

Of Race, Racism and Racially Motivated Offences: A Review of the Hate Crime and Public Order (Scotland) Act 2021

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Of Race, Racism and Racially Motivated Offences: A Review of the Hate Crime and Public Order (Scotland) Act 2021

Abstract

A relationship of social and legal significance seems to exist between the prohibition of expressions or manifestations of racism and the society's preservation of racial diversity. To discourage racial prejudice and thereby protect each race, the state must manage its diversity well by legislating against racist hate offences. In Scotland, for example, the government boldly accepted that hate crimes, including racially motivated offences, are a serious problem requiring closer attention. Through its Hate Crime and Public Order (Scotland) Act 2021, the state resolves to tackle related criminality.

Focusing on the Act, this review examines whether or how race within the context of diversity is protected through its provisions against racism. But why is a review of the Act necessary? Other related questions are explored for an appreciation of the object and purpose of this review: Is race a scientific category or social construct? Are racial minority groups protected under the new Hate Crime and Public Order regime? How might the effectiveness of the Act be assessed? What criteria are to be used for such assessment? To what extent, given the new Act, can race or diversity be distinguished and managed within a society? The question of whether hate should be made a crime is raised before considering two cognate questions: firstly, could the new anti-racist hate regime in Scotland promote a civic duty to report or intervene against racially motivated offences? Secondly, could it deter, or transform the heart of, a potential offender?

Keywords

Protected Characteristics; Race; Racism; Racially Motivated Offences; Hate Crime and Public Order (Scotland) Act 2021

1.1 Overview and Background of Study

In Scotland,¹ prior to the Hate Crime and Public Order (Scotland) Act 2021, five characteristics were protected by three separate Acts. Section 96 of the Crime and Disorder Act 1998 protected ‘races’, which it defines as “a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins”.² Later, the Criminal Justice (Scotland) Act 2003 protected ‘religion’³ and the Offences (Aggravation by Prejudice) (Scotland) Act 2009 protected ‘disability’,⁴ ‘sexual orientation and transgender identity’.⁵

Although Scotland’s hate crime regime was described as one of the most advanced in the world,⁶ it faced various criticisms and proposal for reform,⁷ leading to the passing of the Hate Crime and Public Order (Scotland) Act 2021. Having developed piecemeal, the hate crime laws in Scotland were confusing, difficult to access and sometimes inconsistent.⁸ A hierarchy had also been created within the regime: alongside the Crime and Disorder Act 1998, race was the only characteristic also protected by the two standalone offences: racial harassment was criminalised via the Criminal Law (Consolidation) (Scotland) Act 1995; and stirring up racial hatred offences existed under the Public Order Act 1986.

Lord Bracadale, a senior member of the Scottish judiciary, was appointed by the Scottish Government in 2017 to conduct an independent review of Scotland’s hate crime legislation. Published in 2018, the report contained 22 recommendations for reform, including: the consolidation of hate crime laws; the introduction of age and gender as new protected characteristics; and extending the stirring-up hatred offence to all characteristics.⁹ This review informed the introduction of the Hate Crime and Public Order (Scotland) Bill¹⁰ on 23 April 2020, which was passed on 11 March 2021. Despite being created to provide greater protection for victims of hate crimes whilst simultaneously protecting freedom of expression,¹¹ the new Act has since faced intense criticisms. It has been so labelled by a veteran politician, Jim Sillars, as “one of the most pernicious and dangerous pieces of legislation ever produced” in the UK

¹ Scotland and England as well as Northern Ireland all make up the United Kingdom. As a nation, Scotland maintains a distinct jurisdiction and legal system. Also, since the establishment of the Scottish Parliament in 1999, criminal justice remains a devolved administration. It might help to note that the UK Supreme Court does not hear criminal cases from Scotland, although appeal is possible from the Court of Criminal Appeal to the UK Supreme Court if the appeal concerns an issue of human rights or of devolution itself.

² Crime and Disorder Act 1998, s96(6). This UK wide Act preceded the devolution of legislative powers to Scotland in 1999.

³ Criminal Justice (Scotland) Act 2003, s74.

⁴ Offences (Aggravation by Prejudice) (Scotland) Act 2009, s1.

⁵ Ibid at s2.

⁶ Piotr Godzisz and Mark Walters, ‘Hate Crime: Mapping the Boundaries’ (2020) vol 65(6) *Journal of the Law Society of Scotland*. The Scottish regime provides opportunity to prohibit expressions or manifestations of it in e.g. the refusal to lease a property, to employ or to serve in a shop, use of abusive language or physical violence on the grounds of a person’s colour, ethnic background etcetera. Provisions of the 2021 Act are not limited to race as a protected characteristic. But the criticisms in this article are of the new legislation’s unclear boundaries and nebulous use of language.

⁷ ‘Controversial Hate Crime Bill Passed at Holyrood’ (*Scottish Legal News*, 12 March 2021) <[Controversial hate crime bill passed at Holyrood - Scottish Legal News](#)> accessed 14 March 2021. This article was published in the wake of the Bill being passed. The criticisms in the article are of the new legislation which are not limited to race as a protected characteristic.

⁸ Alison Platts and Dawn Griesbach, ‘Independent Review of Hate Crime Legislation in Scotland: Analysis of Consultation Responses’ (2018) at 4.5.

⁹ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018)

¹⁰ SP Bill 67 Hate Crime and Public Order (Scotland) Bill [as introduced] Session 5 (2020).

¹¹ Justice Committee 25th Meeting, 2020, 27 October 2020 (Session 5) col 2.

in modern times.¹² This study therefore examines the Hate Crime and Public Order (Scotland) Act 2021 with the purpose of determining the adequacy of the Act to protect against racial hatred and related offences.

The importance of having such legislative intervention is illustrated in the harm caused by racially motivated offences; these offences do not only affect the victim but also members of the racial group the victim associates with and communities.¹³ This is because Hate offences are “symbolic” in that they are “aimed at the people watching”¹⁴ to convey the threat that targeted groups are not welcome and do not belong.¹⁵ Thus, the victim is interchangeable and immaterial.¹⁶

Racism and racially motivated offence can cause physical harm where an assault, for example, occurs. However, the likely psychological and emotional harm is much more damaging. Victims were targeted usually because of who they are and what they represented, thereby violating their sense of self-worth.¹⁷ The experience can be traumatic because victims are often unable to change or hide their targeted characteristic, such as their skin colour, and thus they expect to be subject to multiple offences.¹⁸ Various studies have found that the psychological impact of hate offences is greater than that of non-hate offences and that psychological recovery can take up to five years, compared to two years for non-hate offences.¹⁹

Hate offences also harm society. Retaliations, tensions, or suspicions can form between the offender’s and victim’s communities.²⁰ Hate crime damages, inhibits, or even prevents community cohesion and societal values.²¹ It “inflicts numerous hurts and involves many victims”.²² Thus, criminalisation seems justified under the harm principle.²³

So, *why is this study important?* Amy Allard-Dunbar argues that race must “be dealt with separately...because of the historical and institutional nature of racism”.²⁴ Racism is apparent in everyday life, with instances of race related harassment and violence being present from

¹² ‘Controversial Hate Crime Bill Passed at Holyrood’ (*Scottish Legal News*, 12 March 2021) <[Controversial hate crime bill passed at Holyrood - Scottish Legal News](#)> accessed 14 March 2021. See also See Epilogue of Jim Sillars, *A Difference of Opinion: My political journey*, Birlinn, 2021, 97817802706830, £14.99, pp303

¹³ Whereas hate crimes might cause harm to those at whom the conduct is most obviously directed, the questions remain: how is subjective “hate” to be proved? Or does the legislation work objectively, holding that the conduct itself is sufficient evidence of hate? -the case law suggests that it is an objective test unless the legislation suggests that it is subjective, and that evidence of hate is inferred from the things said and done. (LS)

¹⁴ Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001) at 10.

¹⁵ Neil Chakraborti, Framing the Boundaries of Hate Crime in Nathan Hall and others (eds), *The Routledge International Handbook on Hate Crime* (Routledge 2015) at 16.

¹⁶ Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (2009 Sage) at 6.

¹⁷ Paul Iganski, ‘Hate Crimes Hurt More’ (2001) 45:4 *American Behavioural Scientist* 626 at 628.

¹⁸ Nathan Hall, *Crime and Society Series: Hate Crime* (Routledge 2011) at 68.

¹⁹ *Ibid* at 66.

²⁰ Paul Iganski, ‘Hate Crimes Hurt More’ (2001) 45:4 *American Behavioural Scientist* 626 at 630.

²¹ Barbara Perry and Shahid Alvi, ‘We Are All Vulnerable: The in Terrorem Effects of Hate Crimes’ (2011) 18(1) *International Review of Victimology* 57 at 59.

²² Paul Iganski, ‘Hate Crimes Hurt More’ (2001) 45:4 *American Behavioural Scientist* 626 at 631.

²³ R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) at 134.

²⁴ She maintained that race be contextually engaged with. The Committee heard from a range of witnesses in their evidence sessions. Justice Committee 28th Meeting, 2020, 17 November 2020 (Session 5) at col 40.

universities²⁵ to football matches.²⁶ By having a distinct clarity of prohibition and disapproval that the law can provide for this, a stronger stance is taken against race hate crime.

Despite ‘race’ being the first characteristic to be protected under hate crime legislation in the UK, race-related hate crime continues to be the most prevalent in Scotland, with 3,285 race-related charges in 2019-2020.²⁷ With an occurrence every 18 minutes, around 80 hate crimes per day and 29,200 per year in Scotland alone,²⁸ hate crime remains a deeply disturbing issue in the country. Despite this, only 5,525 hate offences were reported in 2020-21, two thirds of which had racial undertones.²⁹ The statistics clearly reveal procedural issues of under reporting, as well as the substantive issues of racial hatred.³⁰ This fact highlights the importance of 1) raising awareness for victims, offenders and society of the impact of racially motivated offences; and 2) scrutinising the Hate Crime and Public Order (Scotland) Act 2021 to ensure it protects against racial hatred and related crimes.

Law and literature show how “hate is a global phenomenon”.³¹ There is a substantial body of works on race, racism, and racial offences, and several different approaches,³² some of which discuss the legal response to racial offences in the UK and/or globally.³³ Others focus on which characteristics are, or ought to be, protected via legislation.³⁴ That said, no in-depth literature is available regarding racial offences crimes in Scotland nor thus far has there been a systematic analysis of the Hate Crime and Public Order (Scotland) Act 2021 and its criticisms.³⁵ This may be explained by the Act being relatively new: only introduced in 2020, and subsequently passed in 2021.³⁶

²⁵ Maureen McBride, ‘A Review of the Evidence on Hate Crime and Prejudice: Report for the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion’ (2016) 7 SCCJR at p31.

²⁶ Connor Ibbetson, ‘Racism in Football: How Has Opinion Changed Among Ethnic Minority Fans?’ (YouGov, 5 August 2021) < [Racism in football: how has opinion changed among ethnic minority fans? | YouGov](#) > accessed 23 September 2021.

²⁷ This is an increase of 6% compared to 2020-21 and the highest annual figure since 2016-17. See COPFS, ‘Hate Crime in Scotland, 2020-21’ (*Crown Office and Procurator Fiscal Service*, 12 June 2021) < [Hate Crime in Scotland, 2020-21 \(copfs.gov.uk\)](#) > accessed 8 September 2021.

²⁸ ‘Understanding the Nature of Hate crime’ (*Scottish Government*, 23 February 2021) < [Understanding the nature of hate crime - gov.scot \(www.gov.scot\)](#) > accessed 2 March 2021.

²⁹ COPFS, ‘Hate Crime in Scotland, 2020-21’ (11 June 2021) < [Hate Crime in Scotland 2020-21.pdf \(copfs.gov.uk\)](#) > accessed 30 August 2021.

³⁰ See generally <https://www.britannica.com/topic/racism>; compare with <https://www.bbc.co.uk/news/world-us-canada-57908808>

³¹ Wesley Myers and Brendan Lantz, ‘Reporting Racist Hate Crime Victimization to the Police in the United States and the United Kingdom: A Cross-National Comparison’ (2020) 60(4) *The British Journal of Criminology* 1034 at 1034.

³² For example, Nathan Hall, *Crime and Society Series: Hate Crime* (Routledge 2011); Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (2009 Sage); Paul Iganski, ‘Hate Crimes Hurt More’ (2001) 45:4 *American Behavioural Scientist* 626.

³³ For example, Nathan Hall and others (eds), *The Routledge International Handbook on Hate Crime* (Routledge 2015)

³⁴ For example, Hannah Bows, ‘Violence and Abuse of Older People – A Review of Current Proposals for Criminalisation’ (2020) 10 *Crim. L.R.* 882; Abenaa Owusu-Bempah, ‘Racially and Religiously Aggravated Offences: God’s Gift to Defence?’ (2019) 6 *Crim. L.R.* 463; Jennifer Schweppe and Amanda Haynes, ‘You Can’t Have One Without the Other One: “Gender” in Hate Crime Legislation’ (2020) *Crim LR* 2 148.

³⁵ Piotr Godzisz and Mark Walters, ‘Hate Crime: Mapping the Boundaries’ (2020) vol 65(6) *Journal of the Law Society of Scotland*. Provisions of the 2021 Act are broad and not limited to race as a protected characteristic. The criticisms of the new legislation includes its unclear boundaries and nebulous use of language.

³⁶ As of 18/10/22, about 2 years after it was passed, the Act had yet to be brought into force. It will happen on a date to be appointed- which may be noteworthy in itself: the Scottish Government was determined to get the

It is vital that Scotland's intolerance of hate crime is well demonstrated via effective and accessible legislation. Racist hate crime has devastating effects on the victim, the victim's wider community and society in general.³⁷ Consequently, the regulatory boundaries of hate crime require careful definition.³⁸ While a qualified right, its restrictions must be necessary and accessible. Substantive literature or review on the 2021 Scottish Act is still very limited. In view of that gap, this review provides a robust examination of the Act alongside its strengths and weaknesses regarding race.

1.2 Subsequent Sections

In response to the central question(s), the study starts by exploring the rationale for reviewing the focused 2021 Act. It also presents a systematic overview of key arguments around pertinent concepts such as race, ethnicity, racism, and racially motivated crime. A third section is then dedicated to examining how hate related offences are approached from within nation state as well as from an extra-legal perspective.

The fourth section explores legal history. It accounts for the development of hate crime legislation in Scotland, focussing on statutory aggravation and standalone offences. It presents a historical overview of hate crime laws, which existed prior to the 2021 Act in relation to race, and Lord Bracadale's recommendations for reform. The terms of the 2021 Act are then compared to those of the previous laws; and the numerous criticisms that the 2021 Act attracts are analysed.

Before the sixth section, which presents an analytical summary of the study, section five's analysis builds on the given historical overview. It explores the immediate context of the 2021 legislation and its provisions, principally examining 1) Statutory Aggravation and Race; 2) Aggravated Harassment; and 3) Stirring up Hatred. By providing a brief outline of the legal response of other countries including America and England and Wales to racism, the likelihood of the Scotland Act succeeding in its aim to tackle racism can be better estimated. Section six reflects on the study with the purpose of determining the adequacy of the Act's protection against racial hatred and related offences. It accordingly provides some opportunity to consider two cognate questions: firstly, could the new anti-racist hate regime in Scotland promote a civic duty to report or intervene against racially motivated offences? Secondly, could it deter, or transform the heart of, a potential offender?

2. What is Racism and hate crime? A Criminological and Legal Definition

As a legal doctrinal approach might fail to encapsulate the impacts of hate crime, this study is not confined to examination of black letter laws. Extra-legal perspectives must equally be considered. A criminological approach, as shall be demonstrated, provides an opportunity to deconstruct the concept of hate crime and examines the socio-cultural aspect of hate offences.

legislation through before the end of the previous session of Parliament in 2021. It now appears that the Government is not in such a hurry to bring it in.

³⁷ Caroline Mellgren, Mika Anderson and Anna-Karin Ivert, 'For whom Does Hate Crime Hurt More? A Comparison of Consequences of Victimization Across Motives and Crime Types' (2021) 36(3-4) *Journal of Interpersonal Violence* 1512.

³⁸ European Convention on Human Rights, Art10.

Meanwhile, for better appreciation of whether or to what extent is race protected under the Hate Crime and Public Order (Scotland) Act 2021, it is useful to consider which semantics and perspectives on race as well as how, as a concept, it functions. A central debate in race scholarship must then be revisited: the question is whether the concept of race is a biological category, or a social construct.

2.1 On Race, Racism and Racially Motivated Offences: Thematic Conceptions and Theories

Although hate crime does not have a universally agreed definition,³⁹ Barbara Perry's definition has received wide support.⁴⁰ Perry states, "hate crime involves acts of violence and intimidation, usually directed towards already stigmatised and marginalised groups".⁴¹ Certain groups of people might, by implication, be belittled, harassed, beaten, or killed for who they are and what they represent. In its effort to combat racial hatred,⁴² the Scottish Government has implemented various hate crime laws: the first being in 1998 for racial hatred; and the most recent in 2021, which is to provide protection to those being targeted on account of their race. But how are 'races', 'hate' or 'crime' to be understood?

Is race a scientific category? Race, it is argued by philosophers like David Hume, is an objective term that explains biological differences.⁴³ Biomedical Scientists might, for example, seek an understanding of some physical characteristics that are genetically transmitted among humans. Technological innovation now means that more specific and detailed studies of the biological configuration of individuals can now be carried out. Nevertheless, all humans belong to the same species, having and sharing a common origin.⁴⁴ And, with technological advancement, it is now known that there are more genetic differences between the colour of cat's eyes than there are between individuals or people -being of the same species and of a common origin.⁴⁵

In practice, race is mostly discussed as a biological category. Statisticians, for example, collect, analyse, interpret, or present masses of numerical data on local geographic or wider human population.⁴⁶ Based on common or shared biological traits, collated data is then categorised or grouped together or differentiated. The category that is often introduced and used as a descriptor to distinguish the physical characteristics of a population as being distinct is RACE, which appears to be nothing but a label or tool for distinguishing. Zodwa Ntuli, South Africa's

³⁹ Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (Sage 2009) at 5.

⁴⁰ Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001)

⁴¹ Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001) at 10. This seems to embrace conduct that is not physically harmful and/or does not involve physical contact. A few questions could then follow: what about disrespect? And indignity? Do we all have an interest in — and a right to — respect for our autonomy and dignity? Perhaps Kant's notion that we expect to be treated as ends rather than means, and, by virtue of universalizability, must therefore always treat others with respect (for their dignity).

⁴² Although it seems that the law seeks to combat certain kinds of hate-motivated conduct, it is arguable that its explicit purpose is to combat the hatred itself.

⁴³ James, Michael and Adam Burgos, 'Race', Edward N Zalta (ed.) *The Stanford Encyclopaedia of Philosophy* (Spring 2022 Edition) < [Race \(Stanford Encyclopaedia of Philosophy\)](#) > accessed 15 August 2022.

⁴⁴ James, Michael and Adam Burgos, 'Race', Edward N Zalta (ed.) *The Stanford Encyclopaedia of Philosophy* (Spring 2022 Edition) < [Race \(Stanford Encyclopaedia of Philosophy\)](#) > accessed 15 August 2022.

⁴⁵ Francys Johnson, "Race is a Fiction: Racism is not" (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not. Francys Johnson at TEDxUGA - YouTube](#) > accessed 19 August 2022.

⁴⁶ Merriam Webster, 'Definition of Statistics' < [Statistics Definition & Meaning - Merriam-Webster](#) > accessed 16 August 2022.

Broad-Based Black Economic Empowerment (B-BBEE) Commissioner, admitted in January 2021 that racial classification in 21st Century South Africa is “an anomaly”.⁴⁷ But, while race is even being dismissed as a logical fallacy with no discernible difference, Ntuli maintained that “regulators and government can only measure progress through statistics based on the old categories”.⁴⁸

As a statistical category therefore, social scientists engage race with reference to its functions. Statistics, being a branch of mathematics, deals “with the collection, analysis, interpretation, and presentation of masses of numerical data”.⁴⁹ It has however been argued that the origin of statistics predates the adoption of numerical systems of accounting⁵⁰. As raw data that is gathered, classified, and analysed, statistics does not only emanate from the functioning and activities of the State.⁵¹ But, as accounted for by Tim Hope, it also remains the property of the State itself.⁵²

Commenting on the relevance of statistics to administration and governance, Hope added: “This is true still: even though other, non-government bodies can collect statistics, and alternative analyses and interpretations of statistics are possible, there is a real sense that ‘statistics’ are the ‘arithmetic of politics’”.⁵³ The state’s operation and function in modern society continues to revolve around the politics of who gets what? when? where? and how?⁵⁴ But political engagement with collated data vis-à-vis policy formulation means that such data may not always be interpreted and applied objectively. A few points, which relate to human factors, must thus be immediately outlined:⁵⁵

First, ‘race’ can only remain a statistical category or tool: and, as demonstrated, technological innovation means that more specific and detailed studies can be carried out on the biological

⁴⁷ See BBC News “Race in South Africa: ‘We haven’t learnt we are human beings first’” in *BBC Africa* January 21, 2021 Available at <https://www.bbc.co.uk/news/world-africa-55333625> accessed 16 August 2022. Compare with Michelle Peens and Bernard Dubbeld “Troubled Transformation: Whites, Welfare, and ‘Reverse-Racism’ in Contemporary Newcastle” in *Diversities* Vol. 15, No. 2, 2013 ISSN 2079-6595, www.unesco.org/shs/diversities/vol15/issue2/art2 © UNESCO accessed 16 August 2022.

⁴⁸ See BBC News “Race in South Africa: ‘We haven’t learnt we are human beings first’” in *BBC Africa* January 21, 2021. Available at <https://www.bbc.co.uk/news/world-africa-55333625> accessed 16 August 2022. Compare with Michelle Peens and Bernard Dubbeld “Troubled Transformation: Whites, Welfare, and ‘Reverse-Racism’ in Contemporary Newcastle” in *Diversities* Vol. 15, No. 2, 2013 ISSN 2079-6595, www.unesco.org/shs/diversities/vol15/issue2/art2 © UNESCO accessed 16 August 2022. See Martinich, A. P. (1996). *Philosophical Writing: An Introduction*. Blackwell Publishing. p. 99.

⁴⁹ Merriam Webster, ‘Definition of Statistics’ < [Statistics Definition & Meaning - Merriam-Webster](#)> accessed 16 August 2022.

⁵⁰ Tim Hope, *Criminology* (Chris Hale and others eds, 3rd edn, OUP 2013) at 43.

⁵¹ The choice of categories for classification can reflect value preferences, as can the choice of analytical techniques that can be applied to the data. For example, there is a value-difference between calculating the average salary and the median salary. Journalists tend to seize on averages, but an average can be significantly different from the median.

⁵² Tim Hope, *Criminology* (Chris Hale and others eds, 3rd edn, OUP 2013) at 43.

⁵³ Daniel Dorling and Stephen Simpson, ‘Introduction to Statistics in Society’ in Daniel Dorling and Stephen Simpson (eds), *Statistics in Society: The Arithmetic of Politics* (Arnold 1999). Compare with Tim Hope, *Criminology* (Chris Hale and others eds, 3rd edn, OUP 2013) at 43. And Paul D. Williams (eds.), *Security Studies: An Introduction* (3rd edn, Taylor & Francis 2018), 1.

⁵⁴ And Paul D. Williams (eds.), *Security Studies: An Introduction* (3rd edn, Taylor & Francis 2018), 1.

⁵⁵ See generally James, Michael and Adam Burgos, ‘Race’, Edward N Zalra (ed.) *The Stanford Encyclopaedia of Philosophy* (Spring 2022 Edition) < [Race \(Stanford Encyclopedia of Philosophy\)](#)> accessed 15 August 2022. Compare with Francys Johnson, “Race is a Fiction: Racism is not” (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022.

configuration of individuals or group (of individuals). With advanced scientific tools, more sophisticated examination of genetic differences now possible.⁵⁶

Secondly, according to recent studies, the lines between the so-called races are blurred. It is claimed that, were race to exist in any sense, only “hybrid race” could; for there can be nothing as a “pure race”.⁵⁷ It is race that then appears to facilitate understanding of biological peculiarity of individuals.

Thirdly, to establish whether any significant relationship exists between the local geographic environment of individuals or groups and their genetical peculiarities, collaborative research focusing on biology and geography must accordingly be carried out. But more modern research works, and findings seem to result in the rejection of the arguments that race, as a biological category, exists.⁵⁸

Is race therefore a social construct? If race does not exist in biology, why waste time researching on it? More significantly, if race is a fiction -rather a construct,⁵⁹ why would a government legislate on it? As shall be made apparent, answers to these questions might be found around the discourse on racism as a “theory” -and not in the “concept” of race itself.⁶⁰ It is in the experience and discourse around racism that the reality of race is understood, and the existence of its attitudes and values appreciated. Martin Luther King bewailed:

“As you well know, racism is a reality in many sections of our world today. Racism is still the coloured man’s burden and the white man’s shame. And the world will never rise to its full moral or political or even social maturity until racism is totally eradicated. Racism is exactly what it says. It is a myth of the inferior race; it is the notion that a particular race is worthless and degraded (sic) innately and the tragedy of racism is that it is based not on an empirical generalisation but on an ontological affirmation. It is the idea that the very being of a people is inferior.”⁶¹

⁵⁶ James, Michael and Adam Burgos, ‘Race’, Edward N Zalta (ed.) The Stanford Encyclopaedia of Philosophy (Spring 2022 Edition) < [Race \(Stanford Encyclopedia of Philosophy\)](#)> accessed 15 August 2022. Compare with Francys Johnson, “Race is a Fiction: Racism is not” (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022.

⁵⁷ James, Michael and Adam Burgos, ‘Race’, Edward N Zalta (ed.) The Stanford Encyclopaedia of Philosophy (Spring 2022 Edition) < [Race \(Stanford Encyclopedia of Philosophy\)](#)> accessed 15 August 2022. Compare with Francys Johnson, “Race is a Fiction: Racism is not” (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022.

⁵⁸ James, Michael and Adam Burgos, ‘Race’, Edward N Zalta (ed.) The Stanford Encyclopaedia of Philosophy (Spring 2022 Edition) < [Race \(Stanford Encyclopedia of Philosophy\)](#)> accessed 15 August 2022. Compare with Francys Johnson, “Race is a Fiction: Racism is not” (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022.

⁵⁹ Many people regard differences, say of skin colour, as indicative of ‘racial’ differences. In so doing, they tend to disregard the concept of a human race (or as one philosopher (Michael Tooley) puts it when writing about the ethics of abortion) ‘members of the species *Homo sapiens*.’ Their error seems not so much linguistic as moral or ethical.

⁶⁰ James, Michael and Adam Burgos, ‘Race’, Edward N Zalta (ed.) The Stanford Encyclopaedia of Philosophy (Spring 2022 Edition) < [Race \(Stanford Encyclopedia of Philosophy\)](#)> accessed 15 August 2022.

⁶¹ See Dr Martin Luther King, Jr. Speech on Receipt of Honorary Doctorate in Civil Law, November 13, 1967, University of Newcastle upon Tyne. Available at <https://www.ncl.ac.uk/media/wwwnclacuk/congregations/files/Transcript%20of%20Dr%20Martin%20Luther%20King%20Jr%20speech%2013th%20November%201967.pdf> Accessed 23 September 2022

Anthropologists and other social scientists are increasingly uncomfortable with presenting race as a biological category.⁶² It is being argued that race does not even exist, but racism does. If it is true that all humans have common origin, being an earth-shattering ideal (in and of itself), race is merely created and used purely as a statistical category. Race is so closely tied to identity in a country and has often been explained considering a related concept, ethnicity.⁶³

Often presented in singular form, ethnicity remains a collective noun. A person's ethnicity may refer to an ethnic quality or affiliation resulting from religious, cultural, or geo-political ties: "ethnicity has a strong influence on community status relations".⁶⁴ Ethnicity is, in other words, synonymous with ethnic shared traits, classification, or association. If your ethnicity is Scottish, you might speak Scottish in the home and eat Scottish food. Or you might simply refer to yourself as Scottish and identify with your ethnicity in no other way. In short, ethnicity relates to the membership of a cultural group: this is usually members of a minority group "who retains the customs, language, or social views of the group".⁶⁵

But whereas dictionaries support the usage of the term ethnicity to refer to cultural groupings, popular culture might not. Usage sometimes determine meaning, rather than meaning determining usage. If Sikhs are called an 'ethnic group' by some intolerant people, those intolerant people might well have skin colour in mind. Usage amongst social scientists is usage by members of a particular 'language community'. Ethnicity is the common difference that may be shared or perceived that distinguishes the racial category of an individual or a group of people. With a root in Late Latin "*ethnicus*" and originating from Greek "*ethnikos*" which stems from "*ethnos*", the adjective "*ethnic*" conveys the idea of a foreign nation or people.⁶⁶ This ultimately presumes an idea of the "otherness".

As apparent in the Scottish 2021 Act, race might refer to skin colour, nationality, culture and ethnicity,⁶⁷ all of which the environment or society shapes. These are a means of expressing and identifying yourself and categorising others. Herskovits states that "culture is the man-made part of the environment".⁶⁸ This is because it is symbolic of a community of people. Ethnicity is closely related to culture as it is a means of categorising ethnic shared traits, classification, or association.⁶⁹ Therefore, race, ethnicity and culture are socially construed as a tool to group and differentiate humans.

⁶² James, Michael and Adam Burgos, 'Race', Edward N Zalta (ed.) The Stanford Encyclopaedia of Philosophy (Spring 2022 Edition) < [Race \(Stanford Encyclopedia of Philosophy\)](#) > accessed 15 August 2022.

⁶³ James, Michael and Adam Burgos, 'Race', Edward N Zalta (ed.) The Stanford Encyclopaedia of Philosophy (Spring 2022 Edition) < [Race \(Stanford Encyclopedia of Philosophy\)](#) > accessed 15 August 2022.

⁶⁴ Thomas Hylland Eriksen, *Ethnicity and Nationalism: Anthropological Perspectives* (London: Pluto Press 1993). Compare with Lee Gardenswartz and Anita Rowe, *Managing Diversity: A complete desk reference and planning guide* (New York: McGraw-Hill 1998)

⁶⁵ Merriam-Webster, 'Ethnic' < [Ethnic Definition & Meaning - Merriam-Webster](#) > accessed 19 August 2022. See also Thomas Hylland Eriksen, *Ethnicity and Nationalism: Anthropological Perspectives* (London: Pluto Press 1993). Compare with Lee Gardenswartz and Anita Rowe, *Managing Diversity: A complete desk reference and planning guide* (New York: McGraw-Hill 1998)

⁶⁶ Merriam-Webster, 'Ethnic' < [Ethnic Definition & Meaning - Merriam-Webster](#) > accessed 19 August 2022. See also Thomas Hylland Eriksen, *Ethnicity and Nationalism: Anthropological Perspectives* (London: Pluto Press 1993). Compare with Lee Gardenswartz and Anita Rowe, *Managing Diversity: A complete desk reference and planning guide* (New York: McGraw-Hill 1998)

⁶⁷ A racial group is defined as "a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins" in the Hate Crime and Public Order (Scotland) Act 2021, s3(2).

⁶⁸ Graham B Stead, 'Culture and Career Psychology: A Social Constructionist Perspective' (2004) 64 *Journal of Vocational Behaviour* 389 at 391.

⁶⁹ Thomas Hylland Eriksen, *Ethnicity and Nationalism: Anthropological Perspectives* (London: Pluto Press 1993).

According to Henry Wadsworth Longfellow, it sometimes depicts ancient ethnic revels of a faith that has since been forsaken.⁷⁰ In a similar historical but disparaging usage, it relates to Gentiles or to nations not converted to Christianity.⁷¹ It is therefore not difficult to establish a link between ethnicization, hatred and crime. Members of an ethnic group might seek to self-preserve when threatened by strengthening members' sense of identity. Members of the same group could themselves constitute a threat by creating a sense of otherness for a group they seek to dominate. Accounts of constant and gradual demonising of those considered "different" litter the history of hate related incidents.⁷²

Hate is a "slippery and conceptually ambiguous label that can mean different things to different people".⁷³ It is ordinarily difficult to define hate given the difficulty of defining the related ideas. For example, "prejudice", which is central to determining hate or hate crime, can be "for something" or "against something".⁷⁴ Consequently, as made apparent in the 2021 Act, law captures a wide range of 'hate'; it can include deep-seated prejudice, an acute disrespect or mild dislike for someone which is acted upon during a conflict with the victim or even something said or done in the heat of the moment.⁷⁵ It is of import therefore that hate crime legislation in Scotland requires the offence to be motivated by, or demonstrating, malice and ill-will.

2.2 Between Legal and Criminological Perspectives: Towards a Working Definition

Hate crimes are not a recent phenomenon (although, in terms of the law, hate crimes agenda are). In the US, the legal agenda was a response to social movements from the 1960s onwards. In the UK, the agenda has emerged from a number of high-profile incidents such as the murder of Stephen Lawrence in England⁷⁶ and more recently the death of Sheku Bayoh whilst in Scottish police custody.⁷⁷

⁷⁰ The Economic Times, 'Racism in food? US, North European cuisines enjoy a privileged status, while others are named 'ethnic'' (2019) <<https://economictimes.indiatimes.com/magazines/panache/food-drinks/why-is-our-food-called-ethnic/articleshow/71130768.cms>> accessed 31 August 2022.

⁷¹ The Economic Times, 'Racism in food? US, North European cuisines enjoy a privileged status, while others are named 'ethnic'' (2019) <<https://economictimes.indiatimes.com/magazines/panache/food-drinks/why-is-our-food-called-ethnic/articleshow/71130768.cms>> accessed 31 August 2022. For the religious and racial division between and within Islamic theocracies, see generally Olufemi O. Ilesanmi, *Islamism, Statehood and Human Rights: A World of Difference* (Illustrated edition, Intersentia Ltd 2016) 276. Muslim members (the *Ummah*) enjoy full rights of citizenship. But classed as the "protected" for not being Muslim, non-Muslim members (the *dhimmi*) are required to pay extra tax (*jiziyah*). Islamic legal traditions usually disallow non-Muslim from serving in the military.

⁷² James, Michael and Adam Burgos, 'Race', Edward N Zalta (ed.) The Stanford Encyclopaedia of Philosophy (Spring 2022 Edition) < [Race \(Stanford Encyclopedia of Philosophy\)](#)> accessed 15 August 2022.

⁷³ Neil Chakraborti and Jon Garland (Eds.). *Responding to hate crime: The case for connecting policy and research* (2nd ed, Bristol University Press 2014) at 2.

⁷⁴ James, Michael and Adam Burgos, 'Race', Edward N Zalta (ed.) The Stanford Encyclopaedia of Philosophy (Spring 2022 Edition) < [Race \(Stanford Encyclopedia of Philosophy\)](#)> accessed 15 August 2022.

⁷⁵ Mark Austin Walters and Rupert Brown with Susann Wiedlitzka, 'Causes and Motivations of Hate Crime' (2016) 102 Equality and Human Rights Commission at 16

⁷⁶ William Macpherson, 'The Stephen Lawrence Inquiry' (1999) Cm 4262-I at 1.11. <[4262.pdf \(publishing.service.gov.uk\)](#)> accessed 15 January 2021.

⁷⁷ Mark Daly and Calum McKay, 'Sheku Bayoh: Why Did My Brother Die in Police Custody?' *BBC News* (Scotland, 18 January 2021) <[Sheku Bayoh: 'Why did my brother die in police custody?' - BBC News](#)> accessed

Prior to the 2021 Act, the Scottish Government described hate crimes in Scotland as “crimes motivated by prejudice based on race, religion, disability, sexual orientation and transgender identity”.⁷⁸ These characteristics were each protected by using individual legislative provisions.

Under s96 of the 1998 Act, a racial group is “a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins”.⁷⁹ In *Mack v Dunn*,⁸⁰ repeatedly shouting ‘Nazi German’ and ‘Nazi bastard’ at a German national physician demonstrated prejudice towards nationality.⁸¹ Despite this definition of racial group, it is unhelpful that ‘hate crime’ itself is not directly defined in legislation.

So, what is a hate ‘crime’ and how does this differ from a hate ‘offence’?

According to Brudholm, for a hate crime to be committed, a defined crime must be committed.⁸² A suitable definition of crime to this study is provided by the nation-state legality framework.⁸³ This generally defines crime as legal rules imposed by the state which, if not followed, results in sanctions.⁸⁴ Therefore, from a nation-state perspective and as acts prohibited by law, hate “incidents” do not automatically qualify as hate “crime”.

Targeting individuals solely due to the belief that they belong to a particular racial group is morally wrong. However, this alone does not equate a crime. Racial hate crime legislation requires the perpetrator to breach a legal rule for it to be classed as a hate crime rather than simply a hate offence or what might be referred to as ‘a non-crime hate incident’.⁸⁵ This is significant as criticisms regarding the implementation of hate crimes concern the impact on freedom of expression.⁸⁶ By requiring a baseline offence to be committed, this argument is limited.⁸⁷ For example, hate crime legislation does not criminalise expressing the religious belief that homosexual relationships are sinful.⁸⁸ However, where this is accompanied by threatening behaviour, for example, a legal rule has been breached and thus a hate crime has been committed.

21 February 2022. Compare with Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018).

⁷⁸ Scottish Government, ‘Crime Prevention: Hate Crime’ <[Crime prevention: Hate crime - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/consultation-papers/crime-prevention-hate-crime/)> 23 August 2020.

⁷⁹ 1998 Act, s96(6).

⁸⁰ 2016 SCL 125.

⁸¹ 2016 SCL 125, para [5].

⁸² Thomas Brudholm, ‘Conceptualizing hatred globally’ in Jennifer Schweppe and Mark Austin Walters, *The Globalization of Hate Crime: Internationalising Hate Crime?* (OUP 2016) at 34. D might have caused offence (to a victim) and, in so doing, committed a specific criminal ‘offence’. In Scotland the terms crime and offence are used mostly interchangeably but crime is used for common law crimes such as murder, assault etc. offences is used for crimes created by statute and perhaps connotes less serious behaviour.

⁸³ Wayne Morrison, *Criminology* (Chris Hale and others eds, 3rd edn, OUP 2013) at 12

⁸⁴ Wayne Morrison, *Criminology* (Chris Hale and others eds, 3rd edn, OUP 2013) at 15

⁸⁵ See generally College of Policing, “Responding to non-crime hate incidents” (21, July 2022) <<https://www.college.police.uk/app/major-investigation-and-public-protection/hate-crime/responding-non-crime-hate-incidents>> accessed 16 October 2022

⁸⁶ Lucy H Blackburn, ‘Chilling Effect: How the Hate Crime Bill Threatens Free Speech’ (*Holyrood*, 10 March 2021) <[Chilling effect: how the Hate Crime Bill threatens free speech \(holyrood.com\)](https://www.holyrood.com/news/2021/03/10/chilling-effect-how-the-hate-crime-bill-threatens-free-speech/)> accessed 16 March 2021.

⁸⁷ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) 4.8.

⁸⁸ All this arguably depends on circumstances and context. If the view was expressed aggressively at a Pride event it might tip over into something more than the peaceful expression of a religious belief. *Orr v Mundell* concerned a man standing outside the Catholic Cathedral in Paisley with a placard stating God hates Catholics. He was convicted of sec 38 with a religious aggravation.

With respect to statutes, the Crown Prosecution Service which is also meant to interpret the statutes and the Police have agreed on what constitutes a hate crime: “Any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice, based on a person’s disability or perceived disability.”⁸⁹

Confining any discourse around the meaning hate crime to formal or legal definition could be lopsided and limiting. A criminological perspective is that crime is social construct:⁹⁰ its definition varies from culture to culture. In theocratic states for example, crime reflects the position of religious authority on behaviours that are unacceptable.⁹¹ Analyses of hate crime must consider its extra-legal dimension. The impact of hate crime on the offenders themselves and not just on their victims are increasingly becoming the central subject of scholarship investigations. Holistic investigation makes it easier to outline the main characteristics, motivations, and effects of hate crime. In their work in 1993, Levin and McDevitt outlined the characteristics to include: excessive brutality; stranger victimization; interchangeableness of victims; and multiple offenders (with message crimes of sending a message to wider community).⁹² While some scholarship takes a “victim” centred approach, others include “political” elements to the discourse on hate crime.⁹³ The effects of hate crime may only be fully grasped when nation-state perspective is considered alongside the extra-legal.

So, there must be a victim of hatred for there to be a hate crime.⁹⁴ For hate crimes, there are what appear to be contrasting extra-legal views. Perry argues that historically stigmatised and marginalised minority groups are victimised, and hateful conduct used to preserve social order and hierarchies by reminding subordinate groups ‘of their place’.⁹⁵ However, this has been criticised as it excludes members of majority communities⁹⁶ and inaccurately illustrates that majority groups are always the offender and minority groups are always the victim.⁹⁷

Alternatively, Chakraborti and Garland argue that victims are targeted because they are perceived as vulnerable and different.⁹⁸ However, a focus on vulnerability may lead to the range of victims being “so wide that almost everyone can be a victim, rendering the legislation meaningless”.⁹⁹ Consequently, within this study, focus shall be placed on difference because a “mythical norm” has been established within society, with young white heterosexual Christian

⁸⁹ Crown Prosecution Service, ‘Hate Crime’ < [Hate crime | The Crown Prosecution Service \(cps.gov.uk\)](https://www.cps.gov.uk/hate-crime)> accessed 15 August 2022. Comparable to the English CPS is the Crown Office and Procurator Fiscal Service (COPFS) with Scotland’s public prosecutor.

⁹⁰ Nathan Hall, *Crime and Society Series: Hate Crime* (Routledge 2011) at 1

⁹¹ ‘What is *Sharia* and How is it applied?’ (*BBC News*, 7 May 2014) <[What is Sharia and how is it applied? - BBC News](https://www.bbc.com/news/health-24484444)> accessed 2 March 2021.

⁹² Jack Levin and Jack McDevitt, ‘Hate Crimes: The Rising Tide of Bigotry and Bloodshed’ (Springer 1993)

⁹³ Mark Austin Walters and Rupert Brown with Susann Wiedlitzka, ‘Causes and Motivations of Hate Crime’ (2016) 102 *Equality and Human Rights Commission* at 16

⁹⁴ See for example the decision by the European Commission of Human Rights in *Laskey, Jaggard and Brown v. the United Kingdom* 109/1995/615/703-705

⁹⁵ Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001) at 55.

⁹⁶ Neil Chakraborti and Jon Garland, ‘Reconceptualising Hate Crime Victimisation Through the Lens of Vulnerability and Difference’ (2012) 16(4) *Theoretical Criminology* 499 at 500.

⁹⁷ Nathan Hall, *Crime and Society Series: Hate Crime* (Routledge 2011) at 79.

⁹⁸ Neil Chakraborti and Jon Garland, ‘Reconceptualising Hate Crime Victimisation Through the Lens of Vulnerability and Difference’ (2012) 16(4) *Theoretical Criminology* 499 at 501.

⁹⁹ Hannah Bows, ‘Violence and Abuse of Older People – A Review of Current Proposals for Criminalisation’ (2020) 10 *Crim. L.R.* 882 at 896.

males being viewed as superior in the western world,¹⁰⁰ and those with different characteristics being viewed as subordinate.¹⁰¹ A black Muslim woman, for example, is more likely to be a victim of hate crime as she is visually different to this mythical norm. This also highlights the intersectionality of hate crimes as misogyny, religious and/or racial prejudice may be present.¹⁰²

3. Historical Overview of Hate Crime Legislation

The key objective of this study is to determine to what extent the Hate Crime and Public Order (Scotland) Act 2021 protects against racial hatred and related offences. It is therefore necessary to consider laws that were in force prior to the 2021 Act and why reform was deemed necessary, as outlined in Lord Bracadale's 'Independent Review of Hate Crime Legislation in Scotland'. Where valid, these points for reform can then be used as criteria to determine a) whether the 2021 Act responded appropriately and, in turn, b) the extent to which race is now protected under the new Act.

The first significant piece of legislation introduced in the UK to tackle racial discrimination was in 1965, namely the Race Relations Act 1965. This prohibited racial discrimination in public places and the promotion of hatred based on colour, race or ethnic or national origins. It also established the Race Relations Board which was responsible for the conciliation of discrimination complaints.¹⁰³ Since then, several pieces of legislation have been introduced in Scotland to offer wider protection against racial prejudice. The three most relevant can be grouped into two categories; statutory aggravations referring to an offence that is more serious when aggravated, and standalone offences. Each will be examined in turn.

Under s96 of the United Kingdom Crime and Disorder Act 1998, race was the first characteristic to be covered by a statutory aggravator. This was introduced following the murder of Stephen Lawrence, a black man, by a group of white youths in 1993.¹⁰⁴ Despite Lawrence's death being "simply and solely and unequivocally motivated by racism", very little was done to convict his killers.¹⁰⁵ The initial failure to bring the killers to justice can be seen either as revealing the inadequacy of law or because of an institutional racism within the British police that did not carry out vigorous and sufficient investigation. Thus, to assure society that racial harassment was taken seriously by the criminal justice system, a racial aggravator was introduced via s96. Racial prejudice is also addressed by two standalone offences; s18-23 of the Public Order Act 1986 created the offence of stirring up racial hatred and s50A of the Criminal Law (Consolidation) (Scotland) Act 1995 created the offence of racially aggravated harassment and conduct, inserted by sec 33 of the Crime and Disorder Act 1998.

¹⁰⁰ Hannah Mason-Bish and Marian Duggan, 'Some Men Deeply Hate Women and Express That Hatred Freely: Examining Victims' Experiences and Perceptions of Gendered Hate Crime' (2020) 26(1) *International Review of Victimology* 112 at 114.

¹⁰¹ Nathan Hall, *Crime and Society Series: Hate Crime* (Routledge 2011) at 78.

¹⁰² Neil Chakraborti and Jon Garland, 'Reconceptualising Hate Crime Victimisation Through the Lens of Vulnerability and Difference' (2012) 16(4) *Theoretical Criminology* 499 at 504.

¹⁰³ Jennifer Brown, 'An Early History of British Race Relations Legislation' (2018) at 1.

¹⁰⁴ Hannah Mason-Bish and Marian Duggan, 'Some Men Deeply Hate Women and Express That Hatred Freely: Examining Victims' Experiences and Perceptions of Gendered Hate Crime' (2020) 26(1) *International Review of Victimology* 112 at 114.

¹⁰⁵ William Macpherson, 'The Stephen Lawrence Inquiry' (1999) Cm 4262-I at 1.11. <[4262.pdf \(publishing.service.gov.uk\)](#)> accessed 15 January 2021. Compare with Robert Booth, "'Institutional racism': 20 years since Stephen Lawrence inquiry," Fri 22 Feb 2019 07.00 GMT <https://www.theguardian.com/uk-news/2019/feb/22/institutional-racism-britain-stephen-lawrence-inquiry-20-years> accessed 15 January 2021.

However, although it has been almost 60 years since the first major piece of legislation to address racism, racism continues to exist in Scotland and worldwide. History of racism, like that of murder, is as old as the history of humans. Racially motivated deaths still happen.¹⁰⁶ This can be seen via the recent death of George Floyd, an African American, by a white police officer in America who had him pinned to the ground by his knee for over nine minutes.¹⁰⁷ Similarly, Sheku Bayoh, a black man, died in 2015 whilst in Police Scotland custody. Bayoh was seen with six policemen kneeling and lying on him which resulted in 23 separate injuries.¹⁰⁸ Both deaths would seem clear examples of tacit racism. Police officers were alleged to have used extreme aggression used, supposedly due to the victims' race.¹⁰⁹ It is therefore necessary to consider the three pieces of legislation in force immediately prior to the 2021 Act to address racial hate crimes in Scotland: being 1) racial aggravator, 2) racial harassment and 3) stirring up racial hatred are examined, with a focus on their limits and need for reform.

3.1 Statutory Aggravation

An offence is racially motivated under s96 of the Crime and Disorder Act 1998 if:

- a) At the time of committing the offence, or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a racial group; or
- b) The offence is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group.

This means that under the statutory aggravation model, there must be a) a baseline offence and b) this baseline offence must have either been motivated by, or evinces, malice and ill-will towards an individual based on their race.

3.1.1 Baseline Offences

A baseline offence is a criminal offence recognised by law and which can be prosecuted regardless of whether there was a racial element. There is a wide range of baseline offences which can be deemed racially aggravated including the common law offences of breach of the peace, assault, murder and vandalism¹¹⁰ and, under the Communications Act 2003, sending grossly offensive, indecent, obscene or menacing messages.¹¹¹ For example, breach of the peace is an offence recognised under common law and s38 of the Criminal Justice and

¹⁰⁶ Sadly, rather than to problems with the definition of the crime these deaths all point to police prejudices and failings. This is too subjective

¹⁰⁷ BBC News, 'George Floyd: What Happened in the Final Moments of His Life' (2020) <[George Floyd: What happened in the final moments of his life - BBC News](#)> accessed 14 August 2022.

¹⁰⁸ Mark Daly and Calum McKay, 'Sheku Bayoh: Why Did My Brother Die in Police Custody?' *BBC News* (Scotland, 18 January 2021) <[Sheku Bayoh: 'Why did my brother die in police custody?' - BBC News](#)> accessed 21 February 2022.

¹⁰⁹ See For an article by Philip Glover arising from the decision in the case of *Tanveer Ahammad v HMA* 2017 JC 130, see *Jur. Rev.* 2017, 2, 85-105

¹¹⁰ Scottish Government, 'One Scotland: Hate Has No Home Here – Consultation on Amending Scottish Hate Crime Legislation' (2018) at 3.

¹¹¹ *Ibid* at 4.

Licensing (Scotland) Act 2010. Neither requires evidence of actual alarm.¹¹² This however covers a “wide range of conduct which may be considered socially destructive or offensive”¹¹³ such as shouting, harassment and peaceful protests.¹¹⁴

The first requirement for a Section 96 prosecution is an underlying hate offence. This is an important aspect of hate crime as it limits arguments that hate crime legislation unjustifiably restricts freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). This states everyone has the right “to hold opinions and to receive and impart information and ideas without interference”.¹¹⁵ This right is not restricted as “statutory aggravation provisions do not create new offences” but rather require the court to consider the aggravation when sentencing for the baseline offence.¹¹⁶

3.1.2 Malice and Ill-Will

The second stage of prosecuting a hate crime under the statutory aggravation model, prior to the 2021 Act, was for the baseline offence to be motivated by, or evincing, malice and ill-will towards the victim due to their race. Under s96 of the 1998 Act, a racial group is “a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins”.¹¹⁷

Where an accused is convicted of an offence with a statutory aggravation, the offence is labelled as a hate crime and their sentence is increased to account for the aggravation.¹¹⁸ As the aggravation appears on the individual’s criminal record, it can be considered in future sentences and allows for accurate statistics and trends to be identified.¹¹⁹ In *Mack v Dunn*,¹²⁰ repeatedly shouting ‘Nazi German’ and ‘Nazi bastard’ at a German national physician was held to demonstrate nationality prejudice.¹²¹ The baseline offence was s38 as the remarks were likely to cause alarm. Further, as the remarks were abusive and involved a racial element,¹²² malice and ill-will was present. Consequently, the accused was charged with contravention of s38 of the 2010 Act, with a racial aggravation under s96 of the 1998 Act.

¹¹² Although there are similarities breach of the peace and sec 38 are not the same. Sec 38 was introduced to cover some situations not caught by the definition of the acts reads of breach of the peace in *Smith v Donnelly* See the wording of sec 38- behaviour that is threatening or abusive and which would cause a reasonable person to suffer fear or alarm

¹¹³ Andrew Cubie, *Scots Criminal Law* (4th edn, Bloomsbury Professional 2016), 12.8.

¹¹⁴ *ORR v Mundell* 2019 S.C. (S.A.C) 5.

¹¹⁵ European Convention on Human Rights, Art10(1). See also European Court of Human Rights, ‘Guide on Article 10 of the European Convention on Human Rights’ (2020) <[Guide on Article 10 - Freedom of expression \(coe.int\)](#)> accessed 3 September 2020.

¹¹⁶ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland: Consultation Paper’ (2017) at p21. A person could claim that a ‘racist behaviour’ was simply part of peaceful protest and it would be put to the court to decide if the line had been crossed and the baseline offence committed.

¹¹⁷ 1998 Act, s96(6). It must be noted here that nothing turns on the distinction that was earlier discussed between ‘races and ‘ethnicity’.

¹¹⁸ Lord Bracadale, *Independent Review of Hate Crime Legislation in Scotland* (Scottish Government 2018) at 4.8

¹¹⁹ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 3.3.

¹²⁰ 2016 SCL 125.

¹²¹ 2016 SCL 125, para [5].

¹²² 2016 SCL 125, para [5]. Interpreting S96 (3) of the 1998 Act seems contentious. On one hand Section 96 seems to require that the prosecution establish malice/ill will. Other accounts can suggest a statutory presumption of malice/ill will whenever there is a racial element. It was however decided that the sheriff did not err in finding that there was malice and ill will on show. The appeal against conviction was refused. See also *RR v PF Aberdeen 2015 S.C.L. 577*; and *Dyer v Hutchison*, Bell & Johnstone (2006 HCJAC 45).

Lord Bracadale recommended that statutory aggravations should continue to be the core method of prosecuting hate crimes,¹²³ with 64% of organisations and 43% of individuals agreeing that the threshold is clear and objective.¹²⁴ However, the use of ‘evincing malice and ill-will’ was criticised as archaic¹²⁵ by the Criminal Law Committee for the Law Society of Scotland. Lord Bracadale argued that its use adds confusion to the concept of hate crime and the level of behaviour which legally constitutes hate crime as it is not defined in the 1998 Act.¹²⁶ Consequently, Lord Bracadale recommended replacing the words, but not the meaning or definition of the threshold, from ‘evincing malice and ill-will’ to ‘demonstrating hostility’.¹²⁷

3.2 Standalone Offences

Alongside statutory aggravations, two standalone offences of racial harassment¹²⁸ and stirring up racial hatred¹²⁹ existed prior to the 2021 Act. Although it is not unrelated, these differ from the statutory aggravations: it is not the aggravation which causes the conduct to be classed as a hate crime, but the conduct itself.¹³⁰

3.2.1 Racial Harassment

There are two ways in which racially aggravated harassment and conduct may be committed under s50A of the Criminal Law (Consolidation) (Scotland) Act 1995. These are when an individual:

- a) Pursues a racially aggravated course of conduct which amounts to harassment of a person and
 - i. is intended to amount to harassment of that person; or
 - ii. occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person; or
- b) Acts in a manner which is racially aggravated, and which causes, or is intended to cause, a person alarm or distress.¹³¹

Although, having a standalone offence of racial harassment is beneficial as “hate-based abuse and harassment are more common than serious assaults”.¹³² Nevertheless, in his Independent Review of Hate Crime Legislation in Scotland, Lord Bracadale considered whether this offence

¹²³ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 3.4.

¹²⁴ Alison Platts and Dawn Griesbach, ‘Independent Review of Hate Crime Legislation in Scotland: Analysis of Consultation Responses’ (2018) at 4.15.

¹²⁵ Justice Committee 26th Meeting, 2020, 3 November 2020 (Session 5) at 18.

¹²⁶ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 3.10

¹²⁷ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 3.10. This is not what happened though.

¹²⁸ Criminal Law (Consolidation) (Scotland) Act 1995, s50A.

¹²⁹ Public Order Act 1986, s18 – 23.

¹³⁰ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 5.4.

¹³¹ Criminal Law (Consolidation) (Scotland) Act 1995, s50A(1).

¹³² Scottish Executive, ‘Working Group on Hate Crime report 2004 Report’ (2004) at 5.20.

was necessary due to its similarities to an aggravated breach of the peace under s38 of the Criminal Justice and Licensing (Scotland) Act 2010. Decision was made not to repeal s50A.¹³³

In 2017-18, 45% of hate crimes recorded were charged under an aggravated breach of the peace.¹³⁴ Breach of the peace can be prosecuted at common law or via s38 of the 2010 Act. While both require conduct that causes alarm to ordinary people, the core difference is that s38 covers disturbances occurring in public and private whereas common law requires a public element.¹³⁵ As s38 is more versatile, it has “effectively replaced” the common law offence.¹³⁶ Thus, in Lord Bracadale’s report, s38 (statutory breach of the peace) was compared to s50A (standalone offence of racial harassment) to determine whether s50A was necessary.

Lord Bracadale primarily concluded that repealing s50A would not adversely affect sentencing powers. The maximum sentence under s50A is 12 months on summary complaint and 7 years on indictment¹³⁷ compared to 12 months on summary and 5 years on indictment under s38.¹³⁸ However, s50A convictions have never exceeded 5 years as this is the maximum sheriffs are permitted to impose.¹³⁹ Additionally, most s50A and s38 offences are prosecuted on summary complaint which has the same maximum sentence.¹⁴⁰

Furthermore, as s50A seems to require conduct to cause alarm or distress and breach of the peace requires fear or alarm¹⁴¹ and they both apply to offences occurring in private and public,¹⁴² they cover the same conduct. Thus, s38 is an appropriate alternative for racial harassment. In *Anderson v Griffiths*,¹⁴³ the accused’s conviction was substituted from s50A to breach of the peace. This is because, under s38, the accused can be convicted for the baseline offence even if the aggravation cannot be proved whereas s50A requires corroborated proof of the harassment and racial motive.¹⁴⁴ Accordingly, the use of s50A has declined. In 2011/12, there were 929 convictions of s50A and 125 of s38 whereas in 2016/17 there were 626 and 433 respectively.¹⁴⁵ This is a 246% increase in s38 convictions, suggesting that it is favoured.

¹³³ Decision was made not to repeal s50A. However, proving the provision (1) (a) seem harder. Harassment, for instant, requires at least two instances of conduct; and intent must be proved.

¹³⁴ Scottish Government, ‘Developing Information on Hate Crime Recorded By the Police in Scotland’ (2019) <[Hate crime: availability of information recorded by the police in Scotland - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/consultation-papers/collections/documents/Hate-crime-availability-of-information-recorded-by-the-police-in-scotland-2019.pdf)> accessed 21 January 2021.

¹³⁵ *Smith v Donnelly* 2002 J.C. 65.

¹³⁶ Andrew Crosbie, ‘Threatening or Abusive Behaviour – Criminal Justice and Licensing (Scotland) Act 2010 s38’ <[“Threatening or Abusive Behaviour” – Criminal Justice and Licensing \(Scotland\) Act 2010 s38 – Crime.Scot](https://www.criminaljustice.scot.nhs.uk/consultation-papers/collections/documents/Threatening-or-abusive-behaviour-criminal-justice-and-licensing-scotland-act-2010-s38-crime-scot.pdf)> accessed 18 November 2020.

¹³⁷ Criminal Proceedings etc. (Reform) (Scotland) Act 2007, s45(1). See also Criminal Law (Consolidation) (Scotland) Act 1995, s50A(5).

¹³⁸ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 7.17.

¹³⁹ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 7.17.

¹⁴⁰ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 7.18.

¹⁴¹ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 7.15. But the test for the actus reus of breach of the peace in *Smith v Donnelly* 2002 J.C. 65 affirmed in *Harris v HMA* (2009 HCJAC 80) and the actus reus of s38 shows that evidence of actual fear and alarm are not required.

¹⁴² *King v Webster* 2012 SLT 342.

¹⁴³ 2005 1 J.C. 169. See also *Martin v Howdle* 2006 JC 35 on a similar point. *King v Webster* 2012 SLT 342 is on a similar but not identical point.

¹⁴⁴ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 7.19.

¹⁴⁵ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 7.13.

Consequently, Lord Bracadale concluded that s50A should be repealed as this would remove the complications and hierarchy it created as no other characteristic, other than race, is protected via a standalone offence of harassment.¹⁴⁶

3.2.2 Stirring Up Offence

The offence of inciting racial hatred was initially introduced by s6 of the Race Relations Act 1965.¹⁴⁷ This was the first legislation in the UK which addressed racial inequality and discrimination by prohibiting racial discrimination in public places and the promotion of hatred based on colour, race or ethnic or national origins. However, within its first year, 73% of complaints were found to be outside the Act's scope.¹⁴⁸ This is because it failed to address areas in which discrimination was most prevalent, namely employment and housing. Thus, the Race Relations Act 1968 was introduced. It criminalised refusal of a job, housing, or service provisions to an individual where the refusal is based solely on an individual's race. This was subsequently extended by the Race Relations Act 1976 to include indirect discrimination.¹⁴⁹ These Acts form the basis of the offence of stirring up of racial hatred under the Public Order Act 1986,¹⁵⁰ which was the legislation in place in Scotland, as well as England and Wales, immediately prior to the 2021 Act.

Part three of the Public Order Act 1986 relates to racial hatred and captures behaviour and material which content encourages others to hate a specific group of people based on their race. This requires threatening, abusive or insulting behaviour or material which a) intends to stir up racial hatred, or b) is likely to stir up hatred.¹⁵¹ This applies where an offence is committed in public or private, providing the words, behaviours or material are heard or seen by a person outside that dwelling.¹⁵² A defence for these offences is that the accused did not intend, and was unaware that their conduct might be, threatening, abusive or insulting.¹⁵³

The 1986 Act covers a range of offences; s19 relates to publishing or distributing written material, s20 a public performance of a play, s21 involves distributing, showing, or playing a recording, s22 governs broadcasting and finally s23 relates to the possession of racially inflammatory material. In *Wilson v Dyer*,¹⁵⁴ insulting and abusive leaflets towards Muslims were prepared and distributed. These were held to be evidence of an intention to "antagonise the community and provoke feelings of ill-will and hatred",¹⁵⁵ prosecuted under s19.

This case emphasised the uniqueness of the 1986 Act and the hierarchy it created, as it only protected against racial hatred. Thus, whilst religion is not protected, the terms 'Pakistani' and

¹⁴⁶ Lord Bracadale, 'Independent Review of Hate Crime Legislation in Scotland' (2018) at 7.24 and 7.25

¹⁴⁷ Lord Bracadale, 'Independent Review of Hate Crime Legislation in Scotland' (2018) at 2.2.1.

¹⁴⁸ Simon Peplow, 'Parliament and the 1965 Race Relations Act' (*The History of Parliament*, 21 March 2017) <[Parliament and the 1965 Race Relations Act – The History of Parliament \(wordpress.com\)](#)> accessed 4 December 2022.

¹⁴⁹ Jennifer Brown, 'An Early History of British Race Relations Legislation' (2018) at 7.

¹⁵⁰ Public Order Act 1986, s18 to s23. It is still the law and will be until the 2021 Act comes into force

¹⁵¹ Public Order Act 1986 at s18(1).

¹⁵² Public Order Act 1986 at s18(4).

¹⁵³ *Ibid* at s18(4); s19(2); s20(2); s21(3); s22(2); s23(3). Making it a defence shifts the burden of proof from prosecution to defence and thus tends to increase protection.

¹⁵⁴ 2005 SCCR 686.

¹⁵⁵ *Ibid* at 687. This is one of the few reported Scottish cases. The essence of this offence is that it is intended to encourage others or incite others to share and act on sentiments of racial hatred.

‘Muslim’, in the context of this case, were used interchangeably meaning the leaflets were abusive to persons defined by reference to national origins and colour, which falls into the definition of a racial group.¹⁵⁶

One possible explanation for this distinction between race and religion is that the offence is rarely used for racial hatred,¹⁵⁷ despite racial hatred being the most prevalent hate crime. Therefore, a stirring up offence is not deemed necessary for some other protected characteristics. However, Lord Bracadale considered this a significant piece of legislation and recommended: 1) it be extended to all protected characteristics; 2) removing ‘insulting’ from the threshold; 3) consolidating the provisions; and 4) keeping the protection of freedom of expression provision.¹⁵⁸

Overall, Lord Bracadale praised the protection offered to race under the 1998 Act and the offence of stirring up racial hatred. His report recommended that the provisions be kept and that only slight modernisation and re-wording were required. Lord Bracadale considered that the wording used caused much confusion making “it less likely that people will report or challenge their experience”.¹⁵⁹ Therefore, if Lord Bracadale recommendation is implemented in the 2021 Act, the evident issue of underreporting could be addressed. Lord Bracadale also acknowledges that having three separate pieces of legislation to cover race related offences was confusing and piecemeal and thus, recommended consolidation.¹⁶⁰ This would provide “clarity, transparency and consistency”.¹⁶¹ His final recommendation was to repeal the offence of racial harassment under s50A of the 1995 Act as this behaviour is sufficiently captured by aggravated statutory breach of the peace offence. Lord Bracadale considered that these changes would remove confusion and crossover, sending a stronger message that racial prejudice is unacceptable in Scotland.¹⁶²

4. The Hate Crime and Public Order (Scotland) Act 2021: an examination of the immediate context and content of the Legislation

Prior to the 2021 Act, racial hatred could be prosecuted under racial aggravation, racial harassment or stirring up racial hatred. Under the Hate Crime and Public Order (Scotland) Act 2021, there are still racial aggravations and some new standalone offences that require proof of a racial element. Racial hatred is addressed in a very similar manner; part 1 offers protection via statutory aggravations, part 2 via racial harassment provisions, and part 3 via offences relating to stirring up hatred. Whilst these mostly coincide with the previous law, the provisions, differences, and criticisms of each of are examined in turn.

The Hate Crime and Public Order (Scotland) Bill was introduced on 23 April 2020 by the Cabinet Secretary for Justice and faced three stages of scrutiny. Stage 1 scrutiny began on the 27 October 2020, with the final stage 1 debate occurring on 15 December 2021. The bill was passed to stage 2 scrutiny however significant changes were called for and numerous interest groups provided lots of criticisms on the Bill. At stage 2 scrutiny, beginning on 2 February

¹⁵⁶ Ibid at 691. 1998 Act, s96(6). It must be noted here that nothing turns on the distinction that was earlier discussed between ‘races and ‘ethnicity’.

¹⁵⁷ Justice Committee 28th Meeting, 2020, *17 November 2020* (Session 5) at col 12.

¹⁵⁸ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 5.42.

¹⁵⁹ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 3.10.

¹⁶⁰ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 9.1 to 9.13.

¹⁶¹ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 9.4

¹⁶² Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 4.48.

2021, amendments were made to the bill, taking into consideration the criticisms and proposed changes voiced at stage 1. Some of the changes made at stage 2 scrutiny are provided below. The Bill was passed with 88 MSPs voting in support of the Bill and 30 opposing. Consequently, the Bill became law on 23 April 2021.¹⁶³

4.1 Statutory Aggravation and Race

One way in which racially motivated hate crimes can be prosecuted is via part 1 of the 2021 Act. This states that an offence is aggravated where either a) the offender evinces malice and ill-will toward a specific victim or b) whether there is a specific victim, the offence is motivated by malice and ill-will towards a group of persons.¹⁶⁴ For each offence, the malice and ill-will must be based on the victim(s) membership or presumed membership of a racial group.¹⁶⁵

By having a statutory aggravation offence in the 2021 Act, Lord Bracadale's recommendation that the core method of prosecuting hate crime should continue to be statutory aggravations is adopted.¹⁶⁶ However, the wording of the offence in the 2021 Act reiterates the previous threshold as conduct which evinces, or is motivated by, malice and ill will continues to be caught. This fails to implement Lord Bracadale's recommendation to replace 'evincing malice and ill-will' with 'demonstrating hostility'. This was recommended as the 'evincing malice and ill-will' was deemed confusing, meaning fewer people may "report or challenge their experience".¹⁶⁷

Whilst the wording of statutory aggravations remains the same, the number of characteristics protected by s1(1) have been modernised and expanded. These include age, disability, race, religion, sexual orientation, transgender identity, and variations in sex characteristics.¹⁶⁸ Thus, the protected characteristics has expanded from five to seven as age has been included and variations in sex characteristics is now a separate category from transgender identity. Whilst there were views concerning each characteristic, race will be focused on here.

Under s1(2), racially aggravated offences include malice and ill-will towards persons of race, colour, nationality (including citizenship) or ethnicity or nationality. The passing of the Act provided an opportunity to clarify what falls under this definition, specifically whether it extends to asylum seekers, refugees, and Gypsy Travellers.

Lord Bracadale considered whether race covers asylum seekers and refugees and relied on England's approach. In the English case of *R v Rogers*,¹⁶⁹ the appellant called three Spanish women "bloody foreigners" and told them to "go back to your own country". It was argued on

¹⁶³ See The Scottish Parliament website for further information at < [Hate Crime and Public Order \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#) > accessed 31 August 2022. There was a great deal of discussion around what was clause 4 in the Bill. It caught performers in a play. Check out some of the proceedings before the Justice committee. The section was removed in the end.

¹⁶⁴ Hate Crime and Public Order (Scotland) Act 2021, s1(1).

¹⁶⁵ A racial group is defined as "a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins" in the Hate Crime and Public Order (Scotland) Act 2021, s3(2). It must be mentioned that the definition of the concept of racial group has not changed from the pre-2021 Act. Compare with 1998 Act, s96(6). It must be repeated here that nothing turns on the distinction that was earlier discussed between 'races and 'ethnicity'.

¹⁶⁶ Lord Bracadale, 'Independent Review of Hate Crime Legislation in Scotland' (2018) at 3.4.

¹⁶⁷ Lord Bracadale, 'Independent Review of Hate Crime Legislation in Scotland' (2018) at 3.10.

¹⁶⁸ Hate Crime and Public Order (Scotland) Act 2021, s1(2).

¹⁶⁹ [2007] 2 AC 62.

appeal, that the term foreigners, rather than a specific racial group, was not included within the meaning of racial group and xenophobia fell out with the definition. Despite this argument, it was held that race is broad and that those with a non-British origin were a racial group. Additionally, the College of Policing's Hate Crime Operational Guidance states that race automatically includes asylum seekers and refugees as this is "intrinsically linked to...ethnicity and origins".¹⁷⁰ *Rogers* seemed persuasive that racially aggravated offences include asylum seekers and refugees in Scotland.¹⁷¹

Additionally, Lord Bracadale, and, during the Justice Committee for the 2021 Bill, John Wilkes¹⁷² considered race to include Scottish Gypsy Travellers¹⁷³ as they are a sub-category of white ethnicity.¹⁷⁴ This is supported by the College of Policing¹⁷⁵ as well as various cases.¹⁷⁶ For the purposes of the Equality Act 2010, Romani Gypsies¹⁷⁷ and Irish Travellers¹⁷⁸ were held to be separate ethnic groups. In Scotland, Scottish Gypsy Travellers were held as an ethnic group in *MacLennan v Gypsy Traveller Education and Information Project*¹⁷⁹. These cases were perceived to extend to hate crime legislation. Therefore, although the Act does not specifically refer to refugees, asylum seekers and gypsies, it is covered by the racial aggravator.

4.2 Aggravated Harassment

Lord Bracadale recommended s50A of the 1995 Act should be repealed. This was supported by Anthony McGeehan, from the Crown Office and Procurator Fiscal Office (COPFS), who stated that repealing s50A "would not diminish [the COPFS's] ability to respond to racial hate crime" as racial harassment "can be libelled (sic) as a contravention of s38 of the Criminal Justice Licensing (Scotland) Act 2010, with an aggravation".¹⁸⁰

However, the Hate Crime and Public Order (Scotland) Bill, as initially introduced, failed to implement this recommendation. Cabinet Secretary Humza Yousaf's, rationale was that there were "strong representations from a variety of racial equality groups" that repealing s50A would weaken protection for racial minorities.¹⁸¹ Instead of repealing the 1995 Act, Yousaf proposed amendment 33 at Stage 2 scrutiny which would insert a reiteration of s50A, an offence of racially aggravated harassment, into the 2021 Act so all acts were consolidated.

Yousaf stated that repealing s50A, without having provisions in the 2021 Act, would be damaging in tackling racial hatred in Scotland as in 2019-20, the COPFS reported 1208 charges under s50A which was 40% of all race hate crimes.¹⁸² Further, including a racial harassment offence in the 2021 Act would "maintain a distinct approach for race and ensure that all hate

¹⁷⁰ College of Policing, 'Hate Crime Operational Guidance' (2014) at p30

¹⁷¹ Lord Bracadale, 'Independent Review of Hate Crime Legislation in Scotland' (2018) 4.76

¹⁷² From the Equality and Human Rights Commission.

¹⁷³ Justice Committee 28th Meeting, 2020, 17 November 2020 (Session 5) at col 30.

¹⁷⁴ Lord Bracadale, 'Independent Review of Hate Crime Legislation in Scotland' (2018) 4.79

¹⁷⁵ College of Policing, 'Hate Crime Operational Guidance' (2014) at p30.

¹⁷⁶ See *O'Leary v Punch Retail*, HHJ Goldstein, Westminster County Court, 29 August 2000; *MacLennan v Gypsy Traveller Education and Information Project*, Employment Tribunal, S/13291/07 in Lord Bracadale p51

¹⁷⁷ *Commission for Racial Equality v Dutton* [1989] 2 WLR 17.

¹⁷⁸ *O'Leary and others v Allied Domecq and others* (unreported) 29 August 2000 (Case No. CL 950275-79).

¹⁷⁹ Employment Tribunal, S/13291/07.

¹⁸⁰ Justice Committee 26th Meeting, 2020, 3 November 2020 (Session 5) at col 47.

¹⁸¹ Justice Committee 25th Meeting, 2020, 27 October 2020 (Session 5) at col 27.

¹⁸² Justice Committee 5th Meeting, 2021, 9 February 2021 (Session 5) at col 5.

crime legislation can be found in one place”.¹⁸³ This was supported and amendment 33 was agreed to.

Therefore, under Part 2 of the 2021 Act, it is an offence to pursue a racially aggravated course of conduct which amounts to harassment of another person and is intended or is likely to amount to harassment. Alternatively, it is an offence to act in a manner which is racially aggravated and which causes or is intended to cause another person alarm and distress.¹⁸⁴ Similarly to provisions prior the Act, this only applies to race. Consequently, Lord Bracadale’s recommendation that a racial harassment offence is unnecessary was not accepted. This means that procurators fiscal continue to have two options when prosecuting racial harassment; procurators fiscal can prosecute under a statutory breach of the peace with aggravation or under s3 of the 2021 Act. Additionally, Lord Bracadale’s recommendation to remove any hierarchy is not met¹⁸⁵ as race is the only characteristic protected by an aggravated harassment provision in the Act.

4.3 Stirring Up Hatred

As well as a statutory race aggravation and the offence of racially aggravated harassment, the 2021 Act addresses racial prejudice via the offence of stirring up hatred under Part 3, s4. This replaces the “somewhat complicated and cumbersome”¹⁸⁶ offences of stirring up racial hatred previously found in sections 18 to 23 of the Public Order Act 1986 and extends the offence to cover all characteristics, as recommended by Lord Bracadale.

For a person to commit an offence of stirring up hatred, there are two different thresholds depending on which characteristic is being addressed. For race, s4(1) of the 2021 Act states a person commits an offence if their conduct is, or they communicate material which is, threatening, abusive or insulting and they either intend or is likely to stir up racial hatred. This reiterates the 1986 Act, failing to remove ‘insulting’ as recommended by Lord Bracadale. For all other characteristics, s4(2) requires threatening or abusive conduct, or material which intends to stir up hatred.¹⁸⁷ Consequently, more conduct can be caught by s4(1) than s4(2) as threatening or abusive is a higher threshold to meet than threatening, abusive or insulting and s4(1) captures behaviour intended or likely to stir up hatred whereas s4(2) only captures behaviour intended to stir up hatred. The implications of having different thresholds for race compared to the other characteristics is examined below.

The Act also reintroduce a new defence which requires the accused to show that the behaviour or communication of the material was, in the circumstances, reasonable.¹⁸⁸ The same defence is found in s38 of the 2010 Act.¹⁸⁹

As there were various criticisms of part 3, these have been sorted into arguments supporting and opposing 1) the exclusion/inclusion of the threshold ‘insulting’, 2) the need for intent and 3) the removal of the dwelling defence.

¹⁸³ Justice Committee 5th Meeting, 2021, 9 February 2021 (Session 5) at 6.

¹⁸⁴ Hate Crime and Public Order (Scotland) Act 2021, s3(1).

¹⁸⁵ The implication of this should be understood in a no-distant time.

¹⁸⁶ Lord Bracadale, ‘Independent Review of Hate Crime Legislation in Scotland’ (2018) at 5.41.

¹⁸⁷ SP Bill 67 Hate Crime and Public Order (Scotland) Bill [as introduced] Session 5 (2020), cl 3(3).

¹⁸⁸ Ibid cl 3(4) and s5(4).

¹⁸⁹ Criminal Justice and Licensing (Scotland) Act 2010, s38(2)

1. Insulting

Lord Bracadale's recommended removal of 'insulting' from the threshold has been partially implemented. Although, stirring up **racial** hatred continues to require threatening, abusive or insulting conduct or material, all other characteristics require threatening or abusive conduct or material.

'Insulting' was kept for stirring up racial hatred as its removal would be perceived as weakening the threshold compared to the rest of the UK. This is because 'insulting' remains within the threshold for racial stirring up offences in England and Wales, Northern Ireland and Republic of Ireland offences.¹⁹⁰ Therefore, had insulting been removed, less protection would be offered in Scotland than in other jurisdictions within the UK,¹⁹¹ despite racial hatred making up two third of all hate crimes in Scotland.¹⁹² Further, Amy Allard-Dunbar¹⁹³ argues that race must "be dealt with separately...because of the historical and institutional nature of racism" and because "when race is hidden among other equality groups, it tends to be...left behind and ignored".¹⁹⁴ The different thresholds and the inclusion of insulting for race has received mixed reactions.

Allard-Dunbar argues that including insulting for race only is necessary as daily instances of racism fall under insulting, such as covert racism and microaggressions, and catching and prosecuting insulting behaviour is essential to ensure this does not escalate to violent racial crimes.¹⁹⁵ To illustrate, Allard-Dunbar uses the pyramid of white supremacy stating at the top is genocide and insults are at the bottom. She states where insults are continuously permitted, racial discrimination can escalate to the point discriminatory violence is accepted. Thus, criminalising racial insults is vital in containing racial discrimination and reducing racial violence.¹⁹⁶

In contrast, Roddy Dunlop QC¹⁹⁷ argues that, as very few convictions fell under 'insulting', its removal will have no significant impact on conviction rates.¹⁹⁸ This suggests that most convictions under stirring up racial hatred prior to the 2021 Act arose from threatening or abusive behaviour. Thus, using the pyramid analogy of Allard-Dunbar, the law could fail to prevent racial violence, and would continue to fail as the law has not changed but rather has only been consolidated for race.

Another argument against the inclusion of insulting is that the threshold of 'threatening or abusive' strikes the right balance between freedom of expression and protection from hatred¹⁹⁹

¹⁹⁰ Justice Committee 25th Meeting, 2020, *27 October 2020* (Session 5) at col 6.

¹⁹¹ Justice Committee 25th Meeting, 2020, *27 October 2020* (Session 5) at col 7. For experience of black and the rise of black churches in Britain, see <https://news.sky.com/story/how-black-majority-churches-became-thriving-community-hubs-in-the-uk-12503805>

¹⁹² Justice Committee 29th Meeting, 2020, *24 November 2020* (Session 5) at col 23.

¹⁹³ Intercultural Youth Scotland.

¹⁹⁴ Justice Committee 28th Meeting, 2020, *17 November 2020* (Session 5) at col 40.

¹⁹⁵ Justice Committee 28th Meeting, 2020, *17 November 2020* (Session 5) at col 41.

¹⁹⁶ Justice Committee 28th Meeting, 2020, *17 November 2020* (Session 5) at col 41

¹⁹⁷ Faculty of Advocates.

¹⁹⁸ Justice Committee 22nd Report, 2020, 'Stage 1 Report on the Hate Crime and Public Order (Scotland) Bill' (SPP 878) para76.

¹⁹⁹ Amnesty International, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/361) at 2.

as criminalising insults may criminalise different or unpopular opinions and thus censor people's views.²⁰⁰ Supportively, Michael Clancy²⁰¹ states that, due to its subjective nature, 'insulting' "lowers the bar for criminality a bit too far" due to its subjective nature.²⁰² Additionally, a threatening or abusive threshold is consistent with s38 of the 2010 Act meaning practitioners are familiar with the terminology.²⁰³

It is also argued that having different thresholds for different characteristics contradicts the Act's key policy objective to be consistent²⁰⁴ and creates a hierarchy²⁰⁵ as more conduct will be caught by insulting and thus race is more protected.²⁰⁶

2. Intention

Prior to the 2021 Act, stirring up racial hatred occurred if the individual a) intended or b) was *likely* to stir up racial hatred. However, it was a defence that if the individual did not intend and was not aware that their conduct or material might be threatening, abusive or insulting.²⁰⁷ As first introduced, the bill included both thresholds for all characteristics as it provides more flexibility and an intent only threshold would be too restrictive in practice as intent is harder to prove.²⁰⁸ However, the defence was excluded from the 2021 Act. It was argued that, without the defence, the offence would be limited to intent only.

Primarily, Tickell argues that many common law crimes in Scotland including theft, assault and fraud have intent only thresholds and these are prosecuted daily.²⁰⁹ Furthermore, in England and Wales, sexual orientation and religion are intent only stirring up hatred offences and are effectively used and prosecuted.²¹⁰ Thus, the Scottish Government's argument that an intent only threshold would be restrictive in practice seems flimsy.

Another argument for an intent only threshold is that 'likely' is too vague and subjective as it can be interpreted either as a chance or more probable than not.²¹¹ To rectify this, the Act was amended at stage 2 scrutiny to include a reasonable person test. This requires the prosecution

²⁰⁰ Care for Scotland, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/339) at 2.

²⁰¹ Law Society of Scotland.

²⁰² 3 Nov at col 4 per Michael Clancy

²⁰³ Association of Scottish Police Superintendents, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/396) at 4.

²⁰⁴ Scottish Government, 'Hate Crime and Public Order (Scotland) Bill: Equality Impact Assessment Record' (2020) <[Hate Crime and Public Order \(Scotland\) Bill - Equality Impact Assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/consultations/hate-crime-and-public-order-scotland-bill-equality-impact-assessment)> accessed 10 February 2021.

²⁰⁵ Justice Committee 26th Meeting, 2020, 3 November 2020 (Session 5) at col 37.

²⁰⁶ Maybe 'race' is so important that extra protection is justified. Alison Platts, Dawn Griesbach and Fiona Mackay, 'One Scotland: Hate Has No Home Here Consultation on Amending Scottish Hate Crime Legislation: Analysis of Responses' (2019) at 11.30.

²⁰⁷ Public Order Act 1986, s18(5).

²⁰⁸ Policy Memorandum to the SP Bill 67 Hate Crime and Public Order (Scotland) Bill [as introduced] Session 5 (2020) at para 140-141.

²⁰⁹ Andrew Tickell, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/379) at 3.

²¹⁰ Andrew Tickell, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/379) at 3.

²¹¹ Law Society of Scotland, Response to the Call for Evidence for Hate Crime and Public Order (Scotland) Bill (24 July 2020) at 16.

to establish that a reasonable person would consider the behaviour or material to be likely to result in hatred being stirred up.²¹²

Finally, an offence of likelihood removes a “critical aspect of the common law test of criminal liability”²¹³, *mens rea*. This requires a guilty mind or intention, which is objectively inferred from the accused’s actions.²¹⁴ Without this, there is more opportunity for accusations of stirring up hatred to be used as a “means of marginalising or silencing opinions”.²¹⁵

As a likelihood threshold was thought “too open ended” and to risk inhibiting Article 10 rights,²¹⁶ there were calls for the stirring up hatred offences to be amended into crimes of intent only.²¹⁷ Humza Yousaf partially accepted this amendment at stage 2 scrutiny as race continues to capture behaviour which intends or is (with the objective reasonable person) likely to stir up hatred whereas all other characteristics were amended to be intent only.

3. Dwelling Defence

Under s18 of the 1986 Act, it was a defence for the accused to prove that they were inside a dwelling and had no reason to believe that the conduct or material would be heard or seen by a person outside that or any other dwelling.²¹⁸ This defence is not included in the 2021 Act, despite Lord Bracadale not recommending its removal. Yousaf argued threatening or abusive behaviour with the intent to stir up hatred, even when it is within one’s home, must be prosecuted.²¹⁹

There were differing reactions regarding the exclusion of a dwelling defence, with most criticisms arguing it breaches society’s right to privacy and freedom of expression.²²⁰ Waiton argues conversations in private, such as comments said at the dinner table, will no longer be treated as such and can be prosecuted.²²¹ Furthermore, the dwelling defence remains in England and Wales and thus the Bill offers less protection to the accused in Scotland²²².

Nonetheless, the argument that the Act breaches the fundamental right to privacy is limited. Tickell and ACC Gary Ritchie both separately state that many offences prosecute behaviour within the home including assault, domestic abuse and sexual offences and these do not breach

²¹² The Hate Crime and Public Order (Scotland) Act 2021, s4(1)(b)(ii).

²¹³ The Catholic Parliamentary, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/321) at 2.

²¹⁴ Scottish PEN, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/358) at 4.

²¹⁵ The Christian Institute, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/333) at 1. Compare with Dexter Dias, ‘Racism Thrives on Silence- Speak Up!’ (TEDxExeter, June 2020) < [Dexter Dias: Racism thrives on silence -- speak up! | TED Talk](#) > accessed 23 September 2021. Also with Allan-Dunbar argument at Justice Committee 28th Meeting, 2020, 17 November 2020 (Session 5) at col 41.

²¹⁶ Humanist Society Scotland, ‘Hate Crime and Public Order (Scotland) Bill Briefing: Stage 1 at 6. <[Hate-Crime-and-Public-Order-Scotland-Bill-Humanist-Society-Scotland-Briefing-1.pdf \(humanism.scot\)](#)> accessed 13 February 2021.

²¹⁷ Andrew Tickell, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/379) at 2.

²¹⁸ Public Order Act 1986, s18(4)

²¹⁹ Justice Committee 25th Meeting, 2020, 27 October 2020 (Session 5) at col 9.

²²⁰ Stuart Waiton, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/421) at 3.

²²¹ Stuart Waiton, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/421) at 3.

²²² Scottish Parliament, ‘Meeting of the Parliament (Hybrid): Session 5’ (10 March 2021) at col 46.

article 9 right of privacy.²²³ Similarly, s38 of the 2010 Act criminalises behaviour which is threatening or abusive and covers behaviour in public and private without a dwelling defence.²²⁴

Additionally, the aim of the offence is not to prosecute ignorant comments made at the dinner table, nor could it as the threshold must be met according to Yousaf²²⁵. Rather it is to criminalise the gathering of groups with shared prejudicial views within one's home with the objective to strategize or discuss their shared hatred.

5. Analysis

Central to this paper is the question of whether or to what extent race vis-à-vis diversity is protected in the 2021 Scotland Act. It therefore seems a convenient juncture to examine whether or how the focussed regime might bring about a society where on one hand racism and racist hate crimes are curbed and, on the other, racial identity and diversity are promoted. But then, the viability of managing racist hate offences through law is increasingly being doubted.

Critics, such as Francys Johnson, pay attention to the complex nature of hate and racism, examining related incidents of prejudice, discrimination, and cognate offences.²²⁶ Like other "ism", critics see racism as a theory with multiple dimensions and implications.²²⁷ They accordingly question the ability of law to effectively prevent, or curb hate related offences. Before assessing the power of the 2021 Act to bring about the needed social change, the nature of racist hate offences must be revisited in brief. This allows for an examination of how Scotland responds to the fundamental question of whether racially motivated offences should be criminalized in the first place. An overview of responses criminalization of hate in the United States and England are then considered alongside the regime in Scotland.

5.1 Of Race, Racism and Racially Motivated Offences: Should Hate Be Made a Crime?

As demonstrated above in Section 2 of this study, hate is multifaceted; it has different meanings to different people and the concept can be used in various contexts. Hate can encompass an array of human emotions. However, in the context of law, hate is not an emotion but a "rigidly structured pattern of oppression".²²⁸ To hate is to be racist or sexist or homophobic. It is to be biased and prejudicial towards a group of people.²²⁹

²²³ Both Articles 8 and 9 might be engaged. But see Justice Committee 22nd Report, 2020, 'Stage 1 Report on the Hate Crime and Public Order (Scotland) Bill' (SPP 878) para 115.

²²⁴ Financial memorandum to the SP Bill 67 Hate Crime and Public Order (Scotland) Bill [as introduced] Session 5 (2020).

²²⁵ Stuart Waiton, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/421) at 77.

²²⁶ Francys Johnson, "Race is a Fiction: Racism is not" (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022.

²²⁷ Francys Johnson, "Race is a Fiction: Racism is not" (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022.

²²⁸ Jennifer Schweppe and Barbara Perry, 'A Continuum of Hate: Delimiting the Field of Hate Studies' (2022) 77 *Crime, Law and Social Change* 503.

²²⁹ See BBC News "Race in South Africa: 'We haven't learnt we are human beings first'" in *BBC Africa* January 21, 2021. Available at <https://www.bbc.co.uk/news/world-africa-55333625> accessed 16 August 2022. Compare with Michelle Peens and Bernard Dubbeld "Troubled Transformation: Whites, Welfare, and 'Reverse-Racism' in Contemporary Newcastle" in *Diversities* Vol. 15, No. 2, 2013 ISSN 2079-6595,

But should hate, in the first place, be made a crime? For a response, it is necessary to revisit in brief the question of whether race is a biological category, or a social construct. Social constructs differ from biological categories. This is because social constructs are not inherent²³⁰ but rather are formed over time through social interaction and human imagination.²³¹ The construct of ‘race’ was formed to divide and group individuals based on their physical appearance. It is a descriptor which has no significant link to biology. Templeton states that “adaptive traits such as skin colour have frequently been used to define races in humans, but such adaptive traits reflect the underlying environmental factor to which they are adaptive and not *overall* genetic differentiation”.²³²

Schweppe and Perry argue that hatred is about power as it is a means to assert one’s identity and belongingness and to commit a hate crime is to “marginalise and disempower targeted communities”.²³³ This is because hate offences might be a means to create a hierarchy, with the offender forcing their superiority on the victim, resulting in the victim being oppressed.²³⁴

5.1.1 Of Racist Hatred and the Law

A paradox in this study is that much like the statisticians who categorise people by race for a better understanding of society, the law categorises people with the intent to benefit society and solve the problem of racism. The function of law is to provide order over society. As lofty as the use of, and value of, law is in society, it is also sometimes abused to advance anti-humanity agenda, as is categorisation.²³⁵ In fact, there are arguments that racism is legally institutionalised: racism said to be 1) legally constructed, 2) socially maintained, 3) politically expedient as it confers 4) economic benefits to racially motivated criminals.²³⁶ Institutional racism is covert or overt racial prejudice residing “in the policies, procedures, operations and culture of public or private institutions”²³⁷ such as the police.

www.unesco.org/shs/diversities/vol15/issue2/art2 © UNESCO accessed 16 August 2022. See Martinich, A. P. (1996). *Philosophical Writing: An Introduction*. Blackwell Publishing. p. 99.

²³⁰ See BBC News “Race in South Africa: ‘We haven’t learnt we are human beings first’” in *BBC Africa* January 21, 2021. Available at <https://www.bbc.co.uk/news/world-africa-55333625> accessed 16 August 2022. Compare with Michelle Peens and Bernard Dubbeld “Troubled Transformation: Whites, Welfare, and ‘Reverse-Racism’ in Contemporary Newcastle” in *Diversities* Vol. 15, No. 2, 2013 ISSN 2079-6595, www.unesco.org/shs/diversities/vol15/issue2/art2 © UNESCO accessed 16 August 2022. See Martinich, A. P. (1996). *Philosophical Writing: An Introduction*. Blackwell Publishing. p. 99.

²³¹ Graham B Stead, ‘Culture and Career Psychology: A Social Constructionist Perspective’ (2004) 64 *Journal of Vocational Behaviour* 389 at 391.

²³² Nonetheless, it seems arguable that these adaptive traits are biological: they have physical manifestations. See Alan R Templeton, ‘Biological Races in Humans’ (2013) 44(3) *Studies in History and Philosophy of Biological and Biomedical Sciences* 262.

²³³ Jennifer Schweppe and Barbara Perry, ‘A Continuum of Hate: Delimiting the Field of Hate Studies’ (2022) 77 *Crime, Law and Social Change* 503.

²³⁴ Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001) at 55.

²³⁵ Francys Johnson, “Race is a Fiction: Racism is not” (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022.

²³⁶ Francys Johnson, “Race is a Fiction: Racism is not” (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022.

²³⁷ [What is institutional racism? - Institute of Race Relations \(irr.org.uk\)](#)

Sheku Bayoh's death in the custody of Scottish police²³⁸ would seem a clear example of institutional racism.²³⁹ There was the allegation of excessive aggression against the police officers²⁴⁰ supposedly because Bayoh was not white, but black. To assess the efficiency of the 2021 Act therefore, how the law will discourage the social maintenance of racism and racial hatred must be considered. This must address the two main forms of racism: the passive and the active. As exemplified in Martin Niemöller's poem *First They Came*, passive racism is to ignore instances of racial discrimination and hatred:²⁴¹

“First they came for the Communists
And I did not speak out
Because I was not a Communist
Then they came for the Socialists
And I did not speak out
Because I was not a Socialist
Then they came for the trade unionists
And I did not speak out
Because I was not a trade unionist
Then they came for the Jews
And I did not speak out
Because I was not a Jew
Then they came for me
And there was no one left
To speak out for me.”

²³⁸ Mark Daly and Calum McKay, ‘Sheku Bayoh: Why Did My Brother Die in Police Custody?’ *BBC News* (Scotland, 18 January 2021) <[Sheku Bayoh: 'Why did my brother die in police custody?' - BBC News](#)> accessed 21 February 2022.

²³⁹ Institutional racism of the police does not only raise special problems, but it can also be left to more general legislation.

²⁴⁰ BBC News, ‘George Floyd: What Happened in the Final Moments of His Life’ (2020) <[George Floyd: What happened in the final moments of his life - BBC News](#)> accessed 14 August 2022.

²⁴¹ Martin Niemöller's, ‘First They Came’ (1946). This was given as part of speech at the Confessing Church in Frankfurt.

There are arguments that, through its laws, a state might unwittingly facilitate abuse.²⁴² Through laws, the states could unintentionally inject into the system hate and hate related offences, including racism: criminalizing hate “creates special groups and may be unfair on those who are not in one of the identified categories”.²⁴³ The criticism against criminalization of hate, it appears, has to do with the limits of law’s ability to deter hate related incidence or offences.

5.2 Critical Engagement with Racially Motivated Offences Through the Laws

Criminalization is also considered ineffective in addressing the motivations and effects of hate crime. Adding extra punishment for an offender’s values might be lawful, but the attendant regime could be unjust.²⁴⁴ In culturally diverse communities, legislating on hate could be inhibitive of freedom of speech or expression. Therefore, to determine whether or how the 2021 Scottish Act protects race, the question of whether or how hate is made crime in a related jurisdiction must be addressed and not be ignored.

Law and literature show how “hate is a global phenomenon”²⁴⁵. Consequently, various countries have made legislative provisions to tackle racism. By providing a brief outline of the legal response of other countries including America and England and Wales to racism, the likelihood of the Scotland Act succeeding in its aim to tackle racism can be better estimated.

5.2.1 United States of America

In the United States, there is a variety of hate crime legislation, also known as bias crime, enforced at state and federal level. Federal hate crime laws “cover certain crimes committed on the basis of race, colour, religion, national origin, sexual orientation, gender, gender identity or disability”.²⁴⁶ One of the more recent provisions is the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.²⁴⁷ This created a new federal criminal law which criminalises wilfully causing bodily injury when the crime was committed *because* of the actual or perceived 1) race, colour, religion, national origin of any person or 2) religion, gender, sexual orientation, gender identity or disability of any person. Under the provisions of this Act, a California man was sentenced to over 6 years imprisonment for using a nine-inch knife to slash

²⁴² See BBC News “Race in South Africa: ‘We haven’t learnt we are human beings first’” in *BBC Africa* January 21, 2021. Available at <https://www.bbc.co.uk/news/world-africa-55333625> accessed 16 August 2022. Compare with Michelle Peens and Bernard Dubbeld “Troubled Transformation: Whites, Welfare, and ‘Reverse-Racism’ in Contemporary Newcastle” in *Diversities* Vol. 15, No. 2, 2013 ISSN 2079-6595, www.unesco.org/shs/diversities/vol15/issue2/art2 © UNESCO accessed 16 August 2022.

²⁴³ Francys Johnson, “Race is a Fiction: Racism is not” (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022. Compare with Michelle Peens and Bernard Dubbeld “Troubled Transformation: Whites, Welfare, and ‘Reverse-Racism’ in Contemporary Newcastle” in *Diversities* Vol. 15, No. 2, 2013 ISSN 2079-6595, www.unesco.org/shs/diversities/vol15/issue2/art2 © UNESCO accessed 16 August 2022.

²⁴⁴ Francys Johnson, “Race is a Fiction: Racism is not” (TED: Ideas Worth Spreading, March 2014) < [Race is a fiction. Racism is not: Francys Johnson at TEDxUGA - YouTube](#)> accessed 19 August 2022.

²⁴⁵ Wesley Myers and Brendan Lantz, ‘Reporting Racist Hate Crime Victimization to the Police in the United States and the United Kingdom: A Cross-National Comparison’ (2020) 60(4) *The British Journal of Criminology* 1034 at 1034.

²⁴⁶ The United States Department of Justice, ‘Hate Crimes: Federal Laws and Statutes’ < [Laws and Policies | HATECRIMES | Department of Justice](#)> accessed 28 August 2022.

²⁴⁷ 18 U.S.C. § 249 Reference seems to be made to an aggravation provision rather than a standalone offence.

the head, chest and stomach of a black man, whilst yelling racial slurs.²⁴⁸ Jay Greenberg, Acting Assistant Director of the FBI's Criminal Investigation Division stated that hate crimes "strike at an unchangeable, fundamental, and defining part of a victim's identity...they [the offender] attack everyone who identifies with this victim".²⁴⁹ This shows that the United States have an understanding of the impact of racially motivated offences, not only on the victim but also the wider community.²⁵⁰

The US 2009 Act is like the 2021 Scotland Act in that the same characteristics are protected in each. However, the 2009 US legislation requires actual or attempted bodily harm whereas this is not required in Scotland. Scotland does require a criminal act. It is also much more flexible than in the United States and can range from shouting to attempted murder. This is advantageous as more racially motivated offences are captured in Scotland.

There are also state laws, which vary across jurisdictions. For example, some states have a similar 'penalty enhancement' statute as the 2021 Scotland Act. Where a baseline offence is committed with racial aggravation, the sentence imposed is heightened to account for the aggravator under the 2021 Act. Similarly, in certain US states, sentences are increased for crimes motivated by factors such as race.²⁵¹

Therefore, the US have a range of laws which address issues such as racism. Whilst the wording and thresholds differ from the 2021 Act, they are very similar in nature. Both aims are to tackle racial, and other targeted, hatred and at the heart of both the US and Scotland's legal response is the understanding that racism attacks whole communities. Nevertheless, the 2021 Act is less complicated and, by implication, more accessible. Scotland may have an advantage over the United States' approach as Scotland's law is consolidated in the 2021 Act whereas the US is scattered and varies state to state. But, as will now be demonstrated, law in England and Wales of the United Kingdom varies to that in Scotland.

5.2.2 England and Wales

Before hate crime legislation was introduced in the UK, "legally and politically speaking, racist violence was considered absolutely ordinary" in that it was treated like any other crime.²⁵² However, within the last three decades, there has been a major shift in the state's response to violent racial crimes²⁵³ as the impact on the victim, the victim's wider community and social cohesion has been increasingly recognised. Consequently, racial hatred was, and continues to

²⁴⁸ Department of Justice, 'California Man Sentenced to More Than Six Years in Prison for Federal Hate Crime Conviction' (2021) <[California Man Sentenced to More Than Six Years in Prison for Federal Hate Crime Conviction | OPA | Department of Justice](#)> accessed 2 September 2022.

²⁴⁹ Department of Justice, 'California Man Sentenced to More Than Six Years in Prison for Federal Hate Crime Conviction' (2021) <[California Man Sentenced to More Than Six Years in Prison for Federal Hate Crime Conviction | OPA | Department of Justice](#)> accessed 2 September 2022.

²⁵⁰ It shows that Greenberg and the legislature's majority thinks that. But the United States is a divided nation.

²⁵¹ The United States Department of Justice, 'Hate Crimes: Federal Laws and Statutes' < [Laws and Policies | HATECRIMES | Department of Justice](#)> accessed 28 August 2022.

²⁵² Erik Bleich, 'Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany and France' (2007) 51(2) *American Behavioural Scientist* 149 at 149.

²⁵³ Maleiha Malik, 'Racist Crime: Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II' 62:3 *MLR* 409.

be, recognised as a “force that can divide a nation”²⁵⁴ and various actions were taken in the UK to discourage and eventually prosecute racial hatred.

In 1981, the Joint Committee Against Racism (JCAR) produced a report to the Home Office which highlighted the severity of racist violence within the UK and in 1983 it was reported that many in the police force were racist.²⁵⁵ Although the government developed policy responses for the police to ensure racism was taken seriously, following the murder of Stephen Lawrence by a gang of white youths in 1993, it became apparent that this was unsuccessful.²⁵⁶ This is because, despite “widespread public knowledge” of the youths’ identities, the police took little action to prosecute, leading to public outcry and a parliamentary inquiry.²⁵⁷ This found institutional racism to be present, with many officers involved stating they did not believe Lawrence’s murder was racially motivated despite it being “simply and solely and unequivocally motivated by racism”.²⁵⁸

Consequently, to ensure victims, perpetrators and society understood that racial hatred was intolerable in the UK, and that instances of racism shall be taken seriously, s96 of the 1998 Act was introduced in the UK. As this required the accused to be punished more severely where the baseline offence demonstrated or was motivated by racial prejudice, this sent a strong message that racist violence was socially unacceptable.²⁵⁹ This proved successful, argues Bleich, as it ensured practitioners concentrated their minds on the issue; and within the first year, there were 2651 prosecutions, resulting in 2078 guilty verdicts.²⁶⁰

Therefore, the introduction of hate crime laws to tackle racism, was an attempt to send a message that racist violence would be taken seriously. The 1998 Act, along with the introduction of stirring up racial hatred and racial harassment offences, has succeeded to a certain extent in ensuring racial hatred was taken more seriously as there were 3,285 race crimes reported in 2020-21. This highlights that victims, and those witnessing racial attacks, feel confident that they will be listened to and taken seriously by the police and the criminal justice system.

Therefore, when comparing the US, England and Wales and Scotland, it is evident that the one common justification for hate crime legislation is the harm caused by racism and racially motivated offences. All jurisdictions recognise that, unlike other offences, offences motivated by racism have an adverse impact on the victim, the victim’s community, and society. This is because hate crimes target the victim’s identity and victimhood is interchangeable.²⁶¹ Despite

²⁵⁴ Erik Bleich, ‘Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany and France’ (2007) 51(2) *American Behavioural Scientist* 149 at 152.

²⁵⁵ *Ibid* at 151.

²⁵⁶ Hannah Mason-Bish and Marian Duggan, ‘Some Men Deeply Hate Women and Express That Hatred Freely: Examining Victims’ Experiences and Perceptions of Gendered Hate Crime’ (2020) 26(1) *International Review of Victimology* 112 at 114.

²⁵⁷ Erik Bleich, ‘Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany and France’ (2007) 51(2) *American Behavioural Scientist* 149 at 152.

²⁵⁸ William Macpherson, ‘The Stephen Lawrence Inquiry’ (1999) Cm 4262-I at 1.11. <[4262.pdf \(publishing.service.gov.uk\)](#)> accessed 15 January 2021.

²⁵⁹ Erik Bleich, ‘Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany and France’ (2007) 51(2) *American Behavioural Scientist* 149 at 153. Deterrence could be promoted through prosecution. By legislation strong message could also be sent. All provide and opportunity to reflect on the limits of law and the relevance of non-legal approach to combating racism.

²⁶⁰ Erik Bleich, ‘Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany and France’ (2007) 51(2) *American Behavioural Scientist* 149 at 153.

²⁶¹ Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (2009 Sage) at 6.

this common foundation, different approaches have been taken. The US hate crime laws are much more scattered and inconsistent, with different states protecting different characteristics.²⁶² This was one issue identified by Lord Bracadale in Scotland. As hate crime laws were scattered over five pieces of legislation, the laws were inconsistent, confusing, and cumbersome. This is believed to be one reason for the underreporting in Scotland and is now addressed by the 2021 Scotland Act.

5.3 Critical Engagement with Racial Hatred through the Laws in Scotland

The Scottish Government, via Lord Bracadale's independent review of hate crime laws and the passing of the Hate Crime and Public Order (Scotland) Act 2021, have shown that it is aware of racism and that it believes racism can be curbed via law. The Scottish Government states in relation to the Hate Crime and Public Order Bill, as introduced in 2020, that "a cohesive society is one with a common vision and a sense of belonging for all communities"²⁶³ and, while legislation alone is not enough to achieve this, it sends a strong message that prejudicial behaviour "will be treated more seriously and will not be tolerated by society".²⁶⁴

Within 21st century Scotland, "a social atmosphere in which discrimination is accepted as normal"²⁶⁵ is undesirable but it is to some extent the reality: hate crime reportedly occurs every 18 minutes.²⁶⁶ This is because social and cultural norms have developed attitudes which normalise prejudicial behaviour²⁶⁷ to the extent that hostility is often unrecognised either by the victim as a hate crime or the victim does not believe it will be taken seriously if it is reported. In a 2015 survey, 74% of those insulted, pestered or intimidated based on a protected characteristic did not report this to the police.²⁶⁸

A strength of the Act is it maintains the distinction between racial hate crimes and hate crimes towards other characteristics.²⁶⁹ This is seen via the different wording for stirring up racial hatred offences. For race, threatening, abusive or insulting conduct or material which was either intended or is likely to stir up racial hatred is captured.²⁷⁰ Due to the additional wording of 'threatening' and 'likely' for race, but not the other characteristics, race is protected more. Further, the racial harassment offence solely applies to racial hatred.²⁷¹

²⁶² The United States Department of Justice, 'Hate Crimes: Federal Laws and Statutes' < [Laws and Policies | HATECRIMES | Department of Justice](#)> accessed 28 August 2022.

²⁶³ Policy Memorandum to the SP Bill 67 Hate Crime and Public Order (Scotland) Bill [as introduced] Session 5 (2020) at para 11.

²⁶⁴ Policy Memorandum to the SP Bill 67 Hate Crime and Public Order (Scotland) Bill [as introduced] Session 5 (2020) at para 8.

²⁶⁵ Scottish Government, 'Hate Crime Bill' (2020) <[Hate Crime Bill - gov.scot \(www.gov.scot\)](#)> accessed 23 March 2021.

²⁶⁶ 'Understanding the Nature of Hate crime' (*Scottish Government*, 23 February 2021) <[Understanding the nature of hate crime - gov.scot \(www.gov.scot\)](#)> accessed 2 March 2021.

²⁶⁷ James Chalmers and Fiona Leverick, 'A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review' (2017) at 37.

²⁶⁸ Maureen McBride, 'A Review of the Evidence on Hate Crime and Prejudice: Report for the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion' (2016) 7 SCCJR at p21. Do some offenders think their own behaviour 'normal'? Relevant studies could be carried on the attitudes of offenders.

²⁶⁹ There is an inclination to give a Kantian justification: universalizability, never treat anyone as a mere means, etc., and a consequentialist one, making the best of all human potential. and perhaps invoke Aristotle's ideals might also be invoked about human flourishing (one might even posit a human right to opportunities to flourish).

²⁷⁰ Hate Crime and Public Order (Scotland) Act 2021, s4(1).

²⁷¹ Hate Crime and Public Order (Scotland) Act 2021, s3.

Yousaf, who was the Cabinet Secretary for Justice in Scotland at the time, argues the statistics are one justification for protecting race more. In 2019/20, there were 3,038 race crime charges, 660 religiously aggravated charges, 1,486 charges relating to sexual orientation, 387 disability aggravated charges and 41 charges with an aggravation of transgender identity.²⁷² This accentuates the prevalence of racial hatred as it makes up 55% of the total offences.²⁷³ In 2017/18, two-thirds of hate crimes included a race aggravator.²⁷⁴ Offences relating to racial prejudice have a severe impact on the victim and the community due to structural racism which is allegedly ingrained and continues to exist in the UK.²⁷⁵

However, there are issues with the Act. Primarily, hate crime laws were first introduced to ensure racial hatred was taken seriously by criminal justice agencies and to offer support to victims and victims' communities. Similarly, the 2021 Act was created to make sure "victims, those who commit hate crimes and the wider society" know that "crimes motivated by prejudice will be treated more seriously".²⁷⁶ Thus, despite being decades apart, the previous law and the new Act have the same objective, suggesting the previous law failed to fulfil its aim to a certain extent. This is concerning as the provisions protecting race in the 2021 Act are very similar to the previous law, with slight adjustments to wording. The main change is that the legislation has been consolidated²⁷⁷ as race continues to be protected by a racial aggravator, harassment offence and stirring up offence. Consequently, it must be questioned whether this is enough to achieve the government's aim of taking prejudicial behaviour more seriously.

Another limitation of the Act is it fails to fulfil the Scottish Government's previously made commitment to include protection against gender hostility. Whilst this "missed opportunity"²⁷⁸ is not the focal point in this work, it is important in terms of interconnection with race.

Intersectionality is the acknowledgment that people often have more than one characteristic which can be subject to hatred. For example, Ingham-Barrow provides that more Muslim women are the victims of violent hate crimes than Muslim men, emphasising the "interplay between misogyny and Islamophobia".²⁷⁹ Similarly, many women from Black and Minority Ethnic communities are targeted due to both their race and sex.²⁸⁰ Thus, recognising the full extent of the perpetrator's hostility is necessary and as the Act does not protect against gender hostility, intersectionality cannot be fully recognised.

²⁷² [Hate Crime in Scotland, 2019-20 \(copfs.gov.uk\)](https://www.copfs.gov.uk)

²⁷³ Justice Committee 25th Meeting, 2020, *27 October 2020* (Session 5) at col 8.

²⁷⁴ Justice Analytical Services, 'Developing Information on Hate Crime Recorded by the Police in Scotland' (2019) [Hate crime: availability of information recorded by the police in Scotland - gov.scot \(www.gov.scot\)](https://www.gov.scot)

²⁷⁵ Justice Committee 25th Meeting, 2020, *27 October 2020* (Session 5) at col 8. Compare with Steven Morris "Damilola police accused of fabrications" in *The Guardian* Sat 13 Apr 2002 01.24 <<https://www.theguardian.com/uk/2002/apr/13/ukcrime.stevenmorris>> accessed 17 September 2021. See also William Macpherson, 'The Stephen Lawrence Inquiry' (1999) Cm 4262-I at 1.11. <[4262.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk)> accessed 15 January 2021. Compare with Robert Booth, "Institutional racism: 20 years since Stephen Lawrence inquiry," Fri 22 Feb 2019 07.00 GMT <https://www.theguardian.com/uk-news/2019/feb/22/institutional-racism-britain-stephen-lawrence-inquiry-20-years> accessed 15 January 2021.

²⁷⁶ Scottish Parliament, 'Hate Crime and Public Order (Scotland) Bill: Overview' <[Hate Crime and Public Order \(Scotland\) Bill - Bills \(proposed laws\) - Scottish Parliament | Scottish Parliament Website](https://www.scottish.parliament.gov.uk)> accessed 17 September 2021.

²⁷⁷ The fact of consolidation might be related to the nineteenth century movement for codification (Jeremy Bentham). Perhaps the main gain is simplification, which encourages prosecutors to get on with the job.

²⁷⁸ Justice Committee 25th Meeting, 2020, *27 October 2020* (Session 5) at col 40.

²⁷⁹ Justice Committee 27th Meeting, 2020, *10 November 2020* (Session 5) at col 49. See also Law Commission, *Hate Crime Laws: A Consultation Paper* (Law Com No 250, 2020) at 12.53.

²⁸⁰ Justice Committee 28th Meeting, 2020, *17 November 2020* (Session 5) at col 51.

Finally, it has been long suggested that “shifting attitudes [via education] would perhaps be more effective than criminalising behaviours of individuals”.²⁸¹ Although criminalisation provides vital protection, there may be some element of truth present. Consequently, regular ongoing training to criminal justice personnel as well as educating society from an early age the impact of, and intolerance towards, prejudice is recommended to break the intergenerational cycle and ideology that drives hate crime.

5.4 Analytical Summary

Again, central to this paper is the question of whether or to what extent race is protected in the 2021 Scotland Act. The paper has therefore examined whether or how the focussed regime might bring about a society where, on one hand, racism and racist hate offences are curbed and, on the other, racial identity and diversity are respected or promoted. To reinforce Scotland’s intolerance of prejudicial behaviour, the Hate Crime and Public Order (Scotland) Act 2021 was passed on 11 March 2021 and received royal ascent on 23 April 2021. Its objective is to consolidate, extend and modernise the current law.²⁸² This is because the previous laws were scattered across five separate pieces of legislation, with race being protected by three.²⁸³ This made the law confusing, inconsistent and difficult to access, particularly for laypersons. Despite the Act’s attempt at improving hate crime protection, it has faced mixed views, with calls for it to be amended. And, to determine the extent to which race is protected under the Act, positive and negative aspects of the Act concerning race are analysed.²⁸⁴

Whilst the 2021 Act has important and necessary objectives, there are concerns that these may not be fully achieved. This is because the Act aims to offer greater protection to victims of hate crimes and ensure hate crime are taken seriously, yet it fails to implement any novel provisions with regards to race. This is troubling as racial hate crimes account for over half of hate crimes reported²⁸⁵ and this is likely to increase, following the 6% increase in racial crimes from 2019-20 to 2020-21.²⁸⁶ Furthermore, since the spread of coronavirus in the UK, there has been a 50% increase in hate crimes against Chinese and Asian and Southeast Asian people between January and December 2020, according to Police Scotland.²⁸⁷

In conclusion, two cognate questions are raised in an attempt here to respond to the central question:

Firstly, could the new anti-racist hate regime in Scotland promote a civic duty to report or intervene against racially motivated offences? This is not quite the case presently;²⁸⁸ further

²⁸¹ Maureen McBride, ‘A Review of the Evidence on Hate Crime and Prejudice: Report for the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion’ (2016) 7 SCCJR at p30.

²⁸² Policy Memorandum to the SP Bill 67 Hate Crime and Public Order (Scotland) Bill [as introduced] Session 5 (2020) at para 4.

²⁸³ Policy Memorandum to the SP Bill 67 Hate Crime and Public Order (Scotland) Bill [as introduced] Session 5 (2020) at para 4.

²⁸⁴ Policy Memorandum to the SP Bill 67 Hate Crime and Public Order (Scotland) Bill [as introduced] Session 5 (2020) at para 4.

²⁸⁵ Justice Committee 25th Meeting, 2020, 27 October 2020 (Session 5) at col 8.

²⁸⁶ COPFS, ‘Hate Crime in Scotland, 2020-21’ (11 June 2021) < [Hate Crime in Scotland 2020-21.pdf \(copfs.gov.uk\)](https://www.copfs.gov.uk/hate-crime-in-scotland-2020-21.pdf)> accessed 30 August 2021.

²⁸⁷ Christina Ong and Debbie Jackson, ‘Covid in Scotland: People Are Treating Us Like the Disease’ (2021) <[Covid in Scotland: People are treating us like the disease - BBC News](https://www.bbc.com/news/health-57844444)> accessed 2 September 2022.

²⁸⁸ As of 18/10/22 the Act had yet to be brought into force. It will happen on a date to be appointed- which may be noteworthy in itself- I think the SG were determined to get the legislation through before the end of the previous session of Parliament in 2021. Now they are not in such a hurry to bring it in.

extra-legal engagements are necessary for a real impact to be made in reducing racial hatred, including ingrained and institutional racism. Educational programmes in homes, public and private institutions as well as in the media must still be considered for members of the society on how to appreciate, respect, and relate well with fellow human beings.²⁸⁹ Legislative provisions alone are not adequate. Instead, society must be educated and become better informed on different cultures, historical racism, and the importance of equality. This is because “racism thrives on silence”²⁹⁰ and thus, for the 2021 Act to succeed and reach its full potential, societal values and norms must coincide with the Act’s message that hate is intolerable. Consequently, the 2021 Act protects race only to some extent as it has made the law more accessible and consistent whilst maintaining the distinct threshold for racial hate crimes. This adequately recognises that current racial hatred stems from historical and institutional racism.

Secondly, could the 2021 Act deter, or transform the heart of, a potential offender? The response here is essentially yes despite the lack of new form of protection of race vis-à-vis diversity. Law can change prejudicial attitude to racial difference: it has the potential to bring about required moral and, by extension, social change against racism and racially motivated offences. Whereas the 2021 Act alone may not end racism, it is a vital step in changing attitudes and habits in society. Concluding with Martin Luther King’s thought on the dynamics of law and socio-moral changes is therefore apt:

*Well, it may be true that morality cannot be legislated but behaviour can be regulated. It may be true that the law cannot change the heart but it can restrain the heartless. It may be true that the law cannot make a man love me, but it can restrain him from lynching me; and I think that is pretty important also. And so, while the law may not change the hearts of men, it does change the habits of men if it is vigorously enforced, and through changes in habits, pretty soon attitudinal changes will take place and even the heart may be changed in the process.*²⁹¹

²⁸⁹ See BBC News “Race in South Africa: ‘We haven’t learnt we are human beings first!’” in *BBC Africa* January 21, 2021 Available at <https://www.bbc.co.uk/news/world-africa-55333625> accessed 16 August 2022. Compare with Michelle Peens and Bernard Dubbeld “Troubled Transformation: Whites, Welfare, and ‘Reverse-Racism’ in Contemporary Newcastle” in *Diversities* Vol. 15, No. 2, 2013 ISSN 2079-6595, www.unesco.org/shs/diversities/vol15/issue2/art2 © UNESCO accessed 16 August 2022.

²⁹⁰ The Christian Institute, Justice Committee: Hate Crime and Public Order (Scotland) Bill (2020, J/S5/20/HC/333) at 1. Compare with Dexter Dias, ‘Racism Thrives on Silence- Speak Up!’ (TEDxExeter, June 2020) < [Dexter Dias: Racism thrives on silence -- speak up! | TED Talk](https://www.youtube.com/watch?v=Kj8v8v8v8v8)> accessed 23 September 2021.

²⁹¹ See Dr Martin Luther King, Jr. Speech on Receipt of Honorary Doctorate in Civil Law, November 13, 1967, University of Newcastle upon Tyne. Available at <https://www.ncl.ac.uk/media/wwwnclacuk/congregations/files/Transcript%20of%20Dr%20Martin%20Luther%20King%20Jr%20speech%2013th%20November%201967.pdf> Accessed 23 August 2022.