’<sup>21</sup>

McGhee also places the development of legislation within a ‘social and political context of ‘participatory democracy’ and participatory or ‘community policing’ agenda.’<sup>22</sup> Focusing upon the UK, McGhee links developments in the post 1990 era to concerns over political apathy, cultural polarization and social detachment, and consequently having an adverse effect on the confidence in government and the police. In contrast to earlier policies, when homosexuality was criminalised and driven ‘underground’, the more recent policy is one of improving communication between this community and the police. Local government was to

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<sup>19</sup> Kirby, *The Sodomy Law: England’s Least Lovely Criminal Law Export?*, JCCL, 2011:

<http://www.acclawyers.org/2011/05/20/jccl-article-the-sodomy-offence-englands-least-lovely-criminal-law-export/>

<sup>20</sup> See Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, New York, December, 2008.

<sup>21</sup> Committee on Homosexual Offences and Prostitution, 1957. *Report of the Committee on Homosexual Offences and Prostitution*. London: Her Majesty’s Stationery Office. Reprinted 1963 as *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution*. New York: Stein and Day, 187-188.

<sup>22</sup> McGhee loc cit., p.348.

be ‘coordinative and facilitative’ rather than ‘directive and distributive’,<sup>23</sup> Citizens were to be ‘sources of relevant knowledge’<sup>24</sup> and ‘empowered citizen’.<sup>25</sup> McGhee places responses to hate crime and homophobic and transphobic incidents within such a context. He cites the Home Office Morgan Report 1991, which highlighted the limitations of a police-driven approach to crime prevention, and that the term ‘community safety’ would encourage greater participation from all sections of the community.<sup>26</sup> Local authority was the arena in which co-ordination and collaboration would take place, and these were written into the 1998 Crime and Disorder Act, which required ‘...local authorities, the police and other bodies to come together to develop strategies for tackling crime and disorder’.<sup>27</sup>

For Chandler the discourse of ‘problems of social cohesion’ lies behind emphases upon community safety.<sup>28</sup> Current EU legislation similarly focuses upon labelling bias crime offences as ‘public order offences’. McGhee places emphasis upon ‘social well-being’: social cohesion is to be achieved through civility and self-control. Homophobes, particularly those who undertake verbal, physical abuse or vandalism are conceptualised as ‘a problem for social or community cohesion’.<sup>29</sup> For McGhee, the driver for legislation and intervention lies less in the interest of equal rights and human rights, but in the issue of social cohesion, in contrast to the rhetoric of LGBT promoters. McGhee cites Hampshire Constabulary, who state that hate crimes or incidents:

‘are a powerful poison to society. It emphasizes and sensitizes feelings of difference rather than focusing on what is shared in common. It breeds suspicion, mistrust,

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<sup>23</sup> M. Dean, *Governmentality: Power and Rule in Modern Society*, (Sage, London, 1999)

<sup>24</sup> J. Young, *The Exclusive Society*, (Sage, London 1999)

<sup>25</sup> S. Thompson & P. Hoggett, ‘The Emotional Dynamics of Deliberative Democracy’, *Policy and Politics* 29(1):351-64, p354.

<sup>26</sup> D. McGhee, ‘Home Office, *Safer Communities: The Local Delivery of Crime Prevention through the Partnership Approach*’, (Home Office, London 1991)

<sup>27</sup> Department of the Environment, Transport and the Regions, *Modernising Local Government: Local Democracy and Community Leadership*. DETR London 1998.

<sup>28</sup> D. Chandler, ‘Active Citizenship and the Therapeutic State: The Role of Democratic Participation in Local Government Reform’, [2001] *Policy & Politics* 29(1) 3-14, p. 4.

<sup>29</sup> McGhee, loc cit., p.351.

alienation and fear. It promotes isolation, introversion and exclusion and sets up barriers to communication.<sup>30</sup>

McGhee, focusing upon the UK, states that it is now the homophobic and transphobic who are seen as 'deviant' and a threat to social cohesion. However, in practice, there remains a disparity in community representation, and McGhee reveals that it is highly motivated and well organised gay men who overwhelmingly represent the LGBT community in any initiatives. Similarly, in more metropolitan settings, 'political professionals in the form of 'freelance consultants' on community discrimination issues dominate advisory groups.<sup>31</sup>

Despite the above linking lesbian, gay, bisexual and transgender communities together, there are significant differences, as academic work argues. As Chakraborti notes, homophobia and transphobia have historically been considered together, and only within the last decade has the latter been considered in its own right. Hill and Willoughby state that

[transphobia entails] emotional disgust toward individuals who do not conform to society's gender expectations; [and transphobia] involves the feeling of revulsion to masculine women, feminine men, cross dressers, transgenderists, and/or transsexuals. Transphobia manifests itself in the fear that personal acquaintances may be trans or disgust upon encountering a trans person...the 'phobia' suffix is used to imply an irrational fear or hatred, one that is at least partly perpetuated by cultural ideology.<sup>32</sup>

Similar to the gay movement, however, it is argued by activists that developments have been encouraged or developed through case studies in court. Indeed, Whittle et al argue that , 'every legal gain made by the UK trans community has been through the courts rather than through the good will of a government pledged to equalities for all.'<sup>33</sup> Spalek argues that legislation currently does not address the perceived differences nor the intersection of different facets of identity; sexuality, age, disability, ethnicity.<sup>34</sup>

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<sup>30</sup> Hampshire Constabulary, *Policing Our Communities: A Practical Guide*. (Hampshire Constabulary, Hampshire, 2000)

<sup>31</sup> McGhee, loc cit., p.362.

<sup>32</sup> D.B.Hill & B.L.B Willoughby, 'The Development and Validation of the Genderism and Transphobia Scale' in *Sex Roles*, 2005, 53 (7/8):531-544 at 533-534

<sup>33</sup> S.Whittle, L.Turner, and M.Alami, *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination* ( 2007, Cavendish Publishing, London) 10

<sup>34</sup> B.Spalek, *Communities, Identities and Crime*, (The Policy Press, Bristol, 2008) L.J.Moran and A.N Sharpe, 'Violence, identity and policing : the case of violence against transgender people', *Criminal Justice*, 4 (4)395-417, p.400.

For many, gender was seen as ‘central to the perpetration of homophobic and transphobic violence. Bornstein defines this as ‘gender defender’ concept, perpetuating ‘the violence of male privilege and all its social extensions.’<sup>35</sup> Perry and Halberstam also focus upon an ‘aggressive heterosexual masculinity’.<sup>36</sup> Stanko sees domestic, racist and homophobic violence to have ‘sufficient commonalities for them to be grouped together, not as ‘hate crimes’ per se.<sup>37</sup> Stanko prefers the term ‘targeted violence’ in place of hate crime, to emphasise the perceived vulnerability of recipients, and thus he highlights commonality, and indeed historical, social and economic legacies of marginalisation. For some, for example Goodey,<sup>38</sup> this includes victims of domestic violence, both males and females.

Regarding disability, Quarmby, a renowned journalist concentrating on disability, reviewed 50 disability related crimes in the 2000s, and noted they were not identified as ‘hate crimes’.<sup>39</sup> She considers that the reason may be that offences against disabled people in the UK can be punishable by enhanced sentencing via the Sentences guidelines Council advice 2004:5 for crimes against vulnerable groups. S146 requires proof of evidence of the acts, and of motivation, and may prove a more difficult route to utilise. However, Quarmby argues that this limits the number of recorded hate crimes against the disabled.

Similarly, perceptions of hate crime as ‘stranger danger’ many argue,<sup>40</sup> has particular difficulties for assessing hate crime and the disabled, for many perpetrators are known to the victims and can include carers, and people who ‘befriend’ the victim.<sup>41</sup> Quarmby similarly suggests a reluctance to believe the disabled can be victims of hate crime, leading to under

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<sup>35</sup> K. Bornstein, ‘Gender Terror, Gender Rage’ in S. Stryker and S. Whittle eds., *The Transgender Studies Reader* (Routledge, New York, 2006, pp236-243) p.237

<sup>36</sup> B. Perry, *In the Name of Hate: Understanding Hate Crimes*, (Routledge, London, 2001), J. Halberstam, *In a queer place: transgender bodies, subcultural lives* (New York University Press, New York, 2005)

<sup>37</sup> E. A. Stanko, ‘Re-Conceptualising the Policy of Hatred: Confessions and Worrying Dilemmas of a Consultant’, *Law and Critique*, 12 (3) 2001, 309-329

<sup>38</sup> J. Goodey, *Victims and Victimology: Research, Policy and Practice*, (Pearson, Harlow, 2005)

<sup>39</sup> K. Quarmby *Getting Away With Murder: Disabled People’s Experiences of Hate Crime in the UK*. (Scope. London 2008)24

<sup>40</sup> M. Sherry, *Don’t Ask, Tell or Respond; Silent Acceptance of Disability Hate Crimes* (Berkeley, CA, Univ. of California at Berkeley, 2003)

<sup>41</sup> M. Sherry *Disability Hate Crimes: Does Anyone Really hate Disabled People?* (Ashgate London, 1966 reprinted 2011.)

prioritisation and collation of hate crime data. Cornides focused upon employment and discrimination, but his argument is relevant when considering any legislation that,

‘Rather than at the moment of their adoption, the true impact and meaning of new laws is often better understood when law courts start applying them. This is particularly true of the EU directives that have been adopted to promote ‘equality’ and ‘nondiscrimination’, and the legislative measures taken by Member States to transpose and implement them. Indeed, ‘the fight against discrimination’ has become a major agenda point for EU legislation in recent years, which in turn suggests that ‘discrimination’ may be the most pressing problem of contemporary society.’<sup>42</sup>

### **Identification of bias crimes.**

The recent work by Chakraborti and Garland argues for ‘vulnerability’ to be used as a way of categorising bias crimes.<sup>43</sup> Indeed, Chakraborti and Garland state that ‘vulnerability and ‘difference’ rather than identity and group membership alone, should be central to investigations of hate crime...’<sup>44</sup> However, others argue that a focus upon ‘vulnerability’ has led to under recognition of bias crimes. In his 2013 article, Mark Austin Walters considered the case of a group of Asian Muslim men who were convicted of a number of sexual offences against young white girls.<sup>45</sup>

Walters argued that the case should have been prosecuted as ‘hate crimes’, for, using s 28 of the Crime and Disorder Act 1998 and s145 of the UK Criminal Justice Act 2003 the authorities could have pursued the gang’s actions ‘...not only as sexual offences but as offences aggravated by racial and religious ‘hostility’. Walters argued that the authorities did not consider ‘prejudice’ and the case was not so prosecuted because of a narrow construction of hate crime, and they: ‘...failed to acknowledge the symbiotic relationship that existed

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<sup>42</sup> Cornides, loc cit., p.1

<sup>43</sup> N.Chakraborti and Garland, ‘Reconceptualizing hate crime victimization through the lens of vulnerability and ‘difference’, *Theoretical Criminology*, 0(0), 1-16 2012

<sup>44</sup> Ibid.,p1.

<sup>45</sup> M A. Walters, ‘Why the Rochdale Gang should have been sentenced as ‘hate crime’ offenders’. *Crim Law Review* 2013.

between the perceived vulnerability of the victims and the intersecting hostilities that such vulnerabilities gave rise to.’<sup>46</sup>

Chakraborti and Garland argue for giving perceived vulnerability and ‘difference’ ‘a more prominent position within hate crime frameworks.’ They state that this would ‘focus upon factors that unite victims of hate crime’.<sup>47</sup> Similarly they argue that vulnerability and difference would highlight the intersectionality of victimisation. They note that currently, only Germany and Bulgaria have explicit legislative measures addressing multiple or intersectional forms of discrimination, and this relates to anti-discrimination, not to bias crime legislation.<sup>48</sup> However, there is increasing interest in considering multiple and intersectional forms of discrimination, (and presumably victimisation).<sup>49</sup> As Chakraborti et al argue, categories are social constructs and vary widely throughout the EU: ‘social position or health status’ (Croatia), ideology (Spain): one could also add ‘age’ or ‘sex’ (Lithuania).

## **Disability**

Scope argues that many disability related crimes, are described as ‘... sadistic conduct on an extremely vulnerable victim’ with no acknowledgement of disability bias. ‘Scope’ stated that failing to acknowledge disability bias, “... sends out completely the wrong message about how crimes against disabled people are treated. It certainly does not reflect the seriousness...” Failure to do so, ‘...is an unpleasant reminder of the low value often attached to disabled people’s lives in our society and the continuing failure of our criminal justice

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<sup>46</sup> Ibid.1.

<sup>47</sup> The elderly, those with mental health issues or drug or dependency, members of subcultures such as Goths, sex workers, foreign national, refugees, asylum seekers, migrant workers, or overseas students. Many of these could actually be covered by existing hate crime legislation – eg., disability, race.

<sup>48</sup> 2010 country Reports (State of Affairs 1 January 2011), European Network of Legal Experts in the Non-Discrimination field (on the grounds of Racial or Ethnic Origin, Religion or Belief, Disability, Age and Sexual Orientation.) *European Anti Discrimination Law Review*, Nov 13 2011.

[http://ec.europa.eu/justice/discrimination/files/antidiscrimination\\_lawreview13\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/antidiscrimination_lawreview13_en.pdf).

<sup>49</sup> Ibid.

system to tackle this.”<sup>50</sup> As case law illustrates, bias crimes against the disabled are often particularly intended to humiliate: those against females to involve a sexual element and or violence; those involving sexual orientation to often involve extreme violence. This suggests something more than perceived ‘vulnerability’ is involved. However, as Roulstone argues, ‘vulnerability’ is often perceived to be the reason for the crime.<sup>51</sup> Resistance to perceptions of vulnerability has been seen by some as inherently disablist when connected with disability hate crime.<sup>52</sup>

### **Gender and bias.**

Regarding female victims of crime Hilary McCollum has argued that victims do not necessarily recognise themselves as such if they know the perpetrator. McCollum links this to the use of the word ‘hate’ which she argues ‘can feel too big a word, especially for crimes committed by people known to the victim.’<sup>53</sup> Collum doubts that defining violence against women and girls as hate crime would help its victims access services and redress’, and partly this is due to the difficulty of the term. Christa Reiser also considers the socio-cultural norms, socialization, class and age differences as factors that may help to explain why both males and females may fail to acknowledge the potential of bias within the act committed.<sup>54</sup> Reiser considers self-esteem, traditional gender roles and attitudes, adversarial attitudes towards women, sexual abuse and belief in rape myths as influential in hostility towards females.<sup>55</sup>

Mason focuses upon ‘grooming’ and notes that this can occur over an extended period, is often not random, nor involving those unknown to the victim. The image of a typical hate crime perpetrator as unknown to the victim is a fallacy, and nor are most crimes random acts,

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<sup>50</sup> K.Quarmby 2008 op cit, 24.

<sup>51</sup> A.Roulstone, *Vulnerable to Misinterpretation: Disabled People, ‘Vulnerability’, Hate Crime and the Fight for Legal Recognition*. In: *Disability, Hate Crime and Violence*. (Routledge Advances in Disability Studies. Routledge, Abingdon, 2012)

<sup>52</sup> Ibid; K. Quarmby 2011 op cit.,

<sup>53</sup> Hilary McCollum, op cit

<sup>54</sup> C.Reiser, op cit

<sup>55</sup> Ibid.,

although these stereotypes continue to affect perceptions of crimes.<sup>56</sup> In her 2003 article, Jenness describes the 2002 televised press conference in which the US Justice Department announced they had invoked the federal hate crimes statute for the first time to charge (an) alleged murderer with hate crime because ‘Criminal acts of hate run counter to what is best in America ,our belief in equality and freedom’...we will pursue, prosecute ,and punish those who attack law-abiding Americans out of hatred for who they are.’ Jenness describes this as the ‘first federal prosecution of hate crime based on gender,’ but also that ‘evidence suggests the ‘source of hatred’ is twofold: sexuality and gender.’ Chakraborti similarly argues for hate crime to be ‘attuned to the intersectional nature of identity...harassment of lesbians may be caused by homophobia and misogyny.’<sup>57</sup>

However, Jenness notes that the inclusion was not unanimously accepted, with the Anti-Defamation League arguing that ‘although gender –related crime represents a serious threat to society...it is a distinct type of victimisation ... (and should not be addressed as a bias crime.’<sup>58</sup> In contrast, there is the argument that all gender-related crimes should be considered capable of being bias crimes: ‘Advocates for women victimized by violence contend that ...at least some degree of hatred, hostility, or disrespect for all women... (is present).<sup>59</sup> However, Jenness notes that, in the US:

‘when law enforcement personnel attempt to enforce gender provisions in hate crime law, they do so with added complications. For example, in Massachusetts the Attorney General has instituted a policy whereby gender-based hate crimes require at least two previous restraining orders issued to protect two different domestic partners.’<sup>60</sup>

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<sup>56</sup> G.Mason, ‘Hate Crime and the Image of the Stranger’ (2005) *Brit.J.criminol*, 837

<sup>57</sup> N.Chakraborti and Garland, ‘Reconceptualizing, loc cit.,

<sup>58</sup> Katherine Chen, ‘Including Gender in Bias Crime Statutes:Feminist and Evolutionary Perspectives’, 3, *Wm & Mary J. Women* & 1.277 (1997) <http://scholarship.law.wm.edu/wmjowl/vol3/iss1/13>,P.278

<sup>59</sup> Jack O’Malley A Prosecutor’s Guide to Hate Crimes, VIII 12-13 (1994) citing Lois Copeland and Leslie Wolfe, *Violence Against Women as Bias-Motivated Hate Crime: Defining the Issues*, Centre for Women, Pol’y studies (1991)

<sup>60</sup> Jenness, loc cit., 87.

McCollum argued for re-politicising hate crimes as crimes of domination. She emphasized ‘understanding of violence against women and girls as a continuum of behaviours, rooted in a culture of misogyny and motivated by power.’<sup>61</sup>

### **Historic Oppression.**

Many argue that bias crimes relate to historically oppressed groups.<sup>62</sup> According to O’Malley, crimes against historically oppressed groups are akin to ‘acts of terrorism in which the perpetrator seeks to impose a social order that continues the oppression of the particular group.’<sup>63</sup> Barbara Perry argues that hate crime is rooted in societal oppression, and crimes often emerge when ‘others’ transgress their ‘proper’ subordinate position.<sup>64</sup> Typically such acts are committed either by individuals or by small groups.<sup>65</sup> McCollum argues that ‘without a full consideration and integration of power relations... ‘hate crimes can be depoliticised as motivated by irrational prejudice, rather than domination, exclusion and control’. Academic and legal articles on discrimination often cite historic tensions behind legislation and bias crimes, particularly if mainland European based.<sup>66</sup>

### **The Media.**

Dixon and Gadd consider the media within their 2006 article, and note that legislation to promote social cohesion, and the Bias laws are often claimed to promote this, compete with alternative imagery and text within the media.<sup>67</sup> Theoretical insights from many disciplines

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<sup>61</sup> H.McCollum, loc cit.,

<sup>62</sup> Chakraborti and Garland relate this conceptual definition to civil rights struggles in the 1960s and 1970s USA. Reconceptualizing, loc it., p.2.

<sup>63</sup> O’Malley, loc cit.,

<sup>64</sup> B. Perry, *Hate Crimes Vol.2* (Praeger publishers, 2009). See also J.Levin & J.McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, 90 (1993)

<sup>65</sup> P. Iganski, ‘Legislating against hate: loc it.,

<sup>66</sup> European Network of Legal Experts in the Non-Discrimination field (on the grounds of Racial or Ethnic Origin, Religion or Belief, Disability, Age and Sexual Orientation.) *European Anti Discrimination Law Review*, Nov 13 2011. [http://ec.europa.eu/justice/discrimination/files/antidiscrimination\\_lawreview13\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/antidiscrimination_lawreview13_en.pdf)

<sup>67</sup> B.Dixon & P.Gadd, ‘Getting the Message? ‘New Labour and the criminalization of ‘hate’’, *Criminology and Criminal Justice* 2006 Vol 6(3) 309-328,

have considered the effect of the media as a promoter of various signals of identity.<sup>68</sup> The Council of Europe publication, ‘Human Rights and a changing media landscape, argued that

The (professional) media play an enormously important role in the protection of human rights. They (can) expose human rights violations and offer an arena for different voices to be heard in public discourse. Not without reason, the media have been called the Fourth Estate – an essential addition to the powers of the executive, the legislature and the judiciary. However, the power of the media can also be misused to the extent that the very functioning of democracy is threatened. Some media outlets have been turned into propaganda megaphones for those in power. Others (including public arena) have been used to incite xenophobic hatred and violence against minorities and other vulnerable groups. ...<sup>69</sup>

However, in an increasingly competitive media environment, it has been argued that ‘...many media employers have sacrificed reporting standards in pursuit of commercial objectives, overriding ethical values with journalism that is populist, sensational and biased.’<sup>70</sup>

The *Sofia Echo* in 2012 reported a study that found ‘Bulgarian Press Coverage of Roma overwhelmingly negative’.<sup>71</sup> Roma people were generally portrayed as ‘robbers, rapists and murderers’, according to a study by the Sofia-based Institute of Modern Politics.<sup>72</sup> The study tracked five Bulgarian-language daily newspapers from July to November 2011. Of 743 articles, only 15 had a positive portrayal of Roma people. This is despite many Bulgarian media signing a Code of Ethics which should ensure that the media reflect the concerns of minorities and be a platform for minority representatives. Bulgaria also recognises the concept of ‘vulnerable group’, for example female gender, physical disability, religious minority, financial deprivation.<sup>73</sup>

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<sup>68</sup> D.Kellner, ‘Cultural Studies, Multiculturalism and Media Culture’, p.5 in G.Dines & J.M.Humez, eds, *Gender, Race and Class in Media*, (London, Sage, 2<sup>nd</sup> Edition, 2002)

<sup>69</sup> Commissioner for Human Rights, Council of Europe Publication, Human Rights and a Changing Media Landscape’ (Dec 2011, Council of Europe Publishing, council of Europe).p.7 Words in brackets added by K.McGuire

<sup>70</sup> See: OECD (2010), *News in the Internet age: New trends in news publishing*, OECD Publishing, Paris and IFJ (2010), ‘Journalism: In touch with the future’, Brussels.

<sup>71</sup> *Sofia Echo*, 4<sup>th</sup> April 2012, ‘Bulgarian Press Coverage of Roma Overwhelmingly Negative Report Finds’, [http://sofiaecho.com/2012/04/04/1801460\\_bulgarian-press-coverage-of-roma-overwhelmingly-negative-study-finds](http://sofiaecho.com/2012/04/04/1801460_bulgarian-press-coverage-of-roma-overwhelmingly-negative-study-finds)

<sup>72</sup> According to the official results of the February 2011 census, there are 325 343 Roma people in Bulgaria, about 4.9 per cent of the country's population. Ibid.

<sup>73</sup> Press TV 19<sup>th</sup> November 2012. ‘Vulnerable groups’ mentioned in article ‘Bulgaria Underdeveloped in view of disability services’ <http://www.presstv.ir/detail/2012/11/19/273389/bulgaria-underdeveloped-in-view-of-disability-services/> accessed 23/3/13.

Disability groups have similarly highlighted negative imagery in the UK press. In their study of the media in 2011, 'Bad News for Disabled People', Inclusion London analysed the way the media was reporting disability and 'how it has impacted on public attitudes towards disabled people'. They argued that in the period 2010-2011 there had been an increased politicisation of media coverage of disability, compared to 2004-5; a reduction in articles portraying disability sympathetically, an increase in articles focusing upon disability benefit and fraud; an increase in pejorative language to describe disabled people, including 'scrounger, cheat and skiver; these articles impacted upon people's views and perceptions'.<sup>74</sup> Most European nations argue that protection of dignity is to be valued over the protection of individual rights, for example, those of freedom of expression. There is, however, a tension between philosophical concepts of, and professional responsibilities regarding, human rights concepts. According to the philosopher Onora O'Neill 'freedom of expression' is 'self-regarding'<sup>75</sup>. However, according to Aiden White, 'professionalism in journalism is 'other regarding', requiring 'constrained expression'.<sup>76</sup>

However, the US does not regulate free speech, since this is a right enshrined in the First Amendment of the US Constitution: some perceive that the US has thus become a safe haven for the promotion of hate speech via the internet, or via twitter.<sup>77</sup> It is claimed that the US 'undermines other nations' efforts to stop the promotion of hate speech'. The crucial role of the internet has been highlighted by many, especially the Council of Europe. Henrick Kaspersen,<sup>78</sup> for example, argued that the internet was crucial for racist groups because they

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<sup>74</sup> *Bad News for Disabled People*, P.4-5 disability groups were restricted to give written evidence only to the Inquiry.

<sup>75</sup> See: O'Neill O. "A right to offend?", *The Guardian*, 13 February 2006, [www.guardian.co.uk/media/2006/feb/13/mondaymediasection7](http://www.guardian.co.uk/media/2006/feb/13/mondaymediasection7).

<sup>76</sup> Aidan White, international media specialist and former General Secretary of the International Federation of Journalists, 'Ethical journalism and Human Rights'

<sup>77</sup> COE report - 2,500 out of 4,000 racist sites were located in the USA See Ramasastry, A. (2003) 'Can Europe block racist websites from its borders? And if so, will hatemongers seek the US's technological asylum?', *FindLaw's Legal Commentary*, <http://writ.news.findlaw.com/ramasastry/20030205.html>. See also J.C.Knechte, 'When to Regulate Hate speech', 110 *PEM ST L.REV* 539,540 (2006)

<sup>78</sup> Henrik.W.K.Kaspersen, Director of the Computer/Law Institute, Vrije Universiteit Amsterdam the Netherlands. He chaired the expert committees of the Council of Europe that drafted the Cyber Crime Convention and its first additional Protocol on Racism and Xenophobia. [http://humanrights.gov.au/racial\\_discrimination/cyberracism/kaspersen.html](http://humanrights.gov.au/racial_discrimination/cyberracism/kaspersen.html)

- have no access to the regular civilian mass media;
- Racist groups are often internationally organised;
- Internet technology is easy and available at low costs;
- Repression of racist activities on the Internet for several reasons is not efficient.

He argued that such groups use the Internet in particular for:

- Ideology: dissemination of ideas and propaganda;
- Communication: e-mail, Usenet (news groups), chat rooms;
- Commerce: mail orders for propaganda material, such as Nazi-paraphernalia;
- mobilisation of groups.<sup>79</sup>

Discussing the Additional Protocol, Kaspersen stated that

‘During the last decades of the twentieth century ... the growing flow of migrants...has created a new breeding ground for racial and xenophobic resentments towards a new group of easy victims.<sup>80</sup> Migration became a big issue during the elections in some European Countries, resulting in a strong move to right-wing political parties. Public attention for the issue of racial discrimination and xenophobia therefore has been revitalised and is broadened in scope. The concept of racism has not been changed, but the manifestations of this attitude are more evil and obtrusive than before’.<sup>81</sup>

### **Perception and offender motivation.**

In 2008, Gallagher and Hutto stated that

"In most intersubjective situations, that is, in situations of social interaction, we have a direct perceptual understanding of another person's intentions because their intentions are explicitly expressed in their embodied actions and their expressive behaviors. This understanding does not require us to postulate or infer a belief or a desire hidden away in the other person's mind. What we might reflectively or abstractly call their belief or desire is expressed directly in their actions and behaviors."<sup>82</sup>

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<sup>79</sup> Henrik.W.K.Kaspersen, Director of the Computer/Law Institute, Vrije Universiteit Amsterdam the Netherlands, chair of the expert committees of the Council of Europe that drafted the Cyber Crime Convention and its first additional Protocol on Racism and Xenophobia.[http://humanrights.gov.au/racial\\_discrimination/cyber racism/kaspersen.html](http://humanrights.gov.au/racial_discrimination/cyber racism/kaspersen.html)

<sup>80</sup> See Bob Purkiss, head of European Monitoring Centre on Racism and Intolerance, Fighting racism now a priority, see file on racism, Portail Council of Europe, (<http://www.coe.int>)

<sup>81</sup> [http://humanrights.gov.au/racial\\_discrimination/cyber racism/kaspersen.html](http://humanrights.gov.au/racial_discrimination/cyber racism/kaspersen.html)

<sup>82</sup> S.Gallagher and D.Hutto ‘Understanding others through Primary Interaction and Narrative Practice’, in T. Zlatev, T. Racine, C. Sinha, & E. Itkonen, *The Shared Mind: Perspectives on Intersubjectivity* ( John Benjamins. Amsterdam, 2008), 17-38

Iganski suggests under recognition by victims of hate crime may be related to the fact that the victim clearly saw the incident as one within the 'daily incivilities' of life with which he dealt.<sup>83</sup> Perception and interpretation of offender motivation are clearly crucial issues. However, as Gadd notes, the 'bulk of criminological work on racially aggravated crime tends to be informed by an exclusively victimological perspective.'<sup>84</sup> Work that exists on offenders tend to consider secondary accounts, typically official accounts of what offenders say and do,<sup>85</sup> or subsume motivation into a homogeneous resentment 'felt by marginalized working class communities'.<sup>86</sup>

Herring considers various justifications for the interpretation of legislation, and in particular whether motive is considered. He argues that judgement of the action does not take into account attitudes and motives. In contrast, the character theory argues that if the actions ...indicate a character trait which is unacceptable according to the standards expected by the criminal law, then the defendant deserves punishment...'<sup>87</sup>

Herring also considers that the objective theory would focus upon what defendants do, rather than their inner thoughts. This can be related to ideas of standards of conduct to which a society is expected to conform, and which: '...should not be varied because of the defendant's individual characteristics.' As Herring notes, this theory can be used to explain offences where conduct is below the required standard, regardless of the defendant's state of mind. Moral blameworthiness may take too long to be argued in court. Proponents argue that this theory is useful for minor offences, whilst opponents argue that any criminal

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<sup>83</sup> P.Iganski, 'Legislating against hate:loc it.,

<sup>84</sup> Bowling and Philips 2002:114, D.Gadd, 'Aggravating Racism and Elusive Motivation', [2009] *Brit.J.Criminol* 49,755-771, 756

<sup>85</sup> B.Perry, *In the Name of Hate: Understanding Hate Crimes*, (Routledge, London, 2001), R.Sibbitt, 'The perpetrators of racial harassment and violence', Home Office Research Study 176. Home Office:London

<sup>86</sup> L.Ray, D.Smith and L.Wastell, 'Shame, Rage and Racist violence', [2012] *British Journal of Criminology*, 44 (3):350-368. D. Gadd, 'Aggravating Racism and Elusive Motivation', [2009], *Brit.j.Criminol*, 49, 755-771,756.

<sup>87</sup> J.Herring, *Criminal Law*, (6<sup>th</sup> edition, Palgrave Macmillan, London, 2009) p.8

conviction has consequences for the defendant, and is only appropriate in the defendant is personally to blame for what has happened.<sup>88</sup>

The concept of individual responsibility and wider collective policy reasoning has been debated. Iganski, a prominent academic on hate crime legislation, writing from a sociological perspective, sees aggravated crimes as ‘... designed to promote justice by attempting to mould the collective conscience.’<sup>89</sup> However, a subjectivist approach would argue that the defendant is only responsible for foreseen or intended consequences of their actions, ‘...those with which they clearly associated themselves.’<sup>90</sup>

Burney and Rose<sup>91</sup> argue that the courts have been inconsistent in their treatment of cases, with the issue of ‘hostility’ needed to prove racial aggravation, for example, being an issue. These writers cite magistrates courts expressing some sympathy for ‘normal working class mayhem’, in which words uttered were seen as part of their normal vocabulary. However, Burney and Rose conclude that: ‘any reference to the victim’s ethnicity ...proves the necessary element of racial aggravation ... (because) ‘anything less condones racism’.<sup>92</sup> However, as Burney and Rose note, some defendants are genuinely upset and indignant at the prospect of a ‘racist tag...it is clearly socially unacceptable (except in a few circles) to be branded as a racist.’ Being found guilty of a racially aggravated crime would so label a defendant.

Various debates have centred upon exactly what needs to be displayed to lead to a conviction for hate crime, with most academics focusing upon ‘bias’ rather than hate.<sup>93</sup> However, such "bias" may reveal itself to be not linked to strongly held conscious prejudice or convictions, but rather ‘many crimes result from less conscious biases, everyday attitudes,

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<sup>88</sup> Ibid., 8-9

<sup>89</sup> P.Iganski, *Hate Crime and the City* ( Policy Press, Bristol 2008),94. D. Gadd, ‘Aggravating Racism...’, loc cit.,757.

<sup>90</sup> Herring , op cit., 9

<sup>91</sup> E.Burney and G.Rose, *Racist Offenders:How is the Law working?* ( Home Office Research Study 244, Home Office:London 2002). D. Gadd, ‘Aggravating Racism...’,loc cit., 758

<sup>92</sup> Burney and Rose, *Racist Offenders*, op cit.

<sup>93</sup> F.M.Lawrence, loc cit., B.Perry, op cit.

dispositions, spur of the moment, not immediately recognised as biased or discriminatory by the victim or the perpetrator.’

In 2005, Lemos presented the argument for tackling the offender’s dependence on ‘unconscious racist stereotypes’, and to this can be added other unconscious stereotypes. Lemos also noted the psychological susceptibilities of some offenders and their belief that their needs and problems are left unaddressed, and that ‘no one ever listens to them’.<sup>94</sup> McGhee argues that many perpetrators understand their behaviour as a transgression from their usual behaviour, occurring in the context of a ‘highly individualised trigger situation’.<sup>95</sup> This view is supported by Iganski in his assessment of the ‘routine incivility of life...’<sup>96</sup> McGhee further states that individuals often have ‘inconsistent, contradictory and highly ambiguous’ attitudes towards race.<sup>97</sup>

Hurd argues that bias and prejudice are emotional states, and ‘...when we refer to a defendant’s emotional state we are very often explaining why her powers of practical reasoning were partially suspended...’ Moreover, to assume a straightforward link between bias and motive is to ‘over intellectualise emotions and dispositional beliefs.’ To ask, for example, ‘would you prefer a world in which there are no gays?’ does not mean that at the time of the action they held this intent or desire to create this... Brute emotions, dispositional beliefs and specific intentions are experienced differently, and it obfuscates their phenomenological distinctness to collapse them into a single category.’<sup>98</sup>

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<sup>94</sup> G.Lemos, *The Search for Tolerance: Challenging and Changing Racist Attitudes and Behaviour Among Young People* (Joseph Rowntree Foundation: York, 2005) Chapter 3, ‘Diversity Awareness Programme’ London 33-39,38, and Gadd, ‘Aggravating Racism, loc cit., at 759

<sup>95</sup> D.McGhee, ‘The Challenge of working with racially motivated offenders: An exercise in ambivalence? [2007] *Probation Journal* 54 (3) 213-226, 221

<sup>96</sup> Iganski, *Hate crime and the City*, op cit.,

<sup>97</sup> McGhee, ‘The Challenge of working...’ loc cit., 218

<sup>98</sup> H.Hurd, ‘Why liberals should hate " hate crime legislation"', [2001] *Law and Philosophy* 20 (2) 215-232.

Quill argues<sup>99</sup> that ‘unless the issue of ‘necessity’ arises, the law punishes law breaking irrespective of the reasons motivating the violation. Whilst advocates of hate crimes argue for a link to bias, there are reasons why traditionally the law has shied away from attempting to interpret mental states and to prove a causal link with actions. ‘the beliefs and desires which constitute motive crimes’ *mens rea* are, in general, more difficult to determine than intent crimes.’<sup>100</sup> ‘Mistaken analysis could lead to a lengthy period of incarceration.’ In the US, the difficulty of ‘obtaining reliable evidence to prove the nexus between the unlawful incident and the bias motivation of the perpetrator...(has proven problematic).<sup>101</sup>

The first rests upon motivation, the prosecution must prove beyond reasonable doubt that the offense is motivated wholly or partly by racial hostility.’<sup>102</sup> In the UK, Iganski admits some similarities with the US exist, but claims that the introduction of a ‘second test’ in UK legislation avoids this difficulty since it rests upon proof, beyond reasonable doubt, that there was evident racial hostility ... at the time of the offense...or immediately before or after the incident. It does not need to be proven that hostility motivated the act. Whilst this would not satisfy many jurisdictions in the US, it is stated that ‘...the prospects for successful prosecution in Britain appear good.’<sup>103</sup>

## **Prosecution**

Whilst such difficulties and anomalies exist, what successful prosecution is believed to reveal or promote as regards the offender depends upon which theory is being expounded by those

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<sup>99</sup> G.F.Quill, ‘Motivation causation and hate crimes sentence enhancement ; a cautious approach to mind reading and incarceration’, [2009] *Drake Law Review* Vol 59, amended 2011.

<sup>100</sup> Ibid

<sup>101</sup> M. Maldonado, ‘Practical Problems with enforcing hate crimes legislation in New York’, *Annual Survey of American Law* 1992/1993, 556

<sup>102</sup> P.Iganski, ‘Legislating against hate: outlawing racism and anti-Semitism in Britain’, [1999] *Critical Social Policy* 58

<sup>103</sup> P.Iganski, ‘Why make Hate a Crime?’ [1999] *Critical Social Policy* 19.3, 386-95, 393

who engage with the law in action. Thus, Iganski promotes a moral education view, punishment to educate the individual and society, ‘criminal behaviour emanating from some type of morally correctable failing,’<sup>104</sup> which the punishment will correct. However, Iganski and others also utilise the theory of: ‘the expressive function of punishment’<sup>105</sup> as defined by Feinberg. For the latter,

‘a satisfactory definition of punishment must account for its expressive function...punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those "in whose name" the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.’<sup>106</sup>

Iganski uses the phrase ‘symbolic’ to denote this "expressive" form of punishment, regarding hate crime legislation, and the term is repeated in other academic literature.<sup>107</sup>

State punishment is also claimed by some to be a safety valve, preventing retaliation and social disintegration. Wellman argues that hate crimes have a greater potential for societal disintegration, and thus utilises this latter argument.<sup>108</sup> Those involved in the law are often unconvinced of the deterrent value of the legislation, stating the low level of public awareness. Suggestions to improve focus upon education, via initiatives with schools, or the use of the press. However, the perception of the ‘mixed messages’ of the media, and its role in exacerbating the discrimination towards specific protected groups, has been highlighted in the recent report by Briant *et al* .<sup>109</sup> Those who utilise the moral education and expressive viewpoints often also invoke the restitutive theory: punishment is to restore the victim by publicly proclaiming they have a moral standing that the offender was wrong to disrespect.<sup>110</sup>

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<sup>104</sup> C.H.Wellman, ‘A Defense of Stiffer Penalties for Hate Crimes’,[2006] 21 (2) *Hypatia*, 62-80

<sup>105</sup> J.Feinberg, ‘The expressive function of punishment’, in *Doing and Deserving*. (Princeton Univ Press, NJ, 1970)

<sup>106</sup> *Ibid.*,

<sup>107</sup> P.Iganski, ‘Legislating against hate...loc cit.,

<sup>108</sup> C.H.Wellman, ‘A Defense of Stiffer Penalties...loc cit.,

<sup>109</sup> E.Briant, N.Watson and G.Philo, *Bad News for Disabled People: How the Newspapers are reporting disability*, Strathclyde Centre for Disability Research and Glasgow Media Unit, in Association with Inclusion London (2011)

<sup>110</sup> Wellman, loc cit.,

## **Selective Perception of hate crimes and harm.**

The claim that hate crimes hurt more,<sup>111</sup> and have a vicarious effect, is indicative of restitutive theories supporting enhanced sentencing. As Herring notes, ‘ there are many who argue that the criminal law should punish only conduct which causes harm to others, the harm principle’ articulated by J.S.Mill, ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.’<sup>112</sup>

As Craig and Waldo argue, ‘Victims may experience hate crimes differently because of who they are, why they are victimized, and with whom they share their experiences’.<sup>113</sup> Moreover, ‘...the demographic status of the participant appeared to determine how disruptive they regarded the crime scenario, and the likelihood that they would report personal knowledge of a victim of a similar type of assault.’<sup>114</sup>

As with all literature reviews, the above is necessarily selective and focussed on a wide range of areas and themes deemed relevant to an investigation of ‘hate crime’ in general.

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<sup>111</sup> P.Iganski, op cit.

<sup>112</sup> Herring, op cit., 5

<sup>113</sup> K.M.Craig and C.R.Waldo, ‘So What’s a hate crime anyway?: Young adults’ perceptions of hate crimes, victims and perpetrators’, [1996] April, Vol 20, Issue 2, *Law and Human Behaviour*, 113-129.

<sup>114</sup> Ibid.,

## LITERATURE REVIEW: PART TWO

Below discusses the academic literature to the formulation of an adequate methodology for qualitative research into hate crime drawing upon the phenomenological tradition.

### **The practical application of phenomenology to hate crime: in search of precedents**

This section begins by searching for precedents concerning the practical application of phenomenology - before addressing various logistical issues concerning semi-structured interviewing as a qualitative research method designed to acquire access to real life experiences of hate incidents as experienced. It also considers the importance of various ethical questions that may arise in relation to the conduct of such phenomenological applied research, and its dissemination. A basic definition of phenomenology is the study of (logy) how things appear (phenomena). Where phenomenology departs from other descriptive methods is its intention to preserve:

‘what is uniquely human...to evoke the mutuality of features essential to a phenomenon, for example, the results may aim to present ‘the victim’s vulnerability as at one feeling, perceiving, and acting his or her “being vulnerable”, which in itself implies previous expectations of invulnerability.’<sup>115</sup>

Phenomenology, as a European philosophy, is most directly associated with Husserl and Heidegger. Benhke argues that a specific feature of Husserlian phenomenology, the preferred research method for this hate crime and law project, is the belief that: ‘...theoretical investigations have practical implications, even if a practice informed by work carried out in a transcendental-phenomenological attitude may be significantly different from our usual

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<sup>115</sup> C.T.Fischer, ‘A Phenomenological Study of Being Criminally Victimized: Contributions and Constraints of Qualitative Research’, *Journal of Social Issues*, Vol.40. No.1 1984 161-178

practical engagement with pre-given things and tasks.<sup>116</sup> This involves suspension of the investigator's pre-conceived theories and opinions about hate crime, but also those of the subjects', in so far as this is possible. According to Gallagher and Francesconi, 'What a subject thinks about something is not the same as his or her experience of that phenomenon ... theory, opinion or hearsay is not accepted.'<sup>117</sup>

The following is a summary of various approaches to crime, law, and interpersonal and intergroup violence. Not all the studies invoke a phenomenological approach, but all may have some insights into areas connected with the above. Whilst differing interpretations and approaches are utilised, therefore, this is to sensitise to various possibilities, and also to highlight possible critiques of existing orientations, presuppositions and policies, including those that inform given laws and state policies. Commensurate with phenomenology, this invites the reader to suspend 'common sense': in this context this means to become increasingly critical of general, generic or stereotypical beliefs, and opinions that are detached from concrete lived experiences of hate crime.

Although he died in 1937, the work of Gramsci, admittedly through his 'Marxist lens' highlighted the role superstition, folklore, simple religious beliefs and the deposits of previous philosophy can have on interpretation and acceptance of 'common sense.'<sup>118</sup> Gramsci was particularly interested in its promotion of cultural hegemony and hidden oppression. More recent work, explored below, relates notions of 'common sense' to acts of violence.<sup>119</sup> The areas of previous work considered here will be: how phenomenology and other types of research can problematise 'crime' and 'the law:' interpretations of the self, 'other' and lived experience: how motivations of perpetrators, and the experience of victims, have been defined and understood in context; suggested purposes for research into violence

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<sup>116</sup> E. Benhke, 'Interkinaesthetic Affectivity: A Phenomenological approach', *Cont Philos Review* (2008) 41 143-161

<sup>117</sup> S. Gallagher and D. Francesconi, 'Teaching Phenomenology to Qualitative Researchers, Cognitive Scientists, and Phenomenologists,' *The Indo-Pacific Journal of Phenomenology*, Vol 12, Special Edition September 2012.

<sup>118</sup> Gramsci, Antonio (1992). Buttigieg, Joseph A. ed. *Prison notebooks*. New York City: Columbia University Press. pp. 233-38.

<sup>119</sup> Bettina E. Schmidt Ingo W. Schröder (eds) *Anthropology of Violence and Conflict* Routledge London, 2001

and hate crime. Experiential research on crime is a complex field. Experiential research upon law as actually practised in the UK is scarce.

### **Searching for precedents**

Hence, our phenomenology of hate crime does not start from a "clean sheet" or a "green field site." We acknowledge that all research builds upon, extends and supplements the contributions of other researchers in various ways. Also - in part - all published research is destined to form a minor or major part of the "literature review" of future postgraduate and other projects, which sum up and relate its contributions to those of others, and suggest possible directions for future research. We begin, therefore, in the midst of an established conversation about both this topic and our phenomenological approach that has already begun, and which will continue long after our particular contribution has been made. It follows that there is an obligation, perhaps even a methodological requirement, to establish and clarify what insights already exist. Then to add our research to the fruits of an established tradition of writings within both the phenomenological movement and qualitative scholarship on hate crime. Such clarification is important to make sense of what a "phenomenology of hate crime" might look like, and where it could usefully supplement existing scholarship and experientially -grounded knowledge.

Unfortunately, there is no published phenomenology of hate crimes within the Anglophone world at least. In 2004, Danny Willis, a nursing studies scholar, completed a PhD with this term in its title, and has published what appear to be revised versions of some of its chapters. This includes the obligatory literature review designed to prepare the ground for his original contribution based on a phenomenological analysis of in-depth interviews with a number of gay males who have personally experienced hate crimes. Aspects of his work relating to the application of a phenomenological approach will be addressed later. However, two points

need to be made: Willis' focus is clearly limited to that of gay males (and one might add, to the gay males within his study), and he has yet to address in his publications the specifically phenomenological nature of his study, its relation to Husserlian approaches for example. And yet, as we will see in detail below, his reported manner of arranging, conducting and analysing qualitative interviews with those with firsthand experience of hate crime represents an especially useful example of the type of sensibility and receptiveness towards such experience that Husserlian phenomenology requires, though not without qualification.

Given the lack of published work on a distinctly and expressly Husserlian phenomenology of hate crime as a specific topic, it might be possible to envisage the nature of such a project by examining phenomenological contributions to the study of other types of criminal acts, including those involving a similar "group dimension," such as, for example, gender specific violence and abuse.<sup>120</sup> Even though we cannot gain inspiration from exact precedents, there still may be something to be gained from identifying phenomenological contributions to the scholarship of criminology, criminal justice studies and the sociology or social psychology of broadly similar or analogous abuse, identity construction and violence.<sup>121</sup> It is possible that such studies have already addressed and perhaps resolved certain common practical issues concerning the application of phenomenology, which could be directly applicable to our project, and these will be addressed in the conclusion.

### **How and why has work utilised phenomenology with regard to crime and criminology?**

The theoretical underpinnings for using a phenomenological approach are evident in much writing. However, this is not often combined with a discussion of the particular type of phenomenological approach recommended, nor the practical issues of doing such research. In

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<sup>120</sup> E.Buchbinder and Z Eisikovits 'Battered women's Entrapment in Shame: A Phenomenological Study,' *Am Journal of Orthopsychiatry* 2003, Vol 73.No 4. 355-366.

<sup>121</sup> Peter. K. Manning, "On the Phenomenology of Violence," *The Criminologist* 14: 1-22.

his 1968 address, Mohr argued for a phenomenological approach to criminology:

‘...what we call crime lends itself to a phenomenology, or, more emphatically, needs a basic phenomenology before the methods and assumptions of other sciences can be applied in a way which would elucidate criminal phenomena, and not just the sciences applied to them.’<sup>122</sup>

As phenomenologists would agree, Mohr stated that crime itself was: ‘... a mixture of mythological conceptions, normative standards and empirical facts.’ Moreover, he argued that ‘an event is only a crime if it is declared to be such by a court of law.’ On the issue of statistics, much used in criminology, he stated ‘criminal statistics can be expanded and contracted almost at will and they often tell us more about public sentiment than about the categories they list.’ His ultimate argument was that ‘criminology is sterile if it does not increase our awareness of ourselves in relation to the world we live in, and the conscious approach to this proposition is what is basically meant by phenomenology.’<sup>123</sup>

### **Phenomenology and the experience of legal regulation**

For Gigeroff, speaking on ‘Phenomenology and Law:’ ‘we seldom realise what a potent social document the criminal code is.’<sup>124</sup> He argued that this code is regarded like ‘an inheritance... nice to have and nice to use’, but without asking too many, if any, questions about it. As already noted, phenomenological research aims to highlight the impact of taken for granted beliefs. He argued that if we regarded this as something more tangible, ‘like an elaborate piece of furniture we might...ask more questions about it, such as what is it? Do we want it? What is its value, who made it? How old is it? How does it work? How useful is it to us? Does it fit with what we have in our house? Does it fit in with the way we want to live?’

As phenomenologists would agree, Gigeroff emphasised that the study of criminal law is not

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<sup>122</sup> J. W. Mohr, ‘Phenomenology and Criminology’, American Society of Criminology Annual Meeting, Toronto, November 1-3 1968. Mohr represented the Clarke Institute of Psychiatry.

<sup>123</sup> Mohr, op cit, 3.

<sup>124</sup> A. Gigeroff, ‘Phenomenology and Law’, paper presented at the Annual Meeting of the American Society of Criminology, November 1968. Gigeroff was a research scientist with the Clarke Institute of Psychiatry.

the study of crime. It is the study of a very specialised vocabulary by which we can express a set of concepts, which are embodied in a set of rules (substantive...procedural... and evidentiary...) and also a set of principles.’<sup>125</sup>

Modern historians, drawing on linguistic and postmodern theories, would also agree with his assertion that ‘our codes are not so much total rational structures for the control of crime but rather consolidations of separate laws and statutes that have been written over the centuries, written at different times... taken as a whole the criminal law can scarcely be said to have a history.’ However, specific types of law can be traced over time, and Gigeroff cites murder and theft. A study of hate crime can similarly trace related developments, with a phenomenological emphasis. The oddities or merits of a provision cannot be understood without some reference to historical context, for these can help illuminate the underlying assumptions and priorities of a period. Equally, Gigeroff called for an investigation of what actually happened in practice, ‘what I am saying is that what one learns from a study of the statutes is not (necessarily) in fact what happens...(on the ground)’<sup>126</sup>

### **Phenomenology and "Post-colonial studies"**

The expression "phenomenology of violence" is frequently found within "post-colonial" analysis of specific regions of the world. However, this usage is often very loose and bears little relationship to Husserl phenomenology. Instead, the phrase is commonly deployed to refer to claims concerning the presence of experienced violence or potential violent situations, including social deprivations of various kinds. However, in these usages there is very little, if any, in-depth qualitative analysis of concrete experiences that even vaguely

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<sup>125</sup> Ibid.

<sup>126</sup> Gigeroff, op cit.

resembles Husserl's agenda.<sup>127</sup> Hence, the reference to "phenomenology of violence" could be replaced with that of "claimed violence", or more phenomenologically, 'perceived violence' without any real loss or alteration of sense. An example of this will be discussed later below.

### **Phenomenology, postmodernism and philosophical criminology<sup>128</sup>**

Postmodernist consideration of phenomena would refer to Foucault, and thus the importance of avoiding becoming: 'comfortable with the certainty of our own presuppositions ... we must always be willing to challenge that which is closest to us, that which remains most familiar and that which often provides us our greatest sense of comfort.'<sup>129</sup> Foucault himself maintained that he wanted to distance his work from phenomenology, because of his concern that this could not account for the event of understanding: phenomenology can provide an adequate account of the manifestation of meaning "but it has given no one the possibility of understanding the language."<sup>130</sup> For Foucault, the imagination was to be prioritised over perception. However, in practice, perception, memory and imagination are arguably intertwined, for referents to enable perception must always involve the imagination.<sup>131</sup> Indeed, recent work in the field of psychology has investigated individuals' language, arguing that it is possible to identify the interrelated roles of memory and imagination, the likelihood of depression, and ability to perceive the past and the future.<sup>132</sup>

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<sup>127</sup> For examples of such vague references to a phenomenology of violence, see for example, Jean M. Clinton, 1991, *Behind the Eurocentric Veils: The Search for African Realities*, 102; Michael Syrotinski, 2007, *Deconstruction and the Postcolonial: At the Limits of Theory*, 111.

<sup>128</sup> See, for example, D.Polizzi and B.A.Arrigo, 'Phenomenology, Postmodernism and Philosophical Criminology: A Conversational Critique', in *Journal of Theoretical and Philosophical Criminology*, 2009, Vol.1.113-145.

<sup>129</sup> Polizzi referring to Foucault in Polizzi, Arrigo, 'Phenomenology...above fn 13, 116. See also M.Foucault, *The archaeology of knowledge*. 1977 New York :Pantheon.

<sup>130</sup> D.Vessey and S.H.Watson, *Encyclopaedia of Phenomenology*, <http://www.davevessey.com/Foucault.htm> accessed 3/10/12

<sup>131</sup> D.Robson 'Fade to Black', *New Scientist* Vol 216, Issue 2885, 38, see also Addis, D.R; Wong, A.T; Schacter, D.L. (2007) 'Remembering the past and imagining the future: Common and distinct neural substrates during event construction and elaboration,' *Neuropsychologia*, 45, 1363-1377; Quoidbach, J., Wood, A.M., Hansenne, M. (2009) 'Back to the future: the effect of daily practise or mental time travel into the future of happiness and anxiety,' *The Journal of Positive Psychology*, 4 (5), 349-355.

<sup>132</sup> D.Robson op cit.

Vessey and Watson placed Foucault's writings '...at the margins of phenomenality and self-presence, on the side of "The Other" over and against such regimes of "The Same"—precisely in articulating the Other in their midst'.<sup>133</sup> For Polizzi,<sup>134</sup> challenging presuppositions represents both personal freedom and social responsibility, and is related to Nietzsche. Polizzi refers to the work of Lacan and the concept of language 'speaking us', and this is placed within the Freudian context of the unconscious. Luce Irigaray's *This Sex Which is Not One*<sup>135</sup> or Kristeva's *Desire in Language*<sup>136</sup> both argue for the transformative power of a reworking of language to empower 'the feminine'. Irigaray argued for a unified '... otherness of female sexuality', which has been repressed by patriarchy. For Irigaray, the psychic was never bisexual, or asexual.

For Kristeva, there is no single essential female, and the notion of the feminine is a useful, temporary strategy for campaigning on behalf of (multiple) women's interests. Hence, the 'existential phenomenology' of Simone de Beauvoir has been seen as a preferable approach to understand the lived experience, regardless of biological sex, or perceived gender. It has been argued that de Beauvoir was herself influenced by Merleau-Ponty's concept of the lived body.<sup>136</sup> Proponents of 'feminist and queer theory' argue that these methods:

'... consist not only in giving account of the meaning of the lives of women and men in all their relational and sexual diversity. Nor is it only about analysing how discourses construct subjects and the stereotypical or defamatory aspects of some of these discourses that contribute to the suffering of some men and women who fall on the wrong side of normalizing processes. Feminist and queer theories are also projects of social criticism. These are theoretical efforts to identify certain wrongful harms or injustices, locate and explain their sources in institutions and social relations, and propose directions for institutionally oriented action to change them.'<sup>137</sup>

The works of Heidegger, particularly *Being in Time*, Husserl, Nietzsche, and Lacan's notion of 'the other' are all quoted as influential works in understanding 'ways of being and of the

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<sup>133</sup> Vessey and Watson, op cit.

<sup>134</sup> D.Polizzi, op cit, in Polizzi and Arrigo, 117.

<sup>135</sup> L.Irigaray, 1985 *This Sex Which is Not One*, Eng Trans.

<sup>136</sup> See, for example, Kruks, 'Freedoms that Matter: Subjectivity and Situation in the Work of Beauvoir, Sartre and Merleau-Ponty', in Kruks, 2001, *Retrieving Experience: Subjectivity and Recognition in Feminist Politics*, pp. 27–51.

<sup>137</sup> I.Young, 'Lived Body v Gender: Reflections on Social Structure and Subjectivity', *Ratio* (New Series, XV 4<sup>th</sup> December 2002, 132.

concept of becoming.’ For Arrigo, the move from critical theory to postmodernism is related to the ultramodern condition, and such concepts are seen as significant for ‘...criminology, relative to the construction of racism, crime and criminal other.’<sup>138</sup> Phenomenology recognises consciousness as historically contingent, culturally and psychologically circumscribed, flexible and provisional. It can, therefore, be seen to have similarities with such poststructural reflection.

Heidegger’s notion of ‘thrownness’, for example, argues that we can never free ourselves entirely from the ‘other’: this relates to the actual moment of interaction and to particular cultural, historical, social and linguistic contexts. For Arrigo, Heidegger’s concept can be useful for accessing constructs of pathological types of encounters within the criminal justice system. Husserlian phenomenology would, as Benhke argued, also require awareness of practical applications, including those related to the operation of criminal justice systems.<sup>139</sup>

### **Phenomenology and ‘hate crime’ studies: motivation, perception, ‘legitimacy’.**

#### **Hate crime and terrorism.**

A potentially promising source of inspiration is in the references to phenomenology within the studies of hate crime itself. One such example is an extended book chapter contribution to the history of this topic by Antony E. Simpson.<sup>140</sup> Simpson considers the use of the pillory in 18th century, and argues for some common ground between the social psychology of hate crime and terrorism. He suggests that neither: 'require a profound alteration of personality structures; nor does it entail the incorporation of very aggressive drives or radical transformations in moral standards. It also does not require profound changes in an

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<sup>138</sup> Arrigo, in Polizzi and Arrigo op cit, 121.

<sup>139</sup> Benhke, op cit

<sup>140</sup> Anthony Simpson, 'Spectacular Punishment and the Orchestration of Hate: The Pillory and Popular Morality in Eighteenth-Century England' in Robert J. Kelly Jess Maghan, 1998, *Hate Crime: The Global Politics of Polarization*: Southern Illinois University Press. Carbondale, IL. 1998. 177-238, 230. Whilst the pillory was legally abolished in England in 1837 it continued to be used until the 1870s: in 19<sup>th</sup> century England mainly to punish acts of gambling and drunkenness.

individual's "identity kit," as occurs in prisons, seminaries, convents, and in military boot camps." Rather, it can be accomplished by cognitively restructuring the moral value afforded to violence, which can then be carried out:

'free from nagging self-censure. By morally approving or sanctioning violent tactics, conditioned individuals might imagine that they are protecting cherished values and preserving a way of life under threat. The task of making hate crimes ... plausible is facilitated when nonviolent options are determined to be ineffective. The psycho-moral processes... imply further that, in the name of deeply felt convictions, quite ordinary individuals are capable of marshaling the energy to commit extraordinary violent acts in the name of religious, or even nationalist, political imperatives through transformative mechanisms that turn them into zealous militant crusaders against evil. Indeed, in the eyes of supportive groups, risky attacks directed at the apparatus of oppression may be construed as acts of selflessness and patriotic martyrdom.'<sup>141</sup>

Simpson then draws analogies between 'the process of displacing responsibility for heinous deeds' with respect to hate crimes, those that were historically present and revealed in 'socially sanctioned mass executions,' and:

'[A] systematic ideology of dehumanizing the victims' [in which] 'stigmatized groups were denuded of their basic humanity. That process weakened emphatic identifications between victims and their victimizers... inhibitions against violence and murder, when they are relaxed, expedite the brutalization of those divested of human qualities without serious risk of self-condemnation to the agents of cruelty.'<sup>142</sup>

The work of Bartlett states that the origins of the pillory drew its logic from what Foucault would call 'the terror', the concept of public approbation: although historical records reveal that public attitudes did not always exhibit this. Of interest for a study of the phenomenology of hate crime, the pillory was used to punish homosexual practices, and, after viewing Old Bailey Sessions papers of the period, Bartlett argues that: 'the accounts of the pillorying of sodomites... tie in with the social construction of the crime itself.'<sup>143</sup> Such victims were often violently attacked, some until death, whilst in the pillory. Work such as Bartlett's argues for the

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<sup>141</sup> Simpson, op cit, 178. See also C. T. Fischer, 'A Phenomenological Study of Being Criminally Victimized: Contributions and Constraints of Qualitative Research', *Journal of Social Issues*, Vol.40. No.1 1984 161-178.

<sup>142</sup> Simpson, op cit, 230.

<sup>143</sup> P. Bartlett, 'Sodomites in the Pillory in 18<sup>th</sup> Century London,' 6 *Social and Legal Studies*, (1997) 553-572.

importance of historical context and linguistic usage, and the moral and legal approval of ‘symbolic’ and violent acts that were (and remain) possible in differing periods and contexts. The notion of ‘freedom from nagging self-censure’ is clearly presumed to be necessary for individuals in Simpson’s analysis, and is equally relevant to the reader.

Within the phenomenological movement itself, the theme of symbolic and physical violence either generally, or in relation to hate crime, has yet to really "take off" as a theme. This is despite the useful pioneering work by Danny Willis on the phenomenology of homophobic hate crime, and Michael Staudigl on violence more generally. American sociological work has considered the law as symbolic or instrumental, arguing that the latter becomes more necessary in areas and times of intergroup tensions. Experiential evidence is not always produced, although acts committed are nevertheless ‘causally’ attributed to this.

Judith Butler’s work uses Emmanuel Levinas’ conception of an ethics that rests upon an apprehension of ‘the precariousness of life’ and ‘an understanding of how easily life is annulled.’<sup>144</sup>

The media representations of the faces of the “enemy” efface what is most human about the “face” for Levinas. [...] Those who remain faceless or whose faces are presented to us as so many symbols of evil, authorize us to become senseless before those lives we have eradicated, and whose grievability is indefinitely postponed.’<sup>145</sup> Historical work has similarly argued for a causal effect of ‘dehumanising’, or perhaps the concept of ‘unacceptable human’ is more relevant, by words in a military situation, and subsequent, or concurrent, violence, for example American soldiers’ use of ‘Gooks, Slopeheads and Chinks for the Vietnamese during the Vietnam war. Examples from other wars are numerous. However, currently, symbolic and linguistic ‘violence’ may not be recognised as a hate crime, unless such use could be proven to be threatening. Often within a war context and within everyday life, the names may appear

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<sup>144</sup> Butler, Judith, 2004, *Prearious Life: The Powers of Mourning and Violence*, 230 referring to Emmanuel Levinas,

<sup>145</sup> *Ibid*, 231.

infantile and harmless in themselves.

The cumulative effect of such dehumanisation in everyday life has received little attention, and this would apply equally to perpetrators of hate speech and other types of hate crime. Work has also placed great emphasis upon historical interpretations, and it is clear that, particularly in intergroup violent activity (including war), the ability to perceive the other as less than human, may have contributed to greater acts of violence, and for these to be seen as legitimate. In 2005, David Levi Strauss observed how: ‘Hooding victims dehumanizes them, making them anonymous and thing-like. They become just bodies. You can do anything you want to them.’<sup>146</sup> However, such patterns of language may be a symptom of preexisting beliefs, and does not necessarily induce or legitimise violence.<sup>147</sup> Arguments have been presented both for and against the effects of language, not necessarily utilizing phenomenological research.<sup>148</sup> One could argue that the concept relates to ideas of ‘lesser human’, as compared to an imaginary ‘ideal.’ How this ideal is imagined, and how it is actually experienced, are potential areas that a phenomenology of hate crime could usefully explore. Moreover, recent work, on how the perceived characteristics of victims affect perception of crime motivation, has revealed the impact of legal norms and interpretations on participants’ understandings.<sup>149</sup>

One could also argue that there is also a need to see how such ideas are developed in practice, even if the individuals involved do not themselves enact violence. Work by Gadd et al, Ray et al, and Sibbitt, discussed below, on perpetrators, and utilizing at least ethnographic (if not strictly speaking phenomenological) studies, has offered suggestions beyond notions

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<sup>146</sup> Levi Strauss, David, 'Inconvenient Evidence: The Effects of Abu Ghraib,' *The Brooklyn Rail*, January 2005.

<sup>147</sup> S. Sottiaux, “‘Bad Tendencies’ in the ECtHR’s ‘hate speech’ jurisprudence”, *European Constitutional Law Review* 2011.

<sup>148</sup> See, for example, A. Tesis, 2002, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, A. C. Desai, 'Attacking Brandenburg with History: Does the Long-Term Harm of Biased Speech Justify a Criminal Statute Suppressing It?', *55 Federal Communications Law Journal* (2003), p.354. C. E. Baker, 2009, 'Autonomy and Hate Speech', in I.Hare and J.Weinstein (eds) *Extreme Speech and Democracy*.

<sup>149</sup> D. A. Saucier, T. L. Brown, R. C. Mitchell and A. J. Cawman, 'Effects of Victims' Characteristics on Attitudes Toward Hate Crimes' *21 J. Interpers Violence* 2006: 890

of 'dehumanising'.<sup>150</sup> Simpson's argument that a phenomenology of hate crime is important in drawing attention to the grounding of such acts in a particular interpretation of social situations and other groups remains highly relevant, and phenomenologists would so situate. However, Simpson limits this to recognition of apparently "principled," as opposed to necessarily "irrational", basis for such attacks:

'Similarly, the phenomenology of hate crimes and terror pose threats to human welfare that stem primarily from grotesque deliberate acts of principle rather than from irrational impulses. Ironically, while principled violence would be of greatest social interest, it is the most ignored in the analysis of violence and hate.'<sup>151</sup>

Simpson does not suggest that such "principles" are justified, only that the motivational, ideological and interpretative basis of hate crime attacks must be taken seriously as a topic in its own right, as opposed to simply medicalising attackers as somehow pathological creatures suffering from various scientifically ascertainable "conditions."

Schröder and Schmidt would concur with Simpson regarding the importance of interpreting motive. In their "On the phenomenology of violence" contained in their *Anthropology of Violence and Conflict*<sup>152</sup> they argue that:

'... real acts of violence can not only stem from and be motivated by interpretative, cultural and symbolic forms of hostility, but also - in a dialectical fashion of two-way influence - find a form of vindication in concrete acts of physical violence. Violence is not a mere exercise in discursive construction, however. ... it is also a form of pursuing very real material interests. Yet, violent practice ... operates through the recourse to a tradition of feuding, reflecting and recreating cultural models of behaviour. It does not simply follow a short-term individualistic logic of instrumental rationality ... but generates its own ideology of legitimacy - in this case by tapping into the resource of traditional imaginaries of the social world. Obviously, the dialectic of practice and imaginary in this perspective is most closely related to the notion of violence ... The act of physical hurt reflects a concept of legitimacy - the expression of an ideology of the social world and its boundaries, and of the different modes of behaviour toward different constituencies in this world, sanctioned by their historicity (reified as 'culture' or 'tradition').'<sup>153</sup>

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<sup>150</sup> D. Gadd, B. Dixon, & T. Jefferson, 2005, 'Why Do They Do It? Racial Harassment in North Staffordshire: Key Findings, Keele, University of Keele, Centre for criminological Research; L. Ray, D. Smith, & L. Wastell, 'Shame, Rage and Racist Violence,' *British Journal of Criminology*, 44 (3) 350-368, R. Sibbitt, 1997, *The Perpetrators of Racial Harassment and Racial violence*, Home Office Research Study 176.

<sup>151</sup> Simpson, op cit, 230.

<sup>152</sup> Bettina E. Schmidt Ingo W. Schröder (eds) 2001, *Anthropology of Violence and Conflict* . 15

<sup>153</sup> Schroder and Schmidt, op cit.,14-15

Thus, whilst accepting that not all 'hate crimes' are symbolic (or more precisely purely symbolic), nor involve either violence or groups of attackers, there may be some insights to be gained regarding what a phenomenological research into such experiences of violence could entail. Schröder and Schmidt's discussion claims to be addressing three distinct, if related, phenomenological dimensions of violence: '... 1) *as violence understood more narrowly as a form of interpersonal relations in everyday cultural reality*, 2) *as conflict*, and 3) *as war*.' For our purposes relating to the prospects of a possible phenomenology of hate crime, the final category of state-on-state violence is arguably of little or no interest, at least when compared to the first two categories.

However, as noted by Simpson and most notably with regard to postcolonial studies individual and group justifications for military intervention leading to war if not accepted, have evoked 'principle' as opposed to 'irrational' violence, and an 'us' versus 'them' orientation. Work by Rothkopf, for example, whilst promoting peaceful and respectful intervention, cites genocide and massacres in Armenia, Russia, the Holocaust, Cambodia, Bosnia and Herzegovina, Rwanda and East Timor, and in America, as examples of culture (in some cases expressed in the ideology of "political culture" or religion) being misused to justify violence: 'during the expansion of virtually every empire.'<sup>154</sup>

With respect to *violent interpersonal relations*, Schröder and Schmidt's suggestion is to highlight how polarised social relations can differentiate society into a series of "us" versus "them" relations, in which those who identify with and implicitly constitute and reaffirm themselves as often proud members of an "us" (including indigenous whites and heterosexual "normals" of every stripe) do so through *an intense negation* of a variously defined others understood as a "them" (such as Asians, Muslims, disabled persons, gay, bisexual, lesbian and transgendered individuals). Feminist research has long argued the importance of 'patriarchy',

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<sup>154</sup> D.Rothkopf, 'In Praise of Cultural Imperialism,' *Foreign Affairs*, Summer 1997, Vol 107, 38-53.

but this does not mean that females do not adhere to and encourage such a division in society, sometimes through failure to acknowledge its existence, or by an imagined 'gender free' adherence to shared 'values' and 'norms.'<sup>155</sup> Why such polarisation might lead to violence is an issue that needs to be further explored.

The empirical experiential study of homophobic hate crime by Willis has re-affirmed the aspect of differentiation, the "us" and "them," although specifics of what exactly the 'us and them' are in the eyes of perpetrators, remains underexplored. Attacks on gay males in the 21<sup>st</sup> century in Willis' study, continue to be notable for their often extreme brutality. However, what is also evident is the often violent denigration of 'the feminine', as noted above, in postmodernist work and phenomenology, an aspect that is often overlooked, and indeed, Willis himself did not focus upon this, focusing upon 'identity' but not considering 'gender perception'.

'Differentiation was salient with respect to the maintenance of boundaries as evidenced by the perpetrators' actions, words, and the actual hate crime assault. Gay men were differentiated and dehumanized as a different type of man, "faggots" and "gays," via their perpetrators' use of harassment, verbal abuse, and physical assault. Part of the message that hate crime perpetrators send to victims—and others like them—is one of differentiation and of their extreme disapproval of differences based on identity status.'<sup>156</sup>

### **Creation of Hostile Environments**

According to these understandings of the phenomenology of violence re-designed for empirical use in the field of hate crime, this attack on cultural difference certainly involves violent acts of symbolic exclusion and hateful denigration at the interpretative and verbal levels of culture. These can - but need not - culminate in acts of physical violence, although it will often contribute to the creation of what is experience as "a hostile environment."

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<sup>155</sup> K.McGuire, 'Construction, Reproduction, Enrolment: Females' Perceptions of Education, with Special Reference to Two Technical Colleges in Manchester and Glasgow, 1890-1911'. PhD thesis Lancaster University 2006.

<sup>156</sup> Willis 2006, op cit, 437.

Schröder and Schmidt suggest that:

'... the focus on violence turns our gaze to the interpersonal level of legitimate physical hurt and its quotidian aspect as reflected in social reality and its cultural representation. The main intent (violence) implementation... from this perspective lies in its being harnessed to strategies of social closure, of defining 'us' and 'them' as clearly and diametrically opposed entities.'<sup>157</sup>

They state that the form and content of these strategies may vary widely across culture, time, and circumstances, in which violence:

'...may constitute an integral element in a group's ideology of self-definition, creating a social imaginary as well as its anti-social/'outside' counterpart. ... The image of culturally legitimate violence ... can be instrumental in establishing a faultline not only between 'own' and 'other', but between civilisation and savagery as well.'<sup>158</sup>

Clearly this perspective emphasises an imaginary quality of violence, which may serve the same purpose of social inclusion and exclusion; 'no matter if its discursive representation reflects any real acts of physical hurt or not.'<sup>159</sup> How 'us and them' are interpretively set up and perceived within any particular context is an important issue that phenomenological research may help illuminate. It cannot be taken for granted that these categories are self evident, nor stable and necessary for interpersonal violence, if such violence is seen as a normal part of everyday life.

### **Collective and motivational dimensions**

It is arguable that a phenomenology of violence relevant to the study of hate crime cannot ignore the lived experience of more collective and motivational dimensions. These include competitive group strategies for "dealing with" rival groups, and various material "explanations" as understood and perceived by participants and affected parties. One instance would be the sometimes xenophobic concern for "defending our way of life" against other

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<sup>157</sup> Schröder and Schmidt, op cit, 15-16.

<sup>158</sup> Ibid.

<sup>159</sup> Schroder & Schmidt, op cit, 14

groups defined as rivals and competitors in a wider material context of a scramble for essential resources, such as housing, jobs, welfare benefits, and public facilities.

'Their focus on violence as conflict looks beyond everyday relations of violence and their discursive legitimation to the underlying causes for the establishment of this form of behaviour. They concentrate upon violence as a strategy generated by competition over scarce resources, and '...as a means to overcome or prevent situations critical for the survival of a given population, for example group maintenance, and a population's physical and social reproduction. A Social Darwinist interpretation is inherent in these concepts, with ideas of '...competition and resulting adaptive responses ... (justifying) violence as an established strategy of external relations (which) enhances the chances for group survival.'<sup>160</sup>

Moreover, Schroder and Schmidt argue that short-term benefits of material gain, social recognition and the attainment of culturally defined goals (like revenge) outside the realm of material incentives, are possible by such strategies.

'These goals...(express) a long-term cultural adaptation to a social reality characterised by competitive social relations, but they tend to develop (their own) situative rationality...reinforcing the selection of violence as the appropriate way of conflict solution at one specific point of time. ... Culturally prescribed criteria of evaluation and rationality enable and guide such behaviours.'<sup>161</sup>

These imaginaries charter a course toward (or perhaps away from) violence by translating historical trajectories of experience into a moral code of appropriate behaviour under specific circumstances. Therefore, Schroder and Schmidt argue that a "phenomenology of violence" can demonstrate that, for example, violent racist attacks can be usefully be understood not only in their material and scientifically ascertainable material aspects. In addition they must be grasped in terms of their subjective meaning and cultural significance within the lived experience of individual and group dimensions of life. These include the negotiation of distinctions between "illegitimate" and "legitimate" violence, similar to 'principled' in Simpson's rhetoric, and between unacceptably "offensive" violence and legitimate defensive

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

"counter-violence" carried out to remedy perceived injustice, or simply as a matter of collective self-defense:

Donn Camara Helder's, *Spiral of Violence* clarifies such possible distinctions in ways that highlight the possibility of spirals of escalating violence similar to long-standing "vendettas" where group-on-group hostility blurs any clear-cut distinctions between "original/offensive" and "responsive/counterviolence." This analysis also highlights the need to take seriously the possibility of institutionalised forms of violence, akin to slavery and institutionalised racism and other structural forms of discriminatory practice, which cannot be reduced to interpersonal animosity or personal dislikes. The possibility of discriminatory neglect by officials legally responsible for the welfare of those with severe disabilities Camara's phenomenology identifies the first appearance of violence as "original structural" or "institutionalised" violence that lays the initial foundation for patterns of life widely perceived as unacceptably "oppressive" and "unjust."

Such violence can, in turn, provoke or inspire what is perceived as a legitimate "counter-violence," even where this is known to trigger an aggressive, even repressive, response by the ruling authorities. This response, which includes interventions by different aspects of the criminal justice system, is often designed to repress and counteract such counter violence. Such state responses can, in turn, provoke further escalating forms of counter violence-leading to an ongoing spiral that could be defused only by a widespread and active form of non-violence. Such interpretations may prove useful when investigating perpetrators of violence and other forms of hate crime, since they move consideration beyond the individual, and acknowledge the role of the criminal justice system.

However, particular studies, whether phenomenological or otherwise, problematize arguments such as those above. The discussion of discrimination towards Goths, below, raises inter socio-economic group conflict, as Goths are generally assumed to be middle-class.

Moreover, it raises issues beyond scarce resources, perhaps more linked to notions of ‘hate crimes’, although as will be discussed, crimes against Goths are not included in 21<sup>st</sup> century definitions of this in legislation. Different types of crime therefore require specific consideration.

### **Specific Studies of Perpetrators.**

Explorations of interpersonal conflict and violence have focused upon perpetrators, and by using ethnographic, if not phenomenological studies, and have both problematized and supported the above assumptions, although further work is necessary. Work by Gadd *et al*,<sup>162</sup> utilized interviews with ‘perpetrators’ on the influence of the far right on white residents in deprived parts of Stoke on Trent. This writer has argued that these groups felt marginalised by mainstream political parties, who had also prioritized minority ethnic residents, migrants and asylum seekers. The BNP utilized the language of ‘us’ and ‘them’, ‘a binary logic of racial politics, a vote for the BNP was most clearly intelligible as a vote for ‘us’. Such ideas, it is argued, can thus have wide influence and possibly ‘legitimise’ hate crimes in the eyes of many.

Whilst there is evidence that extremists conduct a small minority of hate crimes, Sibbitt argues that the extremist propaganda of the British National Party has affected local youths in the south London areas she studied, and this researcher has provided specific empirical evidence to support this:

‘In general, the young people were not members of these organisations. However, they were aware that the far-right presence and propaganda were threatening towards ethnic minorities. The young people therefore co-opted the language and the insignia of these organisations into their own activities, such as graffiti or writing and posting threatening notes.’<sup>163</sup>

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<sup>162</sup> Gadd *et al* loc cit.,

<sup>163</sup> R. Sibbitt, 1997, *The Perpetrators of Racial Violence and Racial Harassment*, Home Office Research Study 176, 3

Sibbitt's research involved interviews with staff in agencies whose work brought them into contact with perpetrators or potential perpetrators, and local people whose social networks and experience were likely to include actual and potential perpetrators. Staff in various agencies: the police service, the housing department,- the local education authority,- the youth service,- the Probation Service,- the Race Equality Council, were asked about their experience of living or working in the area and perceptions of the perpetrators of racial harassment and violence and what motivated them. Such work has offered 'evidence' from which to critique Simpson, for his reductive act of interpretation limited to an imagined dehumanizing of victims, and the comparison to socially sanctioned mass executions. Whilst dehumanization may be a factor, it is not necessarily so, and nor is hate crime affected solely towards or between groups, or leading to mass execution. Sibbitt argued that one reason there has been so little research into perpetrators is that:

'...there is some tension between perceiving the perpetrators of racial harassment as violent and dangerous political extremists, and the boy (or girl or man or woman) next door who may be a little too close to home for comfort. The same tensions have been observed in researching subjects such as the perpetrators of domestic violence or of child sexual abuse. Either way, it has sometimes been easier to forget the perpetrators and focus on the victims instead.'<sup>164</sup>

As Ray et al note,<sup>9</sup> the "uncomfortable truth" is that perpetrators of hate crime are commonly not "Nazis" but, instead, "ordinary" members of the public, albeit often ones with criminal histories. Ray *et al* utilised profiles of racist offenders, and those who had not perpetrated hate crimes, concluding that: 'in respect of the offending, the sample was not significantly different from the total population of known offenders serving community sentences.'<sup>9</sup> Possibly providing support for Schroder and Schmidt, Ray *et al* conclude that violence was often used as an everyday way of resolving disputes.

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<sup>164</sup> Ibid.

## Phenomenology and perpetrators

Phenomenological research on the experience of violent crime and young offenders has argued for the recognition of ‘an amnesia’ of perpetrators, in contrast to the above. If taken at face value this would suggest unconscious, subconscious or repressive factors in play, and also possibly the ‘spontaneous’ or unanticipated nature of many crimes. Evans *et al* speculated that the ‘...derealisation, depersonalisation, and emotional numbing experienced during dissociation might impede the elaboration of the trauma memory, leading to more disorganised recall.’<sup>165</sup> The purpose of Evans *et al*’s work was to study the phenomenological characteristics of amnesia in violent crime. Within their study two participants did not participate after suffering distressing flashbacks during the consent process. The research assessed levels of dissociation during the incident, hypothesizing that the greater the dissociation, the greater the amnesia. Dissociation can be linguistically expressed as ‘I felt as if it was happening to someone else’; ‘I felt cut off from my past.’<sup>166</sup>

Evans *et al*’s findings suggest that partial amnesia was more evident than full; more prevalent for those who knew the victim, and was linked to those who stated they felt a greater sense of ‘loss of control’ during the incident. The latter is suggested to be linked to cognitive disruption during the event, once the individual feels ‘out of control’. Mainly conducted via questionnaire, the findings cannot, however:

‘determine whether the gaps in memory reported by participants reflect irreversible memory loss, a problem in accessing information by intentional recall, avoidance of thinking or talking about the worst moments of the assault, or a failure of encoding. It is possible that some of the material may have been accessible using other modes of retrieval, such as picture cues or a visit to the scene of the assault.’<sup>167</sup>

Such comments may have relevance when attempting to explore how violent hate crime crime is experienced and recalled: the partial amnesia for the most violent offences related to

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<sup>165</sup> C.Evans, G.Mezey, A.Ehlers, ‘Amnesia for violent crime among young offenders’, *The Journal of Forensic Psychiatry & Psychology*, Vol. 20, No.1, February 2009, 85-106.

<sup>166</sup> Quotes taken from Evans *et al*, *op cit*, 90.

<sup>167</sup> Evans *et al*, *op cit*, 101.

the most violent instance of the assault. As per previous research, Evans *et al* found: ‘...no association was found between amnesia and drug dependence or intoxication at the time of the offence.’<sup>168</sup> Such findings suggest a nuanced interpretation and investigation of the recollections of hate crime victims. Research on victims of other types of crime suggest this is an area to consider. Trauma memories, according to some research, are over represented in sensory-based memories, and comparatively under-represented in verbally accessible memories.<sup>169</sup> Expressly phenomenological research by Benhke, discussed further below, has attempted to access and illuminate sensory based memories, through her work on ‘embodiment’<sup>170</sup> and ‘ghost gestures’. Research on amnesia has linked this to dissociation and argued that it may be a defensive mechanism for victims of various types, and that trauma is not a prerequisite.<sup>171</sup> This is an ongoing debate in psychiatry, with many arguing the opposite of the above. The methods utilized will be discussed below.

### **Typologies of perpetrators**

Research by Levin and McDevitt suggests a possible typology of hate crime offenders, with their evidence based upon perceptions elicited through interviews with victims and offenders, police officers investigating these crimes and analysis of data from the Community Disorders Unit of the Boston Police Department. Levin and McDevitt suggest distinctions between: ‘those who act for the thrill of it, those who perceive themselves defending their turf, offenders on a mission to ‘rid the world of evil’.<sup>172</sup> In 2002, McDevitt, Levin and Bennett utilised additional data from the Boston Police Department and added ‘retaliatory violence’ to

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<sup>168</sup> Ibid

<sup>169</sup> C. R. Brewin, T. Dalgleish and S. Joseph, ‘A dual representation theory of posttraumatic stress disorder’, *Psychological Review*, 1996, 103, 670-686; T. Dalgleish, ‘Cognitive theories of posttraumatic stress disorder: The evolution of multi-representational theorizing’, *Psychological Bulletin*, 2004, 130, 228-260.

<sup>170</sup> Benhke op cit.

<sup>171</sup> E. Benhke, 2012, ‘Enduring A Phenomenological Investigation: Study project in Phenomenology of the Body,’ in S.C. Koch, T. Fuchs, M. Summa & C. Muller, *Body Memory, Metaphor and Movement*, 83-103; A. L. Kirkengen & E. Thornquist, 2012, ‘The lived body as a medical topic : an argument for an ethically informed epistemology,’ *Journal of Evaluation in Clinical Practice*, 18, 1095-1101.

<sup>172</sup> J. McDevitt & J. Levin, 1993, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*.

the typology.<sup>173</sup> During the research, the difficulty of defining motivation was raised, and is a useful area for further research. A linguistic analysis of how such identifications were made may reveal how assumptions shape perceptions and encourage or facilitate typologies.

### **Linguistic interpretations of motivation and crime**

Equally, and related to a phenomenology of crime and law, even violent acts may not be labeled as hate crime because victims do not fit within the legally defined categories.

Garland, and Chakraborti, for example, have focused upon whether victimization of sub cultures could be included within the definition of hate crime, utilising the specific case of Sophie Lancaster and her partner Robert Maltby who were both Goths. Linguistic analysis of Garland and Chakraborti's work, and prosecution in the case, reveals how both the crime and motivation were perceived. It also perhaps provides insights into how the 'evidence' of typologies has developed. Both were attacked, (Sophie later died from her injuries), and, according to Michael Shorrocks, QC, for the prosecution, 'singled out not for anything they had said or done but because they dressed differently.'<sup>174</sup> Detective Supt. Mick Gradwell of Lancashire Police said it was one of the most violent murders he had come across in his lengthy career:

'I do not think Herbert and Harris have recognised how violent the attack was. They have just done it without thinking, but they seemed to have enjoyed it, and carried on remorselessly kicking at two very defenceless people who were unable to protect themselves because of the level of violence inflicted upon them... I am very critical of some of the parents involved. I really don't think they have taken completely seriously how repulsive this incident was ...'<sup>175</sup>

Gradwell stated that when Harris was initially interviewed about the assaults he was

"laughing and joking" with his mother.<sup>176</sup> Evidence from the case also reveals the importance

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<sup>173</sup> J McDevitt, J. Levin and S. Bennet, 'Hate Crime Offenders: An Expanded Typology,' *Journal of Social Issues*, 58 (2): 303-317.

<sup>174</sup> BBC News, 2008.3.27

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

of language in ‘placing’ an incident, with Anthony Russell QC, at Preston Crown Court commenting that: ‘this was a hate crime against these completely harmless people targeted because their appearance was different to yours.’<sup>177</sup> Maltby survived, though brain damaged, and required treatment for the ‘serious psychiatric disorder’ caused by the attack.

The impact on victims of crime and violence has been explored phenomenologically, mostly within medical works, but not specifically with regard to hate crimes, except for example those of Willis. However, Chakraborti and Garland place the above attack not within the context of ‘hate crime,’ but within the context of the fear of the other, leading to its possible manifestation in violence, seeing this as characteristic of monocultural communities.<sup>178</sup> They argued that to be labeled as a hate crime would entail an attack on a historically marginalized group, of which Goths cannot be considered. For many ‘hate crime’ is synonymous with ‘stranger danger’ as victims are assumed to not know their attackers. Whether fear of the other is limited or particularly characteristic of monocultural communities, (if such can be said to exist in a modern internet and mass media saturated world), is a moot point, and perhaps more related to the fact that Chakraborti and Garland were only focusing upon a specific area: many incidents occur where there are multicultures and multiethnicities.

Garland, however, identifies features that may have led to the attack, beyond ‘fear of the other’, arguing for the perceived ‘passive’ nature of Goths. This interpretation is reiterated in the language of the detective superintendent, the judge, and may have been a factor in this act of victimisation, and is definitely related to their perception of what it means to be a "Goth." Perhaps related, but not identified as such, Brill argues that some harassment of Goths can be homophobic in nature, despite their predominantly heterosexual composition, with males

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<sup>177</sup> Ibid.

<sup>178</sup> J. Garland and N. Chakraborti, ‘“Race”, Place and Space: Examining Identity and Cultures of Exclusion in Rural England’, 6 *Ethnicities* 159-177.

targeted for their supposedly androgynous or effeminate appearance.<sup>179</sup>

### **A phenomenology of victimisation?**

As long ago as 1984 it was argued that:

‘Even though the actual experience of victims is one of the first places we should explore if we wish to understand criminal victimisation, we have chosen not to stumble around in this unfamiliar terrain. For the most part we have studied what we know how to study rather than victimization... could we not also study what it is to live through victimisation, and then reflect on implications for victims’ lives and for points of intervention? Such a study would require methods not available from our laboratory tradition.’<sup>180</sup>

Fischer’s work on being criminally victimised, utilised a phenomenological study of what it was like to live through being victimised. Her method attempted to identify and ‘put aside as best we can our own prior assumption about the phenomenon... [To convey a sense of the subjects’]... living of a situation as a coherent whole...’<sup>181</sup> The methodology will be discussed later below, and includes strengths, weaknesses and areas for further consideration.<sup>182</sup>

Various types of work have attempted to access, uncover and elucidate the lived experience of victims. Research on discriminatory harassment of disabled persons, undertaken by the Equality and Human Rights Commission has utilised: ‘submissions made by people who have experienced disability-related harassment themselves and the organisations that support them...’ Their aim was to make the experience of the phenomena of hate incidents overt, to make it more publicly visible. This research included a wide variety of quotes from people with disabilities and their opinions, but without in-depth experiential analysis. Similarly, research by the National Union of Students under the title ‘No Place for Hate...’,<sup>183</sup> involved

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<sup>179</sup> D.Brill, 2008, *Goth Culture: Gender, Sexuality and Style*.

<sup>180</sup> C.T. Fischer, op cit, 161-2.

<sup>181</sup> Fischer, op cit 163.

<sup>182</sup> Ibid.

<sup>183</sup> NUS Reports, ‘Hate Crimes and Incidents in Further and Higher Education: Sexual Orientation and Gender ID’, 2011: ‘Hate Crimes and Incidents in Further and Higher Education: Disability 2011: ‘Hate Crimes and Incidents in Further and

four studies into areas identified as falling within the remit of ‘hate crime’: Race, Religion, Disability, Sexual Orientation and Gender. The findings are presented as quotes from perceived victims, (although legislation would not necessarily define all the acts as hate crimes, and nor would all be considered ‘violent’ if this is assumed to be only physical).

Studies by Craig-Henderson and L. Ren Sloan, focussing upon race and ethnicity, argue that when individuals are victimised because of their race or ethnicity: ‘they are likely to experience a host of negative emotions that are qualitatively distinct from those experienced following criminal victimisation that is not motivated by hate.’<sup>184</sup> Craig Henderson and Ren Sloan note the bodily reactions such as: ‘...increased heart rate, hyperventilation, shaking, tears, numbness, a feeling of being frozen or experiencing events in slow motion, dryness of the mouth, enhancement of particular senses such as smell, and a ‘fight or flight’ response’.<sup>185</sup> However, they also argue that victimisation incurs significant psychological cost, with particular characteristics, if it occurs as a result of racial targeting. The 2008 experiential research by the Latvian Centre for Human Rights involving individual case studies similarly considers psychological effects of hate crime on the individual and the community,<sup>186</sup> but once again lacks any in depth phenomenological analysis of the experience, its structures and interpretative preconditions.

As Craig Henderson notes, previous work on hate crime, gathered through questionnaires and interviews, has focussed upon gay, lesbian and bisexual victims of violence. Herek et al,<sup>187</sup> and Noelle,<sup>188</sup> for example, have similarly noted the particular psychological effect of

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*Higher Education: Race and Ethnicity 2012: ‘Hate Crimes and Incidents in Further and Higher Education: Religion or Belief 2012.*

<sup>184</sup> K.Craig- Henderson & L.Ren Sloan, ‘After the Hate: Helping Psychologists Help Victims of Racist Hate Crime,’ 2003 *American Psychological Association*, 481-490, 482.

<sup>185</sup> Ibid, 482, citing the UN Office for Drug and Crime Prevention, 1999, p.4.

<sup>186</sup> Latvian Centre for Human Rights, ‘*Psychological Effects of Hate Crime-Individual Experience and Impact on Community (Attacking who I am)*,’ LCHR project ‘*Combating hate crimes in Latvia and the Czech Republic: legislation, police practice and the role of NGOs*,’ 2005.

<sup>187</sup> G. Herek, J. R. Gillis, J. C. Cogan, and E. K. Glunt, ‘Hate Crime Victimization among lesbian, gay and bisexual adults: Prevalence, psychological correlates, and methodological issues,’ 1997 *Journal of Interpersonal Violence*, 12, 195-215.

<sup>188</sup> M.Noelle, ‘The ripple effect of the Matthew Shepard murder: Impact on the assumptive worlds of members of the targeted group,’ 46 *American Behavioural Scientist* 2002, 27-51.

violence motivated by prejudice against what are perceived to be the essential elements of a person's identity. Herek *et al* interviewed participants and reported higher levels of depression, anxiety and anger than victims of non-hate crime: recovery was twice as long (perhaps five years). Iganski,<sup>189</sup> and Perry<sup>190</sup> make similar suggestions.

Herek *et al* also argue that responses revealed that victims of hate incidents were more likely to view all members of the perpetrators' perceived social group as sharing the same beliefs.<sup>191</sup> Insofar as this is the case, it is likely to affect their future perception of situations and others. The possible implications of this for person's identifying themselves as a "victim of crime," and of perpetrators, have not been sufficiently considered in the academic literature to date. Noelle's work argues for the 'vicarious traumatization effect' (the ripple effect) of a violent attack on a member of a particular group, because it: 'challenged the participants' fundamental assumptions of benevolence and meaningfulness of the world and worthiness of self.'<sup>192</sup> Perry argues that the damage involves the whole community, creating hostility, fear and suspicion.<sup>193</sup>

Lilly, Valdez and Graham-Bermann, utilised the quasi-experiential self-report questionnaire approach, and - from its findings - similarly argued for a diminished self and world view following exposure to interpersonal violence. These researchers claimed to identify a link with depression.<sup>194</sup> However, they also stress that their results are not generalisable to all populations. Moreover, they discussed the possibility that these people may have a diminished world view due to depression, and that:

'more negative assumptions before a trauma are a risk factor in developing adverse psychological outcomes following a trauma, whereas more positive core assumptions

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<sup>189</sup> P. Iganski, 2002, 'How Hate Hurts,' in G.C. Sepeli and A. Orkeny (eds), *Gyulet es politika* (Hate and Politics), Budapest: Minoritas Alapitvány Kisebbségkutató, Intezet, pp. 25-35.

<sup>190</sup> B. Perry, 2003, *Hate and Bias Crime: A Reader*.

<sup>191</sup> T. E. Pettigrew, 2009, 'The ultimate attribution error: Extending Allport's cognitive analysis of prejudice.' *Personality and Social Psychology Bulletin*, 5, 461-476.

<sup>192</sup> M.Noelle, 'The ripple effect of the Matthew Shepard murder: Impact on the assumptive worlds of members of the targeted group.' *American Behavioural Scientist* 46, 27-51, p.32, quoted in Craig Henderson *et al*, op cit, p.484.

<sup>193</sup> Perry 2001 op cit, p.10.

<sup>194</sup> M.M.Lilly, C.E.Valdez, S.A.Graham-Bermann, 2008, 'The Mediating Effect of World Assumptions on the Relationship Between Trauma Exposure and Depression.' *Journal of Interpersonal Violence* 26(12) 2499-2516.

may be a resilient factor in the face of trauma.<sup>195</sup>

Craig Henderson *et al* argue for guiding principles for working with such victims, who may be attempting to search for meaning as an effective coping strategy.<sup>196</sup> Michael Fingerle's<sup>197</sup> recent work on 'resilience' has critiqued the emphasis upon the individual, and 'trait theories' of coping, and has highlighted the importance of communities and availability of resources for the concept of 'recovery' from hate crime. He does not dispute the existence or effect of hate crime, but prefers to focus upon recovery as an inter-relational concept.

In 2011 research positing utilising phenomenology and victims' perceptions, Fischer argues that: 'the actual experience of victims is one of the first places we should explore if we wish to understand criminal victimization.'<sup>198</sup> Kacen's research, published in the *Journal of Family Violence* on the use of language, seeks to demonstrate how Belk's Extended Self Theory contributes to understanding violent relations at the micro and macro levels.<sup>199</sup> Kacen used a Phenomenological-Hermeneutic approach to analyse life stories of battered women and abuser men, and notes the frequent use of the term 'it' in descriptions of violent spousal relations. This researcher argues that the use of 'it' extends the abuser's sense of self by: 'absorbing his victim's self into his own'. The hermeneutic assumption is that 'a life story is not constructed randomly, but rather reflects the storyteller's normalisation strategy concerning the past and the future. Such strategies allow people to 'doctor' their stories, especially concerning issues that are difficult to face.'<sup>200</sup> Kacen also noted the different usage of 'it' by victims.

Kacen's research explores theories of spousal violence, and their interest for the topic of hate

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<sup>195</sup> Lilly, Valdez, Graham-Bermann, *op cit.*, 2512.

<sup>196</sup> See also, R.Bulman & C.Wortman, 'Attributions of blame and coping in the 'real world': Severe accident victims react to their lot', *Journal of Personality and Social Psychology*, 35, 351-363.

<sup>197</sup> See, for example, M.Fingerle, 'Risk and Resilience', Hate Crime Symposium, Part 1, Frankfurt 13<sup>th</sup> April 2012. At 'When Law and Hate Collide', University Central Lancashire, [http://www.uclan.ac.uk/schools/lancashire\\_law\\_school/law\\_hate\\_events.php](http://www.uclan.ac.uk/schools/lancashire_law_school/law_hate_events.php)

<sup>198</sup> Fischer, *op cit.*, 161.

<sup>199</sup> L. Kacen, 'The 'extended Self' and 'It' in the Dynamics of Violent Relationships: Learning from Personal Life Stories on Social Conflicts.' *J. Fam Viol* (2011) 26:31-40

<sup>200</sup> Kacen, *op cit.*, 32.

crimes might be her discussion of "learned helplessness syndrome."<sup>201</sup> This is claimed to correlate with the frequency of violence events, posttraumatic reactions,<sup>202</sup> or survival responses.<sup>203</sup> The concept of emotional ambivalence,<sup>204</sup> and cycles of guilt, leading to the concealing of violence from outsiders may have relevance for disability hate crimes, which are often perpetrated by those known to the victim, including my carers and members of their own family. Similarly, Kacen cites Dutton, and the fact that abuser and abused may have emotional, economic, social and psychological interdependence.<sup>205</sup> This researcher located her participants via the Family Center (sic) for Prevention and Treatment of Violence, in an Israeli city. Analysis of tape recorded interviews was in three stages: locating the facts in the text, for example chronology, strategies, choices, linguistic structures; raising hypotheses and seeking confirmation in the text; forming theoretical generalizations.

Thus, Kacen identified the multiple use of 'it' with regard to violence, and in particular that this choice was '...neither random, conventional or colloquial', but used as an 'empty subject' to normalize their lives: 'especially when facing continued violence.'<sup>206</sup> In perpetrators' descriptions the 'it' is described as having dynamics and a life of its own, like 'a kind of parasite...' inside them: for victims the 'it' is not only the violence, but also the fear, which 'creeps into you ... it comes from the inside, very, very quietly...'<sup>207</sup>

Kirkengen's expressly experiential work has centred on appeals for a 'phenomenological concept of the lived body' since current biomedical theory is inappropriate in the context of violation experience.<sup>208</sup> Her argument concentrates upon framing bodies as lived bodies in

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<sup>201</sup> L. E. Walker, 'The Battered women syndrome, in G.T. & M.A.Straus (Eds.), *Family abuse and its consequences, new directions in research* pp. 140-148.

<sup>202</sup> B. Star, 'Patterns in Family Violence', 2009, *61 Social Casework*, 339-346

<sup>203</sup> M. A. Dutton, 'Battered women's strategic response to violence: The role of context.' In J. L. Edleson and Z.C.Eisikovits (Eds) 2009, *Future interventions with battered women and their families*, 105-124.

<sup>204</sup> D. Balcom, 'Shame and Violence: considerations in couples' treatment, *Journal of Independent Social work*, 1991, 5, 165-181

<sup>205</sup> M.A.Dutton, op cit, 80

<sup>206</sup> Kacen, op cit, 33.

<sup>207</sup> Kacen, above fn 76, 34

<sup>208</sup> A.L.Kirkengen & E.Thornquist, 'The lived body as a medical topic : an argument for an ethically informed epistemology', *Journal of Evaluation in Clinical Practice*, 2012. 18, 1095-1101.

order to do ‘justice to the nature of humans ... medicine needs to abandon the ideal of a value-free, objectifying knowledge of production in favour of an epistemology appraising the values and meanings of the human life world: in other words, an ethically informed epistemology.’<sup>209</sup> Kirkengen *et al* cite Merleau Ponty, particularly for his argument that it is through the body that we experience, gain access to and learned about the world around us. The body is the very centre of all experience; my body is ‘the pivot of the world’, that ‘by which there are objects.’<sup>210</sup>

Kirkengen *et al* cite the case of a woman expressing physical and emotional symptoms for which no diagnosis could be made, ultimately suffering a breakdown, and later realising that her physical symptoms related to her former childhood abuse.<sup>211</sup> Such insights may have relevance for future studies of hate crime and the impact of this on both victims and perpetrators.

Similarly, Benhke writes of "enduring" with regard to withstanding traumatic events, but also their lasting impact upon us, often experienced bodily, if not in a conscious manner.<sup>212</sup> For Benhke the hidden meaning of gestures may be accessible to psychotherapists, and others (including her) who have learned to notice and acknowledge these. For Benhke and Kirkengen, possibly emphasising the concept of restorative justice, but not necessarily so, it is important that perpetrators are made to recognise the particular effect their actions have had for their victims. Both claim that failure to acknowledge these hidden meanings has added to the suffering endured by survivors.

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<sup>209</sup> Kirkengen *op cit*, 1095.

<sup>210</sup> *Ibid* citing Merleau-Ponty, 1986, *Phenomenology of Perception* (Transl Colin smith).

<sup>211</sup> Kirkengen *et al*, *op cit*, 1099.

<sup>212</sup> Benhke, *op cit*.

## **The application of phenomenology within qualitative research into hate incidents and criminal acts more generally**

Willis has provided a concise summary of the findings of his qualitative research that merits extended quotation:

'A beginning secondary analysis (ongoing and unpublished) by the first author of his recent qualitative dissertation study of hate crime and its aftermath among gay men (Willis, 2004b), has exposed secrecy, differentiation, reflectiveness, liminality, voice, and power as major properties of marginalization experienced by victims of hate crime. Briefly, with regard to secrecy, gay male participants in the study struggled with decisions about revealing or concealing their hate crime assaults. Some men wanted to keep their private gay lives secret; that is, pass as straight because of the uncertain consequences surrounding disclosure of their sexual orientation to others. In the aftermath, they worried about reactions from others, such as friends, colleagues and, in some instances, health and criminal justice professionals, when deciding to disclose information about their assaults.'<sup>213</sup>

There is undoubtedly a major strand of phenomenological research that is not concerned with the practical application of phenomenological research methods and forms of experiential questioning and analysis, or in discovering any possible policy relevance and ethical implications of this discipline. This branch is content to remain firmly rooted in purely historical or philosophical and other theoretical debates where the central concerns are with providing critical or supportive commentaries on the works of Husserl and his followers and successors within the phenomenological tradition, comparing these to other theories, or subjecting them to criticism from a variety of different theoretical standpoints, or discussing the implications in principle for various disciplines, such as sociology, psychology and criminology of adopting a phenomenological approach.

On the other hand, another branch of phenomenological research has demonstrated an interest in the practical application of this radically experientially way of questioning and

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<sup>213</sup> Willis, D. G., & Porche, D. J. (2006) 'Envisioning and advancing men's health disparities scholarship: The Marginality-Cultural Competence Integrative Framework (M-CCIF),' *Issues in Mental Health Nursing*, 27(4), 425-442, 436.

analysing real life phenomenon taking shape and exerting various impacts outside the confines of academia, although these are few. At its best, this branch is fully informed by the insights of phenomenological theory and levels of questioning, including the transition from descriptive analysis of given experiences to structural and later constitutive analysis. Here, the goal can include not only applying phenomenological insights to a given area of lived experience but also developing these insights further by taking forward Husserl's agenda, supplementing its limitations, highlighting internal difficulties, correcting both its blind spots and previously unnoticed prejudices. Such work operates in self-critical ways that continue and extend the open-minded and open-ended spirit of inquiry guided by the phenomenon themselves that characterised much of Husserl's own research practices.

At its least impressive, appeals to "phenomenology" or "phenomenological research" within policy oriented strands of qualitative research lack any theoretical and philosophical grounding whatsoever. At best, such studies implement a sadly diluted and abbreviated version of only the *first stage* of phenomenological analysis, the careful and attentive descriptive analysis of the particular subjective meanings and concerns identifiable within lived experiences. The ambition here is too often limited to describing particular examples of concrete experiences in an empathetic non-judgment manner, identifying pervasive themes and possibly considering their significance and policy implications in terms of what was previously known and claimed about the topic in question. Such studies take their place within the context of an array of wider qualitative research methods and methodologies attentive to subjectively experienced meaning including, for example, symbolic interactionism, discourse analysis, ethnomethodology, cognitive sociology, applied hermeneutics, interpretive social science, and action research.

Here, phenomenology risks losing its distinctiveness, even at the level of research methodology, not least because analysis does not always sufficiently "bracket out" the naive

realism of the natural attitude and associated policy standpoints commonly superimposed upon the experience of the topic itself. Nor does this strand of research display adequate recognition of the very rationale for neutralising the more conventional quantitative orientation of empirical social and natural sciences, and the difficulties and contradictions that result from a "rush to quantify" through standard social science techniques and computer software. Yet, it is this rationale that provides the theoretically-justified driving force for conducting distinctly qualitative research where answering the question of what the phenomena is experienced as, how is this experience possible, and for-whom does it take shape in various ways, are recognised as primary and foundation-establishing practices.

Such diluted versions of phenomenological research fail to come to grips with the intentionality of experience, the correlation between encountering an event as one of hate crime and the interpretative acts of perception, anticipation, recollection, linguistic signification and imagination, each of which leave their distinctive mark on the meaning of this experience itself. In more technical Husserlian terms, there is little recognition of the "correlation" and mutual implication of "noematic" and "noetic" analysis. This, in turn, means that constitutive dynamics of practices of engaged, situated and embodied interpretation remain underdeveloped. In addition, the egological realm often remains barely explored even though the meanings themselves provide ample evidence of their relativity to, and dependency upon, underlying individual, group and societal ideological "orientations" including specific "subjective" values, interests and concerns.

Equally, the important task of devising credible and viable ways of gaining access to the lived experiences of others affected by hate incidents or other forms of criminal activity has been developed more fully in this applied branch of phenomenology, sometimes in ways that could offer real gains at the levels of not only research methods and methodology but also Husserlian theory itself. For example, it is arguable that one of the lessons of applied

phenomenological studies is that the rigorous and complete suspension of every aspect of the "natural attitude" towards hate incidents for example is simply not possible, or - if possible - undesirable because it excludes too much of the phenomenon itself.

It is arguable that one of the lessons of the application of Husserlian phenomenology is that, on the one hand, researchers themselves need to minimise the obstructive and distorting affects of this naive and unreflective orientation to facilitate the least prejudiced and most fulsome contact with the lived experience of hate crime itself that is humanly possible. On the other hand, however, in practice this methodological imperative may have real limitations and can, in some case at least, even turn counterproductive. This is because those experiencing hate incidents cannot be expected to engage in such "bracketing out" and their experiences will inevitably be shaped by the continuing impact of the natural attitude, which no amount of probing questioning into these experiences can be expected to entirely eradicate. In this respect, the phenomenon of hate incidents and hate crime include the experiences of victims, witnesses and affected parties as interpreted through the natural attitude, as subject to its underlying and typically unnoticed interpretative orientation.

### **The Practice of Phenomenological Research**

It is now timely to consider some of the practical stages of doing phenomenological research into the lived experience of criminality as displayed within published research. The practices of experiential analysis by Danny Willis, Constance Fischer, and Elisabeth Benke certainly merit attention. Equally, Gallagher and Francesconi provide valuable insights and reminders into the essence of phenomenology, which is found in its practice.<sup>214</sup> They emphasise open ended questions for long-term and short term experience, but also more focused questions to investigate further. They refer to the work of Petitmengin, which provides guidelines for

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<sup>214</sup> Gallagher and Francesconi, *op cit.*

setting up the interview: and stresses that during this interaction the interviewer must constantly focus upon the description being given, not upon providing reasons or theories for the experience.<sup>215</sup>

Willis addressed the preparatory steps undertaken immediately prior to interviews with victims of homophobic hate crimes to optimise undistorted and fulsome accounts of his respondents' lived experiences, including the distinctly subjective aspects. He considered it important that the phenomenological imperative to respect the qualities of the phenomenon precisely and only as it "shows itself," includes a receptiveness to, and interpersonal respect for, those who have had the experience itself, (and requires the interviewer to as far as possible, suspend their preconceived and stereotypical assumptions, beliefs and interpretations):

[I]n the qualitative dissertation study of hate crime, the researcher exercised awareness of identity and power differentials. During the research, he encouraged participants to relate their experiences during the interviews as they wanted. Before interviews began, participants were told that there were no right or wrong answers to any of the interview questions and that by participating in the study, they were considered to be experts on the matter. The researcher emphasized that he was only interested in their thoughts, feelings, perceptions, and meanings. The researcher regarded this type of awareness of identity and power differentials as respectful of the participants' needs for exertions of their authority without imposing the risks of likeness. The awareness was related to the power and differentiation properties of marginalization.<sup>216</sup>

Willis also reports on the phenomenological imperative to attend to all different ways in which the meanings of lived experience are expressed, both verbally and through body language, whose nuances may not be fully appreciated if these are reduced to words on a transcribed interview sheet. Hence, his interviewing included positive steps to capture those aspects of the tone, style of communication and other expressive dimensions displayed by his respondents' statements vital to the project of respecting their "voice," which might otherwise be lost:

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<sup>215</sup> C. Petitmengin, 'Describing one's subjective experience in the second person: An interview method for the science of consciousness.' *Phenomenology and the Cognitive Sciences*, 5(3-4), 229-269.

<sup>216</sup> Willis and Porche, 2006 op cit, 438.

'Communication styles of the participants were deemed an important method of expressing and languaging their experiences—the researcher was attentive to both the verbal and nonverbal content in communication. Careful active listening during the interviews, field notes recorded after the interviews, and attentive listening to the audiotaped interviews allowed the researcher to be respectful of both nonverbal and verbal communication styles. For example, one participant carried out a defensive reenactment of his assault experience during one of the interviews as a way of communicating his response. During the interviews, special attention was paid to each participant's affect, interaction style, mood, tone, and nuances of speech. This approach to communication styles valued the property of voice.<sup>217</sup>

Willis' phenomenology of hate crime also gave effect to the requirement to recognise that all experience takes shape within a specific internal and external horizon, and that a prior understanding of such contextual factors can be vital to the task of understanding the significance of respondent's interviews, particularly those that are more nuanced, and presuppose a measure of acquired subcultural or "insider" understanding. His choice of "relevant" interview questions, and careful preparation for the interviews themselves both demonstrated recognition for phenomenological research of the importance of attaining a properly contextual and contextualised understanding of the meaning both "in" but also "behind" the words his respondents used, and their less than obvious implications and associations.

Willis responded to this methodological imperative by deliberately "going native," as it were, by immersing himself in those slices of gay subculture that might prove important to gaining a comprehensive insight into hate crimes as experienced and expressed by the interviewees:

'Contextuality was important as the researcher, unknown to the gay community, became involved in events in the gay community, attended lesbian and gay community center events, attended Parents and Friends of Lesbian and Gays (PFLAG) meetings, and volunteered weekend time as a hate crimes volunteer crisis-line counselor. Consideration of contextuality also occurred during the preparatory phase of reviewing the literature from the lay public domain, governmental agencies, and professional databases on key subject headings: gay culture, homophobia, violence, victimization, hate crime, sexual orientation, perpetrators of hate crime, and gay men's responses as

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<sup>217</sup> Ibid. 438.

victims of hate crime (Willis, 2004a). A consideration of contextuality continued as men were given the opportunity to talk about their lives, emotional and developmental concerns, gay culture, heterosexual culture, personal psychology, their personalities, and health before, during, and after the interviews. Relevance was considered during all phases of the research, but especially during the crafting of the research questions and the semi-structured qualitative interview-guide. The research questions, pertaining to the lived experience of hate crime and its aftermath, were deemed relevant by members of the gay community and the participants.<sup>218</sup>

The interviewer's stance of respect for the content of lived experiences of hate crime and a willingness to adapt the logistics of the interview process in ways that best enable these experiences to "speak for themselves" as far as humanly possible, on their own terms and in their own way of gaining articulation without being forced to accommodate themselves to naturalistic and "common sense" assumptions, was clear in how Willis deployed time to optimise the most open and trusting form of exchange:

"Time was always considered. The researcher was flexible in scheduling the interviews and spent unhurried time with the participants getting to know them before the interviews and during the study. Respect for time was shown by giving the participants whatever amount of time they needed to tell their stories. They were not rushed or given a time deadline. Time was especially important to enhance trust between the researcher and each participant and to allow for the emergence of reflectiveness during the interviews."<sup>219</sup>

### **Ethics of phenomenological analysis**

Part of respect for experiential evidence strictly as experienced includes *an ethical dimension*: a concern for showing a practical sensitivity to ethical obligations owed by researchers to the victims of such crime. Given the probing nature of phenomenological questioning and its concern to bring to light and disclose emotionally-charged, sensitive and generally "private" aspects of the experience of hate crime, Willis properly considered it vital to fully discharge ethical obligations. These included respect for privacy, informed consent, and the avoidance of any element of misrepresentation of the purposes of the research itself, including how the interview material itself would be deployed to the possible future benefit of individuals in

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<sup>218</sup> Willis and Porche, 2006 op cit, 438-9.

<sup>219</sup> Ibid, 439

their situation. In other words Willis' account testifies both to "research ethics" in the narrow sense but also the ethical rationale informing the entire research project, including its policy goals and implications:

'Disclosure of hate crime assault and its painful aftermath, related to the property of secrecy, was a key consideration in this study. From the beginning of the formal research and giving informed consent, each participant was informed verbally and in writing of the purpose of the study as well as his rights to refuse to enroll in the study and withdraw from the study at any time. Each participant understood that he could stop the interview at any time and that he could omit answering any question. Prior to beginning the interview, each participant verbalized understanding that he could stop the interview at anytime. Each participant understood anonymity and the confidential nature of the information shared in the interviews. Furthermore, participants were provided ample times to ask questions about why the researcher, a nurse, was interested in studying hate crime. Participants were told that the primary intent of the nurse researcher was to collect their personal experiences, perspectives, and narratives of living through hate crime and its aftermath so that nursing knowledge could be advanced with the possibility of improvements in clinical practice and services.'<sup>220</sup>

Willis' work is, however, open to critique on the grounds of the ethics of its undertaking. With the best interests of the participants in mind, as Willis appears keen to ensure, there will always be crucial issues that cannot be ignored, particularly in this kind of research. Whilst clearly related to specific research, but relevant to Willis' and any phenomenological research or indeed any research involving human participants, the comments of the Council of Europe's Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine' ethics policy states that: 'any research that involves people as participants produces potential risks in terms of infringement or invasion of their dignity, rights, safety or well being.'<sup>221</sup> Similarly, participants do not negotiate ownership of their own words: anonymity/confidentiality is assured, as a form of protection. Participants are not typically consulted regarding the formation of questions.

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<sup>220</sup> Ibid.

<sup>221</sup> For more information see ([www.conventions.coe.int/Treaty/en/Treaties/html/164.htm](http://www.conventions.coe.int/Treaty/en/Treaties/html/164.htm)), as cited in M.Blake, 'Formality and Friendship: Research Ethics Review and Participatory Action Research', paper presented to Institute of British Geographers Annual Meeting, 2006. <http://www.acme-journal.org/vol6/MKB.pdf>, accessed 2/10/2012

A phenomenological approach can, however, mediate such criticisms, since it would utilise open-ended questions, (initially) encouraging the participant, and can offer respondents the opportunity to review the finished work, or their participation within it. In Willis' words this is 'Tell me about your hate crime experience.'<sup>222</sup> However, it is arguable that such a question is already framing an act. Yet, it is possible that such a question may reveal individual pre-interpretations, and this itself can be analysed as per Fischer. As detailed by Fischer,<sup>223</sup> the types of analysis of subjects' reports, conducted as phenomenological research, would ask such questions as: what is the person saying about his or her relations to environment, self, and others? What is being said in relation to the person's sense of past and future, as well as present? What is being said about how the phenomenon evolves temporally within the person's experience? What of the above is essential to this phenomenon? How could this account be changed if this phrase or sentence were dropped? How could this segment be condensed without introducing an interpretive scheme (which would disrupt the participant's perception of the phenomena?) Further analysis would consider what do all of these descriptions have in common that is essential to this phenomenon? Can a general structural description remain faithful, reflect commonality and represent mutuality, what does all this say about the nature of human consciousness?

Fischer described her method of conducting phenomenological research: conducted by interview, asked to describe what was 'going on prior to the crime', what the victimisation was like, and what happened afterwards. Interviewers asked for clarification or elaboration if necessary. Interviews were transcribed and analysed via what is reflected here concerning whatever appears "essential" to this person's experience of being criminally victimised? Then, what sequences of events and what personal meanings are present and hold good across the various instances? And what is being said about human experience as lived through

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<sup>222</sup> See Appendix 1 for our list of initial questions. However, further questions may be necessary, and cannot be dictated in advance.

<sup>223</sup> Fischer, op cit, 165-166.

‘being criminally victimised?’

Phenomenology recognises the participants as: ‘...existing in a social, gendered, cultural world where beliefs, traditions practices, institutions and language are imbued with significance and meaning.’<sup>224</sup> Phenomenological researchers must be aware of such influences and encourage self-articulation and reflection, careful listening and interpreting without leading.

### **Purposes of Experiential Results?**

A concern identified by some research<sup>225</sup> is that victimisation experiences may have similarities with other phenomena that are not perceived as hate crimes: victims may speak of feeling violated, vacillate between anger and helplessness, and somehow feel guilty. Burglary victims speak of their homes having been penetrated, desecrated, and dirtied ... findings also reveal similarities to "post-traumatic stress disorder," with ‘uninvited flashbacks, vivid recollections years later, distrust and suspiciousness, and a sense of no longer fitting in with society.’<sup>226</sup> Fischer argues for consideration of similarities and differences in types of victimisation. Other avenues of potential research themes include - is the experience different for recipients of multiple acts, than for single acts? They also argue for studying perpetrators – what was their world like at the time? Who is the victim in their eyes? Yockelson and Samenow argue that work suggesting criminals view the victim as an impersonal object, or as one of them, deserve to be attacked: (as does) work which argues that victims see criminals in terms of impersonal types.<sup>227</sup>

Related points concern both the ethics and the difficulties of ‘proving’ the results of experiential analysis, how these are deployed in practice, the extent and means of

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<sup>224</sup> Willis, op cit p.570

<sup>225</sup> Fischer, op cit, 168.

<sup>226</sup> Ibid, pp.168-169.

<sup>227</sup> S.Yockelson and S.E.Samenow, 1976, *The Criminal Personality* Vol. 1: cf Fischer, op cit, 170.

dissemination in ways that are designed to optimise beneficial outcomes, including possibly - depending upon the contents of the experiences articulated - for the community of the research subjects themselves. Behnke, for example, in her phenomenological research into different aspects of embodiment and the presence of the lived body in the experience of violence and abuse, has developed and refined the related notions of “embodied ethics.”<sup>228</sup> She focuses upon an ethics of embodiment in the theme of bodily expropriation and forms of disempowerment that stem from this. Craig Henderson et al argue that the treatment of clinical psychologists may perpetuate such perceptions, and therefore explicit recognition of their experience is necessary.

## Policy

Willis' phenomenological study of hate crimes against gay males suggests that the findings of such research both can and, as an ethical matter, ought to exert beneficial effects on a number of agencies who come into contact with victims, and in ways that can counteract such disempowerment:

'Hate crimes have their roots in normative, individual, and societal attitudes and ideologies that lead to intimidation, bullying, teasing, physical assault, rape, and murder. This paper provides an overview of the issues specific to hate crime assaults against gay males. Mental health nurses may find this knowledge useful in developing further nursing inquiry, education, and clinical practice related to hate crime and violence prevention.'<sup>229</sup>

The forms of bodily expression addressed by Behnke's experiential research also connect with the related fields of ethics and policy insofar as it can convey sympathy, compassion and

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<sup>228</sup> Elizabeth A. Behnke, 'Ghost Gestures: Phenomenological Investigations of Bodily Micromovements and Their Intercorporeal Implications.', *Study Project in Phenomenology of the Body Newsletter* 7:2 (Fall 1994), 19; Patricia Ellen Benner, 1994, *Interpretive Phenomenology: Embodiment, Caring, and Ethics in Health and Illness*. More recently, see the phenomenological contributions within *Hypatia Special Issue Ethics of Embodiment* (vol. 26.3, Summer 2011) and also the essays contained in the follow up special issue of *Hypatia*, vol.27:2, 'Contesting The Norms of Embodiment', Edited by Debra Bergoffen and Gail Weiss.

<sup>229</sup> Danny G. Willis, 'Hate Crimes against Gay Males: An Overview,' 25, *Issues in Mental Health Nursing* Jan 2004, Vol. 25, No. 2: 115-132 (abstract).

care towards another. Her aim is to articulate an open form of honesty, as well as a closed type of deception, and can also be subject to the distinction between "authentic" and "inauthentic" modes of individual and social being, including characterisations of relations of autonomy and solidarity. A phenomenological approach to hate crime as experienced would not take such interpretations at face value, but would explore their possibility. Early feminist work argued that deconstruction would ultimately lead to the unveiling of the 'truth', whereas later work focussed upon perception and articulation. Behnke argues that there is considerable potential for phenomenological research to contribute to an ethics of embodiment, a number of whose elements are relevant to the experience of hate incidents and discriminatory victimisation more generally:

'An example of a specific theoretical study yet to be worked out within embodied ethics would involve a critique of the notion of the "absent" body, characterizing it not as a "positive" pre-reflective anonymity to be interpreted in terms of a carnal metaphysics of the flesh of the world, but as a widespread social pathology identified by Thomas Hanna (1988) as chronic "sensory-motor amnesia"

Such work would then not only be relevant in, for instance, discussions of the unfelt body of survivors of serious and explicit violations to bodily/kinaesthetic integrity and dignity, but would also be of value in the general critique of the reigning bodily "normality" within a context of peace-building and restorative justice.<sup>230</sup> For Behnke, part of an embodied ethics is a receptivity to difference that, she argues, contrasts markedly with the defensive, negative and often violent reaction to different religions, ethnicities, sexualities, physical capabilities and gendered bodies for example that often characterise the perceived orientations of perpetrators of hate crimes. Such comments do not explore the experience or orientations of perpetrators.

In another study, Behnke suggests that there are a number of other practical benefits arising from a greater appreciation by researcher's of the presence of the lived body. These include

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<sup>230</sup> Behnke, 2001 op cit, 102.

promoting an enhanced sensibility among those who are professionally responsible for responding to hate incidents, including other's bodily injuries and discomfort, as these are being lived from the inside as actual bodily feelings running parallel to those material realities addressed by medical science or physiology or radiology. In addition, greater receptiveness to the experiential dimensions highlighted by a phenomenology of embodiment can permit those caring for injured, traumatised or disabled persons to better detect aspects of their inner life, of the manifestations of living personhood, which are being shielded or distorted by overt bodily actions or inactions.<sup>231</sup>

In Husserlian fashion, Behnke argues that the third-person natural scientific orientation towards damaged or dysfunctional bodies can be usefully supplemented with a first-person "personalistic" attitude that appreciates the experienced qualities of depth, localisation and spread of bodily sensations, as well as incipient tendencies towards movement facing internal resistance or discomfort, which are encountered by victims of hate crimes. According to Behnke, this allows for a useful counter-balancing of the more conventional naturalistic orientation towards material-anatomical dimensions of "muscles, "tendons" "connective tissue" and so forth. If the experiential evidence is allowed to emerge in its own terms and make its implications felt, then this may contribute to a wider healing process.<sup>232</sup>

In turn, this may result not only in a more sympathetic treatment of such victims by health care workers but also in enhanced communication between doctors and this category of patients, leading possibly to technical benefits.<sup>233</sup> Behnke argues that '...insofar as the lived experience of such victims is gently probed by those supporting them, or on their own initiative, enhanced bodily self-awareness and sensibility towards the "feel" of one's own body can, in itself, promote greater relaxation and resulting relief of felt bodily tension,

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<sup>231</sup> Eds D. Moran, L. E. Embree, T. Staedler and E. A. Behnke, 2004, 'Phenomenology: Critical concepts in Philosophy,' Vol 2 *Phenomenology: Themes and Issues*, 217-34.

<sup>232</sup> Behnke, 2004 op cit, 250.

<sup>233</sup> Ibid.

including a spontaneous balancing of disrupted or awkward body postures grown rigid reaction to traumatic events.<sup>234</sup>

Behnke highlights some of the claimed practical and policy benefits potentially stemming from an evidence-based phenomenology of embodiment: one of which is particularly interesting for a phenomenology of hate incidents. She cites the following example which she states shows, '... sensitivity to the ghost gestures moving among us has had positive practical results. ...' Taken from an unpublished paper by Kathy Washington entitled "Practical Applications of Phenomenology," this describes a presentation she gave on "The Body as Object: The Effects of Racism on Lived Body Experience."<sup>235</sup> During the presentation, Washington had other people confront her, reading aloud racially offensive things that people had said to her in the past. At first, her body felt like a thing or object, with minimal sensations. As the presentation progressed, however, she was able to regain a connection with bodily feelings:

'I felt a quivering, as if my muscles were trying to act out and move but something was holding them back. In that moment, I understood very intimately, without any intellectualizing, what this kind of societal oppression does to me and how it is sustained. A threatening situation does not need to exist at all! I have embodied it and carry it around with me at all times. The room after my presentation was heavy with silence. In front of all of us, I had begun the transformation from an object that was acted upon to a lived body that was beginning to reclaim her rights to awareness and consciousness.'

Controversially, Behnke argues that this is '... a crucial step in helping to resolve many of the injustices of the world. Thus the experiential retrieval of the very inadvertent isometrics that numb and disempower us can have a transformative effect: when lived from within, ghost gestures lose their power to haunt us.'<sup>236</sup>

The above is clearly presented as both an exploration and realisation of the embodiment of

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<sup>234</sup> Ibid.

<sup>235</sup> Kathy Washington entitled "Practical Applications of Phenomenology," this describes a presentation she gave on "The Body as Object: The Effects of Racism on Lived Body Experience" cited in Behnke, 1990, op. cit., pp.17-18.

<sup>236</sup> Behnke, 1990 op cit, 17-18..

oppression, and as possibly transformative. This episode has similarities with behaviour therapy, and particularly ‘exposure treatment’ most usually used to treat phobias. In 1986, Foa and Kozak<sup>237</sup> advocated such treatment, which can involve exposing the individual to the phobic stimulus, sometimes to an extreme degree until the fear dissipates. Indeed, it has been claimed that the ‘development and use of exposure-based therapies to treat individuals with pathological anxiety and fear is one of the great success stories within the field of mental health treatment.’<sup>238</sup>

Recognising the interaction of mind and body, although not specifically related to hate crimes, since the 1960s exposure-based psychological treatments have also been applied successfully in the treatment of other anxiety conditions, including specific phobias, posttraumatic stress disorder (PTSD), social anxiety, generalized anxiety disorder (GAD), as well as problems that include a strong anxiety component such as body dysmorphic disorder (BDD) and hypochondriasis/health anxiety.<sup>239</sup> However, such methods are not without critics, most obviously because of the distress they initially cause, the danger of unprofessional practice and thus the risk to the participant, and the unpredictable nature of participant response. Advocates highlight the successes, as listed above. For many, such methods have been supplanted by cognitive therapies, and particularly those which are future focussed, assuming the individual is already aware of their lived situation, and its creation, and who seek a method of "moving forward." This type of method can itself be critiqued for not engaging with the oppression, since it focuses upon cognitive change for the individual, and can thus be seen as perpetuating the *status quo*. A cautionary critique would also suggest that in policy terms focus upon the individual may be promoted due to perceived cost effectiveness.

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<sup>237</sup> Foa, E. B. & Kozak, M.J. (1986), 'Emotional processing of fear; Exposure to corrective information.' *Psychological Bulletin*, 99, 20-35.

<sup>238</sup> Frueh BC, Turner SM, Beidel D.C. 'Exposure therapy for combat-related PTSD: a critical review,' *Clinical Psychology Review*, 1995; 15: 799–817.

<sup>239</sup> Barlow, David (2005), *Essentials of Abnormal Psychology* (4th ed.).

Equally, at the policy level, if it is true as Husserlian phenomenology of embodiment maintains, that the recognition of others as persons in their own right, who, like myself, suffer when in pain, promotes greater sympathy for the plight of others, then the reverse could be the case. That is, it draws attention to the ways in which the failure of bodily self-awareness, the ability to feel one's own body, can impede such compassion and the possibility of identifying with the distress of other persons. In turn, this reduced sensibility, which may be actively encouraged by the internal practices and vocabulary of violent gangs and "training" within paramilitary and military organisations (in which killing people is reinterpreted as "the neutralisation of threats", could, in itself, enable cultures of individual and group violence to thrive.

Willis implies that the wider element of research ethics has formed an important ingredient of his phenomenological research programme, and includes not only the negative obligation to avoid harm to the research subjects but also aspirations towards mutual gain and "empowerment." Here, the very act of freely articulating experiences of hate crime in their own terms and having both their implications and impact taken seriously, is itself interpreted as an ethically positive dimension of "validation:"

'Voice was a key property reflected throughout the data as participants gave explicit, detailed accounts of their experiences, health concerns, and unmet needs during the audiotaped qualitative interviews. Given their prior history of not being heard, and the continued risk of not having "voice," the qualitative interviews became an important aspect in validating their traumatic experiences and empowering them to give "voice" to their woes and aspirations.'<sup>240</sup>

As, Sibbitt has noted,<sup>241</sup> the voice of the perpetrator has been significantly lacking in phenomenological studies of hate crime. Linguistic analysis of others interpretation of perpetrators, as discussed above, with regard to the case of Sophie Lancaster, often reveals their 'incomprehension' of the act and the motivation, although this does not prevent a

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<sup>240</sup> Willis and Porche, 2006 op cit, 437.

<sup>241</sup> R. Sibbitt, op cit.

subsequent diagnosis being made. Similarly, many groups do not fall within legal definition of hate crime, although the potential difficulty of the enactment of legislation in practice has been little explored.<sup>242</sup>

Insofar as such "empowerment" takes place at both individual and more general levels, then giving a voice can be understood as one of the beneficial outcomes of participation in applied phenomenological research. The same is true where, in the absence of direct evidence of such clear empowerment of the research subjects, or the readership of applied phenomenological research, there is achieved at least a greater insight into some of the sources and practices of institutional and interpersonal "disempowerment." Where such unambiguously beneficial outcomes arise, which may not always be the case in hate crimes research, then research ethics can be seen as overlapping with specific policy dimensions:

'Reciprocation was salient in the study. The researcher was able to meet his research goals but, at the same time, participants achieved their goals of contributing to scientific research regarding gay men's health, achieving better understanding of their self-perceptions and responses to hate crime, giving voice to their experiences, and considering how hate crime had influenced their daily lives. Empowerment of the research participants and gay male victims of hate crime was demonstrated in the study as the participants' and researcher's consciousness was expanded to include an enhanced understanding of some of the health problems and issues associated with hate crime and possible avenues for enhancing recognition of hate crime and its traumatic impact on marginalized men. Empowerment has occurred each time the researcher presented the findings at meetings and clinical and professional conferences where nurses, health scientists, and other health providers continue to be interested in the phenomenon and ways to help through education, public awareness, and supportive attitudes toward continued research in this area. Empowerment will be demonstrated as the full results of the qualitative study are disseminated in professional articles in scholarly, peer-reviewed professional health journals ...'<sup>243</sup>

In another relevant study, Behnke suggests that there are a number of other practical benefits arising from a greater appreciation of the lived body. These include promoting an enhanced sensibility among those who are professionally responsible for responding to hate incidents, including other's bodily injuries and discomfort, as these are being lived from the

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<sup>242</sup> S.R.Mellors, 'Defining and Recognising Are Not The Same: Challenges to Tackling Hate Crime in a Performance Culture,' *British Journal of Community Justice*, Vol 7, Issue 3, Autumn 2009: 101-133.

<sup>243</sup> Willis and Porche, 2006 op cit, 439-40.

inside as actual bodily feelings running parallel to those material realities addressed by medical science or physiology or radiology. In addition, greater receptiveness to the experiential dimensions highlighted by a phenomenology of embodiment can permit those caring for injured, traumatised or disabled persons to better detect aspects of their inner life, of the manifestations of living personhood, which are being shielded or distorted by overt bodily actions or inactions.<sup>244</sup>

For Behnke, such broadened sensibilities may result in a more humane appreciation by health care workers and victim support employee and members of the legal profession of the plight of victims that addresses them not only as both defective body-objects and organic malfunctions but also as "persons" who are inhabiting such bodies from the inside and are suffering from these injuries and impairments in various intelligible ways that no scientific instrument or medical diagnostic technique could ever hope to detect.<sup>245</sup>

## **Conclusion**

There can be little doubt that it is possible to develop an experiential account of hate crime based on interviewee's lived experiences, and that phenomenology as set out in this review offers many divergent ways of exploring this experience at different levels and with respect to different themes. Amongst these, ethical and policy dimensions will have to take centred stage, together with a close interpretation of the significance and implications of lived experiences that bear upon the adequacy of existing social responses to hate crime.

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<sup>244</sup> Behnke, 2004 op cit, 250.

<sup>245</sup> Ibid, 250.

