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Racially and Religiously Aggravated Offences: “God’s gift to defence”?

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Introduction

Hate crime is a priority area for the Government, policymakers and criminal justice agencies, including the Crown Prosecution Service (CPS).¹ It is also a topic that has attracted significant academic attention and has been subject to a Law Commission project that was completed in 2014,² with the Commission recently announcing a further review of hate crime legislation.³ To date, much of the discussion on hate crime laws has been informed by, and focused on, the victim and prosecution perspective. This perspective can, for example, provide grounds for extending the racially and religiously aggravated offences in the Crime and Disorder Act 1998 (CDA) to cover further characteristics, namely disability, sexual orientation and transgender identity.⁴ At present, hostility on the basis of these latter three characteristics can only be taken into account at sentencing for a criminal offence.⁵ Conversely, relatively little consideration has been given to

* The authors would like to thank Kay Goodall for her research assistance on this project. We would also like to thank Chara Bakalis, Peter Ramsay, Jonathan Bushell (Senior Policy Analyst, Crown Prosecution Service [nothing should be taken to represent the views of the CPS]), the reviewer and the Editor for their helpful feedback on earlier versions of this article. This research was funded by the EU Directorate-General Justice and Consumers Department.

¹ See, for example, HM Government, *Action Against Hate: The UK Government’s plan for tackling hate crime – ‘two years on’* (Home Office, 2018). See also the Crown Prosecution Service (CPS) public policy statements on hate crime and hate crime prosecution policies, available at <https://www.cps.gov.uk/hate-crime> [last accessed 14 January 2019].

² Law Commission, *Hate Crime: Should the Current Offences be Extended?* (2014), Law Com. No.348.

³ In October 2018, it was announced that the Law Commission will undertake a further review of hate crime to explore how to make current legislation more effective and consider if there should be additional protected characteristics.

⁴ See, for example, Law Commission, *Hate Crime* (2014), ch 4; M.A. Walters, S. Wiedlitzka and A. Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017), Part C.

⁵ Criminal Justice Act 2003 (CJA), s.146.

the defence perspective; to the question of whether current law and procedure sufficiently safeguard the rights and interests of defendants, as well as the question of whether, or how, policy development and legal reform would affect the position of the defence. It is important to consider the defence perspective because if hate crime laws and policies are to withstand critical scrutiny, they must not only work to ensure that victims are protected under the law, but that defendants' procedural rights are respected, including the right to information and the presumption of innocence. This article presents findings from a two-year EU-funded empirical study of the operation of hate crime legislation which sheds light on the extent to which current law and procedure is fair to defendants and, in so doing, helps to answer the question of how defendants would be affected by law reform, particularly extension of the CDA to cover disability, sexual orientation and transgender identity.⁶

The aim of our study was to assess the application of criminal laws (namely racially and religiously aggravated offences)⁷ and sentencing provisions for hate crime in England and Wales,⁸ and to detail the operational realities of hate crime legislation by gathering experiential accounts of the legislation "in action" from legal professionals. We undertook a thematic analysis of: public policies and publicly available statistics on hate crime; over 100 reported cases;⁹ and 71 in-depth, qualitative semi-structured interviews. We interviewed 21 Hate Crime Leads and Hate Crime Coordinators at the CPS;¹⁰ 17 independent barristers;¹¹ nine Crown Court judges;¹² 11 District Judges (Magistrates' Courts);¹³ six police officers (and linked personnel); six practitioners working

⁶ The full report can be found at, Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (2017). The study was funded by the EU Directorate-General Justice and Consumers department and forms part of a wider European comparative study into the use of hate crime laws across five EU member states (England and Wales; Ireland; Sweden; Latvia; and the Czech Republic). See, J. Schweppe, A. Haynes, and M.A. Walters, *The Lifecycle of a Hate Crime: Comparative Report* (Dublin: ICCL, 2018).

⁷ Crime and Disorder Act 1998 (CDA), ss.28-32. Note that our study did not cover hate speech offences (e.g. stirring up of hatred, as per Part 3 and 3A of the Public Order Act 1986). We distinguish between hate crimes and hate speech offences, as the latter concerns additional issues pertaining to free speech and the use of online platforms. These issues require a separate detailed analysis which fell beyond the scope of the original project.

⁸ CJA 2003, ss.145 and 146.

⁹ We are grateful to Chara Bakalis for giving us access to a list of cases on hate crime previously collated up to March 2014.

¹⁰ Interviewees are cited as CPS #.

¹¹ Cited as IB #.

¹² Cited as CCJ #.

¹³ Cited as DJ #.

for a charitable organisation or civil society organisation that supports victims of hate crime; and one hate crime victim who had been through the court process.¹⁴

This article is one of a series of articles that presents our key findings in respect of the legal process for hate crime, from policing through to trial and sentencing.¹⁵ In the first part of the article, we analyse procedural issues that can arise during prosecution of racially and religiously aggravated offences under the CDA from the point of view of the defendant, while also highlighting relevant issues that can affect the interests of victims and their wider communities. We focus on whether, and how, current charging practices can cause injustice to both defendants and victims. Procedural issues stemming from charging practices have been a cause of confusion and concern since the racially aggravated offences were first introduced.¹⁶ By providing new empirical insights into these issues, we show that, notwithstanding developments in policy and practice over the years, there is a risk of “over-” and “under-conviction”, “double conviction”, and “over-charging”. Each of these will be explained below, along with tangible recommendations to tighten up procedure in order to ensure fair outcomes where defendants are charged with racially and religiously aggravated offences.

Despite current procedures sometimes creating a risk of inaccurate or unfair outcomes, interviewees suggested that it is better for defendants to be charged and prosecuted for an aggravated offence under the CDA than it is to have a judge determine whether an offence was a hate crime for the purpose of sentencing. We explore the basis for this proposition in the second part of the article. We note several principled reasons why it could be in the best interests of defendants to extend aggravated criminal offences to cover the characteristics that are currently only set out in sentencing provisions for hate crime. These reasons enhance the fairness and strengthen the legitimacy of hate crime legislation. Thus, if defendants’ rights and interests can be adequately protected during prosecution for aggravated offences, and to a greater degree than through the application of sentencing provisions for hate crime, there may be additional reason to not only extend the offences to cover disability, sexual orientation and transgender identity, but also to replace the relevant sentencing provisions with legislation that allows for any offence to

¹⁴ For full details of our methodology, see Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017), paras 2-2.5.

¹⁵ In a previous article, we emphasised the need for better and more effective enforcement of hate crime laws to address the “justice gap” that exists in hate crime cases, and set out our main proposals for law reform, including the introduction of a new Hate Crime Act. See M.A. Walters, A. Owusu-Bempah and S. Wiedlitzka, ‘Hate Crime and the “Justice Gap”: The Case for Law Reform’ [2018] 12 *Crim. L.R.* 958.

¹⁶ See, for example, E. Burney and G. Rose, *Racist Offences: How is the Law Working?* (Home Office Research Study 244, 2002); A. Owusu-Bempah, “Prosecuting Hate Crime: Procedural Issues and the Future of the Aggravated Offences” (2015) 35(3) *L.S.* 443.

be prosecuted as an aggravated offence. However, as we explore within the second part of the article, the current legal framework in respect of aggravated offences can be manipulated to secure unmerited acquittals, leading one of our interviewees to declare that the requirement to prove “hostility” was “God’s gift to defence”. We explain the need for a refined “hostility test” to prevent such manipulation before concluding that properly operating substantive offences could ensure the effective application of hate crime legislation, while avoiding the imposition of improper and unjustified convictions and sentences.

Hate crime laws

Before turning to the substance of the article, it is necessary to outline briefly the anatomy of racially and religiously aggravated offences. Throughout the article, we refer to these as RRAOs to distinguish them from other offences where hostility based on a personal characteristic is treated as an aggravating factor at sentencing. There are 11 basic offences that can be prosecuted as racially or religiously aggravated, as set out in ss.29-32 of the CDA. They cover various forms of assault,¹⁷ public order offences,¹⁸ criminal damage,¹⁹ and harassment and stalking offences.²⁰ The RRAOs carry higher maximum sentences than their basic offence counterparts.

In accordance with s.28(1) of the CDA, the basic offence becomes aggravated 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 a 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.

Alongside the RRAOs, there are sentencing provisions for hate crime which mirror the requirements of s.28 of the CDA. Sections 145 and 146 of the Criminal Justice Act 2003 (CJA) require judges to treat hostility on the basis of race or religion (s.145), or disability, sexual orientation or transgender identity (s.146) as an aggravating factor at sentencing for *any* criminal

¹⁷ CDA 1998, s.29.

¹⁸ CDA 1998, s.31.

¹⁹ CDA 1998, s.30.

²⁰ CDA 1998, s.32.

offence.²¹ In these latter types of cases, where identity-based hostility is disputed, the issue should ordinarily be determined at a *Newton* hearing,²² or, “at the very least, plain and adequate notice must be given by the sentencer that he is considering sentencing on an enhanced or aggravated basis”.²³ At a *Newton* hearing, the prosecution and defence can call evidence and the prosecution must satisfy the judge of the hostility element before a sentence is increased.²⁴ The main focus of this article is the operation of the RRAOs. However, we will return to the sentencing provisions when considering whether the CDA better safeguards the rights and interests of defendants than the CJA, such that extension of the CDA could be in the best interests of defendants.

Charging decisions

When a defendant is accused of multiple crimes, they can be charged with multiple offences. Where the offences are tried together, in summary trials, each charge is laid separately and, in trials on indictment, each offence forms a separate count on the indictment, with separate verdicts returned on each count.²⁵ However, there are many instances throughout the criminal law where one offence includes another separate offence²⁶ and, while the guilty offender has satisfied the requirements of two (or more) offences, as explained below, it would be unjust to convict them of both offences. This is true of the RRAOs.²⁷ For example, if an offender racially abuses a victim while wounding them, the defendant’s conduct can amount to both racially aggravated malicious wounding and basic malicious wounding. The CPS has the option of pursuing the aggravated offence alone or charging the aggravated and basic offence in the alternative. Where the offences are presented in the alternative, the defendant can be convicted of one or the other offence (or neither), but not both. If the aggravated offence is proven beyond reasonable doubt, the defendant should be convicted of the aggravated offence. If there is insufficient evidence of racial or religious

²¹ Note that s.145 ‘applies where a court is considering the seriousness of an offence *other than* one under sections 29 to 32 of the Crime and Disorder Act 1998’ (emphasis added). There is ongoing confusion as to whether s.145 can be applied to an offence which could have been, but was not, charged as an aggravated offence. See *O’Leary* [2015] EWCA Crim 1306.

²² *Newton* (1983) 77 Cr. App. R. 13.

²³ *O’Callaghan* [2005] EWCA Crim 317 at [18].

²⁴ *Underwood* [2004] EWCA Crim 2256 at [9].

²⁵ Or, if the allegations relate to a course of conduct, they can be dealt with as multiple incident counts or specimen counts.

²⁶ For example, if an offender is guilty of wounding with intent contrary to s.18 of the Offences Against the Person Act 1861, they must also have committed the lesser offence of wounding contrary to s.20.

²⁷ In line with the scope of our research project, the discussion in this section focusses on charging practices and their implications in hate crime cases. Interviewees were not asked about charging practices for other kinds of crime. However, the issues (and solutions) that we identified will likely be of relevance in respect of other kinds of offending where the offence charged includes a separate and less serious offence.

hostility, but the basic offence is proven, the defendant should be convicted of the basic offence. If there is insufficient evidence to prove the basic offence, the defendant should be acquitted.

Charging decisions can have significant implications for the outcome of hate crime cases. For example, our research indicated that if the CPS charge the defendant with the aggravated version of an offence only, there is the *potential* during the legal process for the defendant to be either “over-convicted” or “under-convicted”. Over-conviction can occur where, despite the aggravated element of the offence not being proven beyond reasonable doubt, the defendant is convicted so that they do not escape liability for the basic offence. Conversely, under-conviction may occur where the aggravated element of the offence has not been proven beyond reasonable doubt and, as a result, the defendant is acquitted, despite there being sufficient evidence to prove the basic offence. One way to limit the potential for either of these outcomes is to present both offences in the alternative. In fact, in summary trials, to avoid losing liability for the basic offence in case the aggravated element cannot be proven, it is necessary to lay charges for both the basic and aggravated offence in the alternative. This is because magistrates do not have the power to return alternative verdicts in hate crime cases, meaning that they cannot convict the defendant of a lesser crime than the one on the charge sheet. In trials on indictment, on the other hand, due to a complex body of legislation,²⁸ if the prosecution does not include counts covering both the aggravated and basic offence on the indictment, the judge may (and should)²⁹ allow the jury to return an alternative verdict regarding the basic offence. This means that, at the end of the trial, the jury can be directed that they may find the defendant guilty of the basic offence if the aggravated element is not proven.

In a Home Office study published in 2002, Burney and Rose found a great variety of opinion and practice as to when, whether and why it is desirable to charge defendants with both the aggravated and basic versions of an offence,³⁰ indicating confusion and inconsistency in the prosecution of hate crimes. Our study indicated that, in general, there is less concern about procedural problems related to charging decisions than in the early days of the RRAOs. For example, one Crown Court judge told us that, “[t]here’s no procedural issues at all” (CCJ 05).

²⁸ See Criminal Law Act 1967, ss.6(3) and 6(3A); Criminal Justice Act 1988, s.40; Crime and Disorder Act 1998, ss.31(6), 32(5) and 32(6).

²⁹ See *Coutts* [2006] UKHL 39 at [23]. See also *Foster* [2007] EWCA Crim 2869; *Barre* [2016] EWCA Crim 216; *Archbold: Criminal Pleading, Evidence and Practice* (London: Sweet & Maxwell, 2019), paras 4-532-4-533; D. Ormerod and D. Perry (eds), *Blackstone’s Criminal Practice* (Oxford: Oxford University Press, 2019), D19.41-D19.66.

³⁰ Burney and Rose, *Racist Offences: How is the Law Working?* (2002), 17.

Nonetheless, responses to specific questions about charging practices revealed inconsistency, uncertainty and dissatisfaction as to certain procedures and policies for charging and prosecuting aggravated offences, such that there is a risk of injustice to both defendants and victims of hate crime.³¹ Below, we explore current practice in respect of alternative charges and verdicts in hate crime cases, and how it might be improved, before addressing relatively new concerns about “over-charging”.

Towards a fairer and more consistent practice

The majority of lawyers and Crown Court judges that we interviewed indicated that, in trials on indictment, it is “good practice” (CPS 09) to put the basic offence to the jury as an alternative. They expressed a strong preference for separate counts on the indictment, rather than leaving an alternative verdict to the jury at the end of the trial. Separate counts were thought to be more transparent, making it easier for the jury to understand the issues in the case. Yet, several interviewees had experience of cases where the basic offence was not on the indictment or left to the jury, and a minority did not see the value in leaving an alternative in any form. For two CPS lawyers, the desirability of an alternative depends on the nature of the offence. If, for example, the defendant is accused of a racially aggravated public order offence, where the demonstration of racial hostility constitutes both the basic and aggravated offending behaviour, it can be seen as detrimental to put forward both offences “because it’s almost that you’re suggesting that you’ve got some doubts about your own case” (CPS 01). A further two CPS lawyers said that they would avoid presenting the alternative for all offences where the real gravamen of the complaint was the racial or religious hostility.³² Two others would prefer to “nail [their] colours to the mast” (CPS 03), regardless of the nature of the offence or the offending behaviour.

The experiences of interviewees indicate that there remains inconsistency in the presentation of hate crime cases in the Crown Court, and where the basic offence is neither the subject of an alternative count on the indictment nor left to the jury as an alternative verdict, the possibility of both over- and under-conviction may well increase. A more consistent practice is, therefore, necessary in furtherance of the public interest in the administration of justice. To achieve this, in hate crime cases, the prosecution should ordinarily include the basic offence on the indictment

³¹ See further, Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017), paras 7.1-7.5.

³² This perspective can also be observed in *Mihocic* [2012] EWCA Crim 195.

from the start of the trial, with one exception.³³ The exception is cases where, without the hostility element, there is no basic offence. As mentioned above, the racially or religiously aggravated element of a public order offence can also amount to the basic offence. For instance, racially abusive words used towards a person with the intention of causing fear of violence³⁴ will constitute both the basic offence and the aggravation, rendering the alternative count redundant. Including the basic offence on the indictment is consistent with CPS guidance on drafting indictments,³⁵ but should be stated more plainly in prosecution guidance on racially and religiously aggravated crimes. The latter guidance currently states that, where there is no statutory provision for an alternative verdict in respect of the offence charged, “consideration has to be given to including alternative counts on the indictment”.³⁶ There are statutory provisions for alternative verdicts for RRAOs.³⁷ Thus, the guidance may be taken as suggesting that it is not necessary to consider alternative counts on indictments in respect of RRAOs.

There have been some concerns that jurors might be confused by the inclusion of alternative counts, which may have the effect of “overloading” the indictment,³⁸ and that this could also result in unfair and inaccurate outcomes. However, despite the provisions of the CDA being described as “really quite difficult” for juries (CCJ 06), most interviewees were of the view that alternatives do not present any significant problems and juries can cope with multiple charges in hate crime cases, just as they do in other kinds of cases. Nonetheless, it was suggested that juries could benefit from written directions and route to verdict documents, as well as early directions on the requirements of the offences, as a means of clarifying the issues in the case and aiding jurors’ understanding of the offences. It is hoped that this has (or will) become standard practice in hate

³³ As recommended in Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017), para 7.1.

³⁴ Public Order Act 1986, s.4; CDA 1998, s.31.

³⁵ CPS, *Drafting the Indictment*, http://www.cps.gov.uk/legal/d_to_g/drafting_the_indictment/ [accessed 14 January 2019].

³⁶ CPS, *Racist and Religious Hate Crime – Prosecution Guidance*, http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/ [accessed 14 January 2019].

³⁷ See footnote 28.

³⁸ See Owusu-Bempah, ‘Prosecuting Hate Crime: Procedural Issues and the Future of the Aggravated Offences’ (2015), 457. See also, O’Leary [2015] EWCA Crim 1306 at [18].

crime cases,³⁹ with early and written directions to juries now being endorsed by the Criminal Practice Directions⁴⁰ and the Crown Court Compendium.⁴¹

As explained above, in the Magistrates' Court, there is no power to return alternative verdicts in hate crime cases. Consequently, the CPS recommends that, from the outset, both the basic offence and the RRAO should be charged in the alternative.⁴² For the most part, alternative charges have become part of "standard CPS policy" in summary cases (CPS 21). The consistency in approach is to be commended. However, our findings confirm that the practice of alternative charges in summary trials can create practical difficulties (including where prosecutors try to lay an alternative charge after a trial has commenced), and can lead to undesirable outcomes, as explained below.⁴³ For these reasons, magistrates should be accorded the power to return alternative verdicts on RRAOs. If this reform proposal were adopted, in each case, only the RRAO would need to be charged and, if the aggravated element were not proven, the defendant could be acquitted of the aggravated offence and convicted of the basic offence. Thus, while there are practical reasons why alternative counts on the indictment are preferred to alternative verdicts in Crown Court trials, there are practical reasons why alternative verdicts are preferred to alternative charges in summary trials.

In 2002, Burney and Rose found such strong support for a power to return alternative verdicts in the Magistrates' Court that they recommended a change in the law.⁴⁴ Support for this proposition remains very strong among lawyers and judges. Only one District Judge who took a view on the issue was hesitant because the present situation does not present any "great problem" (DJ 10), while one CPS interviewee did not like the idea of the CPS relinquishing control over the presentation of the case. Three independent barristers also opposed the proposition because they did not want magistrates to have the opportunity to convict of the basic offence when they otherwise would have acquitted altogether. However, these barristers seemed to assume that the

³⁹ Research indicates that 90% of judges 'now use written directions some of the time, although there are differing views about how often, when and what form written directions should take.' See, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial College, 2018), 1-7.

⁴⁰ CrimPD VI 26K.

⁴¹ *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial College, 2018), 1-6 and 1-7. On the benefits of written directions, see also, C. Thomas, *Are Juries Fair? MoJ Research Series 01/10* (Ministry of Justice, 2010), 35-40; C. Thomas, 'Avoiding the Perfect Storm of Juror Contempt' [2013] Crim. L.R. 483, 497-499. For a recent judicial observation on the benefits of written directions and route to verdict documents, see *Atta-Dankwa* [2018] EWCA Cri 320 at [27]-[33].

⁴² CPS, *Racist and Religious Hate Crime – Prosecution Guidance*.

⁴³ While our findings are confined to the operation of hate crime legislation, these issues may also arise in respect of other offences which can be charged in the alternative.

⁴⁴ Burney and Rose, *Racist Offences: How is the Law Working?* (2002), pp.80 and 113.

power to return an alternative verdict would be used where the prosecution failed to, or deliberately chose not to, charge a basic offence. In practice, because the prosecution ordinarily charge both offences, giving magistrates the power to return alternative verdicts (instead of considering alternative charges) would represent a change in approach, rather than according them more opportunities to convict.

Charge bargaining

One major concern of charges laid in the alternative is that it may increase the potential for “charge bargaining”; whereby the defendant offers or accepts a plea to the basic offence on the condition that the aggravated charge is dropped. This concern has been most prevalent in respect of the Magistrates’ Court, where both offences must be charged in order to avoid losing liability for the basic offence.⁴⁵ Charge bargaining can give victims and the wider community the impression that hate crime is not taken seriously. At the same time, it can be detrimental to defendants who wish to maintain their innocence but feel pressured to plead guilty to the basic offence in order to avoid the risk of a harsher sentence and the stigma of being convicted of an aggravated offence.⁴⁶ When the racially aggravated offences first came into force, there was evidence to suggest that charge bargaining was prevalent.⁴⁷ In response to criticisms, in 2003, it became CPS policy not to accept a plea to the basic offence alone to expedite the process.⁴⁸ Our findings indicate that this policy has largely been successful, and that while charge bargaining remains a possibility, there has been a shift in attitude since the RRAOs first came into force.

Indeed, the CPS lawyers that we interviewed were adamant that charge bargaining does not happen. Likewise, the majority of judges and independent barristers expressed the view that charge bargaining is very rare. In the experience of one barrister, “The CPS ... will never accept a plea where there is a racially aggravated offence” (IB 08). One CPS interviewee explained that this change was a result of there being less “cultural resistance” to the legislation:

“[L]ooking back historically, there was quite a bit of judicial resistance to the introduction of the new legislation. It was not uncommon for judges to put pressure on prosecutors to accept

⁴⁵ Burney and Rose, *Racist Offences: How is the Law Working?* (2002), 96.

⁴⁶ Owusu-Bempah, ‘Prosecuting Hate Crime: Procedural Issues and the Future of the Aggravated Offences’ (2015), 451-453.

⁴⁷ Burney and Rose, *Racist Offences: How is the Law Working?* (2002), 80-83; G. John, *Race for Justice: A Review of CPS Decision Making for Possible Racial Bias at Each Stage of the Prosecution Process* (Gus John Partnership 2003), para 95.

⁴⁸ CPS, *Racist and Religious Hate Crime – Prosecution Guidance*. However, there may be circumstances where accepting a plea to the basic offence alone is justified. For example, where the complainant refuses to cooperate with the prosecution and proceeding without the complainant’s cooperation will result in a complete acquittal.

a guilty plea to the basic offence; but I think culturally now, the judges in the Crown Court and in the Magistrates' Court and magistrates are fully attuned to the legislation and the cultural change that they have to make when sentencing." (CPS 17)

Nonetheless, a small minority of interviewees had experience of charge bargaining, including four independent barristers, one of whom explained that charge bargaining "does happen occasionally" (IB 05). Moreover, although the problem has become less pressing, resource constraints and the "enormous" pressure to keep cases out of the Crown Court (CPS 20) may yet result in a reversal of current practice. One way to limit this potential could be for the Magistrates' Court to be given the power to return alternative verdicts. This would make alternative charges unnecessary and, while there are many factors which operate to incentivise guilty pleas,⁴⁹ previous research indicated that the alternative charge can make the CPS appear more vulnerable to pressure to accept a charge bargain.⁵⁰ On the other hand, since lawyers and judges are well aware of the underlying basic offence, its absence from the charge sheet may not have much impact on defence (or prosecution) tactics in summary cases. There is, nonetheless, a more pressing reason why alternative verdicts should be available in the Magistrates' Court.

Double convictions

During our study we found that, where alternative charges are brought to trial in the Magistrates' Court, some defendants are convicted of *both* the aggravated and basic offence. The reason for convicting of both offences is so that the conviction for the basic offence will stand if there is a successful appeal against the aggravated element.⁵¹ However, the consequence is that the defendant ends up with two criminal convictions on their record for the same crime, even if they only receive one sentence.⁵² The problem of "double convictions" has previously been addressed by the Divisional Court where it was held that it was unfair and disproportionate for a defendant to be convicted twice for a single wrong.⁵³ In *Henderson v CPS*,⁵⁴ the Divisional Court again held that there should not be findings of guilt on both charges. The Court confirmed that if there is evidence of the aggravated offence, the correct approach is to convict of the aggravated offence and adjourn the basic offence before conviction under s.10 of the Magistrates' Courts Act 1980,

⁴⁹ See generally J. Peay and E. Player, 'Pleading Guilty: Why vulnerability matters' (2018) 81(6) *M.L.R.* 929.

⁵⁰ Burney and Rose, *Racist Offences: How is the Law Working?* (2002), 96.

⁵¹ Under s.108 of the Magistrates' Courts Act 1980, a person convicted by a Magistrates' Court following a not-guilty plea may appeal to the Crown Court against their conviction.

⁵² See R. Wheeler, 'The Danger of the Double Conviction' (2013) 177(12) *Criminal Law and Justice* 191.

⁵³ *R (on the application of Dyer) v Watford Magistrates' Court* [2013] EWHC 547 (Admin).

⁵⁴ [2016] EWHC 464 (Admin).

so that if an appeal against the aggravated offence was successful, the lesser charge could subsequently be dealt with.

Despite these recent judgments, we found evidence that double convictions are still being applied. Two of the 11 District Judges interviewed told us that they would convict of both charges, with one referring to “an obligation ... to convict [of the basic offence] as well ...” (DJ 09), and the other taking the view that the two convictions on the defendant’s criminal record would not cause “a particular problem” (DJ 08). Several other interviewees, while familiar with the correct procedure for dealing with alternative charges, found it to be “clumsy” (CPS 13), overly-complex and administratively inconvenient. It was put to us that adjourning the basic offence, “causes problems for the courts’ recording system and [the CPS] recording system” (CPS 01). One District Judge expressed the need for “a neater way of dealing with the alternative charges”. They told us that:

“[I]f you find them guilty of the racially aggravated offence but then don’t return a decision on the lower charge because you want to preserve the position pending appeal, that lower charge then just hangs around ... So that’s a tedious little bit of red tape, but it does cause some heartache for the ... not for us as tribunals ... but for the administration underneath.”
(DJ 03)

It may be possible to reduce the risk of double convictions through training and further (accessible) clarification on the procedure for dealing with alternative charges in the Magistrates’ Courts.⁵⁵ However, given that we found dissatisfaction with adjourning the basic offence and letting it “hang around”, a more suitable solution would be to implement the recommendation that magistrates be accorded the power to return alternative verdicts on RRAOs. This minor reform could significantly reduce the risk of injustice to defendants in hate crime cases.

Over-charging

During interviews, we were keen to record the experiences and views of practitioners in respect of alternative charges and verdicts, so that we could assess the reality of concerns that have been raised elsewhere and develop recommendations to improve procedure. However, during our discussions with interviewees, a further concern about charging practices came to light, namely the perception that there is a tendency to “over-charge” defendants in hate crime cases. This issue was raised by a third of judges and independent barristers, with some expressing very

⁵⁵ The latest version of the CPS guidance on prosecuting racist and religious hate crime refers to the decision in *Henderson*, and the “sensible course” being to “adjourn the trial of the underlying offence sine die.”

strong concern that the CPS too readily pursues racially and religiously aggravated offences. These interviewees felt that the CPS had adopted an overly zealous “pro-charge” policy, which was attributed to “political pressure” on the CPS (CCJ 09) as well as fear of criticism from Government, the public and complainants who can request that a decision not to prosecute be reviewed.

For many, criticism of CPS charging decisions reflected a view that hate crime legislation is too broad, and that a basic offence involving a “demonstration of hostility”, as opposed to an offence motivated by racial or religious hostility, is not worthy of prosecution as a “hate crime”. One Crown Court judge provided the following opinion:

“If a defendant is prepared to admit an assault why are we going any further about it. There was some abuse between the two of them and he shouted some very rude things. Do we need to go through a trial process, which most likely going to result in an acquittal, to decide whether at the time he called someone a black so-and-so... the lesser form of the ‘demonstrating’ rather than ‘motivated by’ aspect of it...” (CCJ 09)

This line of thinking may illustrate a lack of appreciation of the impact that demonstrations of racism can have on both victims and society, even when they occur in the “heat of the moment”. We offer a defence of the “demonstration of hostility” limb of the CDA below.

Others suggested that cases are proceeding to court where they do not satisfy the evidential stage of the test for prosecution, as set out in the Code for Crown Prosecutors.⁵⁶ One barrister, who had been acting for the prosecution, gave an example of a racially aggravated assault proceeding to trial despite the independent witnesses being “quite clear that they’d heard nothing racial” (IB 14). They told us that:

“I’m not sure that [the CPS] always properly consider whether that extra element is made out and meets the prosecution test in the same way that the basic, the assault or whatever, they would do. I think that if they’ve got an assault that they think is an assault, and the victim says ... ‘And they said this...’, they just charge it without thinking; and that does cause problems down the line.” (IB 14)

⁵⁶ The Code requires “sufficient evidence to provide a realistic prospect of conviction”. See CPS, *The Code for Crown Prosecutors* (2018), para 4.6.

Putting it into stronger terms, another barrister stated that, “if the CPS see a word that can be racially construed, they will just slam on a charge ... Even if there’s no prospect of succeeding” (IB 01).

CPS guidance on racist and religious hate crime makes it clear that prosecution will usually be in the public interest.⁵⁷ However, in accordance with the Code for Crown Prosecutors, cases must pass the “evidential” stage of the test for prosecution as well as the “public interest” stage, “no matter how serious or sensitive it may be”.⁵⁸ It was not possible to substantiate claims that cases are proceeding to trial despite not meeting the requirements of the Code.⁵⁹ However, the fact that a third of judges and independent barristers were critical of charging decisions is notable in itself, and, if nothing else, is revealing of attitudes towards hate crime legislation. Still, it is worth stating that, while there are good reasons for rigorously pursuing allegations of hate crime, the rigid pursuance of cases that do not meet the requirements of the Code is problematic, both for complainant expectations about the case, and for the fair labelling of defendants. Moreover, some barristers noted that, where the evidence of hostility is weak, focusing on the aggravated element can lead juries to acquit altogether, even if there is evidence to support a serious underlying basic offence.

Combined, then, the pursuance of cases that lack cogent forms of evidence may risk both over-conviction and under-conviction. Such outcomes risk undermining the credibility of hate crime legislation and, more generally, confidence in the justice system amongst those who have experienced hate crime.

The best interests of the defendant: CDA v CJA

The analysis of charging practices for hate crime demonstrates the complexity, inconsistency and unsatisfactory outcomes that can result for defendants, victims and their wider communities. The intricacy of current law and procedure was one reason why a minority of interviewees did not want to see extension of the CDA, and why a small minority preferred the use of sentencing legislation rather than aggravated criminal offences.⁶⁰ In a previous publication, following a doctrinal

⁵⁷ See CPS, *Racist and Religious Hate Crime – Prosecution Guidance*.

⁵⁸ CPS, *The Code for Crown Prosecutors* (2018), para 4.6.

⁵⁹ However, it is notable that the issue of “over-charging” has been raised in respect of other sensitive priority areas, such as serious sexual offences. See HM Crown Prosecution Service Inspectorate, *Thematic Review of the CPS Rape and Serious Sexual Offences Units* (2016), paras 4.19-4.21.

⁶⁰ See Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017), para 11.2.

examination of procedural problems that can arise during the prosecution of aggravated offences, Owusu-Bempah argued that it would be logical to repeal the relevant provisions of the CDA and rely on sentencing provisions as the legislative response to hate crime.⁶¹ In all cases involving alleged hostility on the basis of race, religion, disability, sexual orientation or transgender identity, only the basic offence would be charged, and, if convicted, the hostility element could be determined and taken into account at sentencing. The inconsistent, and sometimes incorrect, application of ss.145 and 146 of the CJA could be alleviated through implementation of the Law Commission's recommendation that new guidance be issued by the Sentencing Council.⁶²

However, our subsequent empirical research shows that, despite some significant procedural difficulties, the CDA provisions have become the cornerstone of the legal framework for hate crime, such that the majority of interviewees who provided an opinion on law reform were in favour of extending them to cover further characteristics. The aggravated offences are generally well comprehended by judges, lawyers and police officers, whereas, notwithstanding improvements in recent years, there continues to be a lack of awareness of ss.145 and 146 of the CJA.⁶³ Further guidance, while still necessary, is unlikely to ensure the effective operation or application of the sentencing provisions.⁶⁴ This means that, at present, it would be most beneficial to concentrate on eliminating the risk of unfair and unsatisfactory outcomes during prosecution of RRAOs, including by: consistently putting alternative counts on indictments in the Crown Court and providing jurors with written directions;⁶⁵ allowing magistrates to return alternative verdicts in hate crime cases; ensuring that the required threshold for prosecution is met on the aggravated element of an offence; and addressing resistance to the "demonstration of hostility" test.

While it is possible to rectify the procedural problems which can cause unfairness or injustice during prosecution for RRAOs, we are left with the question of whether defendants would benefit from (or, at least, not be disadvantaged by) the extension of the relevant provisions of the CDA to cover disability, sexual orientation and transgender identity, the three characteristics which are

⁶¹ Owusu-Bempah, 'Prosecuting Hate Crime: Procedural Issues and the Future of the Aggravated Offences' (2015).

⁶² Law Commission, *Hate Crime* (2014), para 3.49-3.51.

⁶³ See Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017), para 9.7.

⁶⁴ However, it is notable that the proportion of flagged hate crime cases with a declared sentence uplift has increased from 11.8% in 2014/15 to 33.8% in 2015/16 to 52.2% in 2016-17 (beyond the period of the study). See CPS, *Hate Crime Annual Report 2014-15*; CPS, *Hate Crime Annual Report 2015-16*; CPS, *Hate Crime Annual Report 2016-17*.

⁶⁵ As is provided for by CrimPD VI 26K and *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial College, 2018), 1-7.

currently only set out in sentencing provisions for hate crime. To answer this question, we must determine whether the rights and interests of those accused of hate crime are better served through prosecution for an aggravated offence under the CDA than by application of the enhanced sentencing provisions in the CJA. An obvious starting point is to consider the consequences of a finding against the defendant.

The consequences of a conviction for a RRAO are more severe than an enhanced sentence under ss.145 or 146 of the CJA. While ss.145 and 146 require the sentence to be increased to take account of identity-based hostility, unlike the CDA, they do not provide for higher maximum sentences than the basic offence. However, in practice, the sentences passed for RRAOs very rarely exceed the maximum available for the basic version of the offence.⁶⁶ What seems to be of more concern to defendants is the fact that RRAOs show on a criminal record as “racially or religiously aggravated”. The perception of interviewees across all cohorts was that defendants are very reluctant to accept liability for RRAOs because they do not want to be labelled a “racist”. Conversely, a conviction to which ss.145 or 146 is applied is recorded as a basic offence. Given the consequences of a conviction for a RRAO, we were surprised to find that some interviewees strongly believed that the CDA better protects the rights of defendants than the CJA, and this can provide a reason to extend the offences to cover all five statutorily recognised hate crime characteristics. The reasons provided in support of this assertion are explored in the following paragraphs.

Transparency

The CDA can safeguard defendants’ right to a fair trial by ensuring transparency as to the issues in the case.⁶⁷ As one interviewee from the CPS explained:

“[T]he defendant’s position would be better protected if hostility were proved as part of the offence, as an ingredient of the – as it is with the Crime and Disorder Act. Because then it’s very clear what the prosecution are saying, what the court has to be sure of; and all of the protections and other things that operate to protect the defendant are in place – and obviously so.” (CPS 03)

⁶⁶ See Home Office, Ministry of Justice and Office for National Statistics, *An Overview of Hate Crime in England and Wales* (2013), Table 3.13.

⁶⁷ See, for example, European Convention on Human Rights, Art 6(3)(a) which provides the accused with a right to information about the nature and cause of the accusation against them, and Art 6(3)(b) which provides the right to adequate time and facilities to prepare a defence.

Where a defendant is charged with a RRAO, it is clear from the outset that racial or religious aggravation will be an issue at the trial. Moreover, the prosecution is under a duty to disclose to the defence any prosecution material that could reasonably be considered capable of undermining the prosecution case or assisting the defence case.⁶⁸ Provided that the police and prosecution comply with their disclosure obligations,⁶⁹ the defence should be able to prepare to challenge the evidence of hostility. For the reasons explained below, the same may not be true if hostility is not an element of the substantive offence, but, instead, is an aggravating factor for a judge to determine at sentencing.

CPS prosecutors pointed to issues with some police officers not being aware of hate crime sentencing provisions,⁷⁰ meaning that the prejudice element of hate crimes can become an afterthought, and evidence may not be available until a later stage in the proceedings. Also, since there remains a lack of awareness of the CJA provisions among some lawyers and judges, particularly defence barristers and Crown Court judges, reference to ss.145 or 146 sometimes “takes them by surprise” (CPS 03). Reduced opportunity to prepare sufficiently and challenge the accusation at the sentencing stage could result in an erroneous finding against the defendant.

Scrutinising the evidence

As well as creating transparency, the CDA enables trial by jury. The basic offences capable of being aggravated consist of both summary-only offences and either-way offences, whereas all but one of the RRAOs are triable-either-way.⁷¹ Although the bulk of RRAOs are dealt with in the Magistrates’ Court,⁷² the perception among interviewees was that defendants prefer to be tried by jury in the Crown Court, where they are more likely to be acquitted.⁷³ Not all interviewees were

⁶⁸ Criminal Procedure and Investigations Act 1996, ss.3 and 7A.

⁶⁹ For an assessment of the shortcomings of the disclosure regime, see House of Commons Justice Committee, *Disclosure of Evidence in Criminal Cases: Eleventh Report of Session 2017–19* (House of Commons, 2018).

⁷⁰ See further, Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017), para 6.2.

⁷¹ The exception is the aggravated s.5 public order offence (harassment, alarm or distress), under s.31(1)(c) of the CDA.

⁷² Data from 2002 to 2012 shows that approximately 90% of all racially and religiously aggravated offences are tried in the Magistrates’ Court. See Home Office, Ministry of Justice and Office for National Statistics, *An Overview of Hate Crime in England and Wales* (2013), Appendix Tables 3.04 and 3.08, <https://www.gov.uk/government/statistics/an-overview-of-hate-crime-in-england-and-wales> [accessed 14 January 2019].

⁷³ In 2012, the conviction rate for all RRAOs in the Crown Court was 63.7%. In the Magistrates’ Court, in 2012, the conviction rate for RRAOs was 74%. Note, however, that only 481, of a total 8,898 defendants, were found not guilty – with most other cases being dropped early on. See Home Office, Ministry of Justice and Office for National Statistics, *An Overview of Hate Crime in England and Wales* (2013), Appendix Tables 3.07 and 3.08.

content with the number of trials on indictment. Three of the judges we interviewed were particularly disapproving of “low-level” RRAOs being tried in the Crown Court. Their disapproval reflected, in part, a dissatisfaction with “demonstrations of hostility” being prosecuted as serious hate crime offences. But, also, Crown Court trials for “not the most serious conduct” (CPS 01) were perceived to be largely “a waste of time and money” (CCJ 03).

Despite not being the most efficient response to hate crime, it was put to us by several interviewees that trial by jury is in the best interests of defendants. The legitimacy of hate crime legislation depends not only on its ability to protect victims under the law, but it must also respect defendants’ rights with regards to adherence to criminal standards of proof. The prosecution bears the burden of proving the hostility element beyond reasonable doubt regardless of whether it is dealt with at trial or by a judge at a *Newton* hearing. Yet, juries were thought to be more open to defence evidence and more willing to scrutinise the hostility element than judges or magistrates. One Crown Court judge explained that:

“[S]ome defendants have the protection of the verdict of a jury before they can be sentenced more severely. Other ones just are because the judge says I’m satisfied of this and that, and judges are usually somewhat easy to satisfy of the existence of aggravated features than juries maybe.” (CCJ 01)

Likewise, an independent barrister told us that, “most judges, if they’re sentencing someone, tend to go with ... ‘We found everything, the prosecution witnesses on the whole true, so aggravate it’” (IB 04). Trial by jury can, therefore, act to uphold the presumption of innocence in respect of the hostility element of an offence and ensure that the prosecution has met its burden of proof.

In support of trial by jury, interviewees also noted that it is the role of a jury, and not a judge, to decide questions of fact. One barrister felt that it was particularly important that juries consider the issue of motive where it is relevant in hate crime cases:

“[T]here’s something a little distasteful in the context of our criminal code, in the way in which our system of justice is evolved, by leaving such important matters of fact to a judge when a judge invites the jury into court and tells them, ‘We try this case together. We have different roles. You are the judges of fact.’ It’s somewhat out of line if the judge is then in a position to decide whether or not something as important as the motivation for the crime, in particular with the likely uplift in sentence which may accrue from that. And it is left to the judiciary. And I think a number of judges may feel uncomfortable in respect of that.” (IB 13)

Although it is the role of the jury to determine questions of fact, we should not be too quick to conclude that *all* hate crime cases should, therefore, be tried by jury. As it stands, most cases are tried in the Magistrates' Court, and, while it was suggested that juries are (or are at least perceived to be) more open to the defence version of events than magistrates, the main point of concern was that the question of hostility is not always adequately scrutinised when dealt with at sentencing. Thus, there was no suggestion from interviewees that all offences that are currently summary-only should become indictable-only or triable-either-way where there is a hate crime accusation. Moreover, the distinction between the role of judge and jury is not watertight. Outside of the context of hate crime, judges often make findings of fact in criminal cases, particularly at sentencing when determining the presence of aggravating and mitigating factors which can have a significant impact on the sentence passed. Accordingly, if it is to be contended that, in sufficiently serious cases,⁷⁴ defendants should have the option of a jury to determine the issue of identity-based hostility, there must be something that sets hate crime apart from other types of behaviour which judges are left to evaluate at sentencing.

Hate, or, more accurately, identity-based "hostility", is criminalised in certain contexts because it is not socially acceptable; because it causes distinct harms⁷⁵ to individual victims and their wider communities, and because it undermines liberal commitments to equality and respect for others, as explained below. Additionally, some scholars assert that hate crime laws have an important symbolic and educative function, not only sending a message that this type of offending is particularly wrongful, but also contributing to a positive shift in societal attitudes towards diversity and "difference".⁷⁶ However, at the same time, it is important to acknowledge that the criminal law is a coercive tool that must be applied with the utmost care in order to avoid erroneously labelling someone as a criminal or a "hater". Wrongful conviction and labelling can have devastating consequences for the individual and will reduce confidence in the criminal justice system.

From a normative position, then, the right to elect a jury trial provides an important safeguard in hate crime cases and legitimises outcomes. Since the hostility-element of a "hate crime" is an integral component of the offending behaviour, it gives rise to a question of fact that should be determined at trial by a jury (where the offence is sufficiently serious), and not a judge during

⁷⁴ In line with current practice, an offence is 'sufficiently serious' to become triable on indictment where the maximum sentence exceeds six months' imprisonment.

⁷⁵ See M.A. Walters, 'Redrawing the Boundaries of Hate Crime: What Characteristics should be "Protected" in the Criminal Law?' Special Issue of Studies in Law, Politics, and Society (forthcoming).

⁷⁶ See, for example, M.A. Walters, 'Readdressing Hate Crime: Synthesizing Law, Punishment and Restorative Justice' in T. Brudholm and B. Johansen (eds), *Hate, Politics, Law* (Oxford: OUP, 2018).

sentencing. The jury system serves to represent the society in which the defendant is accused of offending. Jurors, then, are deemed to be best placed to ensure that there is accountability for unacceptable conduct that is harmful to society and, at the same time, avoid attributing liability to individuals where the state has not met its burden of proof. In the view of one interviewee, the CDA is “definitely better for the defence” because “you’d rather a jury decide than a court ... it’s fair and it gives it a legitimacy ... that in any conviction you want to have” (IB 04). It was also explained to us that, where a guilty verdict is delivered by a jury, rather than hostility being determined at sentencing, the finding may be more readily accepted by the defendant:

“[A] defendant can’t say, ‘Well the judge had it in for me ... he didn’t like me’ No, no, no ... it was the jury ... the jury don’t know who you are ... This is the first time they’ve seen you. They’ve convicted you, not the judge. And the judge simply prompts the sentence.” (IB 13)

There are, thus, undoubted benefits of trial by jury in hate crime cases, in terms of providing transparency, ensuring that the prosecution can meet its burden of proof and legitimising case outcomes. These benefits indicate that the CDA provides a fairer means of responding to hate crime than the CJA.

[The double-edged sword of jury decision-making in hate crime cases: providing a tactical advantage to defence counsel](#)

While our study revealed several strengths in ensuring that juries, as fact-finders, play a central role in determining whether the hostility element of an offence is proved beyond reasonable doubt, interviews simultaneously uncovered evidence of potential bias amongst both jurors and judges that may be limiting the successful application of hate crime laws. Although this can, at times, advantage defendants, it is not a situation that we can in good faith advocate as supporting the “rights” of defendants in hate crime cases. In some cases, interviewees believed that jurors’ ordinary understanding of prejudice and hostility meant that only the most egregious forms of majority-group offending against minority-group victim would result in a conviction for the aggravated version of an offence. Interviewees spoke of cases involving “same-race” and “minority v majority” hate crimes that were often rejected by juries. Given that hate crime laws were enacted to protect and respond to violence against minority groups, a jury might not see the merit of convicting where the defendant, a member of a marginalised minority group, directed a racial slur at a white victim. Likewise, a jury might decide not to convict where a defendant used a racialised term which is commonly used amongst individuals within the same identity group and which would not ordinarily cause offence or upset when used in this context.

However, in other cases, the application of community norms during decision-making could result in jurors (and judges) rejecting certain forms of prejudice as legitimate targets for the law. For instance, it was suggested to us that juries often return perverse verdicts where the requirements of the CDA are satisfied, but where the defendant's behaviour is considered normal:

“[J]uries can do what they like. ... they can bring in perverse verdicts as long as they want to. That's one of the joys of the system. We've no control over them. And certainly, you know, if you've got an East End case ... being dealt with by an East End jury, who see this sort of thing going on in their market every bloody day ... Nobody pays the slightest bit of attention to it ... And they don't want to convict people. Which is wrong in the law. But nonetheless right. I would acquit too. ... Juries are a lot more sensible than our legislators at times, I think ...” (IB 01)

This quotation reveals the perception, also expressed by other interviewees, that some common forms of “low-level” prejudice should not be captured by hate crime legislation. This means that even where there is evidence of hostility, juries may simply refuse to convict defendants of the aggravated version of the offence. One Crown Court judge described their experience of this as follows: “I mean, pretty much every case I've thought very clearly the offence was racially aggravated, but ... they come back and say, ‘not guilty’” (CCJ 01). While the majority of cases end in conviction, there are clearly enough acquittals in the face of seemingly strong evidence to create the perception that jurors do not like to convict defendants of RRAOs.⁷⁷

Jury reluctance to convict was attributed primarily to the broad definition of “demonstrating hostility” under s.28(1)(a) of the CDA. Section 28 merely requires an “outward manifestation”⁷⁸ of racial or religious hostility during, or immediately before or after, the commission of a basic offence. This is most often verbal, for example, the utterance of a racial slur. It does not matter why the defendant committed the basic offence and it does not matter why they demonstrated hostility.⁷⁹ Nor does it matter whether the defendant consciously harbours racist views or

⁷⁷ In 2012, for example, the conviction rate for all RRAOs in the Crown Court was 63.7%. However, it is notable that of the 399 cases in which there was a not guilty plea, 278 ended with an acquittal. See Home Office, Ministry of Justice and Office for National Statistics, *An Overview of Hate Crime in England and Wales* (2013), Appendix Table 3.08. The conviction ratio for all indictable offences the year ending June 2012 was 81.7%, and has since risen to 83.7%. See, Ministry of Justice, *Criminal Justice Statistics: June 2018*, Overview Table Q3.3. More recent figures from the CPS show that the conviction rate for all cases flagged as racially or religiously aggravated, including basic offences and those that fall outside of the scope of the CDA, was 84.5% in 2017-18, with 69.9% receiving a sentence uplift. See CPS, *Hate Crime Annual Report 2017-18*.

⁷⁸ *Rogers* [2007] UKHL 8 at [6].

⁷⁹ See, for example, *Woods* [2002] EWHC 85 (Admin).

ideologies. In sum, where an act or words *objectively* demonstrate hostility, then the defendant's reasoning for expressing the hostility is not relevant to their liability. Interviewees suggested that, in practice, jurors do not take this approach. The perception was that jurors equate a finding of guilt with a finding that someone is a "racist", and they do not want defendants to be labelled as a "hater" or "racist" simply because the defendant lost their temper and said something abusive, perhaps while drunk or in a fit of rage:

"... juries look at them and they think, 'well that person's not racist. I'm going to find them not guilty.' The legislation doesn't require the prosecution to prove that people are racist; they just have to prove that they've demonstrated a hostility. But there is a disconnection, I think, within the minds of juries and what the legislation says ... they look at defendants and they think, 'they're not racist. They just said something in the heat of the moment'."

(IB 08)

It is not only jurors who take issue with criminalising demonstrations of hostility. Some academic commentators have suggested that "demonstrations", as against motivations, of hostility should not be conceived as "hate crime". Rather, they argue, these types of offence are better understood as acts of frustration, which are more directly correlated with other emotions, such as anger or rage, those which are often expressed in the "heat of the moment".⁸⁰ As explained above, a number of judges that we interviewed were also uncomfortable with demonstrations of hostility amounting to an aggravated offence, especially where the defendant acted out of anger.⁸¹ One judge was of the view that the legislation "includes too much that's trivial and not genuinely motivated by hatred." They put it to us that, "if I get cross with you and say, 'Go away you foreign bitch!', that doesn't mean I hate foreigners does it?" (CCJ 03). Yet, the perception seemed to be that jurors are most resistant to the demonstration of hostility test.

Juror reluctance to convict of RRAOs can provide the defence with a tactical advantage:

"... what you'll often find is that the defence will argue that, 'Well he may have said that, but he doesn't really hate Asian people.' But obviously ... technically that's not a defence under the Act, but it's still an argument which you sometimes encounter. So that's the ... classic scenario." (IB 07)

⁸⁰ See, for example, L. Ray, D. Smith, and L. Wastell, 'Shame, Rage and Racist Violence' (2004) 44(3) *British Journal of Criminology* 350; D. Gadd, 'Aggravating Racism and Elusive Motivation' (2009) 49(6) *British Journal of Criminology* 755.

⁸¹ See further, Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017), para 8.3.

Some independent barristers with experience of defence work stated that they could evade the legislative requirement of an objective demonstration of hostility by focusing on the question of whether the defendant is a “racist”. The term “racist”, in this context, was seemingly used in a very narrow sense of consciously hating, or even generally disliking, a particular racial group. Several judges and barristers spoke about cases descending into a trial about character, with counsel calling numerous witnesses to testify that the defendant has black or Asian friends:

“The irony is, of course, when it comes to trial, the whole case is taken up as to whether your client is racist. So what you do is you call his black dentist, his Chinese doctor, his best friend – and I’ve done this – his best [friend] who is a black shop steward, who specialises in race relations. And as a result, of course, the jury are absolutely convinced you’re the least racist person in the country and they acquit you of everything – including the crime you were charged with. So actually, it’s God’s gift to defence I would say.” (IB 01)

By focussing on good character and emphasising that the defendant is not “a racist”, the defence may not only be able to secure an acquittal on the aggravated offence, but also the basic version of the offence, even if there is strong evidence to support both charges.

A refined hostility test

The rights and interests of defendants must be taken into account when considering the future of hate crime legislation. The analysis of our interview data suggests that the CDA is best placed to safeguard certain interests of the defendant, thus providing support for including disability, sexual orientation and transgender identity in hate crime offences. Yet, while we assert that hostility is best addressed as part of the substantive offence during trial, we do not endorse extension of the CDA on the basis that it will help defendants to secure unmerited acquittals. Indeed, as we have shown above, the current provisions remain open to manipulation, especially in cases involving demonstrations of hostility where hostility is expressed in the “heat of the moment”. One possible solution to this issue, is to abolish the demonstration test, relying instead on “motivations” of hostility. This, though, would be likely to result in just a handful of successful prosecutions each year, as proving motive beyond reasonable doubt is a highly complex task, and one which our interviewees noted defeats most prosecutors.⁸² There are also two important points of principle that justify the maintenance of the demonstration of hostility test.

⁸² See Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017), para 8.1.

First, as Walters argues, *most* expressions of identity-based hostility are either intended or recklessly expressed in order to subjugate the victim's identity.⁸³ As such, most demonstrations of hostility are conscious attempts to subordinate victims based on their characteristics.⁸⁴ To determine whether a demonstration of hostility is meant to subjugate the victim's identity, we need only ask one question: "would the offender have used similar language if directing the insult towards someone of the same or similar ethnic identity to himself?"⁸⁵ If the answer is no, then we can draw inferences from the fact that the defendant decided to use the victim's ethnic background as part of their insult.⁸⁶ Goodall similarly asserts that:

"So long as an offender flung out his racial insult intending it at that moment to diminish his victim on that ground – or utterly disregarded the possibility that it would have that effect – then it is an integral part of his conduct, not any mere ulterior intent nor unintended by-product. His act is thus a constitutive element of the crime."⁸⁷

Thus, while the majority of offenders are not hardened bigots who make it their mission in life to eradicate "difference",⁸⁸ culpability is enhanced to reflect the intention (or at least awareness) to denigrate the victim because of the victim's identity. Defendants should, therefore, not be able to rely on the excuse that they are not conscious bigots in their day to day lives. As one District Judge succinctly put it, "not everyone when they've had too much to drink refers to people in racially abusive terms, so is it really an excuse ...?" (DJ 07).

The second argument is that, demonstrations of hostility are likely to have distinct (enhanced) impacts on a victim and their community, regardless of whether the defendant is motivated by hostility or lashes out in the heat of the moment.⁸⁹ Research has shown that hate-based violence (the vast majority of which involves a demonstrations of hostility) is likely to cause heightened levels of vulnerability, anxiety, anger and even shame amongst victims,⁹⁰ which in turn frequently affects the way individuals dress, how they speak, and where they are prepared to travel to. These

⁸³ See M.A. 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(1) O.J.L.S. 47.

⁸⁴ The subordination of "difference" is what Perry argues is the key to understanding hate crime: B. Perry, *In the Name of Hate: Understanding Hate Crimes* (London: Routledge, 2001).

⁸⁵ Walters, 'Conceptualizing "Hostility" for Hate Crime Law: Minding "the Minutiae" when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' (2014), 68.

⁸⁶ Walters, 'Conceptualizing "Hostility" for Hate Crime Law: Minding "the Minutiae" when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' (2014), 68.

⁸⁷ K. Goodall, 'Conceptualising "Racism" in Criminal Law' (2013) 33(2) L.S. 215, 237.

⁸⁸ P. Iganski, *Hate Crime and the City* (Bristol: Policy Press, 2008).

⁸⁹ See Walters, "Redrawing the Boundaries of Hate Crime: What Characteristics should be "Protected" in the Criminal Law?" Special Issue of Studies in Law, Politics, and Society (forthcoming).

⁹⁰ P. Iganski, 'Hate Crimes Hurt More' (2001) 45 American Behavioral Scientist 626.

impacts can ripple out and affect other individuals in the community who share the victim's identity traits.⁹¹ Demonstrations of identity-based hostility can also cause social, or cultural, harm by undermining society's political commitments to equality, respect and dignity.⁹²

Were we to write off demonstrations of hostility as mere drunken mistakes, or as uncharacteristic moments of madness, we would be likely to undermine the concept of hate crime altogether. As one District Judge lamented:

"I think if one sort of adopts the approach that somehow that things that are said in the heat of the moment are less significant, then I think that that's creating the opportunity for the unscrupulous to try to avoid the consequences of their behaviour, and at the same time, that ignores the impact upon the community at large and the individual who has suffered it." (DJ 09)

For these reasons, the demonstration of hostility test should remain part of the CDA. However, as we have seen, simply maintaining this aspect of the legislation has not in itself prevented the manipulation or misinterpretation of the CDA provisions. Arguably, the test must be clarified, most appropriately under common law, so that the provisions are more clearly understood. Clarification and refinement of the test for a "demonstration of hostility" could not only challenge reluctance to attribute liability to those who act out in the "heat of the moment", but also safeguard defendants against improper or inappropriate conviction.

The appellate courts have emphasised that s.28(1)(a), as it currently stands, requires only an objective outward manifestation of hostility. But it is not entirely clear whether, in practice, the defendant's knowledge and intentions as to the demonstration of hostility are relevant considerations. For instance, must the defendant *intend* to express or demonstrate identity-based hostility, as opposed to, for example, using a term that is considered by others to be hostile, but that was not intended as such by the defendant? One interviewee provided an example of a defendant using the phrase "black bastards" to refer to the colour of the uniform worn by a group of (mostly white) police officers, and not (as the police assumed) the colour of one of the officer's skin (DJ 06).

⁹¹ B. Perry and S. Alvi, "We are all Vulnerable": The in Terrorem Effects of Hate Crimes' (2012) 18(1) International Review of Victimology 57; J. Patterson, R. Brown and M.A. Walters, 'Feeling *for* and *as* a Group Member: Understanding LGBT Victimization via Group-Based Empathy and Intergroup Emotions (2018) British Journal of Social Psychology doi:10.1111/bjso.12269.

⁹² See, in relation to sexual offences, C. McGlynn and E. Rackley, 'Criminalising Extreme Pornography: A Lost Opportunity' [2009] 4 Crim. L.R. 245.

Even if the demonstration is not intended to express hostility, should criminal liability for an aggravated offence be made out where defendant is at least *aware* that they demonstrated racial or religious hostility? For example, should a defendant who uses a racialised slur during the commission of an offence, not knowing that it is a racialised term, be found to have demonstrated racial hostility? Without the defendant intending or being aware of a term's inferred meaning, can we legitimately label and punish him or her as a "hate crime" offender? As stated above, it is intentional and reckless demonstrations of hostility that amount to a conscious attempt to subjugate a victim based on their identity. The wrongfulness of criminal conduct, and the level of culpability apportioned to an offender, must not only reflect the enhanced harm caused by hostility-based action, but must simultaneously reflect the mental state of the offender.

To resolve the issues around the concept of "demonstrating hostility", and to ensure that s.28(1)(a) is applied in a manner that reflects both harm and culpability, we advocate the adoption by the courts of the refined test put forward by Walters.⁹³ In determining whether hostility has been demonstrated by the defendant, whether applying the CDA or CJA, the court or jury may wish to ask:

"(1) Would the defendant have directed the same insult towards anyone, regardless of their identity characteristics? And,

(a) Is the defendant aware that such an insult demonstrates racial, religious, sexual orientation, disability or transgender based hostility?

Or

(b) Does he understand that his language or conduct is likely to be understood by right-minded people as indicating hostility towards the victim based on the victim's (perceived) identity characteristic?

If the answer is no to the first question and yes to either part of the second it is clear that the demonstration made is one of hostility."⁹⁴

This test could help to ensure that only those who are "aware" of the identity-based "hostility" element of their actions are found culpable and sentenced as "hate crime" offenders. Thus, utterances of words that are not intended, or at least not understood as identity-based slurs, would

⁹³ Walters, 'Conceptualizing "Hostility" for Hate Crime Law: Minding "the Minutiae" when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' (2014).

⁹⁴ Walters, 'Conceptualizing "Hostility" for Hate Crime Law: Minding "the Minutiae" when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' (2014), 72.

not fall within the meaning of “demonstrating hostility”. At the same time, this test could help the courts and juries to understand that the purpose of s. 28(1)(a) of the CDA is not to find guilt of racist or anti-religious beliefs (i.e. beliefs that underpin motive), but to find criminal *fault* for an expression of hostility that is connected to a basic offence.

Conclusion

There are a number of reasons why, from a victim and prosecution perspective, it would be beneficial to extend the CDA to cover the personal characteristics that are currently only set out in s.146 of the CJA. These reasons are explained at length in an earlier article and in our final report.⁹⁵ This article has considered the question of reform primarily from the perspective of the defence. We have uncovered a number of ways in which the current system for prosecuting aggravated offences creates the potential for improper and inappropriate convictions, while also adversely affecting victims of hate crime, and we have provided recommendations to rectify this problem, including changes to charging practices and a refined “demonstration of hostility” test. Through our interviews with lawyers and judges, we also found that, notwithstanding the procedural problems, the rights and interests of defendants can be better protected through prosecution of specific hate crime offences (particularly where there is the option of trial by jury) than through the application of enhanced sentencing provisions. In particular, dealing with the hostility element of an offence at trial provides defendants with the greatest opportunity to prepare and to challenge the accusations against them. This is true not only in respect of the 11 basic offences set out in ss.29 to 32 of the CDA, but of all criminal offences. Thus, as it stands, someone accused of an offence which can be prosecuted as racially aggravated under the CDA may be better safeguarded against an erroneous outcome than someone accused of an offence to which the CDA does not apply, just as someone accused of a racially aggravated assault may be better safeguarded than someone accused of a homophobic assault. We, therefore, conclude that properly operating substantive offences would be the fairest and most effective legislative response to accusations of crime involving identity-based hostility toward statutorily recognised hate crime characteristics.⁹⁶

⁹⁵ They include, for example, dismantling “hierarchies of hate” arising from the current unequal treatment of the five statutorily recognised hate crime characteristics. See Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017); Walters, Owusu-Bempah and Wiedlitzka, ‘Hate Crime and the “Justice Gap”: The Case for Law Reform’ (2018).

⁹⁶ While these offences are currently found in the CDA, we have outlined proposals for all aggravated offences to be included under a new Hate Crime Act in Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process* (2017); Walters, Owusu-Bempah and Wiedlitzka, ‘Hate Crime and the “Justice Gap”: The Case for Law Reform’ (2018).