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Ageism as a Hate Crime: The Case for Extending Aggravated Offences to Protect Age Groups

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Abstract

This paper argues that hate crime laws in England and Wales should be extended to protect age groups by aggravating offences that are based on or motivated by hostility to age groups. I critically assess the following arguments for this: that age-related hate crime can impose greater psychological distress than equivalent non-hate crime and this justifies the increased punishments that aggravated offences offer; that hate crime laws can justifiably protect older people because older people are relatively vulnerable to crime; that extending aggravated offences to protect age groups can justifiably punish hate-crime offenders for their increased culpability in contributing to marginalisation of age groups; and creating distinct aggravated offences for age hostile crimes has symbolic value to reflect the grave moral wrong of these crimes and to communicate that the state is committed to eradicating discrimination against age groups.

Key words:

Hate crime; Ageism; Age discrimination.

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1. Introduction

In 2014 the Law Commission published a report identifying inequality in the hate crime legal framework.¹ Aggravated offences in England and Wales, it was explained, increase the punishment of hate crimes that target race groups and religious groups but do not increase the punishment for crimes that target many groups with a history of experiencing discrimination and prejudice, such as disabled people, transgender people, women and elderly people. This inequality in protection risks communicating that some groups are more worthy of protection than others.² The Law Commission are conducting another review to evaluate (among other things) whether aggravated offences should be extended in England and Wales to include additional protected characteristics.³

This paper considers whether there should be new aggravated offences in England and Wales for crimes based on or motivated by hostility to age groups.⁴ Currently, offenders can receive an increase in a sentence under the enhanced sentencing regime if it is proven that the

¹ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014).

² *ibid*, para 4.15-4.17.

³ The project started in March 2019. It is a review on how to make legislation on hate crime more effective and to consider whether hate crime legislation should protect additional groups, including people with disabilities, women and age groups. A report making recommendations is due to be published in 2021.

<<https://www.lawcom.gov.uk/project/hate-crime/>> accessed 2 November 2020.

⁴ Age is a protected characteristic in hate crime laws in New South Wales, Canada, New Zealand, District of Columbia, Florida, Iowa, Louisiana and Vermont. For details, see James Chalmers and Fiona Leverick, 'A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review' (2017) 52-57.

offender targeted the victim because of the victim's age or exploited the victim's vulnerability;⁵ however, age is not a protected characteristic under the aggravated offences in England and Wales, and therefore crimes that are based on or motivated by hostility to age groups are not labelled as hate crimes.⁶ While there has been discussion in consultations on whether age should be a protected characteristic in England and Wales's hate crime legal framework, there has been limited engagement with the topic in the academic literature.⁷

This paper constructs an equality-based argument for extending hate crime laws to aggravate offences that are based on or motivated by hostility to age groups. Further to this, I argue that the justifications for the increased punishments of hate crime laws apply to age hostile crimes in a similar way that they apply to race and religious hostile crimes, which are the crimes that are currently punished as aggravated offences in England and Wales, and therefore equality and consistency require that age groups receive similar protection from

⁵ Sentencing Guidelines Council, *Overarching Principles: Seriousness*, 5.

<https://www.sentencingcouncil.org.uk/wp-content/uploads/Seriousness-guideline.pdf> accessed 2 November 2020.

⁶ The Hate Crime Bill, which has been introduced to the Scottish Parliament, proposes the introduction of age as a protected characteristic in the Scottish hate crime legal framework, which would provide for statutory aggravation for offences motivated by prejudice towards age groups.

⁷ Jon Garland, 'Difficulties in Defining Hate Crime Victimization' (2011) 18 *International Review of Victimology* 25, 31; Helia Garrido Hull, 'The Not-so-Golden Years: Why Hate Crime Legislation is Failing a Vulnerable Aging Population' (2009) *Mich St L Rev* 387; Jennifer Schweppe, 'Defining Characteristics and Politicizing Victims: a Legal Perspective' (2012) 10 *J Hate Stud* 173 (at 187-188 it is recommended that hate crime laws include age as a protected characteristic).

hate crime laws as race and religious groups.⁸ The failure to include age as a protected characteristic in aggravated offences in this context unjustifiably communicates that age groups do not deserve equal protection under the criminal law to race and religious groups.⁹

In making this argument, I critically assess four major justifications for the increased punishments of hate crime laws and I apply these to age-related hate crime, including, firstly, the argument that hate crimes can cause more harm compared to non-hate crimes and therefore hate crimes are deserving of increased punishment;¹⁰ secondly, the argument that hate crime laws are justified because they protect groups that have increased vulnerability to crime;¹¹ thirdly, the argument that hate crime offenders have increased culpability because they risk contributing to the marginalisation and oppression of groups that are vulnerable to

⁸ Consistency is important for hate crime laws because hate crime laws have a symbolic function to communicate that the groups within the protection of hate crime laws deserve special protection. If the justifications for hate crime laws apply in an analogous way to groups outside of the protection of hate crime laws, then hate crime laws unjustifiably communicate that groups outside the scope of protection do not deserve equal concern and respect to the groups that receive protection from hate crime laws. See Alexander Brown, 'The "Who?" Question in the Hate Speech Debate: Part 1: Consistency, Practical, and Formal Approaches' (2016) 29 Can JL & Jur 275.

⁹ Frederick M Lawrence in *Punishing hate: Bias Crimes under American Law* (Harvard University Press 2009) 14-15 argues that there is 'no such thing as "neutral" bias crime law.' He argues that the decision to exclude certain groups from protection of these laws can communicate that the excluded groups do not deserve the protections that these laws offer.

¹⁰ Nathan Hall, *Hate Crime* (2nd edn Routledge 2013), 166.

¹¹ Alon Harel and Gideon Parchomovsky, 'On Hate and Equality' (1999) 109 Yale LJ 507.

discrimination,¹² and, finally, the argument that hate crime laws are justified because they express condemnation of prejudice-based crimes and send a message to victims that the state values them as equals deserving of concern and respect.¹³

Regarding the ‘greater harm’ justification, I argue that it is plausible that age hostile crimes can impose greater psychological distress than equivalent crimes that are not prejudice-based, which may justify using hate crime laws to increase the severity of the punishment of age hostile crimes compared to equivalent non-hate crimes. However, there is a lack of empirical evidence on whether age hostile crimes impose increased psychological distress.

Regarding the ‘vulnerability’ justification, we can justify protecting age groups under hate crime laws because older people are relatively vulnerable to crime due to, on average, having greater physical weakness than other groups making it more difficult for older people to defend themselves. Also, older people tend to have more fragile bodies resulting in crime having a more devastating impact on older people compared to other groups. However, there is evidence that older people find it stigmatising for the criminal law to assume they have special vulnerability. This weakens the vulnerability justification for aggravated offences for age hostile crimes.

The most persuasive argument for the creation of a distinct offence of age-related aggravated offences is that an offender has *increased culpability* for committing crimes that are hostile to age groups. Violence against older people operates in a context in which age groups are devalued and discriminated against. Creating age-related aggravated offences

¹² Allison Marston Danner, ‘Bias Crimes and Crimes Against Humanity: Culpability in Context’ (2002) 6 Buffalo Crim LR 389.

¹³ Antti Kauppinen, ‘Hate and Punishment’ (2015) 30 Journal of Interpersonal Violence 1719.

justifiably punishes the perpetrators of age hostile hate crime for contributing to the cultural context in which age groups are stigmatised and devalued. If we combine this argument with the idea that aggravated offences have an important symbolic function to condemn hate crime as reprehensible and to communicate to hate crime victims that the state is committed to eradicating discrimination and violence against these groups, then we have support for creating aggravated offences to punish age hostile crimes as hate crimes.

I structure this paper as follows: firstly, I explain and justify the use of reflective equilibrium methodology to evaluate whether aggravated offences should be extended to protect age groups; secondly, I explain that the structure of hate crime laws in England and Wales risks communicating that groups outside its scope of protection are less worthy of concern and respect by the legislature; thirdly, I outline justifications of hate crime laws and argue that these justifications support extending the scope of protection of aggravated offences to protect age groups; fourthly, I argue that aggravated offences should protect all age groups from age-related hate crime rather than only older people; fifthly, I argue that aggravated offences should punish age hostile crimes but should not cover crimes that merely opportunistically target age groups; finally, I argue that the possible difficulty in securing convictions for age hostile crimes should not rule out creating these offences.

2. Methodology

This paper addresses a moral question – whether it is justified to extend hate crime laws to create a distinct aggravated offence for age hostile crimes. To answer this, I adopt wide

reflective equilibrium methodology.¹⁴ This requires that we form moral judgments after a process of reflection on the coherence between our initial beliefs about a moral issue, the moral principles that can justify these beliefs, and background theories and empirical facts that are relevant to the moral issue.¹⁵ In this process, we must revise our beliefs and principles as a result of challenges to them.

Wide reflective equilibrium attempts to create justification for moral judgments. It recognises that justification cannot occur merely by finding coherence between our moral judgments and moral principles that can justify these judgments. Our moral judgments may reflect self-interest or historical accident rather than moral truth. Instead, wide reflective equilibrium requires that we consider background theories about the person to generate philosophical arguments about the strengths or weaknesses of moral principles and judgments about an issue. To illustrate this, I summarise an example of the methodology in the context of hate crime laws.

We can start with a widely held moral intuition, namely, the belief that it is justified to punish racist crimes more severely than similar crimes that are not prejudice-based by imposing higher sentences for racist crimes and by labelling racist crimes as hate crimes. The next stage we consider moral principles that may justify this intuition, for example, justifying the increased punishment of racist hate crime because hate crimes impose greater harm than non-hate crimes. Then we consider whether this justification coheres with theories of the

¹⁴ Normal Daniels justifies the reflective equilibrium method in 'Wide Reflective Equilibrium and Theory Acceptance in Ethics' (1979) 76 *Journal of Philosophy* 256. John Rawls famously used reflective equilibrium to justify his theory of justice. John Rawls, *A Theory of Justice* (2nd Edition, Harvard University Press 1999).

¹⁵ *ibid.*

person and/or empirical facts about people. For example, if the empirical data reveals that prejudice-based crime imposes more psychological distress than similar crimes that are not prejudice-based, then this generates justification for hate crime laws imposing more severe punishments for prejudice-based crimes.

Once we identify a set of principles that cohere with background theories about the person and empirical data, then we can examine whether these principles also justify punishing age hostile crimes as hate crimes. To do this, we can examine how the justifications for hate crime laws cohere with background theories on the meaning of age and empirical facts about age. For example, we can examine whether the social salience of age can mean that age hostile crimes are likely to cause more harm than similar crimes that are not prejudice-based. If this can be established, then we have an argument for extending hate crime laws to create an aggravated offence for age hostile crimes. In this way, achieving coherence between our moral beliefs, moral principles and background theories about the person and empirical data generate arguments that justify extending hate crime laws to protect age groups.

Importantly, however, some argue that wide reflective equilibrium fails to justify moral judgments. Richard Brandt, for example, argues that simply making a 'coherent' set of beliefs does not make those beliefs justified.¹⁶ However, even if wide reflective equilibrium cannot create moral certainty, it nonetheless offers value by structuring a moral argument to demonstrate that a widespread moral belief about an issue requires the reader to endorse the

¹⁶ Richard Brandt, 'The Science of Man and Wide Reflective Equilibrium' (1990) 100 *Ethics* 259.

results of reflective equilibrium that concern a similar or analogous issue.¹⁷ For example, this paper starts with the widespread moral belief that it is justified to punish racist crimes as hate crimes. Then the paper proceeds to draw upon theories of age and empirical data about age to illustrate that some of the principles that justify aggravating racist crimes requires that we endorse the moral judgment that hate crime laws should also aggravate age hostile crimes.

3. Aggravated Offences in England and Wales

In this section, I outline the aggravated offences legal framework and explain that this risks communicating to groups outside its scope of protection, such as age groups, that these groups do not deserve the special protections that aggravated offences offer.¹⁸ This is problematic if the rationales for hate crime laws apply in a similar way to protected groups and the unprotected groups. It is important, therefore, to evaluate whether the justifications for aggravated offences extend to groups that are currently outside the scope of protection of hate crime laws, which I explore later in this paper.

¹⁷ Wide reflective equilibrium can be part of a pragmatic attempt to encourage convergence on a moral topic.

See Wibren Van der Burg and Theo van Willigenburg (eds), *Reflective Equilibrium: Essays in Honour of Robert Heeger* (Springer 1998) 5.

¹⁸ Hate crime law in England and Wales can be grouped into three categories: aggravated offences under the Crime and Disorder Act 1998, which deal with offences involving racial or religious hostility; stirring up hatred offences under the Public Order Act 1986, which relate to actions that are intended, or likely, to stir up hatred based on race, religion and sexual orientation; and enhanced sentencing provisions under the Criminal Justice Act 2003, which apply to hostility on the grounds of race, religion, sexual orientation, disability or transgender identity.

The Crime and Disorder Act 1998 ('CDA') holds that certain offences can be 'aggravated' when a crime is 'motivated by'¹⁹ or 'based on hostility'²⁰ towards a race group or religious group. The offender will receive harsher punishment for a hate crime, including the potential to receive a higher sentence than the maximum for the 'basic' offence and receive a distinct criminal label.²¹ For example, common assault has a maximum sentence of 6 months imprisonment,²² but if an offender had committed the assault based on hostility towards the victim because the victim was black, then the offender can be convicted of 'racially aggravated assault' which has a higher maximum sentence of 2 years imprisonment.²³

Hostility is not defined in the legislation but it can be understood to mean some degree of animosity towards the victim because of their race or religion, including dislike or contempt.²⁴ It follows that, strictly speaking, 'hate crime' laws in England and Wales are not just concerned with 'hate' per se but can punish actions motivated by negative attitudes towards victim groups.²⁵ This means that when we refer to 'hate crime', we tend to mean crimes that are prejudice-based rather than necessarily related to the narrower concept of 'hate'.

¹⁹ CDA, s 28(1)(a).

²⁰ CDA, s 28(1)(b).

²¹ CDA, s 28-32.

²² Criminal Justice Act 1988, s 39.

²³ CDA, s 29.

²⁴ Law Commission (n 1), para 2.7.

²⁵ Hall (n 10), 9.

The offences that can be ‘aggravated’ include:

- malicious wounding or inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861;²⁶
- assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861;²⁷
- common assault;²⁸
- destroying or damaging property contrary to section 1(1) of the Criminal Damage Act 1971;²⁹
- threatening, abusive or insulting conduct intended, or likely, to provoke violence or cause fear of violence contrary to section 4 of the POA;³⁰

²⁶ CDA s 29(1)(a).

²⁷ CDA, s 29 (1)(b).

²⁸ CDA, s 29(1)(c).

²⁹ CDA, s 30(1).

³⁰ CDA, s 31(1)(a).

- threatening, abusive or insulting conduct intentionally causing harassment, alarm or distress contrary to section 4A of the POA;³¹
- threatening or abusive conduct likely to cause harassment, alarm or distress contrary to section 5 of the POA;³²
- harassment and stalking contrary to sections 2 and 2A of the Protection from Harassment Act 1997;³³ and
- putting people in fear of violence, and stalking involving fear of violence, serious alarm or distress contrary to sections 4 and 4A of the Protection from Harassment Act 1997.³⁴

There are currently only two ‘protected characteristics’ in the aggravated offences provisions: race and religion. Race is defined as racial groups, skin colour, nationality, national origins, and ethnicity.³⁵ Religion is defined as any religious group.³⁶

³¹ CDA, s 31(1)(b).

³² CDA, s 31(1)(c).

³³ CDA, s 32(1)(a).

³⁴ CDA, s 32(1)(b).

³⁵ CDA, s 28(4).

³⁶ CDA, 228(5).

Aggravated offences offer distinct punishment *over and above* the punishment available for the ‘basic’ crime even in circumstances where the ‘basic’ crime is based on or motivated by prejudice towards groups other than race or religious groups. While prejudice-based crimes outside the scope of the hate crime legal framework can receive more severe punishment compared to similar crimes that are not prejudice-based, this punishment does not necessarily reach the same level of aggravated offences. For example, section 146 of the Criminal Justice Act 2003 provides that courts *must* consider any hostility on the grounds of sexuality, disability and against transgender people when deciding on a sentence, which means that assaults motivated by hostility on the grounds of sexuality, disability and against transgender people can receive a more severe sentence than an ordinary assault. In addition, the sentencing guidelines require that courts consider general aggravating factors such as factors that indicate higher culpability for crimes and therefore crimes that warrant higher sentences.³⁷ This includes crimes based on hostility to minority groups, crimes targeting vulnerable groups and/or crimes with elements of abuse of power or trust.³⁸ However, the enhanced sentencing regime does not, unlike aggravated offences, label crimes motivated by hostility to gay people, disabled people, transgendered people or older people distinct from the ‘basic’ offence. For example, an assault conviction will not be labelled differently even in circumstances where the assault was motivated by ageism, sexism or homophobia. Also, sentences for crimes that are hostile to social groups that are outside the protection of the aggravated offences legal framework cannot be raised above the maximum of the ‘basic’ crime. For example, a common assault motivated by ageism has a maximum sentence of 6

³⁷ See Sentencing Guidelines Council (n 5).

³⁸ *ibid*, para 1.17.

months, which is the same as the maximum sentence of the basic offence of a common assault that is not prejudice-based.³⁹

In this way, aggravated offences in England and Wales provide special protections to race and religious groups by aggravating offences that are based on or motivated by race or religious hostility. However, as explained above, these special protections are problematic if it can be shown that the justifications for the increased protections to race groups and religious groups can also apply in an analogous way to justify increased protection to other social groups.⁴⁰ In these circumstances, we have an equality-based argument for extending the scope of protection in the hate crime legal framework. In the next section, I explain that the justifications for the increased severity of punishment offered to racist crimes and crimes targeting religious groups can apply in an analogous way to justify aggravating age hostile crimes.

4. Justifications for Increased Punishment of Hate Crimes

It is important to note that justifications for increasing the punishment of hate crimes do not necessarily recommend using aggravated offences for increasing the punishment rather than some other method, such as using enhanced sentencing to punish hate crimes.⁴¹ Nonetheless, this paper argues that we can draw upon the justifications for increasing the punishment of hate crimes as part of a wider justification for the creation of a new distinct aggravated offence for age hostile crimes. To do this, as explained above, I construct an equality-based

³⁹ Criminal Justice Act 1988, s 39.

⁴⁰ Brown (n 8).

⁴¹ Chalmers and Leverick (n 4), 23.

argument for treating age hostile crimes in an equivalent way to race hostile crimes and crimes based on or motivated by hostility towards a religion, which currently are punished as aggravated offences. It follows from this that the current failure to punish age hostile crimes as aggravated offences unjustifiably communicates that age groups do not deserve equal concern and respect.

It can be argued that it is possible to create equality between the punishment of racist crimes, religious hostility crimes and age hostile crimes by, for example, abolishing aggravated offences altogether and relying on the enhanced sentencing regime, or some other mechanism, for punishing these offences.⁴² However, I argue that this approach is unsatisfactory because aggravated offences offer symbolic value in proclaiming that the state values hate crime victims as equals in society and is committed to eradicating discrimination and prejudice against these groups by labelling and punishing hate crimes as distinct offences.⁴³ It is therefore better to create a new distinct offence for age hostile hate crimes to communicate to victims of age hostile crimes that they deserve equal protection to the groups that currently receive protection from hate crime laws in England and Wales and to communicate that the state is also committed to eradicating prejudice against age groups. To make this argument, I first consider the major justifications for increasing the punishments of hate crimes and argue that these justify increasing the punishment of age hostile crimes compared to non-hate crimes. Then I argue that the most appropriate way to increase the

⁴² For an argument against hate crime laws and their special protections to social groups, see James Jacobs, 'Should Hate be a Crime' (1993) 113 *Public Interest* 3.

⁴³ Gail Mason, 'The Symbolic Purpose of Hate Crime Law: Ideal Victims and Emotion' (2014) 18 *Theoretical Criminology* 75.

punishment of age hostile crimes would be to create a distinct aggravated offence for age hostile crimes.

A. Increased Psychological Impact of Hate Crime

Many theorists justify the increased severity of punishments offered by hate crime laws, including aggravated offences, by arguing that hate crimes impose ‘distinct emotional and psychological harms’.⁴⁴ In other words, hate crimes *hurt more* than similar non-hate crimes, and this warrants the increased severity of punishment that hate crime laws offer.⁴⁵ There are two versions of this theory: firstly, the idea that hate crime laws are justified because hate crime imposes increased psychological distress on the *victim*; secondly, the idea that the additional criminal punishment imposed by hate crime laws can be justified by the increased impact hate crime has on the *wider community* compared to non-hate crime.

According to Frederick Lawrence, hate crime can have a damaging impact not just on the direct victims of hate crimes, but also on the targeted community, including race groups and religious groups, and on wider society at large.⁴⁶ Because hate crime sends a message that the targeted community must ‘keep in their place’, these messages can be felt by all people who are members of the targeted groups, which can cause hurt and psychological impact on these groups. The harms of hate crime can also be felt by people who are not part

⁴⁴ Paul Iganski, ‘Hate Crimes Hurt More’ (2001) 45 American Behavioral Scientist 626.

⁴⁵ This view was taken up by the US Supreme Court in *Wisconsin v Mitchell* 508 US 476 (1993) at 488: ‘bias motivated crimes are more likely to...impose distinct emotional harms on their victims’.

⁴⁶ Frederick M Lawrence, ‘The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes’ (1994) 93 Michigan Law Review 320, 345-348.

of the targeted community because hate crime undermines the ‘shared values of equality among its citizens and racial and religious harmony in a heterogeneous society.’⁴⁷

However, there is a lack of robust empirical evidence substantiating the idea that hate crime imposes increased psychological distress on the *wider community* compared to non-hate crime.⁴⁸ Also, many have cast doubt on the idea that a crime motivated by hostility to social groups necessarily causes more fear in the targeted community than crimes motivated by greed, opportunism or other motives.⁴⁹ However, there is empirical support that hate crimes hurt *victims* more than non-hate crimes and this can justify the increased punishments that hate crime laws offer. For example, in an early US study, Arnold Barnes and Paul Ephross reported that victims of ethnic hate crimes experience increased levels of negative emotions, including increase levels of nervousness, stress and low self-esteem.⁵⁰ A study by Gregory Herek et al reported that hate crimes against gay, lesbian and bisexual people resulted in increased psychological distress and that the distress persisted over a longer period of time compared to the impact of non-hate crimes.⁵¹ Further, Jack McDevitt et al compared

⁴⁷ *ibid*, 347.

⁴⁸ James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law & Identity Politics* (Oxford University Press 1998).

⁴⁹ *ibid*. Also, see Andrew Sullivan, ‘What’s so Bad About Hate? The Illogic and Illiberalism Behind Hate Crime Laws’ (1999) *New York Times Magazine*.

⁵⁰ Arnold Barnes and Paul Ephross, ‘The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attacks’ (1994) 39 *Social Work* 247.

⁵¹ Gregory Herek, Roy Gillis and Jeanine Cogan, ‘Hate Crime Victimization among Lesbian, Gay, and Bisexual Adults: Prevalence, Psychological Correlates, and Methodological Issues’ (1997) 12 *Journal of Interpersonal Violence* 195

the physical and psychological impact of hate crimes and non-hate crimes.⁵² They sent a survey to all victims of bias-motivated aggravated assaults in the Boston area of the US between the years of 1992 and 1997 and a survey to a random selection of non-bias assaults over the same area and time period.⁵³ The victims of hate crime reported increased intensity of post-event distress compared to victims of non-hate crime, including more intrusive thoughts, more depression, more nervousness, and revealed that they experienced this distress for longer than victims of non-hate crime.⁵⁴ The victims of hate crime were also more likely to report feeling unsafe.⁵⁵ However, these studies have weaknesses. The studies of Barnes and Ephross, Herek and McDevitt have small samples sizes limiting the reliability of the data that purports to evidence distinct psychological harms that result from hate crime.⁵⁶

However, there are more recent studies that have larger sample sizes and more robust methodology, which has made a compelling case that certain forms of hate crime can hurt more than non-hate crime. For example, Paul Iganski and Spiridoula Lagou studied data from the British Crime Survey recorded over a three year period.⁵⁷ They compared the data on the emotional impact of 441 instances of crimes that were perceived to be racially-biased to

⁵² Jack McDevitt, Jennifer Balboni, Luis Garcia, Joann Gu, 'Consequences for Victims: A Comparison of Bias- and Non-bias-motivated Assaults' (2001) 45 *American Behavioral Scientist* 697.

⁵³ *ibid*, 702.

⁵⁴ *ibid*, 708-710.

⁵⁵ *ibid*, 710.

⁵⁶ Barnes and Ephross study the impact of hate crimes on 59 victims. The Herek study had a sample size of 147. The McDevitt study had a sample size of 136.

⁵⁷ Paul Iganski and Spiridoula Lagou, 'Hate Crimes Hurt Some More than Others: Implications for the Just Sentencing of Offenders' (2015) 30 *Journal of Interpersonal Violence* 1696.

crime that was not perceived to be biased-motivated.⁵⁸ The victims of crimes perceived as racially-biased were significantly more likely to report loss of confidence, anxiety, disruption to sleep and other negative emotional states compared to victims of crimes not perceived as biased.⁵⁹

Kevin Smith et al conducted a similar study but focussed on hate crime directed at a range of characteristics, including race, religion, gender-identity, sexual orientation and disability.⁶⁰ They reported on data from the British Crime Survey by combining data on hate crime recorded in 2009/2010 and 2010/2011. The combined data recorded approximately 260,000 incidents of hate crime and revealed that victims of hate crime reported a higher emotional impact from hate crime compared to the impact reported by victims of non-hate crimes.⁶¹ For example, the survey data revealed that a higher proportion of hate crime victims experience fear (39 per cent) and anxiety (23 per cent) resulting from the crime than those who reported fear (14 per cent) and anxiety (6 per cent) from crimes more generally.⁶²

⁵⁸ *ibid*, 1702.

⁵⁹ *ibid*, 1704.

⁶⁰ Kevin Smith, Deborah Lader, Jacqueline Hoare and Ivy Lau, 'Hate Crime, Cyber Security and the Experience of Crime Among Children: Findings from the 2010/11 British Crime Survey' London: Home Office (2012). The British Crime Survey was a face-to-face survey of people in England and Wales where people were interviewed about their experience of crime in the previous 12 months.

⁶¹ *ibid*, 17.

⁶² *ibid*, 22.

Another large study by Matthew Fetzer and Frank Pezzella examined the US National Crime Victimization Survey (NCVS) of 2013.⁶³ They studied the effect of 4,645,961 violent crimes of which 302,486 were bias crimes.⁶⁴ They reported that the victims of bias motivated crimes reported significantly more severe negative emotional impacts, including anxiety, depression, anger and sadness, than victims of non-bias crime.

Taken together, the above studies offer a compelling justification for hate crime laws. We now need to consider whether we can justify aggravating age hostile crimes on the grounds that these crimes may *hurt more* than non-hate crimes. To establish this, we would need to consider whether age hostile crimes are widespread and can *hurt more* than non-hate crimes by causing the distinct emotional harms outlined above, including increased fear of crime, intrusive thoughts, anxiety, depression etc. If this is made out, then this would offer support for hate crime laws offering equal protection for victims of age hostile hate crimes to the protection currently offered to race and religious groups under hate crime laws in England and Wales.

Further to this, the British Crime Survey data offers evidence that age-related hate crime is widespread.⁶⁵ The British Crime Survey estimates that there were around 143,000 incidents of age-motivated hate crimes a year over the period of 2009/10 and 2010/11, which is higher than the figure for gender motivated hate crime, which had about 120,000 incidents

⁶³ Matthew Fetzer and Frank Pezzella, 'The Nature of Bias Crime Injuries: A Comparative Analysis of Physical and Psychological Victimization Effects' (2016) 34 Journal of Interpersonal Violence 3864.

⁶⁴ *ibid*, 3880.

⁶⁵ Smith et al (n 60), 25.

a year over the period of 2009/10 and 2010/11.⁶⁶ However, the report noted that we should treat the British Crime Survey statistics on age-related hate crime with caution because it is possible the survey respondents reported that they were victims of age-motivated hate crime when, contrary to this perception, they may have been targeted because they were vulnerable or an ‘easy target’ because of their age, which would not constitute a hate crime under the current structure of hate crime laws in England and Wales.⁶⁷ Similarly, Ivan Hare has explained that ‘[e]lderly or disabled victims are selected not because the perpetrator hates the elderly or the disabled, but because he anticipates less resistance from such a victim’.⁶⁸ Also, when Hannah Mason-Bish interviewed police on hate crime, some police responders had explained that attacks on the elderly are probably motivated by opportunism rather than hatred towards older people and that they ‘couldn’t begin to think’ of common examples of crimes that would be motivated by hate towards the elderly.⁶⁹

These assertions cast doubt on the idea that age-related hate crime is a widespread practice that can impose greater harms than similar non-hate crimes. However, it is important to note that, as explained earlier in this paper, hate crime law is not just about *hate*-based crimes; hate crime laws punish crimes that are motivated by or based on *dislike* or *generally*

⁶⁶ *ibid*, 25.

⁶⁷ *ibid*, 25.

⁶⁸ Ivan Hare, ‘Legislating Against Hate: The Legal Response to Bias Crimes’ (1997) 17 OJLS 415, 433.

⁶⁹ Mason-Bish reports that a senior police officer from the Association of Chief Police Officers (ACPO) stated that if ‘someone is old and frail and gets attacked by someone in the street, they were probably motivated by the opportunism of taking someone’s bag’. See Hannah Mason-Bish, ‘Examining the Boundaries of Hate Crime Policy: Considering Age and Gender’ (2013) 24 Criminal Justice Policy Review 1, 10.

negative attitudes towards the targeted groups.⁷⁰ In this context, it is possible to conceive that crimes can be motivated by dislike or generally negative attitudes towards age groups. As Sujata Ray et al explains, ‘age-based discriminatory practices...[pervade] the fields of culture; physical appearance; public image; language; media and advertising; work; and healthcare’.⁷¹ Ageism is embedded in a range of different context in our society, and, following this, it is plausible that ageism can motivate crimes and that these crimes could fall within the remit of aggravated offences that are motivated by or based on hostility to age groups.

Nonetheless, there is a lack of empirical evidence on the psychological impact of age-related hate crime on victims which means it is difficult to justify creating a distinct aggravated offence for age hostile hate crime on the grounds that age hostile hate crime can cause more harm than non-hate crime.⁷² The studies on the impact of hate crime outlined above examine the impact of hate crime on social groups other than age. Also, gathering data on the impact of age-related hate crime is difficult because these crimes are not included in hate crime statistics in England and Wales.⁷³ However, there is some limited data from

⁷⁰ Hall (n 10), 9.

⁷¹ Sujata Ray, Ellen Sharp and Dominic Abrams, ‘Ageism: A Benchmark of Public Attitudes in Britain (2006) Age Concern, 9.

⁷² Hannah Bows, ‘Is More Law the Answer? A Review of Proposed Reforms to Address Victimisation of Older Adults, 29.

<https://www.parliament.scot/S5_JusticeCommittee/Inquiries/H_Bows_SPICe_ReportAddressing_older_victimisation.pdf> accessed 2 November 2020.

⁷³ See Home Office, ‘Hate crime, England and Wales, 2018 to 2019’.

Wales. Matthew Williams and Jasmin Tregidga conducted a qualitative and quantitative study to compare the psychological and physical impacts of hate crime across seven hate crime victim types, including the impact on age groups.⁷⁴ They found higher psychological and physical impact resulted from age-related hate crimes than the impacts of religious-based and race-based hate crime (although disability-related and transgender-related hate crime victims reported the highest psychological and physical impacts from hate crime).⁷⁵

The lack of methodologically robust empirical studies examining age-related hate crime may reflect a lack of political impetus to collect data concerning age groups rather than necessarily indicating that harmful age-related hate crime is not widespread. In these circumstances, we could wait until methodologically robust studies report on the degree of age-related hate crime before deciding on the appropriateness of aggravating age hostile crimes. But the concern with this approach is that, in the meantime, many people may be victims of age-related hate crime and may be unjustly unprotected by aggravated offences. In this context, introducing aggravated offences for age hostile crimes could act as a *precaution* to ensure that hate crime laws offer equal concern and respect to age groups by recognising that age groups may be subject to increased harms that may result from age hostile crimes – at least until evidence emerges that age-related hate crime is significantly less harmful than

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf> accessed 2 November 2020.

⁷⁴ Matthew L Williams and Jasmin Tregidga, 'Hate Crime Victimization in Wales: Psychological and Physical Impacts Across Seven Hate Crime Victim Types' (2014) 54 *The BJ Crim* 946.

⁷⁵ *ibid*, 957-958.

the hate crime currently recognised in the aggravated offences legal framework.⁷⁶ This approach is appropriate, I argue, when we consider theories about the social salience of age and the possible impact of age hostile crime.

Further to this, Paul Iganski and Abe Sweiry have explained that hate crimes can hurt more than non-hate crimes because hate crimes are inherently intimidatory ‘message crimes’ communicating that the offender despises the victim because of their membership of the targeted group.⁷⁷ In this way, hate crime stigmatises and marginalises people, and, in doing so, can be more hurtful than non-hate crime by targeting violence at the victim’s group identity in a way that non-hate crimes do not. On this account, racial and religious minorities, who are currently protected by aggravated offences, have suffered widespread discrimination and stigma and, because of this, hate crime directed at these groups can further stigmatise them by reinforcing the demeaning messages inherent in the discrimination, namely, the message that these groups have a lower moral or social worth.⁷⁸ This may cause increased feelings of loss of confidence, fear, anxiety and depression that is reported in the empirical studies discussed above.

Like race and religious groups, age groups have also been subject to widespread discrimination and stigma in society.⁷⁹ Violence against age groups operates in a culture in

⁷⁶ For this argument in the context of extending the protection offered by stirring-up offences, see Brown (n 8) 297-298.

⁷⁷ Paul Iganski and Abe Sweiry, ‘How Hate Hurts Globally’ in *The Globalisation of Hate* (Oxford University Press 2016).

⁷⁸ See also Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001).

⁷⁹ Ray et al (n 71).

which age groups have been devalued, stigmatised and socially excluded.⁸⁰ Age hostile hate crime can, perhaps in an analogous way to racist crime, communicate that the targeted group have a lower social and moral worth, which could have the effect of imposing psychological harms of loss of confidence, fear, anxiety and depression to a greater extent than crime that is not prejudice-based. In a context in which large numbers report being victims of age-related hate crime⁸¹ and age groups are often subject to discrimination, there is some justification for erring towards the judgment that it is possible age hostile hate crimes are widespread and can cause more severe distress than non-hate crimes and that a new aggravated offence for age hostile crime is justified to punish offenders for this possible increased harm. As I will explain below in the context of the denunciation theory of hate crime laws, the creation of an aggravated offence for age hostile crimes can send a clear message that the state recognises that age groups are vulnerable to this harm and that the state takes seriously the need to eradicate practices that contribute to this possible harm.

However, even if we reject the idea that we can justify hate crime laws because of the increased harms hate crime imposes on victims compared to non-hate crimes, there are alternative justifications for hate crimes law that can offer support for extending protection to age groups.

B. Hate Crime Laws Protect Vulnerable Groups

⁸⁰ Grimley Evans, 'Age Discrimination: Implications of the Ageing Process' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue* (Hart Publishing 2003).

⁸¹ Smith et al (n 60), 25.

Alon Harel and Gideon Parchomovsky justify hate crime laws on the grounds that hate crime laws offer additional protections to groups that have increased vulnerability to crime.⁸² They argue that the state has greater obligations to vulnerable people and that hate crime laws are an appropriate way of fulfilling this duty by increasing the punishment for people that target vulnerable groups.⁸³ They define vulnerable groups as those that are at greater risk of experiencing crime and/or are more likely to experience increased harm from crime.⁸⁴ The theory is victim-focussed because it does not justify hate crime laws by the culpability of the offender.⁸⁵ According to this theory, black people and certain religious groups, such as Muslims, are more likely to experience harassment and hate crime and therefore are deserving of increased protection that hate crime law offers.⁸⁶

But does this vulnerability theory of hate crime recommend that hate crime laws protect age groups? Crime statistics reveal that older people are less likely to be victims of personal crime compared to other age groups.⁸⁷ The proportion of victims of personal crime

⁸² Alon Harel and Gideon Parchomovsky, 'On Hate and Equality' (1999) 109 Yale LJ 507.

⁸³ *ibid*, 509.

⁸⁴ *ibid*, 510.

⁸⁵ Harel and Parchomovsky explain that hate crime is not necessarily more wrongful than non-hate crime and that the hate crime offender is not necessarily more culpable than the non-hate crime offender.

⁸⁶ Hannah Corcoran, Deborah Lader and Kevin Smith, 'Hate Crime, England and Wales' (Home Office 2015) Statistical Bulletin, 16.

⁸⁷ Office for National Statistics, 'Characteristics of Adults who were Victims of Personal Crime (Excluding Fraud and Computer Misuse) year ending March 2019' (ONS 2019).

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/adhocs/10794characteristicsofadults>

for the year ending March 2019 was 6 per cent directed at 65-74 year olds, 3 per cent directed at people over 75 compared to 25.8 per cent directed at 16-24 year olds and 22.6 directed at 25-34 year olds.⁸⁸ There is a stereotype that older people are more likely to be victims of scams and fraud, and while there is evidence that criminals are more likely to target mass marketing scams at older people, there is no evidence that older people are more likely to become victims of these crimes.⁸⁹ Regarding instances of hate crime, there is a lack of data on whether older people have an increased risk of experiencing hate crime because the police in England and Wales do not collect statistics on the prevalence of age-based hate crime.⁹⁰

If the crime statistics are accurate,⁹¹ we cannot justify extending hate crime laws to protect age groups on the grounds that older people are at an increased risk of being victims of crime. We can, however, use the vulnerability theory to justify extending hate crime law to protect older people on the grounds that older people constitute ‘extra-sensitive victims.’ Crime can have a more devastating impact on older people than younger people.⁹² Older

whowerevictimsofpersonalcrimeexcludingfraudandcomputermisuseyearendingmarch2019> accessed 2 November 2020.

⁸⁸ *ibid.*

⁸⁹ Office of Fair Trading, ‘Research on Impact of Mass Marketed Scams: A Summary of Research into the Impact of Scams on UK Consumers, 2006.

⁹⁰ Home Office, ‘Hate crime, England and Wales, 2018 to 2019’ (n 73).

⁹¹ The data from the Office for National Statistics (n 87) is taken from the National Crime Survey for England and Wales, which obtains the data from people in England and Wales by asking them about their experiences of a range of crimes in the 12 months prior to the interview.

⁹² Helia Garrido Hull, ‘The Not-So-Golden Years: Why Hate Crime Legislation is Failing a Vulnerable Aging Population’ (2009) *Mich St L Rev* 387, 392.

people, on average, are less capable of self-defence because of weaker strength, slower reactions and more fragile bodies than other groups.⁹³ In addition, age-related impairments and the increased physical fragility of older people can mean crime can cause more severe injuries to older people compared to the impact on other age groups.⁹⁴ For example, older people's bones are more likely to fracture leading to serious injury.

There is evidence that lower resilience to crime among older people can make older people vulnerable in the criminal justice process. Kevin Brown and Faith Gordon have argued, in the context of Northern Ireland, that older victims of crime are disadvantaged in access to procedural justice due to the 'additional vulnerabilities that disproportionately impact on older victims' ability to engage with the justice process'.⁹⁵ Brown and Gordon's study investigates why 'older people who report crimes to the police are less likely than other adults to see their case reach a sanctioned outcome'.⁹⁶ Crime targeted at older people, they explain, tends to have a more traumatic impact than crime targeted at other age groups, and this may prevent older people participating effectively in the criminal justice system that can result in successful convictions. The lower conviction success rate may be because older people tend to have a lower access to support networks and also experience conditions such as hearing loss and dementia, which can inhibit their capability of participating effectively in

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ Kevin J Brown and Faith Gordon, 'Older Victims of Crime: Vulnerability, Resilience and Access to Procedural Justice (2018) 25

⁹⁶ *ibid.*, 202.

the criminal justice process.⁹⁷ Also, older people may be less likely to want to engage with the criminal justice process because they do not want to be perceived as a burden.⁹⁸ The extra sensitivity of older people to crime and the diminished capacity of many older people to participate effectively in the criminal justice process can offer justification for the criminal law offering increased protections to older people.

Neil Chakraborti and Jon Garland adopt a subtly different vulnerability justification of hate crime laws.⁹⁹ They argue that it is justified for hate crime laws to protect groups who are at risk of being targeted for violence due to their perceived difference. The strength of this approach is that vulnerability due to perceived difference can reflect the way that hate crime offenders typically select their victims.¹⁰⁰ For example, a white offender violently attacking a black person because the offender considers black people inferior. According to Chakraborti and Garland, hate crime laws should be flexible in identifying groups for protection because vulnerability to crime relates to a complex range of factors, ‘including hate, prejudice, hostility, unfamiliarity, discomfort or simply opportunism or convenience’.¹⁰¹ We could use Chakraborti and Garland’s account to recommend labelling violence targeting age groups as hate crimes because it is arguable that age can be understood as a perceived difference that often figures in offenders’ calculations when selecting victims. For example, an offender may

⁹⁷ *ibid*, 211.

⁹⁸ *ibid*, 212.

⁹⁹ Neil Chakraborti and Jon Garland, ‘Reconceptualizing Hate Crime Victimization Through the Lens of Vulnerability and ‘Difference’’ (2012) 16 *Theoretical Criminology* 499.

¹⁰⁰ *ibid*, 507.

¹⁰¹ *ibid*, 506.

decide to rob an older person due to stereotypical ideas they may have about older people, including the idea that older people are easy targets because they are less likely to resist. In this way, older people are distinctly vulnerable to crime resulting from ageist stereotypes.¹⁰²

However, the significant disadvantage of using vulnerability as a justification for creating an aggravated offence for age hostile crimes is that it can be understood to convey the message that older people are helpless or weak, which is a message that many older people may find demeaning. Campaign Groups, for example, have reported that older people are uncomfortable with being identified as vulnerable.¹⁰³ The message may fuel stereotypes about older people being frail and therefore undermine the purpose of hate crime laws to tackle prejudices against social groups.¹⁰⁴ In addition, Martha Fineman has argued that vulnerability is a universal feature of the human condition and signalling out particular groups for special protections in the law based on identity characteristics can reinforce difference and therefore stigmatise groups that are assigned a vulnerable status.¹⁰⁵ Using the vulnerability justification of hate crime laws to justify aggravating age hostile crimes can also be criticised as paternalistic because it implies that older people need special protections because of their heightened sensitivity to crime, which can be perceived as reinforcing a patronising and disempowering stereotype that older people need to be cared for.¹⁰⁶

¹⁰² Chakraborti and Jon Garland (n 99) 506 identify the elderly as a vulnerable group for this reason.

¹⁰³ Mason-Bish (n 67).

¹⁰⁴ Rachel Pain, 'Old Age and Victimisation', in Pamela Davies, Peter Francis and Victor Jupp (eds) *Victimisation: Theory, Research and Policy* (Palgrave 2003).

¹⁰⁵ Martha A Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale JL & Feminism* 1, 9.

¹⁰⁶ Nina A Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26 *Yale JL & Feminism*.

Furthermore, if we use vulnerability to crime as a guide for identifying crimes that should be labelled as hate crimes, this may result in labelling an excessively broad range of actions as hate crimes, which may weaken the special condemnatory force that hate crime convictions can communicate. Chakraborti and Garland's argument that hate crime laws should protect groups who are at risk of being targeted for violence due to their perceived difference may encompass crimes that target groups for opportunistic reasons due to stereotypes about the groups being perceived as easy targets. However, as I explain in section 7 of this paper, crimes motivated by 'hostility', which includes hatred and prejudice, are graver moral wrongs than opportunistic crimes because they relate to egregious attitudes such as racism, sectarianism or ageism. If hate crime laws protect groups from opportunistic crimes in addition to prejudice-based crimes, then the message that hate crime laws denounce prejudice directed at oppressed or marginalised groups is diluted and therefore potentially weakened.

The central argument of this paper is that the creation of aggravated offences for age hostile crimes is necessary to communicate that age groups should be treated with equal concern and respect to the groups that currently receive protections in hate crime laws, but it is arguable that relying on the vulnerability theory could undermine this by relying on a justification that older people perceive as stigmatising.

C. Hate Crime Offenders Have Increased Culpability

In contrast to the victim-focussed approach of the vulnerability theory of hate crime, we can explain the justification for increasing the punishment of hate crime because of the increased *culpability* that hate crime offenders have in 'making a contribution to an already-existing

societal pattern of discrimination'.¹⁰⁷ Allison Marston Danner has argued that the culpability of the hate-crime offender is their intention to contribute (or their being reckless in contributing) to a situation that 'renders the victim vulnerable to discrimination'.¹⁰⁸ In this way, hate crime law fits within a retributive theory of punishment. This theory, I argue, offers the strongest support for extending hate crime laws to protect age groups.

Hate crime on this account is analogous to a school bully targeting unpopular groups and, in doing so, contributing to a culture that devalues and encourages further bullying of the group.¹⁰⁹ The unpopularity of the victims and the high status of the bully can mean that other students are less likely to intervene to help and this can lead to a culture where the abuse becomes widely accepted leading to further bullying. Similarly, hate crime typically involves an offender attacking a victim because the victim has identity characteristics that are unjustly devalued, stigmatised and subject to widespread animus or dislike among wider society.¹¹⁰ Hate crime therefore contributes to a culture where the targeted group is cast as inferior which threatens a society of equals by encouraging attacks and discrimination against the group. On this theory of hate crime, it is appropriate that hate crime laws in England and Wales offer special protections to race groups and religious groups because race groups and

¹⁰⁷ Allison Marston Danner, 'Bias Crimes and Crimes Against Humanity: Culpability in Context' (2002) 6 Buffalo Crim LR 389, 426.

¹⁰⁸ *ibid*, 426.

¹⁰⁹ *ibid*, 427.

¹¹⁰ *ibid*, 450. We need to add justice element because some groups, such as sex offenders, are marginalised and stigmatised but are not deserving of special protections from hate crime laws. See Gail Mason, 'Victim Attributes in Hate Crime Law: Difference and the Politics of Justice' (2014) 54 BJ Crim 161, 167.

religious groups have suffered widespread discrimination leading to social exclusion, marginalisation and demeaning stereotypes.

But is it appropriate on this theory for hate crime laws to protect age groups? An argument against expanding hate crime laws to protect age groups on these grounds is that age as an identity characteristic is different to characteristics such as race and religion because everyone, assuming they live long enough, will experience the different stages of life and therefore age is not a marker of difference in the way that race and religion is a marker of difference.¹¹¹ For Perry, hate crime operates by ‘othering’ social groups and to target groups to reinforce a position of superiority of the offender and the inferiority of the victim.¹¹² However, the fact that people experience different age groups means that age groups are not meaningfully ‘other’ or ‘different’ from other age groups in the way that race groups, sexuality groups or religious groups are ‘different’ and ‘other’.¹¹³ It therefore does not make sense for people to cast age groups as inferior or to subordinate them because everyone, assuming they live long enough, will experience being young, middle age and old. Therefore, we cannot understand age groups as representing entirely marginalised social groups. Also, there is a lack of robust empirical evidence to demonstrate age groups are targeted because of hostility or hatred.¹¹⁴

¹¹¹ Bows (n 72), 28-29.

¹¹² Perry (n 78).

¹¹³ Bows (n 72), 28-29.

¹¹⁴ *ibid*, 29. Also, Danner (n 107) 449 argues against extending hate crime to protect age groups by explaining that most crimes targeting older people are motivated by opportunism rather than discrimination towards older people.

In reply to this, older people (and to an extent young people) *are* a social group that has been socially excluded, marginalised and subject to demeaning stereotypes and prejudice.¹¹⁵ For Lawrence, protected characteristics in hate crime laws should relate to ‘divisions that run deep in the social history of a culture’,¹¹⁶ and in many respects age divisions have become deeply embedded in our culture. Age has become ‘one of the bases for the ascription of status’¹¹⁷ with middle aged people tending to have a higher status resulting from a disproportionate access to wealth and power, and other age groups, such as young people and elderly people, tending to have a lower social status with large numbers experiencing social exclusion. Older people are more likely to experience exclusion from basic services and access to social relationships.¹¹⁸ The lower status of young and older people has also resulted from lower access to employment (a major component of esteem in

¹¹⁵ See Centre for Ageing Better, ‘Dodderly but Dear?: Examining Age-Related Stereotypes’ (2020) Centre for Ageing Better. <<https://www.ageing-better.org.uk/sites/default/files/2020-03/Dodderly-but-dear.pdf>> accessed 2 November 2020. For a review of the literature on age stereotyping and prejudice, see Hannah J Swift and Ben Steeden, ‘Exploring Representations of Old Age and Ageing’ (Centre for Ageing Better 2020) <<https://www.ageing-better.org.uk/sites/default/files/2020-03/Exploring-representations-of-old-age.pdf>> accessed 2 November 2020.

¹¹⁶ Lawrence (n 46), 12.

¹¹⁷ Dail Neugarten (ed) *The Meanings of Age: Selected Papers of Bernice L Neugarten* (University of Chicago Press 1996) 60.

¹¹⁸ Matt Barnes, Kate Cox, Carli Lessof and Alan Walker, ‘The Social Exclusion of Older People: Evidence from the First Wave of the English Longitudinal Study of Ageing (ELSA)’, Final Report. <https://www.ifs.org.uk/docs/odpm_social_exclusion.pdf> accessed 2 November 2020.

society)¹¹⁹ and from widespread demeaning stereotypes that sustain discrimination, including the idea that young people are involved in crime, deviance, delinquency,¹²⁰ and older people are less competent and less productive than other age groups.¹²¹ In this context, age hostile crime risks causing social exclusion by contributing to a pre-existing cultural context in which age groups (particularly older people) are devalued and discriminated against. In this way, age-related hate crime is analogous to the social exclusion and marginalisation that can result from race-related and religious-related hate crime, and therefore perpetrators of age hostile crimes ought to be punished as hate crime offenders.

In reply to the argument that there is a lack of robust empirical evidence to demonstrate that age hostile crime is widespread, we can return to the argument outlined earlier in the paper, namely, that in a context where age groups are subject to widespread discrimination and demeaning stereotyping, it is conceivable that ageist prejudice can motivate crimes. There is justification for erring towards the judgment that it is possible that some offenders target age groups with hostility and, in doing so, risk contributing to the marginalisation of age groups.

Unlike the vulnerability rationale of hate crime laws discussed above, the culpability rationale does not perpetuate stereotypes of older people as helpless and weak. The culpability rationale is focussed on the *offender* deserving increased punishment for risking

¹¹⁹ ONS, 'Employment, Unemployment and Economic Inactivity by Age Group (Seasonally Adjusted)' (2020) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/employmentunemploymentandeconomicinactivitybyagegroupseasonallyadjustedda05sa>> accessed 2 November.

¹²⁰ Maurice Devlin, 'Inequality and the Stereotyping of Young People' (the Equality Authority/National Youth Council of Ireland 2006).

¹²¹ Swift and Steeden (n 115) 17.

reinforcing patterns of discrimination against social groups. The rationale does not designate hate crime victims as people with increased fragility from crime, but it identifies victim groups as more likely to suffer discrimination.

It could be argued that judges can already use the enhanced sentencing regime to impose increased sentences on perpetrators of age-related hate crime to punish the hate crime offenders for their increased culpability in risking contributing to the marginalisation and stigmatisation of age groups. However, if we punish offenders of age hostile crimes by enhanced sentencing while hate crime offenders targeting race groups and religious groups continue to receive greater punishment from aggravated offences, then this communicates that the interests of race and religious groups are more deserving of protection than age groups, which, as the analysis above reveals, is unwarranted when age groups can suffer analogous social marginalisation to the marginalisation experience by race and religious groups. Therefore, it is important to recognise the increased culpability of offenders of age hostile crimes by the creation of an aggravated offence for age hostile crimes while aggravated offences remain in England and Wales.

Nonetheless, it is possible to achieve equality of protection between age groups, race groups and religious groups by abolishing aggravated offences altogether and instead relying on the enhanced sentencing regime to punish the increased culpability of hate crime offenders. In the next section I explain that the symbolic role of aggravated offences justifies the use of aggravated offences to punish hate crimes rather than relying on enhanced sentencing.

D. Denunciation Theory

It has been established above that it is plausible that age hostile crimes can impose increased harm on victims compared to non-hate crimes, that age groups have increased vulnerability to crime and that perpetrators of age hostile crimes can have increased culpability in risking contributing to the marginalisation and stigmatisation of age groups. Combined these offer justifications for increasing the punishment of age hostile crimes compared to equivalent non-hate crime. The justifications alone, however, do not necessarily recommend using aggravated offences or some other mechanism to increase the punishment of age hostile crimes.¹²² However, when we combine the justifications with the idea that aggravated offences offer a symbolic function to label hate crimes as deserving of increased condemnation and to communicate that hate crime victims are valued members of society, then we have a strong argument for using aggravated offences to increase the punishment for age hostile crimes.

As Michael Blake has said, hate crime law ‘serves as a public vindication of the ideal of tolerance, which expresses the wrongness not simply of violence but of ... daily acts of humiliation and stigmatization as well’.¹²³ Aggravated offences in this way can communicate to groups that have suffered oppression or marginalisation in society that they have value to society and to denounce hate crimes as grave moral wrongs.¹²⁴ Since hate crimes can constitute ‘message crimes’ that communicate that the targeted groups are inferior,¹²⁵

¹²² Chalmers and Leverick (n 4), 23.

¹²³ Michael Blake, ‘Geeks and Monsters: Bias Crimes and Social Identity’ (2001) 20 *Law and Philosophy* 121, 123.

¹²⁴ *ibid*, 122.

¹²⁵ Perry (n 78).

aggravated offences can counter this message by labelling prejudice-based crimes as hate crimes worthy of condemnation.¹²⁶

This justification for increased punishment of hate crimes is linked to the idea of ‘fair labelling’ in the criminal law.¹²⁷ A criminal label should reflect the nature and magnitude of criminal wrongdoing. Following this, it is justified to label age hostile crimes as hate crimes by aggravating age hostile crimes because perpetrators of age hostile crimes have greater culpability compared to non-hate crime offenders. The criminal law should stigmatise age hostile crime offenders by labelling these offences as hate crime offences to condemn the increased gravity of the moral wrong of age hostile crimes compared to non-hate crimes and to communicate that age groups are valued members of society.

5. Protection for Vulnerable Age Groups or All Age Groups?

A question remains whether the criminal law should aggravate age hostile crimes directed at any age group or only age groups that have increased vulnerability, such as older people. Danner has argued that the protections of hate crime laws should be restricted to protecting only vulnerable groups, such as black people and Muslims, rather than protecting wider identity characteristics such as race, religion and age groups.¹²⁸ The idea that hate crime offenders have increased culpability in risking contributing to the marginalisation and stigmatisation of targeted groups offers more compelling justification for aggravating

¹²⁶ This supports the expressive value of punishment in communicating social disapproval. See Lawrence (n 46), 167 for a discussion of this theory of punishment in the context of hate crime laws.

¹²⁷ See James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 MLR 217.

¹²⁸ Danner (n 107), 439-446.

offences that target groups that have pre-existing vulnerabilities to experiencing discrimination, such as black people, Muslims and older people. Wider categories of identity characteristics include groups that enjoy relatively high esteem in society who are less likely to be marginalised by hate crime. There is lower culpability for offenders targeting relatively privileged groups compared to targeting vulnerable groups, and, therefore, there is a less compelling justification for aggravating offences that target relatively privileged groups.¹²⁹ Furthermore, the symbolic function of aggravating offences to counter the message of hate crime that vulnerable groups, such as black people, Muslims and older people, are inferior offers a more pressing justification to protect groups that have a pre-existing vulnerability to experiencing these messages compared to groups that enjoy more esteem in society.

However, young people as well as older people suffer from marginalisation and age discrimination, and this supports aggravated offences extending protection to young people in addition to older people. The Intergenerational Foundation published a report identifying the low esteem British society holds young people in with British people in their 20s having ‘the lowest scores of any country in relation to being viewed with respect. (...) In terms of contempt, British people in their 20s came first.’¹³⁰ Also, Maurice Devlin argues that negative stereotyping of young people has led to ‘a diminution of their status’ that can lead to their marginalisation.¹³¹ From this we can conclude that age hostile crime directed at young people can risk contributing to the marginalisation and stigmatisation of young people and therefore perpetrators of age hostile crime directed at young people have enhanced culpability

¹²⁹ *ibid*, 440.

¹³⁰ Devlin (n 120), 64.

¹³¹ *ibid*, 66.

deserving the condemnation that hate crimes offer. In this context, it would be divisive for hate crime laws to protect older people but not younger people. It would risk creating the impression that older people deserve more concern and respect than younger people.

However, it would also be unsatisfactory to create aggravated offences to protect young people and elderly people but to exclude middle age people who tend to enjoy higher esteem and power in society. As Danner acknowledges,¹³² the benefit of hate crime laws protecting wider categories of social groups such as race, religion and age rather than only protecting the vulnerable groups within these categories is that hate crime laws can send the egalitarian message that prejudice on the grounds of the identity characteristics is divisive, whether directed at vulnerable groups or relatively privileged groups. On this basis, it would be preferable that aggravated offences for age hostile crimes protects all age groups rather than excluding protection to particular age groups.

6. Model of Hate Crime Protection

As outlined earlier, aggravated offences in England and Wales use an animus-based model of hate crime law by punishing crimes that are based on or motivated by ‘hostility’ to the protected groups.¹³³ However, a question remains whether it would be better for aggravated offences in England and Wales to also increase the punishment of offenders that deliberately *select* age groups for opportunistic reasons. Under this *discriminatory selection* model, hate crime laws could increase the punishment of offenders who, say, rob elderly people because the offender assumes it is harder for the elderly victim to resist because of their age. Danner

¹³² Danner (n 107), 443.

¹³³ CDA, s 28(1)(a)-(b).

has argued that a discriminatory selection model of hate crime law is preferable to the animus-based model because it would punish offenders for their increased culpability in ‘knowingly or recklessly join[ing] other wrongdoers in a demonstration of bias and discrimination that ultimately harms our society’.¹³⁴ According to this argument, offenders can contribute to the marginalisation of vulnerable groups even if the crime was not based on or motivated by hostility or prejudice to the victim’s social group.

However, the problem with the discriminatory selection model of hate crime law relates to the idea of ‘fair labelling’ that was explored earlier in this paper. I explained that criminal labels should reflect the *nature* and *magnitude* of criminal wrongdoing. Importantly, the criminal wrongdoing of crimes that are hostile to social groups are different in nature and magnitude from opportunistic crimes because hostile crimes relate to egregious attitudes such as racism, sectarianism and ageism whereas opportunistic crimes do not.¹³⁵ While offenders that opportunistically target vulnerable groups can have increased culpability compared to offenders that do not target vulnerable groups, the criminal law can appropriately punish this increased culpability with enhanced sentencing rather than labelling the crimes as hate crimes. Prejudice-based crimes, such as age hostile crimes, can, in contrast, be appropriately labelled as hate crime by aggravated offences because this reflects the increased moral wrong that is generated by the prejudice component of this offence.

7. Practical Difficulties

¹³⁴ Danner (n 107), 406.

¹³⁵ See Kay Goodall, ‘Conceptualising “Racism” in Criminal Law’ (2013) 33 LS 215, 228-230.

An argument against creating aggravated offences for age hostile crimes is that it would be difficult to secure convictions.¹³⁶ In section 3 of this paper, I explained that aggravating an offence in England and Wales requires proving that the offence was ‘based on’ or ‘motivated’ by hostility towards the protected characteristic. However, the police have reported that it would be difficult to distinguish crimes that are based on or motivated by hostility to age groups from crimes motivated by exploiting the vulnerable status of age groups.¹³⁷ Crimes targeting older people are often based on stereotypes that older people are easy targets who have a reduced capacity for self-defence. It may be difficult for prosecutors to prove that the crime was based not just on this opportunism but also on age hostility.¹³⁸ Also, older people are more likely to have eyesight impairment, hearing impairment and more likely to have difficulties in memory recall, which can mean that older people are less likely to offer effective witness testimony that can prove beyond reasonable doubt that an attack was based on or motivated by age hostility.¹³⁹

In these circumstances, it can be argued that it is futile to extend aggravated offences to protect age groups when there are likely to be few convictions for age-based hate crime. In reply to this, practical considerations about the prospects of securing convictions should not rule out extending hate crime laws.¹⁴⁰ As outlined above, there are powerful symbolic reasons

¹³⁶ Bows (n 72), 30.

¹³⁷ Alistair Grant, ‘Police Chiefs Have Spoken Out Against Creating a New Hate Crime Covering Elderly People’ (The Herald, 25 February 2019) <<https://www.heraldscotland.com/news/17458032.police-chiefs-argue-against-newhate-crime-covering-elderly/>> accessed 2 November 2020.

¹³⁸ *ibid.*

¹³⁹ Brown and Gordon (n 95), 211.

¹⁴⁰ Brown (n 8), 300.

for the existence of hate crime laws beyond the practical considerations about securing convictions, including the symbolic function of hate crime laws as ‘a general affirmation of the societal value of groups targeted by hate crimes and a recognition of their rightful place in society’.¹⁴¹ This paper has established that hate crime laws can punish hate crime offenders for their increased culpability in risking contributing to the marginalisation of the targeted groups and that this rationale applies in an analogous way to age groups as race groups and religious groups. Extending hate crime laws to protect age groups can communicate that the state treats age groups with equal concern and respect in denouncing discrimination and violence targeted at age groups.

However, it may be argued that adding age to the list of protected characteristics in circumstances where it is likely to result in very few convictions for age-based hate crime might undermine this argument. Lower convictions for age-based hate crime compared to convictions of race-based and religious-based hate crime might be perceived by some as an indication that the state is not taking violence against age groups as seriously as other hate crimes. However, while securing convictions for age hostile crime may prove more difficult than securing convictions for race or religious-based hate crimes, this does not necessarily reveal that the state treats violence against age groups less seriously than violence to race and religious groups. Extending hate crime law protections to age groups can signal that the state will not create a pecking order of protections based solely on the ease of securing convictions, which is an important way for the state to treat age groups with equal concern and respect to the groups that currently receive protection from hate crime laws.¹⁴² In

¹⁴¹ Sara Sun Beale, ‘Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement’ (2000) 80 BUL Rev 1227, 1255.

¹⁴² Brown (n 8), 300.

addition, the possibility of lower convictions for age-based hate crime compared to race-based and religious-based hate crime can reflect the unique challenges of evidencing age-based hate crime discussed above rather than reflecting any attitude of the state that crime targeting age groups is less serious than crimes targeting race groups and religious groups.

8. Conclusion

I have argued that hate crime laws in England and Wales should be extended to protect age groups by aggravating offences that are based on or motivated by hostility to age groups. There are four arguments for this increased punishment, including, firstly, that the social salience of age means that age hostile crimes may impose greater psychological distress compared to similar non-hate crimes; secondly, that aggravating age hostile crimes offers increased protections to groups that have increased vulnerability to crime, namely, older people; thirdly, that perpetrators of age hostile crimes have increased culpability because they risk contributing to the marginalisation of age groups by encouraging further discrimination against these groups; fourthly, that creating distinct aggravated offences for age hostile crimes appropriately labels age hostile crimes as hate crimes to reflect the grave moral wrong of these crimes and to communicate that the state is committed to eradicating discrimination against age groups.

There are significant counter-arguments to the first two arguments, including the lack of empirical evidence to demonstrate that age hostile crimes cause increased harms compared to the impact of non-hate crimes and the argument that older people may find the vulnerability justification for aggravating age hostile offences demeaning because it treats older people as if they are weak or helpless. The strongest argument for aggravating age

hostile crimes is the increased culpability argument combined with the argument that aggravated offences offer a symbolic function in denouncing age hostile crimes.

I have also argued that hate crime laws should protect all age groups and not just, say, older people. This sends the egalitarian message that age-related hate crime is divisive whether directed against elderly people or younger age groups. A distinct aggravated offence protecting age groups should be limited to crimes that are based on prejudice or generally negative feelings against age groups and should not cover crimes that opportunistically target age groups. Finally, I have argued that the alleged practical difficulty of securing conviction should not rule out extending aggravated offences to protect age groups. There are important symbolic functions of aggravated offences to express that age groups deserve equal concern and respect to the groups that currently receive protection in the hate crime legal framework and to communicate that age groups do not deserve to be subject to actions that can contribute to their marginalisation.