Hate Crimes Laws: Progressive Politics or Balkanization?


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I. Introduction

In 1981 the Anti-Defamation League of B’nai B’rith published the model for what have now become known as hate crimes laws. Hate crimes laws are “penalty enhancement” laws. They enhance the penalties for a variety of crimes (most commonly assault, homicide, arson, trespass and vandalism) provided certain triggering conditions are met. Some hate crimes laws apply to specified crimes any time the perpetrator selects his victim because of her race, ethnicity, religion, sexual orientation or other specified characteristic. Others apply to specified crimes only if the perpetrator selects his victim out of a special animus toward a racial, ethnic, religious, or other specified group to which she belongs. So, a law of the first sort but not the second would apply to a criminal who commits one of the specified crimes against a Black victim not out of any particular hostility toward Blacks as a racial group, and not randomly, but because he believes the police less likely to investigate crimes committed against Blacks and thinks judges sentencing those convicted of such crimes less likely to impose harsh sentences.¹

Hate crimes laws are now common in the United States; they have even worked their way into federal law.² Notwithstanding significant public and academic support, these laws have been subject to strong, serious and persistent criticism.³ And much of it is well-deserved, for the arguments standardly made in favor of hate crimes laws are either unsound or weak. Demonstrating as much is the first aim of this paper.

Its second aim, however, is to offer a non-standard argument for hate crimes laws that is neither unsound nor weak. This argument I call the argument from oppression.⁴ It captures and expresses better than any of the standard arguments the moral basis for the sentiments or intuitions many people have in favor of hate crimes laws, and the objections to the standard arguments do not apply to it. But one objection (or perhaps it is a family of objections) must still be addressed. This objection posits hate crimes laws (along with, perhaps, affirmative action policies, the expansion of sexual harassment laws, slavery reparations initiatives and the like) as the balkanizing result of an identity or interest group politics of resentment inconsistent with progressive liberal democratic values. This paper’s third aim is to assess whether this objection is telling against hate crimes laws as justified by and revised suitably in light of the argument.
from oppression. At the risk of ruining an otherwise suspenseful read, a bit of foreshadowing would seem apropos: I argue that the objection is not telling when directed at hate crimes laws justified by and revised suitably in light of the argument from oppression.

II. The Standard Arguments.

There are three standard arguments for hate crimes laws. The first is the argument from greater harm. The second is the argument from more culpable mental states. The third is the argument from liberal democratic values. Each of these arguments is either unsound or weak.

A. The argument from greater harm.

Whether crimes satisfying the trigger conditions of hate crimes laws cause greater harm, physical or psychological, either to victims or non-victim third parties, than similar but non-hate crimes is, of course, an empirical question. This is often forgotten and a priori pronouncements regarding the greater harmfulness of hate crimes are not uncommon. Unhappily, as prima facie plausible as these pronouncements may be, they are not supported by the available empirical evidence.5

Crimes said to be hate crimes do often cause physical harm to their direct and immediate victims. But that is because they are very often assaults and homicides, not because they are committed by perpetrators who satisfy the relevant statutory trigger conditions for hate crimes penalty enhancements. As a class the crimes that satisfy these conditions are no more violent or physically harmful to their victims than the class that do not. And, in any event, existing laws already scale punishment to reflect the nature and degree of physical harm of assaults and homicides to victims.

Because there is little evidence to support the claim that crimes falling within the scope of hate crimes laws are more physically harmful to victims (or, for that matter, to non-victim third parties) than those otherwise similar crimes that do not, the argument is often made that these crimes, those that fall within the scope of hate crimes laws, cause greater psychological harm to their direct and immediate victims, or to non-victim third parties, than those that do not.
This greater psychological harm justifies, so the argument goes, the additional punishment imposed by hate crimes laws.

Crimes said to be hate crimes do cause psychological harm both to their direct and immediate victims and to non-victim third parties. But so do virtually all crimes. The question is whether candidate hate crimes cause greater psychological harm than otherwise similar non-hate crimes. With respect to direct and immediate victims, the available empirical evidence suggests that they do not. Indeed, it suggests that candidate hate crimes may cause their direct and immediate victims marginally less psychological harm than similar crimes that would not count as hate crimes under typical hate crimes laws.

This evidence is admittedly counter-intuitive. There is, consequently, a temptation to dismiss it in favor of arm-chair psychological speculation. But the evidence ought not be dismissed (although pending further studies it ought to be regarded as tentative). Most candidate hate crimes are committed against persons belonging to historically oppressed groups: Blacks, gays, Jews, ethnic minorities and the like. It is not implausible to suppose that many of these victims will possess preferences and other psychological mechanisms adapted to their condition, and that these may mitigate their subjective experience of psychological distress when made victim to a candidate hate crime. It is also not implausible to suppose that the nature of many candidate hate crimes will make it clear to the victim that she was targeted because of her race, or sexual orientation, or religion, etc., thus giving her a way of making a kind of sense of the crime committed against her she would not be able to make were she randomly victimized. These suppositions, admittedly unconfirmed, are sufficiently plausible as explanations of the admittedly counter-intuitive empirical evidence regarding the psychological harm caused by candidate hate crimes to their direct and immediate victims that that evidence ought not be simply dismissed.

As with direct and immediate victims, there is little evidence to support the claim that candidate hate crimes cause non-victim third parties greater psychological harm than similar crimes that fall outside the scope of hate crimes laws. The psychological harm of any crime to non-victim third parties is determined primarily by the proximity and visibility of the crime to such parties. This, of course, does not preclude additional psychological harms to non-victim third parties arising from the fact that the victim was selected because of or out of animosity
toward her membership in a racial, religious, ethnic or other specified group. Or, at least it does not preclude such additional psychological harms when the crime visibly manifests an animosity toward a group with which the non-victim third parties strongly self-identify. While there is no substantial body of empirical evidence to confirm the claim that candidate hate crimes cause such harms to non-victim third parties, the claim (that obvious gay-bashings “terrorize” the gay community generally, etc.) is prima facie plausible. (Of course, even if there were empirical evidence confirming the claimed psychological harms, it would still be necessary to argue that those harms are serious enough to justify the relevant penalty enhancements.) It should not surprise, then, that this argument has been made to do much of the justificatory work in the case for hate crimes laws. Given the absence of compelling empirical evidence establishing the claimed psychological harms, however, it is at present a weak argument. It is also just the sort of argument that invites the characterization of hate crimes laws as the fruit of a balkanizing, identity group, politics of resentment. But that is a matter the discussion of which must be temporarily postponed in the interest of completing a review of the standard arguments. The upshot here is that the best version of the argument from greater harm is the argument from psychological harms to non-victim third parties, and that that argument is, as things stand, not very compelling.

There is, however, an additional difficulty with the argument from psychological harms to non-victim third parties that bears mentioning here. And that is that when we think about the mechanism through which such psychological harms are said to arise, we can see that it is not the harms themselves that explain the moral intuition or sentiment in favor of enhanced penalties for hate crimes. It is rather the membership of the victim in an oppressed group, or, better, the special moral wrong done by targeting for criminal conduct persons already disproportionately vulnerable to harm, whether by virtue of belonging to an oppressed group or for some other reason.

If hate crimes cause greater psychological harm to non-victim third parties than non-hate crimes, it is because the cause psychological harms (e.g., fear or terror) to persons who identify strongly through group membership with the victim and thus feel themselves to be vicariously targeted by the crime. This sort of self-identification through group membership is not uncommon among members of oppressed groups. And thus it is not implausible to assert that
paradigm hate crimes cause greater psychological harms to non-victim third parties, and that these harms justify enhancing the penalties for such crimes. After all, paradigm hate crimes are committed against members of oppressed groups.

But the members of oppressed groups do not always self-identify through group membership. While self-identification through group membership is common within oppressed groups, it is not necessary or inevitable. It is usually the contingent result of strategic political resistance to oppression. Only through concrete political efforts have Blacks, women and gays, for example, produced such a group-based self-identification as a political resource. There was a time when few members of each group would have identified themselves primarily through their group membership. Yet, Blacks, women and gays were each oppressed groups (and thus disproportionately vulnerable to certain social harms) prior to and independent of members self-identifying through group membership. And it is this deeper more basic fact about paradigm hate crimes, that they are selectively committed against members of oppressed groups, that generates the moral intuitions or sentiments in favor of penalty enhancements, not the contingent if often concomitant fact of psychological harm to non-victim third parties.

This can be seen by considering two alternative sorts of cases. The first involves crimes committed selectively against the members of a group who strongly self-identify through group membership but who are not oppressed and thus disproportionately vulnerable to social harm. Suppose (what may in fact be true) that many or most prostitutes self-identify with other prostitutes and that those who serially attack prostitutes specifically cause special psychological harms (e.g., fear and terror) to non-victim third party prostitutes. Do such crimes merit enhanced penalties as hate crimes? Few will have the intuition or feel the sentiment that they do. Or, suppose a criminal who serially and selectively attacks only DeadHeads (the legendary followers of the Grateful Dead), a group the members of which strongly self-identify through group membership. Does he commit a hate crime? Again, few if any will think he does. In both cases it is likely that the crimes will cause special psychological harms to non-victim third parties. And these special harms may be noteworthy at the time of sentencing as an aggravating factor of some import. But they are not harms sufficient in moral weight to justify the non-discretionary legislative imposition of enhanced penalties through hate crimes laws. This is one important reason why hate crimes advocates do not propose statutory language covering such cases.
The second sort of case involves crimes committed selectively against members of a group disproportionately vulnerable to social harm but not oppressed who do not self-identify through group membership. Such crimes cannot cause the relevant special psychological harms to non-victim third parties. But like crimes committed selectively against members of oppressed groups they generate powerful intuitions or sentiments in favor of penalty enhancement. Consider, for example, crimes committed selectively against the cognitively impaired. Such crimes generate strong moral intuitions or sentiments in favor of penalty enhancement. But not because of psychological harms to non-victim third parties, but rather because of the disproportionate vulnerability to harm of the cognitively impaired and the additional moral wrong done by those who specifically target them for criminal conduct. In terms of the moral logic in favor of penalty enhancement, these cases present a closer analogy to paradigm hate crimes than do those selectively committed against the members of non-oppressed groups who nevertheless strongly self-identify through group-membership.

Crimes committed selectively against Jews in the United States present an interesting difficulty here. Jews self-identify through group membership for both religious reasons and reasons rooted in resistance to a history of oppression. It is quite plausible to assert that crimes committed selectively against Jews in the United States cause greater psychological harm to non-victim third parties than similar crimes not so selectively committed. But there is a question as to whether we should assimilate such crimes to the class of crimes selectively committed against, say, Blacks and other groups currently oppressed (the members of which may or may not self-identify strongly through group membership) or to the class of crimes selectively committed against, say, DeadHeads and other groups the members of which self-identify through, but are not oppressed by virtue of, group-membership. This question turns, I think, on the empirical question of whether Jews constitute an oppressed group today in the United States. If they do, then crimes committed selectively against Jews belong in the same category as those committed selectively against Blacks. If they do not, then they belong in the same category as crimes committed against the members of other non-oppressed groups that nevertheless strongly self-identify through group membership.

What these cases show, I think, is that even if, or where, paradigm hate crimes cause greater psychological harm to non-victim third parties, it is not the greater psychological harms
that justifies the penalty enhancements imposed by hate crimes laws. It is rather the special 
moral wrong done by those who selectively target members of oppressed groups. But this 
argument must wait for further development. There are other more standard arguments still 
waiting to be examined first.

B. The argument from more culpable mental states.

The criminal law in the United States already scales punishment according to whether an 
offender acts intentionally, knowingly, recklessly or negligently. Thus, if hate crimes laws are to 
be justified by appeal to the more culpable mental states of those who commit crimes satisfying 
their trigger conditions, it must be that those who commit such crimes act from a more culpable 
mental state than those who commit crimes otherwise identical but outside the scope of such 
laws.

This is straightforwardly implausible with respect to those hate crimes laws that apply to 
perpetrators who simply select their victims because of their race, or religion, or ethnicity, or 
sexual orientation, etc. Recall that hate crimes laws of this sort would apply to a criminal who 
selects only Protestant victims because he believes only Protestants will in fact enjoy the sort of 
salvation that might redeem their suffering here on earth. He selects his victims because of their 
religion. But does he act from a mental state more culpable than the criminal who randomly 
selects his victims just because he likes the experience of anonymous power, or the criminal 
who carefully selects his victims based on who is most likely to suffer the greatest from his 
crime? Obviously not.

To be sure, it may be that some criminals who commit crimes against victims selected 
because of their race, or religion, or ethnicity, etc., act from mental states more culpable than 
those who commit otherwise identical crimes against victims selected for other reasons. But this 
is not true of all criminals who commit crimes against victims selected for such reasons. It 
follows that where the mental state of a criminal who selects his victim because of her race, or 
religion, or ethnicity is in fact more culpable than it would be had he selected his victim for some 
other reason, the additional culpability must be a function of something beyond the fact that he 
selected his victim because of her race, or religion, or ethnicity, etc. What that something else is
I will turn to later. For now, it is enough to note that the argument from more culpable mental states fails as an argument for those hate crimes laws that enhance penalties whenever the criminal selects his victim because of her race, or religion, or ethnicity, or sexual orientation, etc.

The argument from more culpable mental states is perhaps more plausible as a justification for those hate crimes laws that apply to perpetrators who select their victims out of one or another specified group-based animosity. After all, to act from racist, anti-Semitic, homophobic, or xenophobic hatred or animosity is clearly to act from a very culpable mental state, indeed a mental state more culpable than many still significantly culpable alternatives. And this greater culpability can be explained by reference to the evil of targeting individuals solely out of a group-based animosity.

But is it obvious that the mental state of a criminal who selects his victims out of racist animosity is more culpable than that of the criminal who selects his victims out of a desire to see the weak suffer, or to impose the greatest harm possible on a non-victim third party, or to display his superiority to the ordinary run of humanity, or to salve an ego all to easily bruised. That is less clear. Indeed, once adequate attention is given to the range of vicious and evil reasons that lead persons to commit crimes against others, it is not obvious that racist, anti-Semitic, homophobic or xenophobic reasons are significantly more vicious or evil than other familiar reasons criminals have for selecting victims which the law largely ignores when it comes to scaling punishment for crimes. In fact, the whole idea of correctly scaling criminal punishments to reflect the culpability of the reasons for which the criminal selected his victim looks to be beyond the reach of ordinary human abilities once the full range of reasons that lead people to commit crimes against particular victims is fully in view. It is, perhaps, no accident that for the most part the criminal law has limited its inquiry into the culpability of mental states to whether the act in question was done intentionally, knowingly, recklessly or negligently.

Like the argument from psychological harms to non-victim third parties, the argument from the greater culpability of racist, anti-Semitic, homophobic, xenophobic or similar mental states has been pressed into active and regular service by proponents of hate crimes laws. But it too is a weak argument. The problem is not that an empirical premise remains unconfirmed, but rather that an axiological premise – that to select a victim out of racist animosity, say, is worse, ceteris paribus, than to select a victim for virtually any other reason – appears either dubious or
unjustifiable through argument available to ordinary human intellect. And this weakness renders the argument from more culpable mental states vulnerable, like the argument from psychological harms to non-victim third parties, to the charge that it arises out of and affirms an undesirable balkanizing, identity group, politics of resentment. What else, the objectors ask, could explain the vigor and confidence with which proponents of this argument assert the greater culpability of selecting a victim because he’s Black, or gay, or Jewish, or Latino as compared to selecting a victim for any number of other reasons? This charge aside, the upshot here is that the argument from more culpable mental states is not a very compelling argument for either of the two sorts of hate crimes laws in force in the United States today.

C. The argument from liberal democratic values.

Hate crimes laws are sometimes defended on the grounds that they are needed to give adequate public and symbolic expression to the fundamental liberal democratic values of nondiscrimination and tolerance. Crimes committed against particular victims because of or out of a group-based animosity for their race, or religion, or ethnicity or sexual orientation violate these values in a manner and to a degree calling for special public condemnation. Or so the argument goes.

There are many difficulties with this argument. The first is that it is weak as an argument for hate crimes laws that apply just in case the criminal selects his victim because of but not necessarily out of animosity toward her race, religion, ethnicity, etc. The criminal who decides just to assault Catholics, not because he has any group-based animosity toward them, but rather because he wants to systematize his victims in some fashion and attacking only Catholics enables him to do so, does not violate the liberal democratic values of nondiscrimination and tolerance in any significant way, or at least he violates those values no more so than does any other criminal guilty of assault. So, the argument is best taken as an argument for hate crimes laws that apply just in case the criminal selects his victim out of one or another specified group-based animosity.

But even so taken the argument is not strong. Even if a criminal who so selects his victim violates the liberal democratic values of nondiscrimination and tolerance, and even if that
violation calls for a special and visible public condemnation, it does not follow that that condemnation must take the form of enhanced criminal penalties. A special concern with and condemnation of such conduct may be publicly and visibly expressed in a variety of ways within and through public political culture. Given the seriousness of enhancing criminal penalties (a limitation of liberty after all), the argument from liberal democratic values is weak as an argument for hate crimes laws unless it can be shown that enhancing penalties is the only or the best way publicly and visibly to express a special concern with and condemnation of such conduct.

But suppose this can be shown. Is the argument from liberal democratic values then a strong argument for hate crimes laws, or at least those laws triggered when a victim is selected out of a specified group-based animosity? Well, yes and no. It all depends on what we mean when we speak of the liberal democratic values of nondiscrimination and tolerance.9

Suppose we mean that persons ought not impose avoidable harms on others for irrational, irrelevant or indefensible reasons. Employers ought not deny jobs to otherwise qualified persons solely because of their race. Children ought not exclude from their circle of friends perfectly kind and fun but very heavy or bespectacled peers. And the like. If this is what we mean when we speak of the values of nondiscrimination and tolerance, then the argument from liberal democratic values justifies hate crimes laws applicable not only to criminals who select their victims because they are Black or gay or Jewish, but also to criminals who select their victims because they are fat, or skinny, or ugly, or exceedingly beautiful, or socially awkward, or socially adept, and so on, including all irrational, irrelevant or indefensible reasons for which a criminal might select his victim. But if this is what we mean then it is hard to see how to limit hate crimes laws to any manageable list of specified group-based animosities the selecting of a victim from which will trigger the laws’ application. And if the list of group-based animosities triggering the application of hate crimes laws is to include hatred of the fat, the skinny, the ugly, the tattooed, the homeless, the socially awkward, the excessively wealthy, etc., then what is the point of having hate crimes laws? Why not simply enhance the penalties for all crimes of the targeted type, e.g., all assaults, all vandalisms?

Suppose what we mean by the values of nondiscrimination and tolerance is instead that persons ought not impose avoidable harms on others because of some attribute or trait that either
cannot be changed or can be changed only at an unreasonable cost. Employers, again, ought not deny jobs to otherwise qualified persons solely because of their race, or their religion, or ethnicity. And children, again, ought not exclude from their circle of friends perfectly kind and fun but very heavy or bespectacled peers. But, again, if this is what we mean by the values of nondiscrimination and tolerance, the list of specified group-based animosities the selecting of a victim from which will trigger the enhancing of criminal penalties will be long indeed. Those who target the tall, or the exceedingly intelligent, or the stutterers ought to be subject, on this understanding of nondiscrimination and tolerance values, to the penalty enhancements of hate crimes laws.

If hate crimes laws of the sort proponents advocate are to be justified by the argument from liberal democratic values, then the values of nondiscrimination and tolerance must be tied specially to race, religion, ethnicity, sexual orientation and the like. After all, the sentiments and intuitions felt by the supporters of hate crimes laws are aroused by lynchings and cross-burnings, gay-bashings, vandalisms of Jewish businesses or cemeteries, arsons in Latino neighborhoods and the like. These are the paradigmatic hate crimes that call for enhanced penalties. Not attacks against the fat, the skinny, the tattooed, the shabbily dressed, the ugly, or the glamorous, even when they are specifically targeted out of a generalized animosity for such persons.

So, suppose what we mean when we speak of the values of nondiscrimination and tolerance is just that persons ought not impose avoidable harms on others because of their race, religion, sexual orientation, ethnicity and the like. If this is what we mean, then we might be able to argue from these liberal democratic values to hate crimes laws of the typical sort. The question is whether this is what we do, or should, mean by these values.

The advantage of this account of nondiscrimination and tolerance values, or at least of these values as they are invoked as part of a justification for hate crimes laws, is that it captures the idea that there is something special about race, ethnicity, religion, sexual orientation and the like and thus something special about imposing avoidable harms on others because of their race, or ethnicity, etc. If I refuse to date tall people or to purchase goods from persons who bear tattoos, I irrationally and indefensibly impose an avoidable harm on others, perhaps even because of a characteristic or trait that cannot be easily altered. But it would be a stretch at best to say that I violate the fundamental liberal democratic values of nondiscrimination and
tolerance, at least insofar as we are talking about those values as violated by paradigmatic hate crimes. To be sure, my conduct may be rightly criticized, even perhaps morally criticized through a loose use of the language of nondiscrimination and tolerance. But the basis of that criticism cannot really be that I violate the values of nondiscrimination and tolerance insofar as we take those values to be essential to a just and stable liberal democratic order. But if we substitute Blacks for tall people or Jews for persons who bear tattoos, then the picture changes, at least for those of us living in the United States, with its history.

It is tempting here to say that what the core values of nondiscrimination and tolerance demand is that we ignore race, religion, ethnicity or sexual orientation in our interactions with others. That we be color-blind, etc., when it comes to social life, even in our criminal conduct, should we endeavor such conduct. But this is a view that many if not most proponents of hate crimes laws will have reason to reject. It implies that there is no significant moral difference between a White criminal who selects his victims because they are Black and a Black criminal who selects his victims because they are White, or between a Protestant criminal who selects his victims because they are Jewish and a Jewish criminal who selects his victims because they are Protestant. But many if not most proponents of hate crimes laws begin with the intuition that there is a moral difference, even if there are also moral similarities, between these cases. In each example, the prior but not the latter case reflects, expresses and arguably serves to reconstitute existing historical patterns of structural, group-based oppression. To treat the two cases as if they are not morally distinct in any significant way is to fail to attend to the realities of long-standing, structural, group-based oppression at which hate crimes laws are aimed as a partial remedial social response. It is to view the issue of hate crimes from the point of view of the non-oppressed.

It is racially motivated crimes against Blacks, not racially motivated crimes generally, religiously motivated crimes against non-Christians, not religiously motivated crimes generally, that generate the intuitions and sentiments many feel in favor of hate crimes laws. It is crimes against members of already oppressed groups precisely because they are members of already oppressed groups that call for enhanced penalties. Given the realities and history of structural, group-based oppression, a racially motivated murder committed by a Black man against a White man is, for the purposes of punishment, not very different from any other murder, or at least not
very different from a murder motivated by a hatred of brunettes committed by a blonde. But a racially motivated murder committed by a White man against a Black man is different from other murders. It connects with those realities and presses that history forward in ways other murders cannot.¹⁰

At their core and as affirmed and protected by law, the values of nondiscrimination and tolerance must be understood in terms of race, religion, ethnicity, sexual orientation and the like. There is indeed something special, morally speaking, about these specific kinds of social groupings: they point us toward some of the most pressing historical cases of structural group-based oppression that call for a remedial social response. What we mean, then, when we speak of the fundamental values of nondiscrimination and tolerance is not that race, religion, ethnicity or sexual orientation ought always to be ignored in social life, but rather that social life ought to be reorganized so as to eliminate the real, specific, long-lived, structural group-based oppression of Blacks and other non-Whites, Jews and other non-Christians, gays, lesbians and other non-heterosexuals, and non-European ethnic groups. These are the great, structural and evil instances of discrimination and intolerance we want to end, not the more general fact that we notice and sometimes are moved in our social interactions by the race, religion, ethnicity or sexual orientation (or height, IQ, or handsomeness, for that matter) of others. The intuition or sentiment that racially motivated assaults on Blacks, for example, deserve more punishment than other assaults in the United States arises out of a strong desire to end a real, particular case of structural group-based oppression and an awareness of how such crimes affirms and threatens to reconstitute that very oppression.

The argument from liberal democratic values, then, is strongest if the values of nondiscrimination and tolerance are understood not just to be specially connected and limited to race, religion, ethnicity, sexual orientation and the like, but to be so connected and limited in a particular way – proscribing the imposition of avoidable harms on Blacks because they are Black, or Jews because they are Jews, etc., where the imposition of those harms reflects, expresses or serves to reconstitute the real, historical oppression of Blacks, Jews, etc.¹¹ Of course, this version of the argument, like the strongest versions of the arguments from greater harm and from more culpable mental states, invites the objection that those who advocate hate crimes laws are engaging in a balkanizing, identity-group, politics of resentment.
There is, consequently, a temptation to retreat to the position that while it is not true that a murder is always just a murder, it is true that a racially motivated murder is always just a racially motivated murder. All racially motivated murders violate the liberal democratic values of nondiscrimination and tolerance equally, and thus if any call for enhanced penalties, all call equally for the same enhanced penalties. This version of the argument from liberal democratic values is weak, however. It presupposes a basic social structure within which Blacks and Whites, gays and straights, non-Christians and Christians are situated or positioned symmetrically as groups. But this presupposition is false. Indeed, it is from an awareness that this presupposition is false that the moral intuitions and sentiments that most strongly favor hate crimes laws arise. Even if this presupposition were true, however, this version of the argument from liberal democratic values would still be weak insofar as it offers no account of why selecting a victim on the basis of her race, religion, ethnicity or sexual orientation is so bad as to merit enhanced penalties (rather than some other sort of special public condemnation) as compared to selecting a victim on the basis of her height, weight, IQ or occupation. Only one such account is plausible, of course, and that is that some of the most dramatic and damaging cases of oppression in the United States have involved race (Blacks and other non-Whites), religion (Jews and other non-Christians), ethnicity (non-European) and sexual orientation (gays, lesbians and other non-heterosexuals). But to admit this is to admit that not all racially motivated crimes, for example, are morally equal, for not all racially motivated crimes reflect, express or potentially reconstitute such oppression. Oppression is always asymmetric. So, racially motivated attacks by Whites on Blacks connect with historic and ongoing oppression in ways that racially motivated attacks by Blacks on Whites never could.

The upshot then is two-fold. The strongest version of the argument from liberal democratic values invites the same balkanization objection as the strongest versions of the other standard arguments for hate crimes laws. And the strongest version of the argument from liberal democratic values rides piggy back on, indeed is perhaps best understood as an imperfect articulation of, a deeper argument from oppression. It is that argument to which we turn now.

III. The Argument from Oppression.
The argument from oppression goes like this:

P1: Structural group-based oppression is a fact of history and contemporary life in the United States; 
P2: Those who belong to oppressed groups are disproportionately and systemically more vulnerable to a wide range of structurally and socially produced but avoidable harms; 
P3: Those who by virtue of their social positioning vis a vis the vulnerable members of an oppressed group enjoy a special capacity to protect them from the harms to which they are vulnerable, or to help to reorder social life so as to minimize (and eventually eliminate) their structurally produced, group-based vulnerability, have a special moral obligation to do so; 
P4: Those who intentionally select a member of an oppressed group, because they are a member of that group (but not necessarily out of a group-based animus), as their victim for a crime the harm of which reflects, expresses or contributes distinctively to the social reconstitution of the disproportionate vulnerabilities from which members of that group suffer, and who do so notwithstanding their being positioned socially such that they enjoy a special capacity to protect or aid the members of that group, fail to live up to a special moral obligation they owe to their victim; 
P5: It is the violation of this special moral obligation that makes paradigmatic hate crimes morally worse than otherwise similar crimes; 
P6: In general levels of criminal punishment should be scaled to reflect degrees of moral wrongfulness; 
C: The additional moral wrongfulness of paradigmatic hate crimes justifies the extra punishment imposed by hate crimes laws (of a suitably revised sort).

This argument differs from the standard arguments in important ways. While it appeals to the place of hate crimes in a social order that systemically works a certain kind of harm on members of oppressed groups, it is not an argument from the greater harm caused by hate crimes
to direct and immediate victims or non-victim third parties. And while it appeals to the greater moral culpability of hate crimes offenders, it is not an argument from the greater culpability of motives grounded in one or another group-based animosity. And finally, while it rests ultimately on and aims at the vindication of liberal democratic values, it casts itself fundamentally as an argument from structural group-based oppression, not from the values of nondiscrimination and tolerance as values applicable to interactions between individuals assumed to by symmetrically positioned as group members by and within their basic social structure.

Central to the argument from oppression are the ideas of oppressed groups, disproportionate vulnerabilities, and special moral obligations to protect or aid. Explicating some of these ideas may help to avoid misunderstanding. And so it is to that task I turn now.

Oppressed groups are first social groups. Social groups are more than mere aggregates. Insurance companies may aggregate persons with one or another genetic trait for actuarial purposes. But taken together persons so aggregated do not constitute a social group. To constitute a social group members must stand in determinate relations with one another constituted through their interactions with one another and with those at the margins or outside the group. There are many different kinds of social groups, including associations, cultural or identity groups, and structural groups. Oppressed groups are necessarily structural groups, although as such they sometimes overlap with cultural or identity groups, or with associations.

Associations are social groups within which the determinate relations group members stand in with respect to themselves and to those at the margins or outside the group are a function of the group’s shared aims, purposes or ends (e.g., families, the Catholic Church). Cultural or identity groups are social groups within which the relevant relations are a function of how group members construct their identity or self-understanding at its most basic levels (e.g., Chicanos, Southerners). Cultural or identity groups need not share any aim, purpose or end, although sometimes they do. But they must share something by way of tradition, history, language, social practice or cultural forms, and the like sufficient for members to constitute themselves as an “us” or “we” to which they belong. Structural groups are social groups within which the determinate relations group members stand in with respect to themselves and those at the margins or outside the group are a function of how they are positioned by the basic social structure of their society when it comes to access to fundamental goods and resources.
Structural groups are produced through the institutional mechanisms through which authority, power, labor and production, desire and sexuality, prestige and the like are socially constituted and organized. Oppressed groups are structural groups the members of which are systematically disadvantaged in the distribution of or their access to the basic goods and resources needed to develop and exercise capacities for self-expression, self-development, and self-determination. The members of oppressed groups (e.g., African-Americans in the United States) are thus disproportionately vulnerable to a wide and serious range of socially produced and avoidable harms (among the most serious, poverty, illiteracy, economic marginalization, violence, incarceration, avoidable illness, early mortality, and the like). Describing accurately these disproportionate vulnerabilities and marking out the many and interrelated ways in which they arise out of a basic social structure that systematically disadvantages some but not others is a key task of oppression theory.

The members of structural groups need share no common aim, purpose or end. And they need neither find nor construct their identity or self-understanding at basic levels through appeal to their membership in the group. Indeed, they may (and unhappily sometimes do) belong to the group without even knowing it. The existence of and membership within structural groups is a function of how persons are objectively positioned socially relative to one another within and through their basic social structure. The differentiation of structural groups is distinct, then, from the differentiation of associationist groups and cultural or identity groups, for in the latter cases group members must affirm their membership to be group members. In the United States, Blacks, gays, Jews and various ethnic groups, as well as women, have been and remain to various degrees oppressed structural groups. This social fact does not depend at all on whether Blacks, gays, Jews, etc., think of themselves as a group. Of course, it also does not preclude them constituting associationist groups or cultural or identity groups more or less identical in terms of their membership.

It bears emphasizing that the existence of and membership within structural groups generally, or oppressed groups more particularly, is a function of reiterated patterns of social relations and interactions over time. Three things follow from this. First, membership within structural groups is something that may come in degrees, depending on the degree to which one is, over time and in general, implicated structurally in a web of systematically advantageous or
disadvantageous social relations. So, particular persons may be more or less Black with respect to their membership in the structural group called Blacks. Second, membership within, indeed the existence of, a structural group may change over time. So, membership within and even the existence of Jews as a structural group in the United States has and continues to undergo significant change. Third membership in a structural group is logically independent of membership in associationist groups and cultural or identity groups. So, a particular individual may be marginally (perhaps not even) Black with respect to Blacks as a structural group but be centrally Black with respect to Blacks as a cultural or identity group, or vice versa.

Individual members of oppressed groups do not all suffer the same particular, individual socially produced and avoidable harms by virtue of their social positioning. But they are all disproportionately vulnerable to them. And for many, this vulnerability will itself constitute an actualized harm, a sort of psychological weight rooted in a deep sense of anxiety, insecurity, or powerlessness.

To be vulnerable is to be in a distinctively or especially precarious position, to be exposed or at risk to an unusual degree to some injury or harm. To be vulnerable is not the same as simply belonging to a class the members of which merely satisfy some precondition for a particular harm. Only women get ovarian cancer. So, only women are at risk of ovarian cancer. It doesn’t follow that to be a woman is to be vulnerable to ovarian cancer. Similarly, only the employed can lose their jobs during an economic recession. It doesn’t follow that to be employed is to be vulnerable to unemployment during a recession.

Vulnerabilities can arise from many sources. Some women are vulnerable to ovarian cancer by virtue of their genetic endowment. So, nature is one source of vulnerabilities. The disproportionate vulnerabilities that mark oppressed groups as oppressed groups arise from the “normal” functioning of the basic social structure of the society in which they exist. So, given the structure of labor markets and of authority within most employment contexts today, Blacks are more vulnerable to unemployment during an economic slowdown than are Whites. They are more likely to be laid off, and more likely to suffer adversely from being laid off. And given the historical exclusion of Blacks from political processes (something which continues informally today), Blacks are more vulnerable to the legislative sacrifice of their interests for the “common good.” They are more likely to have their interests ignored during ordinary legislative processes,
and then to be accused of and marginalized for divisiveness for asserting their interests once ordinary legislative processes are complete. The multiplication of these disproportionate vulnerabilities, ranging across wide ranges of social life, produce what Marilyn Frye has called the "bird cage" effect: Blacks and other oppressed groups find themselves caged by an intersecting network of constraints arising out of the "normal" operation of the basic social structure that limit or undermine their self-development, self-expression and self-determination.19

Disproportionate vulnerabilities are commonly understood to impose special obligations on those especially well-placed to prevent harm to, to protect, or to aid the vulnerable, and these special obligations are often legally enforced. So, adults have various special obligations to children. Providers of various services have various special obligations to the elderly, as do providers of medical services to the terminally ill. Those not cognitively impaired have special obligations to those who are cognitively impaired. These obligations arise as moral obligations in each case out of the asymmetry of the respective parties’ social relationship or relative positionings. They are given legal backing because (although not exclusively because - consequentialist considerations will have a role to play here) of the moral gravity of their violation. Similarly, the special obligations violated in paradigmatic hate crimes arise as moral obligations out of the asymmetry of the respective parties’ social relationship or positioning (their group-based relationship or positioning within or through the “normal” functioning of the basic social structure) and are given legal backing because (although, again, not exclusively because - consequentialist considerations will again have a role to play here) of the moral gravity of their violation. The moral intuition or sentiment at work here in the case of paradigmatic hate crimes belongs to the same family as that at work when we judge that stealing from a blind man is morally worse, and thus deserving of or at least eligible for greater punishment, than stealing from a sighted man.

A full defense of the argument from oppression would require much more than the foregoing. However, I hope the foregoing sufficient to give a clear enough sense of how the argument goes and how it differs from and improves on the standard arguments to support a concluding discussion of the claim that hate crimes laws arise out of and express a balkanizing, identity-group politics of resentment.
IV. Hate Crimes Laws: Progressive Politics or Balkanization

Objections to hate crimes laws and the politics from which they arise cannot be assessed apart from assumptions about the justification, aim and shape of hate crimes laws. Suppose, then, that the argument from oppression is taken as the sound justification for (suitably revised) hate crimes laws. What then are we to make of the objection that hate crimes laws arise out of and affirm a balkanizing, identity-group politics of resentment?

This objection has been raised in various forms by numerous critics. In their book critical of existing hate crimes laws and the politics from which they seem to have emerged, Jacobs and Potter argue that rewriting particular criminal laws to take into account the racial, religious, ethnic, etc., identities of offenders and victims will undermine the criminal law’s potential for bolstering social solidarity by redefining crime as a problem of intergroup conflict and encouraging citizens to think of themselves first not as citizens but as members of identity-groups, ideally victimized and besieged, and ready to exact revenge on their oppressors. This is, of course, not one but many objections. Those who make the sort of objection just sketched typically make one or more of the three following claims:

1. Hate crimes laws arise out of and encourage a politics of resentment that is psychologically harmful to those who engage in it.
2. Hate crimes laws arise out of and encourage a balkanizing, interest-group politics hostile to the common good and at odds with republican and liberal democratic (small “r”; small “d”) values.
3. Hate crimes laws presuppose a false degree of internal unity within the relevant social groups (Blacks, gays, Jews, etc.) and thus encourage these groups to police their own membership in oppressive ways.

As directed at existing hate crimes laws and the standard justifications given for them (the arguments from greater harm, more culpable mental states, and liberal democratic values), these claims are, at least prima facie, not without some bite. But the case against existing hate crimes laws and the standard justifications given for them does not depend on the strength of these objections, for the standard justifications are themselves either unsound or weak, as demonstrated above. So, rather than assess the force of these objections against existing hate
crimes laws and their standard justifications, I want to assess their force against hate crimes laws justified by (and suitably revised in light of) the argument from oppression.

A. A politics of resentment?

Several critics from the left have argued that hate crimes initiatives (like perhaps slavery reparations or affirmative action initiatives) bear an unhappy relationship to the politics of resentment. The politics of resentment is the politics of those who suffer from and seek to anesthetize the deep hurt of finding themselves in a social world publicly regarded as legitimate or just but within which they are systematically and significantly unable to satisfy their desires. It arises first out of a righteousness or righteous indignation, produced affectively, that overwhelms and thus blocks the subjective experience of weakness, hurt and suffering. That righteous indignation is then given direction through the identification of some agent or agents as the cause of that weakness, hurt or suffering. The weakness, hurt or suffering is then displaced by the inflicting on the causally responsible agent or agents a harm. The aim of this displacement is not to alter the balance of power in the social world, however. It is merely to ease the pain of one’s own condition. Thus, for it to work, the harm inflicted on the external source of one’s suffering must carry itself some public mark of legitimacy. The paradigm harm inflicted, then, is punishment, for punishment is what revenge is called by those who hypocritically seek to cloak their acts in the garb of legitimacy or justice. Of course, the imposition of such a harm (revenge/punishment) does not and was not intended to eliminate the source of the hurt and suffering; it does not alter the balance of power in the social world. Those who find themselves systematically and significantly unable to satisfy their desires will continue to so find themselves; and by passing their act of revenge off as legitimate punishment, they will have reaffirmed the very norms that legitimate their suffering. But they will have dulled their pain.

Hate crimes laws, reparations for slavery and other group-based initiatives are often said to arise out of and reflect such a politics of resentment. They are the fruits of a politics of revenge cloaking itself in the language of legitimacy and justice. But they are poisoned fruits. They do nothing to change the balance of power in the social world, and they invest those who
suffer the most under existing social conditions in their own suffering.

This objection misses the mark, however. Hate crimes laws, reparations initiatives, affirmative action proposals and the like arise not out of a politics of resentment rooted in the experience of suffering, but a politics of anger rooted in the knowledge of and struggle against injustice. The aim is not to inflict a harm on some agent or agents held causally responsible for the suffering of those who suffer, but rather to reorder the basic social structure to eliminate the structural and institutional bases of oppression. Of course, this is, according to the critics, just what proponents of hate crimes laws may be expected to say in their defense.

To be sure, the politics of victimhood and resentment has sometimes accompanied hate crimes and similar initiatives. But for the most part, those actually pushing politically for these initiatives are neither deeply invested in their own suffering, nor acting from a self-defeating resentment. They are angry, mobilized, and increasingly politically empowered. Their aim: the chance to participate and advance their own interests in a basic social structure free of group-based oppression. Ultimately, whether or not theirs is a disabling and disfiguring politics of resentment cannot be determined \textit{a priori}. Time and social experience will settle the matter. To date, however, there is little empirical evidence to support this objection.

B. A balkanizing, interest-group politics?

Critics from both the right and left have complained that hate crimes laws and similar initiatives arise out of and give priority not to a politics of the common good but rather a divisive interest-group politics. In the inevitable clash over which groups are to enjoy which gains, the argument goes, the res publica is lost.

But if proponents of hate crimes laws and similar initiatives are correct about the realities of oppression, the res publica was never in hand in the first place. What divides proponents from these critics of hate crimes laws, then, is not a commitment to a republican and liberal democratic politics of the common good and treating like cases alike; both share that commitment. What divides them is their evaluation of existing social conditions. Proponents of hate crimes laws and similar initiatives argue that group-based oppression is a significant feature of these conditions, and that there is, accordingly, no neutral, universal point of view from which
all citizens may engage in democratic deliberation over the common good or what in fact constitutes a like case. To insist that some murders or assaults deserve greater punishment than others as a result of the social positioning of the victims and offenders is not to subordinate the common good or the demands of formal justice to the particular interests of one’s own group. It is rather to insist that social position and point of view matters and thus ought not be set aside in public deliberations over what the common good requires or what counts as a like case for the purposes of formal justice. To deny this is either to deny the reality of oppression or to falsely and covertly universalize the social position and particular point of view of the nonoppressed.

Critics sometimes argue that social position and point of view did not, and rightly did not, matter for other marginalized groups at earlier points in U.S. history. In relatively short order, numerous immigrant groups, for example, assimilated into mainstream politics, rarely challenging the unstated point of view from which public democratic deliberation over the common good and the demands of justice proceeded. Why should matters be any different for Blacks, gays, Jews and the like?

The answer is that marginalized cultural groups may be assimilated into mainstream democratic deliberation without any fundamental challenge to the unstated point of view from which that deliberation proceeds because, or so long as, they are not also oppressed structural groups. Oppressed structural groups cannot participate, or cannot participate effectively, in democratic deliberation over what the common good or justice requires without calling that point of view into question, without refusing to adopt a point of view from which their oppression is invisible or obscured. And so their politics appears to be, indeed is, divisive at some level. But there is no other path to justice and the common good consistent with democratic commitments. The choice between an unacceptably balkanizing interest-group politics and a more or less harmonious republican and liberal democratic politics of the common good is one confronted only in a society free of structural group-based oppression. Only there will a commitment to basic institutional arrangements and norms function as a common point if departure for all social groups in democratic deliberation. In a society not free of oppression, the choice is a false dilemma.

C: Do we really have or want social groups such as Blacks, gays, Jews, etc.?
It is sometimes said that the sort of politics behind hate crimes laws and similar initiatives presupposes and creates incentives to coerce a degree of internal group unity neither possible nor desirable. So, critics will object to hate crimes laws on the grounds that Blacks (or gays, or Jews, etc.) are too varied a group for such laws to be justified and that such laws create objectionable incentives for Blacks (or gays, or Jews, etc.) to police their own membership for internal conformity to certain criteria of group membership.

This objection arises out of two mistakes. The first is to forget that within the context of hate crimes laws and their justification references to Blacks, gays, Jews and other groups are references to structural groups, not cultural or identity groups or associationist groups. Thus, it is entirely beside the point that group members neither share important ends nor self-identify through group membership. The second mistake is to suppose that structural groups are properly defined through some set of essential membership criteria, a set of necessary and sufficient conditions the proper application of which determines whether any particular individual is in or out of the group. But structural groups cannot be so defined. They are constituted and must be understood in terms of how they are related to other structural groups within and through the basic social structure that determines the ability of individuals, and thus groups of individuals, to access basic social resources. Individuals may and often will differ in the degrees to which they belong to various structural groups, depending on how they are positioned within the network of institutional social arrangements that facilitate or frustrate access to basic social resources. This does not preclude speaking intelligently of groups, however, so long as there are (as there in fact are) concentrated nodal points of numerous individuals situated similarly to a very high degree within and by basic institutional norms and arrangements.

To the extent that the argument from oppression presupposes Blacks, gays, Jews and the like as structural social groups, it neither presupposes nor encourages a false or high degree of internal group unity. Indeed, at least with respect to the politics behind hate crimes laws, the term identity politics is misleading. It is simply not in the nature of structural groups to make claims as such about their identity or the identity of their members. It is in their nature, instead, to make claims about the justice of how they, and thus their members, are positioned within and through the basic social structure.

To be fair, it must be noted that political initiatives aimed at improving the social
positioning of oppressed structural groups are unlikely to succeed in a democracy without substantial support and activism from group members, and that as a strategic and rhetorical matter, cultivating a group-based identity (above and beyond ordinary “consciousness raising”) among group members may prove desirable. But this is a contingent and avoidable feature of such political initiatives. The less the resistance within the democratic polity, the less there is to be gained by such rhetoric and political strategy.

V. Conclusion

Critics of hate crimes laws are correct about two things. First, the standard arguments given as justification for these laws are either unsound or weak. Second, these laws and the standard justifications given for them at least appear to arise out of and affirm a balkanizing, identity/interest-group politics of resentment. But the critics of hate crimes laws are incorrect in concluding that there is no compelling moral case for such laws. The argument from oppression is sufficiently compelling to constitute a prima facie justification for such laws. And hate crimes laws justified by appeal to and suitably revised in light of it cannot be saddled with the charge that they arise out of and affirm a balkanizing, identity/interest-group politics of resentment.

Nevertheless, hate crimes laws and the politics from which they arise are undeniably divisive. But that is to be expected and by itself is unobjectionable; democratic initiatives aimed at responding to and remedying structural group-based oppression are almost always divisive. The question with all such initiatives is whether they are so divisive that their cost in terms of social unity outweighs whatever moral and political gains they promise. That is a complex question I have neither asked nor answered in this paper.

But two points bear emphasizing, as a final thought, here. First, among the moral and political gains promised by hate crimes laws and the politics which surround them is a broader, deeper and more accurate understanding of social and political life. And that is a gain perhaps worth pursuing, even at the (one must hope temporary) cost of an increase in social tension and division between groups. Second, no proponent of hate crimes laws imagines them as a silver bullet capable of working significant social change by themselves. They are just one part of a broader set of social, political and legal initiatives aimed at responding to and remedying
structural group-based oppression. Ultimately, their merits and demerits ought to be assessed within the context of that larger set of initiatives of which they are a part.

Endnotes


2. As of 2002, most every state has adopted some sort of hate or bias crimes law. In 1993, the United States Supreme Court upheld Wisconsin’s hate crimes law against constitutional challenge. See, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). In 1994, Congress passed the Hate Crimes Sentencing Enhancement Act covering crimes committed on federal lands. In 1999, the Hate Crimes Prevention Act was introduced into Congress, but was not enacted. It would have extended federal 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 firearms or explosives. And it would have extended the classes of persons covered to include sexual orientation, gender and disability. A virtually identical bill was introduced in 2002 as the Local Law Enforcement Enhancement Act.


4. For an initial articulation of this argument, see my “Hate Crimes, Oppression and Legal Theory” *Public Affairs Quarterly*, v. 16, forthcoming 2002.


7. The more culpable mental states argument is sometimes couched as an argument from more vicious character traits. See, for example, Andrew Taslitz, “Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong.” 40 *Boston College Law Rev.* 739, 1999.


10. For an alternative account (appealing to equal protection and distributive justice values rather than nondiscrimination and tolerance values) of the moral difference between a racially targeted crime against a Black victim from a racially targeted crime against a White victim, see Harel and Parchemovsky, “On Hate and Equality.”

11. My argument does not preclude appeal to a weaker and broader notion of nondiscrimination and tolerance which I might violate if I refuse to date Baptists or to frequent bars tended by tall bartenders. I take it as more or less obvious, however, that whatever the moral force of this weaker and broader account of nondiscrimination and tolerance, it is insufficient to merit legal enforcement or affirmation through hate crimes laws.


15. The argument from oppression, then, justifies treating male rapes of females as hate crimes.

16. My account of oppressed groups draws heavily on the work of Iris Young. See her *Justice and the Politics of Difference*, and her more recent *Inclusion and Democracy*, Oxford University Press, 2000, esp. Ch. 3.

17. And this will in turn depend in part on one’s ability and efforts at resisting being implicated in such a structural web of disadvantage.

