In this paper I want to present and call attention to an argument for hate crimes laws that has received little if any attention in the literature. I call it the argument from oppression. I want to be clear, however, about my motivation. My reason for presenting and calling attention to this argument is that I think the standard arguments for hate crimes laws are demonstrably weak and that the argument from oppression is the only alternative argument both faithful to the moral sentiments or intuitions that make hate crimes laws so appealing to so many and sufficiently forceful to merit further attention. My reason is not that I am certain that it is sound or sufficiently forceful to justify hate crimes laws. I am not.

By hate crimes laws I mean “penalty-enhancement” laws. Such laws enhance the penalties for a variety of crimes provided certain conditions are met. Most of these laws are modeled on the Anti-Defamation League of B’Nai B’rith’s 1981 model statute. Since 1981, most every state in the United States has adopted some such law, although they vary in the categories of persons covered. In 1993, the U.S. Supreme Court upheld such laws, or at least Wisconsin’s hate crimes law, as constitutional. In 1994, the U.S. Congress passed the Hate Crimes Sentencing Enhancement Act covering crimes committed on federal lands. In 1999, the Hate Crimes Prevention Act was introduced into the U.S. Congress. This Act would extend penalty enhancements to hate crimes committed a) with the aim of preventing a person from exercising a federal right, or b) through the use of explosives or firearms. This Act was debated during the recent 2000 presidential campaign.

There are generally two sorts of hate crimes laws, reflecting two sorts of triggering
conditions. There are, first, “victim selection” laws. These enhance the penalties for certain crimes where the offender selects his victim “because of” her race, ethnicity, nationality, sexual orientation, or other protected characteristics. To trigger these laws, offenders need not be motivated by group-based animus, although very often, of course, they are. Victim selection hate crimes laws extend enhanced penalties to the offender who, say, intentionally selects Black victims not out of racial hatred but because he believes the police are less likely to investigate crimes against Black victims.

But not all hate crimes laws are victim selection laws. There are also so-called “group-based animus” laws. To trigger these laws, offenders must be motivated by racial, ethnic or some other specified form of group-based animus toward their victim. Group-based animus hate crimes laws do not extend enhanced penalties to the offender who selects Black victims because he wishes to minimize his exposure to police investigation. They also do not extend enhanced penalties to the offender who assaults gay victims not because of any group-based animus toward gays but rather because he wishes to win the esteem and acceptance of his more or less homophobic peers.

The argument from oppression developed in this paper is meant as a possible justification for “victim selection” hate crimes laws. At the heart of this argument is the claim that those belonging to groups made disproportionately vulnerable to a wide and serious range of harms socially produced through historic, structural group relations are owed special obligations by those belonging to groups not so vulnerable, and by the state. In the United States, this obligation is owed to Blacks, gays, Jews and others, including, I think, women. And it is owed by White straight Christian males, at least, as well as by the state. In other countries it may be
owed to and owed by members of other groups. It is, I think, the intuitive appeal and widespread sense of this special obligation that gives hate crimes laws their appeal. Oddly, however, this obligation, or the argument from it to hate crimes laws, has received little attention in the debates over the justification of hate crimes laws. My primary aim here is to rectify this unhappy philosophical circumstance.

I shall frame my analysis and argument in the context of the United States. But nothing I say here precludes the extension of either to other states. Indeed, one advantage of the argument from oppression I develop is that it provides even non-liberal and non-democratic regimes with a moral reason for adopting hate crimes laws. I begin with a brief, critical overview of the standard arguments for hate crimes laws. I then examine briefly an innovative and helpful but ultimately unsuccessful argument for such laws recently offered by Alon Harel and Gideon Parchemovsky.\(^5\) Finally, with a clearer view, I hope, of how all these arguments fail, I offer the argument from oppression. I close by highlighting some advantages and difficulties associated with taking it seriously.

Before taking a critical look at the standard arguments for hate crimes laws, however, I want just to note what is often forgotten these days in the debate over hate crimes laws. That is that it is the paradigmatic hate crimes – for example, in the United States, against Blacks, gays, Jews and other members of identifiable historically oppressed groups – that constitute the background against which hate crimes laws gain their intuitive appeal. Assuming U.S. history as we know it to be, no number of racially motivated assaults on Whites by Blacks or on Christians by Jews in the United States could generate the same intuitive appeal for hate crimes laws.

II. The Standard Arguments
In general, proponents of hate crimes laws now make one or more of three arguments.\textsuperscript{6} The first is that hate crimes merit enhanced penalties because they cause greater harm, whether physical or psychological, to victims or non-victim third-parties than similar but non-hate crimes. The second is that those who commit hate crimes merit enhanced penalties because they act from motives morally worse than those who commit similar but non-hate crimes. The third is that hate crimes merit enhanced penalties because they violate values or principles of non-discrimination and tolerance between individuals fundamental to any just and stable liberal democracy. None of these arguments is sufficiently compelling to justify hate crimes laws.

A. The greater harm argument

Many who support hate crimes laws tend to assume \textit{a priori} that hate crimes cause greater harm, whether physical or psychological, than similar but non-hate crimes. But, of course, whether they do or not is an empirical question. Surprisingly, the available evidence does not offer much support for the greater harm argument.

Hate crimes often do cause physical harm to their direct and immediate victims. But that is because they are often assaults and homicides, not because they are hate crimes. There is no evidence to suggest that as a class they are more violent than other assaults and homicides. And, of course, existing laws already scale punishment to reflect the greater harms of assaults and homicides as compared to other crimes, as well as the greater harms of certain extremely violent assaults and homicides as compared to assaults and homicides generally.\textsuperscript{7}

It is also true that hate crimes typically cause psychological harm to their direct and immediate victims. But so do all crimes. The greater harm argument requires evidence that hate crimes cause greater psychological harm than similar but non-hate crimes. The available
evidence suggests, however, that violent hate crimes actually cause their direct and immediate victims no more, and perhaps marginally less, psychological harm than similar but non-hate crimes. Absent some plausible explanation, this claim is counter-intuitive. But such an explanation is not hard to come by, even if it is hard to prove. Two possibilities come to mind. First, to cause additional psychological harm to a victim beyond that which would be caused by a similar but non-hate crime, a hate crime must actually manifest to the victim an intent to harm rooted in group-based animus. But once that intent is manifest to the victim, the victim will be in a better position to “make sense of” the crime than he or she would have been as the victim of an otherwise similar but typically random non-hate crime. Second, paradigm hate crimes are committed against members of oppressed groups who are likely to have developed various psychological mechanisms for coping with their oppressed status. Whether either of these correctly explains the counter-intuitive empirical evidence is beside the point. Either is sufficiently plausible at first blush to warrant taking seriously that evidence notwithstanding its counter-intuitive nature. It is worth noting, however, that if correct the second explanation points toward an alternative justification for hate crimes laws tied not to an increase in psychological harm but rather to status of hate crimes victims as members of oppressed groups. But this possibility must be momentarily set aside for the sake of reviewing the standard arguments for hate crimes laws.

It might be argued that hate crimes at least cause greater psychological harms to non-victim third parties than similar but non-hate crimes. But there is little evidence for this claim. The two factors most likely to increase the psychological harm suffered by non-victim third parties of any crime are the proximity and visibility of the crime. It is, of course, possible that
apart from these factors hate crimes cause non-victim third parties greater psychological harm than similar but non-hate crimes. For example, it is possible that Blacks generally are made to feel more vulnerable or distressed by any crime committed against a Black victim because of his or her race than they would be made to feel by the same crime committed randomly against a Black victim apart from any considerations of racial identity. Of course, such increased feelings of vulnerability or distress could arise only from crimes against Blacks that publicly manifest an intent to target Blacks specifically, whether out of group-based animus or otherwise. It is not implausible to think that such crimes might cause such feelings. The trouble at present is that there is little evidence to confirm these suspicions.

But suppose there was such evidence. A further difficulty remains. With respect to many hate crimes, the crime itself will not publicly manifest any intent to select the victim because of or out of animus toward, say, her racial identity. Indeed, it will not be until trial that there is any public showing that the victim was intentionally targeted because of or out of animus toward her racial identity. Thus, the psychological harm to third parties follows not from the fact that the victim was intentionally targeted by virtue of her racial identity, but rather from the public revelation of that fact at trial.

Some hate crimes immediately publicly manifest an intent to target a particular class of victim. The most common of these today are property crimes such as burning a cross in an African-American’s yard or painting a swastika on a Jewish gravestone. And it is not implausible to think that these crimes may cause non-victim third parties greater psychological harm than similar but non-hate vandalisms and trespasses. It is also not implausible to think that they contribute to a social atmosphere within which violent hate crimes against persons appear
less morally serious than they in fact are. The trouble here is that many, perhaps the majority, of these crimes are committed by young offenders who are neither ideologically nor psychologically wed to any group-based animus; they are instead confused adolescents eager simply to draw attention to themselves and provoke social reaction through the overt violation of social norms. These offenders undoubtedly deserve serious attention within the criminal justice system. But there are several obvious good reasons for thinking that the primary or dominant form of that attention ought not be severely enhanced criminal penalties.

There are many other arguments that might be made to show that hate crimes cause greater harm to victims or to non-victim third-parties than similar but non-hate crimes. It is sometimes said that hate crimes merit enhanced penalties because they are more likely than similar but non-hate crimes to provoke violent retaliation. But even if this were generally true, it would justify hate crimes laws only if the retaliation was so automatic and excusable under the circumstances that the hate crime offender could reasonably be punished for harms brought about, at least formally, through the conduct of others. In any case, however, it is not generally true that hate crimes are more likely to provoke violent retaliation than similar but non-hate crimes. Jews and gays rarely retaliate for hate crimes. And during Jim Crow in the United States Blacks rarely retaliated. Yet if there are any crimes deserving enhanced penalties as hate crimes, surely the lynchings common during that period are among them.

Sometimes it is argued that hate crimes are more harmful in that they generate social distrust between groups to a greater degree than similar but non-hate crimes. But hate crimes committed against persons targeted as members of an oppressed group are likely to arise out of already existing significant social distrust between groups. This is not to say that such crimes
might not solidify or exacerbate that distrust to some degree. It is only to say that the damage
done by any particular hate crime to social trust between groups ought not be overestimated.
Indeed, the additional social distrust engendered by hate crimes committed against persons
targeted as members of an already oppressed group may be, at least for those belonging that
group, not only marginal, but warranted and healthy, as was the Black distrust of Whites during
Jim Crow. Finally, it bears mentioning here that bias-motivated crimes committed against
persons not targeted as members of an oppressed group are not likely to generate much new
distrust by themselves, at least not unless and until it is evident that they are part of a larger
social process aimed at group subordination. It would take many crimes intentionally committed
by tall persons against short persons over a long period of time to generate any significant social
distrust between tall and short persons.

It is important to keep in mind that many of the psychological and social harms offered as
justification for hate crimes laws presuppose hate crimes that publicly manifest group-based
animus. Thus, even if these harms are established by adequate empirical evidence, they would
justify enhancing penalties only for those hate crimes that in fact manifest group-based animus to
the victim and third-parties who identify with him or her through shared group membership.
Such laws would be significantly narrower in scope than either of the two standard sorts of hate
crimes statutes on the books today: victim selection statutes and group-based animus statutes,
since neither of these statutes limits its provisions to crimes that by their very nature manifest
publicly group-based animus at the time of their commission.

There is much more that could be said about the (many versions of the) greater harm
argument. My hope is that enough has been said at this point to justify concluding that the
greater harm argument is likely either unsound or too weak to justify hate crimes laws.

B. The more culpable mental state argument

The criminal law in the United States and many other states already scales punishment according to whether an offender acts intentionally, knowingly, recklessly or negligently. Thus, to justify enhancing penalties for hate crimes, it is necessary to show that the perpetrator of a hate crime who acts, say, intentionally or knowingly, is more culpable than the perpetrator of a non-hate crime who acts in the same way. Proponents of hate crimes laws typically appeal here to the motives of hate crimes offenders, arguing that they render hate crimes offenders more culpable than they would otherwise be.

Several years ago there was a vigorous debate over whether motive is relevant to defining and scaling criminal liability. Several opponents of hate crimes laws argued against them by invoking the old saw that “motive is irrelevant to the criminal law.” But that debate is or is largely over. The criminal law has long made motive an element in numerous affirmative defenses, some of which are statutorily defined. Moreover, it often makes acting with a specific purpose a necessary condition to criminal liability or an enhanced punishment. And there is no conceptually coherent way to distinguish between specific purposes and motives. As Kent Greenawalt has noted, the prohibition on appeals to motives is a red herring in the hate crimes debate.

It does not follow that the motives of hate crimes offenders justify hate crimes laws. Indeed, while acting from racist, homophobic, anti-Semitic or other group-based animus motives is clearly evil, so too is acting from avaricious, sadistic or generally misanthropic motives. And it is not at all clear that the former are more evil than the latter. To assault or kill a person out of
racist motives is not obviously worse than to assault or kill a person just to derive sadistic pleasure from watching him suffer. Indeed, not even all racist motives are equally evil.\textsuperscript{13} In the end, when adequate attention is given to the full range of evil motives from which humans can and sometimes do act, not only is it not clear that racist, homophobic, anti-Semitic or similar motives are significantly more evil than other common motives for criminality, it is also not clear how even to begin to proceed systematically to correlate motive with criminal liability and punishment across the board. To the extent that punishment has traditionally been defined and scaled within the criminal law in light of only \textit{actus reus} and \textit{mens rea} considerations, this is no doubt the reason why.

Some proponents of hate crimes laws have argued that it is the character rather than any particular motive of the hate crime offender that justifies enhanced criminal penalties for hate crimes.\textsuperscript{14} One objection to this argument is that the deep anti-perfectionism of American liberalism demands that the criminal law not take character into account when defining and scaling criminal liability.\textsuperscript{15} But there are other more general objections that are, I think, more compelling insofar as they do not presuppose (controversially, in my view) that American liberalism is or ought to be fundamentally and fully anti-perfectionist with respect to character.

Character-based arguments for hate crimes laws suffer from at least three defects. First, there is no one vicious character trait that hate crimes offenders typically have; indeed, some hate crimes offenders may lack any especially vicious character trait (when compared to those who commit similar but non-hate crimes). Consider the young White male who commits an assault specifically against a Black man not because he is himself a racist in any sense, but because he has fallen in with a peer group of racists whose approval he desires greatly and he is
too weak and insecure to resist or reject his new friends. This young man surely possess a character defect. But it is not that of a racist, but rather that of a weak and insecure person who excessively depends on the approval of others, any others, for his own sense of self-worth.

The second defect of character-based arguments for hate crimes laws is that while the racist, homophobe or anti-Semite may possess a vicious character, it is not at all clear that it is more vicious than that of the sadist, misanthrope or avaricious person. But suppose that vicious character traits may be ranked along a viciousness scale. There is yet still a third problem. Character traits are not revealed by single actions, but rather by patterns of conduct over time. Absent substantial revision of existing evidentiary rules in criminal trials, it will simply not be possible to determine whether or not a person accused of a hate crime possesses the requisite character trait to justify penalty enhancement.

C. The fundamental values argument

Within liberal democracies, principles or values of nondiscrimination and tolerance among individuals are, or ought to be, fundamental. Sometimes hate crimes laws are defended on the ground that they are needed to symbolize or express the shared commitment of citizens in such societies to these principles or values.16 Hate crimes laws give voice to our collective outrage at the violation of these principles or values by the racist, homophobic or anti-Semitic hate crime offender or offense.

This argument would seem to justify only group-based animus hate crimes laws. Selecting an assault victim by virtue of his race but not out of a racist motive does not obviously violate nondiscrimination and tolerance norms. Importantly, however, unlike the argument from greater psychological harm, this argument would seem to justify group-based animus hate crimes
laws of the standard sort. That is, since no appeal is made here to the greater psychological harms done by the underlying crime, there is no need to limit the reach of the law to only those crimes which by their very nature manifest publicly the perpetrator’s motive as group-based animus.

There is something to this argument from fundamental liberal democratic values. But the argument is not, or by itself is not, as strong as it may at first appear. One immediate difficulty is that even if we assume, given our shared commitment to the values of nondiscrimination and tolerance, that it is necessary to express collectively some special condemnation of typical hate crimes offenses or offenders, it is not obvious why this must be accomplished through enhanced penalties. There are many other ways within the larger political culture to express special moral concern with and condemnation of such crimes. Given the seriousness of enhancing penalties, hate crimes laws are not justified unless these alternatives are inadequate in important respects. It is not this difficulty, however, that I want to pursue here. Instead, I want to argue that the apparent strength of the argument from liberal democratic values derives largely from the fact that what is meant by the values of nondiscrimination and tolerance is left unclear.

Suppose what is meant by these values is simply that persons ought not suffer harm at the hands of others due to some morally arbitrary fact about themselves such as their race, ethnicity, religion, etc. If this is what is meant, then it is not clear why punishing equally all intentional or knowing murders, assaults, vandalisms, etc., does not adequately express our shared commitment to these values. Furthermore, if we do indeed need hate crimes laws to express adequately our shared commitment to these values with respect to standard group-based animus
hate crimes (e.g., racially motivated killings or homophobic gay-bashings), it is not clear why we don’t also need hate crimes laws to express adequately that same commitment with respect to crimes intentionally aimed at fat or tattooed or pierced or ugly or socially awkward people by virtue of those morally arbitrary characteristics. To avoid this dilemma – namely, that we must either renounce hate crimes laws as unnecessary or extend their scope well beyond the paradigm hate crimes from which hate crimes laws derive their intuitive support – more must be said about the relevant values of nondiscrimination and tolerance.

Paradigmatic hate crimes do not call for special collective condemnation and response merely because they run roughshod over the liberal democratic values of nondiscrimination and tolerance in the sense just articulated. When in the United States a Black man kills a White man solely for racist reasons he violates the liberal democratic values of nondiscrimination and tolerance at least in the sense just articulated. Suppose for the sake of argument that his violation is sufficient to justify the public expression of a special collective condemnation in the form of enhanced penalties. But now consider the paradigmatic hate crime: a White man in the United States kills a Black man solely for racist reasons. In this case, the perpetrator not only violates the values of nondiscrimination and tolerance in the sense articulated above and, let us suppose, thereby invites the same special collective condemnation visited upon the Black man who kills a White man for racist reasons, he also intentionally targets a person already disproportionately vulnerable to a wide range of socially produced harms arising from historic and systemic, group-based oppression. And this fact about his victim, or perhaps this fact coupled with his intentional or knowing disregard of it, renders his crime morally distinct from that of a Black man killing a White man for racist reasons. The intuitive appeal of hate crimes
laws derives in large part from the fact that paradigmatic hate crimes take this form; they are crimes against victims belonging to a special class of vulnerable persons committed by persons who intentionally or knowingly disregard that fact.

This is the key point overlooked by the U.S. Supreme Court in its opinion upholding Wisconsin’s hate crimes statute. In that case, a Black man was given an enhanced penalty under Wisconsin’s victim-selection hate crimes law for an admittedly brutal and racially motivated assault on a White man. Throughout its analysis, the Court assumed that racially motivated assaults violate nondiscrimination and tolerance norms and that there are no morally relevant differences between Black on White and White on Black racially motivated assaults. The ironic result was that yet another Black man was sent to prison for a little longer than he otherwise would have been because of a statute that presumably gained its popular appeal in Wisconsin as a remedial social response to racism as the historic and systemic, group-based oppression of Blacks. A further irony was that the defendant was moved to commit his racially motivated assault only after watching the movie *Mississippi Burning* and becoming enraged at the fact that it told the civil rights story from a perspective so thoroughly White. Thus, the U.S. Supreme Court managed to uphold hate crimes laws in a case that put a Black male sensitive to cultural imperialism behind bars for longer than he otherwise would have been for a violent assault.

I do not want to deny that the defendant in this case violated liberal democratic values. He did. The question is whether he violated the values of nondiscrimination and tolerance as they are violated in paradigmatic hate crimes (e.g., White racially motivated killings of Blacks) and implicated in the legal or moral right to nondiscrimination. And here, I think, he did not. If
I am right, then there remains an important moral difference between the crime committed by the defendant in this case and an equally brutal racially motivated assault by a White man against a Black victim. To refuse to acknowledge this difference risks tethering the criminal law exclusively to the perspective of non-oppressed persons for whom “a racially motivated assault is a racially motivated assault, and a brutal murder is a brutal murder” regardless of the relative social positions of the perpetrator and victim. Blacks know only too well that neither all racially motivated assaults nor all brutal murders are the same. To avoid being implicated in larger patterns of cultural imperialism, the criminal law must find its way to theorizing crime not just from the point of view of the non-oppressed.

I must now explain why I said a racially motivated assault by a Black man against a White man may violate liberal democratic values, but not the values of nondiscrimination and tolerance as they are violated in paradigmatic hate crimes and implicated in the legal or moral right to be free of discrimination. After all, it would appear that these values are flouted by the Black perpetrator of a racist attack on a White to the same degree that they are flouted by a White perpetrator of a racist attack on a Black. But the truth is otherwise. To see why, it is necessary now to clarify what is meant by the value of or right to nondiscrimination.

The right to nondiscrimination is not a right to be free from discriminatory judgment or conduct based on characteristics one cannot change or can change only at an unreasonably high cost, psychological or otherwise. If I deny a blind person a job as an air traffic controller (assuming there is no technological accommodation available), I do not violate her right to nondiscrimination, even though my treatment of her is determined by such a characteristic. Nor is the right to nondiscrimination a right to be free from discriminatory judgment or conduct
based on irrational grounds. If I refuse to purchase goods, no matter their quality and price, from persons who wear t-shirts with goofy slogans on them, I do not violate anyone’s right to nondiscrimination, even though I act irrationally. Indeed, the right to nondiscrimination is not even a right to be free from discriminatory judgment or conduct based irrationally on characteristics that cannot be changed or can be changed only at an unreasonable cost. It is no doubt irrational to be moved, as many people are, by natural good looks or height when determining who to hire or vote for. But to be so moved is not to violate the right to nondiscrimination of ugly or short people.

The reason for this is that neither ugly nor short people constitute historically oppressed groups. And the right to nondiscrimination is most plausibly a right to be free from judgments or treatment at the hands of others that is itself partially constitutive and wholly symptomatic of larger patterns of group-based oppression. Group-based oppression is, of course, most easily achieved where groups are defined through immutable or highly stable characteristics; members of a targeted group defined by virtue of a shared but easily altered characteristic will simply change and thereby exit the group to avoid suffering serious harms or vulnerabilities simply by virtue of their membership within it. And these immutable or highly stable characteristics will often be morally arbitrary and irrelevant when it comes to how persons possessing them ought to be judged and treated by others. So, in most cases the right to nondiscrimination will in application be a right to be free from judgment or conduct tied to an immutable or highly stable, but also morally arbitrary or irrelevant characteristic. But it is not the immutability, stability or irrelevance of the characteristic that is morally central, but rather that the judgments and conduct based on that characteristic are partially constitutive and wholly symptomatic of existing group-
based oppression. Were this not the case, affirmative action policies would indeed violate the rights of Whites to nondiscrimination.

It is not possible, then, to explicate the value of or right to nondiscrimination, or at least a very important aspect of it, without making reference to patterns of group-based oppression. It follows that a racially motivated attack by a White against a Black violates the value or right of nondiscrimination in a manner or to a degree morally distinct from and more serious than a racially motivated attack by a Black against a White. This explains why treating all murders, even all murders motivated by racial animus, the same is not sufficient to vindicate fully the value or right of nondiscrimination. And it explains why vindicating that aspect of the value or right to nondiscrimination violated in paradigmatic hate crimes does not require extending hate crimes laws to crimes against the tattooed, the fat, the ugly or the socially awkward. It also suggests that it is not enough to appeal to the liberal democratic values of nondiscrimination and tolerance in a justificatory argument for hate crimes laws without grounding that appeal in a deeper and more ambitious argument from oppression.

Still, even with the foregoing in mind, there is something to the idea that a racially motivated assault by a Black man on a White man violates liberal democratic values in some significant sense, even if simply uttering the words “nondiscrimination and tolerance” is insufficient as an articulation of what exactly those values are. There is something morally offensive about racist conduct, whether directed at Blacks by Whites or Whites by Blacks.

But this point deserves careful analysis. One of the problems within American public political culture and social, political and legal theory is that racism (and other forms of structural, group-based oppression such as anti-Semitism, homophobia, patriarchy, etc.) are routinely
reduced to little more than the aggregate social effects of actions taken by racists (and anti-Semitic, homophobes, misogynists, etc.) out of group-based animus. Now, there is no doubt that such actions are especially condemnable when viewed against the background of fundamental liberal democratic values. But the social problem of racism (and other forms of structural, group-based oppression) is neither fully constituted by nor dependent on such especially condemnable conduct by individual racists (anti-Semitic, homophobes, misogynists, etc.). No number of racially motivated crimes or hostile acts against Whites by Blacks could constitute the oppression of Whites by Blacks without a fundamental change in the larger and rarely articulated network of social norms within which Whites and Blacks are formed and asymmetrically positioned as social groups. Thus, if the criminal law is to be placed in service in the struggle against historic, structural, group-based oppression – and that is surely what proponents of hate crimes laws intend – it is not enough merely to enhance penalties in those cases where an individual criminal can be shown to have acted out of a racist or other morally condemnable motive. To do that is to put the criminal law in service in the struggle against racists. That may be a noble cause, but it is not the same as putting the criminal law in service in the struggle against racism. That requires more than merely enhancing penalties for one or another class of crimes when a racist motive is present.

III. Moving in a New Direction: Harel and Parchemovsky’s Equal Protection Argument.

In a recent article Alon Harel and Gideon Parchemovsky concede the weakness of the standard arguments for hate crimes laws and argue for them instead from distributive justice and equal protection premises. Specifically, they argue that distributive justice and equal protection demand that those who we know to be most vulnerable to criminal attack or violation by virtue
of their group membership receive extra criminal law resources. As a matter of distributive justice and equal protection, criminal law resources ought to be distributed so as to minimize between groups significantly unequal vulnerabilities to crime. Criminal law resources include primarily policing, on the front end, and penalties, on the back end. Limiting the inequalities in group-based vulnerability to crime can be done, therefore, in one of three ways: additional policing on the front end, additional penalties on the back end, or some combination of the two.

Since it is unlikely that the inequality gap in vulnerability to crime can be closed adequately through increases in police protection alone, Harel and Parchemovsky argue, there are good reasons to enhance the penalties for at least some crimes committed against those belonging to groups already disproportionately vulnerable to crime in general or to particular classes of crimes. Hate crimes laws, then, are justified as a way of extending to those we know to be disproportionately vulnerable to criminal harm or violation their fair share of criminal law resources. Since Blacks and gays, for example, are disproportionately vulnerable to certain sorts of assaults and violent crimes with respect to which additional policing alone can only accomplish so much, the penalties for those crimes may be justifiably enhanced. The justification for the enhanced penalties is not that the crimes cause greater harm, or that the offenders are more culpable, or that the crimes constitute an affront to principles or values of nondiscrimination or tolerance. It is rather that there is no alternative and feasible path to a just distribution of criminal law resources.

Now there is something powerfully right about this argument. Harel and Parchemovsky rightly focus on the social status or vulnerability of the victims of hate crimes and rightly restrict hate crimes laws to crimes committed against those who are as a class or group especially
Thus, a racially motivated assault on a straight, able-bodied, WASP male would not be eligible for enhanced penalties as a hate crime under the sort of statute they argue for. Further, since there is nothing in the logic of their argument that precludes their endorsing the sort of argument from liberal democratic values aimed at racists (and homophobes, etc.) to a second and more general penalty enhancing law, Harel and Parchemovsky can still allow that racially motivated assaults by Blacks on Whites, say, deserve enhanced penalties also, albeit not for the same reasons and perhaps not to the same degree as assaults by Whites on Blacks.

Another important merit of Harel and Parchemovsky’s argument is that its logic suggests, rightly in my view, that in a patriarchal society male rapes of females belong to the larger class of hate crimes deserving enhanced penalties. Of course, it is a separate question whether the current penalties for a male rape of a female are indeed already enhanced.

But while Harel and Parchemovsky push the hate crimes debate in a new and profitable direction, there is still something powerfully wrong about their argument. They focus on only the vulnerability of victims and only their vulnerability to criminal harm or violation. This double restriction is doubly problematic.

Consider first the latter restriction. In focusing on only the vulnerability of particular groups to criminal harm or violation, Harel and Parchemovsky tacitly adopt a sort of Walzerian sphere-specific conception of distributive justice. On this conception, criminal law resources constitute a social good to be distributed according to their own internal logic. And that logic demands that they be distributed solely in light of considerations tied to vulnerability to crime.

One difficulty here is that disproportionate group-based vulnerability to crime is very often simply one aspect of a larger pattern of disproportionate vulnerabilities to various social
harms. This is especially so when the vulnerabilities arise out of group-based oppression. To limit redistribution of criminal law resources to the end of reducing disproportionate group-based vulnerabilities to crime is therefore to have one less arrow in the quiver when it comes to dealing with general patterns of oppression.

To be sure, the nature of various social goods may impose some constraints on the extent to which they may be justifiably redistributed in response to general patterns of oppression. There is indeed something odd about the claim that we may justifiably undertake to remedy the current social, economic and political aspects of patriarchy by, say, enhancing the punishment for any and all crimes against women. Still, some forms of oppression may be so systemic and deeply rooted that it would be foolish to exclude tout court any and all remedial strategies that involved redistributing resources in one sphere to remedy injustices or special vulnerabilities in others. If affirmative action is justified, it is justified not simply as a corrective to discrimination limited to labor markets, but rather as a or one corrective to the sort of historic, pervasive and systemic oppression of Blacks and others of which discrimination in labor markets is just a part. There is no reason to think that the same might not be true of hate crimes laws.

Their focus on the disproportionate vulnerability of particular groups to the harm of criminal attack or violation leads Harel and Parchemovsky to present hate crimes laws as a narrowly tailored remedial social response to only the special group-based vulnerability of hate crimes victims to crime. And this leads to some counter-intuitive results. For example, on their view, Black on Black crimes in the United States are eligible for enhanced penalties as hate crimes. But Black on Black crimes account for the vast majority of crimes against Blacks in the United States. The result of adopting Harel and Parchemovsky’s argument, then, would be to
incarcerate even more Blacks for an even longer period of time than is currently the case. But this hardly makes sense if we recognize that Black vulnerability to crime, even to Black on Black crime, arises primarily from pervasive, historic, and systemic group-based oppression of which the shockingly high present rate of Black incarceration (and refusal of parole, etc.) is but one symptom. If we think of hate crimes laws as a remedial social response not just to the special vulnerabilities of some groups to crime, but rather to the larger patterns of disproportionate vulnerability and to the social pathologies from which larger patterns arise, then there are good reasons not to extend such laws to Black on Black crime. But this means rejecting or revising Harel and Parchemovsky’s argument.

Harel and Parchemovsky unduly restrict their focus also in that they focus on the disproportionate vulnerability of groups apart from any sense of the relations among groups within and through which those vulnerabilities arise. Unlike risk of harm, vulnerability to harm is a relational property. It is a function of the acts or omissions of others. And group-based vulnerability is a relational property of groups. It is a function of the coordinated acts or omissions of others acting as a group. Individual Blacks may be disproportionately vulnerable to other individual Blacks with respect to crime. And as a group, Blacks may be at a higher risk when it comes to crime than Whites. But if Blacks as a group are disproportionately vulnerable to any other group in terms of socially produced harms, including crime, it is not to themselves, but rather to Whites, or non-Blacks. Their vulnerability is primarily a function of the coordinated acts or omissions of Whites, or non-Blacks, acting as a group. As a group, Blacks are vulnerable primarily to the failure of Whites, or non-Blacks, as a group to undertake the coordinated efforts needed to protect them from the various social harms to which they are now
disproportionately vulnerable. It is their failure to attend to this aspect of Black vulnerability that leads Harel and Parchemovsky to advocate a policy that would put more Black men behind bars for longer periods of time in the name of addressing Black vulnerability to crime.

Because they focus narrowly on the present vulnerability of Blacks and other groups to crime, Harel and Parchemovsky pay no attention to the historical roots of this vulnerability or the broader patterns of disproportionate vulnerability of which it is typically just a part. Yet, it seems to me that the moral obligations generated in the case of a group recently made disproportionately vulnerable to crime for reasons having nothing to do with longstanding historical oppression are different from those generated in cases of groups that are and have long been disproportionately vulnerable to crime (or other harms) because of historical, systemic group-based oppression. There are two reasons for this, I think. First, history carries with it its own moral force; and a history of group-based oppression encumbers a society with special moral obligations, obligations consistent with but distinct from those generated by disproportionate vulnerabilities alone. Second, long lasting, historical group-based oppression is rarely accomplished without significant state or governmental action. Thus, where a particular disproportionate vulnerability, or more likely, a general pattern of such vulnerabilities, arises out of historical oppression, there are good reasons to think that the state or government, in addition to citizens collectively, has a special obligation to respond.

It is important to note that Harel and Parchemovsky do not argue that hate crimes merit enhanced penalties because they are morally worse than similar but non-hate crimes. They argue for enhanced penalties as a method for achieving distributive justice and equal protection. Yet, one of the reasons so many find hate crimes laws so appealing is the intuition that there is
something about hate crimes that makes them morally worse than similar but non-hate crimes. Harel and Parchemovsky fail to capture this intuition. If my analysis of the standard arguments is correct, then they are right, of course, to avoid grounding any claims about the exceptional moral status of hate crimes in those arguments. But the failure of the standard arguments does not establish that hate crimes are not in themselves morally worse than similar but non-hate crimes. And since so many defenders of hate crimes laws seem to think they are morally worse, it is worth considering alternative arguments for hate crimes laws that capture that intuition.

Harel and Parchemovsky undeniably push the hate crimes debate in a profitable new direction. Still, their argument misses the mark in important ways. The question is whether we can do better.

IV. Further Steps in a New Direction: The Oppression Argument.

On the argument I want to propose, what justifies, or might justify, penalty-enhancing hate crimes laws is the special obligation owed by non-oppressed groups, and by the state or government, to those groups disproportionately vulnerable to a wide and serious range of socially produced harms due to historical, systemic, group-based oppression. This is initially a collective obligation, owed both by and to groups. But it imposes obligations on individuals as well. To say that Whites as a group have a special obligation to Blacks as a group is also to say that individual Whites have special obligations to individual Blacks. To say that the state or government has an obligation to Blacks is also to say, at least, that individual state or government officials have special obligations to Blacks. In each case, the latter individual obligations are derived from the former collective or group obligation. I cannot give a full account of that derivation here. But the idea that individual obligations are sometimes derived
from group-based obligations is fairly noncontroversial. The important point here is the content of the obligation. It is two fold. Non-oppressed groups and the state or government have a special obligation (which devolves to persons belonging to non-oppressed groups and state or governmental officials) to make extra efforts to act as a group in a manner reasonably calculated, first, to redress the disproportionate vulnerabilities suffered by oppressed groups, and second, to reorder social relations over time to eliminate patterns of group-based disproportionate vulnerability and the oppression of which it is a symptom. Hate crimes laws, or modified hate crimes laws, then, might be justified as part of a general societal effort to meet this obligation.

This obligation is grounded not in the causal responsibility of non-oppressed groups for the disproportionate vulnerability of oppressed groups. But rather in the fact that non-oppressed groups are especially well placed to redress and eliminate that vulnerability (and that oppressed groups are not similarly well-placed as groups). It is the ability of non-oppressed groups to respond effectively to the vulnerabilities of the oppressed that grounds their moral obligation to make special efforts to so respond. In this regard, the special obligation owed by non-oppressed groups to oppressed groups is not altogether different from other familiar cases of special responsibilities or obligations. The United States government has special obligations to Native Americans, apart from any treaty provisions, because Native Americans are disproportionately vulnerable to a wide range of social harms that the United States government can most effectively prevent. And purveyors of medical treatments have special obligations to the terminally ill because the terminally ill are especially vulnerable to exploitation through fraud or manipulation, a harm purveyors of medical treatments are themselves most effectively able to prevent. In all these cases special obligations (to make extra efforts of a particular sort) arise
from the relationship between a group disproportionately vulnerable to a harm or harms and a
group or groups with a disproportionate ability to prevent or redress that harm or harms.

On the argument I am suggesting here, when a White man intentionally selects a Black
victim to assault he commits a crime morally worse than a similar assault on a randomly selected
victim, not for any of the standard reasons, but rather because he violated in a particularly
egregious manner his special obligation to make extra efforts to act in a manner reasonably
calculated to redress Black disproportionate vulnerability to harm and eliminate oppression over
time. Individuals belonging to non-oppressed groups egregiously violate this special obligation
when they intentionally or knowingly (and perhaps even recklessly or negligently) select of a
member of an oppressed group as a criminal victim, or at least they do so in some cases. It is
this that makes the hate crime morally worse than similar but non-hate crimes. It is also this that
accounts for the moral difference between a racist assault by a White on a Black and a racist
assault by a Black on a White. Only the former assault involves an egregious violation of the
special obligation under discussion here.

Given the historical nature of, and state or government complicity in, many cases of
existing group-based oppression (of, for example, Blacks, Native-Americans, women, gays,
Jews), state or government officials, including perhaps citizens *qua* citizens, also have special
obligations collectively to make extra efforts to act in a manner reasonably calculated to redress
disproportionate patterns of vulnerability and to eliminate the oppression from which they arise.
Assuming that at least some crimes committed by members of non-oppressed groups
intentionally or knowingly against members of oppressed groups are morally worse because they
egregiously violate a special obligation owed by the former to the latter, then state or
government officials, and perhaps citizens *qua* citizens, are obligated to take special steps to address that fact. Hate crimes laws, then, or at least suitably revised hate crimes laws, may be justified as a, or part of a, collective institutional response on the part of officials and citizens generally to the special moral status of at least some crimes committed by members of non-oppressed groups against members of groups subject to historic, structural, group-based oppression.

It must be noted here that the sort of disproportionate vulnerability to harm suffered by oppressed groups is itself a sort of harm. This is not to say that a disproportionate vulnerability to harm X is the same thing as harm X itself. It is, rather, only to say that a disproportionate vulnerability to socially produced harms, or more to the point, a pattern of such vulnerabilities, may be, indeed typically is, itself psychologically damaging, even if the threatened harms themselves never materialize. To be Black in the United States, for example, is to live, by virtue of group membership alone, subject to a far higher vulnerability to poverty, violence, unjust discrimination, marginalization and powerlessness than to be White. And this vulnerability is itself a sort of harm, a burdensome and avoidable social and psychological constraint within which one must make and execute choices, even for those Blacks who manage to escape poverty, violence, unjust discrimination and the rest. Similarly, to live as a woman in the United States is to live by virtue of group-membership alone subject to a far higher vulnerability to rape as well as many of the other harms just mentioned. And this vulnerability is itself a harm, a harm suffered even by affluent, professional women who never suffer being raped.

To use the traditional but misleading jargon, the special obligation owed by non-oppressed groups to oppressed groups is both a negative and a positive duty. It is a negative
duty in that members of non-oppressed groups have a special obligation to members of
oppressed groups to make extra efforts to prevent the harms of poverty, violence and the like, as
well as the harm of disproportionate vulnerability itself. It is a positive duty in that they also
have a special obligation to make extra efforts to redress these harms, including that of
disproportionate vulnerability itself. This distinction, however, between negative and positive
duties, or alternatively between duties of non-maleficence and beneficence, is not very deep.
The affirmation of any negative duty or duty of non-maleficence entails necessarily the
affirmation also of positive duties or duties of beneficence. If I am as a general moral matter
duty bound not to visit harm X on Y, then I am also, other things equal, duty bound to take at
least some affirmative steps to protect Y from X and to remedy Y in the case she suffers X.24

Hate crimes laws justified by appeal to the special obligations owed by non-oppressed
groups to oppressed groups could, in principle, extend to crimes against members of any group
specially vulnerable not just to criminal harm or violation, but to any sufficiently wide and
serious range of socially produced and avoidable harms rooted in longstanding, pervasive group-
based oppression. But laws so justified could extend only to crimes against members of such
oppressed groups, not to crimes against members of non-oppressed groups.25 They would
justifiably take the victim-selection (rather than the group-based animus) form, since it is not any
racist, homophobic, anti-Semitic or other motive (or analogous character trait) that merits the
penalty enhancement, but rather the failure to meet the special obligations owed to those who are
already disproportionately vulnerable to a wide and serious range of socially produced and
avoidable harms arising from historic group-based oppression.26 They would cover the case,
therefore, of the young man who intentionally selects a Black assault victim not out of racist
motives but to impress and win the approval of his racist peers. But they would not cover the
same case if the racial identities of the victim and perpetrator were reversed.

Hate crimes laws justified by the argument from oppression would not extend to Black
on White crimes. Nor would they extend (with perhaps one exception to be discussed below
under the section titled “Difficulties”) to Black on Black crimes in the United States (as would
the laws Harel and Parchemovsky propose). Indeed, the logic of their justification precludes this
in two ways. First, Blacks are not a non-oppressed group and thus are under no special
obligations of the relevant sort (since as a group they have no special ability to prevent or redress
harms to Whites as a group). Second, insofar as hate crimes laws on this justification are aimed
morally at the general social pathology of historic, systemic, group-based oppression, they
cannot justifiably be extended in ways likely to function over time to exacerbate rather than
remedy such oppression or the disproportionate vulnerabilities to which it gives rise. Since
extending hate crimes laws to cover Black on Black crimes does just this, it must not be done.

Of course, while hate crimes laws justified by and adjusted to the argument from
oppression would not cover, say, a racist assault by a Black man against a White man in the
United States, there is nothing in their logic that precludes extending to such a case a second sort
of penalty-enhancing law grounded in, perhaps, an argument from general liberal democratic
values. From the fact that the argument of oppression provides no justification for enhancing
penalties in such cases it does not follow that there is no justification at all for doing so. As I
have argued, however, none of the alternatives are very compelling. For example, an argument
from liberal democratic values that is not itself part of a larger argument from oppression
inevitably runs into the problem of covering too many cases (crimes against the tattooed, the fat,
the ugly, the short, etc.) to retain its appeal. In the end, the criminal law cannot be put in service in the struggle against racism unless it takes seriously the disproportionate vulnerabilities of oppressed groups to a wide range of structurally and socially produced harms, and the special ability of non-oppressed groups to protect against, redress and eventually eliminate those harms and vulnerabilities. Of the arguments for hate crimes laws, it is only the argument from oppression that pushes the criminal law down this path. Of course, it must be admitted that adopting the sort of revised hate crimes laws suggested here would constitute but a small contribution toward putting the criminal law in service in the struggle against racism.

Some theorists argue that the failure to take seriously and be moved morally by the disproportionate vulnerabilities of, say, Blacks is itself powerful evidence of some sort of group-based animus. Suppose a White man intentionally selects a Black crime victim notwithstanding the fact that he knows Blacks to be already disproportionately vulnerable to social harms. He selects a Black victim because he thinks the police are less likely to investigate or that if caught his punishment will be less severe. Suppose the same White man knows that the elderly too are also disproportionately vulnerable to social harms, and is moved by that fact to make special efforts not to visit the same sort of harm on elderly White persons. While this man is not overtly motivated by group-based animus against Blacks (he just wants to minimize his chances of getting caught or punished severely), he is still moved by a group-based animus. That animus is revealed by the fact that he takes seriously the disproportionate vulnerability of elderly Whites but ignores the disproportionate vulnerability of Blacks.

The advantage of this view is that it permits a unified account of racism and similar forms of oppression as fundamentally rooted in some sort of group-based animosity on the part
of some citizens toward others. That is, even the sorts of conduct often analyzed as instances of institutional racism – where overt group-based animus is not among the obvious motives – is ultimately rooted in a deeper subtler form of group-based animus. Now, I want neither to endorse nor reject this analysis here. I want only to note that the argument from oppression given here for suitably revised victim selection hate crimes laws is perfectly consistent with, although logically independent of, this view. To select a Black victim on the basis of race, even without the standard sort of overt group-based animus characteristic of the typical racist, may be to demonstrate a deeper and subtler sort of group-based animus insofar as it demonstrates a failure to attend to the sorts of social harms to which Blacks are systematically and disproportionately made vulnerable when one wouldn’t fail to attend to such harms if it were Whites who were made systematically vulnerable to them. And if this failure is especially morally condemnable and deserving of enhanced punishment, then we have a justification for victim selection hate crimes laws of the sort defended here. The argument from oppression reaches the same conclusion but without taking a stand on whether racism, including institutional racism, is analytically reducible to the aggregate effects of individual actions arising out of group-based animus.

The argument from oppression best preserves the close connection between the intuitive appeal of hate crimes laws generated by paradigmatic hate crimes and the scope and content of the laws themselves. It correctly requires as part of the full vindication of liberal democratic values of nondiscrimination and tolerance a morally appropriate social response to crimes committed by members of non-oppressed groups against victims of historic, systemic group-based oppression who are, and are or should be known by all to be, already disproportionately
vulnerable to socially produced and avoidable harms. It also makes plain the various ways in which the existing hate crimes debate has gone off-course. The tendency within the existing debate has been to assume that hate crimes laws are meant as a remedial social response to racism and similar social ills, but then to reduce the problem of racism to the problem of the conduct of racists as individual actors. Hate crimes laws are then justified by appeal to the greater harm caused by some of criminal conduct of racists, the more culpable mental states of criminals who act out of racist motives, or the ways in which racially motivated crimes specially violate liberal democratic values. The result has been something short of good law.

Getting the debate over hate crimes laws back on track is a matter of thinking seriously again about why so many feel so strongly that there is a need to undertake a remedial social response to racism and similar social ills. One plausible and overlooked answer to that question is that groups privileged not to suffer from historic group-based oppression have special obligations to groups not so privileged.

V. Difficulties.

There are difficulties with the argument from oppression. And they may to sufficient to sink the argument. First, what are we to make of the straight Black man who assaults the gay White man out of both racial rage and homophobia. Has he committed a hate crime against a gay man? Or, is his crime an ordinary assault, or at worst an assault violative of liberal democratic values of nondiscrimination and tolerance, since he, a Black man, attacked a White man? The trouble here is that all persons belong to a number of social groups, and it is rare that all the social groups to which one belongs are oppressed (or non-oppressed). Insofar as many people belong to one or another oppressed group, the argument from oppression advanced here
suggests that many people cannot themselves commit hate crimes. Given the complexity and multi-faceted nature of group-based oppression, perhaps the criminal law is just too clumsy a tool to use in the struggle against oppression.

The best response to this objection, I think, is to limit the use of hate crimes laws to the most obvious, long-lived, and troubling cases of group-based oppression – e.g., the oppression of Blacks or Native Americans or homosexuals in the United States. But this only limits, it does not eliminate, the force of the objection. Indeed, insofar as the oppression of women is one of the most obvious, long-lived and troubling cases of group-based oppression, there is a powerful argument for treating male rapes of females as hate crimes, even perhaps when those rapes are committed by Black males against Black females.

Second, the argument from oppression ranges well beyond the conventional categories of criminal law jurisprudence and is objectionable for that very reason. Traditionally, criminal law jurisprudence is concerned primarily with the harmfulness of the actus reus and the culpability of the mens rea of individual offenders. The argument from oppression is rooted in neither of these concerns and seems to demand serious revisions to the structure of traditional legal theory.

The best response to this objection is, I think, two-fold. First, the fundamental point of the criminal law is to respond through the articulation and realization of rule-following social and institutional practices to the most serious of harms, including those constitutive of group-based oppression. Second, hate crimes laws as justified by and suitably revised in light of the argument from oppression do not in any way violate the rule of law. They are thus consistent with the deepest aims and moral constraints on the criminal law. Thus, revisions they force on criminal law jurisprudence are no more significant than those forced, for example, by the
enactment of strict liability criminal laws.

Finally, there is the political problem. While I think hate crimes laws as justified by the argument from oppression would meet with greater public sympathy than is often supposed, especially if the justificatory argument were carefully made, I have no illusions that they would meet with widespread public sympathy. They smack too much of “special rights” or “group rights.” But, at least two points need to be made here.

First, if citizens generally are not willing to support hate crimes laws as justified by the argument from oppression, then the only real contender of an argument for hate crimes laws is the argument from liberal democratic values, including nondiscrimination and tolerance, without any reference to oppression. And the logic of that argument is such that not only is there no reason to limit the protected classes of persons to those belonging to historically oppressed groups, there is no reason to limit the reach of the laws to crimes committed against persons because of their race, ethnicity, religion, etc. Crimes committed against persons because they are from the South or because they are tattooed or because they are an opera enthusiast would seem also to violate liberal democratic values so understood (although not my understanding of the value of or right to nondiscrimination as specially violated in paradigmatic hate crimes and implicated in the legal right to nondiscrimination) and thus be eligible for enhanced penalties. Pushing citizens to confront this fact and respond accordingly through legislation is a step toward public honesty and political integrity.

Second, even if citizens presently reject hate crimes laws as justified by the argument from oppression, there is merit in their confronting the argument insofar as it places four square on the public agenda the problem of historic, systemic and on-going group-based oppression and
the question of whether such oppression generates special social obligations on the part of citizens generally or non-oppressed citizens more specifically. Such a confrontation may yield positive political dividends in areas outside of criminal law. This is especially true at a time when the affirmative action debate has been so shaped by legal precedents that arguments from oppression merit little attention. The more recent reparations for slavery debate, of course, has pushed the issue of racial oppression back center stage. But other forms of oppression it leaves unaddressed.

VI. Conclusion.

Notwithstanding these difficulties, the argument from oppression deserves, I think, a fair hearing. Those undertaking to debate the merits of hate crimes laws would do well to give it one. At a minimum, taking the argument seriously might clarify some important points. For example, it makes clear that there are reasons other than the desire not to criminalize motive to favor victim-selection over group-based animus hate crimes law. Simply selecting a criminal victim you know or should have known to be a member of a group suffering from disproportionate vulnerability is for some persons a failure to meet a special moral obligation and thus may merit enhanced penalties; there is no necessary appeal to a racist or other group-based animus.

To date the hate crimes debate has proceeded under two assumptions: a) that there is significant intuitive appeal to hate crimes laws, especially if one keeps in mind the paradigmatic sort of hate crimes (certain White assaults on Blacks, etc.), and b) that if hate crimes laws are to be justified, it must be through appeal to conventional legal categories and traditional sorts of arguments. Holding fast to both these assumptions has turned out to be like trying to square a
circle. Rather than conclude that the widely felt intuitive appeal for hate crimes laws is misguided, I think it worth first exploring the possibility that the best justification for hate crimes laws might require some creative rethinking at the ground (if not underground, foundational) level of contemporary legal theory.

Endnotes

1. For helpful comments on earlier drafts of this paper, I want to thank Rex Martin, Russ Shafer-Landau, Ann Cudd, Jonathan Kaplan, John Hardwig, Alon Harel, Christine Sistare and two anonymous referees for this journal.


4. On vulnerability, and especially socially created, group based, asymmetrical vulnerabilities, as a moral basis for special obligations on the part of those less vulnerable, see Robert Goodin, Protecting the Vulnerable: A Reanalysis of our Social Responsibilities, U. of Chicago Press, 1985.

   For an overview of the evidence regarding the vulnerability of oppressed groups in the United States and elsewhere to a wide and serious range of socially produced harms, see Sidanius and Pratto, Social Dominance, Cambridge U.P., 1999. For an overview of the vulnerability of Blacks and others to harm within the criminal justice system of the United States, see David Cole, No Equal Justice, New Press, 1999.


6. For a robust and traditional defense of hate crimes laws, see Frederick Lawrence, Punishing Hate: Bias Crimes Under American Law, Harvard U.P., 1999.


   For a wide range of fairly standard views on hate crimes laws, including those of proponents and opponents, see the following three Symposium issues: 1992/3 Annual Survey of American Law (n.4), 1993; 11 Criminal Justice Ethics (n.1), 1992; and 20 Law and Philosophy (n.2), 2001.

   For a robust and traditional attack on hate crimes laws see, Jacobs and Potter, Hate Crimes: Criminal Law and Identity Politics, Oxford U.P., 1998; and Susan Gelman, “Sticks and Stones

For a judicial discussion of the arguments for and against hate crimes laws, see Wisconsin v. Mitchell, 508 U.S. 476, 1993.

7. For discussion of this point, see Jacobs and Potter, Hate Crimes, pgs. 82-84.

8. For discussion of this point, see Jacobs and Potter, Hate Crimes, pgs. 82-84.


10. For discussion, see Jacobs and Potter, Hate Crimes, pgs. 88-89.


20. The logic of Harel and Parchemovsky’s argument also permits treating rapes, at least against women, as hate crimes since women are disproportionately vulnerable to sexual assaults. I regard this as a merit of their argument, since I think that given the background social condition of historic patriarchy, sexual assaults on women are morally distinct from, and call for a different social response than, sexual assaults on men. Of course, it is a separate question as to whether
the punishment for rape against women is currently set high enough.


22. In recent personal conversation at the World Congress of Social Philosophy and Philosophy of Law in Amsterdam, NL, Alon Harel conceded that this was an assumption he and Parchemovsky shared.


25. Of course, individual members of non-oppressed groups may be vulnerable to various harms for one or another reason. And when they are intentionally or knowingly targeted as a criminal victim because of that vulnerability, a special moral wrong is done. For example, those who defraud elderly persons especially vulnerable to manipulation commit, I think, a special moral wrong. These cases, however, are best handled on a case by case basis within existing laws at the sentencing stage of a criminal prosecution.

26. From the point of view of the argument from oppression, there may be good reason to replace the standard and ambiguous “because of race, ethnicity, etc.” language of victim selection hate crimes laws with the morally more accurate “in knowing or reckless disregard of race, ethnicity, etc.”.