

Gender 'Hostility', Rape, and the Hate Crime Paradigm

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This article examines whether crimes motivated by, or which demonstrate, gender 'hostility' should be included within the current framework of hate crime legislation in England and Wales. The article uses the example of rape to explore the parallels (both conceptual and evidential) between gender-motivated violence and other 'archetypal' forms of hate crime. It is asserted that where there is clear evidence of gender hostility during the commission of an offence, a defendant should be pursued in law *additionally* as a hate crime offender. In particular it is argued that by focusing on the hate-motivation of many sexual violence offenders, the criminal justice system can begin to move away from its current focus on the 'sexual' motivations of offenders and begin to more effectively challenge the gendered prejudices that are frequently causal to such crimes.

Gendered violence¹ is a global phenomenon that continues to be both widespread² and physically, emotionally and socially harmful to those who are targeted.³ The media coverage of the brutal rape and murder of a 23 year old female student on a Delhi bus in 2012 caught the attention of the world's media.⁴ While this case is just one in a long list of horrific incidents of violence directed against women across the globe, it has led to an international debate about the plight of sexually and physically victimised women. The public uproar caused by India's sexual violence 'problem' has since led to the amendment of laws aimed at tackling sexual violence.⁵ Disturbingly though, the young woman's death represents just the tip of what seems to be an ever expanding iceberg of violence

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- 1 The term 'gendered violence' is used throughout this article in order to emphasize the gendered nature of much violence directed against women, while simultaneously acknowledging that violence towards men can also be 'gendered'. The article will also refer to 'violence against women' (VAW), a term which feminist scholars have coined in order to convey the message that violence is not gender-neutral (see A. K. Gill, and H. Mason-Bish, 'Addressing violence against women as a form of hate crime: limitations and possibilities' (2013) 105 *Feminist Review* 1). We will often refer to these terms interchangeably. Other terms which have gained currency within the literature include 'domestic violence' and 'intimate partner violence'. While we do not contest the use of these terms, we use the former phrases to reflect the potential for gender 'hostility' during offences committed against women.
- 2 N. Westmarland and G. Gangoli, *International Approaches to Rape* (Bristol: Polity Press, 2011); Department of Economic and Social Affairs (DESA), *The World's Women 2010: Trends and Statistics* (New York: United Nations, 2010) 130–140; J. P. Hodge, *Gendered Hate: Exploring Gender in Hate Crime Law* (New England: Northeastern University Press, 2011) 2.
- 3 See eg, L. Kelly, J. Lovett and L. Regan, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (2005) 293 *Home Office Research, Development and Statistics Directorate* 1.
- 4 See eg, BBC, 'Delhi gang-rape victim dies in hospital in Singapore' 29 December 2012 at <http://www.bbc.co.uk/news/world-asia-india-20860569> (last accessed 24 June 2013).
- 5 See eg, BBC, 'Explaining India's new anti-rape laws' 29 December 2012 at <http://www.bbc.co.uk/news/world-asia-india-21950197> (last accessed 24 June 2013).

against women (henceforth VAW), with a recent report by the World Health Organisation highlighting that an estimated 35 per cent of all women globally experience physical or sexual violence at the hands of a current or ex-partner.⁶ If we consider the fact that 'gendered violence' relates not just to rape and physical violence but also encompasses a wide variety of human rights abuses, including, *inter alia*, femicide,⁷ trafficking of women and girls, forced prostitution, and honour crimes,⁸ we begin to appreciate how VAW is a global problem of endemic proportions.⁹

While from time to time VAW catches the attention of the media (especially in recent years) it is certainly by no means a recent phenomenon. It has, however, only been in the last few decades that the law has been used specifically to protect women from gendered violence. It seems almost inconceivable now to note that marital rape remained 'legal' in England and Wales until 1991. It took the English courts almost two centuries to abolish the common law rule that prohibited a male spouse from being prosecuted for raping his wife, which finally met its death knell in the House of Lords decision in *R v R*.¹⁰ In that case, Lord Keith of Kinkel in his leading speech reflected that 'the fiction of implied consent has no useful purpose to serve today in the law of rape' – as if it really ever had. The case of *R v R* is a stark reminder of how slow the courts (and Parliament) have been to challenge and amend patriarchal formulations of English law. Part of the problem was that women's experience of violence remained largely hidden until victimologists and government agencies began to investigate it during the latter part of the twentieth century.¹¹ The seminal work of notable feminist activists and academics in the 1970s, 1980s and 1990s has been pivotal in bringing female victimisation to the fore of public and political debate.¹²

Significant to this article is that the majority of violent acts targeted against women are committed by men, highlighting the often gendered nature of much

6 World Health Organisation, *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence* (Geneva: WHO, 2013); see also DESA, n 2 above, 130–140; K. Smith (ed), D. Lader, J. Hoare and I. Lau, *Hate crime, cyber security and the experience of crime among children: Findings from the 2010/11 British Crime Survey: Supplementary Volume 3 to Crime in England and Wales* (London: Home Office, 2012) 25. For a discussion on the methodological limitations of VAW victim surveys see, S. Walby and A. Myhill, 'New Survey Methodologies in Researching Violence Against Women' (2001) 41 *British Journal of Criminology* 502.

7 The United Nations states that 'Femicide is the name given to the gender-based murder of women, implying that women are targeted and murdered solely on the basis of gender inequalities in contemporary societies', DESA, *ibid*, 134.

8 As well as other social and cultural practices which have the effect of subjugating the rights and freedoms of women.

9 See also C. Watts and C. Zimmerman, 'Violence Against Women: Global Scope and Magnitude' (2002) 359 *The Lancet* 1232.

10 *R v R* [1992] 1 AC 599.

11 See generally, S. Walklate (ed), *Handbook of Victims and Victimology* (Cullompton: Willan, 2007) Part 2.

12 Such as S. Brownmiller, *Against Our Will: Men, Women and Rape* (New York: The Ballantine Publishing Group, 1975); and C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989); see also Walklate, *ibid*.

female victimisation.¹³ It is by no means new to feminist literature to highlight the gendered dynamics of VAW. Sexual offences and domestic violence have, in particular, been conceptualised as conducts which are intended to subjugate and subordinate women, while simultaneously enforcing a male-dominated social hierarchy.¹⁴ Indeed, the conceptualisation of gendered violence as a form of male hegemony is now a well-trodden path within feminist and socio-legal scholarship.¹⁵ Yet despite the gendered nature of many forms of VAW, this area of legal and criminological scholarship has remained distant from another burgeoning area of academic study – that of ‘hate crime’.¹⁶ This is a notable omission when we consider the targeted and bias nature of such offences. While some attempts have been made to include VAW within definitions of ‘hate crime’ in the United States,¹⁷ its inclusion within the United Kingdom hate crime policy domain remains elusive. For instance, the Law Commission is currently considering the possible extension of the legislative framework on hate crime to include sexual orientation, disability and transgender identity within the current aggravated offences prescribed under sections 29–32 of the Crime and Disorder Act 1998. Yet no mention is made of gender-based hostility. In his theory paper which accompanies the Commission’s consultation paper, John Stanton-Ife provides only a fleeting reference to gender, noting that:

In the case of women victims, for example, a question to explore would be the extent to which women victims of relevant crimes have been selected in virtue of being women.¹⁸

This is the question on which this article focuses. The paper will, in the main, direct its attention to the specific offence of rape. Rape is often a clear demonstration of male dominance over women¹⁹ and it is a salient example of when gendered violence might become a ‘hate crime’.²⁰ Like most other examples of

13 See Hodge, n 2 above, 2.

14 See eg, Brownmiller, n 12 above; Smart, n 12 above; Hodge, *ibid.* See also B. Perry, *In the Name of Hate: Understanding Hate Crimes* (New York: Routledge, 2001).

15 *ibid.*

16 There is no one agreed definition of hate crime, but common amongst most descriptions is that it includes offences which are motivated, or partly motivated, by prejudice, bigotry, or animus based on the victim’s group-based identity traits. See M. Walters, ‘A General Theories of Hate Crime: Strain, Doing Difference and Self Control’ (2011) 19 *Critical Criminology* 313.

17 See Hodge, n 2 above.

18 J. Stanton-Ife, *Criminalising Conduct with Special Reference to Potential Offences of Stirring Up Hatred Against Disabled or Transgender Persons* (2013) at http://lawcommission.justice.gov.uk/docs/Hate_Crime_Theory-Paper_Dr-John-Stanton-Ife.pdf (last accessed 24 June 2013). This is despite the fact that the British Crime Survey has estimated that there are around 120,000 incidents of gender-motivated hate crime each year – the estimate is based on whether respondents of the survey perceived their experience of crime to be motivated by the offender’s attitude towards their gender, Smith et al., n 6 above, 25.

19 See Hodge, n 2 above, 13.

20 E. Rothschild, ‘Recognising another Face of Hate Crimes: Rape as a Gender-bias Crime’ (1993) 4 *Maryland Journal of Contemporary Legal Issues* 231; J. Gaffney, ‘Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases’ (1997) 6 *Journal of Law and Policy* 217; K. M. Carney, ‘Rape: The Paradigmatic Hate Crime’ (2001) 75 *St John’s Law Review* 314.

VAW, the majority of rape victims are women, with the offenders being men.²¹ Moreover rape, unlike intimate partner violence, is a specific offence which can only be committed by men.²²

This perspective of rape as a form of male dominance and control over women is a macro-oriented feminist approach to examining gender-based violence and has been criticised for 'failing to explain same-sex interpersonal violence . . . [and] ignoring the fact that women may also be violent within intimate relationships.'²³ While we do not intend to ignore the fact that women as well as men can be violent, and that same-sex violence can and does occur frequently in both sexual and intimate relationship violence, we wish to highlight the fact that women are much more likely to be the victims of such crimes *because they are women*.²⁴ It is this specific fact which brings the issue of VAW within a discussion about hate crime policy. Of particular concern to us is that despite many improvements in gender equality and criminal justice responses to gendered violence, the crime of rape remains a prevalent and serious issue in 21st century Britain – one that remains underreported and, in turn, rarely prosecuted.²⁵

This article starts by critically exploring the various conceptual parallels that exist between rape and 'hate crime'.²⁶ While it is argued that many incidents of sexual violence can fall within criminological conceptions of hate crime, it does not necessarily follow that such crimes should fall within the current framework of hate crime legislation. There are myriad reasons why gender-based violence (such as rape) should and should not be included within hate crime policy/law. This article explores the pros and cons of including gender 'hostility' within what is at times a contentious policy arena. It concludes that gender 'hostility' should be included within hate crime legislation in order to recognise, and additionally combat, the biased nature of various forms of VAW.

HATE CRIME: THE POLICY CONTEXT

It has only been in the last 15 years that the term 'hate crime' has entered political and academic discourse in the UK.²⁷ It was during this time that various high

21 Hodge, n 2 above.

22 Research and statistics have shown that men are also the victims of sexual violence and interpersonal violence, *ibid*, 13; see also statistics from the British Crime Survey, R. Chaplin, J. Flatley, and K. Smith, *Crime in England and Wales: Findings from the British Crime Survey and Police Recorded Crime* (London: Home Office, 2nd ed, 2011). Same-sex intimate partner violence is also common, see Hodge, n 2 above, 13.

23 *ibid*, 14.

24 *ibid*.

25 The CSEW found that just one in seven victims had told the police about the incident (15 per cent). The detection rate for sexual offences is currently 30 per cent, see Ministry of Justice, *An Overview of Sexual Offending in England and Wales* (London: Ministry of Justice, Home Office & the Office for National Statistics, 2013) 16 and 25. See also, A. Myhill and J. Allen, *Rape and Sexual Assault of Women: The Extent and Nature of the Problem* (Home Office Research Study 237, 2002).

26 *ibid*.

27 N. Chakraborti and J. Garland, *Hate Crime: Impact, Causes and Response* (London: Sage Publications, 2009) 1. The term was first coined in the US during the 1970s and 1980s in response to

profile racist attacks and murders caught the attention of the media.²⁸ The murder of Stephen Lawrence in 1993 was a particular turning point with media coverage resulting in political attention given to the needs of commonly victimised minority groups.²⁹ The preponderance of ‘racist crime’, however, meant that policies aimed at tackling hate crime more generally were developed using what has now become labelled as the ‘racial animus’ model.³⁰ This model provides that for a crime to become a ‘racist’ offence it must be at least partly ‘motivated’ by racial animosity towards the victim.³¹ This particular model of hate crime, common in both the US and the UK, has therefore dominated popular conceptions of what amounts to a ‘hate crime’. The ‘prototypical’ hate crime that emerged during this period depicted hate-motivated offences as those committed by strangers, in public spaces, without provocation, and usually accompanied by racist expletives.³²

While to a great extent this understanding of hate crime remains,³³ UK policy in this area rapidly evolved in the early part of the 21st century. The emergence of other identity groups’ experiences of targeted violence has meant that a more inclusive understanding of hate crime has been developed both within academic literature and public policy.³⁴ Policy guidance on the recording and prosecuting of hate crime can be found in various criminal justice institutions including the Association of Chief Police Officers (ACPO), the Crown Prosecution Service (CPS) and the Home Office.³⁵ They have, together, agreed a common definition of hate crime as:

Any criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice based on a person’s race or perceived race . . .

what appeared to be a growing number of prejudice-motivated crimes. See V. Jenness, ‘Engendering Hate Crime Policy: Gender, the “Dilemma of Difference,” and the Creation of Legal Subjects’ (2003) 2 *Journal of Hate Studies* 73, 75.

28 The ‘social problem’ of racist violence had also begun to penetrate the public conscience and several Home Office reports highlighted the pervasiveness of such violence. B. Bowling, *Violent Racism: Victimisation, Policing and Social Context* (Oxford: Clarendon Press, 1998).

29 The murder of Stephen Lawrence was followed by the Macpherson Report in 1999, Home Office, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* Report Cm 4262-I (1999). Various research reports into the ‘social problem’ of racist violence also added credibility, see Bowling, *ibid.*

30 See F. W. Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Cambridge, Mass: Harvard University Press, 1999).

31 As against other models such as the discriminatory model, which asserts that a hate crime is committed if the offender selects a victim because of the victim’s group identity. Under this model there is no requirement that the offender be motivated by prejudice or animosity. See Crime and Disorder Act 1998, s 28(1)(b) for a version of the racial animus model of hate crime.

32 Within the UK context see G. Mason, ‘Hate Crime and the Image of the Stranger’ (2005) 45 *BJC* 837; within the US context see discussion by B. A. McPhail, ‘Gender-Bias Hate Crimes: A Review’ (2002) 3 *Trauma, Violence & Abuse* 125.

33 *ibid.*

34 See Chakraborti and Garland, n 27 above, ch 1.

35 *ibid.*

religion or perceived religion . . . sexual orientation or perceived sexual orientation
. . . disability or perceived disability . . . transgender or perceived transgender.³⁶

While this definition is used by the police and the CPS to identify hate-motivated offences, the current body of hate crime legislation provides a much narrower definition of such offences. In fact, statutes proscribing hate crime do not use this term at all. The main criminal offences are contained under sections 29–32 of the Crime and Disorder Act 1998.³⁷ Section 28 (1) of the Act states that:

An offence is racially or religiously aggravated for the purposes of sections 28–32 below

If – (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of racial or religious group: or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.³⁸

The aggravated offences under the Act include assaults,³⁹ criminal damage, harassment, stalking and various public order offences.⁴⁰ Note that these offences are only aggravated by racial or religious hostility, meaning that offences aggravated by hostilities based on other identity characteristics are not specifically proscribed under the Act.⁴¹

In addition to these relatively new criminal offences, there are sentencing provisions prescribed under the Criminal Justice Act 2003.⁴² The provisions require a judge to treat an offence as 'aggravated' at sentencing where there is evidence to prove the offender demonstrated, or was (partly) motivated by, hostility based on the victims' race, religious beliefs, sexual orientation, transgender and/or disability.⁴³ These provisions apply to all types of offence, including sexual offences, which are committed by an offender who demonstrates or is (partly) motivated by hostility against one of the five protected

36 See eg, Crown Prosecution Service, *Hate Crime* (London: CPS, 2012) 1. This broad victim-centred definition is more inclusive than most other jurisdictions. It allows justice agencies to identify a high number of hate-based offences. However, the fact that incidents can be identified as 'hate crimes' by the victim or any other third party does not mean that the offence will be classified as a 'hate crime' in law, see further below.

37 As amended by the Anti-Terrorism, Crime and Security Act 2001, s 39.

38 Crime and Disorder Act 1998, s 28–32.

39 Including assault occasioning actual bodily harm and grievous bodily harm, see Offences Against the Person Act 1861, ss 47 and 20.

40 Including the Public Order Act 1986, s 4, 4A and 5.

41 Though as mentioned in the introduction to this article, the Law Commission is currently reviewing whether the Crime and Disorder Act should be extended to include hostilities based on sexual orientation, disability and transgender status. See Law Commission, *Hate crime: review of aggravated offences and stirring up of hatred offences* Consultation Paper No 213 (2013) at <http://lawcommission.justice.gov.uk/areas/hate-crime.htm> (last accessed 24 June 2013).

42 Or 'presumed' race etc, Criminal Justice Act 2003, ss 145 and 146.

43 See ss 145 and 146. See also 'stirring up of hatred' offences set out under the Public Order Act 1986, Part 3 and Part 3A.

characteristics.⁴⁴ This means that offences such as rape can only become ‘hate crimes’ where the offender ‘demonstrates’ hostilities or is motivated by hostilities pertaining to the victim’s race, religious beliefs, sexual orientation, disability or transgender status.

The growing legislative framework on hate crime has been a key reason why hate-motivated offences of various types have become a priority for both criminal justice agencies and the UK government.⁴⁵ In fact England and Wales now record more ‘hate crimes’ than virtually any other country in the world.⁴⁶ The most recently reported statistics show that there were 42,236 hate offences recorded by police services across the country between 2012/2013⁴⁷ – more than any other jurisdiction within the OSCE region.⁴⁸ The CPS also recently reported that during the period of 2006/2007–2010/2011 the number of hate crimes referred to the CPS rose from 14,133 to 15,519.⁴⁹ Clearly then, a great deal of time and resources are being spent on tackling the high number of hate crimes committed each year in England and Wales.

The purpose of hate crime legislation is to increase the amount of protection offered to specific groups while providing a potential remedy to the victimisation and fear that many group members experience when a hate crime occurs.⁵⁰ Within our retributive system of justice, the enhanced penalties in the legislative provisions not only act as an important tool for recognising the enhanced harms caused by hate crime incidents,⁵¹ but also provide state-expressed denunciation⁵² (described in more detail later in this article). On this basis, it is our view that hate-motivated offences should be pursued by the state specifically as ‘hate crimes’.⁵³

GENDERED VIOLENCE AND THE HATE CRIME MODEL: POWER, RISK, VULNERABILITY, AND ENHANCED HARM

Although absent in the UK context, several US based scholars have argued that certain gendered crimes should fit within the hate crime paradigm.⁵⁴ This is because crimes that are specifically directed against women are also likely to carry

44 The Public Order Act 1986 also provides for the offences of stirring up of racial or religious hatred or hatred based on sexual orientation, Parts 3 and 3A.

45 Chakraborti and Garland, n 27 above, xi.

46 Office for Democratic Institutions and Human Rights (ODIHR), *Hate Crimes in the OSCE Region – Incidents and Responses: Annual Report* (Poland: OSCE, 2013). The high level of recorded hate crime is partly a result of the broad definition of hate crime, outlined above, but is also due to the emphasis state agencies have put on tackling hate crimes post Macpherson.

47 Home Office, Office for National Statistics and Ministry of Justice, *An Overview of Hate Crime in England and Wales* (London, 2013).

48 See ODIHR, *Hate Crime Laws – A Practical Guide* (Poland: OSCE, 2009).

49 Crown Prosecution Service, *Hate Crime and Crimes against Older People Report 2010–2011* (London: CPS, 2012).

50 See P. Iganski, ‘Why Make “Hate” a Crime?’ (1999) 19 *Critical Social Policy* 386.

51 *ibid.*

52 See M. Walters, ‘Conceptualizing ‘Hostility’ for Hate Crime Law: Minding ‘the Minutiae’ when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998’ (2014) 34 *OJLS* 47.

53 See further explication of the justification and role of hate crime legislation below.

54 Rothschild, n 20 above, Gaffney, n 20 above and Carney, n 20 above.

with them a demonstration, or (part) motivation, of hostility that is based on the victim's gender. In illustrating the hate dynamics of gendered violence, several academics have referred to the case of Marc Lépiné – a young man who killed 14 female students at a university in Montreal, Canada. Jane Caputi and Diana Russell provide a chilling account of this case:

25 year-old combat magazine aficionado Marc Lépiné suited up for war . . . rushed the school of engineering. In one classroom, he separated the women from the men, ordered the men out, and, shouting, 'You're all fucking feminists,' opened fire on the women. During a half-hour rampage, Lépiné killed 14 young women, wounded 9 other women and 4 men, and then turned the gun on himself. A three-page suicide note blamed all of his failures on women, whom he felt had rejected him and scorned him. Also found on his body was a hit list of 15 prominent Canadian women.⁵⁵

Lépiné's victims were shot solely on the basis that they were female, the victims had no previous relationship with the attacker, and they were, for all intents and purposes, interchangeable objects who were selected because of a hatred Lépiné felt towards women. Gender-based crimes, such as Lépiné's offences, could fit within the UK hate crime model with little contestation if the provisions were to include gender as a protected characteristic. In this case Lépiné was clearly motivated by hostility towards his victims' gender. His actions would also clearly fall within the meaning of 'demonstrates' used in both the Crime and Disorder Act 1998 and the Criminal Justice Act 2003.⁵⁶

More recently in the UK on 25 February 2008, Levi Bellfield was convicted of the murder of two young women and the attempted murder of a third.⁵⁷ Prior to these convictions, Mr Bellfield had been charged with false imprisonment, attempted murder and abduction of women, and in 2010 he was charged with the murder and abduction of Milly Dowler, who was 13 years old at the time of the incident.⁵⁸ Bellfield's history of violence against women is believed to be even longer, with police suggesting that he may have been responsible for around 20 unsolved crimes against women, including rape.⁵⁹ During the sentencing of Bellfield for the murder of Milly Dowler, the judge described

55 J. Caputi and D. Russell, 'Femicide: Sexist Terrorism Against Women' in J. Radford and D. E. H. Russell (eds), *Femicide: The Politics of Women Killing* (New York: Twayne Publishers, 1992) 13.

56 A 'demonstration' of hostility is much easier to prove and does not require the courts to examine the offender's motives. Such cases are usually proved using evidence of identity-based slurs uttered during the commission of an offence. See E. Burney and G. Rose, *Racist offences: How is the law working? The implementation of the legislation on racially aggravated offences in the Crime and Disorder Act 1998* (London: Home Office Research, Development, and Statistics Directorate, 2002).

57 BBC, 'Levi Bellfield Guilty of Milly Dowler Murder' 23 June 2011 at <http://www.bbc.co.uk/news/uk-england-13875507> (last accessed 5 September 2013).

58 *ibid.* See C. Davies 'Levi Bellfield gets life without parole' *The Guardian* 24 June 2011 at <http://www.theguardian.com/uk/2011/jun/24/levi-bellfield-life-without-parole> (last accessed 5 September 2013).

59 *ibid.*

Bellfield's attacks to be the result of 'unreasoning hatred' towards women. Police and media reports described how he hated blonde women in particular. Acquaintances spoke of his intense loathing of women who had dyed blond hair, calling them 'sluts', 'impure' and who 'deserved to be messed around with'. A former girlfriend of his even said that he would hang around in alleyways waiting for women to walk by and feel an urge to want to 'hurt them, and stab them.'⁶⁰

Bellfield's crimes, like Lepinés, were clearly motivated by hostility towards his victims' gender. This begs the question, why have crimes such as Levi Bellfield's, been left outside of UK hate crime policy? Before we discuss why this might be, we should look further into whether other types of 'gendered violence' could fall within legal and criminological conceptions of 'hate crime'. For the purposes of illustration and space and for the reasons mentioned in the introduction of this article we focus, in the main, on the offence of rape.

The extant literature on the crime of rape has not only uncovered its deleterious harms but sociologists and social-psychologists have also helpfully explored its aetiology.⁶¹ Feminist scholars have long asserted that rape is an expression of power and control over women.⁶² A long history of female subordination has been perpetually reinforced by social and structural processes that support male domination.⁶³ Rape has been, and still is, frequently used to subjugate women. Psychological research on convicted rapists has shown that offenders frequently feel anger towards women which manifests in a need to control or dominate them.⁶⁴ Nicholas Groths' famous typology of rape suggests that there are two main motivating factors involved in the crime of rape.⁶⁵ The first is called 'power rape' and refers to 'sexual intercourse as evidence of conquest'.⁶⁶ Dominance is achieved by overpowering women, thus (re)asserting male authority. A female victim is in effect forced to submit to her male captor. The second type of rape is termed 'anger rape' and is explained by reference to the 'anger, rage, contempt, and hatred' that is expressed by the offender beating his victim and/or forcing her to submit to degrading sexual acts.⁶⁷ This form of rape uses the physical act to subordinate women's sexuality and identity, ensuring

60 *ibid.*

61 See eg. K. Drieschner and A. Lange, 'A review of cognitive factors in the etiology of rape: theories, empirical studies, and implications' (1999) 19 *Clinical Psychology Review* 57; T. A. Gannon and T. Ward, 'Rape: Psychopathology and Theory' in D. R. Laws and W. T. O'Donohue (eds), *Sexual Deviance: Theory, Assessment, and Treatment* (New York: A Division of Guildford Publications, Inc, 2008).

62 See eg. Brownmiller, n 12 above.

63 See eg. Brownmiller, *ibid*; Perry, n 14 above; K. Kirsh-Ashman and G. H. Hull, *Understanding Generalist Practise* (Belmont: Thomas Brook/Cole, 2006); Hodge, n 2 above.

64 D. Lisak and R. Roth, 'Motivational factors in nonincarcerated sexually aggressive men' (1988) 55 *J Pers Soc Psychol* 795. Despite such findings Hodge notes that many people remain convinced that sexual violence is motivated, not by power or misogyny, but by a desire for instant sexual gratification, Hodge, n 2 above. See also J. Tedeschi and R. B. Felson, *Violence, Aggression, and Coercive Actions* (Washington, DC: American Psychological Association, 1994).

65 N. Groth, *Men Who Rape: The Psychology of the Offender* (New York: Plenum Press, 1979).

66 C. A. Wicktom, 'Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws' (1998) 56 *Geo Wash L Rev* 399, 400.

67 *ibid.*

that men's sexuality remains dominant, powerful and superior.⁶⁸ Rape as a form of bodily violence can therefore be characterised as a process of subjugation which keeps women in 'their place',⁶⁹ or more precisely as Susan Miller⁷⁰ asserts, as an expression of misogyny.⁷¹ As with other forms of prejudice, misogyny can be described as a type of hatred of women, or within the legal lexicon, gender-based 'hostility'.⁷² Men are taught to harbour gender animus as a result of their socialisation process, and in the context of structural power relations between men and women, learn to see – and denigrate – women as inherently inferior.⁷³ This process involves the propagation of negative stereotypes and expectations about women and their sexual roles and in the case of rape can lead to attitudes of victim-blaming towards rape victims, as well as 'rape myths' which serve to justify why men seek to exercise violent sexual power over women.⁷⁴

Parallels of impact

Rape is a violation of both the body and mind, and as such many women experience immense psychological and physical harms.⁷⁵ As we have already alluded to above, rape is a crime which remains omnipresent throughout society.⁷⁶ According to recent data from the Crime Survey for England and Wales (CSEW) there were an estimated 366,000 – 442,000 sexual offences committed against women in the last year.⁷⁷ During 2011/12 the police recorded 53,665 sexual offences, of which 14,767 were rapes of a female, and 1,274 were rapes of a male.⁷⁸ The disproportionate number of sexual offences committed against women has meant that gender has been considered a 'risk factor'.⁷⁹ The risk of sexual violence (and other forms of gendered violence) is exacerbated by both its persistent and repetitive nature.⁸⁰ For example, Andy Myhill and

68 Groths' research found that most rapists actually had blends of power and anger motivations, meaning that the feelings of anger are often associated with the desire to control women. Groth, n 65 above.

69 Brownmiller, n 12 above.

70 S. Miller, 'Gender-Motivated Hate Crimes: A Question of Misogyny' in D. J. Curran and C. Renzetti (eds), *Contemporary Societies: Problems and Prospects* (New Jersey: Prentice Hall, 1994) 231.

71 While Hodge states that they are 'misogynistic acts of violence', Hodge, n 2 above, 31.

72 D. D. Gilmore, *Misogyny: The Male Malady* (Pennsylvania: University of Pennsylvania Press, 2001).

73 Gaffney, n 20 above, 264.

74 *ibid*, 264–268; McPhail, n 32 above, 132.

75 Kelly et al., n 3 above, 11. Harms often include physical injury, STIs, depression, alcoholism and suicide, WHO, n 6 above.

76 Westmarland and Gangoli, n 2 above, 1.

77 Ministry of Justice, n 25 above.

78 Chaplin et al., n 22 above.

79 L. Heise, 'International Dimensions of Violence Against Women' (1989) 12 *Response to the Victimization of Women and Children* 3, 6.

80 Römken and Letschert also note that 'a substantial proportion of domestic violence is not limited to single incidents, but develops into patterns of repeated violations': R. Römken and R. Letschert, *Feasibility Study For A Convention Against Domestic Violence, European Committee On Crime Problems* (Strasbourg: European Committee on Crime Problems (CDPC), 2007) 6 at <http://www.law.georgetown.edu/rossrights/docs/pdfs/DVfeasibility.pdf> (last accessed 24 June 2013).

Jonathan Allen's analysis of British Crime Survey data in 2002 found that 41 per cent of women who reported sexual victimisation experienced more than one incident.⁸¹ Multiple victimisation is common at the hands of both current and ex-partners.⁸²

The often repeated nature of much sexual violence is, in many respects, similar to other types of hate crime. In relation to racist violence, Benjamin Bowling notes that incidents cannot be 'reducible to an isolated incident, or even a collection of incidents,'⁸³ but rather they are likely to make a process of structural and personal experiences of violence, which is the result of their racial background.⁸⁴ Mark Walters and Carolyn Hoyle have also highlighted the repeated nature of hate crime via their research into community mediation.⁸⁵ They found that many of the cases that they researched 'could be characterized as long-term targeted hate abuse' which were committed by people known to the offenders.⁸⁶ The 'process of victimisation' uncovered by researchers examining both hate crime and gendered violence provide evidence of the similarities between these discrete forms of crime. Such findings counter the outdated perception that both types of violence are committed by deranged strangers in dark alleyways.

The consequences of (repeated) rape and other types of hate crime are also comparable. Both types of victimisation have far-reaching individual and social implications which can have long lasting impacts.⁸⁷ For instance, researchers have highlighted high levels of what has been termed 'rape trauma syndrome' amongst survivors of sexual violence.⁸⁸ This is where victims experience symptoms of emotional trauma, such as anxiety, depression or post-traumatic stress disorder (PTSD) as they relive their experience over and over again in their mind.⁸⁹ Post-traumatic stress disorder is also common amongst victims of domestic violence who often live in constant fear of retaliation if they confront their abusers.⁹⁰ The psychological damage caused by both sexual and domestic violence will in some cases lead to suicidal ideation and actions amongst victims.⁹¹

The emotional experiences of survivors of rape are in many ways similar to those who experience hate crime victimisation. Although the sexual nature of much gendered violence is different in nature to a physical racist assault, many

81 Myhill and Allen, n 25 above.

82 *ibid.*, 3.

83 Bowling, n 28 above, 230.

84 See also M. Walters and C. Hoyle, 'Exploring the Everyday World of Hate Victimisation Through Community Mediation' (2012) 18 *International Review of Victimology* 7.

85 *ibid.*

86 Often as neighbours, but also former friends, *ibid.*, 7.

87 See for example, Myhill and Allen, n 25 above; Smith et al., n 10 above.

88 This is a psychological condition which relates to the severe disruptions to an individual's physical, emotional, and behavioural characteristics. See J. Temkin, *Rape and the Legal Process* (Oxford: OUP, 2002) 4.

89 Carney, n 20 above, 345.

90 See L. Jones, L. M. Hughes and U. Unterstaller, 'Post-Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research' (2001) 2 *Trauma, Violence, & Abuse* 99.

91 WHO, n 6 above, 24.

of the psychological impacts are strikingly similar.⁹² For example, Paul Iganski's analysis of British Crime Survey data in 2008 found that victims of racist hate crime were more likely to report experiencing feelings of anxiety, shock, depression and vulnerability, when compared to victims of similar but non-hate motivated crimes.⁹³ Similarly, Herek et al.'s research in the US found that victims of homophobic hate crimes were more likely to experience emotional harms such as anxiety and depression for extended periods of time beyond that which is experienced by victims of similar but non-hate motivated crimes.⁹⁴ The enhanced traumas caused by hate crime can be partly explained by the fact that such incidents attack a victim's individual identity. Every hate crime conveys a symbolic message to both the victim and others like him or her. It expresses disdain for the victim's identity traits and, as such, actively undermines the victim's social worth within the community.⁹⁵ Victims of hate crime will know that they have been attacked, not because of what they have done, but because of what they look like, what they believe in, or who they are sexually attracted to.⁹⁶

The symbolic nature of hate crime means that other members of the victim's group are likely to fear that they too will be targeted.⁹⁷ Barbara Perry and Shahid Alvi refer to this as the '*in terrorem*' effect of hate crime, as hate-motivated incidents act to terrorise whole communities.⁹⁸ The constant fear of targeted victimisation leads to many minority group members changing the way that they act in order to fit in, thus avoiding victimisation.⁹⁹ For many, this also means

92 It should be noted that many hate crimes are of a sexual nature. See K. Allerfeldt, *Crime and the Rise of Modern America: A History from 1865–1941* (New York: Routledge, 2011). The 'corrective' rapes of lesbians as a means of turning them heterosexual, or the sexual penetration of gay men with various damaging objects as a way of injuring them have been documented as forms of hate crime. See B. Watermeyer, *Towards a Contextual Psychology of Disabilism* (Oxford: Routledge, 2013).

93 P. Iganski, *Hate Crime and the City* (Bristol: The Policy Press, 2008) 12, 13, 82 and 83. See also Ministry of Justice, n 47 above; G. M. Herek, J. R. Gillis, J. C. Cogan and E. K. Glunt, 'Hate Crime Victimization among Lesbian, Gay and Bisexual Adults' (1997) 12 *Journal of Interpersonal Violence* 195; J. McDevitt, J. Balboni, L. Garcia and J. Gu, 'Consequences for Victims: A Comparison of Bias- and Non-Bias- Motivated Assaults' (2001) 45 *American Behavioural Scientist* 697.

94 Herek et al., *ibid.*

95 *ibid.*

96 The highly damaging individual effect of sexual violence and hate crime is one of the main reasons why legislators have enacted enhanced penalties for these types of crime (See eg, Lawrence, n 30 above).

97 *ibid*; McPhail, n 32 above.

98 B. Perry and S. Alvi, "'We are all vulnerable": the *in terrorem* effects of hate crimes' (2012) 18 *International Review of Victimology* 57; see also M. Noelle, 'The Ripple Effect of the Matthew Shepherd Murder: Impact on the Assumptive Worlds of Members of the Targeted Group' (2002) 46 *American Behavioural Scientist* 27.

99 It is important to note that hate crime laws offer protection to people of any religion, race or sexual orientation, regardless of whether the individual is a member of a minority group or not (see for example, McPhail, n 32 above). Hate crime law and policy does not specify that the victim must be a member of a minority group (see *R v White* [2001] 1 WLR 1352). Therefore, while men and women are not minorities' numerically, they would both be protected by hate crime laws if gender were to be included as a protected category under current hate crime legislation.

avoiding certain locations and even staying at home during certain times when they feel at greatest risk.¹⁰⁰

It is unsurprising then that violence targeted specifically towards women is also likely to have the effect of instilling fear in other women that they too will be victimised.¹⁰¹ Carole Sheffield describes rape as a form of ‘sexual terrorism,’ arguing that it is:

... manifested through actual and implied violence; and all females, irrespective of race, class, physical or mental abilities, and sexual orientation, are potential victims – at any age, at any time, or in any place.¹⁰²

Under Sheffield’s construction of sexual terrorism then, rape and other processes of violence directed against women are used to keep women in a state of fear,¹⁰³ much in the same way that violence directed towards gay and lesbian people, religious groups and racial minorities work to keep them in ‘their place’. Perpetrators of rape just like other ‘traditional’ hate crime offenders act ‘out, in violent form, a relationship of prejudice which permeates our society’.¹⁰⁴ Susan Griffin asserts that regardless of whether a woman has experienced the direct act of rape, every woman in society is a victim because ‘rape and the fear of rape are a daily part of every woman’s consciousness’.¹⁰⁵ Indeed, some have even considered the rape of a woman in today’s society to be comparable to the lynching of African-Americans before it was recognised as a civil rights violation.¹⁰⁶ That is because rape is the ultimate physical threat; what Susan Brownmiller famously expressed as the ‘conscious process of intimidation by which *all men keep all women* in a state of fear’.¹⁰⁷ It thereby re-enforces a social hierarchy where women are subordinate to men – just as lynching was historically used to keep black people in a state of intimidation thus ensuring that white people remained socially and culturally dominant.¹⁰⁸

The vexing issue of interchangeability

One reason why rape and other forms of gendered violence have fallen outside of the hate crime paradigm is that most victims are known to their offender – often intimately.¹⁰⁹ It has been asserted that hate crimes under UK legislation differ from other crimes because the choice of victim by the perpetrator is based

100 See Iganski, n 93 above.

101 Hodge, n 2 above, 3.

102 C. J. Sheffield, ‘Hate Violence’ in P. S. Rothenberg (ed), *Race, Class, and Gender in the United States: An Integrated Study* (New York: St Martins, 1995) 393.

103 *ibid.*

104 Rothschild, n 20 above, 262–263.

105 S. Griffin, ‘Rape: The All-American Crime’ (1971) 10 *Ramparts* 26, 27.

106 *ibid*; M. Angelari, ‘Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women’ (1994) 2 *Journal of Gender and the Law* 64; Carney, n 20 above.

107 Brownmiller, n 6 above (emphasis added).

108 Brownmiller, *ibid*, 281; Rothschild, n 20 above; Angelari, n 106 above; Perry, n 14 above, 83; Hodge, n 2 above.

109 See Hodge, *ibid*; Lawrence, n 30 above, 14–15; Kelly et al., n 2 above.

on their membership of a particular group, such as their race or religion, which suggests that 'one member of such a group is interchangeable with any other'.¹¹⁰ One argument against the inclusion of rape or domestic violence in hate crime laws is that the victims of these crimes are not necessarily interchangeable in the same way other victims of hate crimes might be.¹¹¹ This is of particular salience in the case of intimate or acquaintance rape where the victim and offender are already known to each other.¹¹² Research in England and Wales has shown that females are more likely to be raped by males who know them in some way, usually acquaintances or partners,¹¹³ with stranger rapes accounting for just 10 per cent of all rapes.¹¹⁴ As such, most rape victims are not interchangeable in the same way that most other hate crime victims are. This means that the majority of rapes do not seem to match the necessary characteristics of a 'conventional' hate crime.¹¹⁵ This has led Eric Rothschild to argue that only specific types of rape, such as stranger rape, should be considered as 'hate crimes',¹¹⁶ because these are the only types of rape where the victim is truly interchangeable, ie the selection of the victim is based on her gender rather than because of other interpersonal factors.¹¹⁷

Rothschild's argument is, however, to a large extent flawed. The simple fact that a personal relationship exists between offender and victim does not preclude an incident from being understood as an expression of identity-based hatred. Central to whether an offence amounts to a 'hate crime' is whether the offender demonstrates hostility towards the victim based on the victim's identity traits and not whether the victim is interchangeable with another person. Recent research has begun to illuminate the interpersonal relationships that develop between individuals before hate incidents occur.¹¹⁸ In particular the close (faux) friendships which are often formed prior to the commission of disablist hate crime have led some to refer to such victimisation as 'mate crimes'.¹¹⁹ In a similar strain, the fact that rapes frequently occur between people known to each other¹²⁰ must not preclude them from being understood as being motivated by gender hostility.¹²¹ Indeed, the growing tendency to view intimate rapes as a problem that exists in individual men and their relationships with women potentially 'renders the gendered aspect invisible and obscures any focus on wider issues of misogyny'.¹²²

Even if we were to accept interchangeability as a prerequisite for hate crime, this should still not preclude rape or domestic violence from being classified as

110 ODIHR, n 48 above.

111 Carney, n 20 above, 341.

112 *ibid.*, 27.

113 Ministry of Justice, n 25 above, 16.

114 *ibid.*

115 Carney, n 20 above, 341.

116 Rothschild, n 20 above.

117 Hodge, n 2 above.

118 Walters and Hoyle, n 84 above.

119 P. Thomas, 'Hate crime or mate crime? Disablist hostility, contempt and ridicule' in A. Roulstone and H. Mason-Bish (eds) *Disability, Hate Crime and Violence* (Abington: Routledge, 2013).

120 Myhill and Allen, n 25 above; Kelly et al., n 2 above.

121 Lawrence, n 30 above, 15.

122 H. Mason-Bish, 'Examining the Boundaries of Hate Crime Policy: Considering Age and Gender' (2013) 24 CJPR 297, 308.

being potentially aggravated by gender hostility. This is because victims of acquaintance/intimate rapes or domestic violence may well be interchangeable in the minds of their attackers.¹²³ Although the victim is not selected randomly she will be interchangeable in the sense that the offender will express gender hostility towards any woman that he becomes intimately involved with. Statistics already highlighted above show that gendered violence is often repeated over prolonged periods of time, with offenders abusing and raping women they know *because* they are women.¹²⁴ Such violence is therefore not directed at the victim as an ‘individual’ but is way of subordinating women *per se*.¹²⁵

Interchangeability is not only reflected in the minds of offenders but can be symbolised in the group response to gendered violence. Kathryn Carney argues that when women hear about a rape many experience a heightened sense of vulnerability, fearing that they too could be raped.¹²⁶ It is these widespread feelings of vulnerability felt by an entire community of women that signify the interchangeable nature of rape.¹²⁷ Additionally, the belief that women are not interchangeable in the way that other hate crime victims are, ignores the fact that many women take considerable steps to alter their lifestyles in order to avoid victimisation, ‘precisely because they are aware of their vulnerability.’¹²⁸ Gender-bias crimes therefore affect women as a group; similar to the way attacking someone who is lesbian or gay affects lesbian and gay communities.¹²⁹ This means that although women are not a minority group numerically, their marginalisation by men leaves them ‘minoritised’ in a similar way to that which numerical minority groups experience.¹³⁰

WHY INCLUDE GENDER ‘HOSTILITY’? THE IMPORTANCE OF CENSURE

It is clear thus far that many crimes committed against women fit within current conceptions of hate crime. However, it does not automatically follow that crimes such as rape should be brought within the policy domain of hate crime. Just because an offence may fit within our comprehension of what ‘hate’ might entail does not necessarily mean it is advantageous to include it within hate crime law. There are many hate-motivated crimes – caused by prejudice which result in enhanced levels of harm – which are not included within current hate crime policies. Crimes motivated by hostilities against the elderly or incidents which are directed against individuals belonging to certain subcultures, while arguably about identity-based prejudice, remain outside state-led policies aimed at

123 Lawrence, n 30 above, 15.

124 *ibid.*, 16.

125 *ibid.*

126 *ibid.*, 342.

127 Carney, n 20 above, 341–342.

128 *ibid.*, 342.

129 Noelle, n 98 above.

130 Mason-Bish, n 122 above.

tackling 'hate crime.'¹³¹ There are various reasons for inclusion/exclusion which extend beyond whether an offence can fall within the meaning of 'hate' or 'hostility'. Before we examine these reasons it is helpful to give further consideration to some of the justifications for hate crime legislation. It is beyond the scope of this article to examine all the rationales that have been given for hate crime legislation – indeed the arguments for and against such legislation are well rehearsed within hate crime scholarship.¹³² Nevertheless one rationale in particular requires further elucidation if we are to determine whether 'gender' should be included under hate crime legislation – that of expressed denunciation.

Laws that specifically criminalise hate-motivated crimes are an attempt to protect those groups which have historically experienced disproportionate levels of targeted abuse.¹³³ The law is used, not only as recognition of the enhanced levels of harm that such incidents cause (as described above),¹³⁴ but as an important source of state-expressed denunciation.¹³⁵ The messages contained within hate incidents are, in turn, met with the symbolic messages of the law. It is asserted that the power of the law will deter future incidents of hate crime by helping to shape positive social mores – those which reject prejudice-motivated behaviours.¹³⁶ Iganski asserts that hate crime laws:

... provide an important declaratory purpose aimed at the individuals who might offend in the unfolding context of their everyday lives, either when the opportunity presents itself or a provocation occurs.¹³⁷

While it is unlikely that hate crime legislation will deter the 'unthinking racist' who lashes out in the 'heat of the moment',¹³⁸ the criminalisation of racially motivated offences when combined with a criminal justice apparatus specifically

131 Note that subculture has recently been added to some police service's definition of hate crime. While this means that subculture has recently entered the policy domain it does not exist within the legal framework of hate crime. BBC, 'Hate crime: Police record attacks on punks, emos and goths' 4 April 2013 at <http://www.bbc.co.uk/news/uk-england-lancashire-22018888> (last accessed 24 June 2013).

132 See J. Jacobs, and K. Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York: OUP, 1998); and Lawrence, n 30 above, for two seminal texts on this topic.

133 Though it should be noted that some studies have highlighted that some hate crime laws are being disproportionately used to prosecute certain minority group offenders, see eg, Burney and Rose, n 48 above.

134 See Iganski, n 93 above.

135 See Walters, n 52 above.

136 Deterrence is best understood in educative terms rather than as specific or individual forms of deterrence. It is unlikely that the law will have any individual deterrent effects on offenders who may instead see their additional punishment as unfair, leading to further resentment towards certain others. However, this does not mean that hate crime laws cannot reduce hate crime offences. More likely is that the law will provide a message of social condemnation for prejudice-motivated conducts which over long periods of time can filter through to public (un)acceptance of certain prejudice-motivated conducts. For further discussion on this see *ibid.*

137 Iganski, n 93, 87.

138 See eg, D. Gadd, 'Aggravating Racism and Elusive Motivation' (2009) 49 BJC 755.

designed to tackle hate crime,¹³⁹ is likely to deter at least some people from committing hate crime.¹⁴⁰

The law clearly has an important role in shaping the ways in which society thinks about certain forms of victimisation.¹⁴¹ We believe this to be especially the case considering the fact that the state has itself been guilty of proliferating practices, policies and laws which have historically supported social environments through which hate crimes have thrived.¹⁴² We need only remind ourselves of the example of the legal exemption of marital rape, mentioned in the introduction to this article, to reflect on how the law has been used to justify the subjugation and oppression of women through violence. Other forms of targeted abuse have also emerged as a direct result of state practices and laws which have at their heart the subjugation of certain identity groups. The introduction of slavery and racial segregation are but two historical examples of the use of state power to repress certain minority groups. In more modern times the use of anti-terrorism legislation and government policies on state security have arguably resulted in anger and anxieties directed towards Muslim communities, and in turn to hate crime.¹⁴³ Iganski is apt to reflect that:

... if the state plays an important role in providing an environment in which 'hate crime' can flourish, the state can therefore also potentially play a role in eroding that environment.¹⁴⁴

Key to this article is the question of whether the inclusion of gender within hate crime law will help to 'erode' the patriarchal environment¹⁴⁵ which supports the acceptance of gendered violence and the culture of blame attached to its victims. In order to answer this question it is instructive for us to examine the declaratory power of current offences aimed at tackling VAW. We use again the offence of rape as a particularly salient example of the use of the law to tackle gendered violence.

The law on sexual offences was vastly overhauled 10 years ago under the Sexual Offences Act 2003.¹⁴⁶ Wide sweeping changes were made as a response to the old law being perceived as 'archaic, incoherent, and discriminatory'.¹⁴⁷ In particular, greater clarification of the concept of 'consent' was required while gender neutrality was necessary if the law was to limit gender discrimination within this area of law. Moreover, changes in both law and policy were needed in order to encourage victims to report sexual offences in an attempt at increasing

139 For example, Community Safety Units which are tasked with investigating hate crimes.

140 Iganski, n 93 above, 87; Walters, n 52 above.

141 E. Posner, *Law and Social Norms* (Cambridge, Mass: Harvard University Press, 2002).

142 J. Burnett, 'Britain: racial violence and the politics of hate' (2013) 54 *Race & Class* 5.

143 See B. Perry, *Hate and Bias Crime: A Reader* (New York: Routledge, 2003) 97.

144 Iganski, n 93 above, 87.

145 As supported by existing state policies.

146 J. Temkin and A. Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Crim LR* 328.

147 Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (London: Home Office, 2002).

official detections.¹⁴⁸ Section 1 of the Sexual Offence Act 2003 now defines rape in England and Wales as an offence where the defendant 'intentionally penetrates the vagina, anus or mouth of another person with his penis' without consent and where the defendant does not reasonably believe that the victim consents. Rape is therefore now gender specific in terms of perpetration and gender neutral in terms of victimisation.¹⁴⁹

Prior to the 2003 Act, significant amendments had been made to the law on rape in the 1970s and 1990s.¹⁵⁰ The inclusion of marital rape was incorporated into the common law in 1991¹⁵¹ and male rape was introduced into the statutory framework in 1994,¹⁵² while a new limitation on the use of sexual history evidence was enacted under section 41 of the Youth and Criminal Evidence Act 1999.¹⁵³ However, although there have been many advances in law, procedure and practice,¹⁵⁴ problems still remain with the current legislative framework.¹⁵⁵ Baroness Stern in her review into how rape complaints are handled by public authorities observed that the policies and laws that are now enacted onto the statute books are the 'right ones', however the real failure remains with the implementation of such laws.¹⁵⁶ Of significant concern is that there remains a stubbornly high attrition rate.¹⁵⁷ Attrition refers to the numbers and percentage of rape cases that do not reach court or result in a guilty verdict. Even if rape is reported to the police, the case may not be recorded as a crime or proceed to court.¹⁵⁸ A large number of cases 'drop out' of the process before reaching trial, and for these women the sense of injustice can be victimising in itself.¹⁵⁹ Research has suggested that the high attrition rate may be partly due to the way in which criminal justice practitioners respond to complaints.¹⁶⁰ Stern notes that 'There is a long history of disbelief, disrespect, blaming the victim, not seeing rape as a serious violation, and therefore deciding not to record it as a crime'.¹⁶¹ While there have been vast improvements in this regard, there remains an extensive body of empirical evidence to suggest that many justice practitioners

148 Temkin and Ashworth, n 146 above.

149 N. Westmarland, 'Rape Law Reform in England and Wales' (2004) 7 *School for Policy Studies* 1, 7–8.

150 K. Daly and B. Bourhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 30 *Crime and Justice* 565, 573.

151 *R v R* n 10 above.

152 Criminal Justice and Public Order Act 1994, ss 142 and 143.

153 J. Temkin and B. Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing, 2008).

154 M. Horvath, and J. Brown (eds), *Rape: Challenging Contemporary Thinking* (Cullompton: Willan, 2009).

155 Westmarland and Gangoli, n 2 above, 6.

156 Baroness A. Stern, *A report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* (London: Home Office, 2010).

157 J. Brown, 'We Mind and We Care but Have Things Changed? Assessment of Progress in the Reporting, Investigating and Prosecution of Allegations of Rape' (2011) 17 *Journal of Sexual Aggression* 263.

158 Stern, n 156 above.

159 K. Cook, 'Rape Investigation and Prosecution: Stuck in the Mud?' (2011) 17 *Journal of Sexual Aggression* 250.

160 Temkin and Krahé, n 153 above.

161 Stern, n 156 above, 14.

and members of the public continue to view rape victims as partly to blame for their own victimisation.¹⁶² According to a study carried out by Amnesty International, 26 per cent of the respondents believed that if a woman was wearing provocative or sexy clothing, then she was totally or partially responsible for being raped.¹⁶³

Of equal concern is that out of the relatively small number of perpetrators that do face prosecution, an even smaller number end up facing conviction.¹⁶⁴ Currently the conviction rate remains low at 6.5 per cent.¹⁶⁵ The reasons why cases do not result in a conviction have been linked to both individual and institutionalised misconceptions of rape, such as stereotypes, bias and prejudice towards the alleged rape victim – all of which are gendered.¹⁶⁶ A number of studies have shown that the acceptance of ‘rape myths’ remains prevalent amongst members of the public (and jurors); such as that ‘real rape’ is committed by a stranger.¹⁶⁷ Such beliefs reinforce inaccurate understandings about the reality of rape and affect how rape is understood and treated within the criminal justice system.¹⁶⁸ Other common ‘rape myths’ identified by researchers include: the belief that a prior sexual relationship with the alleged perpetrator implies consent, intoxicated women want to be raped¹⁶⁹ – or are at least to blame for their rape¹⁷⁰ – false allegations of rape are common,¹⁷¹ ‘rape is an expression of sexual desire’,¹⁷² and that a real rape victim will tell someone immediately about the incident.¹⁷³ These misconceptions, as well as negative attitudes towards rape

162 See eg, Temkin and Krahé, n 153 above.

163 Amnesty International, *Sexual Assault Research Summary Report* (UK: AIUK, 2005) 7. See also, S. Bieneck and B. Krahé, ‘Blaming the victim and exonerating the perpetrator in cases of rape and robbery: Is there a double standard?’ (2011) 26 *Journal of Interpersonal Violence* 1785.

164 Horvath and Brown, n 154 above.

165 Stern, n 156 above.

166 Temkin and Krahé, n 153 above.

167 For an overview, see *ibid*; E. Suarez and T. M. Gadalla, ‘Stop Blaming the Victim: A Meta-Analysis on Rape Myths’ (2010) 25 *J Interpers Violence* 2010; See also, A. Grubb and J. Harrower, ‘Understanding attribution of blame in cases of rape: An analysis of participant gender, type of rape and perceived similarity to the victim’ (2009) 15 *Journal of Sexual Aggression* 63; L. Maddox, D. Lee and C. Barker, ‘The Impact of Psychological Consequences of Rape on Rape Case Attrition: The Police Perspective’ (2012) 27 *Journal of Police and Criminal Psychology* 33. Though there is some evidence to suggest that relationship rape is now more commonly imagined, A. L. Ellison and V. E. Munro, ‘Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study’ (2010) 13 *New Criminal Law Review* 781. For a comparative analysis indicating that the percentage of people who hold negative attitudes towards rape victims has decreased over time, see J. Brown, M. Horvath, L. Kelly and N. Westmarland, *Has anything changed? Results of a comparative study (1977–2010) on opinions on rape* (London: Government Equalities Office, 2010).

168 HM Crown Prosecution Service Inspectorate (HMCPIS) and HM Inspectorate of Constabulary (HMIC), *Without Consent: A Report on the Joint Review of the Investigation and Prosecution of Rape Offences* (London: HMIC, 2007); Myhill and Allen, n 25 above.

169 Carney, n 20 above, 353.

170 E. Finch and V. Munro, ‘Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Finding of a Pilot Study’ (2005) 45 *BJC* 25.

171 Kelly et al., n 3 above; A. Levitt, *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations* (CPS, 2013).

172 Angelari, n 106 above, 103.

173 *ibid*.

victims, can undermine the credibility of the rape complaint, increase the police's propensity to 'no-crime' rape complaints¹⁷⁴ and therefore hinder the chances of a conviction.¹⁷⁵

What these studies tell us is that legislation aimed at tackling sexual violence has yet to effectively challenge the high levels of rape committed against women or the negative social attitudes surrounding rape victims.¹⁷⁶ It is likely that 'rape myths' and 'rape myth acceptance' continue to blight the successful prosecution of many rape offenders.¹⁷⁷ One might therefore assert that the problem is not with the law on rape, or the punitiveness of the statutory provisions, but with the social attitudes that continue to dictate that women are at least partly to blame for their experiences of victimisation. Paradoxically, what might seem to be a powerful statement of law, the Sexual Offences Act 2003, which aims to strenuously challenge sexual violence, is to a certain extent frustrated by socially ingrained attitudes that continue to dictate that women are largely to blame for their own experiences of sexual violence, or that rape rather than being an expression of power is simply due to men's low levels of self-control and their inability to suppress their own desires for sexual gratification. Clearly then, the acceptance of 'rape myths' when combined with criminal justice practitioners' ignorance about the nature of gendered violence, means that the criminal justice system continues to lack sufficient bite to effectively combat this type of crime.¹⁷⁸

There are questions here around what possibilities exist within the law if it is continuously thwarted by the pervasive misogynistic beliefs which underlie its operationalisation. Within the criminal process various efforts have been made to address the continuing issue of 'rape myths',¹⁷⁹ including providing new jury directions and providing information packs for juries.¹⁸⁰ Others have also called for the use of expert evidence to dispel myths.¹⁸¹ Outside of the criminal process, calls for greater public education on what amounts to rape have also garnered much support,¹⁸² while better public engagement via third sector agencies may help to prevent rather than cure the problem of VAW.¹⁸³

174 Temkin, n 88 above.

175 Temkin and Krahe, n 153 above. Though it should be noted that others have argued that the prevalence of rape myth acceptance amongst the public has been overstated, see H. Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33 OJLS 445. The current authors wish to note only that we do think that this article is a constructive contribution to this area of study. As Barbara Krahe has recently noted, the assertions made by Reece are based on conceptually and methodologically flawed assumptions. B. Krahe, 'Myths About Rape Myths? Let the Evidence Speak. A Comment on Reece (2013)' at http://www.uni-potsdam.de/fileadmin/projects/sozialpsychologie/assets/Comment_Reece_Paper.pdf (last accessed 21 March 2014).

176 Temkin and Krahe, *ibid*; N. Westmarland, 'Still Little Justice for Rape Victims Survivors: the Void Between Policy and Practice in England and Wales' in N. Westmarland and G. Gangoli (eds), *International Approaches to Rape* (Bristol: Polity Press, 2011) 79.

177 Temkin and Krahe, *ibid*.

178 McPhail, n 32 above, 132.

179 Westmarland, n 176 above.

180 Temkin and Krahe, n 153 above.

181 A. Orenstein, 'No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials' (1997) 49 *Hastings LJ* 663.

182 Stern, n 156 above.

183 M. Duggan 'Using Victims' Voices to Prevent Violence Against Women: A Critique' (2012) 10 *British Journal of Community Justice* 25.

We believe that all of these strategies will play a significant role in addressing gendered violence. However, the law must simultaneously remain a means through which the state effectively challenges such behaviours. One way in which rape, and potentially other types of gendered violence, can be re-framed is through the law of hate crime. By including gender identity within hate crime legislation, many offences of rape would be understood, not just as acts of sexual abuse, but as acts of prejudice used against women to oppress, subordinate and control them.¹⁸⁴ Such a reorientation of causation could help to diminish the perceived ‘responsibility’ of victims by shifting emphasis onto the offender’s wrongful, immoral and discriminatory conduct.¹⁸⁵ There is the potential, therefore, for hate crime law to directly challenge those ‘rape myths’ that continue to undermine the effectiveness of the Sexual Offences Act 2003.¹⁸⁶ For instance, in the case of acquaintance rape where the rape complainant knows the offender, or where the victim has dressed in a ‘provocative’ way, or perhaps even initiated non-intercourse intimacy, police and prosecutors may not see any point in building the case due to a disbelief and/or lack of credibility towards the complainant; despite these factors having little bearing on whether the victim consented or not.¹⁸⁷ By focusing on the violent conduct of the offender and his motive – ie to penetrate the victim’s vagina, mouth or anus without her consent while demonstrating hostility against her gender – the legal system may well become less interested in the victim’s conduct and the ‘artificial circumstance of the relationship between rapist and victim’.¹⁸⁸ Angelari additionally notes that the benefit of ‘focusing on the hatred involved in violence against women . . . [is that] treating violence against women as a hate crime may direct emphasis away from the sexual nature of certain bias motivated acts of violence against women, such as rape.’¹⁸⁹ An important step would be to ‘divorce sex from rape where possible’¹⁹⁰ and therefore potentially eradicate the myth that rape is the result of a misguided sexual desire.¹⁹¹

This article asserts that the additional label of hate crime in some cases of sexual violence could help to challenge the myths that surround rapes and rape complainants ‘by telling society that rape is a crime that occurs not because a woman asked for it or deserved it, but because of her gender’.¹⁹² This is not to say that rape (or other types of gendered crimes) should be relabelled wholesale as ‘hate crime’. Rather, certain offences such as rape or domestic violence could, in certain circumstances, become labelled additionally as ‘hate crime’.¹⁹³ Just as racially aggravated assault is a crime of assault which is aggravated by racial hostility, so might the crime of rape be aggravated by gender hostility. In turn

184 See similarly, Carney, n 20 above.

185 Angelari, n 106 above, 103.

186 See also, *ibid*; Carney, n 20 above.

187 Rothschild, n 20 above, 283; Stern, n 156 above.

188 Rothschild, *ibid*, 284; see also Angelari, n 106 above, 103.

189 Angelari, *ibid*, 103.

190 *ibid*, 104.

191 *ibid*, 103–104.

192 Carney, n 20 above, 40.

193 We set out in the following section when there may be evidence of gender hostility and when this might be difficult to prove in court.

this could improve rape conviction rates by revealing the biased nature of many sexual offences, helping to dispel 'rape myths' and supporting the long held belief that gendered violence is a crime of prejudice against women.

Notwithstanding the arguments in favour of additional censure for rape offenders, one might remain sceptical about the denunciatory power of the law in relation to the crime of rape considering the stigma that is already attached to this offence. As Rothschild notes:

While anecdotal evidence suggests that a hate crime conviction is the first thing a defendant wants plea bargained off his record when subject to prosecution for assault or battery, it is not clear that the threat of such a conviction on a rapists record will add much incremental deterrence in relation to the already significant censure which will accompany the label of rapist.¹⁹⁴

However, whether the additional stigma of 'hate' will have any deterrent effect on individual offenders is less important than the impact that it may have on broadly held social attitudes towards rape perpetrators and victims. Indeed most research indicates that increasing criminal sanctions has little direct impact on crime rates.¹⁹⁵ Rather it is the potential for longer term norm creation which is of greatest significance. An important purpose of hate crime law is to shape social mores by policing the boundaries of acceptable behaviour.¹⁹⁶ While it may be the case that many people believe that rape is a gendered crime, this is not necessarily a view held by the majority of people and therefore enhancing the punishment for some rape offenders under the hate crime label could 'serve as a legal imprimatur on the definition of rape'.¹⁹⁷ In this sense, reframing some incidents of gendered violence as being about 'hate' could empower victims by shifting blame away from them and onto the offenders and thus helping to validate their experiences.¹⁹⁸ Such relabeling may help to encourage victims to report rapes, by incrementally improving the perception that their experiences will be taken seriously both by criminal justice practitioners and other members of the community.¹⁹⁹

The failure to include the option for 'gender aggravated' rape under UK hate crime legislation ignores the evidence that rape affects women collectively as a group, similar to those groups currently included under hate crime laws.²⁰⁰ Furthermore, exclusion may actually perpetrate the myths surrounding why men choose to rape women.²⁰¹ In other words, the state's refusal to acknowledge gendered violence as gendered 'hostility' may actually send an unintended

194 Rothschild, n 20 above, 283.

195 See review in J. Halliday, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (the Halliday Report) (London: Home Office, 2001).

196 Rothschild, n 20 above.

197 *ibid.*, 283.

198 Carney, n 20 above, 349–352.

199 Rothschild, n 20 above; Carney, n 20 above, 352; McPhail, n 32 above, 17; Myhill and Allen, n 25 above; Gill and Mason-Bish, n 1 above, 16.

200 Hodge, n 2 above.

201 See *ibid.*

counter message that gendered crimes are not gendered at all. This, in turn, feeds directly into misogynistic beliefs about women being partly to blame for their own victimisation.²⁰²

While labelling some rape offenders as ‘hate-motivated rapists’ may well help to challenge the gendered notions of victimisation which have proliferated over the centuries, there remains one concerning ramification of pursuing rape as ‘hate crime’. That is, if the state begins to label some rapists as hate crime offenders and not others, a perception may arise that some rapes are worse than others. This is indeed a possibility; one which may result in some feminist scholars/lobbyists being reluctant to pursue the inclusion of gender in hate crime policy. We certainly do not wish to advocate a policy which actively creates a hierarchy of rape seriousness. However, we believe that it is equally, if not more important that the criminal law and sentencers have the ability to consider a range of aggravating and mitigating factors when determining the seriousness of an offence. There is a vast list of features which will aggravate an offence, including ones which change the type of offence an offender is charged with and those which are applied only at sentencing to enhance an offender’s penalty.²⁰³ For example, the commission of an assault committed against an elderly victim may result in aggravation at sentencing if it is determined that the victim’s age made him or her additionally vulnerable to the offender’s actions.²⁰⁴ In the case of racially motivated assault, the offence of assault is relabelled as ‘racially aggravated assault’ in recognition of the higher level of seriousness. The fact that the crime is motivated by prejudice enhances both the offender’s culpability (ie his blameworthiness for committing the offence increases) and the harms caused by the offence.²⁰⁵ These same principles already apply to rape cases where there is evidence to prove that the offence demonstrated or was motivated (wholly or partly) by racial, religious, sexual orientation, disability and/or transgender hostility. This list must also include ‘gender’ if we are to truly recognise and combat the bias nature of such offences.²⁰⁶

CHALLENGES TO INCLUSION: PROVING GENDER ‘HOSTILITY’ BEYOND REASONABLE DOUBT

Conceptually, at least, there is a persuasive argument that most, if not all, incidents of sexual violence are expressions of gender-based hostility that sustain women’s marginalised position within society.²⁰⁷ This has led some scholars to suggest that all rapes of women should be labelled as hate crimes, a perspective also held by many proponents of the Violence Against Women Act of 1994 in

202 Perry, n 14 above. It is important, however, that we reemphasise that not all rapes or acts of violence towards women should be classified as ‘hate crime’. VAW must only become an offence aggravated by hostility where there is evidence to prove it.

203 See Sentencing Guidelines Council, *Overarching Principles: Seriousness* (SGC, 2004) 6.

204 *ibid.*

205 Explained in more detail above. See Lawrence, n 30 above.

206 Hodge, n 2 above; Lawrence, n 30 above.

207 Perry, n 14 above.

America.²⁰⁸ For instance, Jennifer Gaffney believes that courts should adopt a rebuttable presumption of gender animus in all cases of rape, based on the belief that such bias is present in almost all rape cases.²⁰⁹ This would mean that 'a defendant must show that he raped the victim while taking no account of her gender'.²¹⁰ Such a position certainly pushes the current boundaries of what should and should not be included under the 'hate crime' umbrella.

While we certainly agree that most incidents of sexual violence can at least partly be explained by gender-based animus, we foresee several practical (and to a lesser extent conceptual) problems with such a conclusion. If gender-based hate is to be transposed successfully into law there must first be clear evidence of gender hostility from which a criminal court can then add the additional label of 'hate crime'.²¹¹ The issue here is that it is up to the finder of fact, and not the judge, to determine whether identity-based hostility was present during the commission of an offence – based on the facts and context of the incident.²¹² The very fact that a woman has been raped may well provide a conceptual *inference* of gender 'hostility', but it is doubtful that it can in itself provide conclusive (or even presumptive) evidence of it from which a jury can satisfy itself that 'hate' was present during the commission of the offence. This is because violence directed against women will frequently involve a range of situational and psychological factors (such as alcohol abuse, psychiatric and personality disorders) and/or as Nancy Crowell and Ann Burgess assert, the physiology of men.²¹³ Thus while it is difficult to argue with the claim that almost all rapes are 'gendered', it will be more challenging to convince juries that there is, in every case, an expression of gender-based 'hostility'.

One issue which will remain contestable (both in court and academia) is whether notions of power and control can always be intrinsically linked to prejudice in cases involving sexual violence. Inevitably it will be asserted that desires to demonstrate power and control are rooted, not in hatred, but in other internalised psychological problems. These 'problems' may be the result of an offender's own childhood traumas, neglect and/or experiences of (sexual) abuse.²¹⁴ It could be argued that some offenders of 'power rapes', for example, are motivated by a desire to *obtain power* (which is linked to their feelings of weakness and/or powerlessness) rather than their wanting to *exert control*. There is a subtle but important distinction here. For example, offender A may desire to obtain power because of an internalised feeling of worthlessness. This can be compared to offender B whose desire to exert control over others emanates from his appetite to suppress women in order to keep them in 'their place'. The

208 see eg Gaffney, n 20 above. See further discussion of this below.

209 *ibid*.

210 *ibid*, 287.

211 Or more accurately gender aggravation.

212 See Walters, n 52 above.

213 *ibid*, 264; N. A. Crowell and A. W. Burgess, *Understating Violence Against Women* (Washington, DC: National Academy Press, 1996) 52–56.

214 D. Lisak, and P. M. Miller, 'Childhood abuse, PTSD, substance abuse and violence' in P. C. Ouimette and P. Brown (eds), *PTSD and Substance Abuse Comorbidity* (Washington, DC: American Psychological Association, 2003).

actions of both offenders may well be ‘gendered’ in that in order to obtain power or exert control they specifically target women. However, while the victim’s gender is central to understanding both motivations, it could be argued that it is only the second offender who intends²¹⁵ to demonstrate gender hostility.²¹⁶

In relation to racist hate crime, Ray et al. have used a similar social-psychological approach to explaining the difference between internal and external feelings of hatred.²¹⁷ They assert that many racist hate crimes are best explained, not by referring to the hatred that offenders have for their victim’s identity, but rather are the result of unacknowledged shame that is experienced within themselves.²¹⁸ This shame refers to their own place within society, which for many offenders is one of socio-economic disadvantage and educational underachievement. Rather than acknowledging their feelings of shame regarding their own shortcomings, some offenders will project their insecurities onto those more vulnerable than themselves, and it is these victims they see as to blame for their own socio-economic instabilities. As such, they suggest that some hate crimes are not really about hate at all but about internal insecurities which are the result of socio-structural inequalities.

In terms of rape and other forms of gendered violence, it may be argued by lawyers and social psychologists that the main factor compelling the offender was his hatred or loathing of the ‘self – whether acknowledged or not – as against his hatred of the female ‘other’. Without wishing to lend sympathy to the rape offender here, we simply note that many men will be susceptible to the gendered processes that they themselves perpetuate. The difficulty for legal practitioners and jurors will be to determine whether an offence is one which is motivated, or that demonstrates, gender hostility or one which represents the manifestation of self-loathing on the part of the offender.

It is no wonder that criminal justice practitioners are reluctant to comprehend VAW within the same paradigm of other types of hate crime when such conceptual complexities abound. Beverly McPhail and Diana DiNitto’s research in the US found that the majority of the prosecutors in their study believed that gendered violence is motivated by the perpetrator’s desire to have power and control over the victim but this was somehow different to it being motivated by hate.²¹⁹ The reluctance of criminal justice practitioners to acknowledge the potential bias nature of gendered violence, even in jurisdictions where gender is included in hate crime legislation, is illustrated in US statistics which show the low numbers of recorded gender bias hate crimes. Hodge has pointed out that in 2007 only one gender bias hate crime was recorded in Minnesota and New Jersey

215 Or at least recklessly foresees that he will demonstrate gender hostility, see Walters, n 52 above.

216 It may also be difficult to prove that there is an ‘objective’ demonstration of gender hostility (as prescribed under the Crime and Disorder Act 1998, s 28(1)(a); see also *Rogers* [2007] UKHL 8). The jury would have to determine whether the offender objectively demonstrated gender hostility based on the facts and context of the case. Such demonstrations are typically evidenced by prejudiced language, without such evidence of hostility it is often difficult to prove the presence of hostility.

217 L. Ray, D. Smith, and L. Wastell, ‘Shame, Rage and Racist Violence’ (2004) 44 BJC 350.

218 *ibid.*

219 B. A. McPhail, and D. M. Dinitto, ‘Prosecutorial perspectives on gender-bias hate crimes’ (2005) 11 *Violence Against Women* 1162.

while a total of 25 were recorded in California.²²⁰ In each of these jurisdictions many more racial, religious and homophobic crimes were recorded.²²¹ Such findings indicate that there remains a belief by some legal actors that the motivations of rape are separate from the motivations of hate and even within states where hate crime legislation encompasses 'gender' bias, criminal justice actors have failed to acknowledge that gender-motivated crimes 'go beyond an intense dislike for someone, and that such crimes are committed in order to enforce a social hierarchy that is biased toward a particular group.'²²² The difficulties faced by prosecutors who do not see the similarities between power and control on the one hand and hate and bias on the other, mean that rape is frequently viewed as qualitatively different from the 'conventional' hate crime model – even if evidence in some cases shows the perpetrator's direct bias against women.²²³

What this short and rather superficial exploration of power and control tells us is that the reason why people desire power is not always easy to explain. Criminal justice practitioners, juries and judges alike will inevitably be confronted with decisions about whether an offender's violence is motivated by gender hostility or whether it is an expression of power and control connected to his own insecurities. Much will depend on the type of evidence that the police and CPS gather, including what the offender himself says at police interview and during examination. Such information will only be forthcoming if the 'right' questions are asked.²²⁴

Added to this complex mix of aetiological determinants is often the excessive consumption of alcohol; in many cases consumed by both offender and victim. Alcohol consumption can lead to the lowering of inhibitions and to the misreading of interpersonal signals and cues.²²⁵ Sexual intercourse between those who are intoxicated where there is an absence of a free and deliberate choice by the victim can and should lead to a determination that the victim was raped.²²⁶ Of course in some cases the consumption of alcohol will simply allow the offender's bias to rear its ugly head. But we may wish to add caution to equating such behaviour with an intentional subjugation of the victim's gender. Indeed, there must be evidence to show that drunken sexual intercourse, without consent, is a demonstration of gender hostility – as against a drunken (though gendered) desire to gain sexual gratification with little regard to the bodily autonomy of the person he chooses to abuse.

Other examples where demonstrations of gender hostility are less than clear-cut include offenders who honestly, though unreasonably, believe in consent. Under section 1 of the Sexual Offences Act 2003 the offender will be guilty of

220 Hodge, n 2 above.

221 *ibid.*

222 *ibid.*, 59.

223 McPhail and DiNitto, n 219 above, 1173; Hodge, n 2 above, 59.

224 See further below a list of factors which the police and CPS should consider when deciding whether to pursue a case of VAW as a 'hate crime'.

225 A. Abby, L. T. Ross and D. McDuffie, 'Alcohol's role in sexual assault' in R. R. Watson (ed), *Drug and alcohol reviews: Vol 5 Addictive behaviors in women* (Totowa, NJ: Humana Press, 1995).

226 See *R v Bree* [2007] EWCA Crim 256; [2007] All ER (D) 412 (Mar).

rape if the jury determine that his honest belief in consent was nonetheless unreasonable. In such a situation it may be the case that his honest belief is based on a misogynistic belief that women who say 'no' actually mean 'yes' and in such situations this may give rise to evidence of gender hostility. However, in other cases he may simply have believed there was consent, perhaps based on a drunken mistake or because he is incapable of properly understanding social cues due to mental health conditions. Such men may misinterpret signals that women give in social situations while also lacking the self-control to suppress associations between sexual gratification and aggression.²²⁷ Such behaviour is almost certainly gendered in that missed cues and acceptable sexual behaviours are constructed along gendered lines. Yet such misinterpretations cannot automatically be conflated with demonstrations of hostility – the offender's intention, while based on gendered constructions of female sexuality, is not necessarily an intentional expression of hostility towards women per se.

Clearly then, rape and other forms of violence directed against women are multifaceted phenomena that will have multiple and intersecting aetiological determinants. The authors wish to be clear that we believe that a significant proportion of sexual violence will be motivated by gender bias and will therefore amount to expressions of 'gender hostility'. However, it is important to acknowledge the complex reality of sexual violence and that gender 'hostility' will not always be provable, or perhaps even present, in every case that comes before the courts – just as not all violence against gay men is the result of homophobia. Whether the law can differentiate between crimes that are gendered and those which involve gender hostility will be the greatest challenge in bringing 'gender' into the hate crime paradigm. Some of the same evidential problems observed in rape trials will persist in rape/hate crime cases, ie it may come down to one person's word against another.²²⁸ As noted above, there is also the potential for police officers and prosecutors to refuse to acknowledge the gender bias within many types of crimes.²²⁹ We therefore suggest that the following traits/factors may aid practitioners tasked with identifying evidence of gender hostility:

1. Vocalised hostility such as 'bitch' 'whore' 'slag' 'slut'.
2. The presence of acts intended to demean the victim's gender or sexual identity, such as burning her breasts, mutilating genitals, inserting objects such as knives and bottles into the vagina.
3. A history of targeted abuse/violence directed at women.
4. Derogatory remarks made about the victim's gender during police questioning.
5. Internet or paper based materials, in the possession of the offender, that indicate a dislike, resentment or prejudice towards women (as was the case with Marc Lepine).

227 See K. Drieschner and A. Lange, 'A review of cognitive factors in the aetiology of rape: theories, empirical studies and implications' (1999) 19 *Clinical Psychology Review* 57.

228 See also, Gill and Mason-Bish, n 1 above 13.

229 Hodge, n 2 above.

6. The victim's own perception that the violence was used against her in order to put her in 'her place'.
7. An absence of other motivations such as material acquisition, a mutual personal dislike of one another, or a prior altercation that was unrelated to gender identity.

Intersectionality

It is clear that there will be various evidential challenges when attempting to prove that VAW is motivated by, or demonstrates, gender hostility. In addition to proving that such hostility exists, there will be further difficulties where the offender is motivated by multiple and intersecting prejudices. In a recent article aimed at reconceptualising our understanding of hate crimes, Neil Chakraborti and Jon Garland state the following:

Recognizing that hate crime can be the outcome of prejudice based on multiple, distinct yet connected, lines is important for recognizing the reality behind both the experience of victimization and the commission of the offence.²³⁰

The fact that targeted violence is not always based on a single type of hostility, or motivating factor for that matter, is important to our understanding of, and response to, hate crimes. Victims are often targeted because they are gay *and* disabled, Muslim *and* Asian, female *and* Black. It is not always easy to identify which prejudice is the main motivating factor or whether prejudices based on several identity traits are mutually inclusive. As Ault notes, discrete categorisations:

... create a false dichotomy between the categories 'lesbian' and 'woman' and 'anti-lesbian' and 'anti-woman'. Anti-lesbian is quintessentially anti-woman; violence against women of all sexual orientations is often overtly 'anti-lesbian'.²³¹

Perhaps more than any other type of hate crime, gendered violence will concern intersecting prejudices and perceptions of vulnerability. We turn to a recent high profile case study to illustrate this point and to show how such cases can still be dealt with through hate crime laws. In May 2012 nine Asian men from the northern town of Rochdale were found guilty of a variety of sexual offences committed against a number of young white girls. The victims had been 'groomed' over a sustained period of time and had been plied with alcohol, drugs and gifts.²³² The offences committed against these young victims included rape, trafficking of girls for sex and conspiracy to engage in sexual activity with a child.

230 N. Chakraborti and J. Garland, 'Reconceptualizing Hate Crime Victimization Through the Lens of Vulnerability and "Difference"' (2012) 16 *Theoretical Criminology* 499, 504.

231 A. Ault, 'When it happens to men, it's "hate" and "a crime": Hate Crimes Policies in the Context of Gay Politics, Movement Organizations, and Feminist Concerns' (1997) 30 *Journal of Poverty* 49, 59.

232 BBC, 'Rochdale grooming trial: Nine found guilty of child sex charges' 8 May 2012 at <http://www.bbc.co.uk/news/uk-england-17989463> (last accessed 24 November 2012).

Several of the victims were beaten and forced to have sex with ‘several men in a day, several times a week’.²³³ The case is notable for several reasons, not least because of the media coverage it garnered, but also because of the insidious debate around race and crime that ensued.²³⁴ For the most part, the gang’s crimes were labelled as ‘sexual grooming’ as a result of men using their power to gain the sexual gratification they had been lusting after.²³⁵ The issue of vulnerability also became key for those attempting to explain the causes of this case, with the Assistant Chief Constable of Greater Manchester Police publicly declaring that the crimes were about ‘adults preying on vulnerable young children’.²³⁶ It is of particular relevance to note that the police and CPS were at pains to deny that racial or religious bias had anything to do with the matter, with public statements consistently denying that this was the case.²³⁷

The first author has been less than convinced about either the way in which the vulnerability of the victims was framed, or the denial that racial or religious prejudice had anything to do with the victims’ experiences.²³⁸ Walters notes that:

Judge Gerald Clifton at sentencing told the offenders: ‘All of you treated [the victims] as though they were worthless and beyond any respect . . . One of the factors leading to that was the fact that they were not part of your community or religion.’²³⁹

The judge’s comments when combined with the fact that the offenders specifically targeted only young white women provides a persuasive inference that their crimes were at least partly motivated by racial, religious and gender hostility. Despite this, the judge was never invited to consider any aggravating factors based on racial or religious hostility, while the absence of gender hostility within the legislation meant that this was never going to be an issue. Even after these points were raised in another journal, the Chief Prosecutor for the North West of England responded by writing a letter which stated ‘I would suggest that Dr Walters in focusing on the supposed hate crime element has in fact misunderstood what these types of grooming cases actually involve.’²⁴⁰ In response to this we would like to note that ‘hate crime’ need not be an all-encompassing label but one which can be additionally attached to crimes in cases involving multiple intersecting motives. The Crime and Disorder Act 1998 itself makes this very

233 *ibid.*

234 See eg, P. Vallely, ‘Child sex grooming: the Asian question’ *The Independent* 10 May 2012 at <http://www.independent.co.uk/news/uk/crime/child-sex-grooming-the-asian-question-7729068.html> (last accessed 24 November 2012).

235 *ibid.*

236 BBC, n 232 above. See also Mason-Bish, n 123 above, who states that ‘criminal justice practitioners interviewed for this research felt that crimes against women and older people were about an abuse of trust rather than hatred.’

237 See M. A. Walters, ‘Why the Rochdale Gang should have been sentenced as “hate crime” offenders’ [2013] *Crim LR* 131.

238 *ibid.*

239 *ibid.*, 135

240 N. Afzal, ‘Response to CLR article on Rochdale child sexual exploitation case’ [2013] *Crim LR* 145, 145.

clear by stating that the hostility element of an offence need only be *part* of an offender's motivation (section 28(1)(b)), while the legislation also states that it matters not that the 'offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.' (section 28(3)).²⁴¹ Hence, section 28 of the Act and sections 145 and 146 of the Criminal Justice Act 2003 make it clear that offenders do not need to be solely motivated by one individual type of hostility in order that an offence be classified as a 'hate crime'.

Furthermore, the meaning of the term 'hostility' should not be understood simply as a form of hatred or bigotry but must also include expressions of prejudice whereby a victim is subjugated because of their identity *and* their 'perceived' vulnerability.²⁴² Had the hate crime provisions included 'gender', as a protected characteristic, a broader and more holistic understanding of the hostility evident in the Rochdale case may have been reached. To us the case provided evidence of the racial, religious and gendered hostilities all of which underpinned the nature of the crimes – as well as issues relating to age and potentially social class. All of these characteristics were relevant to the victim's experiences. Their selection as rape victims came about first and foremost because of their gender, however when this characteristic was combined with their non-religious beliefs, different ethnic background and young age they became highly vulnerable to the offenders' desires to control, use and abuse them. As such the offenders' hostilities, while not direct motivations of hatred or even bigotry, should have been conceived as demonstrations of prejudice – those which were expressed via a belief that the victims were less worthy of the social respect that the offenders afforded other members of their own male, adult, Asian, Muslim communities. The victims were in effect denied their human dignity by reason of *who* they were.

The role of identity politics

One of the reasons why offences such as those committed by the Rochdale Gang or Levi Bellfield have fallen outside of the hate crime paradigm is because there have been very few activists in the political domain calling for their inclusion. In the US, many commentators and women's advocacy groups have long argued for the inclusion of rape in hate crime legislation.²⁴³ Yet there has still to be any unified lobbying efforts for its inclusion in the UK. But why has this been the case? After all, there is now a wealth of empirical and theoretical evidence to show that women are victimised because of their gender.²⁴⁴ Recent research carried out by Hannah Mason-Bish may provide part of the answer to this question. She notes that 'social movement activists [are] central to how policy [is]

241 Readers should note that these subsections are also applicable to the sentencing provisions under ss 145 and 146 (see s 145(3)), ie they apply to any offence, including sexual offences, where there is evidence of racial, religious, sexual orientation, disability and/or transgender hostility.

242 Walters, n 237 above; Chakraborti and Garland, n 230 above.

243 Rothschild, n 20 above; Angelari, n 106 above; Carney, n 20 above; Perry, n 14 above; Hodge, n 2 above.

244 Lawrence, n 30 above, 14; Carney, n 20 above; McPhail, n 32 above.

defined and expanded to include other victim groups.²⁴⁵ The inclusion of various characteristics has typically been accompanied by campaigns supported by lobby groups combined with empirical evidence illustrating the ‘social problem’ of specific types of targeted abuse.²⁴⁶ The victim groups and lobbyists that are aligned with gendered violence have already forged their own policy domain and political agendas. Many of these groups do not see crimes such as domestic violence as involving the same issues as hate crime. Part of the reason may be that rape or domestic violence simply do not fit the hate crime model that has developed over the past 20 years.²⁴⁷ Mason-Bish illustrates this point by referring to one representative who explained that the concept of including gender within hate crime legislation had been particularly problematic as the women’s groups found it difficult to imagine an example of when ‘gender might be considered’ and that ‘domestic abuse might not be perpetrated because of the hatred of somebody’s gender’.²⁴⁸ However, a sea change may now be upon us. A more recent study conducted by Aisha Gill and Hannah Mason-Bish found that the majority of women’s groups, academics and public sector practitioners that they surveyed believed that VAW should be included within hate crime policy.²⁴⁹ In fact, amongst those who were surveyed, the highest proportion (34/88) stated that rape should be considered as a hate crime.²⁵⁰ Whether women’s groups will become more vociferous in demanding inclusion is yet to be seen. The fact that such groups have yet to form a consensus on this themselves is illustrative of the contentious and contested nature of gendered violence and of ‘hate crime’.

It is also significant to note that terms such as ‘rape’ and ‘domestic violence’ have an important history, with feminist scholars and activists devoting much time and energy to highlighting them as forms of gendered violence and arguing for them to become embedded within criminological, victimological and legal landscapes. Martha Fineman notes that feminist approaches to law and policy have helped to usher in new legal concepts such as sexual harassment and cumulative provocation.²⁵¹ Subsequent amendments to the law have helped to change the way that society views VAW. For example, the wholesale reformation of the sexual offences legislation in 2003 is testimony to feminist approaches to understanding sexual violence and to limiting the gendered nature of the law itself.²⁵² We might therefore wish to remain cautious about potentially undermining such changes. Of particular concern is that by re-termining sexual violence as ‘hate crime’ we potentially undo the decades of hard work that has been achieved in changing our understanding of gendered violence. Yet simultaneously, by excluding gendered violence from hate crime policy, we also fail to recognise that the concept of hate crime might help to deepen the gender

245 Mason-Bish, n 122 above.

246 *ibid.*, 7.

247 *ibid.*

248 *ibid.*, 11.

249 Gill and Mason-Bish n 1 above, 12.

250 *ibid.*, 11.

251 M. A. Fineman, ‘Feminist Legal Theory’ (2005) 13 *Journal of Gender, Social Policy and the Law* 13.

252 *ibid.*, 18. See further discussion about the Sexual Offences Act above.

analysis of rape: most if not all women are selected as victims of sexual and domestic violence due to their gender and ignoring the gender animus present in many gender violence cases risks '... perpetuating the false – and often sexist – perceptions of why some men choose to rape women.'²⁵³ As alluded to above, treating rape as a hate crime could shift the focus away from the victim's conduct to the rapist's hatred of women,²⁵⁴ thereby potentially positioning men's hate within a gendered framework.

Police resources and recording hate crime: it's a numbers game

A final practical reason why the state might resist the inclusion of gender within hate crime policy is that the sheer number of sexual offences (and other types of VAW) could overwhelm the practitioners who are tasked with operationalising hate crime policy.²⁵⁵ Identity groups have spent the best part of 50 years lobbying government for greater protection from targeted violence. Their minority status has made this a long and arduous fight. One concern regarding the inclusion of gender within hate crime legislation is that small minority groups will be pushed to the periphery of hate crime policy because of the large numbers of gendered hate crimes which occur every year.²⁵⁶

We refer again to recent statistics taken from the Crime Survey for England and Wales to demonstrate this point. Between 2012/13 there were an estimated 278,000 hate crimes in England and Wales.²⁵⁷ In comparison there are an estimated 366,000 – 404,000 sexual offences committed against women each year,²⁵⁸ while over one million women are victims of domestic violence.²⁵⁹ Excluding all other types of gendered violence this would still dwarf the total numbers of already defined 'hate crimes'. Of course, not all VAW would result in hate crime investigations, but there remains the potential that police officers and other criminal justice practitioners specialising in hate crime will become preoccupied with gendered violence ultimately at the expense of all other types of hate crime.

Conversely, Mason-Bish points out that resistance to the inclusion of gendered violence as hate crime can also be founded on the fear that it will undermine the level of service that is currently offered to victims of rape and domestic violence.²⁶⁰ The resources and expertise currently on offer to combat gendered violence far outstrips those for hate crime.²⁶¹ The fear then is that inclusion will undermine the special status that gendered violence currently holds, leaving victims of gender bias offences marginalised by the totality of

253 Hodge, n 2 above, 61.

254 Angelari, n 106 above, 103–104.

255 Carney, n 20 above, 349.

256 See Jenness, n 27 above.

257 Ministry of Justice, n 47 above.

258 Ministry of Justice, n 25 above.

259 Smith et al., n 10 above.

260 *ibid.*, 15. See also Gill and Mason-Bish, n 1 above.

261 *ibid.*

other forms of hate crime. Ultimately, the competing political agendas of the anti-hate crime movement and women's rights groups mean that the inclusion of gender is simply too controversial for legislators to seriously consider.²⁶²

This article posits that the inclusion of gender within hate crime provisions would not undermine the current body of expertise and resource deployment for gendered violence. This is especially the case if only those offences where clear evidence of gender hostility exists are operationalised as 'hate crime'. There is no reason to believe that the current body of expertise would disappear based on the fact that some incidents of VAW would become aggravated by gender hostility. In fact, in many ways such aggravation simply reflects what many service providers have been saying for many years, that gendered violence is 'gendered'. Just as BME and religious organisations continued to focus their attentions on supporting the needs of these communities after the inclusion of sexual orientation, transgender and disability under the Criminal Justice Act 2003, so too will those organisations set up to tackle the victimisation of women. We do, however, remain more concerned about the potential marginalising effects of subsuming gendered violence into the current hate crime paradigm on smaller marginalised groups. After all, the initial hate crime movement was, like the feminist movement, aimed at uncovering the problem of targeted victimisation and to ensure that ethnic minority groups receive the legal protection they deserve.²⁶³ If the impact of including gender in hate crime policy is to marginalise other vulnerable groups we would remain reluctant to advocate its inclusion. However, again there is good reason to believe that this is unlikely to happen. For example, Phyllis Gerstenfeld notes that jurisdictions in America that have included gender-bias offences under their hate crime laws have not been overwhelmed by this inclusion, nor has it distracted the attention of prosecutors away from dealing with other types of hate crimes.²⁶⁴ It is unlikely that the thousands of cases of sexual and domestic violence recorded by the police would be ultimately conflated as hate crime. Like racial or homophobic crimes, there would need to be evidence of the prejudiced nature of the incident which proves beyond reasonable doubt that the offender demonstrated or was (partly) motivated by hostility.²⁶⁵ Hence the inclusion of gender within hate crime policy would not mean that rape, domestic violence, forced prostitution etc would all automatically be reclassified as 'hate crime', rather incidents would become additionally labelled as and when there is evidence of gender-based hostility. The same resources, knowledge and bodies that help to support victims of gendered violence would remain. The additional label of hate crime would however help to further the protections offered to women by changing the way we think about gender-motivated crimes.

262 See Jenness, n 27 above.

263 M. Malik, "'Racist' Crime: Racially Aggravated Offences in the Crime and Disorder Act 1998, Part II' (1999) 62 MLR 62.

264 P. Gerstenfeld, *Hate Crimes: Causes, Control, and Controversies* (California: Sage Publications, 2004); see also Hodge, n 2 above.

265 Angelari, n 106 above.

CONCLUSION

This article has argued for the inclusion of 'gender hostility' within the UK's framework of hate crime legislation.²⁶⁶ The article has used the offence of rape to demonstrate the often biased nature of VAW. The fact that many such crimes involve hostility against women and additionally cause heightened levels of harm amongst women as a group, leads us to the conclusion that gender-motivated crimes should at least be considered as a type of 'hate crime' by those state agencies tasked with tackling the problem. However, it is not just conceptual parallels that can be drawn between gendered violence and other types of hate crime. There are also various moral and practical reasons for its inclusion. In particular, we believe that the law of 'hate crime' would help to challenge the gender bias that persists within the current framework of sexual offences by reformulating certain 'sexual' offences as both 'sexual' *and* 'hate' crimes. This is not to suggest that all rapes are hate crime. As we have highlighted throughout this paper there must be tangible evidence that can be used to prove in court that the offence was motivated by, or demonstrated, gender hostility. We believe that where such evidence exists it must be used to support the re-orientation of responsibility away from victims by refocusing on the offender's hate-motivation. The expressed denunciation conveyed by hate crime laws would additionally assist in supporting social norms that challenge female victimisation while simultaneously rejecting a culture of victim-blame. In particular, the legal proscription of 'gender aggravated rape' would help to eradicate gendered misconceptions about the nature of rape as well as the 'rape myths' which, we believe, continue to hinder the effectiveness of rape law reform.

266 Carney, n 20 above.