Criminalising hate: the need for rationalisation and reform


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Abstract

Although the presence of aggravated offences along with the enhanced sentencing regime appears to provide a comprehensive response to identity-based criminality, the English and Welsh hate crime legislation is fragmented, inconsistent and lacks clear moral foundations. To address this, the criminalisation of hate should be seen by the legislature and those tasked with interpreting the law as a three-stage process while treating the various hate crime provisions as an interconnected body of laws. After making the case for the rationalisation and reform of the current law, the article proceeds by illustrating how the legislature of a liberal society can utilise the proposed three-stage process to adopt a more principled and coherent legal framework. To this end, an amended version of section 28(1)(a) of the Crime and Disorder Act 1998 is proposed. Although the jurisdictional focus of this article is England and Wales, the aim of this article is to identify an analytical tool which can be used by legislatures, policy makers and legal commentators around the world as a means of evaluating, developing and reforming the hate crimes laws of their jurisdiction.

Keywords

criminal law, hate crime, Law Commission, equality, discrimination, fair labelling

Introduction

England and Wales appear to have one of the most comprehensive ‘hate crime’ legal frameworks among Western jurisdictions.¹ This is due to the hybrid model of bespoke

¹ The way the term ‘hate crime’ has been operationalised by the police and other criminal justice institutions for recording purposes and the way this is understood by the general public often varies significantly from what the criminal law of each jurisdiction regards as a hate crime. In England and Wales, for instance, the Crown Prosecution Service has adopted a definition of hate crime which includes ‘[a]ny criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudiced based on’ someone’s protected identity, such as their race. This definition is not entirely consistent with what the law regards as a hate crime. See CPS, Hate Crime Report 2018-19 (2019) p 1 available at
agravated offences and enhanced sentencing provisions that is in operation to address identity-based criminality. The English and Welsh hate crime legislation can broadly be divided into four categories: i) the racially or religiously aggravated offences (‘RRAOs’) under sections 29 to 32 of the Crime and Disorder Act 1998 (‘1998 Act’); ii) the enhanced sentencing provisions under section 66 of the Sentencing Act 2020 (‘2020 Act’); iii) the stirring up of hatred offences under Part 3 and 3A of the Public Order Act 1986 (‘1986 Act’); and iv) the football-specific offence under section 3 of the Football (Offences) Act 1991 (‘1991 Act’). In addition to these hate-specific provisions, there are a number of other offences that can be utilised to address various types of identity-based criminality that might not fall within the ambit of any of the abovementioned provisions, such as online hate abuse. Thus, a plethora of legal instruments through which identity-based criminality can be dealt with is provided. That notwithstanding, the hate crime legislation of England and Wales is fragmented, full of inconsistencies and appears riddled with ambiguous moral foundations.

The main purpose of this article is twofold. First, it aims through a rigorous and sustained analysis of the English and Welsh hate crime legislation to make the case for rationalisation and reform. As illustrated below, the current legal framework poses a number of normative and practical challenges, such as the potential creation of a ‘hierarchy of hate’, which can be attributed to the fact that the law was developed in a piecemeal and unprincipled manner. It is argued that many of the concerns identified could have been addressed if the legislature had


Following the enactment of the Sentencing Act 2020, sections 145 (covering race and religion) and 146 (covering sexual orientation, disability and transgender identity) of the Criminal Justice Act 2003 were consolidated into a single provision under section 66 of the 2020 Act.

See Figure 1.

regarded the criminalisation of hate as a three-stage process and the measures introduced as an integrated body of laws.

Second (and most importantly), to address this lack of clear theoretical framework, the article argues for the criminalisation of hate to be seen by the legislature as a three-stage process. The first stage of the process should focus on the identification of the mischief at hand. The legislature must first determine what, if anything, is wrong with identity-based prejudice. The next step of the process is to determine how the wrong identified should be dealt with. If the legislature decides that some forms of identity-based prejudice should be a matter for the criminal law, then the final stage of the process should focus on selecting the most appropriate model of criminalisation, bearing in mind what is the mischief at hand and any other relevant considerations identified during the second stage of this process. Failure to see this as a three-stage process is likely to result in the inconsistent development and/or implementation of the law and ultimately undermine its legitimacy. The second part of this paper illustrates how the adoption of the proposed three-stage model of criminalisation by the legislature of a liberal society can result in the introduction of a more principled and coherent legal framework with regard to identity-based prejudice. The importance and novelty of this analysis lies in the fact that the criminalisation of hate is treated as a three-stage process process rather than scrutinising certain aspects of it in isolation. As part of this process, the article theorises about the wrongfulness of identity-based prejudice and makes recommendations regarding the structure of any potential criminal offences that might be introduced to deal with this kind of behaviour. Although the jurisdictional focus of this article will be England and Wales, the subsequent analysis is of much wider relevance and it should be of interest to lawmakers, courts, legal practitioners and legal commentators across the world.
The case for rationalisation and reform

Although in many Western jurisdictions, such as the United States, specific legislation has been introduced to deal with identity-based prejudice, the criminalisation of certain forms of hate remains a strongly contested topic. Hurd and Moore, for instance, argue that hate crimes are objectionable because they allow for the imposition of additional punishment based on the perpetrator’s reasoning, such as their hatred towards the victim’s ethnicity, for committing an offence. For them, focusing on the perpetrator’s hatred towards the victim’s identity is morally problematic because these are ‘emotional states and enduring character traits’ which ‘are not directly responsive to the will’ and are alien concepts to the criminal law. Hence, those who commit hate crimes are subjected to increased punishment not because of their actions, but due to their character. Another vehemently contested issue relates to which identity groups should be protected. While it is commonly accepted, both at an international and domestic level, that the victimisation of someone based on his race and/or ethnicity should be regarded as a hate crime, there are different views as to which other identity groups should be protected and on what basis.

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6 This focus on the defendant’s motive(s) though, raises an important question for the advocates of hate crime laws: which attitudes, motives or emotions should be the proper concern of the criminal law? Why treat identity-based prejudice differently (and perhaps more harshly) than jealously and greediness? Although these are some of the most important questions faced by lawmakers when considering the introduction and/or reform of hate crime laws, it is not our intention to provide a normative theory of hate crime laws here. Instead, we wish to highlight some of the normative and practical questions that lawmakers will face when legislating against identity-based prejudice.
8 H. Hurd and M. Moore, above n 7, 1118.
Notwithstanding the challenges the criminalisation of hate poses for lawmakers, in many Western jurisdictions there is political appetite to extend the reach of hate crime legislation even further. In Scotland, following a comprehensive review of the law,\textsuperscript{12} ‘age’ was included as a protected characteristic whilst allowing Scottish Ministers to add ‘sex’ to the list in the future.\textsuperscript{13} In England and Wales, in December 2021, the Law Commission published its final report following a request from the Government to examine inter alia whether sex/gender should be added to the list of protected characteristics.\textsuperscript{14}

Having analysed some of the broader issues underpinning the criminalisation of hate, the article proceeds by engaging with some of the most important challenges posed by the current hate crime legislation in England and Wales to make the case for rationalisation and reform. The main focus of this analysis will be: i) the hierarchy of hate created by the existing legal framework; ii) the need for the hate crime laws to adhere to the principle of fair labelling; and iii) the need for the hate crime legislation to be based on clear moral foundations. Evidently, many of the limitations identified with the hate crime legislation can be attributed to the piecemeal fashion in which these provisions developed. This resulted in a fragmented and inconsistent legal framework. More fundamentally, however, it is argued that the aforementioned deficiencies would have been avoided if the legislature had regarded the criminalisation of hate as a three-stage process and the measures introduced as an integrated body of laws. The importance of this analysis is heightened in light of the burgeoning political appetite to extend the scope of the hate crime legislation even further.

\textsuperscript{13} Hate Crime and Public Order (Scotland) Act 2021, s 1(2) and s 12 respectively.
One of the main criticisms raised about the current hate crime legislation in England and Wales is that there are significant variations in the level of protection afforded to each of the five protected characteristics. This has resulted in the formulation of a ‘hierarchy of hate’. As shown in Figure 1, race is the only characteristic that is currently protected under every type of hate crime law. In contrast to this, disability and transgender identity are only protected under the enhanced sentencing provisions. To explain the importance of this disparity, it is imperative to elaborate further on how the RRAOs and the enhanced sentencing regime operate.

As far as the RRAOs are concerned, sections 29 to 32 of the 1998 Act include eleven aggravated offences. To establish liability for any of these offences: i) the defendant must have committed one of the base offences listed under sections 29 to 32, such as criminal damage; and ii) that either section 28(1)(a) or (b) applies. Under section 28(1)(a), someone’s liability for the base offence will be elevated to a RRAO, ‘if at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the

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15 We use the phrase ‘hierarchy of hate’ to refer to the uneven protection offered to the characteristics that already fall within the ambit of the hate crime legislation. See M. Walters and others, ‘Hate Crime and the “Justice Gap”: The Case for Law Reform’ (2018) 12 Criminal Law Review 961, 973.
offence hostility based on the victim’s membership or presumed membership of a racial or religious group’. Section 28(1)(b) on the other hand requires that ‘the [base] offence is motivated [wholly or partly] by hostility towards members of a racial or religious group based on their membership of that group’. The defendant’s liability is not only elevated in terms of the label attached to the wrong committed, but he also faces the prospect of an increased punishment. The maximum sentence available for the aggravated offences is significantly higher than the one available for the base crimes. For instance, someone who is convicted of common assault faces a maximum sentence of six months’ imprisonment whereas those liable for the racially or religiously aggravated version of this crime can be given a custodial sentence of up to two years.\textsuperscript{16} This represents a four hundred per cent uplift.

The enhanced sentencing provisions under section 66 of the 2020 Act can be regarded as supplementary to the RRAOs since they allow for the imposition of an increased punishment in cases where the defendant has committed an offence other than those listed under sections 29 to 32 of the 1998 Act.\textsuperscript{17} Under sections 66(4)(a) and (b) of the 2020 Act, if the sentencing court is convinced that the base offence was racially or religiously aggravated, then the defendant’s hostility must be regarded as an aggravating factor. Section 66(1) of the 2020 Act extends the scope of the hate crime legislation even further by offering protection to three other characteristics: sexual orientation, disability and transgender status.\textsuperscript{18}

It follows from the above analysis of the two regimes that in order to establish liability for a RRAO, the prosecution must prove the defendant’s motive and/or demonstration of hostility,\textsuperscript{16} In most cases though the penalty imposed for a RRAO does not exceed the maximum sentence available for the base crime. See M. Walters and others, Hate Crime and the Legal Process: Options for Law Reform (2017) p 200 available at https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539.\textsuperscript{17} Sentencing Act 2020, s 66(3). This will not alter though the maximum sentence that can be imposed for the offence committed.\textsuperscript{18} Previously Criminal Justice Act 2003, s 146.
that is the hostility is one of the constituent elements of the offence.\textsuperscript{19} In contrast to the RRAOs, whether the defendant should be subjected to the enhanced sentencing provisions is a matter that is decided at the sentencing stage by the trial judge.\textsuperscript{20} Accordingly, it is not necessary for prosecutors ‘to consider the aggravating factor when assessing the evidential stage of the Full Code Test’, that is whether there is sufficient evidence for a conviction.\textsuperscript{21} The importance of this lies in the possibility of section 66 becoming an afterthought for the police and the CPS which might not gather enough evidence to convince the court about the aggravating element and eventually fail to secure a sentence uplift. If this becomes the norm, victims and other members of their group might lose faith in the authorities and the legitimacy of the hate crime legislation will be severely undermined. Clearly, the preservation of this combined system can prove highly problematic in its practical application.\textsuperscript{22}

To illustrate further what is problematic with the current law, let us assume that hate crime laws can be justified on the basis that certain identity groups are subject to disproportionate levels of violence which cause elevated individual, community and societal harm.\textsuperscript{23} If this is accepted as the primary justification for the criminalisation of certain forms of identity-based prejudice, it would be morally problematic to treat protected characteristics differently from one another unless a compelling reason is provided to do so.\textsuperscript{24} Does ‘racialist’ chanting at a

\textsuperscript{20} In this case, a Newton hearing will be held in order to determine whether the defendant demonstrated or was motivated by hostility based on the victim’s protected identity under section 66. See C. Bakalis, above n 19, 194 and 198-199.
\textsuperscript{24} What would a compelling reason to depart from an even protection be? In its consultation paper, the Law Commission explored the possibility of treating disability different from the other characteristics currently protected under the law. The impetus for this exploration is the low prosecution rates for disability hate crime when compared to the total number of disabled people in England and Wales. A possible explanation for the low number of prosecutions is that crimes against disabled people are often seen as attempts to exploit the victim’s actual or presumed vulnerabilities rather than as a demonstration of hostility towards their protected identity. In
football match, for example, cause more harm than homophobic chanting? If not, why does section 3 of the 1991 Act not cover sexual orientation? This is particularly important given the prevalence of hate incidents relating to sexual orientation in football. This is not to undermine the importance of certain forms of identity-based criminality. Rather, it is to argue that if the legislature decided that certain kinds of identity-based criminality necessitate different treatment from the base crimes, then all protected characteristics should be afforded an equal status unless strong justification for not doing so is provided. Failure to do so would convey a message to society that certain kinds of hate crime hurt more than others. The legislature would also speak with a strange moral voice if it argued that a particular identity group should be given a special status due to its long and persistent subordination, but failed to put it on an equal footing with other identity groups who have experienced similar oppression. It is for these reasons that the hate crime legislation should be an integrated body of laws.

Fair labelling

Arguably, the criminal law could operate by only using a handful of very broad offences each covering certain kinds of criminality. For example, it would be possible to replace all sexual offences with a generic offence covering all kinds of non-consensual sexual activities carrying a maximum penalty of life imprisonment. It would then be up to the sentencing court to assess

an attempt to address this phenomenon, the possibility of adopting a broader legal test which would apply only to disability hate crime reflecting the unique challenges posed by this type of criminality was explored. Although the Commission concluded that this was not a viable option, this clearly suggests that it might not always be possible/desirable to treat all protected characteristics in exactly the same way. See Law Commission, Hate Crime Laws: A Consultation Paper (Law Commission No 250, 2020) pp 158-159 and 369-370.

25 Approximately nineteen per cent of all hate crime incidents that took place during the 2018/19 football season were based on sexual orientation. See Home Office, Football-related Arrests and Banning Order Statistics: England and Wales, 2018/19 Season (2019) table E1.
26 M. Walters and others, above n 15, 973.
the seriousness of the wrong committed and pass an appropriate sentence. If this was to happen, the punishment imposed on the offender could still be proportionate to the seriousness of the wrong committed. Nonetheless, the introduction of this generic and broadly defined offence would contravene the principle of fair labelling, that is the label attached to each offence should accurately reflect the nature and blameworthiness of the wrong committed. To achieve this, it is imperative that ‘separate crimes should be recognised as far as it is possible to describe the essential character of a criminal incident or venture and attach a label to it’. To achieve this, it is imperative that ‘separate crimes should be recognised as far as it is possible to describe the essential character of a criminal incident or venture and attach a label to it’.  

The importance of fair labelling lies primarily in the coercive nature of criminalisation. A criminal conviction does not only result in the imposition of ‘hard treatment’, such as deprivation of liberty, but it also publicly and purposefully condemns the behaviour criminalised. Through criminalisation, the legislature conveys a message to society that the behaviour proscribed constitutes a serious moral wrong and those who behave in such a manner should therefore be condemned. One way of informing the public about the nature and blameworthiness of the wrong criminalised is through the label attached to the offence enacted. If the offence enacted is broadly defined and the label attached does not provide sufficient indication about the blameworthiness of the wrong criminalised, then the public will not be able to fully comprehend the message conveyed. Moreover, even if the appropriate sentence is passed, it would be unfair both to perpetrators and victims if the same label was attached to offenders whose conduct varies significantly in terms of its blameworthiness. As Horder put it, ‘[i]f the offence in question gives too anaemic a conception of what’ is criminalised, then ‘it

29 A. Ashworth, above n 28, 54.
is fair neither to the defendant, nor to the victim. For the wrongdoing of the former, and the wrong suffered by the latter, will not have been properly represented to the public at large.

Turning now to the hate crime legislation, of particular concern in terms of fair labelling is section 28(1)(a) of the 1998 Act which focuses on ‘outward manifestation[s]’ of racial or religious hostility. As cases such as Woods suggest, for someone to be convicted of a RRAO under section 28(1)(a), he need only have demonstrated some kind of hostility towards the victim’s (actual or presumed) racial or religious background. There is no need for the prosecution to prove that it was the defendant’s intention for his conduct to demonstrate hostility towards the victim’s race or religion. In fact, it appears possible for someone to be convicted of a RRAO even if the ‘racial [or religious] element is ancillary to the substantive offence, rather than the [true] cause’. According to section 28(3), the defendant’s hostility towards the victim’s race or religion need only be one of the factors that caused the commission of the base offence. Moreover, it seems possible for someone to be convicted of a RRAO through the application of section 28(1)(a) even if he did not actually foresee the possibility that his behaviour would demonstrate hostility based on the victim’s race or religion. Suppose that Michelle and Lee had lunch at a restaurant. At some point, Lee (a British Asian) unwittingly made physical contact with Michelle. Michelle got extremely frustrated and punched Lee in the face. Immediately after this, Michelle, for whom English is not her first

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35 The subsequent analysis applies equally to section 66(4)(a) of the 2020 Act.
40 In R v SH [2010] EWCA Crim 1931 para 30, it was held that mere vulgar abuse which is ‘unconnected with hostility based on race’ or religion will not satisfy the test set out by section 28(1)(a).
41 Clearly, it will rarely be the case that the offender did not foresee the possibility that his behaviour will amount to a demonstration of hostility even if the words were uttered in the heat of the moment. See M. Walters, above n 38, 70-72.
language, directly translated and used a phrase, commonly used in her country, to express her anger about what happened. Lee and many of the other customers found Michelle’s phrase highly offensive and racist. Although Michelle did not even foresee the possibility, due to her different cultural background, that her conduct might amount to a demonstration of hostility based on Lee’s racial background, she can still be held liable under section 28(1)(a) for a racially aggravated assault. This is not to suggest that someone in a similar situation will definitely be convicted of a racially aggravated assault. Instead, it is to highlight the fact that the law allows the trier of fact to convict Michelle for the section 28(1)(a) offence even if it accepts her explanation that she did not realise that her conduct would have a racist meaning.

Although the breadth of section 28(1)(a) provides the necessary flexibility needed to address a range of unpleasant behaviour, as explained below, its scope should be limited to cases where someone intentionally or recklessly demonstrates hostility based on the victim’s protected identity. Failure to do so can result in the criminalisation and the potential labelling of the defendant by the public as a hater despite the fact that he was not even aware of the risk that his conduct will be regarded as a demonstration of hostility. This will be unfair to the alleged perpetrator because the label attached to him will not accurately reflect the nature of the wrong committed. This is not to suggest that section 28(1)(a) should not deal with every-day expressions of prejudice or with hostility demonstrated in the heat of the moment. This could still be regarded as a ‘conscious [attempt] to subordinate and additionally harm victims by

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42 We discuss this further below. It has to be acknowledged though, that in the great majority of cases a person who demonstrates towards the victim hostility based on the victim’s membership of a racial or religious group does intend hostility or is at least reckless as to the possibility that her conduct might (objectively) be regarded as such.

43 This is something which resonates with many judges and jurors who tend to be very reluctant to convict someone of a RRAO if the hostility was not a key aspect of the offence committed. This can be attributed to the tendency to equate a conviction for a hate crime with premeditated behaviour carried out by individuals who are ‘deeply racial and set out to upset’ others. Consequently, convicting someone of a RRAOs for ‘every day racism’ might raise questions about the moral foundations and the proper limits of the hate crime laws. See E. Burney and G. Rose, above n 39, pp 20-21; M. Walters and others, above n 15, 968 and 976.
targeting their “difference” as long as the perpetrator is ‘aware [of the fact that] he is subjugating the victim’s identity’.\textsuperscript{44}

A combined system of hate crime laws?

The adoption of a combined system of aggravated offences and enhanced sentencing provisions appears to provide a comprehensive response to identity-based criminality. However, this appears to be sending conflicting messages about the moral foundations of the hate crime legislation. The presence of the RRAOs suggests that identity-based crimes are qualitatively different from the base offences.\textsuperscript{45} Conversely, the introduction of the enhanced sentencing provisions suggests that for the legislature the wrong committed is qualitatively similar to that criminalised by the base crimes. It is acknowledged by the legislature though that hate crimes hurt more and/or that those who commit identity-based crimes are more culpable than those who commit the base crimes and therefore they should be subjected to an increased punishment.

It is not our intention to provide a complete theory of hate crime laws, but to highlight the need for the criminalisation of hate to be seen as a three-stage process. If the legislature is convinced that the primary justification for the criminalisation of hate is that this kind of criminality causes a unique type of ‘harm’ which is not covered by pre-existing offences, then the measures introduced to deal with it must reflect that. Failure to do so, can cause ambiguities regarding the moral foundations of the law which can potentially undermine its communicative function.

\textsuperscript{44} M. Walters, above n 38, 73.
Rationalising the criminalisation of hate

Through the preceding analysis many principled objections to the English and Welsh hate crime legislation have been identified. Although many of these objections can be attributed to the piecemeal fashion in which the law developed, it is argued that the main cause of many of the issues identified is: i) the failure of the legislature to treat these provisions as an interconnected body of laws; and ii) the lack of clear moral foundations (or at least these are not apparent from the scheme of criminalisation which has been adopted) upon which these can be justified. For these concerns to be addressed and for the law to develop in a more principled and coherent manner, it is imperative for the legislature to treat the criminalisation of hate as a three-stage process. This will not only result in a more principled and coherent legal framework, but it can also ‘give legitimacy to the actions of the state’ to criminalise certain forms of hate.\footnote{C. Bakalis, ‘The Victims of Hate Crime and the Principles of the Criminal Law’ (2017) Legal Studies 718, 722.} In the remainder of this article we elaborate further on what this three-stage process entails and how this can address some of the aforementioned issues with the current law.

Identifying the mischief at hand

The first stage of the criminalisation process requires the legislature to determine what is wrong with identity-based prejudice. This, of course, raises a further question: how can legislatures determine what is wrong with identity-based prejudice?\footnote{Another really important question for those advocating for the criminalisation of certain types of identity-based prejudice is: why should group-based prejudice be treated differently from hostility towards someone as an individual rather than as a member of a particular group? We discuss (albeit briefly) this issue below.} The answer to this first question is contingent upon the kind of society we are dealing with or the one that the legislature aspires...
to create. The legislature of a liberal and diverse society might have a completely different view about the wrong committed by identity-based prejudice than the legislature of a more homogenous society.\textsuperscript{48} Hence, to determine what is wrong with identity-based prejudice, the legislature must first reflect on the values that underpin society. In what follows, we explain how the legislature of a liberal democracy should approach identity-based prejudice. In doing so, we engage with Hobbes’s political theory, which has been instrumental in the development of the contemporary liberal state.\textsuperscript{49} The reason for this is twofold. First, Hobbes’s account starts from the premise that each individual is and should be treated as an equal member of the polity in the sense that everyone agreed to abandon the same rights and they all expect to receive the same kind of protection from the State. This is a principle that we believe is integral to any liberal society. In contrast to Hobbes though, we argue that what matters is social rather than absolute equality. Simply put, we use Hobbes’s account to demonstrate why the legislature of a liberal society must focus on social rather than absolute equality. Second, Hobbes’s theory highlights one of the most important (societal) harms that can be caused by identity-based prejudice. That is, the possibility of undermining public order\textsuperscript{50} which can result in members of society exercising what Hobbes calls their ‘right of nature’\textsuperscript{51}.

\textsuperscript{48} The legislature of a monolithic society which wishes to maintain the status quo might conclude that identity-based prejudice should not be treated differently from other crimes and therefore decide not to introduce any specific hate crime laws.

\textsuperscript{49} Many legal commentators used equality as a normative justification for the introduction of hate crime laws. The novelty of our analysis is the use and development of Hobbes’s political theory to highlight the wrongfulness of identity-based prejudice. See A. Duff and S. Marshall ‘Criminalising Hate?’ in T. Brudholm and B. Schepelern (eds) \textit{Hate, Politics, Law: Critical Perspectives on Combating Hate} (Oxford University Press, 2018); C. Bakalis, above n 46.

\textsuperscript{50} Hate crimes pose a unique threat to public order since they ‘have the potential to cause social division and civil unrest’ by exacerbating ‘existing social tensions (see OSCE, above n 10, 20). The importance of the threat posed by hate crimes to public order is heightened by the globalisation of hate. For example, the fact that a high-profile incident, such a terrorist attack that took place in one country, can ‘quickly ripple out as social media and traditional media outlets spark interest, outrage and in turn violent retaliation in locations across the globe’ (see J. Schewppe and M. Walters, ‘Introduction: The Globalization of Hate’ in J. Schwepppe and M. Walters (eds) \textit{The Globalization of Hate: Internationalizing Hate Crime?} (Oxford University Press, 2016) p 2).

(i) From a Hobbesian perspective

In *Leviathan*, Hobbes deconstructs the relationship between the State and its subjects. Based on his account, each man has the ‘right of nature’, that is the ability to do everything in his power to preserve his own life. If all men decide to exercise their ‘right of nature’, then ‘they are in that condition which is called war; and such a war as is of every man against every man’.

In this state of war ‘there is no law’ and therefore no justice. For some men, the possibility of dominating others is an alluring prospect. Men though are driven by many passions, including fear of death. It is this fear of death that motivates men to seek peace. To achieve this, men enter a covenant through which they agree to abandon their ‘right of nature’ and consent to obey a common power, that is the sovereign and its laws, something which results in the formulation of commonwealths. In return, they expect that the sovereign will protect them from any unjustifiable interference with their liberty by others. To this end, the sovereign must punish those who are found in breach of their covenants.

For the purposes of the first part of our contended three-stage process, what is of particular importance is Hobbes’s claim that the covenant formulated is between men themselves rather than between men and the sovereign. Consequently, by agreeing to be bound by the terms of such a covenant, men recognise each other as equal members of the commonwealth. As members who are not only obliged to abandon their ‘right of nature’, but as individuals who

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52 T. Hobbes, n 51.
53 T. Hobbes, above n 51, 100.
54 T. Hobbes, above n 51, 97.
59 T. Hobbes, above n 51, 140.
60 By entering such a covenant, men also agree to abandon their ‘right’ to punish those who interfere with their liberty. This enables the sovereign to use its own powers to punish those who offend as it deems ‘fit, for the preservation of them all’. See T. Hobbes, above n 51, 138-139 and 236-237.
are entitled to equal protection by the sovereign and its laws.\textsuperscript{62} It would therefore be antithetical for someone who agreed to enter into this covenant to undermine through his behaviour others’ status as equal members of the commonwealth.\textsuperscript{63} To do so, is to question the very existence of the covenant and by implication the legitimacy of the sovereign to punish those who unjustifiably interfere with the liberty of others. On this view, for the legislature of a liberal republic, behaviour that undermines others’ status as equal members of the polity by means of identity-based prejudice are morally problematic because they violate one of society’s core values, that is the principle of equality.

\textit{(ii) The meaning of equality}

Based on Hobbes’s account, members of the Leviathan are equal in the sense that they are entitled to the \textit{same} protection by the sovereign and its laws. If, for instance, Dan and Jo have been sexually assaulted, the State has an obligation to investigate both incidents promptly, prosecute and if proved guilty punish those responsible. This conceptualisation of equality though is based on the assumption that Dan and Jo are equal in all relevant respects, such as their rights and obligations stemming out of the covenant formulated. What is problematic about this conceptualisation of equality is that it fails to acknowledge that certain social groups face unique challenges when trying to realise their full potential. Some groups, for example, may have been subjected to prolonged discrimination and persecution due to their identity, such as their ethnic background, something that can not only undermine their ability to fulfil their aspirations, but it also questions their status as equal members of the polity. Hence, a


\textsuperscript{63} For Duff and Marshall, treating someone as an inferior member of the polity constitutes \textit{a de facto} denial of their membership by the perpetrator(s). See A. Duff and S. Marshall, above n 49, 126.
more detailed account of equality is needed whilst elaborating on the basis upon which the legal regulation of certain forms of identity-based prejudice can be justified.

In what follows, we first outline Duff and Marshall’s account which elaborates on the basis upon which the regulation of identity-based hatred can be justified. Although their account provides a strong normative justification for the regulation of certain types of identity-based hatred, it is argued that this should be complemented by an analysis of equality that truly reflects the problematic nature of this kind of behaviour, an analysis which is based on social rather than absolute equality.64

For Duff and Marshall, as members of a liberal republic what should ‘guide our conduct in the public, civic realm … [is] equal concern and respect’.65 To exemplify this distinction between public and private realm, they make reference to the Equality Act 2010 which, according to them, only deals with discrimination that takes place in the public realm, such as in the context of employment, and they contrast this with how someone might feel towards others which falls within the private sphere.66 The importance of this distinction lies in the need to strike a fair balance between individual autonomy and state control. Although by being part of a commonwealth people agree to abandon their ‘right of nature’, any further interference with their freedom needs a strong justification. An inherent characteristic of any liberal republic is ‘that it respects an extensive area of privacy into which the state must not intrude’.67 It is for this reason that members of the polity have a civic duty to acknowledge and treat others as equal members of society only when their behaviour falls within the public realm.68

64 This is not to argue that Duff and Marshall advocate for strict equality. Rather, it is to highlight the need for a more comprehensive account of equality as a form of social justice.
For Duff and Marshall, the wrongfulness of hate-related conduct, that is when someone enacts his hatred towards others, lies in the violation of the civic duty owed by the perpetrator towards the victim(s).69 This kind of behaviour, according to them, seeks to alienate and exclude the victim(s) from society not because of their ‘qualities as individuals’, but simply due to their membership of a particular identity-group.70 It sends a message to them that they are not an equal member of the polity. This is particularly the case when the victim is part of a ‘vulnerable or threatened’ group whose membership of the polity tends to be denied.71 This focus on specific groups raises a really important question for our purposes: why should hatred towards someone as an individual be treated differently than hatred towards specific identity-groups?

Due to lack of space, we cannot provide a comprehensive normative theory based on which it can be determined which identity groups should be included within any hate crime laws. As we will see below, though, if the legislature adopts a social justice approach regarding the meaning of equality, then this will not only assist it in identifying potential candidates for inclusion within any future hate crime laws, but it will also enable it to highlight the undeserved inequality experienced by certain identity groups.

Although Duff and Marshall are right to hold that the mischief at hand is that victims of identity-based hatred are denied full membership of the polity because they are not treated with ‘equal concern and respect’, it is still imperative to elaborate further on the meaning of equality. What does equality entail? What does it mean to be an equal member of the polity? What does it mean to be treated with ‘equal concern and respect’? These are some of broader questions

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69 A. Duff and S. Marshall, above n 49, 121 and 130.
71 A. Duff and S. Marshall, above n 49, 121.
that need to be addressed to identify what is wrong with identity-based prejudice in a liberal society.

Our analysis starts from the premise that equality should be interpreted in such a way as to achieve social justice. That is to allow everyone to participate in society on equal terms while acknowledging that this is not a level-playing field. To explain how social justice is to be achieved, Rawls noted that ‘men are born into different [social] positions’ that will inevitably affect their ability to ‘compete on a fair basis’ for economic opportunities. If the state’s resources are to be distributed (strictly) equally among members of the public, then those born into disadvantageous social positions, such as in an economically deprived family, will still be unable to ‘compete on a fair basis’ with others. To address this ‘undeserved inequality’, Rawls proposed the adoption of the ‘difference’ principle. The ‘difference’ principle does not require society to give resources directly to those who were born in a disadvantageous social position to address any inequalities that might exist. Instead, it allows the state to allocate more resources in areas, such as education, that will ‘improve the long-term expectation of the least favoured’ and therefore achieve social justice. In this case, the uneven allocation of resources can be justified on the basis that the state is able to ‘treat unalike (unequally) those who are unalike (unequal) in relevant respects, in direct proportion to the differences (inequalities) between them’. Applying the above analysis of equality and social justice to identity-based prejudice, it is argued that this kind of behaviour is morally problematic because it is capable of exacerbating pre-existing ‘undeserved inequalities’ in society, such as the unequal treatment received by someone due to their sexual orientation, leading to the further subordination of certain groups whose membership of the polity is frequently challenged.

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72 J. Rawls, above n 62, 7.
73 J. Rawls, above n 62, 7 and 101.
74 J. Rawls, above n 62, 100-108.
This conceptualisation of equality as a means of achieving social justice imposes an obligation on the liberal state to introduce and implement policies that go beyond the basic need to prevent the collapse of the polity and the possible return to a state of nature. It requires the liberal state to create and maintain those conditions in society that will provide all of its members with an equal opportunity to realise their full potential. This reaffirms that a liberal society is not just one that prevents a state of nature (a totalitarian regime might be equally effective in achieving this through repression),\textsuperscript{76} but one that is premised on the prioritisation of individual liberty.\textsuperscript{77} This can only be achieved by ensuring a level-playing field. To this end, the liberal state must pay equal attention to the needs and challenges faced by each individual (or social group) and formulate policies that address undeserved inequalities, such as identity-based discrimination.\textsuperscript{78} The introduction of measures that seek to combat identity-based prejudice can be justified on the basis that behaviour that undermines certain groups’ status as equal members of the polity exacerbates pre-existing ‘undeserved inequalities’ experienced by those groups and is capable of further curtailing individual liberty.\textsuperscript{79}

**How should the mischief identified be regulated?**

The next step of the process is to determine what is the most appropriate method of dealing with the mischief identified. It is worth noting here that an array of legal (not just the use of the criminal law) and extralegal measures can be utilised to deal with identity-based prejudice that undermines the status of others as equal members of society. For instance, the state might decide to introduce educational courses at schools as a means of establishing certain positive


\textsuperscript{78} P. Roberts, above n 77, 332.

\textsuperscript{79} This does not necessarily mean that the legislature should criminalise all kinds of prejudice. We elaborate further on the kinds of conduct that should fall within the scope of the criminal law below.
social norms and therefore prevent identity-based prejudice.\textsuperscript{80} Similarly, non-state actors might decide to deal with certain forms of identity-based hostility by introducing their own measures.

For present purposes, a particularly apposite and instructive illustration of self-regulation by a non-state actor relates to the internal regulatory and disciplinary procedures applied by the Football Association (‘FA’). As a private law body, the FA exerts control over members on the basis of a contractual relationship.\textsuperscript{81} The exercise of this control by the FA, for instance, following the use of abusive and/or insulting words which include a reference to a protected characteristic, such as race, by a registered player, has the potential to overlap with the functions of the criminal justice system.\textsuperscript{82} Regulation 23 of the FA’s Disciplinary Regulations provides that:

[t]he fact that a Participant is liable to face or has pending any other criminal, civil, disciplinary or regulatory proceedings (whether public or private in nature) in relation to the same matter shall not prevent or fetter The Association commencing, conducting and/or concluding proceedings under the Rules.\textsuperscript{83}

An incident involving Fernando Forestieri, during a pre-season friendly in July 2018, resulted in both criminal and FA proceedings following an alleged racially aggravated offence.\textsuperscript{84}

\textsuperscript{81} M. Beloff and others, \textit{Sports Law} (Hart Publishing, 2\textsuperscript{nd} edn, 2012) pp 30-31. Simply applied, as constituent members of the FA, footballers are bound by the Rules of the FA.
\textsuperscript{82} S. Gardiner and others, \textit{Sports Law} (Routledge, 4\textsuperscript{th} edn, 2012) p 89.
\textsuperscript{84} \textit{The Football Association v Fernando Forestieri}, 15 July 2019. The FA Regulatory Commission was satisfied that Forestieri probably called an opposing player ‘a nigger’ and so the charge of Misconduct by an ‘Aggravated Breach’ of Rule E3(1) within the meaning of Rule E3(2) was proved. Prior to charges being brought by the FA, a charge of a racially aggravated offence contrary to section 5 of the 1986 Act had been made against Forestieri. The defendant was acquitted following a trial and a verdict of not guilty was entered against him.
Nonetheless, the application of the criminal law in the context of sport continues to be underpinned by the approach advanced by Lord Woolf in *Barnes*:

In determining what the approach of the courts should be, the starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings.\(^{85}\)

Since this judgment in 2004, the disciplinary procedures of sports governing bodies have become increasingly robust, thus suggesting that ‘many clearly criminal acts are no longer considered appropriate for the criminal justice system’.\(^{86}\) Lord Woolfe’s view in *Barnes* is reiterated in the 2015 revised agreement (the ‘agreement’) between the CPS, the Association of Chief Police Officers,\(^{87}\) the FA and the Football Association of Wales.\(^{88}\) In acknowledging concurrent jurisdiction to investigate and prosecute charges where a breach of football’s Rules and Regulations amounts to a criminal offence, the purpose of the agreement is to: (i) clarify the roles and responsibilities of the parties dealing with incidents falling under concurrent jurisdiction; (ii) ensure consistent early liaison between the parties where appropriate; and (iii) establish a streamlined and consistent approach to all cases.\(^{89}\) The agreement emphasises the distinction between the standard of proof in a criminal court, that is ‘beyond reasonable doubt’, and the lower civil evidential standard applicable in football disciplinary proceedings, that is the ‘balance of probabilities’.\(^{90}\) Consequently, given the lower standard of proof in FA

\(^{85}\) *R v Barnes* [2004] EWCA Crim 3246.
\(^{87}\) Now the National Police Chiefs’ Council.
\(^{89}\) CPS, available n 88, para 2.
\(^{90}\) FA Disciplinary Regulations, available n 83, Regulation 8.
disciplinary proceedings, in cases involving the same factual allegation, an acquittal of a criminal charge does not act as a procedural bar.\textsuperscript{91} More fundamentally, there is strong recognition in the agreement of the fact that, in certain circumstances, the sanctions open to the FA may be a more effective punishment and may also act as an effective deterrent against misbehaviour.\textsuperscript{92}

In recent years, English football has seen a number of high-profile accusations of racial abuse, most notably, those involving John Terry, Luis Suarez and Rio Ferdinand.\textsuperscript{93} Following these cases, the FA amended its rules regarding ‘misconduct’,\textsuperscript{94} pursuant to FA Rule 3.\textsuperscript{95} Rule E3(2) states:

\begin{quote}
A breach of Rule E3(1) is an ‘Aggravated Breach’ where it includes a reference, whether express or implied, to any one or more of the following: ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability.\textsuperscript{96}
\end{quote}

The FA now applies a mandatory minimum sanction of a five-match ban to certain aggravated breaches. Moreover, the agreement on the handling of incidents falling under both criminal and football regulatory jurisdiction makes plain that ‘[i]f an alleged offence is aggravated by factors that would potentially make it a “hate crime”, it is more likely that a criminal

\textsuperscript{91} The Football Association v Fernando Forestieri, 15 July 2019 para 48.
\textsuperscript{92} CPS, above n 88, para 3.
\textsuperscript{93} R v Terry, Westminster Magistrates’ Court, 13 July 2012 (unreported) (Terry being acquitted following a criminal charge under section 5 of the 1986 and section 31 of the 1998 Act. See also The Football Association v Terry, 24-27 September 2012); The Football Association v Ferdinand, 13 August 2012 (no criminal charges being brought); Football Association v Suarez, 20 December 2011 (no criminal charges being brought). See further, M. James, ‘Sports Participation and the Criminal Law’ in A. Lewis and J. Taylor (eds) Sport: Law and Practice (Bloomsbury Professional, 3\textsuperscript{rd} edn, 2014) pp 1679-1680.
\textsuperscript{94} M. James, above n 86, 139. There previously being no mandatory entry point for sanction for an ‘Aggravated Breach’.
\textsuperscript{95} Rule 3(1) states that: ‘A Participant shall at all times act in the best interests of the game and shall not act in any manner which is improper or brings the game into disrepute or use any one, or a combination of, violent conduct, serious foul play, threatening, abusive, indecent or insulting words or behaviour’. See FA Disciplinary Regulations, above n 83, 115.
\textsuperscript{96} FA Disciplinary Regulations, above n 83. For a high-profile case involving an ‘Aggravated Breach’ pursuant to Rule E3(2) by a coach see: The Football Association v Peter Beardsley, 18 September 2019.
investigation will be required’. The internal self-regulation of football is an issue which requires in-depth analysis but, importantly, the factors discussed above would be of considerable relevance to the application of our proposed three-stage process. These factors are not only relevant when determining the most appropriate method of dealing with the mischief identified, but they can also have implications when deciding the ambit of any criminal law interventions. For instance, given the presence of comprehensive internal regulations and robust procedures, the legislature might decide to introduce a much narrower criminal offence which will focus on the most serious forms of identity-based prejudice in football.

As far as legal interventions are concerned, the legislature might decide to use a combination of civil and criminal interventions to eradicate systemic discrimination in society. For many criminal law theorists though, such as Husak, criminalisation should only be used as a last resort measure. According to Husak, if ‘nonpunitive alternatives are better in attaining the objective of the legislature’, then criminalisation should not be used. The importance of Husak’s argument is twofold. First, it reiterates the need for the legislature to identify the mischief at hand and carefully consider how this can best be addressed. Second, it highlights the fact that criminalisation is the most coercive means of social regulation. This is one of the main reasons why the legislature needs to justify its use. On this view, if nonpunitive alternatives can adequately address the ‘hate element’ of the offence, then the introduction of new criminal offences which carry a significantly higher penalty than the equivalent base crimes and/or the imposition of an enhanced punishment is unjustifiable.

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97 CPS, above n 88, para 5.
98 Section 149(1)(b) of the Equality Act 2010, for instance, provides that ‘A public authority must, in the exercise of its functions, have due regard to the need to … advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it’.
100 D. Husak, above n 99, 215.
101 This also applies to cases where the legislature considers the possibility of extending the list of protected characteristics covered by the hate crime legislation.
102 Walters, for instance, is in favour of the preservation of legal provisions which explicitly proscribe hate, but argues that ‘the punitive approach to hate crime [(that is the imposition of an enhanced punishment)] is
Similarly, if non-punitive interventions can adequately deal with certain forms of discrimination, such as unconscious bias, then criminalisation should be reserved for the most serious forms of identity-based prejudice. In particular, it is argued that given the coercive nature of criminalisation and the label that can be attached to those convicted of a hate crime, it is imperative for the ambit of any prospective hate crime laws to be limited to cases where the defendant at least foresees the possibility that his conduct will demonstrate hostility based on the victim’s (actual or presumed) protected identity.

**How should the criminal law respond?**

If the legislature decides that certain forms of identity-based hostility should fall within the ambit of the criminal law, the next question to be addressed is: how should the criminal law respond to the mischief identified? To address this question, the legislature must reflect on the decisions taken during the first two steps of the process. If, for instance, the legislature concludes that identity-based criminality is qualitatively different from base crimes, then it should introduce a new criminal offence(s) to deal with this distinct kind of wrong. As part of this process, the legislature must scrutinise any relevant pre-existing offences and decide whether the label attached to each of these crimes could accurately reflect the nature and blameworthiness of identity-based prejudice.

If the legislature concludes that a new criminal offence(s) must be introduced because the current law cannot adequately address the mischief identified, then particular attention needs to be paid to the structure of this new offence(s). The legislature must also take into

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counterintuitive to the task of preventing hate and prejudice-based conduct from proliferating in society’. Instead, he advocates for the use of restorative justice processes which are far more effective in terms of repairing the harm caused and challenging identity-based prejudice. See M. Walters, ‘Readdressing Hate Crime: Synthesising Law, Punishment, and Restorative Justice’ in T. Brudholm and B. Schepelern (eds) *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford University Press, 2018) pp 150 and 165-166.
consideration any normative and practical issues identified during the second stage of this process. These normative and practical issues can have important implications for the structure of the offence introduced, such as the need for the label attached to the offence to accurately reflect the blameworthiness of the wrong committed.

Before explaining how the decisions taken during the first two stages of this process can have implications for the structure of any hate crime laws, it will be instructive to elaborate briefly on the two models of criminalisation that are usually adopted by legislatures around the world to deal with identity-based prejudice, that is the discriminatory selection model and the animus model.103 Under the former model an offence can be regarded as a hate crime if the perpetrator chose his victim because of their identity, such as their actual or perceived disability.104 The animus model requires the prosecution to prove that the defendant’s crime was motivated by hatred towards the victim’s identity.105 As far as England and Wales is concerned, it adopts a modified and more inclusive version of the animus model since it requires that the perpetrator was motivated by hostility and/or his conduct demonstrated hostility towards the victim’s protected identity.106 This provides the necessary flexibility needed to deal with a range of identity-based criminality well beyond what can be regarded as paradigmatic forms of hatred. In fact, someone’s behaviour might fall within the scope of section 28(1)(a) of the 1998 Act even if it was ‘not intended or even understood by the offender as being an expression of bigotry’ and is something which raises a series of normative and practical concerns, such as issues relating to fair labelling.107

104 F. Lawrence, above n 103, 324.
105 F. Lawrence, above n 103, 324.
106 In its final report, the Commission suggested modifying the motivation limb to cover behaviour motivated by prejudice as well. The underlying rational for this recommendation is to capture those cases where the victim is targeted because of their perceived vulnerability stemming out of their actual or presumed disability rather than due to hostility towards disabled people. See Law Commission, n 14, para 9.94.
107 M. Walters, above n 38, 70.
What really matters for the purposes of this third stage is whether the model adopted in England and Wales is consistent with the decisions made during the first two parts of the criminalisation process. As seen above, although personal autonomy should be an integral feature of any contemporary liberal society, behaviour that undermines others’ status as equal members of the polity by means of identity-based prejudice is morally problematic because it violates the principle of equality. This finding matters for two reasons. First, it suggests that the wrong committed by certain forms of identity-based prejudice is *qualitatively different* from that covered by base crimes. To treat the perpetrator’s motivations and/or demonstration of hostility as an aggravating factor at the sentencing stage constitutes a failure on the part of the legislature to acknowledge this as a *distinct* moral wrong. If the wrong identified during the first part of this process is qualitatively different from any base crimes, then the legislature will have (subject to any decisions made during the second stage of this process) to introduce bespoke criminal offences to deal with it. It is for this reason that we argue that the hybrid model adopted in England and Wales is inconsistent and sends conflicting messages about the wrongfulness of identity-based criminality.

Second, if the wrongfulness of identity-based prejudice lies in the undermining of the victim’s status as an equal member of the polity and if it was decided that only the most serious and blameworthy manifestations of hostility should be criminalised, then the scope of the criminal law should be limited to cases where the perpetrator *intentionally or recklessly* demonstrates hostility based on the victim’s protected identity. Clearly, this is not the case with section 28(1)(a) which can result in the criminalisation and possibly the labelling of someone as a hater despite the fact that he did not even foresee the possibility that his conduct might demonstrate hostility towards the victim’s protected identity. In an attempt to ensure that the law focuses only on ‘demonstration[s] of hostility…based on prejudice’, Walters proposes the
adoption of a two-part test when applying section 28(1)(a).\footnote{M. Walters, above n 38, 71.} According to Walters, in determining whether the defendant’s conduct amounts to a demonstration of hostility the trier of fact must first consider whether ‘the offender [would] have directed the same insult towards anyone, regardless of their identity characteristics’.\footnote{Consider, for example, someone who, following an argument with the victim, who is black, throws a banana towards her. Would the perpetrator have done the same to anyone else regardless of their race? If not, the perpetrator’s conduct should be regarded as a demonstration of hostility towards the victim’s race.} If the answer is no, then they will have to consider whether the defendant is aware of the fact that his conduct demonstrates or ‘is likely to be understood by right-minded people as indicating hostility towards the victim based on the victim’s (perceived) identity characteristic’.\footnote{M. Walters, above n 38, 72.} If the answer to this second question is yes, then the defendant’s conduct should be regarded as a demonstration of hostility towards the victim’s protected identity.

Clearly, Walters’ test can limit the ambit of section 28(1)(a) only to cases where the perpetrator was \textit{at least} aware that his conduct would demonstrate hostility towards the victim’s protected identity. It is also evident that the proposed test is consistent with our earlier analysis regarding the wrongfulness of identity-based prejudice since this will only cover conduct that consciously undermines others’ status as equal members of the polity. That notwithstanding, it is argued that it is not enough to provide the trier of fact with a test (no matter how well articulated this might be) through which the over inclusiveness of the section 28(1)(a) can be mitigated. The structure of each criminal offence should accurately reflect the nature and blameworthiness of the wrong criminalised. To achieve this, section 28(1)(a) must be amended in such a way that would limit its scope \textit{only} to conduct that (at least) recklessly demonstrates hostility based on the victim’s (actual or presumed) protected identity. To this end, what we propose is for section 28(1)(a) to be amended as follows:
An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if: (a) at the time of committing the offence, or immediately before or after doing so, the offender intentionally or recklessly demonstrates towards the victim of the offence hostility based on the victim’s membership or presumed membership of a racial or religious group.

If our proposed three-stage process had been adopted by the legislature prior to the enactment of section 28(1)(a), the necessity for the insertion of the ‘intentionally or recklessly’ clause would have been immediately apparent. Adding a mens rea of recklessness ensures that the ambit of section 28(1)(a) is limited only to cases where the perpetrator at least foresaw the possibility that his conduct might demonstrate hostility towards the victim’s (actual or presumed) ethnic or religious background. Based on Cunningham, in order for recklessness to be established: i) the defendant must foresee the risk at hand (that is a subjective limb); and; ii) he must unreasonably decide to run it (that is an objective limb). If our recommendation is acted upon, it would be impossible for someone to be convicted for a RRAO (or face a sentence uplift) if they did not at least foresee the possibility that their conduct might demonstrate hostility based on the victim’s protected identity.

Does the defendant’s recklessness in this case though amount to conduct that undermines the victim’s status as an equal member of the polity? We argue that it does. By foreseeing and unreasonably deciding to run the risk, the defendant demonstrates sufficient culpability to be labelled as someone whose conduct undermines the victim’s (and their group’s) status as an equal member of the polity. This is not to suggest that someone who recklessly demonstrates hostility based on the victim’s protected identity is as blameworthy as someone who

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111 The same applies to section 66(4)(a) of the 2020 Act which provides for the imposition of a sentence uplift in cases where the defendant demonstrated hostility towards the victim’s protected characteristic.

112 Cunningham [1957] 2 QB 396.
intentionally does so.\textsuperscript{113} Instead, what it is argued is that those who recklessly demonstrate hostility based on the victim’s protected identity are sufficiently blameworthy to fall within the ambit of section 28(1)(a).

A potential objection that might be raised against our proposal is that it might blur the line between sections 28(1)(a) and (b). Is there a difference between someone who intentionally demonstrates hostility and another whose conduct is motivated (at least partly) by hostility based on the victim’s protected identity? Courts might in fact come across cases where the defendant’s conduct falls within the ambit of both our amended version of section 28(1)(a) and section 28(1)(b). Our response to this criticism is that if there is strong evidence to suggest that the crime was motivated by ethnic or religious hostility, then the defendant should be charged with the section 28(1)(b) offence because this will reflect more accurately the blameworthiness of the wrong committed.\textsuperscript{114} In contrast to section 28(1)(a), behaviour that falls within section 28(1)(b) is inherently prejudicial. It manifests deep-seated animosity towards the victim’s protected identity. This is not necessarily the case with a defendant, who in the heat of the moment, intentionally demonstrates hostility towards the victim’s identity. For this reason, we do not only believe that our recommendation will preserve the normative distinction between sections 28(1)(a) and (b), but it will also better capture the different manifestations of identity-based hostility and therefore reflect more accurately the blameworthiness of the wrong committed.

\textsuperscript{113} There are two types of intention currently recognised in the English and Welsh criminal law: direct and oblique. In order to establish direct intention, it must be either the defendant’s purpose/desire to demonstrate hostility based on the victim’s protected identity or the demonstration of hostility must be a necessary means to an end (see Moloney [1985] AC 905). In order to establish oblique intention: i) the demonstration of hostility must a virtually certain outcome of the defendant’s conduct (this is an objective limb); ii) the defendant himself must foresee the demonstration of hostility as a virtual certainty (this is a subjective limb); and the trier of fact must choose to find an intention (see Woollin [1998] 4 All ER 103).

\textsuperscript{114} Our argument applies to the current law as well.
Moreover, it could be argued that our proposal will make the law underinclusive since it will not capture cases where the defendant did not foresee what should have been an obvious risk. Our response to this criticism is twofold. First, it is not our intention through this paper to determine whether objective recklessness should be restored.¹¹⁵ Second, as mentioned before, judges and jurors are already reluctant to convict someone of a RRAO if the racial or religious hostility demonstrated was not a key aspect of the offence committed.¹¹⁶

Conclusion

While most Western jurisdictions have introduced specific legislation to deal with certain forms of identity-based criminality, the criminalisation of hate remains a strongly contested topic. Even in England and Wales, which appears to have a comprehensive hate crime legislation, the law poses a series of normative and practical challenges for legal commentators. One of the main objectives of this article was to engage with some of the most important normative and practical challenges posed by the English and Welsh hate crime legislation, such as the fair labelling challenges raised by section 28(1)(a). This was done in order to make the case for rationalisation and reform. It has been argued that the law in this area is incoherent and lacks (or at least gives the impression that it lacks) clear moral foundations due to the failure of the legislature to treat the various hate crime provisions as an interconnected body of laws and see the criminalisation of hate as a three-stage process. That is, to initially identify the mischief at hand, to determine what is the most appropriate method to address this, and finally if the legislature decides to resort to criminalisation, then it should bear in mind any decisions made during the first two stages. Accordingly, our aim was to identify an analytical

¹¹⁵ Objective recklessness was originally introduced in Caldwell [1982] AC 341, but was later abolished by the House of Lords in G [2003] UKHL 50.
¹¹⁶ E. Burney and G. Rose, above n 39, 20-21; M. Walters and others, above n 15, 968 and 976.
tool which can be used by legislatures, policy makers and legal commentators around the world as a means of evaluating, developing and reforming the hate crimes laws of their jurisdiction. So, whilst it was not our intention to formulate a normative theory of hate crime laws, and the answer to many of the questions posed above will remain jurisdiction specific, it is contended that utilisation of our proposed three-stage process will prove instrumental in developing a more principled and coherent legal framework.