The Hate Threshold: Emotion, Causation and Difference in the Construction of Prejudice-motivated Crime

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Abstract
Hate crime laws have emerged within a climate of penal expansion and identity politics. They contain ideological claims designed to reconfigure social norms and regimes of difference. This article employs the concept of the hate threshold to examine the principles and practices that turn an ordinary crime into a hate crime and the normative messages that flow from this. The hate threshold takes three major elements – emotion, causation and difference – as a framework for analysing how the legal rules are operationalised. Analysis of Australian sentencing aggravation law reveals that courts have set a relatively rigorous standard for offender sentiment and causation. However, the development of a more fluid threshold around the element of difference raises questions about the constitutive implications when law ‘misfires’. This analysis of the law in action provides a material foundation for reflecting on the capacity of hate crime law to engage in larger processes of remoralisation.

Keywords
Hate crime, hate threshold, politics of difference

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Introduction

Hate crime laws have emerged in a climate of penal expansionism. They have also emerged in an era of identity politics. This is no coincidence. A confluence of punitive justice policy and social justice ideals provides the ostensible mandate for hate crime laws, framing their objectives, elements and expressive functions in specific ways. By criminalising and punishing manifestations of prejudice on the part of offenders, and by offering extra protection to victims who are the targets of such prejudice, these laws construct hate crime as a breach of liberal democratic values of equality, acceptance and respect. In theory, this ideological claim has the capacity to reach beyond the legal sphere to reconfigure the social norms that govern regimes of difference and otherness. In this article, I ask: Where and how does the criminal law construct these normative boundaries? Through what principles and practices is a demarcation drawn between conduct that amounts to hate crime and conduct that does not meet this threshold? This analysis of the law in action provides a material foundation for reflecting on the capacity of hate crime law to engage in larger constitutive processes of resistance and remoralisation (Mason, 2014; O’Malley, 1999).

To consider these questions, I employ the concept of the hate threshold. The hate threshold is a heuristic device for examining the principles and practices that turn an ordinary crime into a hate crime and the normative messages contained within these legal constructions. The hate threshold takes the three major elements that are common to most hate crime statutes – emotion, causation and difference – as an initial framework for analysing and comparing how the legal rules are operationalised at different points in the criminal justice system (e.g. police investigation, prosecutorial discretion or judicial pronouncements). Drawing upon the first national study of hate crime law in Australia, I use this framework to analyse how sentencing aggravation provisions, for offences motivated by prejudice or group hatred, have been interpreted by the courts. This analysis reveals that Australian courts have set a relatively rigorous threshold for the kind of offender sentiment that is necessary to enliven the provisions and the extent to which this sentiment must actually cause the criminal conduct. It is the development of a hate threshold around the element of difference that proves most controversial. Two issues emerge as worthy of further consideration. The first is the judicial application of sentencing aggravation provisions to provide protection and recognition to victims targeted because they were perceived to be ‘paedophiles’. The second is the disproportionate number of cases where the prosecution sought to invoke the provisions against offenders from racial, cultural or religious minorities. If we accept that hate crime laws are a form of moral training designed to resist and challenge established notions of ‘good’ and ‘bad’ citizens, we must ask, what happens to these perlocutionary effects when law misfires (Butler, 2010; Callon, 2007)? In other words, what are the implications of drawing a legal threshold around victim and offender attributes that do little to progress, or may actually contradict, the normative aspirations of these laws?

This article begins by considering how discourses of punitive justice and social justice have influenced the enactment of hate crime laws in Western nations and the bold ideological claims that flow from these statutes. It then turns to the hate threshold to analyse cases where the application of hate crime sentencing laws have been given serious
consideration by Australian courts. After describing the results of this study, the article explores the practical and constitutive implications of these cases for hate crime law’s capacity to make a meaningful contribution to the reconstitution of racial, religious, sexual and other hierarchies of difference, asking whether hate crime laws may act in ways that inadvertently undermine the politics of difference. Investigation into the development of law in this area is timely as domestic legislatures and international agencies highlight the need for robust definitions and principled thresholds for the identification of hate crime (Law Commission, 2013; NSW Parliament, Law and Justice Committee, 2013; ODIHR, 2009; Office of the High Commissioner for Human Rights, 2012).

Social and Punitive Justice: The Performativity of Hate Crime Law

The failure of law enforcement and criminal justice agencies to deliver safety and security to citizens from minority communities was one of the main drivers behind the hate crime movement in Western liberal democracies towards the end of the 20th century (Moran et al., 2004). Although the ordinary criminal law provided ample options for policing, prosecuting and sentencing offenders who were motivated by prejudice, institutional discrimination hindered its day-to-day delivery to communities perceived to be ‘bad victims’, that is, victims whose injuries were interpreted as a sign of their own wrongdoing, such as gay men and lesbians, African Americans or Roma (Moran, 1996, 2007). Explicit legal recognition of the victimisation of these groups became a core claim of the hate crime movement as it gained political traction in the 1980s. These claims were fuelled by larger trends towards increased civility (Ray and Smith, 2004) and victim’s rights (Jenness and Grattet, 2001), but their specific roots are found in the anti-discrimination norms of identity politics. This politics of difference has sought recognition, rights and equality for minority groups who have experienced historical subjugation because of their difference, or otherness, from the dominant majority (Grattet and Jenness, 2004; Young, 1990). Although a range of local and global variables influence the structure, scope and timing of law making in this field (Jenness and Grattet, 2001; Soule and Earl, 2001), these ‘rights’ movements have created a social and political environment that is increasingly receptive to the demands of influential minority groups for an explicit criminal justice response to counteract social, institutional and individual forms of prejudice. In the United Kingdom, for example, hate crime penalty enhancement laws ‘were enacted primarily in order to address the denial of equal respect and dignity to minorities and people who are generally seen as “other”’ (Law Commission, 2013: 81–82). Given that the traditional criminal law provides remedies for most behaviour governed by this new wave of statutes, the extra ‘protection’ offered by these laws has come to represent, as Wendy Brown (1995) might suggest, recognition of the suffering and injury of minority groups and state affirmation of citizenship, human rights and social justice. This symbolic objective is a key rationalisation and, according to some, the ‘primary value’ of these laws (Schweppe and Walsh, 2008: 165).

Hate crime laws are also part of a larger neo-liberal trend towards the intensification of punishment (Bell, 2011; Garland, 2001). As the state has increasingly relied upon punishment as a tool for delivering social policy, it appears that punitiveness has
simultaneously become a sign of respect and justice for victims (Karstedt, 2002; Pratt, 2000). Although hate crime laws may not be a product of populism (Iganski, 2008), the reality is that nearly all such laws are punitive in nature. They impose a heavier penalty upon offenders than that which is applicable to comparable crimes that do not have this element of prejudice or group hostility (‘parallel’ crimes). Indeed, the imposition of an extra penalty for the element of prejudice is a core feature of most hate crime statutes (Mason, 2014; Moran, 2001). While much academic concern has focused on punitive penal policy as a mechanism for the social control of undesirable or marginal populations (Feeley and Simon, 1992; Wacquant, 2009), the punitiveness of hate crime law is exploited towards the promise of social inclusion rather than exclusion, for example, through the ‘extra protection’ offered to racial minorities. Progressive social movements, such as the labour movement and the women’s movement, have previously sought to harness the moral force of punishment to enhance their social status (Bumiller, 2008; Carson, 1974), but the irony of using punishment to benefit some of the very same populations who bear the brunt of law and order policy is not lost on critics who characterise hate crime laws as an apology for oppressive state practices (Smith, 2007). On the other hand, proponents of hate crime laws seek to justify them through retributivist principles of proportionality – these crimes are said to inflict greater harm upon victims, targeted communities and larger values of tolerance and equality that, in turn, increase the moral culpability of offenders who knowingly inflict such harm – and consequentialist goals of deterrence and denunciation (Al-Hakim and Dimock, 2012; Warner, 2010). Advocates claim that it is necessary to explicitly label and punish hate crime to send the message that such actions are no longer tolerated (Lawrence, 1999; ODIHR, 2009).

Yet hate crime laws do more than establish norms for legal/illegal behaviour. Like all criminal law, they contain ideological claims about wider relations of morality, authority and identity (Durkheim, 1895; Foucault, 1977; Garland, 1990). By explicitly labelling, prohibiting and punishing the criminal manifestations of prejudice, these laws engage in a form of moral training that does not just describe and punish the phenomena of hate crime but constructs the very norms and subject positions they regulate (e.g. legitimate victim or racist offender). In other words, hate crime laws are not just a repressive exercise of juridical power. The sanctions they impose also have social ordering and redistributive dimensions (Golder, 2012) that serve as a public vindication of the values of tolerance, equality and respect (Blake, 2001). This remoralisation agenda (Mason, 2014; O’Malley, 1999) is recognised in a range of policy documents. For example, the UK Law Commission (2013: 81) has recently suggested that the introduction of new hate crime offences could have a positive effect by sending the message that ‘people with disabilities, particular sexual orientations and transgender people’ should be treated with dignity and respect, regardless of their personal characteristics’. Similarly, the Organization for Security and Co-operation in Europe claims that hate crime laws ‘both express the social value of equality and foster the development of these values’ (ODIHR, 2009: 7). These far-reaching social implications are a matter of the performative potential of hate crime law to reconfigure the norms that fix and internalise certain characteristics to identity categories of race, sexuality, gender, disability, and so on (Butler, 1990; 2010). As Race (2012) puts it in the context of laws governing human immunodeficiency virus, new criminal offences may create new ways in which people become subject to
moral principles. To achieve these desired effects, the ideological claims contained within these laws require ongoing repetition and reinforcement in circumstances conducive to their message (Butler, 2010). When these circumstances are absent, it is easy for law to misfire (Callon, 2007). Misfires occur where ‘the law does not quite do what it says, or worse, can be seen to be participating in processes that undermine some of its express aims’ (Race, 2012: 4). The difficulty for hate crime law is that, unlike many other forms of criminal law (Golder, 2012; Race, 2012; Smart, 1992), it is designed to resist or nullify, not reinforce, the established power relations that infuse categories of identity; for example, to construct gay men and lesbians as good citizens who deserve security, equality and respect and to code homophobes as bad citizens who are responsible for violating and threatening cherished social values. Whether hate crime laws do misfire, in Callon’s terms, will depend on a number of variables, including the empirical conditions under which they operate, the manner in which they are applied and the normative statements that flow from their practical application (Callon, 2007).

A small but important body of research examines hate crime laws in practice. It suggests that statutory rules and procedures can be given quite different meanings in the hands of poorly-led police officers, overzealous prosecutors or resistant judges (Bell, 2002; Burney and Rose, 2002; Byers et al., 2012; Cronin et al., 2007; Goodall, 2013; Hall, 2012; Iganski, 2008; Ip, 2005; Jenness and Grattet, 2005; Lawrence, 2009; Perry, 2010; Phillips, 2009; Roberts and Hastings, 2001). The courts, especially appellate courts, have an influential role to play in limiting, validating or elaborating hate crime statutes. Judicial pronouncements serve as authoritative texts on the scope and meaning of these laws that circulate to other judges, prosecutors, defence lawyers and scholars, representing ‘an important moment in the legal construction of hate crimes’ (Jenness and Grattet, 2001: 103). In the United States, Phillips and Grattet (2000) and Jenness and Grattet (2001) have traced the development of hate crime jurisprudence by analysing how basic statutory templates have been given meaning by the courts, particularly in appellate decisions on constitutional standing. Although early judicial constructions favoured an image of ‘normal’ hate crime, the US courts have gradually developed a more refined account of motive as a matter of bias rather than hatred, a pronounced demarcation between hate crime and hate speech and an expanded range of circumstances within which hate crime can occur. In her analysis of both European and US laws governing racist crime, Goodall (2013) argues that much case law has developed to embrace victims, motives and forms of group hostility that are a far cry from the original impetus driving these laws, which was to redress the denial of human rights and dignity to racial and other minorities. For example, a formalistic application of the principle of equality before the law means that most hate crime laws apply to specified forms of social differentiation irrespective of whether the victim is a member of a privileged majority or suffused minority group in relation to that attribute. This means that hate crime laws offer extra protection to victims who are, for example, White as well as those who are Black. As Lawrence (2009) points out in her analysis of sentencing laws in Canada, the kind of conduct that comes to be constructed as hate crime is effectively a synthesis of the formal legal rules, the development of case law principles by the courts and the interpretation and application of these rules and principles by institutions and actors at various points in the criminal justice system.
In sum, hate crime laws are a form of resistance to discourses of prejudice, hostility, bias and hatred that inhibit the human rights of minority groups (Moran, 2001). They embody a call for social justice on behalf of these groups that extends beyond the question of crime itself. They rely upon distinct forms of criminalisation and/or punitive punishment to claim that hate crime is more serious than parallel crime because it breaches multicultural, liberal values of equality, acceptance and respect towards those who are different. In theory, these normative statements have the potential to contribute to the ongoing (re)production of new norms and subjects of social differentiation: blameless minorities and blameworthy bigots. Yet such performative effects, and any misfires, will be shaped by the ways in which the problem of hate crime, including the roles accorded to victims and offenders, is given meaning in practice. In the following section, I propose a framework for analysing the empirical and constitutive effects of hate crime law and describe a recent study where this framework was used to examine judicial interpretations of sentencing laws.

The Hate Threshold and Sentencing Aggravation Laws in Australia

Hate crime laws take many forms. Some are freshly crafted, while others are reformed versions of offences dealing with civil or human rights. There are roughly three models of legal intervention: substantive or stand-alone offences; penalty enhancement provisions that create aggravated versions of existing offences; and sentencing aggravation provisions (Law Commission, 2013; Mason, 2009; ODIHR, 2009). The ‘hate threshold’ is a heuristic device designed to analyse how hate crime is constructed within and between these different models and the larger constitutive implications of these constructions. In the allied field of civil incitement or vilification law, the concept of a harm threshold refers to the legal threshold of conduct that is necessary to establish hatred, contempt or ridicule for the victim on the basis of their group membership; for example, through case law that determines that certain expressions may be distasteful yet too trivial to meet the threshold of unlawful conduct (Hennessy and Smith, 1994; Meagher, 2006). Gelber (2000: 14) has referred to this as the hate threshold. The many differences that exist between civil incitement law and criminal hate crime law – such as the mental standard required for liability – prevent the former from providing a definitive model for the development of the latter (Malik, 1999). Yet both do turn on legal prohibitions and principles that actively draw a demarcation between acceptable/unacceptable expressions of prejudice and hatred towards others on the basis of their presumed group membership. Adapting the concept of the hate threshold to the criminal domain, I use it to capture both the empirical and performative dimensions of hate crime laws: (i) where and how is the demarcation drawn between expressions of hostility towards differences that are criminalised and punished as hate crime and those that are not, and (ii) what do these principles and practice do, or fail to do, in terms of (re)constructing norms around prejudice and the politics of difference (Butler, 2010; Callon, 2007)? There is of course no single or static hate threshold but, rather, a multiplicity of constructions that shift between models, according to applicable tests and across time and jurisdictions. As a starting point, there are three features common to most hate crime statutes that, without
mapping strictly onto the elements of liability, are generally required to turn an ordinary crime into a hate crime: (i) the element of emotion; (ii) the element of causation; and (iii) the element of difference. Each of these elements is approached differently within individual statutes but there are significant similarities.

The element of emotion refers to the need for evidence of negative or adverse feelings on the part of the offender (towards a presumed attribute of the victim). The statutory language varies considerably, with some legislation requiring evidence of offender ‘prejudice’ or ‘hatred’ (e.g. s 21A(2)(h) Crimes (Sentencing Procedure) Act 1998 (New South Wales (NSW))) and others requiring evidence of offender ‘hostility’ (e.g. s 28 Crime and Disorder Act 1998 (United Kingdom)). Under most statutes, this involves a subjective inquiry into the accused’s state of mind but US jurisdictions in particular have sought to sidestep the need to prove the offender’s thoughts or emotions by relying upon objective evidence that the offender selected the victim by reason of his or her group membership (Goodall, 2013; Quill, 2010). The second element of hate crime law is the causal link between the offender’s negative emotions and the commission of the offence itself. Again, definitions of this element vary considerably between statutes. Offences that require an offender to be motivated by negative feelings have attracted criticism for obliging the prosecution to prove an element which is not normally needed for criminal liability (Al-Hakim, 2010; Gadd, 2009; Hurd, 2001). Thus, some statutes have approached the question of motive by relying upon evidence that the offender selected the victim because of his/her attribute (e.g. Iowa Code § 729A.2). Others require only that the offender demonstrated hostility towards the victim on the basis of his/her group membership (e.g. s 28(1)(a) Crime and Disorder Act 1998 (United Kingdom)). These variations reflect significant differences in the extent to which a direct causal link between the offender’s feelings and the offence must be established to trigger the provisions. All raise questions of proportionality: How substantial or significant must the causal link be? The third element of the hate threshold centres on the question of difference: Which forms of social differentiation, human attributes or categories of identity are accorded specific protection and recognition under the law? Technically, it is only victim attributes that are specified in the legislation. The only attribute protected in all hate crime statutes is race, whereas ethnicity, religion, sexual orientation, disability and gender receive varying degrees of recognition (ODIHR, 2009). Although hate crime laws are not formally concerned with the offender’s identity, this is an important dimension in the interpretation and application of these laws in practice (Federal Bureau of Investigation, 2012), particularly in terms of which groups end up carrying responsibility for the commission of hate crime. Together, these three elements embody much of the gap between a hate crime and a parallel crime; that is, they make up the hate threshold. Exploring where and how the threshold is drawn between a hate crime and a parallel crime provides a picture of the construction of hate crime, its development under individual statutory regimes and the practical and constitutive implications that flow from this distinct mode of criminalisation and punishment.

The Study: Sentencing Aggravation Provisions in Australia

Australia has a less extensive history of hate crime law reform than countries such as the United Kingdom, United States or Canada. Although criminal incitement laws have been
in force for some time, these are rarely used to prosecute, and only one jurisdiction, Western Australia, has penalty enhancement provisions, which to date have led only to a single conviction (Mason and Dyer, 2013). Since 2003, three jurisdictions – Victoria, NSW and the Northern Territory (NT) – have introduced hate crime sentencing aggravation provisions that have been embraced with more enthusiasm by prosecutors. To take one example, the NSW provisions states that it will be an aggravating factor at sentencing if:

the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability). (s 21A(2)(h) Crimes (Sentencing Procedure) Act 1999 (NSW))

The Victorian and NT sentencing laws are worded a little differently from the NSW provision, but several commonalities and distinctions across the three elements of the hate threshold (emotion, causation and difference) are worth noting. In NSW and Victoria, the prosecution can rely upon the evidence of either prejudice or hatred on the part of the offender, whereas the NT provision will only be triggered by proof of hatred. From the outset, all three statutes set a high threshold for the causal link because they require evidence that the offence was motivated by these feelings (only Victoria spells out that partial motive is sufficient). Unlike liability itself, there is common law precedent for inquiring at sentencing into why an offender acted as he/she did (Mason and Dyer, 2013). Like sentencing laws in Canada and New Zealand, all three statutes provide for considerable judicial discretion in terms of the element of difference, requiring only that the offence be motivated by hatred/prejudice against a group of people. As shown above, in NSW this is qualified by examples and in Victoria the terminology is a ‘group of people with common characteristics’.

In the first nationwide study of hate crime laws in Australia, judicial interpretations of these provisions were examined across the three jurisdictions (Mason and Dyer, 2013). The aim of the study was to identify the kinds of evidence required to trigger the provisions and to analyse how the courts construct prejudice-/hate-motivated crime. Extensive searches revealed a total of 24 (reported and unreported) cases where the prosecution’s submission that the offence was aggravated by prejudice or group hatred was given serious, as opposed to passing, consideration by the court (this included several common law cases that were heard either before these provisions were enacted or in states that have not codified this motive as an aggravating factor at sentencing). The cases included both sentencing judgments in the District/County or Supreme Courts as well as decisions of the courts of criminal appeal in each jurisdiction. All of these courts hear the more serious indictable charges and as such the study cannot comment on how these sentencing provisions are being taken up in the summary courts. Appeal court decisions provide the most authoritative interpretations of hate crime statutes, but in a relatively new area such as this it is informative to look at how the statutory language is interpreted by courts that deal with the bulk of sentencing matters for indictable offences. No relevant cases were identified in the highest court in Australia, the High Court. The cases were analysed for consistencies (and inconsistencies) within and between jurisdictions. This also
revealed patterns in prosecution decision-making that have been used to inform the analysis. The following section presents the results of this analysis framed according to the three elements that are used to draw a threshold around behaviour that amounts to prejudice-/hate-motivated crime.

**Results of the Study: Emotion, Causation and Difference**

**Emotion**

International research suggests that courts rely upon a variety of proof to infer an offender’s feelings under hate crime legislation, including evidence intrinsic to the commission of the offence itself, such as language used by the offender, and extrinsic material, such as evidence of website activity or psychological reports (Burney and Rose, 2002; Lawrence, 2009; Read, 2006). The current study found that three main forms of evidence are used by the Australian courts to arrive at the conclusion that an offender’s feelings amount to hatred or prejudice: insulting, demeaning or abusive language by the offender towards an attribute of the victim; psychological evidence of the offender’s prejudiced feelings and evidence of extreme physical violence by the offender towards a victim who belongs to a vulnerable, well-recognised minority group. Language that satisfies the courts of the offender’s hatred or prejudice tends to focus on skin colour, animal characterisations, associations with women’s bodies or with illegitimacy: ‘black bastard’, ‘yellow dog’, ‘sons of bitches and dogs’, ‘fucking black cunts’, ‘bloody Indians’ or ‘fucking gook’ (Holloway v. R, 2011 NSWCCA 23; R v. O’Brien, 2012 VSC 592; R v. El Mostafa, 2007 NSWDC 219; R v. Dean-Willcocks, 2012 NSWSC 107; Hussein v. The Queen, 2010 VSCA 257; DPP (Vic) v. Caratozzolo, 2009 VSC 305). Rejection of the victim’s right to be in Australia is also a common theme: ‘fuck off’, ‘Japanese cunt’, ‘fuck off back to Japan’ or ‘go home’ (R v. Dean-Willcocks; Holloway v. R; Hussein v. The Queen). Psychological evidence of the offender’s ‘feelings of antipathy’ and ‘ill will’ (Dunn v. R, 2007 NSWCCA 312, 17, 31) or ‘absolute disrespect’, ‘disparagement’ and ‘contempt’ (R v. I.D and O.N, 2007 NSWDC 51, 50, 157) towards an attribute of the victim have also been sufficient to amount to prejudice or hatred. In R v. Doody (Unreported, Supreme Court of the Northern Territory, Martin (Br) CJ, 23 April 2010), the NT Supreme Court held that extreme violence and intimidation by a group of white offenders towards a group of homeless Aboriginal people was also sufficient to demonstrate the offender’s ‘negative attitude’, ‘antagonism’ and ‘absolute disrespect’ towards the victims because they were Aboriginal (R v. Doody, 4, 18). These cases do not establish binding definitions of prejudice and/or hatred but together they create a threshold that requires strong and negative feelings of disrespect, antagonism, antipathy, ill will or contempt. The expression of such emotion by an offender will not, however, meet the hate threshold unless the court is also convinced that these feelings were what caused the offender to commit the offence. This element is discussed next.

**Causation**

Legislation that requires the offence to be motivated by the offender’s feelings sets a higher threshold for the causal link than legislation that requires only that the offender
demonstrated his/her feelings or intentionally selected the victim because of their group membership. It also raises the question of proportionality: How dominant or prevailing must the hateful motive be in circumstances where an offender has other motives? In most cases in the study where the provisions were triggered, there was evidence of the kind of antagonistic and disrespectful feelings described above coupled with the absence of any other feasible motive. For example, in *R v. Al-Shawany*, 2007 NSWDC 141, a Muslim man lured a woman from a Muslim background to an apartment where he raped her twice. There was evidence that he believed she was converting to Christianity and that Christians were infidels. In the absence of evidence pointing to any other motive for the offence, the court held that ‘the strongest inference, and indeed ... the only inference’ that could be drawn was that he sexually assaulted her because of his anti-Christian feelings (*R v. Al-Shawany*, 111–114). If, however, there is evidence of an alternative motive for the offence, such as robbery or a pre-existing dispute with the victim, the demonstration of prejudiced feelings will be normally insufficient to meet the motive threshold (e.g. *R v. Thomas*, 2007 NSWDC 69, 40; *DPP (Vic) v. RSP*, 2010 VSC 128, 21; *R v. Winefield*, 2011 NSWSC 337, 26–28; *R v. Robinson*, 2007 NSWDC 344, 25–26). Similarly, the weight of authority appears to hold that the intentional selection of a victim because of his/her membership of a particular group will not amount to motive unless prejudice and/or hatred is the reason *why* the offender targeted a member of that group (*DPP (Vic) v. Caratozzola*, 2009, 14). For example, in *R v. Aslett*, the offender selected the victims of a home invasion because they were ‘Asian’, and he believed that Asians were likely to keep valuables in their home. The NSW Court of Criminal Appeal held that discriminatory selection alone was insufficient to prove that the offender was motivated to offend because he hated or was prejudiced against Asians (*R v. Aslett*, 2009 [124]. See also for example *DPP (Vic) v. MM*, 2009 VSC 336 [6]; *DPP (Tas) v. Broadby*, 2010 TASSCA 13. C/f *R v. Gouros* (Unreported, Victorian County Court, Judge Cohen, 14 December 2009)). Yet even in Victoria, where the statute specifies that partial motive is sufficient, cases involving a genuine mix of motives can receive quite different judicial treatment. For example, in *R v. O’Brien*, the Victorian County Court found that the offender’s racist feelings need to be only partially responsible for the offence. Yet in *R v. Rintoull*, 2009 VSC 617, the Supreme Court of Victoria held that the causal link between the offender’s racist language and the homicide of an African victim was too weak to amount to motive because the offender probably would have committed the offence irrespective of the victim’s race (effectively applying a ‘but for’ test that required prejudice to be the sole motive) (*R v. Rintoull; R v. Doody*). In NSW, it appears that it will be sufficient if prejudice or hatred is a ‘significant’ motive for the offence (*Dunn v. R*). In effect, and bearing in mind that there is some inconsistency, it appears that the bulk of Australian courts largely look for the offender’s negative feelings to be the deliberate, unequivocal and sole, or at least significant, cause of the offence.

**Difference**

Discretionary sentencing laws provide insight into the kinds of victim attributes, or forms of social differentiation, that are identified by judges and prosecutors as warranting extra protection and recognition under the criminal law. Much less attention has been
given to offender profiles (Roberts et al., 2013), yet these help identify who carries legal responsibility for hate crime: Who is held to be so racist, homophobic or anti-Semitic that they deserve this label and the extra punishment that goes with it?

In terms of victims, the Australian sentencing cases lend no support to international concerns that hate crime laws will be used to provide undue protection to victims who are members of majority groups. In very few cases in the study were the victims from a majority or dominant group. Most victims were from racial minorities (e.g. an Indian, Aboriginal or African background) with a couple of cases involving religious minorities (e.g. Shiite Muslim) (Holloway v. R; Hussein v. The Queen; Grivell v. R, 2008 NTCCCA 6; R v. Doody; R v. El Mostafa). The provisions were successfully applied to one (sexual assault) case of prejudice against a woman (R v. I.D and O.N, discussed further below) but unsuccessfully raised in one case of fatal violence against a gay man, which involved a homosexual advance by the victim towards the offender (R v. Johnstone, 2011 VSC 300 [56]). Two cases where the provisions were triggered stand out as particularly problematic. In both, the NSW statute was applied to aggravate the sentence of offenders who targeted their victims because they presumed them to be, in the words of the courts, paedophiles. In R v. Robinson, 2004 NSWSC 465, the offender’s sentence was aggravated for attacking and killing a fellow inmate while in prison because he believed the victim to be a paedophile. In Dunn v. R [32], it was held that an offence of arson was motivated by hatred for or prejudice against the victim because the offender ‘believed him to be a member of a particular group, i.e. paedophiles’. The court in Dunn considered that the examples given in parentheses in the NSW provision did not limit its application to any particular kind of people, suggesting that any group that is targeted for hostility or vigilantism can be interpolated as a victim of prejudice-motivated crime. This decision was confirmed on appeal.

The symmetrical application of hate crime laws means that members of minority groups can be offenders as well as victims. This opportunity appears to have been embraced by Australian prosecutors. In approximately two thirds of the cases in the study, the offenders, all of whom were male, came from racial or religious minority, refugee or non-English-speaking immigrant backgrounds (e.g. Aboriginal, Lebanese, Sunni Muslim, Chinese, Maori, Somalian, Turkish, Italian and Thursday Islander) (e.g. R v. Al-Shawany; R v. El Mostafa; R v. El Masi, 2005 NSWCCA 167; R v. I.D and O.N; R v. MSK, 2004 NSWSC 319; R v. SIN, 2008 NSWSC 621; R v. Robinson, 2007; Holloway v. R; R v. Lee, 2010 NSWSC 632; R v. Gouros; R v. Robinson, 2004; DPP (Vic) v. Metaxas (Unreported, Victorian County Court, Judge Sexton, 22 March 2010), DPP (Vic) v. Kilinc (Unreported, Victorian County Court, Judge Gullaci, 24 May 2010); Hussein v. The Queen; DPP (Vic) v. Caratozzolo; R v. Chong, 2008 VSCA 119 [29]; R v. Dempsey; ex parte A-G (Qld), 1999 QCA 520; R v. Aslett; R v. Rintoul). The most common scenarios involved members of one racial/religious/cultural minority targeting the members of another. The one case, noted above, where the court was convinced that the offence was motivated by prejudice against a woman also bears upon the ethnicity/religion of offenders. In R v. I.D & O.N, two young men broke into a woman’s apartment and subjected her to multiple sexual assaults several hours. Psychological evidence was tendered at sentencing that both offenders came from families that were immersed in a ‘disparaging gender stereotypical value system’ that
'encourages sexualisation and objectification of women' (R v. I.D & O.N, 128). The court was left in no doubt that the sexual assaults were motivated by misogyny, contempt and absolute disrespect for women (R v. I.D & O.N, 156, 128). These offenders were undoubtedly misogynist but is it a coincidence that in the only case in the study where gender prejudice was argued and proven, the offenders came from Lebanese and Algerian backgrounds?

The threshold between criminal manifestations of prejudice and non-criminal ones under hate crime sentencing law in Australia is not easily or inadvertently crossed. The case law suggests that three common denominators are usually required to turn an ordinary crime into a hate crime in practice. First, strong and negative feelings of antagonism, disrespect, antipathy or contempt on the part of the offender towards an attribute of the victim are often present. Second is the absence of evidence from which to infer a second or alternative motive. Third is evidence of group difference between offenders and victims, where victims are largely members of well-recognised racial/religious minorities. Yet this description of the difference element hides some anomalies that demand further scrutiny, particularly the inclusion of ‘paedophilia’ as a protected victim attribute and the over-representation of racial, religious and cultural minorities amongst offenders. The implications of these constructions of the hate threshold for the empirical and constitutive effects are discussed below.

Discussion: Constructing a Hate Threshold

It has been suggested that the concept of hate crime is a misnomer because it is prejudice, not hatred, that is criminalised (Iganski, 2008; Jacobs and Potter, 1998). This claim does not do justice to the continuum of emotion that is apparent in hate crime statutes. The highest threshold is set by legislation that requires hatred. The Supreme Court of Canada in its interpretation of hate propaganda offences in R v. Keegstra (1990 3 SCR 697, 777) defined hatred as an ‘emotion of an intense and extreme nature’, which implies that members of the specified group are to be ‘despised, scorned, denied respect and made subject to ill-treatment’. Statements that are merely distasteful will not meet this threshold (Claridge, 2006). Similarly, the UK Law Commission has defined hatred, as it operates in criminal incitement provisions, as ‘active dislike, detestation, enmity, ill will [and] malevolence’ (Law Commission, 2013: 27). Legislation that describes the requisite offender emotion as hostility sets a lower threshold (Schweppe and Walsh, 2008) but still implies a degree of animosity that is akin to being unfriendly, adverse or antagonistic (Law Commission, 2013) and more than ‘mere prejudice’ (Burney and Rose, 2002: 14). Although it is open to the courts in Victoria and NSW to rely upon this lesser sentiment of prejudice, they have not done so. Instead they have given a meaning to the emotion element that is comparable to the definitions of hatred in these other jurisdictions; that is, a strong and negative feeling of antagonism, disrespect, antipathy or contempt. By and large, they have also set a high threshold for the meaning of motive. Although research suggests that hate crime offenders often have mixed motives (Gadd, 2009; Iganski, 2008; Phillips, 2009; Ray et al., 2004), Australian courts appear more comfortable when prejudice or hatred is the sole or significant cause of the offence. Although partial motive has occasionally been recognised, there is no clear test for
determining proportionality. This resonates with the US situation where the question of proportionality remains largely unresolved. Most US statutes do not require the precise character of motive to be established, but they do require a causal link between the offender’s bias and the selection of the victim (Jenness and Grattet, 2001). Recent analysis by Quill (2010) reveals that some courts have settled for a but for threshold and/or a ‘substantial’ causal connection rather than one that looks for a ‘preponderance of evidence’ (see also Goodall, 2013). In addition, Australian courts have refused to use these sentencing aggravation provisions to surreptitiously criminalise hate speech or to punish the opportunist selection of victims based on stereotypes or mild bias alone (although there is some inconsistency in terms of the latter scenario). While Roberts and Hastings (2001) see this as a failure to respond to the ‘true’ harm of hate crime, which they claim stems not from the offender’s motive but from the additional injury that hate speech inflicts on the dignity of the victim and the community, Goodall (2013) argues that such harm is insufficient to justify the distinct label and enhanced penalty imposed by these laws (Goodall, 2013). It seems that Australian courts are in agreement. By limiting motive to the ‘exercise of choice to commit an offence with a specific intent’ (Edney and Bagaric, 2007: 138), they have given precedence to the offender’s moral culpability over the infliction of harm.

This exacting and narrow threshold reproduces the popularised image of typical hate crime, which also dominated early judicial constructions of the US statutes (Jenness and Grattet, 2001): Serious, random and unprovoked attacks by strangers who knowingly use violence to express their antagonism, contempt or disrespect towards the victim’s presumed social group (Gerstenfeld, 2004; Mason, 2005). By punishing such offenders more heavily than those who commit parallel crimes, the ideological message is clear: ‘in a society like Australia, which celebrates diversity and encourages all groups to live together in harmony and equality’, such unambiguous manifestations of group antipathy, disrespect or contempt are worse than parallel crimes because they are ‘a negation’ of the country’s ‘fundamental values’ (DPP (Vic) v. Caratozzolo [15]). The repetition of these judicial pronouncements, whether explicit or implicit, expresses a set of social norms that are consistent with the remoralisation ambitions at the heart of hate crime law. By creating a demarcation between prejudice-motivated crime and ordinary crime, they construct prejudice and group hatred as a distinct moral wrong that hinders people’s opportunities to ‘realize their full potential’ and achieve ‘full human dignity’ (ODIHR, 2009: 19). In other words, by rejecting the bad values that feed prejudice and hatred, hate crime sentencing laws operate as ‘a general affirmation of the societal value of groups targeted by hate crimes and a recognition of their rightful place in society’ (Beale, 2000: 1254).

This begs the question, who are these targeted victim groups and what is their relationship to offenders? The group difference between victim and offender is a key indicator of hate crime for law enforcement (Cronin et al., 2007; Federal Bureau of Investigation, 2012; Law Commission, 2013; Lawrence, 2009). In all cases in the study, victims and offenders belonged to different social groups in terms of the kind of prejudice alleged. In the vast majority of these, the victim was from a racial minority. Although gender and homosexuality have received protection under comparable sentencing laws in Canada (Lawrence, 2009), the Australian study reveals only one case where the courts recognised women as a protected group and no cases where the
provisions were successfully applied to homosexuality (and only one unsuccessful attempt by the prosecution to do so). Essentially, it seems that the symbolic message of remoralisation described above is only systematically realised in practice in the context of racism (and occasionally in the context of religious prejudice). In other words, in Australia, it is primarily racial minorities who receive the benefit of normative legal statements capable of reconfiguring them as inferior, illegitimate or dangerous others. At the same time that this reinforces the image of racial minorities as the ‘true’ victims of hate crime, the inclusion of other unexpected attributes within the hate threshold is equally problematic. The two ‘paedophile’ cases stand out in this regard. Paedophiles, or more accurately, child sex offenders, engage in behaviour that is illegal, harmful and an abuse of power (Filipas and Ullman, 2006; Young et al., 2007). Unlike minority groups that are traditionally recognised under hate crime law, there are no signs that social taboos around this behaviour are relaxing. Child sex offenders are undoubtedly the targets of vigilantism and they deserve legal protection but the problem with using hate crime laws to do this is that these laws inevitably contain particular ideological claims about the victim groups they protect. Quite simply, they send a message of acceptance, equality and state affirmation for that group (Mason, 2014). This construction of child sex offenders as ‘rights holders’ accords a form of ‘sexual citizenship’ (Lunny, 2013) that has recently been rejected by the English Court of Criminal Appeal (R v. Barmby, 2013 EWCA Crim 291) and by discrimination law more broadly (Thornton, 1990).

The application of these laws to aggravate the sentences of offenders who are largely racial, religious or cultural minorities is also striking. This may partially reflect wider patterns of over-criminalisation, especially in terms of Aboriginal offenders (Cunneen et al., 2009). Nevertheless, it is concerning that communities who are subject to larger forces of social and economic marginalisation are also over-represented as the perpetrators of prejudice-motivated crime under these laws. Such unease has also been expressed in the United Kingdom (Dixon and Gadd, 2006; Gadd, 2009: 759) where the British Crime Survey suggests that 31% of perpetrators of racially motivated offences are believed to come from a visible ethnic minority (Roberts et al., 2013). The application of sentencing aggravation provisions primarily to minority group offenders may inadvertently lend encouragement to critics of multiculturalism who claim that racial minorities abuse the hospitality that is extended to them and are incapable of social mixing (Mason, 2007). Some support for this is found in Hussein v. The Queen, 105, where the court explicitly condemned an attack by a group of Somalian offenders against a group of Indian victims as a negation of the ‘welcome’ they had received as immigrants into Australia and a ‘particularly shameful’ expression of ‘hatred and aggression towards other young immigrants and overseas students’. Stereotypes of Muslim men as misogynist may also have been at play in R v. I.D & O.N. There is no doubt that the two offenders in this sexual assault case were driven by a deep disrespect and contempt for women. The point is not that their sentence should not have been aggravated by gender prejudice but, rather, that it is unusual for the prosecution to seek to apply these provisions in cases of sexual assault. By way of comparison, the study examined several comparable sexual cases in NSW involving non-Muslim offenders. In none of these cases did the prosecution submit that the offences were motivated by gender prejudice (R v. TS,
 Might it be that the misogyny and racism of offenders becomes more visible or more serious in the eyes of prosecutors and judges when it issues from the language and behaviour of (male) racial, religious and cultural minorities?

These developments in sentencing aggravation laws have constitutive implications for the element of difference. The capacity of hate crime law to enact ‘resistance through law’ (Moran, 2001: 341) is contingent on the reconstruction of the traits and norms ascribed to the roles of both victim and offender. To resist established hierarchies of difference, hate crime laws need to issue ideological statements that help create new ways of inhabiting what it means to be black, gay, disabled, etc, and new ways of what it means to be racist, homophobic, ablest, etc.; for example, by engendering the expectation that to be Black is to receive the same respect and rights as those who are White or to be racist is to expect the unequivocal condemnation of the community and the state. The consistent application of sentencing aggravation provisions to victims from racial minorities portends desirable effects in this direction. At the same time, however, these cases also appear to generate a series of misfires around the element of difference that does little to further these social justice ideals and may actually undermine them. In particular, the application of sentencing aggravation provisions to victim attributes or activities that are not just benign (such as having blue eyes) but are harmful and abusive (such as being a sex offender), accords a form of rights recognition that downplays any meaningful distinction between this kind of ‘difference’ and the kinds of differences that render people subject to unjustified intolerance and inequality. The implication is that all forms of difference are rendered virtually the same (as if being victimised because of one’s difference from the mainstream eclipses the social context for that difference). This universalisation of difference or amplification of similarity (Cooper, 2004) effectively places group victimisation – any group victimisation – as a core constitutive element of hate crime rather than inequalities of race, ethnicity, sexuality, etc. As Goodall (2013: 222) has pointed out, the problem with applying the principle of formal and undifferentiated ‘equality’ to hate crime statutes is that the societal discrimination that provides the impetus for these laws is ‘barely sighted before it is pushed under again’. Not dissimilarly, the repeated application of these laws to offenders from racial, religious and cultural minorities means that not only do these groups bear the brunt of the punishment, they also end up carrying the bulk of the blame for prejudice-motivated crime (in the higher courts at least). If, as I have suggested above, hate crime laws have the potential to name offenders as the undesirable epitome of those who are responsible for intolerance, disrespect and antipathy towards others, this seemingly selective application may have the unintended effect of contributing to the construction of these minorities as the source of racism and other forms of prejudice in Australia. What is more, in ascribing the roles of chief offenders and chief victims to racial, cultural and religious minorities, these laws risk creating the impression that hate crime is largely a minority-on-minority problem of failed integration and multiculturalism.

Hate crime laws lack a convincing rationale for why the criminal manifestations of antipathy and contempt from any social group towards any form of difference should attract a heavier punishment (Goodall, 2013). The cases in this study repeatedly take a neutral stance on victims and offenders that project an account of difference as a
relation of difference from each other rather than a relation of privilege and subjugation. This neutralisation or ‘flattening out’ of the normative politics of difference trivialises the larger organising principles of illegitimate inequality and disadvantage (Cooper, 2004) that provide the rationale for legal intervention in this field. This surely causes these laws to misfire by diminishing their symbolic power to challenge the norms and moral principles that shape these authority relations and the subject positions they govern. Ultimately, these misfires expose the fragility of law’s ability to maintain a coherent threshold between forms of ill will that purportedly warrant this distinct criminalisation and heightened punishment and those that do not.

**Conclusion**

Hate crime laws are an example of a contradictory trend in punishment associated with the destabilisation of traditional divisions between the left and the right (O’Malley, 1999). They use individualising and punitive techniques to further liberal, multicultural ideals of equality, human rights and civility. Principled debates about the justifications for these laws would benefit from greater attention to developments of the law in action. This article has proposed the concept of the hate threshold as a starting point for investigating the features that turn an ordinary crime into a hate crime in practice and the larger constitutive effects that flow from this. This articulation of the hate threshold – through the common elements of emotion, causation and difference – is not intended to be a comprehensive account of all variables that feed into the development of the law but merely a framework for exploring and comparing their operation at particular points in the criminal justice process.

Analysis of judicial constructions of prejudice-motivated crime under sentencing aggravation provisions in Australia reveals the development of a rigorous and relatively narrow threshold around the meaning of a prejudiced or hateful motive. While this threshold excludes a range of harmful behaviour, a more expansive interpretation would have punitive repercussions for offenders who may not have the same degree of moral culpability as those who knowingly and deliberately inflict such harm because of strong feelings of antipathy, disrespect or contempt towards the victim’s group. While racial minorities have been the primary beneficiaries of the so-called extra protection provided by these laws they are simultaneously, along with religious and cultural minorities, the primary offenders in cases where the prosecution has attempted, both successfully and unsuccessfully, to enliven the provisions. Australian courts have used their discretion to give a very flexible interpretation to the kinds of victim attributes that should be protected, most notably by extending the threshold to paedophiles as a protected group. These anomalies show how easy it is for hate crime laws to bypass or neutralise the foremost relations of difference, inequality and injustice upon which they are founded. Instead of challenging the norms, sentiments and identities that sustain hierarchies of difference, these constructions of the problem may actually undermine and expose the cracks in the remoralisation agenda that sustains and validates these laws. Hate crime laws are in an ongoing process of expansion (Chakraborti and Garland, 2012; Goodall, 2013; HM Government, 2012; Law Commission, 2013; Mason, 2014). The current study suggests that we need to counter such expansion with a hearty dose of scepticism about
the capacity of the criminal law to draw a sustainable and justifiable demarcation between hate crime and ordinary crime.

Notes

1. In the Northern Territory, s6A(e) of the Sentencing Act 1995 came into force in 2006 and states that an offence may be aggravated if ‘it is motivated by hate against a group of people’. Section 5(2)(daa) was inserted into the Victorian Sentencing Act 1991 in 2009 to provide that a court must have regard to ‘whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or which the offender believed the victim was associated’.

2. In this case, as in R v. Doody (unreported, Supreme Court of the Northern Territory, Martin (Br) CJ, 23 April 2010), it seems that the court relied upon evidence of the nature of the violence itself, which involved sexual assault that was described as an ‘exercise in humiliation’ whereby the offenders demonstrated their opinion of women as ‘menial objects’: [49].

3. In R v. Rintoull, 2009 VSC 617, the offender spray-painted ‘fuck da niggers’ and spoke words to the effect that he was going to ‘take his anger out on some niggers’ but this was insufficient to amount to a racist motivation when he subsequently killed a Sudanese youth, largely because of the likelihood that he would have been violent towards a White group of young men in the same circumstances. R v. O’Brien, 2012 VSC 592 is one of the few cases where the court was alive to the wording of the Victorian legislation, which requires only that prejudice or hatred be a partial motive.

4. The targeting of a Muslim woman because of her presumed conversion to Christianity in R v. Al-Shawany, 2007 NSWDC 141 is arguably an example of a victim assumed to be from, or becoming a member of, a majority group, namely Christians.

5. Interestingly, the study also found one case in Queensland, which has not codified a prejudiced motive in sentencing legislation, where the court recognised that the offence was motivated by prejudice against the victim because he was perceived to be gay: R v. Irving, 2004 QCA 305.

6. Although in the United Kingdom it has been accepted that an offence can still be racially aggravated where both victim and offender are from the same racial group (Law Commission, 2013).

7. The question of intersectionality in victim attributes was dealt with differently in different courts. In R v. Doody and in Grivell v. R, 2008 NTCCA 06, the courts explicitly recognised that the victims were targeted because of their Aboriginality and homelessness. In R v. Al-Shawany, the court seemed oblivious to the fact that the offender had chosen to express his anti-Christian sentiment through sexual assault of the woman victim, nor was it recognised in RSP where racism and homophobia appeared to be at play.

8. Although in the latter case, the offenders were the sons of Greek immigrants.

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