PART II

CASE STUDIES OF ANTI-ARAB VIOLENCE
Congress passed the Hate Crime Statistics Act of 1990 in order to provide the federal government and American public with data on the nature and extent of bias-motivated violence in the United States. The data facilitate informed policymaking and effective allocation of resources to communities in which hate crime is most severe. Published in the FBI’s annual report, Hate Crime Statistics, the data also provide critical information for communities and advocates alike.

While the data in Hate Crime Statistics and comparable state-level hate crime reports are disaggregated according to location, offense, bias-motivation, and other important factors, the data do not capture the distinct personal and collective harms that hate crime inflicts on victims and communities. That such data are depersonalized is neither completely beneficial nor completely disadvantageous. On the one hand, passing legislation based solely on anecdotes is not a sound approach to public policy. On the other hand, and especially in the context of hate crime, individual accounts and personal stories can serve to illustrate a particular issue and what can be done to solve it. These narratives also have the potential to communicate not only the specific threats facing certain communities, but the systemic failure to address, or even recognize, those threats as well.

For the Arab American community in particular, hate crimes have historically intensified in the wake of developments in the Middle East or incidents of mass violence. This trend first emerged in the late 1960s and early 1970s, and was most severe in the aftermath of 9/11.

As noted in Chapter Three, targeted violence against Arab Americans influenced Congress to pass legislation requiring the Justice Department to collect data on bias-motivated crimes. Similarly, the post-9/11 backlash against Muslim, Arab, and South Asian communities in the United States prompted a comprehensive response from the federal government—congressional hearings, public statements, and various forms of community engagement—to address the specific threats facing targeted or vulnerable populations. Despite these efforts, we know some communities, including Arab Americans, were overlooked.

The FBI UCR Program's hate crime data collections were developed following the passage of the Hate Crime Statistics Act of 1990. While the initial hate crime data collections were designed to collect data on incidents that manifest evidence of anti-Arab prejudice, the federal government did not begin publishing statistics on anti-Arab hate crime until 2015. During this period, however, law enforcement agencies in 38 states and the District of Columbia submitted anti-Arab hate crime data through the UCR program. Some of the data were published in state-level hate crime reports. The remainder were discovered in Excel versions of FBI Hate Crime Master Files, which contain records of raw data submitted from reporting agencies. During this period, no information on anti-Arab hate crime was recorded in the FBI’s annual report, Hate Crime Statistics, which is the principal resource for communities, advocates, and policymakers on hate crime in the United States.

For nearly two decades, hate crimes against Arab Americans were excluded from official statistics. If the purpose of hate crime reporting and data collection is to inform the American public and federal government about the nature and extent of violence targeting specific communities, then the Arab American community, and the particular threats facing the community during this time, were overlooked. Today, in a period of burgeoning xenophobia and increased anti-Arab and anti-Muslim sentiment, neither the government nor the American public can afford to overlook the nature and extent of violence targeting Arab Americans or American Muslims.

The following chapter features a selection of narrative vignettes, four in total, that demonstrate the nature of hate crime targeting Arab Americans, the harms such crimes inflict on individual victims and communities, and the limitations of existing laws, policies, and their irregular enforcement to address those harms. In this respect, the four vignettes serve to communicate

---

1 In this context, anti-Arab hate crime data refers to UCR submissions or similar crime reports that explicitly denote anti-Arab bias in the commission of an offense. An additional state, Hawaii, published anti-Arab hate crime data but does not participate in the national UCR program.
the need for comprehensive hate crime reporting and data collection reform, particularly at the state and local level. The passage of criminal statutes offering sufficient, inclusive protections for hate crime victims, along with legislation requiring hate crime training for law enforcement personnel, will support hate crime prevention as well.

Each case is different. While the four separate offenders committed these crimes because of the actual or perceived ethnicity or faith of the victims, their actions inflicted distinct harms upon the victims, their families, and their respective communities. Furthermore, and due to variance between the laws, policies, and law enforcement practices designed to address hate crime in the states where the incidents occurred, the cases were met with different outcomes.

The following vignettes contain sensitive, potentially upsetting material, especially for readers who have experienced harassment, discrimination, or targeted violence because of their actual or perceived ethnicity or religious affiliation. As noted above, our intention in sharing these accounts is to demonstrate the harmful effects of hate crime targeting Arab Americans on victims and communities, along with the need for an improved response to address those harms. Readers must recognize the human face behind the data to understand why reporting and data collection are important. Similarly, and as affirmed in the Supreme Court’s ruling in the landmark case, Wisconsin v. Mitchell, 508 U.S. 47 (1993), readers must recognize “the greater individual and societal harm” associated with bias-motivated crimes to understand why hate crime statutes are not only justified, but also necessary.
Hate crime statutes provide enhanced penalties for crimes committed because of someone’s actual or perceived protected characteristics. The current federal hate crime statute includes protections for race, color, religion, national origin, gender, sexual orientation, gender identity, and disability. While 45 states offer protections for hate crime victims in the form of criminal statutes, the majority of those statutes do not offer inclusive protections. In other words, most state-level hate crime statutes do not offer the range of protections provided under federal law. Additionally, hate crime statutes in some states only apply to certain criminal offenses. In the case of North Carolina, state law provides enhanced penalties for misdemeanors, but not felonies, committed “because of the victim’s race, color, religion, or country of origin.” Under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, which also expanded the federal definition of hate crime and amended hate crime data collections with additional reporting categories, federal authorities have greater latitude to investigate and prosecute acts of bias-motivated violence. In order to open a federal hate crime investigation, the Justice Department’s Civil Rights Division must demonstrate that a particular case satisfies one of the following conditions: the state does not have jurisdiction; the state has requested the federal government assume jurisdiction; the verdict or sentence obtained under state charges failed to vindicate the stated federal interest to eradicate bias-motivated violence; or a federal hate crime prosecution is in the public interest and necessary to secure substantial justice. These provisions are critical, as in many cases, and for different reasons, state and local authorities fail to investigate and prosecute certain acts of violence as potential hate crimes.

The June 2015 mass shooting of nine black worshippers at Emanuel African Methodist Episcopal Church in Charleston, South Carolina, provides one example. South Carolina is one of five states without a hate crime statute. The Justice Department was, nevertheless, able to secure hate crime charges under federal law, and a federal grand jury convicted the defendant, Dylann Roof, of 33 counts of federal hate crimes. This sentence not only demonstrated the federal government’s vested interest in eradicating bias-motivated violence, but also served the public interest in demonstrating that crimes targeting someone because of their race, religion, or other protected characteristics will not be tolerated.

Most state-level hate crime statutes do not offer the range of protections provided under federal law.

No sentence can offset the suffering inflicted upon hate crime victims, their families, or communities. A hate crime sentence can, however, affirm the government’s commitment to preventing bias-motivated violence, while providing for a greater sense of justice among those affected. Unfortunately, the families and friends of Yusor Abu-Salha, Deah Barakat, and Razan Abu-Salha, along with the broader Arab American Muslim community, still await that affirmation and sense of justice.

---

5 The remaining four states: Arkansas, Georgia, Indiana, Wyoming.
No sentence can offset the suffering inflicted upon hate crime victims, their families, or communities. A hate crime sentence can, however, affirm the government’s commitment to preventing bias-motivated violence, while providing for a greater sense of justice among those affected.

On February 10, 2015, Yusor Abu-Salha, her husband Deah Barakat, and her younger sister Razan were murdered in the couple’s home in Chapel Hill, North Carolina. According to state and local authorities, the three victims, aged 21, 23, and 19, were killed as a result of “an ongoing parking dispute.” Signs indicate, however, that the gunman targeted Yusor, Deah, and Razan on account of their religious affiliation. The devastation wrought is indisputable: the lives of three young Arab American Muslims, full of hope and promise, were ended abruptly in an extreme display of violence. That the accused gunman deserves to be punished for this indefensible act is certain as well. What remains in dispute, however, is whether his actions constitute a hate crime. That question is complicated as a result of North Carolina’s hate crime statute, which provides enhanced penalties for misdemeanors, but not felony offenses.7 While federal investigators opened a preliminary inquiry into the shooting, the Justice Department has yet to indict the shooter, Craig Hicks, on hate crime charges.8

Words cannot fully capture the scale of this tragedy. However, we hope this narrative vignette communicates the distinct nature and lasting impact of the event, and that readers discern not only the specific threats facing targeted or vulnerable communities, but also the challenges within the system to address those threats.

Introduction
In the summer of 2013, Deah Barakat moved into an apartment in Chapel Hill, North Carolina. His roommate, Imad Ahmad, was a Ph.D. student of chemistry at the University of North Carolina. Deah would be starting at the university’s school of dentistry that coming fall. Their first interaction with Craig Hicks, a neighbor, occurred shortly after their arrival. Hicks, a middle-aged white man, was a former auto-parts salesman who had a history of tormenting fellow residents over their alleged misuse of parking spaces in the shared lot of the apartment complex where they lived.10 According to his social media, Hicks was also a devout gun enthusiast, and even flashed his weapon during subsequent confrontations with Deah and Imad over parking or noise.11 Hicks also took to social media to post anti-religious missives and was a self-described “anti-theist.” In response to one post about tensions between Islam, Judaism, and Christianity, Hicks wrote, “I wish they would just exterminate each other!”12 In another post, he wrote about expressions of religious faith with particular disdain:

The moment that your religion claims any kind of jurisdiction over my experience, you insult me on a level that you can’t even begin to comprehend. Even if your beliefs had substance, the arrogance of that would be insult enough. But the fact that they have no substance, and are merely a transparent raft of delusions and lies, magnifies the insult enormously.13

For Deah, a devout Muslim, faith was a driving force throughout his short life. Over the course of his studies at UNC, he began to take an interest in pediatric dentistry, where his warm, affectionate disposition helped him thrive. He remained close with administrators from the private, faith-oriented grammar school he attended as a child, and he worked for a local charity providing dental and nutritional relief to the area’s homeless population. At the time of his death, Deah was fundraising for a trip with other dental students to treat Syrian refugees in Turkey.14 His passion for serving others was apparent to all who knew

---


36 | Arab American Institute Foundation
him. In many ways, Deah grew up as an everyday American kid. He played basketball, watched ESPN’s “SportsCenter,” and listened to country music. He was goofy, lighthearted, and knew every word to the song “Let It Go,” from the Disney musical “Frozen.” Despite his towering height, at six-foot-three, he was gentle, and a big fan of hugs.

Deah and Imad learned to deal with their irascible neighbor. To prevent further confrontations with Hicks, Deah distributed annotated maps of the parking lot to his friends and family, identifying the spaces where visitors could and could not park. For a long time, these preventive measures seemed to work just fine. Things changed toward the end of 2014, when Imad moved out of the apartment and Yusor, Deah’s wife, moved in.

Yusor Abu-Sahla was smart, caring, ambitious, and loving. According to her family members, she had found her match in Deah.\[^{15}\] Just like him, she had excelled in her studies and aspired to become a dentist. Yusor spent the summer after her college graduation volunteering at a dental clinic for Syrian refugees in Southern Turkey.\[^{16}\] This experience cemented her decision to attend dental school. It also inspired Deah’s aforementioned fundraising efforts. The couple were married in December 2014. Following their honeymoon, Yusor joined Deah in the Chapel Hill apartment. She expected to begin her studies at UNC’s School of Dentistry in the fall of 2015.

Faith was also a driving force in Yusor’s life, and just like Deah, she was committed to assisting and caring for those in need. Razan, her younger sister, often visited the apartment and was likewise devoted to helping others. She had accompanied Yusor during the couple’s first outings together, many of which involved public service of some form. Razan was training for a marathon, enjoyed early morning chats with her parents over coffee, and was a freshman at North Carolina State, where she was studying to become an architect. In the wake of the shooting, the families and friends of Yusor, Razan, and Deah shared many stories illustrating their spirit, humor, and commitment to service.\[^{17}\] They also shared stories indicating the incident was a hate crime.

One potentially critical detail might explain why Hicks’ anger seemed to swell after Yusor moved in. Whereas Deah “dressed like other college guys, in sweats and T-shirts,” Yusor and Razan wore the headscarf and therefore carried an outward expression of their faith. According to the couple’s family members, Hicks repeatedly told Yusor he did not like how she looked because of her headscarf.\[^{18}\] In one interview, Yusor’s father, Mohammad Abu-Salha, said he was certain Hicks targeted his daughters because of their faith:

> I am sure my daughter felt hated, and she said, literally, “Daddy, I think it is because of the way we look and the way we dress.”\[^{19}\]

Imad, Deah’s former roommate, also reported that Hicks’ resentment increased after Yusor moved in. In the month of January alone, Hicks allegedly harassed the couple at their apartment on six different occasions. He also left a menacing note on Yusor’s car; something he had never done to Deah or Imad.\[^{20}\] Text messages between Yusor and Deah reveal the couple were concerned. On one occasion, Yusor wrote:

> “Our neighbor is always walking around us with a gun. He’s always looking at me. Would he be doing this if we were white? I feel unsafe.”\[^{21}\]

Deah reassured her that Hicks would not resort to violence, and they decided against contacting local authorities.

"Our neighbor is always walking around us with a gun. He's always looking at me. Would he be doing this if we were white? I feel unsafe.”

**Incident**

Around 5:00 pm on February 10, 2015, Craig Hicks confronted Deah at the front door of the couple’s apartment,
shooting him multiple times in the chest, head, and extremities.\textsuperscript{22} He then entered the apartment, where he encountered Yusor and Razan, who had come over for dinner. After shooting Yusor once in the hip, Hicks stood over the women and shot each of them once in the head. The autopsy indicates the shots were fired from close range. Hicks then evacuated the apartment, but not before shooting Deah once more in the mouth.\textsuperscript{23} In a matter of hours, Hicks was in police custody.

In the immediate aftermath of the shooting, the Chapel Hill Police issued a statement declaring that a preliminary investigation indicated Hicks committed the crime on account of “an ongoing neighbor dispute over parking.”\textsuperscript{24} Later statements from Hicks’ wife seemed to support this narrative. At a press conference the following day, Karen Hicks told reporters the shooting “had nothing to do with religion,” and was solely related to her husband’s aggravations over parking.\textsuperscript{25}

**According to Chapel Hill Police, the incident resulted from “a neighbor dispute over parking.”**

The families of Yusor, Razan, and Deah felt this narrative trivialized and obscured the true nature of the crime, that their killer was motivated, at least in part, because of their faith.\textsuperscript{26} In an interview on the radio program *Democracy Now*, Mohammad Abu-Salha, the father of Yusor and Razan, said he was certain the murder was a hate crime:

> Though he picked on parking for five years, he never threatened anybody this way until he saw my daughter Yusor and my daughter Razan show up on the scene with the hijab and he could tell they’re Muslim, because, before that, he never did that with Deah, my son-in-law, because Deah looked like an average, tall, slim, athletic white American boy. Nobody could tell Deah was a Muslim, because he didn’t—they never had an accent, either. So, once he began to see my daughters, he began to raise the heat. And he told Yusor, my late Yusor, that he hated her and how she dressed and how she appeared. And though the three of them were drop-dead gorgeous children, very well-known philanthropists and charity workers in the region, he saw them as just Muslims, and he zoned in on them, planning to kill them. And he carried out his threats in a very premeditated and cold-blooded fashion.\textsuperscript{27}

**Response**

Members of the American public, particularly within the Arab American and American Muslim communities, were concerned about the nature of the crime as well. Two days after the shooting, a coalition of over 150 civil rights, faith, community and advocacy groups, including the Arab American Institute, wrote a letter to U.S. Attorney General Eric Holder urging the federal government to pursue hate crime charges.\textsuperscript{28} The coalition argued an indictment would send a clear message from the nation’s chief law enforcement officer: that acts of extreme violence targeting the American Muslim, Arab, Sikh, or South Asian communities are reprehensible and will be punished to the fullest extent of the law. While federal investigators opened a preliminary inquiry into the shooting, the Justice Department has yet to indict Hicks on hate crime charges.\textsuperscript{29}

Along with family, friends, community members, and coalition groups, experts also suspected the incident was a hate crime. According to Jack McDevitt, a criminologist at Northeastern University whose work is cited elsewhere in this report, while Hicks’ frustrations were parking-related, anti-religious bias may have influenced his decision to commit violence.

> You can decide you want to rob someone, for instance, but only someone you perceive to be gay, because maybe you think they’ll be less likely to go to the police, or only an immigrant, because you think the police won’t take it as seriously. In this case, he’s angry

\textsuperscript{22} The Guardian, “Chapel Hill Shooting: Gun Held to the Head of Two Victims, Autopsy Reveals” (May 6, 2015), https://www.theguardian.com/us-news/2015/may/06/chapel-hill-shooting-gun-autopsy.


\textsuperscript{26} Moni Basu, “A Gunman Killed His Brother. Now Farris Barakat is on an American Journey,” supra note 21.


about the way people around him live, but he’s chosen these specific people because they also represent a religion he’s intolerant of.30

When investigating a potential hate crime, it is also important to consider whether the level of violence was in excess of what would have been required to commit the crime.31 The depraved, cold-blooded nature of the shooting seems to indicate a bias motivation was present.32

Conclusion
As of June 2018, Hicks is still awaiting trial for murder. If convicted, he could face the death penalty.33 He will almost certainly not be convicted of a hate crime, as North Carolina’s hate crime statute applies to misdemeanors, but not felonies, committed “because of the victim’s race, color, religion, or country of origin.”34 Writing in 2016, the families of Yusor, Razan, and Deah discussed the importance of defining their murder as an act of bias-motivated violence:

[I]n today’s environment of hatred and bigotry towards Muslim Americans, citing the hateful murder of [Yusor, Razan, and Deah] as an “ongoing parking dispute” is like re-telling the story of Rosa Park’s civil rights struggle as an “ongoing dispute over a bus seat.” …During a time when Muslims, and those who are perceived to be Muslim, are being attacked, and Muslim community centers and places of worship are being vandalized and threatened, it is critical that we speak out against hate and call on our officials to prosecute these crimes to the fullest extent of the law.35

Unfortunately, it seems the families, friends, and loved ones of Yusor, Razan, and Deah, along with the broader Arab American and American Muslim communities, will neither be affirmed of the government’s commitment to eradicating bias-motivated violence, nor will they be afforded a greater sense of justice.

As compassionate, ambitious, enthusiastic young Americans, Yusor, Deah and Razan accomplished a great deal in their short lives. Their legacy lives on through the work of their families, friends, and community. In the three years since their deaths, an annual interfaith food drive has helped feed families in 34 North Carolina counties.36 The “Our Three Winners Foundation,” named after Yusor, Deah, and Razan is working to raise funds for various dental and humanitarian relief projects. The Foundation is partnering with several organizations to promote a message of love and understanding alongside service. These include: The Light House, an incubator for faith-based programs that work with youth; Run for Razan, a race that encourages young people to live fulfilling, healthy lives; a day of service with support from the UNC School of Dentistry and the Dental Foundation of North Carolina; Dunking for Deah, a three-on-three basketball tournament; and Habitat for Humanity’s Our Three Winners Build Days, where volunteers build homes for those in need. In addition, the Foundation has provided sizable grants to support refugees.

The measure of this tragedy is incalculable. In its wake, however, a community has formed to embrace and celebrate the legacies of Yusor Abu-Salha, Deah Barakat, and Razan Abu-Salha. Their memories will continue to impart messages of love, resilience, and service, even in the face of bigotry and violence.

Background

Testifying before Congress in 1986, AAI President James Zogby discussed the relationship between targeted violence against Arab Americans and the broader trends of discrimination, exclusion, harassment, and intimidation facing the community at that time. He recounted his own personal experience of victimization and that of fellow Arab American organizations and political activists. Zogby’s office at the Palestinian Human Rights Campaign in Washington, DC, was firebombed in 1980. Five years later, ADC’s west coast regional director, Alex Odeh, was killed after setting off a wired explosive upon entering his Santa Ana, California, office. Zogby’s brother, John, then a representative of ADC, was also violently assaulted following his appearance on a television program in upstate New York. According to Zogby, federal authorities had not demonstrated sufficient interest in investigating or prosecuting these acts of violence. With the Odeh case in particular, not only had federal authorities failed to secure an indictment; the incident also received little coverage in the media, and despite the extreme nature of the offense, there was limited response from the Reagan Administration. Zogby went on to note that a broader “campaign of vilification” against Arab Americans had preceded, and perhaps influenced, the commission of each incident. Also testifying at the hearing was attorney Abdeen Jabara, who asserted that public censure of bias-motivated crimes against Arab Americans was necessary to prevent future escalations of targeted violence:

This paucity of official statements denouncing attacks against Arab Americans creates an atmosphere not just of societal permissiveness but of sanction. Where is the long-term, well-publicized saga of the arrest, prosecution, and punishment of just one perpetrator of ethnically or religiously or politically motivated violence against one Arab American? Where are the denunciations of such attacks by labor leaders, church figures, and politicians? The paucity of official statements denouncing attacks against Arab Americans creates an atmosphere not just of societal permissiveness but of sanction.

Today, we have seen an increase of anti-Arab and anti-Muslim hate crime coinciding with concerning developments in American politics and popular culture. Caustic political rhetoric denigrating historically targeted or vulnerable communities, including Arab Americans and American Muslims, along with xenophobic, discriminatory policies such as the Muslim Ban and so-called “extreme vetting,” have come, in part, to define the Trump Administration. Some civil rights and advocacy organizations have suggested that divisive anti-Muslim rhetoric and xenophobic policies have contributed to the recent surge of hate violence against Muslim, Arab, and South Asian communities in the United States. Empirical studies have also

---

38 The murder of Alex Odeh remains unsolved.
39 See statement of Abdeen Jabara (including discussion of Reagan Administration’s promulgation of anti-Arab sentiment), id., at 122.
demonstrated a strong correlation between Donald Trump’s tweets (since announcing his presidential campaign) relating to Islam or Muslims and subsequent outbursts of anti-Muslim hate crime. 42

A central question of the 1986 hearing was that of the relationship between targeted violence and the broader trends of discrimination, exclusion, harassment, and intimidation of a specific community. Had a “campaign of vilification” against Arab Americans precipitated anti-Arab violence? Had the failure of public figures to categorically denounce such violence created an aura of permissiveness, or even sanction? We continue to ask the same questions today. To what degree are the political rhetoric and discriminatory policies of the Trump Administration responsible for a reported increase in hate crime against targeted or vulnerable communities? These questions are difficult to answer, and they fall outside the scope of this report. However, we do know that hate crime perpetrators have in fact cited President Trump’s rhetoric in defense of their actions, as in the following case.

The Incident
In the early hours of December 5, 2015, Nicholas Tavella threatened and assaulted a fellow student on Penn State University’s main campus. Tavella, a 19-year-old white male who was intoxicated at the time of the incident, had allegedly stalked, harassed, and then physically confronted the victim, a South Asian man who will remain anonymous. 43 According to court documents, Tavella had followed the victim home because he “appeared to be of Middle Eastern or Asian descent.” At one point, Tavella asked the victim if “he was going to rape a girl,” and proceeded to taunt the victim as he tried to get away. “What are you,” he said, “from the Middle East?” Tavella then put his hands around the victim’s neck and said, “Don’t make me put a bullet in your chest.” 44

According to a police affidavit, a Penn State parking officer witnessed the confrontation and called in the University Police over two-way radio. An officer arrived on the scene shortly thereafter. Following his arrest, Tavella admitted to racially profiling the victim because “[he] had been acting suspicious.” Tavella also admitted that he had “probably said something racist” during the assault. According to the FBI’s 2015 Hate Crime Master File, University Police reported the incident as an anti-Arab hate crime.

The Prosecution
Among other misdemeanor offenses, prosecutors charged Tavella with the felony offense of ethnic intimidation. 45 Under Pennsylvania’s hate crime statute, ethnic intimidation is defined as a crime committed “with malicious intention toward the race, color, religion, or national origin of another individual or group of individuals.” 46 In this context, “malicious intention” indicates the crime was motivated by hatred. 47 At a December 9 preliminary hearing, Tavella’s attorney requested the judge dismiss the ethnic intimidation charge because he had not demonstrated malicious intention. Rather, it was “love of country” that motivated the assault. 48

Tavella’s attorney requested the judge dismiss the ethnic intimidation charge because he had not demonstrated malicious intention. Rather, it was “love of country” that motivated the assault.

The defense noted the San Bernardino shooting had occurred three days prior to the incident. 49 Coupled with the previous month’s attacks in Paris, 50 and “Donald Trump’s rhetoric covered in the media,” 51 the shooting may have incited fear of “suspicious individuals.” Therefore,

---

48 Jalelah Ahmed, supra note 45.
51 Jalelah Ahmed, supra note 45.
According to the defense, Tavella’s actions were the product of caustic political rhetoric, fear, and “drunken stupidity,” not hatred.52 We should note that two days before the preliminary hearing, then-candidate Trump called for “a total and complete shutdown of Muslims entering the United States” two days before the preliminary hearing.53 The local Assistant District Attorney, Jessica Lathrop, warned the judge he would “be sanctioning blatant bigotry” were he to throw out the hate crime charge. Despite this warning, the judge stated the prosecution failed to show Tavella had committed the crime of ethnic intimidation and dismissed the charge.54

While Tavella still faced misdemeanor counts of “terroristic threats,” “simple assault,” “disorderly conduct,” “stalking,” “harassment,” and multiple drinking-related charges, the prosecutors were committed to securing a hate crime sentence. After refiling ethnic intimidation charges and requesting a new judge, Centre County District Attorney Stacy Parks Miller stated that acts of bias-motivated violence must be prosecuted as hate crimes: “A physical attack motivated by skin color and/or perceived ethnicity is simply a hate crime and this will not be tolerated in our community.”55

After his second preliminary hearing in March 2016, Tavella pleaded guilty on October 5 to the following charges: felony ethnic intimidation, misdemeanor terroristic threats, and summary harassment, public drunkenness and purchase, consumption, possession or transportation of liquor.56 On November 18, 2016, Tavella was sentenced to 15 days to 23 ½ months for ethnic intimidation, to be served concurrently with his misdemeanor sentence, along with 90 days probation for summary harassment. Tavella was also ordered to pay fines for public drunkenness.57

Conclusion

As we note in the preceding vignette, a hate crime sentence can serve to affirm the government’s commitment to eradicating bias-motivated violence while providing a greater sense of justice to those affected. In the case of this particular incident, state authorities managed to convict Nicholas Tavella under Pennsylvania’s hate crime statute. Had the state failed to secure a hate crime sentence, we cannot assume federal authorities would have opened an investigation, especially given the low-level nature of the underlying offense. Had the defendant not received a second preliminary hearing, or had the incident occurred in a state without a hate crime statute, this case would have been one of thousands to go unpunished each year. According to the Bureau of Justice Statistics’ National Crime Victimization Survey, approximately 250,000 hate crime victimizations occur annually in the United States.58 On average, only 46 percent of those victimizations are reported to law enforcement.59 Even if a hate crime is reported to police, the victim might not be protected under state law, given that most states do not offer protections consistent with the federal hate crime statute.60 Furthermore, the evidentiary burden can be high in a hate crime case; despite substantial evidence demonstrating bias motivation, as with this particular incident, a case can still be at risk of falling through the cracks.

The challenges cited above demonstrate the need for comprehensive state-level statutes to support the federal government’s commitment to hate crime prevention. Robust enforcement of those statutes is likewise critical to securing justice. In this particular case, the responding officer identified a bias motivation and correctly reported the incident as an anti-Arab hate crime. While there is no state law requiring such training, the Pennsylvania Municipal Police Officers’ Education Training Commission has required that law enforcement personnel receive basic training on ethnic intimidation and bias crimes. Only 15 states have statutes requiring hate crime training for law enforcement certification. To ensure hate crimes are prosecuted, they must first be reported. State legislatures must therefore pass law enforcement training statutes and other laws promoting

54 Jalelah Ahmed, supra note 45.
56 Sarah Rafacz, supra note 44.
59 There are various reasons why hate crime victims do not report incidents to law enforcement, including fear of retaliation, distrust in law enforcement, or a feeling that nothing will be done. Through the #ReportHate Project, the Arab American Institute works with local partners and communities to encourage hate crime reporting through official avenues. See Arab American Institute, #ReportHate, http://www.aaiusa.org/reportate.
hate crime reporting and data collection. These efforts would not only help to improve nationwide hate crime statistics, but also to secure justice for individual hate crime victims, their families, and their communities.

Additional Considerations
As for the initial question posed in this vignette, the exact relationship between the political rhetoric and discriminatory policies of this administration and the recent escalation of targeted violence, particularly against Arab Americans and American Muslims, is hard to define. When it comes to hate crime against historically targeted or vulnerable communities, some have speculated that an aura of permissiveness, or even sanction, pervades American politics and popular culture. This report does not seek to answer that question. However, in this particular case, the perpetrator cited President Trump’s campaign rhetoric in defense of his actions. This case could refer to an isolated incident. Furthermore, while the evidence suggests the defendant committed the assault because of the victim’s actual or perceived ethnicity, we cannot know for sure whether the president’s campaign rhetoric was a decisive factor. Despite these qualifications, we are nevertheless tempted to view this case in light of a broader narrative.

The perpetrator cited President Trump’s campaign rhetoric in defense of his actions.

Before we conclude this vignette, we should consider one additional aspect of this case: the defendant’s mistaken perception of the victim’s ethnicity. According to court documents, Tavella followed and then assaulted the victim, a South Asian man, because he thought he was of “Middle Eastern or Asian descent.”61 In the immediate aftermath of 9/11, many Sikh Americans, who are predominantly South Asian, were the victims of anti-Arab and anti-Muslim hate crime.62 According to the Southern Poverty Law Center, the white supremacist responsible for a 2012 shooting that killed six Sikh worshippers at a gurdwara in Oak Creek, Wisconsin, believed he was targeting Muslims.63 In a February 2017 incident at a bar in Olathe, Kansas, a middle-aged white man denigrated two Indian men with an anti-Arab epithet before shooting both of them, killing one and injuring the other.64 These examples serve to illustrate that Anti-Arab and anti-Muslim hate crimes affect not only Arab Americans and American Muslims, but also Sikh Americans, South Asian Americans, and other communities as well.

61 Mark Marino, supra note 43.
Khalid Jabara
Tulsa, Oklahoma

Background
Since 1992, the FBI UCR Program has published an annual report on the nature and extent of bias-motivated violence in the United States. Based on voluntary data submissions from participating law enforcement agencies, Hate Crime Statistics provides the federal government and American public with critical information regarding the threat of hate crime against specific communities. The report features data organized according to a variety of “data elements,” including Bias Motivation, Offense Type, Known Offender’s Race and Ethnicity, Victim Type, and Location Type. Information pertaining to each state, including the number of hate crime incidents that specific law enforcement agencies report per quarter, is also provided.

While national UCR hate crime data collections are based on voluntary submissions from participating agencies, some states require mandatory hate crime reporting and data collection at the state level. A total of 23 states have statutes requiring law enforcement agencies to report hate crimes to a centralized repository. In all 23 states, that centralized repository performs the duties of a state-level UCR program: collecting data submitted from reporting law enforcement agencies and forwarding that data to the FBI UCR Program, which then publishes the data in Hate Crime Statistics. Oklahoma state code requires the Oklahoma State Bureau of Investigation (OSBI) to “develop a standard system for state and local law enforcement agencies to report incidents of crime” apparently committed because of race, color, religion, ancestry, national origin, or disability.65 Pursuant to this statute, all state, county, city, and town law enforcement agencies are required to submit monthly hate crime reports to the OSBI.

In 2016, a total of 15,254 law enforcement agencies, representing 49 states and the District of Columbia, participated in the national hate crime statistics program. To be considered a participating agency, law enforcement agencies must submit either “zero data” or incident reports to the FBI UCR Program during at least one quarterly submission period. When a participating agency submits zero data for a specific quarter, that means no hate crimes were reported during that period. Of these 15,254 participating agencies, 13,478 (88 percent) submitted only zero data in 2016. The remaining 1,776 agencies submitted incident reports during at least one quarter, amounting to 6,121 hate crime incidents in total. These 6,121 incidents correspond to 7,321 separate offenses,66 including, but not limited to: 2,109 intimidation offenses; 1,913 destruction/damage/vandalism offenses; 1,687 simple assaults; and 873 aggravated assaults.67 According to Hate Crime Statistics, there were fewer than 10 hate crime murders or non-negligent manslaughters reported in 2016.

Of the 355 Oklahoma law enforcement agencies participating in the national hate crime statistics program, a total of 22 agencies submitted incident reports to the FBI UCR program in 2016.68 These 22 agencies submitted 33 incidents, corresponding to 35 separate offenses. Behind the Oklahoma City Police Department, the Tulsa Police Department represents the second largest population in the state.69 According to Hate Crime Statistics, the Tulsa Police Department reported a single hate crime to the FBI UCR Program in 2016: a religion-based incident occurring in

---

65 Okla. Stat. tit. 21, § 21-850(F).
66 A single incident can consist of multiple offenses.
69 The Tulsa Police Department represents a population of 405,748.
the second quarter. The department submitted zero data during the third quarter of 2016, indicating that no hate crimes occurred in Tulsa between July and September of that year. As the following vignette demonstrates, however, that simply is not true.

**According to federal statistics, one of the highest profile hate crimes in recent years never even happened.**

**Introduction**

On August 12, 2016, Khalid Jabara was shot to death on the front porch of his Tulsa, Oklahoma home. His next-door neighbor, a 61-year-old white man, was ultimately found guilty of first-degree murder, “possession of a firearm in the commission of a felony,” “threatening an act of violence,” and “malicious intimidation or harassment.” Under Oklahoma state law, malicious intimidation or harassment is defined as a crime committed “maliciously and with specific intent to intimidate or harass another person because of that person’s race, color, religion, ancestry, national origin, or disability.” While Khalid’s murderer, Stanley Vernon Majors, was charged and convicted with a hate crime under Oklahoma’s hate crime statute, the incident was never reported in federal hate crime statistics. Given that every law enforcement agency in Oklahoma is required to submit monthly hate crime reports to the OSBI, the FBI UCR Program should have received this incident through its hate crime data collections. Had that been the case, the incident would represent one out of a total 10 hate crime murders or non-negligent manslaughters reported in 2016 nationwide.

Khalid was 37 years old when he was killed. The middle of three children, he was quieter and more sensitive than his siblings Victoria and Rami, but also charming and quick-witted. Khalid’s cousin said she had never known a man “so nice, sweet, emotional, tender, as humble, handsome, beautiful, inside and out.” After his father, Mounah, became seriously ill, Khalid embraced the role of caregiver to his parents, living at home and assisting with the family business. He was also a loving uncle.

The Jabaras fled Lebanon in 1983 and settled in the quiet suburbs of Tulsa, Oklahoma. Given that no restaurants in the area served authentic Lebanese cuisine, Khalid’s parents established a small bakery and deli, which eventually became a full-fledged catering company. According to his sister, Khalid faced more prejudice growing up than his siblings. “He was darker than my brother and I, plus he had an Arabic name,” Victoria said. “Khalid felt that pain and prejudice more than we did.” At the same time, many people admired Khalid: he was charismatic, kindhearted, and, nevertheless, an introvert. Despite the common challenges of adjusting to life in a new culture, things were good for the Jabara family. That all changed when a man named Stanley Vernon Majors moved in with their next-door neighbor.

The neighbor, an elderly man named Stephen Schmauss, was reportedly quite friendly with the Jabara family. Given their shared love for computers, Khalid and Stephen were especially close. “Khalid was my best friend,” Schmauss said after the murder. “My only friend.” Majors objected to the friendship, and the Jabara family’s encounters with him became more threatening and explicitly bias-motivated over time. In an interview, Victoria described one of their initial confrontations with Majors, who first arrived next door in 2011:

[H]e came onto our property, took photos of my mom cooking, and called the health department, asking for our business to be shut down. He claimed that we were preparing food for our business at home, which we were not. It got worse from there. He called us “filthy Arabs.”

---

75 Id.
77 Id.
79 Id.
Majors also directed racist epithets toward the family’s African American friend and their fellow Hispanic neighbor. Records indicate he had an extensive criminal record. On October 14, 2009, he was sentenced to 16 months in a California prison for threatening another man “with intent to terrorize” in Los Angeles County, and was paroled nine months later.80 On July 7, 2011, he was charged in San Bernardino County Court with assault with a deadly weapon, threatening a crime and making criminal threats.81 After determining he may have violated his parole, California authorities issued a warrant for his arrest on December 11, 2012. According to Khalid’s older sister Victoria, the Jabaras received news of the arrest warrant from family friends. “We called the cops, and they took him away,” she said. “He was sent back to California, and we thought he was out of our life for good.”82

Mounting Threats
When Majors reappeared in the neighborhood six months later, his threats against members of the Jabara family became more severe. Khalid’s mother, Haifa, filed an application for a protective order against him in August 2013, citing multiple cases of harassment. Majors had reportedly stolen documents from her car, threatened violence against her over the phone, and would occasionally creep around the Jabaras’ home at night, tapping on the windows.83 In a statement released three days after Khalid’s murder, the Jabara family recounted the array of racist epithets Majors used against their ethnicity and perceived religious affiliation:

This suspect had a history of bigotry against our family. He repeatedly attacked our ethnicity and perceived religion, making racist comments. He often called us “dirty Arabs,” “filthy Lebanese,” “Aye-rabs,” and “Mooslems.”84

According to the family’s statement, the Tulsa Police Department confirmed Majors had, in fact, made these comments.

In March 2015, Majors was charged with violating the restraining order after he threatened Haifa in her driveway. According to a police report, he said he wanted to kill her and uttered multiple racial slurs. Non-cooperative and clearly intoxicated, Majors was also charged with obstructing police.85 At Majors’ January 2018 murder trial, the police officer who responded to the March 2015 incident testified that Majors asked why the officer was taking him to jail. “You’re white, I’m white,” he said. “I can’t believe the Lebanese are running the show.”86 According to the Jabara family, Majors hired an attorney after being taken into custody and posted bond. After he stopped appearing in court, a judge issued a warrant for his arrest. While both Victoria and Haifa called police alerting them of their neighbor’s whereabouts (he was still living next door), he was never arrested: “They can’t see beyond the paperwork. On paper, it was just a misdemeanor, so they ignored it.”87

On September 12, 2015, Haifa Jabara was walking through her neighborhood when she was struck in an apparent hit-and-run. She had “road rash all over her body,” and suffered a broken hand, shoulder, ribs, ankle, nose, a collapsed lung, and head trauma.88 Khalid told authorities he suspected Majors had intentionally mowed down his mother. According to police reports, his car was later found with the windshield shattered and “what appeared to be blood or tissue stuck on it.”89 According to court records, he was charged with “assault and battery with a deadly weapon, leaving the scene of a collision involving injury, violating a protective order, and public intoxication.”90

After spending eight months in the Tulsa jail, Majors was released on May 25, 2016, after posting $60,000 bond.91 No

---

82 Arjun Singh Sethi, supra note 76.
83 Eger and Killman, supra note 79.
84 Arab American Institute, “Our Thoughts Are With the Jabaras” (Aug. 15, 2016), http://www.aaiusa.org/our_thoughts_are_with_k.
87 Arjun Singh Sethi, supra note 76.
88 Id.
89 Id.
90 Id.
91 Id.
Arab American Institute Foundation

one informed the Jabara family of Majors’ release. Only because Khalid routinely checked the state’s online court records system did the family learn he was out of custody. Majors’ bond was originally set at $200,000. Out of concern for their safety, the Jabaras contacted the district attorney’s office requesting the bond be revoked, and a judge ultimately granted that request. On May 23, however, Majors hired a new lawyer and got the bond reinstated at $30,000. According to Khalid’s younger brother, Rami, authorities failed to consider the particular circumstances of the case.

Apparently there was a hearing with a new government attorney who didn’t know the case history, and when the defense lawyer made an oral motion to reconsider bond, it was granted by the judge. The government attorney didn’t object because he hadn’t read the case file and because it’s customary to grant bond in cases of assault and battery.

Majors’ release from jail terrified the Jabaras, and the district attorney’s office filed a motion to reconsider bond, which the judge simply doubled from $30,000 to $60,000. He posted easily. The judge presiding over the hearing, a former mayor of Tulsa and Chief Judge of the Tulsa County District Court’s Criminal Division, put the defendant on notice. “This is a very precarious situation,” he said. “I’m very concerned with you out of custody and living next door…given this history.” Despite the district judge’s stated concerns, Majors was released without any conditions on his bond and no requirements to vacate the neighborhood.

The Incident

Three months later, on August 12, 2016, Khalid Jabara was dead, slain in cold blood on the front porch of his family home. On the day of his murder, Khalid called 911 to notify authorities that Majors had a gun. Majors had allegedly beaten his elderly husband and “emptied at least five rounds from a handgun inside the couple’s home, sending bullets in every direction.” According to Schmauss, who has since passed away, he warned Khalid that Majors was dangerous and then fled for his life. “[C]all the police,” he said. “For God’s sake, call the police.” Officers from the Tulsa Police Department responded at the Jabaras’ home 50 minutes after Khalid’s second call (he had already called once to report someone was tapping on the windows). When police knocked on Majors’ front door and no one answered, they told Khalid they could not enter the home without a warrant. There was nothing they could do. They left the scene.

Eight minutes later, neighbors reported hearing gunshots. Haifa Jabara was on the phone with her son when it happened—he had warned her to stay away from the home. She heard Khalid scream. She heard his killer in the background. “I told you this was coming!” He said. After pointing his weapon and threatening to shoot a neighbor, Majors fled from the front porch of the Jabara family home, his bare feet leaving tracks of Khalid’s blood across the driveway. Khalid died in the ambulance. Police found Majors hiding not too far from the scene.

According to the letter, statements from the Tulsa Police Department had “undermined community confidence that law enforcement officials would conduct an exhaustive and objective investigation.”

Members of the Tulsa Police Department were not convinced that Khalid’s death was a hate crime. In an interview aired on the popular television program Good Morning America, Sergeant David Walker described the incident as “an ongoing dispute with neighbors.” This characterization resembles that of the February 2015 murder of Yusor Abu-Salha, Deah Barakat, and Razan Abu-Salha in Chapel Hill,
North Carolina. Sergeant Walker continued: “Yeah, there’s hate there. I just don’t think the only reason is because they’re Middle Eastern.” Following these statements from the Tulsa Police Department, Muslim Advocates and the Arab American Institute spearheaded a coalition letter of over 50 advocacy, civil rights, community, and faith-based organizations demanding a fair investigation in Khalid’s murder. According to the letter, statements from the Tulsa Police Department had “undermined community confidence that law enforcement officials would conduct an exhaustive and objective investigation.”

The Prosecution

For Haifa, securing a hate crime sentence was not a priority as she struggled to come to terms with the loss of her son. “Nothing will bring my son back,” she said. “But if we were white, he would never have touched us.” According to Khalid’s sister Victoria, however, defining the murder as a hate crime had broader implications:

[calling it a hate crime allows us to better tackle bigotry and hatred. It allows the public and media to see this crime not as isolated or random, but as part of a larger problem. Right after the tragedy, we received emails and calls from people describing how they felt hated by a neighbor or their community. …We can't dismiss this tragedy as a one-off. Hate is why he attacked us rather than the other neighbors.]

On February 7, 2018, Stanley Vernon Majors was found guilty of two felony offenses and two misdemeanors: first degree murder; possession of a firearm in the commission of a felony; threatening an act of violence; and malicious intimidation or harassment, as defined in Oklahoma’s hate crime statute. During the trial, the jury was provided recordings of 10 phone calls between Majors and his husband while he was incarcerated. In one call, dated January 26, 2017, Schmauss rebuked Majors when he insinuated that Khalid was responsible for inciting the violence. Majors then brought up how President Trump would put a stop to the issue of “Muslims wanting to come over [to the United States].” It appears he was citing a January 25 address at the Department of Homeland Security. He’s hired 5,000 customs agents, he hired [Immigration and Customs Enforcement] agents,” Majors said. “He doesn’t want a bunch of Muslims or aye-rabs. … They’re building a wall.” The following day, on January 27, the president signed Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States), also known as the initial Muslim Ban.

“[I]n this case the system failed. Khalid’s death was preventable.”

While she felt “justice was served,” Victoria maintained the case should never have happened. “Khalid should still be with us.” Khalid’s younger brother Rami reiterated that sentiment on a separate occasion: “[I]n this case the system failed. Khalid’s death was preventable.”

Considering the particular circumstances of this case, it is hard not to agree with Khalid’s family. Despite numerous indications that Majors posed a threat, and even after he had run over Haifa Jabara with his car, authorities failed to effectively intervene. In this respect, the Tulsa Police Department and the county’s criminal justice system were unable to preempt an act of bias-motivated violence that, given the facts of the case, appeared to be imminent. Ultimately, prosecutors were able to secure a conviction under Oklahoma’s hate crime statute. While the sentence might have provided those affected with a greater sense of justice, the details of the case seem to undermine law enforcement’s stated commitment to preventing bias-motivated violence. That the incident was never reported in official hate crime statistics is telling as well.
Conclusion
The slaying of Khalid Jabara is one of the highest profile hate crimes in recent years. He was killed in Tulsa, Oklahoma, on August 12, 2016. According to the FBI’s annual report, *Hate Crime Statistics*, the Tulsa Police Department reported zero hate crimes between July and September of that year. Every law enforcement agency in Oklahoma is required to report hate crimes to the Oklahoma State Bureau of Investigation. We do not know why the murder of Khalid Jabara never reached our federal hate crime statistics. Despite evidence to the contrary, the responding officers could have determined the crime did not contain an element of bias or prejudice at the initial filing. Another possibility is technical error—perhaps an improper transmission on the part of the Tulsa Police Department’s Records Division. Both explanations point to the need for improved law enforcement training relating to investigating, reporting, and responding to hate crimes and other bias-related incidents. Oklahoma is one of 35 states without a law requiring such training for police certification.

As we conclude this vignette, one question remains: if this particular incident never reached federal statistics, what does that say about the quality of those statistics? The FBI’s annual report is a critical resource for the federal government and American public. However, if the data do not capture the true nature and extent of hate crime in the United States, then communities, advocates, and policymakers will be less equipped to effectively respond.
Ghaith Sahib, Tiffany Sahib, and the Employees of DarSalam Restaurant

Portland, Oregon

Background
The term “hate crime” did not enter popular usage until the mid-to-late twentieth century.112 Developments in both civil and victims’ rights, including federal anti-discrimination laws and enhanced protections for victims and witnesses in the criminal justice system, preceded a shift in how Americans understood, and hoped to address, the issue of bias-motivated crime.113 The extent of racial injustice and gender inequality in America necessitated the passage of laws banning discrimination in the context of employment, voting, education, and housing.114 Another piece of landmark civil rights legislation, the Civil Rights Act of 1968, prohibited the use of force to willfully injure, intimidate, or interfere with another person because of their race, color, religion, or national origin and because that person is participating in those same federally protected activities.115 In the following decades, Congress also passed legislation to enhance and protect the roles of victims and witnesses, including through victim compensation.116 Laws such as the Victim and Witness Protection Act of 1982 and the Victims of Crime Act of 1984 (VOCA) reflected a central concern of the victims’ rights movement: to prioritize the victim within the criminal justice system. In some respects, these priorities clashed with those of the civil rights movement, particularly in regard to defendant’s rights and the so-called “due process revolution.”117

In the 1980s, prominent civil rights organizations began advocating for the criminal justice system to prioritize victims of bias-motivated crime targeted on account of their race or other protected characteristics. These efforts coincided with changing perceptions of racial, gendered, and anti-LGBT violence, not as isolated incidents, but rather as extreme manifestations of deep-rooted cultural biases. Organizations published annual reports on the incidence of bias-motivated crime against their communities and the unique individual and collective harms such crimes inflicted. The reports encouraged readers to empathize with targeted or vulnerable communities while demonstrating the need for an improved overall response to bias-motivated violence. Their findings also supported the sense of a mounting hate crime epidemic in American society.118

Widespread concern about hate crime influenced two basic responses within state governments that preceded similar federal efforts: data collection and criminal statutes. State human relations commissions and police departments began collecting data on bias-motivated crime or related incidents, publishing their findings in annual reports. State-level data collection of this kind influenced Congress to pass federal legislation establishing a national hate crime reporting and data collection system. Following the passage of the Hate Crime Statistics Act of 1990, those responsibilities were delegated to the FBI Uniform Crime Reporting (UCR) Program within the Department of Justice. The second basic response was the passage of laws prohibiting bias-motivated crime. These laws took the form of stand-alone criminal statutes or penalty enhancement provisions for crimes committed because of different protected characteristics, such as race, color, religion, or national origin. Some state legislatures would incorporate

additional protections into their hate crime statutes over time, including sexual orientation, disability, gender, and gender identity. In 2018, a total of 14 states offer what we call inclusive protections in their hate crime statutes. An additional 31 states and the District Columbia have a hate crime statute of some kind. In 2009, Congress passed the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act in part to assist state and local efforts to investigate and prosecute hate crimes.\(^{119}\)

**Hate Crime Statutes Explained**

Just as federal and state anti-discrimination laws were challenged on constitutional grounds, so too were state-level hate crime statutes. Critics argued that by authorizing enhanced penalties for certain bias-motivated crimes, hate crime statutes punished defendants’ bigoted beliefs in violation of the First Amendment. On the other hand, proponents of hate crime statutes defended penalty enhancement on account of the greater individual and societal harms that bias-motivated crimes tend to inflict on victims and communities. The Supreme Court took up these arguments during its October 1992 term in the landmark case, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). In a unanimous decision, the Court defended the constitutionality of hate crime penalty enhancement statutes.

In this particular case, a young black man named Todd Mitchell was convicted under Wisconsin’s hate crime statute and sentenced to four years’ imprisonment for the offense of aggravated battery. While the offense ordinarily carried a two-year maximum sentence, Mitchell’s sentence was increased because he was found to have intentionally selected his victim, a young white boy, on account of his race. Mitchell appealed his conviction and sentence, challenging Wisconsin’s hate crime statute on First Amendment grounds. While the Wisconsin Supreme Court reversed the appellate court and held that penalty enhancement “violates the First Amendment by punishing what the legislature has deemed to be offensive thought.” In other words, by authorizing increased sentences for crimes motivated because of an offenders’ bigoted beliefs, hate crime penalty enhancement statutes punished those very beliefs and therefore criminalized certain ideas. In addition to citing a potential “chilling effect” on free speech,\(^ {120}\) the state supreme court distinguished anti-discrimination laws, which prohibit “objective acts of discrimination,” from the statute in question, which punished the “subjective mental process” of targeting someone because of their protected status.

The U.S. Supreme Court rejected these arguments and held that Wisconsin’s hate crime penalty enhancement statute did not violate Mitchell’s First Amendment rights. Writing for the Court, Chief Justice William Rehnquist emphasized the distinction between proscriptions aimed at content and those based on conduct. During the preceding term, the Court struck down a local bias-motivated crime ordinance in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The ordinance in question prohibited the display of a symbol, such as a burning cross or Nazi swastika, that one could reasonably expect to arouse anger, alarm, or resentment on the basis of “race, color, creed, religion, or gender.” While the government is permitted to regulate certain forms of speech that tend to incite violence or civil unrest, also known as “fighting words,”\(^ {121}\) the Court stated that regulations based on the government’s “hostility or favoritism” toward specific ideas expressed through that speech are unconstitutional. In defending the ordinance, St. Paul conceded that it applied only to “racial, religious, or gender-specific symbols.” The ordinance would therefore seem to permit symbols that incite violence or civil unrest on the basis of sexual orientation, disability, gender identity, and many other examples. In this respect, the ordinance did not regulate the mode, or conduct, used to express a particular message, but rather the content of the message itself.\(^ {122}\) Additionally, the Court indicated the ordinance not only discriminated against the content, but also the viewpoint, expressed in those messages, observing that under the ordinance, those arguing for racial, religious, or gender equality were seemingly permitted to display inflammatory symbols that might incite violence or civil unrest.\(^ {123}\) St. Paul’s final line of defense was that even if the ordinance restricted expression because of ideologically disfavored

---

\(^{119}\) See *State v. Mitchell*, 485 N. W. 2d, 807, (Wis. 1992) (“...[T]he fact remains that the necessity to use speech to prove this intentional selection threatens to chill free speech.

\(^{120}\) Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state”.

\(^{121}\) Chief Justice Rehnquist, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). The Constitution does not permit regulations that “abridge the freedom of speech unless necessary to advance a compelling governmental interest and the means chosen are narrowly tailored to the interest.”


\(^{123}\) See id., at 391-92.
content, the government had a compelling interest to safeguard the rights and security of historically targeted or vulnerable communities. While the Court agreed those interests were compelling, and the ordinance was limited to a narrow set of circumstances, serving those interests did not necessitate restricting speech. The city of St. Paul had sufficient “content-neutral” alternatives to achieving its ends. The Court concluded:

Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.124

Whereas the St. Paul bias-motivated crime ordinance prohibited certain forms of expression containing messages of intolerant viewpoints deemed especially repugnant, the Wisconsin statute focused on criminal conduct deemed more serious because of its targeted nature.125 The intentional selection of a victim because of their race, religion, or other protected characteristics was more serious and therefore subject to enhanced penalties.126 According to proponents of the Wisconsin statute, hate crimes were more serious because of their increased potential “to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.” Given the state’s “desire to redress these perceived harms,” Chief Justice Rehnquist asserted that Wisconsin had ample justification for penalty enhancement, “over and above mere disagreement with offenders’ beliefs or biases.”127

The particular circumstances of the case, including Mitchell’s statements directly preceding the incident, suggest he might have possessed objectionable beliefs or opinions about race. However, a person’s “subjective mental process” is difficult, if not impossible, to prove. Far easier to substantiate is whether, based on the evidence, someone because of their actual or perceived protected characteristics. After watching a movie depicting racial violence against African Americans, Mitchell asked his peers if they wanted “to move on some white people.” Shortly thereafter, when a young white boy passed the group on the street, Mitchell said: “You all want to fuck somebody up? There goes a white boy; go get him.” After Mitchell counted to three, the group advanced on the boy and beat him unconscious.128 Mitchell’s subjective beliefs about race were irrelevant in determining that he targeted his victim because of race. On similar grounds, Mitchell’s “subjective mental process” was irrelevant in determining that he should be convicted of a hate crime. This point, along with much of the preceding discussion, is critical to understanding the following case.

The Incident

On April 21, 2017, an active-duty U.S. Marine named Damien Rodriguez assaulted an employee at DarSalam Iraqi restaurant in Portland, Oregon. Rodriguez, a highly decorated Afghanistan and Iraq War veteran suffering from post-traumatic stress disorder, visited the restaurant just weeks after the anniversary of an especially scarring episode during his first deployment to Iraq.129 According to DarSalam staff, Rodriguez and another man sat in the restaurant for about an hour, refusing to order. The men at some point started using racially and ethnically insensitive language ridden with profanities.130 In addition to derogatory statements about Iraq, Rodriguez reportedly told members of the restaurant’s staff, “I’m American. You guys aren’t American.”131 According to statements provided to police, Rodriguez also discussed how many people he killed while on duty in Iraq and demanded that employees shake his hand.132

Security footage from the restaurant appears to show a verbal exchange between Rodriguez’s companion and a DarSalam employee.133 The two men are standing in close proximity, gesturing toward one another and at times

124 Id., at 396.
126 See id., at 485.
127 Id., at 488.
128 Id., at 480.
placing their hands on each other’s shoulders. While no audio is provided, it seems Rodriguez is not directly involved in the exchange: his companion stands between Rodriguez and the employee with his back to Rodriguez. At one point, Rodriguez tugs his companion’s upper arm in an apparent attempt to get his attention. After appearing to survey the room, Rodriguez picks up a chair with both hands and swings it around the back of his companion, striking the employee in what appears to be his neck and shoulder. The confrontation moves off-screen for a moment, but the footage does capture Rodriguez throwing at least one punch before multiple staff and patrons of the restaurant intervene.

"Her first thought was about her family and the safety of the restaurant, but she was also thinking about the well-being of this guy."

The owners of the restaurant, Ghaith and Tiffany Sahib, believed the incident to be a hate crime. “Clearly these people had a problem with Middle Easterners or Iraq,” Tiffany said, “and they came in here looking for trouble or looking to express their anger.” She also noted that while her employee was not seriously injured, both he and a server caught up in the incident had sustained emotional harms. After learning of Rodriguez’s military service and related diagnosis, the couple expressed regret over the circumstances. “We were really sorry about what happened,” Ghaith said. “We feel sorry for [Rodriguez], and we feel sorry for ourselves, too.” According to Sean Davis, a friend of the Sahibs and an Iraq War veteran, the couple asked if there was anything he could do to help Rodriguez. As the local post commander for the American Legion, the nation’s largest veterans service organization, Davis had experience working with veterans suffering from post-traumatic stress disorder (PTSD). He told reporters that Tiffany called him shortly after the incident. “Her first thought was about her family and the safety of the restaurant,” Davis said, “but she was also thinking about the well-being of this guy.”

Following his arrest, Rodriguez was forced to retire from the Marines after 20 years of service. He would ultimately be convicted of a hate crime and attempted second-degree assault. Partly because of the court’s concerns over his mental health, Rodriguez was able to avoid prison and was instead sentenced to five years of probation and required to pay $21,000 in fines. News reports covering the remainder of the case are conflicting, and the narrative is made more complicated in that charges against Rodriguez were dropped and then reintroduced on multiple occasions. Perhaps most significant, however, was the role of inaccurate or misleading coverage in confusing the nature of the prosecution, and consequently, the definition of a hate crime.

Developments in the Case

Rodriguez was originally charged with three separate misdemeanor offenses: harassment, disorderly conduct, and intimidation in the second degree. Under Oregon’s hate crime statute, intimidation in the second degree is punishable as a Class A misdemeanor and therefore subject to a maximum sentence of one year in prison and up to $6,250 in fines. A person commits intimidation in the second degree if the person “intentionally subjects another to offensive physical contact,” or tampers or interferes with their property, “because of the person’s perception of the other’s race, color, religion, sexual orientation, disability or national origin.” Sexual orientation is defined in Oregon state code so as to include gender and gender identity. Hate crime offenders in Oregon can also be convicted of intimidation in the first degree, which is a felony, but only if they acted with at least one other person to commit the crime.

According to news reports, the intimidation charge was dropped following the arrest, leaving Rodriguez with the two remaining charges of harassment and disorderly conduct, which are both Class B misdemeanors and subject to six months in prison and up to $2,500 in fines. While the initial intimidation charge was dropped, the Portland Police Bureau notified reporters that a detective from the department’s Bias Crimes Investigations unit had been


136 Id.

137 Mary Emily O’Hara, supra note 130.

138 Aimee Green, supra note 131.


141 Or. Rev. Stat. § 174.100(7).

142 Or. Rev. Stat. § 166.165.

assigned to the case, and that Rodriguez’s military service had no bearing on the investigation or the charges brought against him. Rodriguez posted bail and was released following a court appearance on April 24, 2017.

Then, on May 10, 2017, the harassment and disorderly conduct charges were dropped as well. According to news reports, the Multnomah County District Attorney’s Office stated that “an investigation is pending and that the ends of justice will be best served” by dismissing the charges. These comments from the district attorney’s office, not to mention the prior dismissal of the second-degree intimidation charge, may have created the impression that authorities were not taking the Sahib’s allegations of a hate crime seriously. Whereas some local news outlets failed to look past the fact that charges had been dropped, others considered the potential for new, more serious charges to be introduced.

Weeks later, on July 3, 2017, Rodriguez was indicted on one count of second-degree assault, one count of second-degree disorderly conduct, and two counts of intimidation in the second-degree: one for striking the employee with a chair, and another for the server who was caught up in the incident. After appearing in court for his arraignment, Rodriguez pleaded not guilty and was let out of custody. According to the Marine Corps Times, he potentially faced more than 10 years in prison if convicted.

Prior to the July 3 indictment, the case had received little attention outside of the local news. However, given the nature of the charges, the potential sentence, and questions regarding Rodriguez’s mental health, the case soon came under national media scrutiny. Before discussing that coverage, we should first consider the individual charges that were brought against Rodriguez in the July 3 indictment. When he was arrested following the incident at DarSalam on April 21, Rodriguez was charged with three misdemeanor offenses: harassment, second-degree disorderly conduct, and intimidation in the second degree. Were he to serve consecutive sentences for these crimes, Rodriguez would have faced no more than two years in prison. While Oregon is one of 45 states with a hate crime statute, that statute does not contain a penalty enhancement provision such as that described in Mitchell v. Wisconsin. Unlike Wisconsin’s hate crime statute, which provides enhanced penalties for crimes when they are committed because of race, religion, or other protected characteristics, Oregon’s hate crime statute is a stand-alone criminal statute. Regardless of the underlying criminal offense, when a person “intentionally subjects another to offensive physical contact” on account of their perceived protected characteristics, that person commits the crime of intimidation in the second degree. If that person is convicted and found to have committed no other criminal offense, that person is guilty of a Class A misdemeanor and subject to a maximum sentence of one year in prison. If a person convicted of intimidation in the second degree is found to have committed additional criminal offenses, that person may be subject to additional penalties pursuant to those offenses.

The July 3 indictment differed from the original April 21 charges on three accounts: the harassment charge was dropped; a second hate crime charge was added; and the charge of second-degree assault was introduced. The charge of disorderly conduct remained. If not for the charge of second-degree assault, the difference between the April 21 and July 3 charges was minimal with respect to the maximum sentence. However, under Oregon’s Measure 11 sentencing guidelines, which were approved via ballot initiative in 1994, second-degree assault carries a mandatory minimum sentence of 5 years, 10 months, with no possibility for reduction. As a Class B felony, second-degree assault in Oregon is also subject to a maximum sentence of 10 years and up to $250,000 in fines. Therefore, while hate crime charges were reintroduced against Rodriguez in the July 3 indictment, when it came to his potential sentence, the
charge of second-degree assault was far more significant. Given that Oregon’s hate crime statute does not provide enhanced penalties for bias-motivated crimes, but rather is a stand-alone, misdemeanor criminal statute, the charges of intimidation in the second degree did not significantly alter his potential sentence. Based on reporting from the New York Times, many readers might have assumed otherwise.

National Media Coverage
On October 18, 2017, the New York Times published a story with the headline: “A Marine Attacked an Iraqi Restaurant. But Was It a Hate Crime or PTSD?”154 The article appeared with a slightly altered headline on the front page of the paper’s New York edition the following day. According to author Dave Philipps, a national correspondent covering veterans and the military, Rodriguez’s case had “raised questions about what constitutes a hate crime and how effectively the legal system treats combat veterans who suffer from post-traumatic stress disorder.” The article begins with a brief discussion of the incident and the charges brought against Rodriguez, which Philipps contextualizes within a rash of hate crimes occurring in Portland that year. Regarding the question of whether the incident should be charged as a hate crime, Philipps quotes Ghaith, the owner of the restaurant:

“My family, they have fear now in everything—we can’t forget this,” Mr. Sahib said. He said the restaurant was targeted because of his ethnicity, so hate crime charges are fitting. “I feel for this guy, but he cannot do what he does. He must face consequences.”

The article also provides an account of Rodriguez’s background, his military service, the source of his trauma, and the broader challenges combat veterans face in American society. According to psychologists working with military service members and veterans quoted in the article, when their symptoms are left unaddressed for too long, veterans suffering from PTSD are more likely to commit violent outbursts like the one at DarSalam. “There is no evidence that combat veterans are more prone to committing hate crimes,” Philipps says, “but studies suggest combat veterans with PTSD commit violent acts at a much higher rate than civilians.” Philipps notes that within the criminal justice system, some communities have established “special veterans courts devised to offer therapy instead of jail time to wounded veterans.” According to Philipps, however, many veterans are not eligible for veterans treatment courts because they have committed violent crimes. Before concluding the article, Philipps informs readers that like Rodriguez, Ghaith is haunted by memories of the Iraq War. Following the U.S. invasion of Iraq in 2003, Ghaith’s neighborhood devolved into a theater of bloodshed and violence. A student at Al Mansour University College in Baghdad, Ghaith was sitting in traffic one day in 2005 when he witnessed an explosion a few cars ahead. The blast put him in a coma for three weeks.155 After surviving the car bombing, Ghaith fled to Syria, India, France, and Germany before arriving in the Netherlands, where he met Tiffany. The couple moved back to Tiffany’s native Portland, where they established DarSalam. According to Philipps:

The couple opened their restaurant as a way to present a kinder side of Iraq to America. Before long, to their surprise, it became a hangout for Iraq veterans, who held a poetry reading at the restaurant and became friends of the family. “Always I have joy talking with them,” [Ghaith] said. “They lost friends, we lost friends also. They cry, we cry also. We talk about it.”

Philipps concludes with a return to Rodriguez. According to an interview, Rodriguez could not remember what caused him to strike the employee with a chair, stating, “All I can remember, honestly, is being handcuffed by the police.” Philipps reports that following his arrest and forced retirement from the Marine Corps, Rodriguez had entered “an intensive program for abuse and PTSD.” With respect to the possible hate crime conviction, Philipps quotes Rodriguez:

“I’m sorry about what happened,” he said. “But no one tries to understand what we went through.”

The article ends. At this point, we have yet to consider Philipps’s discussion of the charges brought against Rodriguez. According to Philipps, the rash of hate crimes committed throughout Portland in 2017, including the murder of two men at the hands of an avowed white supremacist after he was confronted for screaming anti-Muslim insults at two teenage women on a commuter

154 In addition to forging a false dilemma between whether the attack was a hate crime or a result of PTSD, the title obscures the fact that Rodriguez did not just target a restaurant, he also targeted the employees who work there. Dave Phillips, supra note 129.

train,\textsuperscript{156} inspired prosecutors to come down hard on the veteran. Philipps notes that according to lawyers, Rodriguez would face misdemeanor charges under typical circumstances, however, “prosecutors charged him with felony-level hate crime and assault charges that carry a mandatory prison sentence.” In the following paragraph, Philipps seems to attribute the mandatory sentence to the hate crime charges.

That is where people who know Mr. Rodriguez say the case took a wrong turn. Mr. Rodriguez was a decorated Marine sergeant major who was forced to retire after his arrest. He had spent years in combat. Friends and family say his actions were not provoked by hate but by post-traumatic stress disorder for which, despite repeated efforts, he never received effective treatment.

As we discuss in the preceding paragraphs, there is a felony-level hate crime offense in Oregon. However, a person can be convicted of intimidation in the first degree only if they commit the offense with at least one other person. Otherwise, the defendant would face charges of intimidation in the second degree, which is a Class A misdemeanor and subject to a maximum sentence of one year in prison. Therefore, to say Rodriguez was charged with “felony-level hate crime and assault charges” is misleading. In addition, Philipps notes that prosecutors brought more serious charges against Rodriguez after the July 3 indictment, and that, if convicted, he faced a mandatory minimum sentence. He fails to point out, however, that Rodriguez would have faced a mandatory minimum sentence even if he had not been charged with a hate crime, given that second-degree assault carries a mandatory sentence under Oregon’s Measure 11 sentencing guidelines. Philipps inaccurately depicts the role of the hate crime charge in this particular case, creating a false debate between whether Rodriguez should be convicted of a hate crime and whether he should be treated for his illness.

This debate is the focus of the November 3, 2017, episode of the New York Times podcast ‘The Daily: A Hate Crime, or a Wound of War?”\textsuperscript{157} In this episode, host Michael Barbaro invites Philipps to discuss the case. He also interviews Ghaith, Rodriguez’s mother, and a veteran who served under Rodriguez in the Marine Corps. Barbaro begins the episode with the following introduction:

When a man attacked an Iraqi restaurant in Portland, Oregon, it felt to the owner like an attack on his country; an act of hate. But as details emerged about the man who did it, the story became far more complicated.\textsuperscript{158}

Following a brief review of the incident at DarSalam, which is supplemented with audio clips from news reports, Philipps’ description of the security footage, and commentary from Ghaith, Barbaro asks Philipps to describe what unfolded after the incident, “from a legal perspective.” Just as he does in the article, Philipps contextualizes the incident and the charges brought against Rodriguez within the rash of hate crimes that occurred in Portland in 2017. “I think local prosecutors really wanted to show that they weren’t going to stand for something like this,” Philipps says. “And what happens is they increase the charges on him from misdemeanor charges, where he probably would have gotten probation, to a hate crime, essentially a bias-related crime, and felony-level assault.”

The episode is structured to reflect the conflict at the center of its title. As such, the episode transitions from the introduction to a discussion of the case from Ghaith’s perspective. Following an account of Ghaith’s personal experiences of the Iraq War and eventual establishment of DarSalam in Portland, the narrative turns to the incident. Philipps notes that given the circumstances, particularly that Rodriguez seems to have targeted DarSalam because the restaurant serves Iraqi cuisine, the incident inflicted distinct emotional harms on Ghaith, his family, and restaurant staff. “From that night, I don’t feel safe anymore,” Ghaith says. “I feel scared—maybe I’ll get hurt, or somebody will attack me.” At this point, the episode shifts to a discussion from the perspective of Rodriguez, or as Philipps often refers to him, “the man with the shaved head.” Citing Portland’s alleged state of paranoia about burgeoning white nationalism, Philipps assumes that Rodriguez’s appearance might have led some people to mistake him for a threat. “I think a lot of people at the restaurant might have thought that he was some skinhead,” Philipps says. “In fact he’s a career


\textsuperscript{158}This framing “others” Ghaith Sahib, an Arab American born in Iraq.
sergeant major in the U.S. Marine Corps…who had done four deployments to Iraq and Afghanistan.” According to Philipps, this aspect of the case was what got his attention: “Here’s this guy with this long history of exposure to combat, coming into an Iraqi restaurant and attacking the waiter. To what extent was this a hate crime and to what extent was this a wound of war?”

Barbaro interviews Rodriguez’s mother, who shares stories of his childhood. Afterward, Philipps notes that based on these stories, in addition to accounts from his fellow Marines, Rodriguez likely defines himself through his service to his country. Barbaro then interviews Jimmy Gentile, a veteran who served under Rodriguez during a harrowing ambush in the Iraqi city of Ramadi in April 2004. The ensuing firefight left multiple Marines dead, Gentile severely injured, and Rodriguez with lasting psychological and emotional damages. From here, the narrative turns to Rodriguez’s struggle with post-traumatic stress disorder and how he has continued to suffer from memories of combat. Seeing as the incident at DarSalam occurred in April 2017, nearly thirteen years to the day since the ambush in Ramadi, Philipps speculates that PTSD likely had something to do with Rodriguez’s violent outburst. “[Y]ou never know what was happening inside someone’s head,” Philipps says. “Was he having a flashback or was he just angry over everything in his past and decided to hit somebody with his chair?” When asked about the charges brought against Rodriguez, Gentile states that while Rodriguez had to pay his consequences, prosecutors were being severe. “Do I think [Rodriguez] feels negatively toward Iraqis? No,” he says.

Barbaro then asks Ghaith what he thinks of the explanation that Rodriguez committed the crime “because of the trauma that he experienced.” Ghaith responds:

I hear him. I’ve been through the same. My family has been through the same. Most of the Iraqi people—the same. Most of the American soldier Marines have been through the same. So, we share. But that’s not something that’s allowed me to go and, you know, hit with chairs people I don’t like. ...I feel if he can get help from his community, from his family, and he learns about forgiveness, I think that would be the best way to make the world even more peaceful.

When Barbaro asks him whether the assault was a hate crime, Ghaith says he does not know. “I feel sorry for him, believe me, and I feel sorry for myself too,” he says. “Hopefully he can get help.”

The episode concludes soon thereafter, but not before Barbaro and Philipps discuss the criminal justice alternatives available to combat veterans. Philipps notes that because he has been charged with a violent crime, Rodriguez is not eligible for a veterans treatment court. He says, “How much do we give understanding to this person, and how much do we owe to the victim that’s been harmed?” And that’s what we haven’t worked out as a society.” To close, Barbaro reiterates the charges brought against Rodriguez. “He is charged with felony-level assault and intimidation, Oregon’s equivalent of a hate crime,” Barbaro says. “If convicted, he faces a mandatory prison sentence.” The episode ends.

Conclusion

On March 2, 2018, Damien Rodriguez was convicted of a hate crime and attempted second-degree assault.159 He was sentenced to five years of probation and required to pay $21,000 in fines: an $11,000 compensatory fine to the employee he struck with a chair, and a $10,000 compensatory fine to the server caught up in the incident. Had Rodriguez been convicted of second-degree assault, he would have faced a mandatory sentence of nearly six years in prison. Given Rodriguez’s medical history and PTSD diagnosis, not to mention that he was drunk and “delirious” during the incident, prosecutors determined his actions were in part the result of trauma from military service, and charges were reduced to attempted second-degree assault. Under Oregon state code, an “attempt” is a Class C felony if the offense attempted is a Class B felony.160 Class C felonies are not covered under Oregon’s Measure 11 sentencing guidelines and have a maximum sentence of five years in prison.161 According to the prosecution, the two victims supported Rodriguez’s sentence. Rodriguez also agreed to intensive mental health treatment for his PTSD and told the parties he had quit drinking.

Rodriguez was able to avoid prison and receive needed treatment for his PTSD despite being convicted of a hate crime. Based on coverage from the New York Times, readers and listeners likely assumed this was not possible. In this respect, the question of whether the incident was “a hate

---

159 Aimee Green, supra note 131.
crime, or a wound of war” presents a false dilemma, one
that misrepresents the nature of what constitutes a hate
crime. Returning for a moment to our discussion of Mitchell,
a defendant’s “subjective mental process” is difficult, if
not impossible, to prove. As Philipp notes, “you never
know what was happening in someone’s head.”162 Much
easier to determine is whether the evidence in a particular
case indicates the defendant targeted someone because
of their actual or perceived race, ethnicity, or some other
protected characteristic. Given the circumstances of the
incident at DarSalam, including Rodriguez’s statements
prior to the attempted assault, there is substantial evidence
to suggest Rodriguez committed the crime because of the
employee’s perceived ethnicity or the fact DarSalam is an
Iraqi restaurant. According to news coverage of the March
2018 hearing, Rodriguez’s defense attorney acknowledged
that his defendant “said some ethnically insensitive things,
but he is not a racist.”163

The purpose of a hate crime conviction, however, is not to punish
a defendant’s subjective opinions or beliefs, nor even to determine those
beliefs.

Rather, hate crime statutes, whether in the form of penalty
enhancement provisions or a stand-alone criminal statute, reflect
the sense that crimes targeting victims on account of protected characteristics
tend to provoke retaliatory violence, inflict distinct personal and collective harms on
individuals and communities, and produce civil unrest.164

According to investigators, the two victims of the attack
and other workers at DarSalam were left “deeply afraid”
following the incident.165 In his interview on ‘The Daily,’
Ghaith expressed fear of additional violence.166 While
reports do not suggest that threats of violence were made
against the restaurant, coverage from the trial indicates that
DarSalam received a barrage of online criticism and negative
reviews following the incident. In some cases, critics blamed
Ghaith and Tiffany for allegedly supporting a long prison
sentence for Rodriguez. At his hearing, Rodriguez defended
the restaurant:

It has also come to my attention that certain people
are attacking [the Sahibs] and the victims on the
internet. To them I say this: You do not speak for me.
I do not agree with your actions. Please leave the
DarSalam restaurant, its owners and employees alone.
They have been compassionate and kind toward me.
They are good people who did nothing wrong and
deserve to be left alone.

Ghaith and Tiffany Sahib, their employees, and the
community of DarSalam restaurant experienced distinct
individual and collective harms as a result of the incident
on April 21, 2017. Evidence suggests the offender, Damien
Rodriguez, committed the crime of attempted second-
degree assault against a DarSalam employee because
DarSalam is an Iraqi restaurant or because of the employee’s
perceived ethnicity. While Rodriguez suffers persistent
trauma from his military service, the suppression of which
might have spurred the outburst, that does not account for
his committing the crime in a specific restaurant or that he
targeted a particular employee of that restaurant.

Tensions do exist between defendants’ and victims’ rights,
including within the context of hate crime convictions.
Many victims of hate crime belong to communities that
have suffered disproportionately under the criminal justice
system. Selective enforcement or prosecution of hate crime
statutes could potentially lead to further criminalization
of targeted communities.167 In these respects, whether
sufficient alternatives to penalty enhancement exist for hate
crime convictions is a question worth considering. The New
York Times addressed this question through its coverage
of the April 2017 incident at DarSalam Iraqi restaurant in
Portland, Oregon. However, the coverage misrepresents
the nature of the case and the impact of the hate crime
charges brought against the defendant. What results is the
presentation of a false dilemma: “Was it a hate crime, or
was it a wound of war?” As confirmed through the ultimate

162 Michael Barbaro, supra note 157.
163 Aimee Green, supra note 131.
164 See text accompanying notes 126, 127.
165 Aimee Green, supra note 131.
166 Michael Barbaro, supra note 157.
167 See Christopher E. Anders, Legislative Counsel, American Civil Liberties Union, Statement on Hate Crime Legislation Before the Crime Subcommittee of the Committee on
the Judiciary (Apr. 17, 2007) (“We should add that evidence of association could also just as easily focus on many groups representing the very persons that the hate crimes bill
conviction and corresponding sentence, the answer is both.168

Additional Considerations
This narrative vignette provides an example of hate crime targeting Arab Americans, in addition to the harms such crimes inflict on individual victims and communities. Unlike the preceding case studies, however, the vignette does not focus on the limitations of existing laws, policies, and their irregular enforcement to address those harms. Instead, we focus on the broader conversation about hate crime in American public discourse. As a final note, we should mention that the incident was not reported as an anti-Arab hate crime in Oregon state-level hate crime data collections. According to statistics from the Oregon State Police, zero anti-Arab hate crimes were reported in Multnomah County between April and June of 2017.169 A total of two anti-Arab hate crime incidents were reported throughout Oregon that year.170

---

168 A few days after the hearing, DarSalam posted a photo on Instagram of Ghaith and Rodriguez standing side-by-side, smiling for the camera. They had apparently just left a local Portland café, where they discussed the incident, shared their personal stories, and made amends.
