

BIAS CRIME STATUTES: A QUALIFIED LIBERAL DEFENSE

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ABSTRACT

Daniel M. Layman: Bias Crime Statutes: A Qualified Liberal Defense
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Since American legislatures began passing bias crime statutes (which set more severe penalties for crimes committed from biased motives) in the 1980s, many legal philosophers have argued that such statutes are unjust on the grounds that they punish character traits and feelings rather than actions and intentions. It is unjust to punish character traits and feelings, these authors have supposed, because character traits and feelings are not under agents' direct autonomous control. I argue that while it is unjust for governments to punish feelings and character traits, not all bias elements of crimes are feelings or character traits. Rather, some bias elements of crimes are intentions. I urge that in cases of biased crime in which the bias element in play is an intention, governments may punish the crime more severely than parallel non-biased crimes without violating the requirement not to punish what is not under agents' direct autonomous control.

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1. The Action Condition on Criminal Punishment

Ever since American legislatures began passing laws to enhance penalties for crimes committed from biased motives, many philosophers and legal theorists have objected to such laws on the grounds that they punish feeling and character rather than action. These authors, nearly all of whom work in the broadly classical liberal tradition,¹ argue that it is a necessary condition of the justice of a criminal law that it punishes nothing but agent actions, and that laws enhancing penalties for bias (henceforth ‘bias crime laws’) one and all fail to meet this condition.² Let’s call this the action condition on criminal punishment.³ The action condition

¹ It is important to note that not all liberals, and not even all broadly classical liberals, hold this view. Andrew Altman, for instance, offers a liberal argument from public reason *for* the justice of bias crime laws. See Altman, “The Democratic Legitimacy of Bias Crime Laws: Public Reason and Political Process.” *Law and Philosophy* 20 (2) (2001): 141-173. Furthermore, it is important to note here that it is not at all clear to what extent the best known historical framers of classical liberalism, such as Mill and Kant, would have been willing to sign on to this contemporary liberal understanding of the scope of the criminal law. My own view is that Mill most likely would not have been willing to sign on while Kant would have been. Although Mill explicitly states in *On Liberty* that the government may not exercise coercion against individuals merely on account of their possessing thoughts and feelings on the grounds that any such policy of coercion would not conduce to utility, there is no clear indication that he would object to punishing thoughts and feelings if they were shown to have a clear causal relation to harmful external behavior. Indeed, given the utilitarian foundations of Mill’s liberalism, it would have been odd for him to object to such punishment. Kant on the other hand, explicitly limits the scope of justice (*Recht*) to external action understood as deeds, by which Kant means something like chosen, agential actions. Furthermore, his defense of this limitation is grounded in his deontological understanding of freedom and its value rather than in a consequentialist theory. For Mill’s treatment, see *On Liberty*. Cambridge: Cambridge UP, 2003: Ch.1. For Kant’s treatment, see his *Doctrine of Right* in *The Metaphysics of Morals*. Cambridge: Cambridge UP, 1996.

² See Susan Gellman, “Hate Crime Laws are Thought Crime Laws,” *Annual Survey of American Law* 1992/3: 514-515, and “Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws.” *UCLA Law Review* 39 (1991): 333-396. See also Craig P. Gaumer, “Punishment for Prejudice: A Comment on the Constitutionality of and Utility of State Statutory Responses to the Problem of Hate Crime,” *South Dakota Law Review* 39 (1994): .1-48. See also Anthony M. Dillof, “Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes,” *Northwestern University Law Review* 91 (1997): 1015-1081.

³ It is important not to confuse the action condition with criminal law’s act requirement, which has traditionally been understood as requiring that a person must have performed a “willed muscular contraction” in order to be

should be understood as a side constraint on how governments may use the criminal law to address societal ills. If a certain kind of behavior is more detrimental to society than a criminal punishment for the behavior would be, then governments have at least at least some degree of reason to consider criminalizing it. But governments must act, in this respect as in others, within the constraints of justice, and the action condition is such a constraint.

Perhaps the most sophisticated and rigorous criticisms of bias crime laws along these lines have been offered by Heidi Hurd and Michael Moore, both in their individual efforts and in their collaborative work.⁴ Hurd and Moore argue that the restriction of the criminal law to action alone is one of the core tenets of political liberalism, a doctrine they understand as (rightly and properly) underwriting at least a great deal of the Anglo-American legal tradition. They write together: “If hatred and bias constitute new conditions of legal culpability, then the criminal law has been quite radically altered...For the criminal law to punish persons for bad emotions or bad character is for it to move from an act-centered theory of punishment to a character-centered theory, and so from a liberal agenda to a perfectionist one.”⁵ Since Hurd and Moore take the current, liberal structure of the criminal law to be a just structure, this charge of innovation is a charge of injustice as well.

While Hurd and Moore take punishing for character and feeling to be at odds with a just liberal scheme of criminal punishment, they do not have the same view about punishing for intentions. Indeed, they recognize that liberal criminal law has traditionally used

charged with a crime. On this point, see George Fletcher, *Rethinking Criminal Law*. New York: Oxford, 2000: 421.

⁴ See Heidi Hurd and Michael Moore. “Punishing Hatred and Prejudice.” *Stanford Law Review* 56 (2004): 1081-1146. See also Heidi Hurd, “Why Liberals Should Hate “Hate Crime Legislation.” *Law and Philosophy* 20 (2) (2001): 215-232.

⁵ Hurd and Moore 1084

intentions to distinguish between types of criminal offense, and they hold that in doing so it has not strayed from its act-centered orientation.⁶ Specific intent crimes (such as burglary) and crimes of attempt (such as attempted murder), they point out, are prime examples.⁷ Bias crimes, they suppose, do not punish criminals for trying to bring about further states of affairs other than the deaths, bodily damage, etc. that all violent criminals try to bring about, so Hurd and Moore insist that bias crime laws focus purely on motives as distinct from intentions. They write:

To explain a defendant's action as a product of hatred is not itself to attribute to him a desire to bring about some further state of affairs. It is, rather, to characterize his action as a product of a particular passion within which he was gripped at the time... We speak of emotions "motivating actions...but when we say such things, we are not explaining others' conduct by reference to their future goals.⁸

So according to Hurd and Moore, people do oftentimes commit crimes with intentions that are especially bad, and it is not unjust to designate such crimes using special, more serious criminal categories. But as a matter of fact, they argue, no bias crime laws punish intentions. Rather, they exclusively punish feelings and values. Consequently, bias crime statutes are always unjust.

One might reasonably ask at this point why it is right to think that the action condition is a side constraint on the just use of the criminal law, and why the action condition allows governments to take intentions, but not feelings and character traits, into account when designating crimes and their sentences. Hurd suggests that both the action condition and the privileged status of intentions with respect to this condition follow from a more basic

⁶ Hurd and Moore 1121-26

⁷ Hurd and Moore 1121

⁸ Hurd and Moore 1122-3

restriction on the just use of criminal law, namely that it is always unjust for governments to punish people for what is not under their autonomous control. She writes:

We cannot abandon our emotions and (dispositional) beliefs the way we can abandon our goals—i.e., simply by choice. Thus, criminal legislation that targets emotions and dispositional beliefs targets things that are not fully or readily within defendants' immediate control. And if law ought not to punish us for things that we cannot autonomously affect, then hate and bias crime legislation is suspect for doing just that.⁹

When we act autonomously, we act on goals that we set for ourselves, and which we might not have set and may later abandon at will. Acting autonomously *just is* to act in a way that is explained by autonomously established goals. Furthermore, inasmuch as we autonomously commit to a goal (and are rational), we set ourselves in action toward that goal to whatever extent we are capable; this is Kant's point when he sets out his hypothetical imperative.¹⁰ So intentions, where intentions are understood as rationally established goals, are the very things that set action apart as autonomous, and so fit for praise, blame, and, most importantly in the present context, punishment.

Although this sketch of the relationship between intentions-as-goals and autonomous action would require a more thorough treatment in order to be convincing to someone who is not already sympathetic, there can be no doubt that it is at least intuitively plausible. Furthermore, it seems to be born out to a considerable degree in the criminal law, perhaps especially inasmuch as provocation and emotional distress count as mitigating factors there. The Model Penal Code, for instance, specifies that in cases where a criminal's behavior is largely explained not by her own judgment but rather by an intense passion that temporarily

⁹ Hurd 226

¹⁰ Immanuel Kant. *Grounding for the Metaphysics of Morals*. 3rd ed. Trans. James W. Ellington. Indianapolis: Hackett, 1993: 414.

wrests control of her behavior from her, the passion is a mitigating factor.¹¹ Where an agent lacks autonomous control of her behavior via her judgments, the law takes that agent's behavior to be less completely imputable. In virtue of the widespread support that this picture of the relationship between action and intention enjoys in the contexts of law and liberal political thought, I will not undertake to defend it here, and I will assume in what follows that it is correct.

One might worry that privileging intention in this way leaves no room for the mens rea elements of knowledge and recklessness. I do not think, however, that this ought to be a source of concern. In cases where knowledge is a pertinent mens rea element, one must still carry out an action while possessing the relevant knowledge in order to commit the crime. For instance, if it is a crime to kill a police officer while knowing she is a police officer, a suspect cannot be found guilty of this crime unless she performed the action of killing the officer, which requires that she was more or less in rational control of her conduct at the time of the offense.¹² Indeed, there is no reason why a provocation defense (a defense resting on the fact that the suspect had lost rational control due to emotion) might not succeed in such cases. Similarly, reckless action is *action* undertaken without due caution under circumstances that call for due caution. Although one need not have any goals in particular in

¹¹ Unlike the common law doctrine of provocation, the Model Penal Code does not require that the source of the intense emotion must be a provocation that no reasonable person would have been able to withstand. All that the Model Penal Code specifies with respect to this mitigating factor is that the emotion must be present and cause the person's judgments to lose their usual power to determine what the agent will do. See Fletcher 426.

¹² I thank Michael Corrado for bringing up this point and pressing for clarification.

order to commit a crime of recklessness, one must be more or less in autonomous control of one's (reckless) actions at the time.¹³

So the reasoning in support of rejecting bias crimes as anti-liberal and unjust that I am concerned with here proceeds as follows. Because the criminal law may only punish people for those things over which they exercise autonomous control, the criminal law may not punish feelings or dispositional states, but it may 1) punish actions and 2) take intentions into account when doing so (because agent action *just is* action on intention). This action condition on the just use of the criminal law is a side constraint; that is, whatever reasons a government might have to enact a given criminal statute, they cannot override the action condition. Consequently, governments must tailor their criminal law doctrine to fit within the strictures of the action condition. So even if bias crime laws would be beneficial to society, they are nonetheless unjust because they punish feelings and dispositional states and so fail to meet the action condition.

This reasoning opens up an intriguing avenue for someone who (like me) is attracted to the action condition but who is unwilling to accept the conclusion that all bias crime statutes are really off the table with respect to justice. The avenue is this: what if at least some bias elements of crimes *are* intentions after all? If they are, then so long as they are appropriately *bad* intentions, they can justly be subjected to criminal punishment. The sort of badness capable of rendering intentions suitable for special criminal designation and

¹³ Crimes of omission may be slightly harder to fit into the present schema, especially if such crimes are understood as requiring only the fact of an agent's not having done the required act as opposed to the agent's having decided not to do the required act or to do something else instead. However, to the extent that crimes of omission require decisions not to perform actions, they present no particular problem here. It is worth noting here that crimes of omission often present difficulties for theorists of criminal law, especially liberal theorists. Moore, for instance, argues that there are very few actual instances of crimes of omission, and that those instances that are in force constitute a sort of curiosity that it is not easy to justify within a liberal criminal law system. See Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law*. New York: Clarendon, 1993: 59.

punishment must be addressed, of course, and will I discuss this in §4. But assuming we can work out the details, there is hope here of finding a way to both embrace the action condition and support at least some bias crime statutes. In what follows, I will argue that there is such a way, and that liberals attracted to the action condition would do well to follow it and grant that some carefully constructed bias crime statutes would be just statutes.

Before I begin, however, two clarifications and caveats are in order. First, although I have linked the action condition and the authors who defend it with classical liberalism, I mean to suggest neither that all classical liberals are somehow committed to this view nor that this view follows straightforwardly from positions held by any of the major figures in the classical liberal tradition. Rather, I merely intend to address a problem that arises within a particular strand of contemporary thinking about criminal law that plausibly self-identifies with this tradition. Second, although I will argue here that only a narrow subset of the criminal actions currently classified as bias crimes may justly be classified as bias crimes, I do not mean to suggest that this is because only these bias crimes are morally bad enough to deserve special status, or that only these bias crimes reflect an especially depraved character. To the contrary, I would be happiest if it were just for governments to use the criminal law to extirpate such acts from the cultural scene entirely. But unhappily, justice does not always allow us to do what would bring about the very best results, and it does not allow us to do so with respect to bias-motivated crime. Nevertheless, the prospects for addressing at least some of these crimes through carefully designed legislation are considerably brighter than most recent classical liberal treatments of the subject have supposed.

2. Bias Crime Statutes

Two distinct types of bias crime statute exist under American law. These are stand-alone statutes and penalty enhancement statutes.¹⁴ Stand-alone statutes establish as criminal certain bias-oriented acts that do not have non-biased parallels under criminal law. Stand-alone statutes nearly always prohibit some kind of expressive behavior that uniquely targets the members of protected groups. Anti-cross burning statutes, which exist or have existed in several states, are paradigmatic examples of stand alone statutes.¹⁵ By contrast, penalty-enhancement laws establish a more severe punishment for individuals who perform an action that is criminal regardless of any bias element, but with a motivation or intention that expresses bias against a protected group.¹⁶ While stand-alone statutes also present interesting philosophical questions, I will not be concerned with them here. Rather, I will consider only

¹⁴ For a discussion of the varieties of bias crime statutes, see Frederick Lawrence. *Punishing Hate: Bias Crimes under American Law*. Cambridge: Harvard, 1999: 91-99.

¹⁵ Interestingly, expression-oriented stand-alone statutes have not fared well in the courts. The US Supreme Court established the constitutionality of statutes prohibiting “offensive, derisive or annoying language” in general in the landmark case *Chaplinsky v. New Hampshire* (315 U.S. 568 (1942)). However, the same court ruled in *R.A.V. v. City of St. Paul* (505 U.S. 377 (1992)) that a St. Paul, Minnesota ordinance prohibiting expression that might reasonably be expected to “arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” was unconstitutional. The court reasoned that unlike the statute at issue in *Chaplinsky*, the St. Paul ordinance designated specific expressive (group-related) content and was therefore unconstitutional. In *Black v. Virginia* (538 U.S. 343 (2003)), the court struck down a Virginia Statute prohibiting cross burning on the grounds that the issue at hand was not significantly different from that of *R.A.V.*

¹⁶ Some bias crime laws are written as stand alone laws, but the crimes they create are identical to already existing crimes with respect to everything but motivation. An example of such a statute is Wyoming’s Bias Crime law (Wy. Stat. 1997 §6-9-102). For the purposes of this paper, I will not treat these bias crime statutes differently from penalty enhancement statutes.

whether, how, and to what extent penalty-enhancement laws are compatible with the action condition on criminal law.

American bias crime laws differ considerably with respect to how they define the bias element needed to elevate a criminal offense to bias crime status. We can beneficially divide American bias crime statutes into two categories with respect to the language they employ. The first category, which we might call the broad category, includes statutes that use phrases like ‘because of (bias)’ or ‘by reason of (bias)’ in specifying which criminal actions may be prosecuted under them. Here are some examples:

California—The Penalty for a felony committed *because of* the victim’s race, color, religion, nationality, country of origin, ancestry, disability or sexual orientation shall be enhanced one, two or three years in prison, if the person acts alone.¹⁷

Illinois—A person commits a hate crime when, *by reason of* the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, regardless of the existence of any other motivating factor or factors, he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action or disorderly conduct as these crimes are defined.¹⁸

Missouri’s statute is perhaps the broadest of all:

Missouri—A person commits a crime of ethnic intimidation in the first degree if, by reason of any motive relating to the race, color, religion, or national origin of another individual or group of individuals [he or she damages the victim’s property or uses illegal weapons].¹⁹

¹⁷ Cal. Penal Code 422.75 (emphasis added)

¹⁸ 720 Il. C.S. 5/12-7.1 (emphasis added)

¹⁹ Mo. Stat. Ann. 574.090

Nearly all American bias crime laws, including the federal bias crime statute,²⁰ fit the broad model. Consequently, nearly all American prosecutors enjoy a good deal of discretion regarding whom to prosecute as a bias criminal. If all that is necessary in order for a crime to count as a bias crime is some causal or explanatory relation between the criminal's choice of victim and the victim's actual or perceived group status, then there is no reason why a criminal could not be prosecuted as a bias criminal on account of nothing more than hateful feelings, so long as such feelings help to explain her action.

A few states, however, reject the broad statute model in favor of a narrow model that hinges on criminals' selection criteria or on criminals' specific intent. Wisconsin's statute frames bias crime in terms of discriminatory selection:

Wisconsin—[A person commits a bias crime if he or she] commits a crime...[and] intentionally selects the person against whom the crime is committed...in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.²¹

Discriminatory selection is clearly an intentional concept. If I select some particular person P because she is black and I aim to harm a black person, then it is also right to say that I intend to harm P because I intend to harm a black person. But the Idaho,²² Michigan,²³ Oklahoma,²⁴ and South Dakota²⁵ statutes all state explicitly that bias crime is a matter of

²⁰ H.R. 2647 Div. E.

²¹ Wis. Stat. Ann. 939.645

²² Id. Code §18-7902

²³ Mich. Comp. Laws Ann. §750.147b

²⁴ Okla. Stat. Ann. Tit.21 §850

²⁵ S.D. Cod. Laws Ann. 22-19B-1

acting on a certain kind of intention. Here is the relevant language from the Michigan statute and the Oklahoma statute:

Michigan—[A person commits a bias crime if she causes injury or property damage] with specific intent to intimidate or harass another person because of that person’s race, color, religion, gender, or national origin.²⁶

Oklahoma—[A person commits a bias crime if she causes injury or property damage] maliciously and with the specific intent to intimidate or harass another person because of that person’s race.²⁷

The criteria that a criminal offense must meet in order to fall under these statutes are much more narrowly tailored than the criteria an offense must meet in order to fall under one of the broad statutes. In order to successfully prosecute a criminal under a narrow bias crime statute, it is necessary for prosecutors to prove something about the *intentions* of the actor.

If we take the action condition seriously, then we must reject all bias crime statutes that adhere to the broad model. This is because these statutes allow people to be punished for their feelings and values so long as their feelings or values in some way explain how they came to behave as they did. However, it seems to me that the narrow model, with its focus on criminals’ intentions, presents a more promising route to follow. Before we can pursue this line of thought any further, however, we need to consider what sorts of bias elements can be considered intentions and why.

²⁶ Mich. Comp. Laws Ann. §750.147b

²⁷ Okla. Stat. Ann. Tit.21 §850

3. Biased Intentions

Frederick Lawrence begins to approach the insight that the bias elements of certain bias crimes may be understood in terms of intention.²⁸ According to Lawrence, *all* bias crimes may be understood in terms of intentions. He writes:

The perpetrator of this (hate-motivated) crime could be seen as either:

(1) possessing a mens rea of purpose with respect to the assault, along with a *motivation* of racial bias;

or

(2) possessing a first-tier mens rea of purpose with respect to the parallel crime of assault and a second-tier mens rea of purpose with respect to assaulting *this* victim because of his race.

The defendant in description (1) "intended" to assault his victim and did so because he is a racist. The defendant in description (2) "intended" to assault an African-American and therefore acted with both intent to assault and discriminatory intent as to the selection of the victim.

In order to assess Lawrence's move here, we need to consider what it might mean for an intention to be biased or discriminatory. And in order to get at this particular sort of intention, we need to get at least a cursory grip on intention generally. An intention, we may safely say, is a goal or aim, regardless of what else it might be. This rough and ready formulation seems to fit especially well in the context of the criminal law. For instance, the Model Penal Code does not distinguish acting intentionally from acting "purposely" and

²⁸ Lawrence 108-9

states that “a person acts purposely with respect to a material element of an offense when, if the element involves the nature of his conduct or the result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result.”²⁹

If this is the case, then a discriminatory intention must be a goal or aim that has, in some sense, the property of being discriminatory. The most immediately plausible way in which an intention might be discriminatory is this; an intention is discriminatory if the intending agent aims to achieve a goal such that we cannot describe the goal completely and correctly without reference to a particular group or classification of people.³⁰ In the rest of this section, I will argue that while Lawrence is wrong to suggest that all biased motives can be accurately re-described as biased intentions, it is true that some biased motives can be accurately re-described this way. However, the matter of whether such a re-description is appropriate hinges entirely on details about the mental state of the criminal at the time of her crime, and these details are often, but not always, epistemically underdetermined by publically observable facts of the case. Consequently, it is sometimes difficult or impossible to say whether a criminal acted on a biased intention. I will argue that in cases in which it is not clear whether punishing an action as a bias crime would involve punishing a non-intentional motive, the deference due to the action condition demands that governments not prosecute the action as a bias crime.

²⁹ MPC §2.02(2)(a)

³⁰ Two things about this formulation of discriminatory intent are worth noting immediately. First, this framing leaves open the possibility that there could be morally praiseworthy discriminatory intentions—aiming to carry out affirmative action policies is a plausible candidate here—though hopefully no such discriminatory intentions would fall under criminal proscription! Second, the conditions for discriminatory intent are not satisfied either by a) goals that in fact involve a group or its members but which can be correctly understood without reference to a group or its members or by b) goals that are in some sense caused or explained by a *feeling* about a group or its members.

Let's begin by considering a case of racially motivated crime in which a criminal acts on an intention that is both biased and publically accessible.

Assault at the Party Geoff, a white man, is a racist who hates Latinos. He has watched with loathing and disgust as the population of his town has become more heavily Latino over the past several years. One day, he reads in the newspaper that the local Latino Chamber of Commerce will be sponsoring a street party that will celebrate traditional Latino food, music, and culture. This is the last straw for Geoff, so he resolves to assault at least one of the Latino street party attendees. True to his resolution, Geoff arrives at the street fair and assaults Lisa, a Latina woman in attendance.

The first thing that stands out in this case is that it is utterly unimportant to Geoff's criminal aim that Lisa is the victim of his assault. Given what Geoff is concerned to do at the street party, namely assault some unspecified person who meets the criteria of being Latino and attending the party, Lisa is completely fungible as a victim. It would have been all the same to Geoff if he had come across and harmed some other person, so long as that person also met the criteria of being Latino and attending the party. The element of fungibility in play in Geoff's crime stands out even more clearly if we compare Geoff's crime to another (also imaginary) crime in which bias plays a role.

Assault at the Door James, a white man, is a racist who hates black people. James's neighbor, Timothy, is a highly successful investment banker, while James, who has never been able to hold down a decent job, lives in his parents' basement. Timothy is a black man. On account of his racial hatred, James finds Timothy's success extremely galling. One day after seeing Timothy celebrate yet another promotion next door, James resolves to assault Timothy if he ever comes around again. The next day, Timothy does stop by James's home to drop off a mistakenly delivered piece of mail. James holds true to his resolution and assaults Timothy with a baseball bat.

James's criminal aim here is to bring about harm to Timothy and only to Timothy. Had Timothy arrived at James's door with another successful black man, James would not have judged his action a success if he had mistakenly succeeded in harming Timothy's companion but not Timothy. This is not, of course, to say that James certainly would not

have been pleased with this result; in fact, being a racist, he very well might have been. But being pleased with a result is not the same as having a result as a goal. For instance, I might be pleased if I accidentally eat a piece of brownie when I meant to eat a bite of ice cream, but if I really had intended to go for the ice cream, it would be untrue to say that I succeeded in doing what I meant to do, pleasure notwithstanding. Thus, even if James's pleasure is not dependent on harming a particular person, the achievement of his intention *is* thus dependent. By contrast, anyone will do as a victim of Geoff's assault as long as she is a) Latina and b) at the street party.

Geoff's victim in *Assault at the Party*, then, is fungible in a way in which not all victims of bias-motivated crime are fungible. What is important here is not this fungibility itself, but rather what it indicates about the structure of Geoff's intentions. Like James, Geoff hates a particular racial group and its members, and this hatred helps to explain the formation of Geoff's intention. But while James has only one relevant intention, Geoff forms and acts on *two* intentions. First, Geoff forms the intention to assault one or more Latino persons at the street party. Then, having formed this intention, Geoff forms a second intention once he arrives at the street party, namely to assault the particular Latino person he comes across, Lisa. Geoff forms and carries out his second intention (to assault Lisa) as a means of carrying out his first intention (to assault someone of Latino origin at the street party).

This tiered intentional structure maps neatly onto the structure the criminal law category of specific intent. As we have already seen, a specific intent crime is a crime of which one of the mens rea elements is an intention to bring about some state of affairs other than the immediate goal of the action. For instance, burglary is a specific intent crime of breaking and entering with the further intent to commit a felony therein. Following the same

model, a legislature might pass a statute that designates assault (or whatever) with specific intent to harm some member of a protected group as a unique crime.

Hurd and Moore, however, would object at this point on the grounds that that unlike current specific intent crimes, biased intentions of the sort harbored by Geoff in *Assault at the Party* are not future-directed but rather present-directed.³¹ According to Hurd, in order for a crime to count as a specific intent crime, it must be set apart by a particular goal, and goals just are future states of affairs.³² However, it is not plausible that all goals must be future-directed. In *Assault at the Party*, for instance, it seems clear enough that Geoff's aim to assault Lisa is distinct from his aim to assault some Latino person at the street fair. After all, the states of affairs that would constitute success or frustration with respect to these intentions are different (there are states of affairs that would satisfy the aim to assault someone Latino at the street party but fail to satisfy the aim to assault Lisa). This is very strong evidence that the intentions themselves are distinct.

Perhaps, though, the point is not that all goals are future-directed, but rather that only future-directed goals are compatible with specific intent as it actually functions in criminal law. Hurd and Moore suggest that as a matter of legal fact, specific intent crimes all involve actions performed in order to bring about some future aim. It is not at all clear that this is true.³³ For instance, Dan Kahan makes note of the specific intent crime of killing in order to

³¹ Present-directed intentions are widely recognized in the philosophical literature on action. See, for instance, Michael Bratman. *Intentions, Plans, and Practical Reason*. Cambridge: Harvard, 1987: 4, 112.

³² Hurd 219

³³ Hurd and Moore 1122

mutilate a corpse.³⁴ Why could someone not carry out this specific intent crime in such a way that the killing and the mutilation occur contemporaneously? Furthermore, even if all specific intent crimes that currently exist under American law did involve only future directed intentions, it isn't clear why the law *shouldn't* recognize any present-directed specific intent crimes, so long as any such crimes involved distinct intentions (like Geoff's intention in *Assault at the Party*).

I suggest, then, that since Geoff acts on two separate but hierarchically ordered intentions, one of which cannot be accurately described without reference to a target group, the crime in *Assault at the Party* clearly fits Lawrence's schema; Geoff acts on a biased intention. Consequently, governments may punish crimes like Geoff's as bias crimes without violating the action condition. But what about James's crime in *Assault at the Door*? Does it feature a biased intention? As we have seen, Timothy is not a fungible victim in the way that Lisa is; although James would not have attacked Timothy if Timothy had not been black, not any black person at all, or even any successful black man at all, would have served equally well as a victim. This is because James's intentional structure is not tiered in the way Geoff's is; James does not attack Timothy in order to achieve any further end. It is tempting to conclude from this fact alone that James does not act on a biased intention, although of course he is in the grip of biased passions and values. If James's victim is not fungible, one might suppose, then it can only be right to understand James's intention as the intention simply to attack Timothy, an intention that can be completely and correctly described without any reference to a target group.

³⁴ Dan Kahan. "Two Liberal Fallacies in the Hate Crimes Debate." *Law and Philosophy*, Vol. 20, No.2 (Mar., 2001): 178.

This move is too fast, however, as it overlooks the possibility that James represents his aim to himself in terms that do essentially involve a target group. When James strikes out at Timothy, he perhaps represents his aim to himself this way:

J1: I will attack Timothy.

If this is the case, then no matter what biased values and emotions might be in play, James does not act on a biased intention, since his intention is completely and correctly describable without any reference to a target group. However, he might also represent his aim to himself this way:

J2: I will attack Timothy, that black man.

If this is how James represents his aim to himself, then his intention is not completely and correctly describable without reference to a target group. But troublingly, there is nothing about James's action that might indicate whether he acts on J1 or J2.

This epistemic under-determination in cases like James is a serious issue for anyone seeking (as I am) to construct bias crime laws that respect the action condition. Since it is not necessary to make any reference to a target group in order to completely and correctly describe J1, the government violates the action condition if it prosecutes James as a bias criminal where J1 is James's intention. But since it *is* necessary to reference a target group in order to describe J2 completely and correctly, the government does *not* violate the action condition if it prosecutes James as a bias criminal where J2 is James's intention. And since what is at stake here is internal representational content, the matter of which of these intentions James acts on is unavailable to public appraisal in a way that the matter of whether Geoff attacks Lisa in order to fulfill a further purpose is not. In assessing Geoff's case, a court might be able to determine the fungibility of Geoff's victim by observing that Lisa was

a stranger at the time of the killing and might be able to ascertain the class within which his victim was fungible (i.e. Latinos at the party) through interviews, background data about Geoff, the time and location of the attack, etc. But in James's case, it would surely be considerably more difficult (though not, perhaps, impossible) to determine whether James acted on J1 or J2. Apart from simply asking James, a court would be hard pressed to gather persuasive and acceptable evidence pointing one way or another.

It is not the case, then, that all bias crimes can be correctly described in terms of either biased motives or biased intentions. However, some bias crimes may certainly be re-described this way, while others are such that there are no public criteria by which to assess whether they may be re-described this way. The class of biased crime whose members may always be re-described this way includes all and only crimes in which the criminal harms a victim in order to harm some member of a group as such. Geoff's crime in *Assault at the Party* falls into this class. The class of biased crime which may not reliably be re-described this way includes all cases in which the criminal acts on a single intention. James's crime in *Assault at the Door* falls into this class. In these cases, the question of whether the criminal acted on a biased intention hinges completely on publically inaccessible facts about how the criminal represented her aim to herself.

What, then, should legislators who are concerned to enact bias crime legislation that respects the action condition do about cases like *Assault at the Door*? I suggest that in virtue of the action condition's status as a side constraint, such legislators must err on the side of caution and write their bias crime laws so that crimes like James's do not meet the criteria for bias crime status. If (as I have supposed all along) it is a requirement of justice that governments must conduct themselves so as not to violate the action condition, then justice

surely does not permit governments to undertake serious risks of violating the action condition. Just as the constraint against punishing the innocent demands that juries not risk doing so by handing down guilty verdicts when the evidence is inconclusive, the side constraint against punishing non-actions demands that governments refrain from passing laws that create a non-trivial risk of punishing non-actions. In the final section, I will construct a model bias crime law that passes the action condition, and I will make some suggestions there about how the language of such a law might be tailored so as to rule out cases like James's as cases of bias crime. First, though, we need to consider why it is that crimes of biased intention are fit for harsher punishment than parallel crimes.

4. Biased Intentions and Punishment

I have so far operated on the assumption that if some bias crime statutes should turn out to pass the action condition, then there is reason to pass such statutes. But is this true? Are biased intentions fit for harsher punishment than parallel, non-biased criminal intentions? This is not an issue that is unique to my project here, but one I share with all defenders of bias crime statutes of any sort. Nevertheless, it is important to address the point, as there is no particular reason to care whether bias crime statutes are compatible with the action condition if there is no good reason to pass any such laws. In this section, I will consider this question and argue that there is good reason to think that biased intentions are fit for harsher punishment. And since I am now concerned only with the sort of bias crime I have argued may be criminalized without violation of the action condition, I will focus *only* on crimes of biased intention and the reasons that exist to specially designate and punish crimes of biased intention.

Arguments in support of bias crime laws may usefully be separated into consequentialist arguments and non-consequentialist arguments. And while these arguments have (of course) not been offered with my restricted understanding of bias crime in mind, there is no clear reason why they should be less applicable to bias crime understood in terms of biased intentions. The non-consequentialist arguments for the greater severity of bias crimes that have appeared in the literature fall into two broad subclasses. One of these subclasses includes arguments that hinge explicitly on the character and values of bias criminals. Theorists like Kahan have argued that a primary function of criminal punishment

is to express collective disapproval of anti-social values, and that bias criminals possess and express values that are well worth condemning.³⁵ The other subclass includes arguments that proceed on deontological grounds. The most common line of argument here hinges on the apparent fact that when a criminal harms some person as a way of attacking some group of which the victim is a member, the criminal treats the victim as merely an instantiation of a type rather than as an individual human being. As Michael Blake puts the point, every hate crime victim is attacked “for *what* he is, not *who* he is.”³⁶

Of these non-consequentialist arguments, there can be little doubt that the arguments from the expressive function of law are a good deal stronger than the deontological arguments, if only because the sort of deontological argument available here is so extremely weak. While it is no doubt true that bias criminals attack their victims “for what (they are), not who (they are),” this is also true of violent crime generally. Whether a criminal acts in order to derive pleasure, money, or some other kind of advantage, the criminal attacks the victim for *what* she is, namely a means to a chosen end. Only in very rare cases of targeted crime, such as stalking and certain forms of domestic violence, does a criminal victimize someone because of *who* she is. The arguments from expression, by contrast, are quite strong if the basic premise that the criminal law ought to be in the business of condemning bad values is granted. After all, the bias criminal’s values are paradigmatically wicked and anti-social values. However, the notion that the quality of a person’s values in any way licenses the government to punish her (or to punish her more harshly) is in deep and obvious tension

³⁵ See Kahan 178-9. See also Kahan and Martha Nussbaum, “Two Conceptions of Emotion in Criminal Law,” *Columbia Law Review* 96 (1996): 269-374.

³⁶ Michael Blake. “Geeks and Monsters: Bias Crime and Social Identity.” *Law and Philosophy*, Vol. 20, No. 2 (Mar., 2001): 128.

with the liberal take on the criminal law that underwrites the action condition. The action has nothing to say about whether governments ought to use punishment as a way of expressing outrage or disapproval. But it does rule out any view on which severity of punishment ought to track perceived iniquity of values. Even if a government were to refrain from punishing values until values revealed themselves through actions, that government would clearly violate the action condition if it were to make severity of post-action punishment wholly or partially a function of how bad the criminal's values were at the time of the crime.

The other sort of argument, which depends on the unique and serious harm done by bias crime, shows much more promise. When a criminal commits a crime against an individual in order to commit a crime against a group, the entire group is harmed by loss of security and even self-respect. Furthermore, criminal acts of biased intention exacerbate existing group tensions that are harmful to the greater society in which the groups are situated. In this way, the scope of harm caused by crime of biased intention reaches not only beyond individual victims to the groups in which they live, but beyond these groups to the greater society in which these groups exist and interact with each other. These considerations are at least very plausible, and they present no obvious problem for the action condition or the liberal view of the criminal law that supports the action condition.

Blake has challenged this kind of argument for bias crime laws generally (and would no doubt likewise challenge such argumentation in support of laws singling out crimes of biased intention) on the grounds that there is no principled way to stake out a particular set of groups for protection. American bias crime laws protect the members of what have often been called 'identity groups,' or groups through which members understand themselves and their place in society. Groups based on gender, race, sexuality, and religion are all identity

groups, and these are the groups typically protected by bias crime laws. But according to Blake, any argument that is successful in support of bias crime laws that protect identity groups gives equal support to including non-identity groups such as “geeks” and the homeless.³⁷ Far from being groups from within which individuals develop a positive understanding of who they are and how they fit into society, these are groups of which people typically do not want to be members and from which people typically try to exit as quickly as possible. With respect to harm-based arguments for greater punishment, Blake has this to say:

In both cases [that of identity groups and that of non-identity groups], individuals are made aware that they are subject to a threat not shared by other people; they are made vulnerable in a way that people are not made vulnerable by the existence of random muggings... What matters most, it seems, is not whether the individual in question sees herself as a member of this group for purposes of self-identification, but whether or not the attacker identifies the individual as a member of that group.³⁸

I do not think Blake’s criticism here is successful. This is because Blake ignores the harm done by crime from biased intentions to the relations *between* identity groups. In a society like ours, identity groups are the subjects of long standing and destructive tensions and conflicts. Relations between race groups, which though on the mend are still very unstable, are a perfect example. When there is a long standing, deep seeded antipathy between large-scale-identity groups, this negatively affects not only the members of the less fortunate group or groups, but the entire society in which the involved identity groups have their places. For instance, to the extent that the American racial identity groups of blacks and whites are in a state of only sometimes restrained antipathy and distrust toward one another,

³⁷ Blake 127-31

³⁸ Blake 133

all of American society is very much the worse off. Even those who are neither black nor white have to live amidst entirely unnecessary fear, distrust, and violence that affects not only their own projects, but their ability to include persons of all races in their lives without fear of such fear, distrust, and violence. Furthermore, as Andrew Altman has pointed out, it is surely detrimental to a functioning democracy that depends on all of its members as participants in public discourse for large swaths of its citizenry to be opposed to each other along jagged fault lines.³⁹ Crime that is committed with intentions that are irreducibly targeted against major identity groups exacerbates these fault lines and is thus uniquely damaging to society as a whole.

There is, of course, nothing necessary about the unique position of identity groups in our society that makes it possible for biased crime against members of these groups to do so much damage to society as a whole. It might have been the case, and may yet come to be the case, that biased crime against some or all non-identity groups is equally or more damaging than biased crime that targets identity groups. Under such circumstances, it would be proper for bias crime statutes to include these non-identity groups in their provisions (or perhaps for such laws to be repealed entirely).

This response to Blake also answers a worry from Hurd and Moore, who complain that bias crime laws always treat biased crime as a proxy for some kind of harm (say fear among members of a community) that the criminal law could address directly.⁴⁰ As Hurd and Moore admit, proxies only present a problem when they are what we might call ‘loose’ proxies, or proxies that do not pick out (or come close to picking out) all and only cases of

³⁹ See generally Altman

⁴⁰ See Hurd and Moore 1085-1000

some particular sort of harm. But if I am right that bad relations between identity groups are uniquely positioned to do harm to a society as a whole, punishing crimes of biased intention against large-scale identity groups is not a loose proxy. Instead, it is a tight proxy that zeroes in on a unique and serious sort of harm.

I suggest, then, that it is very plausible that crimes committed from biased intentions are harmful in a way that is sufficiently serious and unique to justify bias crime legislation. But in light of the foregoing discussion, it is clear that no existing bias crime statute model will do. In the final section that follows, I will discuss how a legislature might draft a bias crime law that meets the action condition.

5. New Bias Crime Statutes

Unlike existing bias crime legislation, which simply calls for higher sentences for existing crimes committed under the circumstance of a biased motive, bias crime statutes of the sort I have argued for would be entirely new crimes specified by *mentes reae* of purpose. The mens rea for murder, for example, is a state of intent (or in some cases a state of knowledge) with respect to the death of the victim. The mens rea of bias crime would be a state of intent with respect to a specified group. For example, the mens rea of bias murder would be the intention to bring about the death of a member of some group as such. It is a deficiency of existing bias crime laws is that they typically do not create new crimes (and with them new sentences), but rather call for higher penalties for only some instances of existing crimes.⁴¹ It is much more desirable to maintain a tight one-to-one correlation between crime-types and sentencing rules, and bias crime laws of the sort I have in mind would do just this.

But what would the language of such statutes be like? Of the types of existing bias crime statutes surveyed at the outset, the ‘specific intent’ model is by far the closest to what the restriction of bias crime to biased intention demands. Here is Michigan’s specific intent bias statute again:

Michigan—[A person commits a bias crime if she causes injury or property damage] with specific intent to intimidate or harass another person because of that person’s race, color, religion, gender, or national origin.⁴²

⁴¹ I thank John Hasnas for helpful discussion on this point.

⁴² Mich. Comp. Laws Ann. §750.147b

Even this statutory model, however, will not quite do. This is true for two reasons. Most obviously, this model is restricted to intimidation and harassment, which is clearly unsatisfactory. A more serious problem, though, is that the language employed here is ambiguous in a way that fails to rule out cases like *Assault at the Door*, in which it is not possible to determine whether the criminal acted with a biased intention. Supposing that the language of this statute were expanded to encompass violent crime, there is no reason why James could not be prosecuted under it. After all, even though it not clear whether a complete and correct description of James's intention is possible without reference to a target group, it *is* clear James forms an intention to kill a particular person and that he does so "because of" feelings intimately bound up with the race of the victim. A bias crime law must be written so as to rule out bias crime prosecutions in unclear cases like *Assault at the Door* if it is to meet the action condition.

It seems that in order to make sure that cases in which it is not clear whether the criminal acted on a biased intention are not counted as bias crimes, legislatures would do best to write bias crime legislation so that a crime must match the sort of two-tiered intentional structure featured in *Assault at the Party*. While writing the law this way would of course result in some actual cases of crime of biased intention not being prosecuted as such, explicitly invoking the two-tiered intentional structure would effectively prevent bias crime prosecution in the absence of a biased intention. Language specifically requiring that a crime meet the two-tiered structure in order to count as a bias crime would not pick out *all* crimes of biased intention, but it would pick out *only* crimes of biased intention.

I suggest, then, that an ideal bias crime statute would expressly specify bias crime as crime that features 1) a first-tier intention to harm some particular person or persons and 2) a

second-tier intention to harm a member of a group as such by harming the person picked out by the first-tier intention. The best language for this task would probably be ‘in order to’ language. Here is a sample bias crime statute that meets the standards I have argued for here:

Sample Bias Crime Law

A person commits a bias crime if he or she:

- a) commits a felony or misdemeanor;
- b) against a person whom he or she believes, truly or falsely, to be a member of a group defined by race, color, religion, gender, national origin, sexual orientation, or sexual identity;
- c) in order to achieve the goal of committing a criminal act against some member of the group defined by race, color, religion, gender, national origin, sexual orientation, or sexual identity of which he or she believes the victim to be a member.

However, a problem arises here. It is oftentimes the case that criminals victimize a particular individual in order to victimize some member of a group, but only in order to achieve some still further goal. Suppose for instance, that a criminal is interested in stealing wallets, and that she believes (for whatever reason) that white women are least likely to effectively resist. Such a criminal might mug a particular white woman in order to achieve the goal of mugging *some* white woman, but only to achieve the ultimate goal of securing a wallet with as little resistance as possible. Should legislatures write bias crime laws so as to include crimes like this as bias crimes?

It is worth noting that this is not a problem that is unique to my take on bias crime laws. Indeed, any defender of bias crime laws of any sort must face this issue, (although, unfortunately, nearly all American legislatures have failed to address it clearly).

Nevertheless, something must be said about this nagging problem. I suggest that since the

reason why legislatures ought to pass bias crime laws in the first place is a function of the harm they do to society as a whole, the question of whether or not to count crimes like that of the mugger as bias crimes depends on whether they are likely to be harmful to the same degree as crimes in which harming a member of a group is the ultimate end. And although I cannot be sure about this, it seems very likely that crimes like that of the white woman-seeking mugger are likely to be very similarly harmful. If members of a particular identity group understand themselves to be considered easy targets by another identity group, this is likely to fan the flames of irreducibly identity group-oriented anger, mistrust, and violence just as effectively as a self-understanding engendered by crimes in which attacking the group is the ultimate goal. This point is, however, entirely empirical and contingent, and I welcome research that might shed better light on it.

6. Conclusion

At the outset, I presented a troubling problem that has come up in the philosophical literature on bias crime laws. There is strong support in both the liberal political tradition and Anglo-American law doctrine for the action condition, which is a side constraint that requires governments to restrict their use of the criminal law in such a way that they do not punish anything but what is under the autonomous control of agents. The action condition rules out punishing people for their feelings and values, including their biased and otherwise abhorrent feelings and values. But crime committed from bias does seem to be a uniquely pernicious force in our society, and it is truly tragic if justice requires that governments do nothing to specifically target such crime. I have argued that there is a partial resolution to this problem; the bias elements of some bias crimes are intentions, and since intentions may be punished without violating the act condition, it is possible to construct limited bias crime laws that respect the action condition. Furthermore, I argued that there is good reason to reject several arguments to the effect that crimes of biased intention against large-scale identity groups are not uniquely harmful. It is my hope that that a scheme of bias crime legislation like the one I have suggested could appeal sufficiently to thinkers on both sides of the bias crime debate to usher in legislation that respects the liberty and autonomy of citizens while still doing much to tend to the wounds cut by crimes of biased intention.

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