

Prosecuting Disability Hate Crime: a disabling solution?

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Abstract

Public acts of hostility and harassment against disabled people are characterised in law as hate crime when they are accompanied by evidence of prejudice. But, rather than protecting and deterring, the offence of hate crime invites and depends on the identification of a person as different, thereby reinforcing culturally embedded ideas of normality and disability. As a result the law is based on disablist assumptions of disabled people as inferior. The law is also based on ideas and practice that presume ablebodiedness and thereby risks marginalising disabled people with whom the criminal justice system can find it difficult to work.

Keywords: hate, prejudice, pity, inclusion, difference.

Introduction

Despite the Disability Discrimination Act (DDA) 1995, the intention of which is to address the social exclusion and isolation of disabled people, there is continuing anecdotal evidence that when disabled people go out in public they are subject, from some of the people around them, to harassment which is intended to intimidate. As evidenced by the Equality and Human Rights Commission (EHRC) report on harassment published in 2009, disabled people often have to make a brave decision on a daily basis when they wish to leave home and go out into their own neighbourhoods. This is because where there is visible impairment in a person they are at risk from taunts, teasing, name calling, threats and worse from members of the public. The extensive media coverage of the case of Fiona Pilkington (*The Guardian*, 2009) is one compelling story which brought the problem of harassment into public consciousness. The experience of this one family and the tragic consequences of harassment were largely presented as a failure of criminal justice solutions in the form of Anti Social Behaviour Orders, together with a failure of police procedure. The police were represented as unwilling to hear that a problem existed and incapable of controlling unruly youth. The consequences of harassment were extreme for this family and this goes some way to explaining the national attention it received, but there is a great deal of day to day low level harassment experienced by disabled people. The policy response to public harassment of disabled people has been to label it as hate crime and to enact

legislation in the Criminal Justice Act 2003 that directs that behaviour regarded by the victim as based on prejudice against disability should carry an enhanced sentence, as it does in cases of racist abuse. This solution requires the disabled person to identify the abuse as prejudice against him or herself as an individual and as part of a group known as 'disabled' due to physical or mental impairment. This is directly counter to the understanding of the social model of disability in which social identification of disability is the cause of disablement (Barnes *et al.*, 2010) and can be seen as a major flaw in the legislation and the policy of inclusion from which it comes. In order to understand the meaning of hate crime legislation for disabled people it is necessary first to define the concept of hate crime, second to examine some explanations for the harassment and third to extend some reasons for criticising the policy and legislative responses as inadequate. The contention is that this law does little to counteract the public abuse experienced by disabled people.

Hate crime is any criminal offence which is perceived by the victim or any other person, as being motivated by prejudice or hate. A hate crime may be motivated by race, homophobia, transphobia, faith, sectarian prejudice, or prejudice towards the disabled. A sentence for a hate crime will be more severe than one for a similar crime when it is carried out with prejudice. Harassment takes many forms including violence, threats, abuse, and damage to property. It can involve verbal abuse and name calling, offensive graffiti or post. It may cause physical injury, mental stress, anxiety, or insecurity. But it depends on the identification of the victim as belonging to a particular group. The question posed by Grattet and Jenness (2001) as to whether all victims of crime should be treated the same or whether people who face unique barriers when accessing the criminal justice system should be treated differently is an important one. Policies that ignore differences between types of victims run the risk of being insensitive to the disadvantages faced by those who find themselves confronting a criminal justice system with ideologies and structures that were enacted without them in mind, but treating crime victims as members of a minority does little to challenge the biases and stereotypes with which criminal justice officials often operate. The difference in question should be the disability caused by an ableist culture and not individual or group impairment.

Definition of Hate Crime

Hate crime legislation has its origin in the US where the term was first coined by journalists in an effort to protect minorities from being targets of violent behaviour (Green *et al.*, 2003). In the UK the Criminal Justice Act 2003 which came into effect in April 2005 followed the US lead and empowered courts to impose tougher sentences for offences of harassment motivated or aggravated by prejudice or hate. Harassment is defined as physical or emotional violence, and the crime of hate is the verbal expression of prejudice that accompanies the violence and which carries enhanced sanctions. The actual crime is a crime of violence against the person whether emotional or physical and the added factor of hate is meant as a deterrent to prejudiced behaviour in a bid to protect minorities (Goodall, 2007). For the act of hate to be treated as based on prejudiced beliefs, whether racist or disablist, the victim must perceive it as such and report the behaviour as being based on prejudice.

Initial legislation to protect disabled people from harassment came in the form of the DDA 1995 which made it unlawful to discriminate against workers in employment, education, transport and the provision of goods and services. It included unlawful harassment and victimisation in its definitions of discrimination. In legal terms, a person is unlawfully harassed for a reason related to their disability if they are subject to unwanted conduct that has the purpose or effect of violating their dignity or of

creating an intimidating hostile degrading humiliating or offensive environment. The conduct will only be regarded as harassment when all the circumstances are taken into account, including in particular the perceptions of the person being harassed' (DDA, 1995).

There followed the Criminal Justice Act 2003 which established that hate crime should be extended to disability. In what might be seen as an extension of this law the Labour government (Home Office, 2010) stated its intention to deal with the problem of harassment and hate through criminal justice measures by increasing reporting by victims and witnesses, bringing more offenders to justice and improving local responses to hate crime. However, while the aim was to protect and include, by this intent the then government could be said to have produced a category of people whom society is invited to view as being 'different'. The Equalities Act 2010 set out to simplify the laws against discrimination and to enable people to make claims against discrimination, but similarly produced a list of categories. The result is as much to identify groups in society who are at risk of discrimination as to provide protection in law. The law underlines a perception that there is a perceived category of vulnerable people in society who cannot expect to go about their business unmolested and who should if challenged in any way by members of the public view this not as a simple aggressive act but one that is based on feelings of hatred towards this category of person and that the solution for any individual who has been attacked is to involve the criminal justice system.

There are problems with this scenario, not least the categorisation of disabled people as different and vulnerable. First this approach places the burden of responsibility on the individual who has to report the incident, second, it emphasises a notional difference between disabled people and the general public. In approaching the problem of discrimination as a problem of hate based on prejudice, hate crime legislation may be accused of simply reflecting cultural attitudes rather than challenging them. In order to deter and protect, the law seeks to single out and identify the individual as a member of a group, rather than as a member of society. This is not to deny that harassment of disabled people is a problem.

Mencap's 1999 report 'Living in Fear' found that nine out of 10 people with a learning disability are bullied each year, and indicating an understanding that violence against disabled people was a significant problem the Disability Rights Commission (DRC) stated in its report for 2004-05 that it had worked to extend the Disability Duty in relation to harassment and the promotion of positive attitudes towards disabled people, while in 2004 the DRC in Scotland found that one in five Scots had experienced harassment because of their disability. Hunter *et al* (2007) suggest that if local and national agencies were more diligent in identifying victims of violence as disabled the full extent of the problem would become apparent. Certainly there have been several attempts to research, quantify and expose the extent of harassment against disabled people in recent years (cf. Berzins *et al.*, 2003; Wood and Edwards, 2005) and the British Crime Survey 2009/10 concluded that people with a disability are at a significantly greater risk of being a victim of violence compared to able bodied people. The EHRC (2009) also found that disabled people are at higher risk and experience greater levels of targeted violence in comparison to non-disabled people and that within the disabled population, people with learning disabilities and/or mental health conditions experience higher levels of targeted violence.

However, no national data on hate crime was collated before 2009. In 2009 a total of 52,028 crimes were recorded in which the offence was motivated by prejudice and of these 2,083 were targeted because of disability. In the year 2008-09 only 576 defendants were prosecuted for disability hate crime (Crown Prosecution Service, 2009). These statistics may reflect a lack of reporting and recording rather than a lack

of experience. Disabled people have been reported as discounting their experiences as crimes, for example, Sharp (1999) describes how punching and kicking in a public place, name calling and threats to kill were seen as bullying rather than as crimes. When asked to describe their experiences disabled people cite many examples of taunts about taking state handouts, the need to avoid certain public places for fear of violent attacks and name calling (Shamash and Hodgkins, 2007). Action for Blind People (2008) has evidence that symbol canes which are not aids but are used to indicate visual impairment are in fact often treated as an invitation to abuse, while a *Community Care* survey of almost 2,000 people in 2007 found that 16% said they had been bullied on the street in the previous year (Gillen, 2007). These stories reflect the abuse and misuse experienced by disabled people in institutional settings in past times, while the visibility of some disabled people does indeed make them special targets. But such attacks may be explained as an invited response by a society which constructs people with impairments as disabled and therefore abnormal, to collude with this view, and by asking disabled people to name the assault as one that is based on prejudice the criminal justice system ignores the unequal social and economic position, lack of individual control and choice that are what really put disabled people at risk in society (Rioux *et al.*, 1997).

This construction also causes difficulties for voluntary organisations whose aim is to support inclusivity. They must at one and the same time acknowledge difference and deplore discriminatory behaviour. On its web site Scope engages with the notion of difference as abnormal when it defines disablism as discriminatory, oppressive or abusive behaviour arising from the belief that disabled people are inferior. Although Scope concedes that the term hate crime can itself create barriers to understanding, so making a reference to the problem of singling out and categorising individuals as members of a group Scope also feels the need to support the policy of protecting individuals by identifying them as objects of hatred when it says that vulnerability can be the cause of hostility and that people need to recognise hate crime in order to tackle it (Quarmby, 2008). The Mencap advice on hate crime similarly accepts the premise that because someone is 'different' they are at risk from bullying when they are out in public, making it necessary to think about personal safety when going out and about (Mencap, 2007).

Rights and inclusion

Legislation against a particular behaviour should follow evidence that there is a real and pressing problem in existence (Green *et al.*, 2003). In the case of hate crime, it is necessary to carefully consider what the actual problem is. One explanation for public abuse of disabled people revolves around the negative images of disability with which we are surrounded and which inform our culture. Negative images of disabled people have been extensively discussed by writers from the disabled people's movement (DPM) as inviting discrimination and oppression. Hughes (2009) writes of the unwelcome stare as a form of violence, while Tom Shakespeare (1994) in his analysis of representations of disabled people presented a huge litany of the negative cultural meanings of disability for society. These include ideologies of normality which engender negative ideas about abnormality, disability as a cipher for characteristics we fear, pity as the expression of superiority, the sense that disabled people who go about their daily lives are invading the world of normal people, and objectification where disabled people are exposed to the stares of others. This objectification is something that some disability activists confront (Barnes *et al.*, 2010), but the challenge they mount is not based on involving the criminal justice system. Instead of challenging the problem as a

cultural issue, the criminal justice system depends on the category of hate crime, thereby underlining the problem as caused by the individual who goes out in public.

In recent times the words 'care in the community' have been used by the general public in a pejorative sense to mean someone who is not wholly in command of themselves, someone who in fact needs care. This is mild abuse in terms of some of the experiences of those who are sometimes termed vulnerable. Those who were once contained and kept out of the public eye in institutions, for whatever reason, regularly experience challenges to their privacy as they go about their business in public. While these experiences have come to be termed harassment and hate crimes as part of an equality agenda which attempts to define and protect difference they are also a significant part of a disabling society. Morris (2001) writes that disabled people are often treated as not 'belonging' to the communities in which they live. Hate crimes are 'messages' which remind victims and offenders themselves of the victim's place in the community (Iganski, 2008) and rights based legislation depends on the identification of difference and redefines the politics of difference as the politics of minorities, casting aside any belief that laws and rights should be content- neutral (Dixon and Ray, 2007) and thereby discounting notions of belonging.

The report on disability equality (Home Office, 2010) defined hate crime as a form of discrimination that infringes human rights and keeps people from enjoying the full benefits of society, in other words that hate crime is an activity which interferes with social inclusion, but the report published by the EHRC (2009) underlines the difficulty in achieving these aims when it says that the emphasis on help and protection underpinning much of existing policy and legislation should be replaced by a focus on justice and redress; a much more emphatic defence of the principle and one based on an understanding of how difficult it is proving to achieve. There is no question that disadvantaged and marginalised people are vulnerable and should be enabled to become full participants in society. In 'Valuing People' (2001) the then Labour government set out a blue print for full citizenship for people with learning difficulties focusing on civil rights, independence, choice and inclusion. However, rights do not necessarily deliver justice. In setting out the need to enforce independence and inclusion social policy relates these to ideologies of care, vulnerability and risk, thereby constructing disabled people as 'incompetent' (Priestley, 2000). The result is a law that was made about disabled people and not for them.

Contamination and contempt

The social model of disability aims to give an explanation of disability as socially structured, removing individual blame for whatever happens to someone as a result of their impairment and the term disability is explained as a tool of oppression used against people with impairments. Then also denial of impairment that comes with focusing on disability as a social rather than a personal problem could lead to denial of personal difficulties in managing impairment and also in asking for help to manage. People who are in physical or emotional distress are caught in the double bind of being dependent and of longing for independence and control over their own lives. This applies to people placed in every 'category' of disability from physical through to intellectual impairment. Services for disabled people are seen to be paternal in their objectives, asking disabled people to identify themselves as belonging to a minority group that is subject to special and unequal treatment, rather than as citizens (Hughes, 2009). The problem could be described as being about how to achieve social inclusion without drawing attention to one self. Crow (1996) hoped that by accepting the fact of impairment in order to challenge the stereotype of impairment as personal tragedy, personal inadequacy or functional limitation, stereotypes of disability could be replaced

by acceptance. However, social perceptions of impairment continue to be influenced by cultural representations which depict disability as pitiable.

The way that disability is depicted in our culture often invites negative responses. Synnott (1993) contends that physical deformity symbolises inner ugliness or evil when depicted in literature, claiming that the evil are ugly and the ugly are evil, while discrimination against the less attractive is virtually institutionalised in our society and literature engages with disability in terms of deformity and ugliness. Mona *et al.* (2005) have similarly argued that society as a whole is complicit in perpetuating hatred towards a category of people named as disabled.

In the ever popular novel 'Flowers for Algernon' Daniel Keyes presents the unintelligent Charlie's life as one of persistent abuse from his mother and perpetual teasing and taunting from his work mates. When he returns to his former self after a spell of enhanced intelligence Keyes indicates that the role of work place clown is one that Charlie has learned to appreciate. This is how he comes to terms with the loss of his intellectual prowess. Areheart (2008) examines the phenomenon of the telethon in the US pointing out the way that such fund raising efforts allow viewers to convince themselves they do not discriminate against disabled people because their donations are proof of their good will. They are enabled to feel pity while dispensing charity, an age old conjunction of emotions. Children in Need, the BBC telethon fundraiser in the UK adds the dimension of fun to the emotion of pity, creating an uncomfortably cosy and happy aura around the problem of need, believing possibly that this is the only way to engage support for its causes. Areheart (2008: 145) points out that 'it is difficult to feel pity for people with disabilities and also view them as having the same entitlement to rights as people without disabilities'. Cheu (2004) in analysing the film the Black Stork says that the public fear of 'defectives' is shown by the story which tells how a baby is born 'defective', dies quickly and floats into heaven meaning that death is preferable to disability unless a cure is possible. In literature, television and film disability is depicted as a problem for the individual who has impairment. These depictions both reflect and inform the views prevalent in society. Moreover, the British media attempts to disparage and shame disabled claimants as being part of an alleged 'scroungerphobia' problem. In 2006, for instance, the BBC in a series entitled *On the Fiddle* was primarily concerned with people who were supposedly claiming Incapacity Benefit fraudulently (Piggott and Grover, 2009). Government policy in relation to social welfare is complicit in the depiction of disabled people as dependent when it claims that disabled people are guilty of benefit fraud, or that they no longer need benefits such as the Disabled Living Allowance and instead need to be incentivised to work.

These images contribute to a marking of difference which labels that difference as a deficiency in a social and political process which Perry (2003) says has the effect of creating hierarchies along divisions such as race, sexuality, class, so that when a group has been defined as deficient it is necessarily assigned a subordinate place in society. Mona *et al.* (2005) argued that much of the violence against persons with disabilities is hate-motivated rather than random in the sense that the abuse and violence directed at members of this group can be taken as evidence that much of this violence is based on group membership rather than individual attributes, but hate crime policy requires the individual to respond. Furthermore, Craig (2002) writes that where a person is perceived as a victim that victim comes to symbolise a despised social group. In depicting disabled people as victims of their own bodies our social culture automatically invites social condemnation. Sayce (2000) comments that when deinstitutionalisation began it was heralded as a way of offering the chance to be in the 'community', but that fundraising efforts such as Children in Need present disabled children as the 'poster child for pity' while our culture represents the disabled as blameworthy.

There is the paradox described by Schweik (2009) that there is also a public fascination with viewing impairments. In her book on begging Schweik tells the story of the US ugly laws enacted at the beginning of the 20th century which demanded that any deformed person, showing this deformity in public (named as self display) was considered to be at least as much of a problem as a beggar begging because they created something like side shows. At the same time, as Crow (1996) says, an understanding of impairment as personal tragedy can create fear of impairments which are seen to produce personal inadequacy or functional limitations. The paradox that people both fear the unknown and have a need to confront it produces conflicting emotions in those who are unsure they understand what they are seeing when faced with difference. The emotions which are produced as a result of this conflict can border on morally justified feelings of disapproval expressed as contempt, anger and disgust involving fear of contamination alongside unwelcome reminders that we are all mortal (Rozin *et al.*, 1999). Cultural representations drive the perceptions which drive the hate which drives the legislation. Human emotions are easily represented through disability, which becomes a vehicle for human expression both in media and in human action. The invitation to pity also invites the opposite emotion of disgust.

Criminal Justice

Research indicates that the experience of the criminal justice system is not a good one for disabled people whose expectation of fair treatment being met often depends on meeting someone in the criminal justice system with prior experience of disability (Cant and Standen, 2007; Leggett *et al.*, 2007; Talbot and Riley, 2007). There are major problems connected with the use of hate crime laws to protect disabled people. Crow (1996) contends that although mainstream interventions are presented as being for the benefit of disabled people, they are in fact made for a non-disabled society. This point is reinforced by Campbell (2010) who reminds us that the concept of social inclusion needs a permanent category of the excluded. Those defined as disabled are outside political existence and only part of society in as much as they belong to a category of the excluded. Social policy only relates to disabled people if they accept they are disabled through their own inadequacy and this admission invites scapegoating both in order to facilitate exclusion and as part of inclusion. Disability hate crime laws may recognise the existence of a problem, but they do not address the problem.

In 2008 the government joint committee on human rights reported in 'A life like any other?' that while there was evidence that the vulnerability of people with learning disability put them at risk of being victims of hate crime the power to increase the sentence is rarely used. Leaving aside the problem that it is not the disability but the impairment that invites the prejudice (the disability being the crime committed against the person where it is disabling) the emphasis on perception creates its own difficulties. In 2008 a Crown Prosecution Service report (Lee and Charles) indicated that a case file should contain a full assessment of the cognitive abilities of the victim prepared by a professional and relevant to the ability of the victim to take part in the criminal justice process indicating both the need to be in possession of strong evidence and a reluctance to accept the word of a disabled person.

Nixon *et al.* (2007) found that disabled people are vulnerable to being constructed as both victims and perpetrators of anti social behaviour. The mental health charity Mind (2007) maintains that the British Crime Survey should record crimes against people with mental health problems in order to establish that victimisation is unacceptable. As they say, disability hate crime sentencing was introduced to enable courts to increase sentences for any offence aggravated by hostility towards a person's

mental health. But police officers do not have a consistent record of recognising mental health issues to the extent that the Bradley Report 2009 recommends that mental health awareness and learning disabilities should be a key component in the police training programme. The low incidence of recorded hate crime could be a result of both low reporting by victims or low recording by the police. Shamash and Hodgkins (2007) recommend improving awareness of disability hate crime, facilitating effective reporting and responding, and improving knowledge, policy and procedures within services and thus the ability to tackle the issue and increase disability hate crime recording and intelligence. But the problem that disabled people are not necessarily believed, the fact that the law aims to deter rather than prosecute, the fact that the police are part of a society that often takes a negative view of disabled people, and that perceptions of harm are personal, all make hate crime a problematic area. Disabled people cannot be certain of the reception they will get when reporting abuse.

Conclusion

While hate crime legislation has in recent times specifically included disability hate crime, and this has often been hailed as a positive development, there is no certainty that it will facilitate the safe inclusion of disabled people into public society. Undoubtedly there is a serious, identifiable and unacceptable problem of public harassment of disabled people, but while prosecutions may be successful in the future in dealing with some cases of public harassment, there remain two key problems which are that the criminal justice system cannot by itself provide an effective response to the problem, and that to ask disabled people to define themselves individually as objects of hatred in the eyes of the law demands a great deal in a culture which is often unthinkingly disabling.

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